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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 58

CHRIS PRICE,

Appellant.

Westchester County Courthouse
11 Dr. Martin Luther King Jr. Boulevard
White Plains, New York
April 26, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on this
2 afternoon's calendar is appeal number 58, the People of the
3 State of New York v. Chris Price.

4 MS. LINN: Good afternoon, Your Honors; may it
5 please the court, Tammy Linn of Appellate Advocates for Mr.
6 Price. The photo of my client holding a gun and money was
7 inadmissible for two reasons in this case. First, there
8 was no evidence that it was real, although Detective
9 Sheehan - - - this court has required clear and convincing
10 proof that a photo is genuine and unaltered to admit it
11 into evidence. Although Detective Sheehan identified my
12 client's face, the victim, Louisma, failed to identify the
13 gun, leaving open the possibility that it had been
14 Photoshopped into the picture.

15 JUDGE WILSON: So, counsel, what is the minimum
16 that the People could have done to establish a basis for
17 admission?

18 MS. LINN: Here, there had to be evidence that
19 this was the same gun to show that it was real. I mean
20 they could have conceivably also put in expert testimony,
21 but I think it would have been easier to just have a
22 witness with personal knowledge, which is what they planned
23 to do. Unfortunately - - - well, fortunately for my
24 client, the witness did not do that, and so we don't know
25 if the photo was real or not. And while there is the

1 possibility that they could have linked the - - - what they
2 also tried to do was link the website to my client, but
3 there also was not enough proof of that, either. Because
4 all we had here was - - -

5 JUDGE RIVERA: But does your rule result in - - -
6 in the need for the People always to have a computer
7 forensic expert testify? Is that the only way they're
8 going to be able to authenticate under your rule?

9 MS. LINN: No. Because the easiest way to do it
10 would be a witness with personal knowledge, and that's
11 actually what they tried to do here, they just didn't have
12 a witness with personal knowledge.

13 JUDGE RIVERA: The - - - the person you're
14 talking about in this particular case is the - - - is the
15 victim, correct?

16 MS. LINN: Yes. Although it wouldn't always have
17 to be a victim. If they had had a friend of my client's or
18 someone who, you know, was a social - - -

19 JUDGE RIVERA: But in this case, it's the victim?

20 MS. LINN: In this case, it was the victim and
21 the detective.

22 JUDGE RIVERA: And - - - and the victim says, as
23 best he can, it looks like it.

24 MS. LINN: It - - - it's similar.

25 JUDGE RIVERA: Does it - - -

1 MS. LINN: It is similar.

2 JUDGE RIVERA: Right. And so in this - - - in
3 this case, that - - - doesn't that mean that they can only
4 satisfy your rule with the forensic - - - computer forensic
5 expert?

6 MS. LINN: In this case, I guess - - -

7 JUDGE ABDUS-SALAAM: Yeah.

8 MS. LINN: - - - it would - - - they would have
9 had to have an expert in this case.

10 JUDGE STEIN: Well, I thought your argument was
11 that it's the same foundation as is required in any other
12 situation for a photograph.

13 MS. LINN: Yes.

14 JUDGE STEIN: Okay. And so it doesn't
15 necessarily require someone to say that was the gun used in
16 the robbery. It could be that somebody that can state from
17 personal knowledge that this is an accurate representation
18 of what it - - - it says it depicts.

19 MS. LINN: Correct.

20 JUDGE STEIN: So they were there when the
21 photograph was taken or, you know, something like that. Is
22 - - - is that your argument? Because I think that's a
23 little different from what I hear you saying now.

24 MS. LINN: Well, I think that it could have come
25 in under two ways. It could have been a witness with

1 personal knowledge who was there when it was taken who said
2 I was there, this is what happened, it's a real photo. Or
3 under the circumstances of this case, it could be through a
4 witness who has personal knowledge about the object in the
5 photo.

6 JUDGE STEIN: But how would that show that - - -
7 that the defendant was actually holding that object if - -
8 - if someone wasn't there to say that, yes, this - - - this
9 is what it depicts?

10 MS. LINN: I think that if you have a witness
11 identifying my client's face on the one hand, which was
12 Detective Sheehan, and you have a witness identifying
13 what's in his hand, which was supposed to be Louisma, then
14 it would be fair to infer that the photo hadn't been
15 altered. I think that obviously, the better rule would be
16 someone who was there and says I saw this happen, but I do
17 think it would be fair to say if you can identify different
18 pieces of the photo as genuine, then the photo's probably
19 real.

20 JUDGE RIVERA: Now how is that a workable rule if
21 you're talking about this kind of a case where it's just a
22 victim? The - - - the best they're ever going to do is - -
23 - because they don't know the person, they have not touched
24 the gun, obviously, and they say it looks like it.

25 MS. LINN: I think in this case, you can't do it

1 that way because there's no evidence that the gun was
2 unique. If there was a unique gun, then the victim could
3 have said this is the same gun.

4 JUDGE GARCIA: Why doesn't this all just go to
5 weight, right? If you step back and you say here's
6 somebody who the argument is, we got on this website, they
7 authenticate they got this off of this website, it looks
8 like a photo of the defendant before these crimes took
9 place holding a gun that looks like the gun that was used.
10 Why shouldn't the jury get to see that within - - - you
11 know, with argument that it could be Photoshopped, it could
12 - - - and it just - - - give it what weight you think
13 appropriate rather than exclude it, which would ninety-nine
14 percent of the time under your rule, no matter what
15 somebody posts because I don't think you're going to get a
16 forensic person to come in and say that. And too, it's
17 going to be the rare case where you're going to get a
18 witness who says I was there when the - - - what used to be
19 the flash went off and I saw this picture being taken. So
20 why do we deprive a jury of what is clearly relevant proof
21 with issues as to authentication and - - - and how much
22 weight you should give it under a rule that pretty much is
23 going to preclude it?

24 MS. LINN: I think there are a couple things
25 going on. I think, first, there wasn't enough evidence

1 this actually was his website. So that goes to
2 authentication. And under my rule, I'm not saying that
3 there has to be forensic proof that this was his website,
4 although the easiest thing would be to get subscriber
5 records - - -

6 JUDGE GARCIA: Agree. So let's look at that for
7 a minute. Could the weight of the People's proof in terms
8 of the website is your website overcome the fact that you
9 don't have somebody who's there when you took the photo?

10 MS. LINN: I think that this court has said - - -
11 but even without - - - you know, in context other than
12 photos, this court has previously held that there has to be
13 a clear and convincing connection between an offered
14 exhibit and the case at issue. And so there has to be some
15 level of proof to tie a website to someone, whether it's
16 the defendant or whether it's the prosecution witness, and
17 here, there just wasn't enough.

18 JUDGE FAHEY: Well, it's really is the problem
19 with the social media, but it's really not the website.
20 It's the photo on the website - - -

21 MS. LINN: Right.

22 JUDGE FAHEY: - - - that we want to tie to it
23 because it seems to me that you may be - - - and you can
24 explain to me why you're not, but you may be stuck with a
25 requirement that there needs to be a forensic expert.

1 That's what you're asking for for the rule to be
2 meaningful. It's similar to what's in the state of
3 California. And it - - - I don't know if this case
4 sustains that, but in the photo, a videotape, an audiotape,
5 we don't need to do those things.

6 MS. LINN: No.

7 JUDGE FAHEY: And - - - and you can - - - you can
8 authenticate them with who did it, when - - - where they
9 did it, when they did it, and it's - - - somebody says it's
10 accurate as to the defendant or the gun or whatever. And
11 we seem to have two prongs of that here. Somebody says,
12 yes, it was the gun. Someone says yes, that's the person.
13 And why - - - so unless we go to the expert - - - and you
14 don't seem to be arguing for that. I - - - how is this not
15 admissible?

16 MS. LINN: I'm not arguing for an expert, first.
17 I'm saying that there are - - -

18 JUDGE FAHEY: I understand that. Yeah.

19 MS. LINN: Okay. There are a lot of
20 jurisdictions that have identified a variety of factors
21 that could be relevant to link a website or a particular
22 posting like the photo here to someone.

23 JUDGE FAHEY: But isn't the policy issue whether
24 or not the photograph could be altered because of the
25 nature of the social media and that it's trans - - -

1 transported?

2 MS. LINN: Yes.

3 JUDGE FAHEY: All right.

4 MS. LINN: And so that's why it matters to have
5 more evidence that actually ties a - - -

6 JUDGE FAHEY: So you're really arguing legal
7 sufficiency then. Not - - - that there wasn't enough
8 evidence here, not that - - - not that you needed an
9 expert?

10 MS. LINN: Right. Absolutely. That's what I'm
11 arguing. And I'm also saying that even if you say that - -
12 - well, very quickly, all we had here was my client's face,
13 his last name was part of the username, and a bunch of
14 photos, some of which were at least of my client. And
15 that's not enough, even under the cases that the People
16 rely on from other jurisdictions. But even if you say that
17 this is enough to make - - - to satisfy authentication, it
18 still doesn't prove that the photo was real, which is a
19 problem without - - -

20 MS. LINN: I see my light is on. May I finish my
21 thought, then?

22 CHIEF JUDGE DIFIORE: Please do.

23 MS. LINN: Thank you. Without the gun being
24 real, we just don't know whether - - - without Louisma
25 identifying the gun as the same gun, we just don't know

1 whether it was Photoshop. And even if it was my client's
2 page, he could have posted a fake photo because gun
3 possession is very common, people often pose like this or
4 Photoshop pictures because they think it's cool. It's not,
5 but people do it. And it doesn't mean that he committed a
6 crime. And I'd like to very briefly address the Molineux
7 point, if possible.

8 CHIEF JUDGE DIFIORE: Please

9 MS. LINN: There just wasn't - - - without this
10 being the same gun, this had no relevance that could
11 possibly outweigh the prejudicial impact. Under Myers,
12 this court already rejected the notion that possession of a
13 similar gun two-and-a-half months before the charged crimes
14 was admissible under Molineux's identity section. That is
15 completely controlling here. This was even more remote in
16 time, it was - - - the photo was taken - - - we don't know
17 when it was taken. It was posted at least four months
18 before the crime at issue, and there was no evidence
19 whatsoever that this gun was unique in any way or that the
20 weapon was real. Thank you, Your Honor.

21 CHIEF JUDGE DIFIORE: Thank you, Ms. Linn.
22 Counsel.

23 MS. SPANAKOS: May it please the court, Anastasia
24 Spanakos on behalf of Richard A. Brown.

25 CHIEF JUDGE DIFIORE: May I ask you to move your

1 microphone down a little? Thank you.

2 MS. SPANAKOS: Not a problem.

3 JUDGE GARCIA: Counsel - - -

4 JUDGE STEIN: Counselor - - -

5 JUDGE GARCIA: I'm sorry. Go ahead.

6 JUDGE STEIN: If - - - if the police walked into
7 the defendant's apartment, clearly his apartment, he
8 acknowledged it was his apartment, and they saw this
9 photograph of him holding a gun on the wall of his
10 apartment, what would they need to show to have that
11 admitted into evidence?

12 MS. SPANAKOS: They would just need to show that
13 they found that photo in defendant's apartment.

14 JUDGE STEIN: I - - - I thought our - - - our
15 jurisprudence says that he would have to show that somebody
16 would have to identify that either that they were the
17 photograph or that they - - - that they were present when
18 the photograph was taken and that it depicted what it - - -
19 it purported to depict or have - - - or have expert
20 testimony that it was not changed in any way. That's not
21 part of our jurisprudence?

22 MS. SPANAKOS: That is when you're trying to
23 admit a photograph for the accuracy of a photograph itself,
24 and that's not what we're doing - - -

25 JUDGE STEIN: Well, isn't that you're trying - -

1 - isn't that what you argued in the trial court that you
2 wanted to show that - - - that this defendant owned - - -
3 had possession of this gun and therefore, he must have
4 committed this crime?

5 MS. SPANAKOS: Not that he had possession of.
6 Okay. That he had access to, he had a connection to - - -

7 JUDGE STEIN: That's - - - is that what you
8 argued in the trial court?

9 MS. SPANAKOS: When we admitted the evidence, we
10 admitted it as a fair and accurate depiction of the
11 posting, not of the image itself. The officer testified
12 that it fairly and accurately depicted what she found on
13 defendant's social media page.

14 JUDGE WILSON: But what's the relevance of that?

15 JUDGE STEIN: Yeah.

16 MS. SPANAKOS: The relevance is, and it's similar
17 to this case of the Fourth's Patterson case from December
18 is that it helps the jury make a - - - the connection
19 between defendant and this type of weapon, and a weapon
20 that the victim said looked just like the gun used in the
21 crime. And it helps the jury assess the identification
22 evidence here and helps corroborate. To be a corroborating
23 evidence, it doesn't have to be accurate. We don't need
24 the accuracy. It doesn't - - - here it's an image, but it
25 doesn't have to be an image. It could be any sort of

1 posting. It could be a poem. It could rap lyrics. It
2 could be a video. It could be part of a conversation
3 between people. It is - - - what's important here is the
4 fact that the defendant posted something on the - - -

5 JUDGE GARCIA: But going to that point, and I
6 think part of Judge Stein's question, you know, it's clear
7 when you go into somebody's house and you take the picture
8 off the wall you have this type of foundation, at least
9 that the defendant possessed that photo. Here, I think
10 your adversary makes very strong points that you really
11 didn't do much to authenticate this website or link it with
12 this defendant.

13 MS. SPANAKOS: We - - - we did enough here to
14 establish - - -

15 JUDGE GARCIA: What did you do?

16 MS. SPANAKOS: The detective was able to testify
17 that defendant's surname was part of the username. She
18 also testified that she noticed the account because
19 defendant's photo was the profile photo for this account.
20 And normally, when it comes to social media, people
21 indicate who the owner is of the account by putting - - -

22 JUDGE GARCIA: But they've seen that there was
23 other information available on the website like I - - - I
24 may have this wrong but hometown and other things like
25 that, and I see nothing in the record that you attempted to

1 link that to this defendant, any of the identifying
2 biographical information.

3 MS. SPANAKOS: That - - - that is correct. There
4 wasn't, you know, demographic information there, but we
5 failed to ask that, you know, next leading question - - -
6 next question to the detective - - -

7 JUDGE STEIN: Don't most o of the - - - of the
8 cases that use this kind of - - - of evidence, first of
9 all, relate to postings on a website which would require
10 proof of authorship, not necessarily that it - - - it's an
11 accurate depiction of something but that - - - that the
12 person who's website it is actually authored the posting.
13 And don't they usually have a lot more information like - -
14 - or some - - - more connecting like that somebody
15 communicated with the defendant through this website or
16 that there was information on the website that would not
17 generally be known to other people or things of that
18 nature?

19 MS. SPANAKOS: The other cases that are out there
20 in the other jurisdictions do run the gamut of what type of
21 evidence that, you know, the proponent of the evidence has
22 put forth.

23 JUDGE STEIN: But are there any with as little as
24 what we have here?

25 MS. SPANAKOS: We have - - -

1 JUDGE STEIN: And if so, is that - - - is that
2 enough, in any event? Should we follow those cases?

3 MS. SPANAKOS: I - - - I think that this is
4 enough here in - - - in this case for a reasonable juror to
5 decide whether this really is - - - and that - - - and
6 that's where we need to get. We need to just establish
7 enough. Authenticity doesn't have to establish beyond a
8 reasonable doubt, okay, that this is what it purports to
9 be.

10 JUDGE STEIN: What is the standard?

11 MS. SPANAKOS: Well, that's a very good question
12 because I found that the - - - this court's cases are a
13 little unclear. In audiotape cases, this court has said
14 there has to be clear and convincing evidence.

15 JUDGE STEIN: And didn't we saw that that applies
16 to all real evidence?

17 MS. SPANAKOS: You said that in McGee, but McGee
18 was an audiotape. And then the year after McGee, you have
19 the Lynes case where you don't talk about the standard at
20 all, and you apply circumstantial evidence to establish the
21 authenticity in the Lynes case.

22 JUDGE STEIN: Well, can circumstantial evidence
23 establish something clearly and convincingly?

24 MS. SPANAKOS: It can, Your Honor. It can. Most
25 jurisdictions follow the Federal Rules of Evidence, and in

1 the Federal Rules of Evidence, a preponderance of evidence
2 is enough. And it's just unclear what is used here and
3 what is evaluated. The standard that the court, the trial
4 court, used here is just unclear because it never came up.
5 So the issue of whether it was clear and convincing or
6 preponderance actually was unpreserved. However, I would
7 suggest to you that preponderance of the evidence is
8 sufficient to establish that the reliable evidence gets
9 admitted here in New York. As I said, Federal Rules of
10 Evidence and many jurisdictions that have followed the
11 Federal Rules of Evidence use preponderance, and there
12 hasn't been a problem, a pervasive problem of unreliable
13 evidence getting admitted in federal court. No matter what
14 standard you use to authenticate the evidence, you still
15 have that the defendant's guilt has to be proven beyond a
16 reasonable doubt.

17 CHIEF JUDGE DIFIORE: Counsel, if this were a
18 prosecution for possession of child pornography a
19 photograph were taken off of this same website and you used
20 the same authentication procedure that you used here, would
21 that photograph be admissible?

22 MS. SPANAKOS: That's a different situation,
23 Judge. Because in a pornography case, you have you to
24 establish that it's actually real pornography. It can't
25 be, you know, animation, a cartoon, it can't be

1 Photoshopped. Someone can Photoshop, I guess, images and
2 videos and manipulate them and edit them to look like
3 something they're not. And that's, you know - - -

4 JUDGE STEIN: Well, isn't that true of - - - of a
5 person holding a gun?

6 MS. SPANAKOS: That is true but in this case, it
7 doesn't matter whether it's an accurate. It doesn't matter
8 whether defendant was actually standing somewhere holding
9 the gun. And because here it is not - - - it is not - - -

10 JUDGE STEIN: Well, you - - - you mentioned
11 earlier that you - - - you wanted to show that he had
12 access to the - - - to this kind of gun. How do you show
13 that he had access unless you're showing that he was
14 holding it?

15 MS. SPANAKOS: Access knowledge about guns that
16 look like this.

17 JUDGE STEIN: But how - - - how do you show any
18 of that unless that photograph accurately depicts him
19 holding that gun?

20 MS. SPANAKOS: The accuracy isn't significant,
21 Judge, because it's not that he's holding it. He's aware
22 of it, he knows of it, and he has a connection to it.

23 JUDGE STEIN: But - - -

24 JUDGE RIVERA: But that's the whole point, right.
25 If - - - if it's been altered and the original picture he

1 is not holding the gun, the photo is meaningless because it
2 doesn't do what even you claim it would do, which is show a
3 connection, show some familiarity, some access if he's
4 really not holding the gun, right?

5 MS. SPANAKOS: No. That's - - - that's not true,
6 Your Honor. Because that he has - - - that he knows
7 enough, he's familiar - - -

8 JUDGE RIVERA: You mean if you found that picture
9 on the website without the gun you'd be using it?

10 MS. SPANAKOS: If - - - no. If I found the
11 picture or an image or even a drawing of a gun that looks
12 just like - - -

13 JUDGE RIVERA: No, no, no. If you had that
14 picture without him holding the gun, you would never have
15 sought to admit it, correct?

16 MS. SPANAKOS: No.

17 JUDGE RIVERA: Because it would show nothing,
18 which is her point. If it's been altered and the photo
19 doesn't have him holding a gun, it's meaningless. It's
20 irrelevant.

21 MS. SPANAKOS: If it was just a photo of a gun on
22 his website and that gun was identified by the victim as
23 looking exactly like the gun used in the crime, it is still
24 relevant and we still would have sought - - -

25 JUDGE RIVERA: No, no. If you had a picture of

1 him, the exact same picture, but there's no gun in his
2 hand, you would not have used it, correct?

3 MS. SPANAKOS: Well - - -

4 JUDGE RIVERA: Because it's meaningless.

5 MS. SPANAKOS: Correct.

6 JUDGE RIVERA: So that's her point. If it has
7 been altered and in the original picture he never held the
8 gun - - -

9 MS. SPANAKOS: Judge as my adversary
10 acknowledged, that individuals post photos and some of the
11 photos are Photoshopped, and they do it to prove a point.
12 They - - - they do it for whatever reason they - - - they
13 feel, you know, they want to exhibit that this is the type
14 of person they are, this the connection they have - - -

15 JUDGE RIVERA: No. But you're back to her
16 argument that you haven't established that someone else
17 didn't alter it. Trying to say he posted it, he's the one
18 - - - if it's altered, he's the one who's altered it.

19 MS. SPANAKOS: It doesn't matter if it's altered.
20 It's on his website four months prior to the crime. It's
21 still on his website at the time of the crime, and it - - -

22 JUDGE RIVERA: So he's acquiesced in this image,
23 is what you mean.

24 MS. SPANAKOS: He's - - - he's adopted it. It's
25 attributed - - -

1 JUDGE RIVERA: So - - - so but even if the image
2 is, as counsel was arguing, you know, it's cool to look
3 this way, even though the man never had the gun in his hand
4 - - - or the photo never shows him with the gun and you
5 can't connect him otherwise with a gun, the fact that he
6 likes the look of being cool is enough to have this
7 admitted. Is that what you're saying?

8 MS. SPANAKOS: Yes. It shows his connection - -
9 -

10 JUDGE RIVERA: How is that prep - - - how is that
11 not propensity?

12 MS. SPANAKOS: It's not propensity because it's -
13 - - it wasn't being argued that, oh, he has access to guns,
14 he must be the robber. It is he has some sort of
15 connection to a gun that looks identical - - -

16 JUDGE RIVERA: Or he has an interest in looking
17 cool. He has an interest in looking like a tough guy.

18 MS. SPANAKOS: Exactly. Okay. But a tough guy -
19 - -

20 JUDGE RIVERA: Right. And so - - - and so just
21 because he has an interest in looking like a tough guy,
22 it's more likely he committed this crime than not?

23 MS. SPANAKOS: But, Your Honor, a tough guy that
24 has access or has a connection to the exact type of weapon
25 used in this crime.

1 JUDGE RIVERA: But now it's circular, right,
2 because her point is you haven't showed the access.

3 JUDGE WILSON: I mean counsel - - -

4 JUDGE RIVERA: Because it may have been altered.

5 JUDGE WILSON: My daughter, a six-year-old, posts
6 pictures of unicorns, but she doesn't actually have one.

7 MS. SPANAKOS: You can post pictures of a lot of
8 things. It doesn't necessarily have to be a photo. It
9 could be - - - as I said, it could be a poem, it could be
10 something else. It's the defendant's connection to it and
11 that it will help corroborate - - -

12 JUDGE FAHEY: Well, but the - - -

13 MS. SPANAKOS: - - - the identification evidence.

14 JUDGE FAHEY: The policy problem is underlying
15 the nature of the medium has changed so much from photos to
16 - - - to film to audiotapes. And - - - and now with the
17 ubiquitous nature, with the commonality of - - - of social
18 media and the ability to manipulate the images, it creates
19 a whole different evidentiary problem for authentication
20 than we had before. And you're asking us to apply the same
21 rules that we have to those objects to this, and I'm
22 wondering how we can do that given how easy it is to change
23 them. And - - - and say - - - because it has to start out
24 with - - - a foundation is, yeah, that's him. Yeah, that -
25 - - that's an accurate depiction of a - - - of a particular

1 scene, and how do we do that in this context?

2 MS. SPANAKOS: As my adversary indicated, that
3 it's the defendant, okay, and her only problem was that - -
4 - is the victim wasn't able to identify the gun. But he
5 was able to - - - you've never going to have somebody
6 identify a gun when the gun's never recovered in a crime,
7 and in a lot of the crimes it's not.

8 JUDGE FAHEY: Okay.

9 MS. SPANAKOS: Okay.

10 JUDGE FAHEY: Sure.

11 MS. SPANAKOS: Defendant's not admit - - -
12 arrested within minutes of the crime. Here, you have a
13 victim identifying that the gun looks like exactly like the
14 gun used in the crime. That's enough - - -

15 JUDGE STEIN: Did he say exactly or did he say
16 similar?

17 MS. SPANAKOS: He - - - I believe it looks just
18 like the gun used in the crime, and he said no, I can't say
19 it is the gun. Of course not, I mean that would have been
20 unreasonable.

21 CHIEF JUDGE DIFIORE: Counsel, could you have
22 subpoenaed the records from the internet service provider
23 for that webpage, website?

24 MS. SPANAKOS: Yes. We could have, Your Honor.
25 I don't know - - - know if that would have necessarily

1 helped us here, but we could have done that. And we could
2 have, you know, attempted to find out, you know, what
3 information they might have had on that.

4 CHIEF JUDGE DIFIORE: Okay. Thank you,
5 counselor.

6 MS. SPANAKOS: Thank you.

7 CHIEF JUDGE DIFIORE: Ms. Linn. I took the
8 liberty of reserving some rebuttal time for you.

9 MS. LINN: Thank you. Sorry about that, Your
10 Honor.

11 CHIEF JUDGE DIFIORE: That's quite all right.

12 MS. LINN: I just want to briefly say about
13 Patterson, which the People cited. That doesn't help them
14 here. Both the trial court and the Appellate Court found
15 that the evidence there, there were some cyber records,
16 were non-hearsay. They weren't trying to admit it for a
17 different purpose on appeal as the People are here. It's
18 very clear from the colloquy below that they sought to
19 admit this under Molineux's identity exception. There is
20 no - - - even if it was preserved, there is no exception
21 for access to guns. And as Judge Rivera noted, it's clear
22 propensity evidence.

23 JUDGE RIVERA: Did defendant concede that the
24 photo was, in indeed, a picture of him?

25 MS. LINN: I don't believe he did. But even if

1 it was, I still believe that under the Fourth case law,
2 especially under Myers, you can't have evidence of
3 possession of a similar gun as proof under Molineux's
4 identity exception which requires clear and convincing
5 proof that the defendant committed the uncharged crime and
6 that the uncharged and charged crimes were so unique and
7 similar that it's fair to conclude that the same person was
8 responsible.

9 JUDGE STEIN: If we - - - if we apply a
10 preponderance of the evidence standard, is it the same
11 result that you're advocating or - - -

12 MS. LINN: I would think it would be because
13 there was so little evidence that this was my client's
14 webpage and still not enough evidence that this was the
15 same gun. There's no evidence at all that this was unique.
16 So I think even under a lower standard, I would still win
17 here.

18 And I just want to very briefly say in response
19 to one of Judge Garcia's questions which I didn't answer
20 before. The reason that this goes to admissibility and not
21 weight is because this type of evidence is extremely
22 compelling to a jury, and as this court noted, I believe it
23 was in (indiscernible). To have evidence of this come in
24 and then have it later turn out to be unsupported, the jury
25 cannot then see that. And this court recognized that that

1 would be extremely prejudicial. And that's why it goes to
2 authentication. It goes to admissibility and not weight.

3 It's also worth noting that juries can't figure
4 out whether this has been altered, a layperson
5 (indiscernible).

6 JUDGE RIVERA: Let's assume we agree it's an
7 error. Is it harmless?

8 MS. LINN: It would absolutely not be.

9 JUDGE RIVERA: Why not?

10 MS. LINN: I don't want to belabor the point, but
11 this is a photo of my client holding a gun and money while
12 he was on trial for armed robbery in a one-witness stranger
13 ID case with no corroborating evidence. The prosecutor
14 highlighted the photo in summation. The jury got not
15 limiting instructions that this was relevant only to ID and
16 the pure propensity that it was, and the jury fixated on
17 the photo, asking for it in its very first note, repeatedly
18 asking for testimony about the gun's appearance - - - about
19 the robbery weapon's appearance, including evidence that
20 wasn't in the record such as when Louisma first described
21 the gun and whether Detective Sheehan ever gave a
22 description of the gun. So I don't think there's any way
23 to conclude that this was harmless, and I ask for a new
24 trial. Thank you.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.

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(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Chris Price, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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