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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 48

MATTHEW KUZDZAL,

Respondent.

20 Eagle Street
Albany, New York
March 28, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 48, which is the
2 People of the State of New York v. Matthew Kuzdzal. Hope I
3 am pronouncing that correctly.

4 MR. POWERS: To my knowledge, that's about as
5 close as you can get, Your Honor.

6 Good afternoon, Matthew Powers, on behalf of the
7 People. If I could, with the court's indulgence, request
8 one minute for rebuttal time?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. POWERS: Thank you very much.

11 Where a trial court finds a third-party
12 allegation of - - - relating to jurors' qualifications to
13 be incredible, we're asking this court to hold that it does
14 not abuse its discretion when it dispenses with the need
15 for a Buford inquiry.

16 JUDGE FEINMAN: So - - - so how do we know from
17 this record that such a finding was made? Either by the
18 trial court or the Appellate Division in exercising its
19 factual review power, which, of course, we don't have.

20 MR. POWERS: Well, I'll start with the trial
21 court, Your Honor. I - - - I think that the best evidence
22 that that's what it, in fact, did was the fact that the
23 prosecutor specifically requested the court to rule on the
24 threshold issue of credibility, and in immediate response
25 to that, the trial court said that it did not think that



1 the inquiry was necessary or appropriate, based on what it
2 had heard, and, of course, what it had heard, just moments
3 ago, was the account of Brandi Conner (ph.), the third
4 party.

5 JUDGE FEINMAN: But how do you know that that
6 means I find her incredible, as opposed to it's credible,
7 but it doesn't rise to the level of something that's - - -
8 warrants legally having to make the inquiry? That - - -
9 that's - - - that's the problem I'm having - - -

10 MR. POWERS: Sure.

11 JUDGE FEINMAN: - - - in terms of reading this
12 record. I mean, obviously, if the judge had said, I find
13 Ms. X incredible, we wouldn't be here.

14 MR. POWERS: Well, I - - - I think that the best
15 I can do, Your Honor, is to tell you that - - - that - - -
16 that it was made in direct response to the - - - the
17 request to rule on the issue of credibility. And - - - and
18 certainly one of the problems that the Appellate Division
19 had with what the trial court did was - - - was in finding
20 that its - - - whatever its determination was, that it was
21 conclusory.

22 And - - - and one of the - - - the remedies I
23 propose for this court is if - - - if you agree, if you
24 have that same problem that it might make more sense to
25 remit the matter for the trial court to state in no



1 uncertain terms why exactly it did what it did.

2 CHIEF JUDGE DIFIORE: So what was it that made
3 her so incredible? What - - - what do you - - - how do you
4 explain that?

5 MR. POWERS: I - - - I think that the three best
6 sources of evidences for such a finding, and - - - and, of
7 course, I can't comment on anything regarding her - - - her
8 demeanor - - - there's - - - there's no record of that, but
9 it's possible that that played in the trial court's mind.

10 But what we can refer to as far as the record is
11 concerned is the very real potential for bias on her part,
12 specifically her relationship with the defendant. She was
13 described by counsel as her - - - his girlfriend. She
14 declined to acknowledge that relationship but did admit
15 that she was a lifelong friend. So I think there's very
16 strong evidence that she was biased in favor of defendant.

17 The second example is her behavior. She admitted
18 that she was thrown out of court the day before, which I
19 think suggests a lack of regard for the proceedings. And a
20 third example is - - - is the - - - the incoherence of her
21 timeline, regarding the allegation. She said at one point
22 that it came on a break, and specifically used the number
23 "fifteen-minute break." And then moments later when
24 confronted with the fact that there was no break, said, oh,
25 no, it - - - it was - - - it was after court, and seemed to



1 adopt whatever the truth was.

2 JUDGE RIVERA: Well, let's assume all of that.
3 Let - - - let's assume that makes some threshold - - -
4 reaches some threshold about the credibility. Given - - -
5 given the serious nature of what she claimed she overheard
6 - - - them referring to the defendant as "scumbag" and - -
7 - and laughing and mocking and so forth, she did mention
8 that she was with someone else. Why wouldn't the judge, at
9 least, call the other witness?

10 MR. POWERS: I think a couple of reasons, Your
11 Honor, and the first is - - - is that - - - that that claim
12 is unpreserved for this court's review. There was never a
13 request by defense counsel - - -

14 JUDGE RIVERA: Let me give you a hypothetical.

15 MR. POWERS: Sure.

16 JUDGE RIVERA: Let's move beyond the preservation
17 question. What if you have the same scenario? You have
18 someone - - - we're not talking about jurors; we're talking
19 about others who claim they've overheard or observed the
20 jurors do something that perhaps falls within, as a matter
21 of law, suggesting that they're grossly unqualified. And
22 the judge has some concerns about whether or not the judge
23 is willing to believe that witness, but they say, I was
24 with someone else; I was with five other people. They
25 heard the same thing; they saw the same thing. Why not



1 call someone else? Given the serious nature - - -

2 MR. POWERS: Sure.

3 JUDGE RIVERA: Right?

4 MR. POWERS: Certainly if - - - if it had been
5 asked for, I think it would have been the appropriate
6 remedy. The problem with doing it here is that Ms. Conner
7 never named her friend, and there was no indication, on
8 this record, that her friend was even present the day Ms.
9 Conner made her allegation. So I don't know that it would
10 have been possible, even if it had been preserved.

11 JUDGE RIVERA: What - - - what's - - - what's the
12 duty and obligation of the court, in these types of Buford
13 scenarios? When it's not a juror, right?

14 MR. POWERS: When the allegation is coming from a
15 third party?

16 JUDGE RIVERA: Yes.

17 MR. POWERS: I - - - I think it's - - -

18 JUDGE RIVERA: Correct.

19 MR. POWERS: - - - a little bit different. Very
20 often we see the information coming from a juror note, like
21 we saw in - - - in this court's decision in Mejias. Or
22 from some maybe more reliable source, like a court officer
23 or the court, or one of the attorneys, and I - - - I think
24 there's a pretty good reason to credit the information when
25 it comes from one of those sources, particularly where it



1 comes from a note, because it's from the juror themselves.

2 But when it comes from a third party, I - - - I
3 would refer to the Third Department's decision in Matiash,
4 where there was a - - - an inquiry of a third party, but
5 not of the jurors. And I think the court should consider
6 both the - - - the credibility of the allegation, to the
7 extent that it can exhaust or - - - or satisfy its
8 curiosity regarding the credibility.

9 JUDGE RIVERA: All right. My problem - - - my
10 difficulty with that is, of course, that in - - - talking
11 just practically - - - who's likely to have been in that
12 courtroom, if not someone who's somehow connected to the
13 case. It's true, as for example today, we may have people
14 just observing the case, who are totally unconnected to it,
15 but the nature of it is you may have people who have some
16 connection in the room and may very well be the people who
17 overhear.

18 I'm having some difficulty discounting
19 credibility merely because they have some connection,
20 without the judge doing what they would do in what you seem
21 to, at least, not fully concede, suggest might be
22 appropriate, if it's something that comes from a juror or
23 from a court officer or someone else who may not be so
24 connected to the case in the obvious way of suggesting
25 bias.



1 MR. POWERS: Well, I guess bias is - - - is, as I
 2 mentioned, only - - - only one of the reasons I think the -
 3 - - the court was justified in arriving at this conclusion.
 4 And - - - and there is a very real possibility that - - -
 5 that anyone who is an observer of a - - - of a court
 6 proceeding, is likely to have, you know, a connection - - -

7 JUDGE RIVERA: So I take it your position is, if
 8 a juror sent out a note saying, another juror called the
 9 defendant scumbag, you would agree under those
 10 circumstances, Buford requires the inquiry of that other
 11 juror?

12 MR. POWERS: I - - - I guess I would counsel a
 13 hundred times out of a hundred to - - - to conduct the
 14 inquiry in that instance, yes.

15 JUDGE RIVERA: Of who? Of the juror who passed
 16 the note, or the juror of whom the juror who passed the
 17 note is speaking?

18 MR. POWERS: Well, I think there's, at least,
 19 some room for discretion in there, Your Honor. We're - - -
 20 we're concerned with probing and tactful inquiries, and
 21 that means we care about both the truth, but also not being
 22 overly intrusive upon the jurors.

23 JUDGE STEIN: Counsel, what - - -

24 JUDGE WILSON: What do you - - - oh.

25 JUDGE STEIN: - - - what if - - - what if the - - -



1 - the - - - the other juror or a third-party witness, what
2 - - - what they said that they heard the juror say is,
3 after hearing all of that proof, I really - - - I really
4 think that defendant is a scumbag? Okay. Does that
5 indicate - - - is that the kind of bias that Buford is
6 directed at or does it have to be a pre-existing bias? In
7 other words, if somebody forms an opinion about - - - about
8 the defendant based upon the evidence that they've heard,
9 then aren't we just talking about possibly entering into de
10 - - - deliberations prematurely and - - - and we obviously
11 have case law about that?

12 MR. POWERS: That's - - - that's certainly our
13 position, Your Honor. The - - - the Appellate Division
14 took the position that the statement reflected bias, and -
15 - - and - - - and our counter to that, of course, is that
16 it was not biased. There was nothing on the face - - -

17 JUDGE STEIN: So what's the obligation of the
18 court? Can the court make that determination without
19 conducting a Buford hearing? That's - - - that's - - -
20 that's really just my question.

21 MR. POWERS: I - - - I think we ought to try, at
22 least, to tether ourselves to what the allegation is. So
23 if - - - and I see my time's up. May I finish answering?

24 CHIEF JUDGE DIFIORE: Yes, please.

25 MR. POWERS: Thank you, Your Honor.



1 If - - - if - - - if the juror had said something
2 or was alleged to have said something like, you know, I
3 always knew he was a scumbag, which means that they're
4 carrying that belief with them into the trial, then I think
5 we're - - - we're squarely in bias territory, and - - - and
6 you have to do the inquiry. But considering both the - -
7 - the statement on its face, whi - - - which is just
8 Matthew's a scumbag, and the timing of the statement - - -
9 it was made after the conclusion of all proof, I think
10 looking at that, there isn't necessarily a - - - a reason
11 to conclude that it was, in fact, a pre-existing belief and
12 one - - -

13 JUDGE STEIN: So the question then would be would
14 - - - was it an abuse of discretion? Is that - - -

15 MR. POWERS: If - - - if all we're talking about
16 is premature deliberations, then under Mejias, no, Your
17 Honor. It's quite the contrary. Thank you.

18 CHIEF JUDGE DIFIORE: Thank you, Mr. Powers.
19 Counsel?

20 MR. HAJDU: May it please the court, Lyle Hajdu
21 for defendant Kuzdzal.

22 JUDGE WILSON: Could I just start with that last
23 point? So Mejias says that Buford is not implicated in the
24 circumstances in this case, and the circumstances in Mejias
25 were essentially that a juror may have engaged in premature



1 deliberations. If - - - if we read that in connection with
2 CPL 270.35, which has a distinction between a juror who is
3 grossly unqualified to serve and a juror who's engaged in
4 misconduct of a substantial nature, I'm wondering why we're
5 talking about Buford at all and would like you to respond.
6 It's sort of related to Judge Stein's question.

7 MR. HAJDU: Well, the - - - in - - - in the
8 Mejias case, they were parsing the word "we" that came in a
9 note, so they're trying to figure out whether - - -

10 JUDGE WILSON: And pretext, both, right?

11 MR. HAJDU: And - - - and - - - yes. So they - -
12 - the pretext in terms of - - - of - - - of coming to a
13 conclusion, and then the use of the word "we" which would
14 mean premature deliberations. But the - - - the
15 distinction here is that, you know, that is - - - and it's
16 similar sort of like what happened in the Third Department
17 case that was cited, Matiash, where the jurors were talking
18 about something in general terms, but it was not specific
19 to the defendant.

20 In this case, they're disparaging the defendant,
21 and they're specifically using the term "scumbag" when
22 referencing him, which raises an obvious red flag. Now,
23 there's potential there for - - - for bias and prejudice.
24 Did it pre-exist? Possibly.

25 JUDGE WILSON: Well, would you agree that the



1 statement would be more likely to indicate bias or
2 prejudice or gross unqualifiedness, if it had been made
3 before any evidence was introduced, as opposed to after all
4 the evidence was introduced?

5 MR. HAJDU: We don't know. On this - - - on - -
6 - on this record, we don't know. We are left to speculate.
7 That's a - - - that's the problem throughout this, is that
8 the - - - the prosecutor came up with a theory and - - - on
9 the appeal, as to what the judge did, but it's just a
10 theory; it's based on speculation.

11 JUDGE STEIN: So that sends us back to the
12 credibility question, right?

13 MR. HAJDU: It - - - right, exactly. Saying that
14 it's - - - well, what the judge did was made a
15 determination of credibility. Well, I don't read that in
16 the record, and three judges from the Fourth Department
17 didn't give that conclusion.

18 JUDGE GARCIA: But Counsel, so the judge clearly
19 calls this person in and has - - - essentially, here, talks
20 to them, asked them questions, right. And then exercised
21 his discretion in saying I'm not going to go any further.
22 What - - - I'm having some trouble, even on the other - - -
23 People's position. What are we going to send it back for?
24 I mean, doesn't the conclusion itself, the action that the
25 trial court takes, show you the exercise of discretion



1 there? What would we send it back for?

2 MR. HAJDU: Well, I - - - I agree. I - - - I
3 don't think that that's a proper remedy to send - - -

4 JUDGE GARCIA: And - - -

5 MR. HAJDU: - - - to send it back.

6 JUDGE GARCIA: - - - following along then, and I
7 think what Judge Wilson is getting at, it seems to me in -
8 - - in criminal trials particularly, you want to insulate
9 the jury from outside forces. And we talk about a juror
10 coming out or a court officer coming out who has some kind
11 of access anyway to the jury room. But where you have a
12 spectator, and in this case, with some affiliation to the
13 defendant, coming out and saying I heard them call the
14 defendant this derogatory term, I mean - - - and you have
15 this hearing, hauling a juror in and then saying to that
16 juror, did you call the defendant a scumbag, don't you
17 think that could have a negative effect itself on the
18 juror's position in the case?

19 MR. HAJDU: Well - - -

20 JUDGE GARCIA: I mean, is that the rule we want?

21 MR. HAJDU: Well - - -

22 JUDGE GARCIA: That when, you know, you have this
23 type of allegation made, you're going to call a sitting
24 juror into a courtroom and ask them if they did this. And
25 they'll say no, okay. What happens? I mean, doesn't - - -



1 isn't that undermining all of the rules we have around that
2 kind of sanctity of the jury? The judge makes his
3 determination. The judge calls that witness. Judge puts
4 that witness on the stand, questions the witness, and says,
5 I'm not going any further with this. Exercise of
6 discretion at that point.

7 MR. HAJDU: Well, we do have the sanctity of the
8 jury, but when we're talking about fundamental rights,
9 there's nothing more fundamental than the right to a fair
10 trial. At the heart of that is the right to have an
11 impartial jury.

12 JUDGE GARCIA: But my point, I guess, some of it,
13 at least, is protecting that impartial jury, meaning not
14 hauling them into a courtroom and say - - - and accusing
15 them of making this type of slur. And then saying, okay, I
16 believe you; you're going to go back and now fairly
17 deliberate - - - you know, because they'll know where
18 that's coming from.

19 MR. HAJDU: Well, if - - - if you have two biased
20 jurors against the defendant, and again, on this record, we
21 don't know how deep their bias and prejudice goes, because
22 the judge never conducted the Buford inquiry, which is
23 required. But if they exist, then that judge has a duty to
24 remove them from that jury pool before they taint the
25 entire panel.



1 JUDGE GARCIA: It seems to me, doesn't the judge
2 really have a duty, at first, to do exactly what the judge
3 did here? Which is call the complainant - - - for lack of
4 a better word - - - up, put them in the box and say what
5 happened. And then make an assessment on whether or not
6 you're going to take that next very intrusive step, which
7 may backfire, in terms of a prejudice inside the jury room,
8 by calling a sitting juror into the courtroom and asking
9 them if they've committed misconduct.

10 MR. HAJDU: But the judge, by following that type
11 of a - - - a stepped approach, at the conclusion of making
12 that inquiry of the first juror - - - or excuse me, the
13 witness - - - then he's got to put his reasons on the
14 record for what he's deciding to do next. In the case of
15 the - - - I'm probably mispronouncing it - - - Matiash,
16 where there was a witness who came out and said, hey, these
17 two jurors, they're talking about the case; they shouldn't
18 be doing that. What the judge determined was, after
19 listening to what the witness overheard, it dealt with
20 trials in general; it dealt with the boredom of being a
21 juror. There was no prejudice shown against that specific
22 - - - the parties in that particular case. So the judge
23 deemed it unnecessary to go to the next step.

24 That's not what we have here.

25 JUDGE STEIN: I - - - I - - -



1 CHIEF JUDGE DIFIORE: Are you arguing that the
2 judge's error that - - - it was that he did not place his
3 findings on the record?

4 MR. HAJDU: Pardon?

5 CHIEF JUDGE DIFIORE: Are you arguing that the
6 judge's error was that he did not place his findings on the
7 record?

8 MR. HAJDU: Well, that's part of what the Fourth
9 Department found is that the judge - - -

10 CHIEF JUDGE DIFIORE: I mean - - -

11 MR. HAJDU: - - - the judge made two errors. One
12 is that he did not do the probing and tactful inquiry that
13 is required. And two is he did not place, on the record,
14 the reasons for what his decision was.

15 JUDGE STEIN: I - - - I - - - I kind of read the
16 - - - the requirement of placing reasons on the record a
17 little bit differently. I - - - I see it as being required
18 after the Buford inquiry, if one is held. I mean, courts
19 make decisions on issues all the time, and - - - and we, as
20 appellate judges, hope and wish and encourage them to state
21 their reasons on the record as much as possible, so that we
22 can intelligently review their decisions.

23 However, that doesn't mean that every dec - - -
24 every determination they make, every ruling they make, has
25 to be laid out on the record. And so I - I see this



1 distinction in - - - in what Buford was really getting at.
2 Would - - - would you respond to that?

3 MR. HAJDU: I - - - I understand the distinction
4 you're drawing, but I go back, unfortunately, in this case,
5 on the record, I don't understand why the judge decided
6 what he decided. Did the judge decide that the - - - the
7 use of the term "scumbag" in and of itself is innocuous? I
8 don't know. If that were the case, then let defense
9 counsel know, so that they know how to argue.

10 JUDGE WILSON: But - - - but - - -

11 MR. HAJDU: Did the judge make a determination of
12 credibility? If he did, let defense counsel know because -
13 - -

14 JUDGE STEIN: Well, certainly that - - -

15 JUDGE WILSON: Let - - -

16 JUDGE STEIN: - - - would be preferred. My
17 question is, is whether it - - - it's - - - it's grounds
18 for a reversal.

19 MR. HAJDU: Well, the - - -

20 JUDGE FEINMAN: And - - - and - - - and then
21 following up on that, how does the Appellate Division
22 actually get to a reversal when it says, we are not making
23 a substituted finding of - - - of credibility? I mean, it
24 - - - it - - - it denies that it's making any findings of
25 credibility one way or another. And - - - and I don't see



1 how you get to the reversal, unless they're, in fact,
2 finding that the witness was credible, which they could
3 have said. They could have said, we reviewed the record
4 and we are making alternative findings of fact, but.

5 MR. HAJDU: Yeah, there - - - there was not that
6 finding at the Appellate Division.

7 JUDGE WILSON: Let me - - - let me ask you this.
8 Is it your position that a juror after hearing all of the
9 evidence in the case, the evidence is closed, who forms the
10 opinion for himself or herself that the defendant is a
11 scumbag, has acted improperly, or is it the communication
12 of that view to a different juror that's improper, or both?

13 MR. HAJDU: It could be a whole slew of things,
14 Your Honor.

15 JUDGE WILSON: No, but I'm asking you if you
16 think both of those are improper?

17 MR. HAJDU: I - - - I - - - I understand that - -
18 - that jurors are going to sit there and they're going to
19 form opinions and they're going to have words or ideas that
20 come to their mind, and I'm not interested in parsing that.
21 The problem is, is that when they're openly disparaging the
22 defendant, and they're using a term like "scumbag" which
23 can - - - you know, that - - - that's not a positive term
24 under any circumstances - - - that I would want to know if
25 - - - if - - - if those two jurors were overheard calling



1 the defendant a scumbag, pri - - - during the initial jury
2 selection, that would have been thoroughly vetted by the
3 judge and the attorneys, to make sure that there was not
4 that bias.

5 The problem I - - - I'm left with is, again, is
6 it goes back to, on this particular record, we don't know.
7 And we're left to speculate.

8 I see that my time is up.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. HAJDU: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. POWERS: I - - - I just wanted to follow up
13 on Judge Feinman's point. The Appellate Division did not
14 make an alternative credibility finding and I think that
15 squarely takes us out of the realm of mixed question
16 analysis. Unless there are any questions from the court,
17 I'm prepared to stop there.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Matthew Kuzdzal, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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