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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 203

BRANDON WARRINGTON,

Respondent.

20 Eagle Street
Albany, New York
November 16, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 JUDGE PIGOTT: Our final case for this afternoon
2 is number 203, People v. Brandon Warrington.

3 Judge DiFiore has recused herself from this case
4 so we're going forward with six.

5 Mr. Carusone, welcome.

6 MR. CARUSONE: Thank you. Good afternoon. I'm
7 Jason Carusone for the appellant, the Warren County
8 District Attorney's Office. If I could reserve three
9 minutes?

10 JUDGE PIGOTT: Yep.

11 MR. CARUSONE: Thank you. Judge, the - - - the
12 issue in this case is did the lower - - - did the lower
13 court properly use its discretion when it determined that
14 Juror 383 should not be discharged for cause. We know the
15 Appellate Court majority holding was that there was an
16 abuse of discretion. Justice Devine, contrary to that
17 dissented and felt that there was not.

18 JUDGE GARCIA: Counsel - - -

19 MR. CARUSONE: Yes.

20 JUDGE GARCIA: An issue I never have but you
21 might want to raise the microphone.

22 MR. CARUSONE: Sure. Sorry. Thank you. The - -
23 - in common law, if there was any bias raised in the past
24 that was the end of the analysis. Then we went into 376
25 became the law and that brought about the expurgatory oath.

1 We're now in a world of 270.20, and in that world, there is
2 no longer a required expurgatory oath. In fact, it's not
3 even listed in that statute. So without the expurgatory
4 oath, sort of the rules have changed. And the idea is that
5 when the trial court is making its analysis, it has to have
6 an opportunity to look at the individual jurors and make a
7 determination if they're in compliance with C.P.L. 270.20.
8 So the first - - -

9 JUDGE RIVERA: But once a juror has articulated a
10 - - - a bias, which I don't think you're challenging here,
11 right, that a juror articulated a bias, doesn't the judge
12 have to clarify that even if the juror says, yes, I can be
13 fair, yes, I - - - I will listen to your instructions and
14 the evidence and I can put aside this bias that I've
15 already admitted to, doesn't the judge have to have the
16 juror say not exactly those words but to communicate that
17 that juror is able to overcome the bias?

18 MR. CARUSONE: Yes. I believe that's true. And
19 I believe that happened in this very case. When you - - -

20 JUDGE RIVERA: How - - - how did that happen
21 here?

22 MR. CARUSONE: Okay. What - - - as this court
23 will recall, this involved a five-year-old's death. And so
24 the way that the genesis of this is the defense counsel
25 raises it in voir dire and says, look, this is very sad.

1 It's sort of comp - - - compound question. This is
2 upsetting. Will it be difficult for anyone? One juror
3 says yes, another raises their hand. Ultimately, the two
4 jurors that become the subject of that inquiry are Juror
5 123 and Juror 383. And before we even get to the court's
6 interaction, defense counsel goes on and says I'm concerned
7 that this is a case about kids and you two have raised
8 concerns. Are you maybe shifting the burden? Can you
9 assure me, even though this is about children, that you'll
10 base your verdict on the evidence? That's defense
11 counsel's inquiry. He gets an affirmative from the - - -
12 the panel, panel of twenty-one, I believe. Which, by
13 itself, probably isn't enough but it isn't to be ignored,
14 either.

15 Then the court becomes involved in inquiry. And
16 when you're looking at that inquiry, what you're going to
17 observe is two individuals being spoken to, first, Juror
18 123 and then, I believe immediately following, he goes into
19 383. And that interchange, that discussion that occurs,
20 highlights what the issue is, and the issue is the same for
21 both juror. There is a death of a child. It's upsetting
22 and these jurors - - -

23 JUDGE ABDUS-SALAAM: Wouldn't it have been
24 prudent for the judge to say when the judge finished with
25 Juror 123 and turned to Juror 383, same questions I just

1 asked that juror? And what is your - - -

2 MR. CARUSONE: He does that - - -

3 JUDGE ABDUS-SALAAM: And what is your response to
4 that. But the - - - but my understanding is - - - of the
5 record is the judge actually asked Juror 123 about the bias
6 that the juror mentioned about this being a five-year-old
7 and an adult. I don't recall that the - - - the judge
8 actually said to Juror 383 remember you said - - - or, the
9 same questions about the - - - the child and the adult. I
10 don't - - - I don't recall that. Am I incorrect, counsel?

11 MR. CARUSONE: Well, what the judge does is he
12 goes through the full inquiry with Juror 123. And I think
13 - - - and one of the things I want this court to focus on
14 is when C.P.L. 270.20 was passed, that - - - that judicial
15 discretion that - - - that trial judges are afforded became
16 even more important because they want to get that
17 assurance, and I want to make sure that I say this right,
18 that the state of mind of the juror is likely to pre - - -
19 if their state of mind is likely to preclude them from
20 rendering an impartial verdict based on the evidence then
21 they should let them be discharged for cause. The courts
22 have said that there is not one method. There isn't that -
23 - - that talismanic oath.

24 JUDGE FAHEY: No, but it's - - - you have to get
25 into the weeds here, don't we? We have to really get down

1 into the words and say is it unequivocal.

2 MR. CARUSONE: Yes.

3 JUDGE FAHEY: I - - - I think that's where we
4 have to go. And there's a test in Biambi (ph.), I believe,
5 that sets out a two-part test. And really, at that point
6 we have to parse the language against the test and see if -
7 - - if this is unequivocal with 383. 123 is - - - is only
8 relevant, I think, is because the court - - - the reference
9 to the similar questions between the two of them.

10 MR. CARUSONE: The reason I suggest to this court
11 that 123 is so important is because, as we know, this is an
12 abuse of discretion standard, and - - - and I want to
13 hopefully answer both questions here.

14 JUDGE FAHEY: Yeah. I - - - you go ahead and
15 answer the judge. I didn't mean to interrupt you. Go
16 ahead.

17 MR. CARUSONE: No, no. I like interruptions.
18 123 and 383 are being spoke - - - they're together in the
19 room. They're being spoken to together. The judge is
20 there to assess are they interacting, are they listening.
21 What we know is that the judge gets what might even qualify
22 as an expurgatory oath from 123, but he keeps questioning
23 because it's clear that he can read body language and
24 there's an issue. As you'll recall, he goes through this
25 is about a child. He directs this is the issue. And then

1 he gets to the - - - towards the end of his inquiry and he
2 says can you be fair and impartial and the juror says yes.
3 And the judge says I'm not trying to drag this out of you.
4 I - - - I want to make sure. It's okay if you say no. Are
5 you sure? And they - - - I think they say maybe or I'll
6 try, and ultimately, they - - -

7 JUDGE STEIN: So - - - so that shows that the - -
8 - that the judge was clearly paying attention to 123. The
9 problem that I have is that it just seems like something
10 was overlooked because he said I'm going to ask you the
11 same questions, to 383, but he never did. And that's the
12 problem. He never got any kind of - - - not - - - there's
13 nothing on the record that tells us that that juror made an
14 unequivocal statement that they - - - that they could put
15 aside the bias that they had indicated and fairly judge the
16 case.

17 MR. CARUSONE: Judge, I would say that, in fact,
18 the judge did not mirror his questions with Juror 123 and
19 383. I agree there. But the subject matter was clear.
20 This is about the child. This - - - they'd been raising
21 hands on the same issue. He then does go through and he
22 says - - -

23 JUDGE STEIN: But the questions went in - - - the
24 following questions went to, you know, will you listen to
25 the evidence and based it on the evidence, but that doesn't

1 go to whether they're going to be able to view the evidence
2 without this bias that they've - - - that they've
3 articulated.

4 MR. CARUSONE: I think, when taken in the whole,
5 that it does. Because the ultimate question and the
6 question that's raised by the statute is from - - - are
7 they - - - do they have a mind likely to preclude them from
8 rendering. That's what the judge has to decide there.
9 He's there. He can see the head nods. He can see the - -
10 - whether people are paying attention. That's all present.
11 They're afforded that discretion for a reason because, as
12 we know, when you're in the room and you're seeing the
13 context and the - - - the interchange it's different than
14 when you look at a bare record on paper.

15 JUDGE RIVERA: Yeah. But everyone agrees that -
16 - - that it's - - - it's a tough case and it's - - - it's
17 the candor of these perspective jurors admitting, you know,
18 this is tough. I don't see how I can do it. This involves
19 a child and this adult. I mean how can we, just looking at
20 a record that, as Judge Stein has already pointed out, this
21 questioning with this particular juror, 383, is about this
22 burden of proof without ensuring that the juror is not
23 going to look through the lens with bias in deciding
24 whether or not the defen - - - the prosecutor has - - - has
25 met their burden.

1 MR. CARUSONE: Well, in - - - in, I think, the
2 Johnson holding this court said that the judge - - - the
3 trial judge has to, in some form, get the assurance. And
4 it's - - -

5 JUDGE RIVERA: So if you don't ask the question
6 how are you going to get that assurance?

7 MR. CARUSONE: Well, I think the judge did ask
8 the question - - -

9 JUDGE RIVERA: To - - - no, but not to this
10 juror.

11 MR. CARUSONE: To this juror, didn't ask the
12 identical questions but did ask the question if the People
13 - - - and I'm going to summarize the questioning that he
14 asked of 383. He said there was a follow-the-law
15 discussion that goes on later. He goes through that at
16 length with that juror. He also talks about burdens of
17 proof and following the law and the evidence.

18 JUDGE STEIN: Yes. But the problem, it's the
19 same problem because in deciding whether the People have
20 met their burden of proof; if you have this bias then it's
21 going to influence that conclusion. And - - - and that
22 juror was never asked whether they could do that.

23 MR. CARUSONE: The judge does not - - -

24 JUDGE RIVERA: Let me ask you this. Do you
25 concede that if the judge hadn't asked sort of the bias

1 questions to the prior juror, the juror just before this,
2 and had just started asking these questions, the ones that
3 are on the record, to 383, that that wouldn't be good
4 enough? Do you concede that?

5 MR. CARUSONE: I don't like conceding. I would
6 say that it wouldn't be ideal if you just took that snippet
7 in isolation and looked at it alone. But I - - - I don't
8 think that you have to look in isolation and just say I'm
9 going to only look at that. We do have the defense
10 counsel, before any of this, goes through his, I'll call it
11 rehabilitation, with these jurors on this issue. He gets a
12 group affirmation. And then we do have the individual
13 inquiries that the judge does. I guess the question is, is
14 there some - - - I don't like talismanic, but that's the
15 word that we see all the time. Is there some magic
16 language that needs to be said? Do they have to follow
17 almost a script, the judge? Or can they be relied on to
18 look at the total picture of what they've got in making
19 their determination if this person should be discharged for
20 cause.

21 JUDGE RIVERA: Well, and it doesn't have to be
22 talismanic. I understand your point with that. The
23 question is whether or not the - - - the juror has said
24 enough that clarifies that bias will not be the basis by
25 which the juror considers all of the evidence presented and

1 eventually renders their vote when they deliberate.

2 MR. CARUSONE: Well, the ultimate question is for
3 all - - - for a trial is can the juror follow the law and
4 base the verdict on the evidence? And that were the - - -
5 those were the questions.

6 JUDGE STEIN: But no, it's not. I mean if - - -
7 if a juror says I believe - - - I have a bias. I believe
8 that anything a police officer says is true - - -

9 MR. CARUSONE: Right.

10 JUDGE STEIN: Okay. And then you ask the
11 question well, will you - - - will you, you know, base your
12 verdict on the evidence? Will you follow my instructions?
13 Yes, all of that I will do. Absolutely. But there's still
14 this bias. So we know that whatever the police officer who
15 testify, that - - - that juror is going to take that as
16 true. So that colors everything. And that - - - I think
17 that is the point of having to have some articulation that
18 the juror can - - - can overcome that.

19 MR. CARUSONE: What I would say is that when you
20 look at the cases that have come before here, what's
21 typically happened is there's been a bias that's been
22 raised and there's been no inquiry. That's a number of the
23 cases. Or there's been a bias that's been raised and
24 there's an inquiry. And at the end of the inquiry, the
25 response is equivocal. And that's happened time and again.

1 I'll try. I'll do my best. We don't have an equivocation
2 here. We do have a juror who's saying I will follow the
3 law as you, Judge, give it to me. And - - - and part of
4 the law and part of the requirement is that you are
5 impartial, and - - - and I believe the - - - the court
6 discusses impartiality at the beginning of his charges to
7 the jury. And it's been heavily discussed throughout this
8 record as in - - - as we know one juror is disqualified,
9 Juror 123, because they ultimately, just prior to this, say
10 I can follow the law. I can't do it. And they ultimately
11 equivocate in the end.

12 JUDGE PIGOTT: Thank you, Mr. Carusone. You have
13 your three minutes.

14 MR. CARUSONE: Thank you.

15 JUDGE PIGOTT: Mr. Connolly, good afternoon.

16 MR. CONNOLLY: Good afternoon, Your Honor.

17 Initially, I'd like to point out that it's not correct to
18 say that Juror 123, the juror who was questioned
19 immediately preceding Juror 383 by Judge Hall, was ever
20 asked specifically whether he - - - I don't remember if
21 it's a he or she, say it's he, whether he could put aside
22 his bias. It's true that that juror did ultimately say
23 during that questioning by Judge Hall that he couldn't be
24 fair in the case.

25 JUDGE PIGOTT: Have you ever had a situation

1 where you ask somebody the exact question and they - - -
2 and they look at you right in the eye and they say sure, I
3 can be fair, and you know they're not - - - they're not
4 going to be fair at all?

5 MR. CONNOLLY: Sure.

6 JUDGE PIGOTT: So how do you tell from a cold
7 record exactly what went on, you know, in a situation like
8 this? And shouldn't we be deferring to what I - - - what
9 I'm going to surmise is a fairly experienced judge who
10 asked these questions, got these answers, and was
11 satisfied?

12 MR. CONNOLLY: Well, the law from this court is
13 clear that there is a place for this court to be
14 deferential to trial courts. And that would be if the
15 trial court, or counsel, for that matter, it wouldn't
16 matter whether it was counsel or trial court, had obtained
17 from the juror an express statement that he will not be
18 influenced in these deliberations.

19 JUDGE PIGOTT: Well, when you look at what was
20 asked and what was responded to with Mr. Carusone, well,
21 you know, it's conceivable to me that a judge could say,
22 you know, looking at this and seeing, you know, and as - -
23 - as he points out, body language, et cetera, that I think
24 this lady can be fair. And I - - - and I think about that
25 because I can't imagine in any venire anybody that doesn't

1 have some reservations when there's - - - when there is a
2 claim such as this, a child being killed by - - - by an
3 adult.

4 And so most of the people who said, oh, sure, I
5 can be fair, you know, those are the ones I would think
6 sometimes you'd have a little more question with than
7 somebody who very candidly says this is troubling to me and
8 then is asked a series of questions that she says if the
9 evidence says not guilty, I'm voting not guilty, if the
10 evidence says guilty, I'm voting guilty. And I - - - and I
11 don't know where we step on a judge and say, well, you had
12 to do something more, and I can't think of what the
13 something is. I guess that's a question.

14 MR. CONNOLLY: Okay. I'd go back to the - - -
15 the history here that Mr. Carusone alluded to briefly.
16 There was a time, and I think it was before about 1870,
17 that once a juror expressed a bias of the sort that this
18 juror, 383, expressed, that would be it. That juror was
19 out, no more. However, the law became somewhat more
20 liberal, I guess, statutorily through the legislature
21 saying that, well, we won't necessary screw the juror who
22 expresses a bias like that. But before that juror can
23 possibly be allowed to serve, that juror has to at least
24 expressly state that he will not be influenced in his
25 deliberations by the bias that he expressed.

1 JUDGE PIGOTT: No. That he or she will follow
2 the law, which I think was said here, and - - - and before
3 the - - - this juror never sat, right? I mean the argument
4 here is that there was an exhaustion of peremptories.

5 MR. CONNOLLY: Yes.

6 JUDGE PIGOTT: Okay. So this juror never - - -
7 never - - - was never in the case.

8 MR. CONNOLLY: Yes. Correct.

9 JUDGE FAHEY: You know, the way I understood - -
10 -

11 MR. CONNOLLY: I'm sorry. Was there a point? I
12 - - - was there a question?

13 JUDGE PIGOTT: Well, I just wanted to make that
14 clear because it's not like she sat and then - - - and then
15 because of her bias a verdict was rendered. And I
16 understand the whole, you know, thing about, you know, that
17 - - - because he exhausted his peremptories he therefore,
18 you know, was out of opportunities to challenge someone
19 else. And I realize, too, that that's difficult. But my
20 point is that in this whole thing, how do we say this judge
21 did not do what at least he was satisfied with in that this
22 juror, you know, could be fair and, of course, the defense
23 has the right to excuse them if they want to.

24 MR. CONNOLLY: Because the - - - the law from
25 this court is clear that once a juror has expressed a bias

1 of that nature the juror has to make two expressions, has
2 to explicitly say that he won't be influenced by that bias.
3 I think that he can put that bias aside.

4 JUDGE PIGOTT: So - - - so you say this judge
5 should have said you said before - - -

6 MR. CONNOLLY: Yes.

7 JUDGE PIGOTT: - - - and therefore, you know, I
8 want you to specifically say that you will know - - - you
9 will not make your decision based upon the fact that the
10 age difference and an adult is - - - is alleged to have
11 injured and killed a child.

12 MR. CONNOLLY: Yes. Because once a juror has
13 said - - - I mean this juror came out and said - - -

14 JUDGE STEIN: The judge - - -

15 MR. CONNOLLY: - - - I can't be fair because of
16 this - - - I'm biased in this case because the - - -

17 JUDGE GARCIA: But that's not really what he
18 said, right? Don't you have to look at kind of what the
19 back-and-forth was? I mean he says, you know, "Could you
20 be fair and impartial?" "It's a five-year-old. I can't do
21 it." He says that. But then there's further Q&As where
22 the defense counsel is asking him "The burden is for the
23 People to prove beyond a reasonable doubt that I did do
24 it." And the defense counsel says "Can you agree with
25 that?" And 383 says "Yes." And then counsel inquires,

1 "You know, despite the fact that it's a young child. It's
2 emotional. Let's face it this is an emotional thing. You
3 still cannot shift the burden to the defense. The burden
4 is not for me to come and show I didn't do it. The burden
5 is for the People to come." And the defense counsel says,
6 "Do you agree with that?" And as the venire, Juror 383
7 says "Yes." Counsel then inquired if any of them would
8 have difficulty finding the defendant not guilty if the
9 People failed to meet their burden of proof. "If the
10 People did not meet their burden of proving each and every
11 element of the crimes beyond a reasonable doubt, would have
12 a problem finding the defendant not guilty?" 383 says "I
13 don't know." And then following that response is when the
14 court inquires specifically of that juror. So don't you
15 have to look at that entire back-and-forth to say what does
16 the judge have to do at that point to satisfy themselves
17 that he has given an unequivocal response to can he be fair
18 and impartial?

19 MR. CONNOLLY: Well, if the court - - - if you're
20 asking does this court have to look at the entire record of
21 the voir dire - - -

22 JUDGE GARCIA: Right.

23 MR. CONNOLLY: - - - sure.

24 JUDGE GARCIA: It wasn't I can never do this,
25 it's a five-year-old, let's go to these questions. There

1 was more in between there. There was other questioning.
2 And then at a certain point, the judge steps in and
3 questions those two jurors. So I - - - I think the way
4 it's been going here, we're seeming to suggest that it's a
5 five-year-old, my God, I can never be fair and impartial,
6 let's go to these questions. But that isn't really the
7 sequence of what happened here. And to get to Judge
8 Pigott's questions, it seems more of this was a trial judge
9 who's letting this process play out. There are different
10 questions that are asked. And finally, at that point where
11 the question is I don't know - - - the answer is "I don't
12 know" to a question that says "If the People don't meet
13 their burden of proving each and every element beyond a
14 reasonable doubt, would you have a problem finding the
15 defendant not guilty?" 383 says "I don't know." The judge
16 then comes in and questions these two jurors.

17 Why don't you look at all of that in terms of
18 what the judge then asks, who's there and who's hearing all
19 this and watching all this, to see if this answer
20 unequivocal rather than put in - - - and you can call it a
21 talisman or the need for the judge to say at one point you
22 said it was a five-year-old and that would bother you and
23 now, can you tell me, even though it's still a five-year-
24 old, whether you can be fair and impartial. Why don't you
25 have - - - why don't we look at all of this to see whether

1 those answers indicate he could have put aside whatever he
2 expressed as reservations and give an unequivocal answer
3 that I could be fair and impartial?

4 MR. CONNOLLY: Because if - - - even if you look
5 at all of that, it still doesn't amount to a question to
6 that juror. Having expressed this bias in this situation,
7 can you put it aside? Can you assure that it will play no
8 rule whatsoever in your deliberations in this case? Now
9 it's quite possible that the juror could answer all the
10 other questions, oh, yes, I'll be fair, I'll obey all your
11 instructions, I'll do everything that you say that I'm
12 supposed to do and yet, when confronted with that question,
13 can you really put that bias aside, the juror might say, as
14 in Blyden, the case involving a racial minority, the juror
15 said - - - when confronted with that question the juror
16 said, well, I'll try.

17 JUDGE GARCIA: But I don't know - - - I know the
18 case, I know that part of it. I don't know what happened
19 before. But in this case, you have a defense lawyer asking
20 the panel before this questioning about the young child.
21 After he gives this initial - - - 383 gives an initial
22 answer of "It's a five-year-old; I can't do it," the
23 defense lawyer gets up and asks questions and says "It
24 sounds like you're shifting the burden. That's what I'm
25 afraid of. When you have such a young child and it's

1 emotional. Let's face it it's an emotional thing. The
2 burden is not for me to come in and show I didn't do it.
3 The burden is for the People to prove beyond a reasonable
4 doubt that I did do it." And defense counsel then says
5 whether you all, the venire, can agree with that and 383
6 says "Yes." So does the judge then have to repeat that
7 later?

8 MR. CONNOLLY: I'm sorry, Your Honor. Would - -
9 - in - - - are you saying - - - and I don't have that in
10 front of me. Are you saying that the whole venire agreed
11 with that?

12 JUDGE GARCIA: Yeah. But then 383 agrees. But
13 the judge then has to single that juror out later in the
14 individual colloquy when he's really following up on this
15 later question it seems to me. "If the People did not meet
16 their burden of proving each and every element of the crime
17 beyond a reasonable doubt, would you have a problem finding
18 the defendant not guilty?" He says "I don't know." And
19 then the judge steps in.

20 But you've had - - - some of them are direct
21 questions, some of them are questions to the panel, but 383
22 is answering them. Why isn't it all of that, that as Judge
23 Pigott says, goes into this trial judge's determination of
24 is this an unequivocal answer rather than now of this had
25 happened, he mentions this five-year-old, says I can never

1 be fair and impartial, and then the judge says to him
2 there's a five-year-old here. Can you be fair and
3 impartial, and he says yes. That would be okay, but the
4 whole process here, because he doesn't say those magic
5 words at the end, is not?

6 MR. CONNOLLY: Well, I - - - it's not really
7 magic words, but it's an exp - - - an actual expression of
8 an ability to set aside a previously expressed bias.

9 JUDGE GARCIA: Right.

10 MR. CONNOLLY: And the question - - - the - - -

11 JUDGE STEIN: And that followed questioning of
12 Juror 123 on that very issue, right?

13 MR. CONNOLLY: I'm sorry?

14 JUDGE STEIN: Part of the context of this is that
15 the judge also questioned Juror 123 on that very issue but
16 didn't do the same thing with - - - with this juror.

17 JUDGE PIGOTT: Well, he said - - -

18 MR. CONNOLLY: Well - - -

19 JUDGE PIGOTT: He said the same questions to you
20 and in my world, I don't repeat them all, it's just, you
21 know, same questions to you, do you have any problem with
22 that, and then - - - then the answer's no, you know.

23 MR. CONNOLLY: No. But the - - - but the judge
24 never asked Juror 123 whether Juror 123 could set aside her
25 bias or his bias.

1 JUDGE RIVERA: Well, have - - - have we ever said
2 an answer - - -

3 JUDGE GARCIA: That's not the way - - -

4 JUDGE RIVERA: - - - from the group or an answer
5 from another juror - - -

6 MR. CONNOLLY: No.

7 JUDGE RIVERA: - - - will purge the bias of - - -

8 MR. CONNOLLY: And there's a good reason - - -

9 JUDGE RIVERA: - - - another juror?

10 MR. CONNOLLY: There's a good reason for that
11 because a lot of people - - - mostly not lawyers, but a lot
12 of people are not, you know, eager to raise their hand.
13 You know, they'll do it if they have to but if they can
14 just sit there, they'd rather do that. They don't want to
15 single themselves out.

16 JUDGE ABDUS-SALAAM: Is that - - -

17 MR. CONNOLLY: So it's important in this
18 situation - - -

19 JUDGE ABDUS-SALAAM: But, counsel, this juror
20 did. This juror raised her hand or his hand and said I,
21 you know - - - that I have that problem, adult-child, can't
22 do it. And just listened to the questions put through
23 number 123 who ultimately got excused because he said
24 basically I haven't changed my mind, I still can't do that.
25 So if that - - -

1 MR. CONNOLLY: Well, she didn't say that.

2 JUDGE ABDUS-SALAAM: Or - - -

3 MR. CONNOLLY: She didn't say why. It could have
4 - - - because the questioning also concerned the - - -
5 whether a juror could be fair - - -

6 JUDGE ABDUS-SALAAM: The burden.

7 MR. CONNOLLY: - - - where there - - - where
8 there's voluminous evidence - - -

9 JUDGE ABDUS-SALAAM: Right.

10 MR. CONNOLLY: - - - or - - - or only one
11 witness. There's - - -

12 JUDGE ABDUS-SALAAM: My point - - - my point is
13 that the juror knows, Juror 383 knows, that if they really
14 have a problem with this they can get out of it. They can
15 just say, look, I can't do it. I can't follow the law. I
16 can't - - - I just can't do it just - - - just like Juror
17 123 did.

18 MR. CONNOLLY: Yes. But the juror - - - but
19 still, the juror could be in a situation where she really
20 wants to serve, which is fine, but still really can't put
21 aside that bias.

22 JUDGE PIGOTT: Well, see, now you get my initial
23 question to you which is you - - - jurors lie.

24 MR. CONNOLLY: Well - - -

25 JUDGE PIGOTT: I mean not intentionally.

1 MR. CONNOLLY: - - - I don't know if they - - -
2 you know, but - - -

3 JUDGE PIGOTT: Well, I asked you. I said, you
4 know, have you ever had somebody come - - - you know, you
5 ask them a direct can you be fair and they say yes and you
6 know darn well that they can't. I mean that - - - that's
7 why we get peremptories. And - - - and you can tell by
8 tone, you can tell by body language, you can tell by a
9 number of things whether or not it's true.

10 MR. CONNOLLY: Yes.

11 JUDGE PIGOTT: But simply one question, you know,
12 the - - - the argument here, I guess, is if that one
13 question had been asked, as - - - as prejudiced as she may
14 have been, she's in. And - - - and that's not - - - that's
15 not the way we do it. When - - - and that's why, you know,
16 when the defense lawyer asks and when, you know, the judge
17 says let's say they - - - they bring in lots and lots of
18 witnesses, lots of evidence, lots of DNA, lots of picture
19 and you're still not convinced, can you render a verdict of
20 not guilty and she says yes. I know it's not a question.

21 MR. CONNOLLY: Yeah. Again, it doesn't go to the
22 - - - it doesn't confront her with her bias. And that's -
23 - - this court has said that once a juror has expressed a
24 bias, a defendant is entitled, at a minimum - - - not a
25 maximum but a minimum is entitled to have that juror's

1 expressed assurance on the record that the juror can put
2 that bias aside. And this question is - - -

3 JUDGE GARCIA: Should the - - - should the
4 defense lawyer have said judge, you know, I want to ask
5 another question, I want to ask, you know, specifically
6 this? I'm not - - - I'm not looking, you know, to pass
7 blame here. But, you know, apparently, everybody seemed to
8 think there was enough information here to make a
9 determination, and the judge said I think she's okay and
10 the defense lawyer said then I'm going to - - - I'm going
11 to knock her off, perempt her.

12 MR. CONNOLLY: Well, I mean, the jur - - - the
13 defense lawyer has a certain amount of time to ask
14 questions and that time was exhausted. And the - - - the
15 defense lawyer felt that she hadn't been - - - that she had
16 expressed a bias and she hadn't disavowed that bias. So -
17 - -

18 JUDGE PIGOTT: Thank you, Mr. Connolly.

19 MR. CONNOLLY: Thank you.

20 MR. CARUSONE: Thank you.

21 JUDGE PIGOTT: Mr. Carusone, there's no - - -
22 there's no expression that she can be fair. She didn't set
23 aside her bias.

24 MR. CARUSONE: Well, the - - - the questioning
25 immediately following the question to Juror 123, and I know

1 we're kind of getting, as you said, into the weeds, is he
2 says - - - uses the term fair and impartial, meaning Judge
3 Hall. He says "If the People are able to prove their
4 direct - - - their case beyond a reasonable doubt, what
5 would your fair and impartial verdict be?" And she says
6 "Guilty." And then he goes through that example of now if
7 they don't, if they go through all this. He says then what
8 does your verdict have to be? He doesn't use the words
9 fair and impartial verdict anymore. But again, I think
10 what's happening is separating things out into snippets is
11 - - - is what we're saying the court shouldn't do. That
12 don't look at it in a vacuum. Look at it in the totality.
13 If - - -

14 JUDGE RIVERA: Yes. But at some point she's got
15 to - - - or the juror's got to express - - - perspective
16 juror's got to express in some way - - - let's - - - let's
17 accept that you're correct about it doesn't have to any
18 magic words that the judge uses or magic words that the
19 perspective juror uses. But at some point she's got to
20 express that she can move - - - or the juror can move
21 beyond the bias, what disqualifies that's person. That's
22 what disqualified - - - not whether or not she can weigh
23 the evidence or understands what reasonable doubt is or
24 won't understand what reasonable doubt is or won't or will
25 follow the instructions. Those are all other reasons not

1 to keep this juror on or to keep this juror on. But the
2 one that she - - - the juror's articulated, the one that -
3 - - that juror then got to say I can get by - - - I can get
4 beyond this. I'm not going to rely on this bias.

5 MR. CARUSONE: My argu - - -

6 JUDGE RIVERA: And that's - - -

7 MR. CARUSONE: Sorry.

8 JUDGE RIVERA: With all the reading that's gone
9 from various members of the bench, I still don't see where
10 - - - where that was expressed.

11 MR. CARUSONE: And my argument to you would be
12 that, in fact, if you read it in the total so that you - -
13 - we don't pull out pieces and say well, where is that
14 language where he's saying - - -

15 JUDGE RIVERA: Well, why shouldn't we, is what
16 I'm saying. Why shouldn't we be looking for the expression
17 that I can get past my bias or my bias will not influence
18 my vote? Why shouldn't we have that expressed statement?

19 MR. CARUSONE: I - - -

20 JUDGE RIVERA: What is wrong with that? Why not
21 have that clarity?

22 MR. CARUSONE: I will say that - - -

23 JUDGE RIVERA: A person's liberty is on the line.

24 MR. CARUSONE: I don't think there's anything
25 wrong with that. I think that's what the law was at one

1 time. One time it was we can't trust jurors that say they
2 have a bias. Then it was well, we can, but they have to
3 give this expurgatory oath, and then it came - - - it came
4 about, 270.20, we don't have to have an expurgatory oath.
5 It's essentially just saying we do have to have an
6 expurgatory oath. Say these words in this way, get your
7 yes, and we're off to the race. But as we've heard - - -

8 JUDGE RIVERA: She said - - - a juror could say
9 I'm not going to be biased, no, the bias won't get in my
10 way, I can put it aside. Look, I just gave you three
11 different ways I can deal with this. Not magic phrases or
12 - - - or the exact same sentence or - - - right? There are
13 different ways of expressing. But again, one person's
14 liberty is at interest. What is wrong with having that
15 express statement on the record?

16 MR. CARUSONE: I think that the juror expressed
17 to the judge - - -

18 JUDGE RIVERA: And by the way - - -

19 MR. CARUSONE: Yes.

20 JUDGE RIVERA: - - - when a juror expresses that
21 isn't that also confirming for the juror they mean it, this
22 is real, I have to put this bias behind me? It's not just
23 part of several sentences and questions that I've just gone
24 through that didn't mention bias, didn't get back to that
25 specifically.

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MR. CARUSONE: I guess the question comes down to
is there going to be a requirement for an expurgatory oath.
And if you read - - -

JUDGE RIVERA: Okay.

MR. CARUSONE: - - - the total record here, I
would suggest to the court that the juror essentially says
I can be fair when they say I can give a fair verdict. And
that if they don't prove the case, the - - - it's a not
guilty. Thank you.

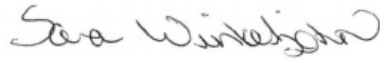
JUDGE PIGOTT: Thank you, sir.

(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. Brandon Warrington, No. 203 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: November 22, 2016