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COURT OF APPEALS  
STATE OF NEW YORK

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FISHER,

Appellant,

-against-

NO. 41

PEOPLE,

Respondent.

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20 Eagle Street  
Albany, New York  
March 14, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Fisher.

3 MS. BURGESS: If it please the Court. Lisa  
4 Burgess for the Appellant, Kenneth Fisher.

5 Nothing is more basic in the criminal process  
6 than the right of a defendant to an unbiased jury. CPL  
7 270.35.1 states, "If at any time after the trial jury has  
8 been sworn and before the rendition of its verdict ... the  
9 court finds, from facts unknown at the time of the  
10 selection of the jury, that a juror is grossly unqualified  
11 to serve in the case or engaged in misconduct of a  
12 substantial nature, the court must discharge such juror,  
13 and if no alternate juror is available, the court must  
14 declare" - - -

15 JUDGE RIVERA: So is your argument that Juror 6  
16 is unqualified, or the other jurors that were also asked  
17 questions, unqualified?

18 MS. BURGESS: My main argument is that Juror 6  
19 was unqualified. There's questions about Juror 3 being  
20 unqualified. I believe Juror - - - that argument of Juror  
21 6 being unqualified is fully preserved. The argument for  
22 Juror 3 is less preserved. But I think that this goes to  
23 the essential validity of the process. There's fundamental  
24 that the - - - it's fundamental that you have an unbiased  
25 juror. So I think that even though Juror 3 was not

1 challenged - - -

2 JUDGE TROUTMAN: So if we focus on Juror 6 - - -

3 MS. BURGESS: Okay.

4 JUDGE TROUTMAN: - - - which you say is  
5 preserved, what makes it clear that she was unqualified  
6 here?

7 MS. BURGESS: What makes it clear is that they  
8 did the jury selection on a Monday. And at the time, the  
9 judge said to the jury - - - jurors the normal admonishment  
10 that if anything happens that affects your service as a  
11 juror, you need to not talk to the other jurors about it,  
12 but you need to contact the court officer and they will  
13 contact me, and I will speak with you privately. And once  
14 we speak, you're not to speak to the jurors about what we  
15 discussed. On Monday they released the jury. They don't  
16 come back until Wednesday. They come back Wednesday. They  
17 go through the entire trial on Wednesday. Thursday they go  
18 through the trial. They start their jury proceedings when  
19 they're almost through the - - - they're hours into the  
20 jury deliberations, and they get a note from the foreman  
21 saying that one of the jurors believes she may have been  
22 followed home Monday after jury selection by Kenneth  
23 Fisher.

24 She discussed this with the other jurors, it was  
25 clear, because the jurors were all afraid of it - - -



1           afraid that - - - you know, aware that she believed she - -  
2           -

3                   JUDGE TROUTMAN: So are you also arguing that she  
4           was incapable of following the court's instructions?

5                   MS. BURGESS: She was. Because she - - - she  
6           disobeyed the instructions immediately after they were  
7           given. They were given on a Monday. She claims he  
8           followed her home. She had no real basis to believe that  
9           he followed her home, but she believed he followed her  
10          home. And then she discussed it with the other jurors  
11          during the deliberations. Which is very concerning,  
12          because she's putting in what we - - - anyone would  
13          consider a bad act without any comment from the court on  
14          it. She's just introducing that into the jury  
15          deliberations.

16                   JUDGE CANNATARO: The court conducted an inquiry  
17          on all of this and - - - you know, probed around what  
18          happened to Juror Number 6. And then extracted a statement  
19          from Juror 6 that she could nonetheless follow the court's  
20          rules and participate as a juror. And I believe the court  
21          then further elicited additional questioning from counsel,  
22          of which there was none. So I - - - I'm - - - I don't know  
23          if this is a preservation issue, but I - - - I'm not sure I  
24          understand the basis of your ongoing argument that this  
25          juror was grossly unqualified to serve, given that that

1 hearing occurred.

2 MS. BURGESS: I believe - - - she said she was -  
3 - - she was - - - could decide it solely on the evidence.  
4 But she had already introduced something into the  
5 deliberations that wasn't introduced as evidence. She  
6 introduced this alleged bad act of Mr. Fisher. And what's  
7 very concerning about this is they never asked her why she  
8 thought it was Mr. Fisher. She said that - - - when they  
9 questioned her, she said she was in the parking lot of the  
10 bank, and she saw Mr. Fisher walking through the parking  
11 lot at the courthouse. She then left in her car. She  
12 never saw him get into a car. She goes through a couple of  
13 stoplights. She looks up in her rearview mirror, and she  
14 said she did that because a husband rear-ended her years  
15 ago. And she sees this maroon Lincoln, she identifies it  
16 by the Lincoln symbol on the front, and she claims it's Mr.  
17 Fisher. He's six to eight car lengths behind her. There's  
18 no way - - -

19 JUDGE HALLIGAN: Is - - - is your view that - - -  
20 that there was no way, having said that, that she could  
21 have provided some adequate assurance that she could be  
22 impartial or that such assurance was not elicited from her?

23 MS. BURGESS: There was no way she could provide  
24 an assurance that she was impartial, because there was no  
25 way she could have identified the driver of that car is

1 Kenneth Fisher.

2 JUDGE HALLIGAN: What - - - what - - -

3 MS. BURGESS: She's - - -

4 JUDGE HALLIGAN: - - - tell me - - - tell me why  
5 it is that having - - - having said that she thought the  
6 defendant was following her, why she could not then have  
7 established sufficiently her ability to be impartial? What  
8 about that statement makes that impossible?

9 MS. BURGESS: I think it's impossible because  
10 you're a juror in a trial. It deals with drugs. You're  
11 driving home. You have someone you believe is following  
12 you, and you don't follow the judge - - - the judge's  
13 orders. Instead, you keep this to yourself. There had - -  
14 - she was never asked how it made her feel. All she said  
15 was she only came forward because other jurors were scared  
16 for their safety.

17 CHIEF JUDGE WILSON: Well, let me ask - - - let  
18 me follow up on Judge Halligan's question. Suppose that  
19 the juror was told, or maybe - - - maybe shown to the juror  
20 that Mr. Fisher drove a white Chevy, not a maroon Lincoln,  
21 and she said, oh, you know, I must have been wrong. If  
22 that had happened, and then she gave an assurance that she  
23 could be fair, would that suffice?

24 MS. BURGESS: I think there had to be more.  
25 Maybe that would - - - what was concerning about it is

1 during the trial, there was never anything about a maroon  
2 Lincoln. And - - - and I mean, she said a maroon Lincoln.  
3 I don't know whether that was the car that was behind her.

4 CHIEF JUDGE WILSON: I mean, did she - - - did  
5 say that she was ninety-five percent sure that it was him.

6 MS. BURGESS: She was ninety-five percent sure it  
7 was him.

8 CHIEF JUDGE WILSON: And I'm - - - I guess what  
9 I'm asking is, suppose she said, you know what, I was  
10 wrong. I know I was wrong and it's actually - - - I - - -  
11 I'm sure it wasn't him. Would that plus a - - - a - - -  
12 you know, a firm statement that - - - you know, I can be  
13 fair now that I know this; would that have cured it?

14 MS. BURGESS: I think if she acknowledged that  
15 she made a mistake, I think that would - - - that would be  
16 it. But she - - - she maintained the entire time by  
17 ninety-five percent certainty that it was Mr. Fisher. And  
18 what I find in Bufort, they want this thorough - - - you  
19 know, this probing inquiry. No one ever - - - when they  
20 asked her why she thought it was Mr. Fisher, she said  
21 because years ago I was rear-ended by an ex-husband, and I  
22 look in my rearview mirror a lot. That doesn't answer the  
23 question of how she thought it was Mr. Fisher. There - - -  
24 there was nothing - - -

25 CHIEF JUDGE WILSON: Well, the implication of

1 that is she saw him in the rearview mirror, right?

2 MS. BURGESS: But he was six to eight car lengths  
3 behind her, which would be impossible to see someone that  
4 far behind you in a car, in a rearview mirror.

5 CHIEF JUDGE WILSON: Right. And so I take it  
6 which - - - and it does seem to be counsel's argument at -  
7 - - in the trial court, was that that reflected a racial  
8 bias on her part?

9 MS. BURGESS: I - - - I believe it did.

10 CHIEF JUDGE WILSON: I mean, he used those words,  
11 I think. Counsel - - -

12 MS. BURGESS: I believe it did. And to be  
13 perfectly honest, I don't even know if she could have told  
14 - - - looking in her rearview mirror, six to eight car  
15 lengths behind her, I don't know if she would have even  
16 been able to tell if it was an African-American man, or if  
17 it was just a man. The other thing is, there was not - - -  
18 no distinguishing characteristics about Mr. Fisher. He - -  
19 - he was just a very clean cut, average, everyday-looking  
20 man. She wouldn't have identified him. And this is  
21 important because during the trial, he was with someone  
22 when the - - - when the drugs were allegedly sold and the  
23 person had dreadlocks. So they kept making a big issue out  
24 of the fact that Mr. Fisher did not have dreadlocks, Mr.  
25 Fisher was clean-cut and they identified him like that. So



1 it's not like you could say, well, I looked in my rearview  
2 mirror and I saw the dreadlocks. The only thing she could  
3 have identified him by was actually seeing his face,  
4 because there was nothing that would have stood out other  
5 than that's what Mr. Fisher looked like. And - - -

6 JUDGE SINGAS: So is your position that it's just  
7 a per se violation? It's just per se that because she  
8 says, I think it was the defendant who followed me home  
9 that she's grossly unqualified?

10 MS. BURGESS: No. I think what it is, is she was  
11 so sure it was the defendant that followed her home, and  
12 she introduced this into the jury deliberations. And this  
13 is what makes me feel she's unqualified is, what happened  
14 during those deliberations that made her introduce that?

15 JUDGE SINGAS: But isn't that more a question of  
16 - - - of misconduct on her part rather than her  
17 qualifications?

18 MS. BURGESS: It's - - - I believe it - - - it's  
19 both, I believe. I believe she engaged in misconduct, and  
20 I believe she - - - she was unqualified. And I - - - I  
21 don't believe she had the state of mind that could be  
22 unbiased because she picked Mr. - - - she said Mr. Fisher  
23 did something that would be concerning to anyone to be  
24 followed home by someone, let alone - - -

25 JUDGE SINGAS: I understand that. I guess, the -

1 - - my issue is what do we do with that when we had a court  
2 that made an inquiry and she said the words that are on the  
3 pages that we're reading, that assured the court that she  
4 could be fair? Do we give any kind of deference to the  
5 trial court who had the opportunity to engage with her, to  
6 talk to her, to see her demeanor? The words on the page,  
7 that's what our case law requires. She said I could be  
8 fair.

9 MS. BURGESS: Well, I'm concerned about the - - -  
10 you know, and I - - - I don't know, but I'm concerned about  
11 the way the judge handled the whole thing because she walks  
12 out of the room, says I'm ninety-five percent certain that  
13 it was Mr. Fisher. And when Juror 3 comes in, they ask  
14 Juror Fisher if she has any - - - Juror - - - if she - - -  
15 Juror 3, if she has any concerns. And she said, I didn't  
16 today until Juror 6 said Mr. Fisher followed her home on  
17 Monday. And - - -

18 JUDGE CANNATARO: Counsel, I'm certainly  
19 sensitive to your concern about the way the judge handled  
20 it. But at the hearing itself, after the court indicated  
21 that it was disinclined to believe Juror 6's story and  
22 noted that he did get an assurance from the juror that she  
23 could be fair and impartial. He then threw it back to  
24 counsel, and I believe, asked for any applications that  
25 they wanted to make, which at that point, seems to me to be

1 an invitation to raise these concerns about the way the  
2 judge handled the hearing or about something that was  
3 missing from the hearing. And there - - - there were no  
4 applications made. And it seems as if at that point it's  
5 over.

6 MS. BURGESS: The - - - there wasn't. But when  
7 they went - - - after - - - they - - - they had to give  
8 more instructions to the jury after that, which they did.  
9 They went back in, and that's when Mr. Fisher said, hey,  
10 this - - - he - - - he was the one who was pushing forward  
11 that this isn't right. You know, I - - -

12 JUDGE CANNATARO: Yes. And then there was an  
13 application for a mistrial.

14 MS. BURGESS: Yeah.

15 JUDGE CANNATARO: A different - - -

16 MS. BURGESS: Yeah.

17 MS. BURGESS: - - - form of relief.

18 MS. BURGESS: And - - - and I just think it does  
19 go to Juror 6's state of mind that the judge's - - - the  
20 judge just interviewed her, said - - - and she's ninety-  
21 five percent sure that it was Mr. Fisher. The next person  
22 walks in, he says, well, we've already determined that it -  
23 - - that probably never happened. And that shows that  
24 Juror 6 has a very different mindset than the way the court  
25 is looking at her mindset.

1 CHIEF JUDGE WILSON: Thank you counsel.

2 MS. BURGESS: Thank you.

3 MR. KELLEY: May it please this court. John  
4 Kelly of the Chemung County District Attorney for the  
5 People. Your Honor, as this court in People v. Spencer  
6 recognized that there's no such thing as either perfect  
7 jurors or perfect trials. And that's precisely what we  
8 have in this case.

9 JUDGE TROUTMAN: But in this case, we have a  
10 juror - - -

11 MR. KELLEY: Yes.

12 JUDGE TROUTMAN: - - - when the court inquires,  
13 she says, "I can be fair and impartial juror, yes. I say  
14 that because the other juror members encouraged me because  
15 their safety may be at risk." How are - - - how does that  
16 establish that she was qualified to remain on the jury?

17 MR. KELLEY: Well, Your Honor, I believe that in  
18 - - - in reference to Juror 6, she did equivocally - - -  
19 unequivocally state that she could be fair and impartial.  
20 I believe the coming forward was the - - -

21 JUDGE TROUTMAN: Doesn't it require more than  
22 just saying the words? That there is evidence that she  
23 actually can be a fair and impartial juror?

24 MR. KELLEY: Well - - - well, remember, Your  
25 Honor, I believe under People v. Buford, a lot of what is



1 going on here is speculation, and speculation is not a - -  
2 - a reason to say - - -

3 JUDGE TROUTMAN: What about her own words,  
4 "because others" and she's mentioning safety.

5 MR. KELLEY: Yes.

6 JUDGE TROUTMAN: You're saying that's  
7 unequivocal?

8 MR. KELLEY: Your Honor, as a - - - as was  
9 pointed out, during the inquiry that was conducted with  
10 Juror 6, the court found that Juror 6 - - - that he  
11 believed Juror 6 could be fair and impartial.

12 JUDGE TROUTMAN: The court found it. But what  
13 I'm asking - - -

14 MR. KELLEY: Yes.

15 JUDGE TROUTMAN: - - - is this response, the type  
16 of response that clearly establishes that she was qualified  
17 to remain on the jury? And if so, why is this response  
18 sufficient?

19 MR. KELLEY: Your Honor, I believe that it is  
20 sufficient. I don't agree - - -

21 JUDGE TROUTMAN: Why?

22 MR. KELLEY: - - - that - - - I believe, as a - -  
23 - appellate counsel has stated, that she believes that it's  
24 an introduction of a bad act. But if we remember for - - -  
25 if we look at the record, I believe that attorney - - - ADA

1 Thweatt had asked - - - you know, is it - - - is it  
2 possible that he could have just been - - - you know,  
3 driving in the same direction as you, not that he was  
4 following you home. And she's like, yeah, he may have  
5 been.

6 JUDGE HALLIGAN: But with respect to her  
7 assurance itself - - -

8 MR. KELLEY: Okay.

9 JUDGE HALLIGAN: Right? She says, "I can be a  
10 fair and impartial juror. Yes." But she doesn't stop  
11 there. She continues and says, "I say that." And I assume  
12 "that" means I'm telling you I can be fair and impartial,  
13 "because the other juror members encouraged me because  
14 their safety may be at risk." Doesn't that confuse or  
15 muddy her assertion that she can be fair and impartial,  
16 even setting aside - - - you know, for a moment everything  
17 that came before that?

18 MR. KELLEY: You know, Your Honor, I don't think  
19 so. And - - - and - - -

20 JUDGE HALLIGAN: Well, why not - - - why not?

21 MR. KELLEY: Well, because I think that she's  
22 combining two different things. We're combining about why  
23 she came forward versus if she can be fair and impartial.  
24 Which - - -

25 JUDGE HALLIGAN: I'm just reading what she said

1           though.

2                   MR. KELLEY: Right. And again, that's - - -  
3           that's why we give such deference to the trial court in  
4           these matters.

5                   JUDGE CANNATARO: Well, Counsel, if you don't  
6           think that's a red flag, let's - - - let's go a little  
7           earlier than that.

8                   MR. KELLEY: Yeah.

9                   JUDGE CANNATARO: And - - - and the court says,  
10          "Is there a reason why you're bringing this up now rather  
11          than when we - - - when we were here on Wednesday". And  
12          she says at that point, "Because other juror members were  
13          scared for their own safety - - -

14                  MR. KELLEY: Right.

15                  JUDGE CANNATARO: - - - "because of certain  
16          people that were sitting watching the trial through the  
17          week". I mean, if you don't consider that other statement  
18          a red flag - - -

19                  MR. KELLEY: Right. But again, - - -

20                  JUDGE CANNATARO: - - - is this not a red flag?

21                  MR. KELLEY: - - - Your Honor, I - - - think it's  
22          referencing other people, not her concerns. So what we're  
23          talking about is - - -

24                  CHIEF JUDGE WILSON: What we're concerned about  
25          is her state of mind, right? And part of her state of mind

1 is what she thinks about the other jurors as well. And she  
2 thinks the other jurors are afraid for their safety, which  
3 presumably they've communicated to her. That all seems to  
4 go into her state of mind.

5 MR. KELLEY: Well, again, we don't know that,  
6 Your Honor - - -

7 CHIEF JUDGE WILSON: She just said those words,  
8 right?

9 MR. KELLEY: Well, no, about the other jurors  
10 being - - -

11 CHIEF JUDGE WILSON: No, no. I - - - I'm making  
12 a different point.

13 MR. KELLEY: Okay.

14 CHIEF JUDGE WILSON: I don't know about the other  
15 jurors either.

16 MR. KELLEY: Right.

17 CHIEF JUDGE WILSON: Right? But we do know that  
18 she believes that the other jurors have safety concerns.

19 MR. KELLEY: Um-hum.

20 CHIEF JUDGE WILSON: Right? Is that fair?

21 MR. KELLEY: I think that's fair from the record.

22 CHIEF JUDGE WILSON: Okay. And that's her state  
23 of mind. We're asking about her qualification to be a  
24 juror.

25 MR. KELLEY: Yeah. All right.



1 CHIEF JUDGE WILSON: So we have two things,  
2 right? We have her statement that you've been asked about  
3 by my colleagues. Right?

4 MR. KELLEY: Yes.

5 CHIEF JUDGE WILSON: Which seems equivocal to me  
6 at least. And you also have her statement that Judge  
7 Cannataro just read to you, which suggests her state of  
8 mind is a little troubled. Is that fair?

9 MR. KELLEY: Well, I - - - we keep on pushing a  
10 troubled - - - no. And again, Your Honor - - -

11 CHIEF JUDGE WILSON: So you don't think it's a  
12 fair conclusion that she thinks that some of the other  
13 jurors are afraid of their safety because of the people who  
14 are in court with Mr. Fisher?

15 MR. KELLEY: I don't know that that's a fair  
16 conclusion. I believe that she says that - - - and I agree  
17 that that's what she says. I don't know if that's  
18 definitively a conclusion. She's just saying I came  
19 forward.

20 JUDGE TROUTMAN: But isn't that part of the  
21 problem? Every person accused of a crime has the right to  
22 have a fair and impartial jury. Every member that's going  
23 to judge their guilt or innocence in a case. When someone  
24 says that, isn't that a problem?

25 MR. KELLEY: Well, it definitely needs to be



1 delved into, which it was by this court - - - by the trial  
2 court, Your Honor. And again, the - - - the process was -  
3 - - included defense counsel. And I believe the only  
4 question he asked Juror 6 was something about and it wasn't  
5 - - -

6 JUDGE HALLIGAN: But wait, Counsel - - -

7 MR. KELLEY: - - - it was about - - -

8 JUDGE HALLIGAN: - - - just - - - just to return  
9 to that for a minute. When Juror 6 says what Judge  
10 Cannataro read to you, "because other juror members were  
11 scared for their own safety because of certain people that  
12 were sitting watching the trial through the week", the  
13 court responds, "Okay. And without getting into what other  
14 those concerns may be, does this affect your ability to  
15 remain on the jury". So he's not - - - I - - - I don't see  
16 how he's probing that at all, which seems to me like a  
17 fairly significant statement.

18 MR. KELLEY: Well, again, he's - - - he's the - -  
19 - I agree with you, Your Honor, on paper, that that - - -  
20 that would be - - - that would seem to be at least somewhat  
21 troubling. But again, the trial court is there observing  
22 not just what we have on the written record, but the - - -

23 JUDGE TROUTMAN: The trial court's not only  
24 there, it is the trial court's responsibility to clarify,  
25 make the inquiry, not to just hear words, but make sure

1 that - - - that jurors qualify - - - or are you disagreeing  
2 with that? By asking subsequent - - -

3 MR. KELLEY: No, no, no. I'm not disagreeing  
4 with that at all, Your Honor. But I'm saying that they are  
5 also there - - - being in present. It's not just what's on  
6 - - - in writing. We can all agree that there's - - -

7 JUDGE TROUTMAN: Court's present, but on - - - on  
8 appeals we review the record.

9 MR. KELLEY: Right?

10 JUDGE TROUTMAN: Correct?

11 MR. KELLEY: Correct. And that's also why  
12 deference is given, Your Honor, because I believe, as the  
13 appellate court.

14 JUDGE TROUTMAN: If the record supports that it  
15 should be in certain instances. Would - - - would you not  
16 agree with that?

17 MR. KELLEY: Oh, I would agree with you, Your  
18 Honor.

19 JUDGE TROUTMAN: So if this court failed to make  
20 its record that we can be assured that the court made a  
21 sufficient inquiry, why should - - -

22 MR. KELLEY: Well, Your Honor, again, I think  
23 that as - - - as you had brought up with my opposing  
24 counsel, there are issues with preservation here. Again -  
25 - - you know, as a suit - - - right after, when the court

1 was satisfied with Juror 6, he opened it up to defense  
2 counsel and actually, the People too - - -

3 CHIEF JUDGE WILSON: Well, and then there was - -  
4 - and then there was a motion for mistrial, right?

5 MR. KELLEY: Right.

6 CHIEF JUDGE WILSON: Is that not - - -

7 MR. KELLEY: And that's - - -

8 CHIEF JUDGE WILSON: - - - is that not preserved  
9 as to Juror - - - as to Juror 6?

10 MR. KELLEY: Well, Your Honor, I think that that  
11 motion had to be supported because where I - - - we're - -  
12 - we're confused with is when it says - - -

13 CHIEF JUDGE WILSON: Supported is a little  
14 different from preserve - - -

15 MR. KELLEY: - - - racial bias.

16 CHIEF JUDGE WILSON: - - - support is a little  
17 different from preserve. No?

18 MR. KELLEY: Okay. Yeah. No, you're - - -  
19 you're correct, Your Honor.

20 CHIEF JUDGE WILSON: But so - - - and I think  
21 there's a fair argument that things that happened after  
22 that, having to do with the qualification of the other  
23 jurors -

24 MR. KELLEY: Correct.

25 CHIEF JUDGE WILSON: - - - may not be preserved.

1 MR. KELLEY: Right.

2 CHIEF JUDGE WILSON: But I don't know if - - - if  
3 you disagree, tell me. But it seems to me that as to Juror  
4 6, there's not a preservation issue.

5 MR. KELLEY: I - - - I disagree, at least, I  
6 think it's arguable to disagree with you about that, Your  
7 Honor. Especially because the motion for a mistrial  
8 specifically talks about racial bias, which in reviewing  
9 what we have, I don't see any implication where that was  
10 brought up by anybody other than defense counsel on their  
11 motion for mistrial. So the record doesn't support that.

12 CHIEF JUDGE WILSON: I'm sorry. You mean in the  
13 trial record there's no mention of racial bias?

14 MR. KELLEY: Anything to support that other than  
15 - - - than his - - - in his motion for a mistrial. So what  
16 wasn't asked by - - -

17 CHIEF JUDGE WILSON: You think that the motion  
18 for the - - - just so I understand your position. And you  
19 think that the motion for the mistrial is limited to racial  
20 bias?

21 MR. KELLEY: Correct, Your Honor. If that's what  
22 he's making the grounds on. But what we have with the  
23 record, I think there's an issue with saying, well, where -  
24 - - where's defense counsel coming up with this?

25 CHIEF JUDGE WILSON: Not just - - -



1 MR. KELLEY: The - - -

2 CHIEF JUDGE WILSON: - - - so you don't read - -  
3 - you don't read the motion for mistrial based in part on  
4 the jurors' bias against the defendant, regardless of his  
5 race?

6 MR. KELLEY: Well, he shows that he - - -

7 CHIEF JUDGE WILSON: Because somebody followed me  
8 home - - - because somebody followed me home, and I'm  
9 afraid.

10 MR. KELLEY: Um-hum. I - - - again, I have to go  
11 with what he said in the record in this case, Your Honor,  
12 he said racial bias. Now, I did - - - I did learn that Mr.  
13 Fisher is black, but I don't - - - we don't know what - - -  
14 what Juror 6's race is, at least as far as I can tell, we  
15 don't know. We're throwing in a component in here, Your  
16 Honor, that I - - - I think is - - - is very sensitive but  
17 I also don't see where it's supported in the record that  
18 the - - - that that should be reviewed in terms of - - -

19 JUDGE RIVERA: But wasn't - - - wasn't the point  
20 of the motion that counsel was arguing that it appeared  
21 that Juror 6 was apprehensive. She was fearful regarding  
22 defendant because she thought ninety-five percent certain  
23 that he was following her in the car?

24 MR. KELLEY: Well, that - - - you're correct,  
25 Your Honor. But I guess, going back to again the grossly

1 unqualified. If he chose not to make that motion exactly -  
 2 - - he didn't make any further application after when he  
 3 had the opportunity with Juror 6. Then should he be - - -  
 4 you know, in terms of meeting that standard under the  
 5 Buford inquiry, are we prepared to say then, that - - - you  
 6 know, when he makes a motion for mistrial later on and say  
 7 - - - in order to say that, you know, it's so gross - - -  
 8 she's so grossly unqualified, Your Honor, because - - -

9 JUDGE CANNATARO: Counsel, I have a personal view  
 10 of the mistrial motion as being separate from the  
 11 qualification of Juror Number 6. I see it, based on what  
 12 counsel said in making the motion, that he was introducing  
 13 the notion that the - - - the entire jury had been poisoned  
 14 by something that was going on in there. And indeed,  
 15 counsel asked for an inquiry of all the other jurors and  
 16 all the other jurors were interviewed, and they had various  
 17 things to say. I mean, do - - - do you view the mistrial  
 18 as still being confined to Juror 6, or - - - or is that  
 19 bringing up a much broader issue?

20 MR. KELLEY: No. I believe that it's confined to  
 21 Juror 6 in particular, because he hadn't - - - nobody had  
 22 talked to the other jurors, obviously, at that point. So  
 23 there's nothing to base that on.

24 MR. KELLEY: But he was alerting the court to his  
 25 concern that by - - - because of what he heard from Juror

1           6, that there might be something more pervasive going on  
2           with the entire jury. And indeed some - - - some other  
3           jurors expressed concern for their safety.

4                   MR. KELLEY: Yes, Your Honor, that - - - that is  
5           true that some other jurors did express within the  
6           confines, I believe, of the type of case. I don't know  
7           that it was ever referenced to Mr. Fisher specifically.

8                   CHIEF JUDGE WILSON: Thank you, Counsel.

9                   MS. BURGESS: I forgot to reserve.

10                   CHIEF JUDGE WILSON: You did forget, and I forgot  
11           to ask you. I'll give you a minute if you need it.

12                   MS. BURGESS: Sure. Thank you. I just wanted to  
13           address that no other person brought up their safety  
14           concern with respect to Mr. Fisher. Juror 3 clearly said  
15           that she had no safety concerns until today when Juror 6  
16           told her that Mr. Fisher had followed her home. And Juror  
17           7 said that she had no safety concerns and then they were  
18           talking about it today. And it was clear that one of the  
19           things they were talking about was Mr. Fisher allegedly  
20           following Juror 6 home. So I - - - I think it's a  
21           mischaracterization that none of the other jurors' concerns  
22           related to Mr. Fisher.

23                   CHIEF JUDGE WILSON: Thank you.

24                   MS. BURGESS: Thank you.

25                   (Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Kenneth Fisher v. People, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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