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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 158

ANDREW BLAKE,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 158, People v. Blake.  
2 Counselor, do you want any rebuttal time?

3 MS. KEELING: I would, Your Honor. Two  
4 minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes. Go  
6 ahead.

7 MS. KEELING: Alexandra Keeling for Andrew  
8 Blake. May it please the court.

9 Where there is no dispute here that the  
10 defense was entitled to an adverse inference charge  
11 regarding the missing video, which was the only  
12 objective evidence of the incident, this is that rare  
13 case where counsel was ineffective for failing to  
14 request it.

15 JUDGE SMITH: There's no dispute now,  
16 because we've decided Handy. You can't blame trial  
17 counsel for not having read Handy.

18 MS. KEELING: Of course, Your Honor, I do,  
19 number one, think that this case presents an  
20 excellent corollary to Handy. However, Handy  
21 reaffirmed principles; adverse inference existed at  
22 that time. Where evidence goes missing because of  
23 the State's failure to preserve or because it was  
24 destroyed, good faith or bad, an adverse inference  
25 charge is warranted.

1 JUDGE ABDUS-SALAAM: So what if trial  
2 counsel had a strategic reason for not asking for an  
3 adverse inference charge?

4 MS. KEELING: Your Honor, I think, given  
5 the circumstances of this case, there can be no sound  
6 strategy here. Number one, we know that counsel put  
7 her full force behind this argument, and I - - - I  
8 would say that Turner is very instructive here. What  
9 we know from this record is that self-defense was the  
10 only question for the jury.

11 CHIEF JUDGE LIPPMAN: Right, but it's not  
12 like the attorney did nothing, right, in relation to  
13 the video?

14 MS. KEELING: Correct, Your Honor. We  
15 submit this is a single error case. How - - -

16 CHIEF JUDGE LIPPMAN: This is such a  
17 glaring singular error?

18 MS. KEELING: Yes, Your Honor, and  
19 especially - - -

20 JUDGE GRAFFEO: But wasn't her comments in  
21 the closing stronger than what the adverse inference  
22 would have been? She basically claimed that he would  
23 have been exonerated if they had seen the video, so  
24 maybe she didn't want the adverse - - -

25 MS. KEELING: Absolu - - - I think her

1 argument was absolutely not stronger than the adverse  
2 inference, because no one told the jury they were  
3 permitted to do this. And I think this goes directly  
4 to what the prosecutor did say in summation, which  
5 was unintentionally precisely what the judge then  
6 supported in his general instructions.

7 The prosecutor - - - and I would direct  
8 Your Honors to the appendix at 1108, 1110 through  
9 1112. She says a couple of things that I think are  
10 very critical. She says maybe the reason why we  
11 don't have this tape is because there was nothing on  
12 it. After you've heard all of this testimony about  
13 how when there is some violent incident like this  
14 everybody goes to the VIPER unit and they pull all of  
15 the tapes, she then says because we don't have it, it  
16 is not a reasonable doubt. And then she says the  
17 judge will instruct you that speculation has  
18 absolutely no place in your deliberations, and  
19 defendant's self-defense here is utter sheer  
20 speculation. The judge then follows up with,  
21 rightfully so, reasonable doubt cannot be borne of  
22 speculation, and you are to decide this case only on  
23 the evidence before you. So everything that the  
24 judge says actually supports the prosecutor's  
25 version. And so given those facts as well - - -

1                   JUDGE ABDUS-SALAAM: So is it your position  
2 that had the judge given an instruction that said to  
3 the jury you may, but you're not required to, draw an  
4 inference that the tape was destroyed and that it  
5 would have been favorable to the defendant, that that  
6 would have bolstered the arguments made by counsel -  
7 - -

8                   MS. KEELING: Absolutely, and in fact - - -

9                   JUDGE ABDUS-SALAAM: - - - and countered  
10 the ones about speculation?

11                   MS. KEELING: It - - - it would have  
12 certainly supported - - - it would have - - - in our  
13 criminal justice jurisprudence, the fact that you can  
14 speculate that something is favorable to the defense,  
15 I mean, that the jury would have - - - know that they  
16 were permitted to do this. Everything that they were  
17 told by the judge inferred that they were not  
18 permitted to do this. If you put yourself in the  
19 place of the jurors, you can imagine a juror in that  
20 jury room saying, uch, if only we had the tape, and  
21 someone saying, well, remember what the judge said,  
22 we're not really allowed to think about that.

23                   But in terms of supporting what counsel was  
24 saying, there were complex questions on reasonable  
25 defense. And the - - - the jury never got any

1 guidance as to the effect of the fact that this tape  
2 was missing. Number one, I think the video itself,  
3 the nature and the quality of the evidence here goes  
4 to these questions of prejudice. The video was  
5 important; it was central; it was critical. Number  
6 one, we know the nature and the potency of video in  
7 our culture. We see it every day in the news; see  
8 the NFL situation. But we also have a lot of  
9 testimony about this camera and this surveillance.  
10 Number one, it captures those critical moments which  
11 go to the complex questions of self-defense. I would  
12 also point Your - - -

13 JUDGE SMITH: Is it just one camera that's  
14 missing? I mean, the summation made it sound like it  
15 was two. But it's really one?

16 MS. KEELING: There are - - - there's  
17 another one, but I think the one camera is the most  
18 critical here in terms of why this failure to know  
19 that they could have inferred that it was favorable  
20 to the defense.

21 JUDGE SMITH: You're talking about camera  
22 23 and the playground camera? That's - - -

23 MS. KEELING: Right, and so camera 23, in  
24 the appendix, in Sergeant Buonviaggio's testimony, at  
25 514 through 526 of the appendix, he talks about how

1           this camera - - - we do know a lot about the  
2           potential of what the video could have shown, that it  
3           was a continuous motion camera in the area where the  
4           shooting occurs. It has zoom capabilities. But  
5           there were other factors here, the atmosphere of  
6           aggression. Questions of self-defense are all about  
7           the scene. And I think self-defense is instructive  
8           here too. Number one, it includes the - - - the  
9           reasonable actual - - -

10                         JUDGE SMITH: Yeah, but you've got a client  
11           who offered the police money to destroy tapes. How  
12           likely is it the jury is going to think that there's  
13           going to be an exculpatory tape somewhere that was  
14           destroyed?

15                         MS. KEELING: Well, this goes back, Your  
16           Honor, I think, to the questions of self-defense that  
17           the jury was enti - - - that it was required to  
18           answer. There's an objective and subjective  
19           component to it. And also, I think, mistaken belief,  
20           which is part of the law on self-defense, is critical  
21           here, as well as duty to retreat, which is objective  
22           and subjective. The adverse inference tells them  
23           that they could have thought about that missing video  
24           as favorable to the defense, that it actually would  
25           have been evidence to support self-defense, which

1           again, are incredibly lay - - - multi-layered,  
2           incredibly complex. We had an atmosphere of  
3           aggression that night. Just before the shooting  
4           occurs, Mr. Blake's companion is punched in the face  
5           with such force that they both fall into each other.  
6           We know, by the complainant's own testimony, that  
7           they're looking for the fight.

8                         And with this question of the mistaken  
9           belief, that they could have heard from the judge,  
10          the imprimatur of the judge, we all - - - everybody  
11          agrees the importance of jury instructions,  
12          especially in the face of hearing from the  
13          prosecutor, hey, maybe the reason why we don't have  
14          that tape is because it doesn't show anything on it,  
15          even though we're the ones who lost it and we carry  
16          that burden. And this goes, again, back to Your  
17          Honor's decision in - - - the written decision in  
18          Handy. It's an excellent corollary to that.

19                         JUDGE GRAFFEO: Handy was five - - - four  
20          or five years after this situation, though.

21                         MS. KEELING: Correct, but - - -

22                         JUDGE GRAFFEO: So I mean - - -

23                         MS. KEELING: - - - the - - -

24                         JUDGE GRAFFEO: - - - this isn't an  
25          effective assistance.

1 MS. KEELING: But again, Your Honor,  
2 adverse inference - - - missing evidence - - - this  
3 goes back to People v. Kelly years before.

4 JUDGE READ: So we didn't need to bother to  
5 decide Handy; it was all so obvious?

6 MS. KEELING: No, Your Honor, I think - - -  
7 I think that Handy certainly fleshed out these  
8 questions. However, the - - -

9 JUDGE SMITH: Well, obviously it wasn't  
10 impossible to move for an adverse inference before  
11 Handy, because Handy did.

12 MS. KEELING: Correct, Your Honor. Adverse  
13 inference existed, and rightfully so, where the State  
14 loses critical evidence, and I think - - -

15 JUDGE ABDUS-SALAAM: But wasn't that a  
16 strategic choice by the lawyer in Handy to ask for  
17 it? And perhaps there was a strategic reason not to  
18 ask for it here?

19 MS. KEELING: Your Honor, again, this goes  
20 back to what we know about here, and - - - and this  
21 goes to People v. Turner, but this is like - - - this  
22 is like a surgeon failing to stitch somebody up.  
23 This is the finish line where, especially after what  
24 she heard the prosecutor tell this jury, that you are  
25 not permitted to speculate - - - no one told the jury

1 they are permitted to speculate in favor of the  
2 defense.

3 JUDGE SMITH: Well, no one told them they  
4 were permitted to speculate. The defense lawyer did  
5 some pretty fancy speculating.

6 MS. KEELING: Well, and why should the jury  
7 have believed what - - -

8 JUDGE RIVERA: Well, I think your point is  
9 - - -

10 MS. KEELING: - - - she was saying - - -

11 JUDGE RIVERA: - - - no neutral person in  
12 the courthouse told them - - -

13 MS. KEELING: Correct, Your Honor.

14 JUDGE RIVERA: - - - we intended that you  
15 may speculate pursuant to our law.

16 MS. KEELING: Correct, Your Honor. And I  
17 think it's the confluence of factors here that pushes  
18 this case. It's one, the unique nature of an adverse  
19 inference charge. Handy speaks to that, absolutely.

20 JUDGE ABDUS-SALAAM: The adverse inference  
21 charge doesn't invite speculation.

22 MS. KEELING: No, it - - - it does - - -

23 JUDGE ABDUS-SALAAM: And by the way,  
24 counsel, isn't the "don't speculate" charge a usual  
25 charge given by the judge?

1 MS. KEELING: Absolutely, it was absolutely  
2 permissible, which I think is why adverse inference  
3 is so unique, because generally, in terms of how we  
4 structure and guide a jury in terms of thinking about  
5 evidence, evidence that exists only, judges are  
6 saying, you know, don't speculate about my rulings,  
7 don't speculate about things that are not in  
8 evidence. What was not in evidence here? What was  
9 on that tape, which was the only objective evidence.  
10 And again, this goes back to the potency of video,  
11 what it means to - - -

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MS. KEELING: - - - laypeople. Thank you,  
14 Your Honor.

15 CHIEF JUDGE LIPPMAN: You'll have your  
16 rebuttal.

17 MS. KEELING: Okay.

18 CHIEF JUDGE LIPPMAN: Let's hear what your  
19 adversary has to say.

20 MR. RIVELLESE: Good afternoon. May it  
21 please the court. Vincent Rivellese for the People.

22 May I just correct one factual tweak here.  
23 The - - - 1108 of the prosecutor's summation, the  
24 prosecutor is actually, at that point, responding to  
25 the defense description of what would have been on a

1 tape of the confession during the time that the  
2 defendant was speaking to the police, but only  
3 eighteen minutes of it was recorded by the Delaware  
4 Police Department. And at that point, the defendant  
5 was saying that there might have been other  
6 statements about knives and guns and such, and the  
7 prosecutor was then responding, on page 1108, saying  
8 that - - - that you shouldn't speculate. Now - - -  
9 and which was a correct statement of the law; there  
10 shouldn't be speculation. That evidence, in  
11 particular, was not subject to an adverse inference  
12 instruction; it wasn't something that was lost or  
13 destroyed by our police department, and there was  
14 never any claim that that was an adverse inference  
15 issue.

16 The defense may well have had many  
17 strategies, at least one that the Appellate Division  
18 identified, as to why they would not want the adverse  
19 inference instruction, one being that the defense  
20 argument was particularly strong, stating what would  
21 have been on the video affirmatively. The defense  
22 specifically referring to - - -

23 JUDGE RIVERA: Counsel, how does defense  
24 counsel undermine their case? How do they undermine  
25 their defense by requesting the charge?

1 MR. RIVELLESE: Well, because the judge is  
2 going to give a balanced charge that just says that  
3 you may but are not required to infer that this would  
4 have favored the defense, which is correct. And in  
5 fact, what the judge did - - -

6 JUDGE RIVERA: But he's - - - this is  
7 defense counsel. One assumes, on the jury, that a  
8 juror would think you're just making a suggestion;  
9 you're representing your client.

10 MR. RIVELLESE: And when she made - - -

11 JUDGE RIVERA: But I'm still not seeing how  
12 the charge undermines defense counsel's argument - -  
13 -

14 MR. RIVELLESE: Well, when I say I don't -  
15 - -

16 JUDGE RIVERA: - - - before the jury.

17 MR. RIVELLESE: - - - I don't mean that it  
18 would refute the defense argument, but that if the  
19 defendant is arguing to the jury, as she did, you've  
20 really got to find that this would show absolute  
21 exculpation, that it would show that the - - - the  
22 guys pulled razors and were attacking him and he was  
23 fearing for his life. And then the judge is just  
24 going to say you may but are not required to infer  
25 that this is beneficial to defense, and - - -

1                   JUDGE RIVERA: Why is that not a good thing  
2 to hear from the judge?

3                   MR. RIVELLESE: It's rather neutral. It  
4 doesn't really support or - - - but - - - but in the  
5 - - - in the context - - -

6                   JUDGE PIGOTT: The People love inferences,  
7 where you had one involving the drug presumption in a  
8 room. And that's the CPW-2, you know, the  
9 presumption that you're going to use it unlawfully  
10 against another. And they're very powerful, aren't  
11 they? I mean, you almost take something out of the  
12 hands of the jury. You say, look, you know, the  
13 guy's got a gun, you can presume that he's going to  
14 use it against another, even if there's no one  
15 around.

16                   And - - - and the same thing in this room,  
17 presumption that we're fighting over or discussing it  
18 with respect to the drugs; I mean, when and where and  
19 how. And since the - - - the judge is going to talk  
20 last and the defense lawyer is going to make whatever  
21 pitch he chooses, why wouldn't she then be able to  
22 say I'm telling you that this - - - this tape is  
23 decisive. The judge is going to tell you you have an  
24 option; I'm telling you the option's very clear, and  
25 then say exactly what she said.

1                   MR. RIVELLESE: Well - - - well, she could  
2 have said that, but she did get the benefit of  
3 arguing exactly what she said, having the People  
4 object, when she spoke specifically about what would  
5 have been on the tape, when the People object and the  
6 judge overruled that and says I will permit that  
7 argument. That's an actual mini-adverse inference  
8 instruction there, obviously not as straight out as  
9 saying you may but are not required to - - -

10                   JUDGE SMITH: She makes the argument - - -  
11 and I'm looking at 1108. It looks to me like the  
12 prosecutors are applying that argument. It says - -  
13 - "Other than the defendant's self-serving  
14 statements, which are not on the eighteen-minute  
15 video, there were pulling out razors. The fact that  
16 any of these witnesses had weapons, knives, guns, is  
17 utter sheer speculation."

18                   MR. RIVELLESE: And I think that's in  
19 response to the defense statement of what would have  
20 been on a tape that had - - -

21                   JUDGE SMITH: Exactly, yes.

22                   MR. RIVELLESE: Right.

23                   JUDGE SMITH: And why shouldn't the jury -  
24 - - well, I think you have to agree that the jury  
25 should and would, if the defense lawyer had made the

1 motion, would have heard the judge say you may but  
2 are not required to infer that the tape would have  
3 failed to support the prosecution's case.

4 MR. RIVELLESE: Are you speaking about the  
5 videotape or are - - - or about the tape that could  
6 have existed of the statements?

7 JUDGE SMITH: I'm talking about the  
8 videotape.

9 MR. RIVELLESE: Okay.

10 JUDGE SMITH: The witnesses had weapons,  
11 knives, guns, and - - - that's not - - - that's not  
12 the defendant's statement; that's the videotape.

13 MR. RIVELLESE: But it was the defendant's  
14 statement that the - - - at 1108, the prosecutor is  
15 responding to the - - -

16 JUDGE SMITH: I see - - -

17 MR. RIVELLESE: - - - the defense argument  
18 at 1046.

19 JUDGE SMITH: So you mean the - - - well,  
20 but that's not spec - - - what he's saying is other  
21 than the defendant's self-serving statements; that's  
22 a reference to what he said.

23 MR. RIVELLESE: Yes. And the eighteen-  
24 minute - - -

25 JUDGE SMITH: And he said other than that,

1 referring to what - - - any evidence of razor,  
2 weapons, knives, guns is sheer speculation, that's  
3 got to be in response to the defense lawyer's  
4 argument.

5 MR. RIVELLESE: Well, in the context - - -  
6 because the prosecutor waited to speak about camera  
7 23 until about two pages later, when she says camera  
8 23 and then discusses that, at this point she  
9 specifically mentions the eighteen-minute video and  
10 is responding to the defense question that maybe  
11 razors, knives or guns had been used in the defense  
12 summation.

13 So later, about two pages later, when the  
14 prosecutor starts talking about, at 1110, camera 23,  
15 and then finally speaks specifically to because we  
16 don't have camera 23 - - - now on page 1112 - - -  
17 because we don't have a camera that might have showed  
18 a person - - - a portion - - - a slight portion of  
19 this incident is not reasonable doubt. That's the  
20 only really specific thing she says. She doesn't say  
21 that - - - that you can't in any way imagine that - -  
22 - that something was against the People, but she's  
23 not making a specific statement about the - - - the  
24 tape supporting or not supporting. She's saying I  
25 don't know what's on the tape. But it doesn't mean

1           there's reasonable doubt. Just missing the tape  
2           doesn't mean there's reasonable doubt. So that's  
3           really all she's saying about speculation.

4                     The judge's charge, at 1154 and 1155,  
5           specifically says of course you can't speculate,  
6           which is the law. The judge wasn't going to give a  
7           charge that says you should speculate. But then on  
8           the next page, 1155, the judge talks about the lack  
9           of evidence can be a reason to have the doubt. So  
10          when you're talking about that you must consider  
11          every part - - -

12                    JUDGE PIGOTT: There's nothing in the  
13          judge's charge, that I recall, that said anything  
14          about the camera.

15                    MR. RIVELLESE: Correct, the judge did not  
16          - - -

17                    JUDGE PIGOTT: Because there's no reason  
18          to.

19                    MR. RIVELLESE: Right.

20                    JUDGE PIGOTT: Her summation is the camera,  
21          the camera, the camera. And it would seem to me, as  
22          Judge Rivera was indicating, that that would be a  
23          much more powerful argument if you can say and the  
24          judge is going to instruct you with respect to the  
25          camera, and he's going to tell you you can do certain

1 things. And I would think that that - - - I don't  
2 get the strategy that says my - - - my - - - my  
3 summation is stronger because the judge can't say  
4 anything or won't say anything about the camera.

5 MR. RIVELLESE: Well, if you look at page  
6 1063, she's making a very forceful argument. It's  
7 not that you may infer, you could infer, you might  
8 infer; she's saying you have to infer this. So the  
9 judge certainly never said that she can't - - -

10 JUDGE PIGOTT: Does anybody speak after  
11 her?

12 MR. RIVELLESE: After her?

13 JUDGE PIGOTT: After her summation?

14 MR. RIVELLESE: Yes, of course. And we  
15 said the opposite. And the judge, at the end, said  
16 that you can consider the evidence or the lack of  
17 evidence in deciding on reasonable doubt. So the  
18 defense attorney should have the right to chart the  
19 course. I mean, imagine if the judge had offered the  
20 instruction and the defense attorney said no and the  
21 judge gave it anyway. That wouldn't be appropriate.  
22 That would be taking it away from the defense  
23 attorney. So she didn't ask for it, there's no  
24 indication that she just didn't know about it. And  
25 if there had been a 440.10 post-judgment motion, we

1 would know if the defense attorney didn't know about  
2 it, didn't think about it and didn't consider it.  
3 But here we have these other strategic reasons. We  
4 also have, for example, that she had - - -

5 JUDGE SMITH: If there was no strategic  
6 reason, was this ineffective assistance?

7 MR. RIVELLESE: Well - - - well, no,  
8 because you'd still have to show prejudice. I mean,  
9 we've - - - we've got an overwhelming case. If you  
10 have all the evidence that corroborates what the  
11 witnesses said on the portions of the tape that we do  
12 have, you have Rory going - - -

13 JUDGE SMITH: You're saying even if it's an  
14 error, it's not egregious and prejudicial.

15 MR. RIVELLESE: Correct. Correct. I mean,  
16 you've got Rory going up to the defendant and Wonder  
17 Williams, taking off his jacket, which you don't do  
18 when you're about to stab somebody, and he's going to  
19 fight them, he's going to fistfight. He pushes up  
20 against them, they back off, and that's when the gun  
21 is passed. You've got that on tape, and it's not  
22 that clear where the gun is. It's not very easy to  
23 see the gun, which of course would mean it wouldn't  
24 be very easy to see a smaller razor blade.

25 JUDGE SMITH: Do you actually - - - I mean,

1 I couldn't see it. If you've got really good eyes,  
2 can you see it?

3 MR. RIVELLESE: I - - - I don't think we  
4 can say for sure that in any particular frame that's  
5 definitely the gun, but I did list the pages where  
6 you might think that you can see the image of a gun.  
7 They're grainy videos. So you'll see black - - -  
8 black length below the hand. For example, pages 101,  
9 125, 134 and 1 - - - I think those three pages are  
10 the most likely, but - - - but that wasn't - - - you  
11 know, that wasn't part of the argument that you can  
12 specifically see the gun on a specific frame. But  
13 you can see the sequence of events, and you can see  
14 the unarmed Rory going up against the defendant and  
15 Wonder Williams. So at that point, where the gun is  
16 passed, there hasn't been a weapon, and we know that  
17 from the video.

18 And - - - and of course the 440 would have  
19 given the opportunity for the defendant's attorney to  
20 explain whether there was any strategy at all. The  
21 Appellate Division identified one. That's a  
22 unanimous court agreeing that there was one potential  
23 strategy. Another potential strategy could have been  
24 that there were other - - - the other missing  
25 evidence, that wasn't subject to a missing-evidence

1 instruction, was also part of our argument that the  
2 jury should consider reasonable doubt. So if there  
3 was an instruction on one piece of evidence and not  
4 another, that could undermine the significance of the  
5 second piece of evidence, which is the - - - the  
6 videotape of the statement. And - - -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. RIVELLESE: - - - I see my light is on,  
9 if there are any other questions.

10 CHIEF JUDGE LIPPMAN: Thank you, counsel.

11 MR. RIVELLESE: Thank you.

12 CHIEF JUDGE LIPPMAN: Appreciate it.

13 Rebuttal, counsel?

14 MS. KEELING: Yes, Your Honor. This idea  
15 that defense counsel was saying, you know, you have  
16 to infer it, no one ever told the jury they're  
17 allowed to. And everything else that they heard was  
18 that you're not allowed to do that, you're not  
19 allowed to think about that kind of evidence in that  
20 kind of way. It's very remarkable, again, in our  
21 criminal justice system, that where missing evidence  
22 is something that can be held favorable to the  
23 defense only. There's a real probability here that -  
24 - - that the State was the one who, unintentionally,  
25 gained the advantage, because counsel dropped the

1 ball.

2 JUDGE RIVERA: Can you address the  
3 prejudice issue?

4 MS. KEELING: Yes, Your Honor. Again, this  
5 goes to - - - I think it goes directly to the fact  
6 that these questions went to the jury's deliberations  
7 on these complex questions of self-defense in what we  
8 know was a night - - - a night of fighting. It was  
9 an atmosphere of aggression. And - - - and these  
10 questions about mistaken belief, all these layers of  
11 self-defense, what the video would have shown are  
12 questions I'm sure all the jurors in the jury room  
13 were asking. If we had this objective neutral  
14 evidence, the only - - - the - - - the testimony we  
15 do have comes from the victims. And also - - -

16 JUDGE SMITH: Isn't that kind of undermined  
17 by the fact that your guy wanted the tapes destroyed?  
18 He - - - he knew - - - he knew whether he was  
19 defending himself or not - - -

20 MS. KEELING: Well - - -

21 JUDGE SMITH: - - - and he - - - he offered  
22 money to the police to get rid of the tapes.

23 MS. KEELING: Well, Your Honor, the idea  
24 that he knew whether or not he was defending himself,  
25 this goes to a colloquial understanding of whether or

1 not self-defense is permitted. Is it ever permitted  
2 to shoot people? I mean, that's a very difficult  
3 question. And we know that that is established here.  
4 And - - -

5 JUDGE SMITH: Do you really think he was  
6 offering the cops money to get rid of tapes that  
7 would have showed him being attacked with razors,  
8 guns and knives?

9 MS. KEELING: Your Honor, he pulls out the  
10 gun and - - - and he uses it that night. And that he  
11 was afraid? I mean, that - - - what his perception  
12 was, and again, self-defense, the - - - the jury was  
13 charged on it. There's a subjective and an objective  
14 component.

15 JUDGE RIVERA: Isn't his perception I don't  
16 want to be prosecuted, self-defense or not, I don't -  
17 - - you don't know if you're going to win.

18 MS. KEELING: Correct.

19 JUDGE RIVERA: You don't want to be  
20 prosecuted.

21 MS. KEELING: Correct, Your Honor. I mean,  
22 he knows he did something very, very wrong that  
23 night. And so, in that sense, his consciousness of  
24 guilt is absolutely relevant, but it does not render  
25 his justification defense incredible or irrational to

1 the point where this was not an egregious error. We  
2 cannot rely on this jury's verdict.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.  
4 Thanks.

5 MS. KEELING: Thank you.

6 CHIEF JUDGE LIPPMAN: Thank you both.  
7 Appreciate it.

8 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Andrew Blake, No. 158, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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