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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 159

LYXON CHERY,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on the  
2 calendar is number 159, People v. Lyxon Chery.

3 MS. CABRERA: May it please the court,  
4 Marisa Cabrera on behalf of Mr. Chery. I'd like to  
5 reserve two minutes in rebuttal.

6 CHIEF JUDGE DIFIORE: You may.

7 MS. CABRERA: The court erred in broadening  
8 Savage to permit impeachment by omission in this case  
9 of an un-Mirandized defendant even though he never  
10 received the opportunity to narrate the essential  
11 facts of his case. Recently, in Williams and Pavone  
12 this - - - this court reaffirmed the rule that  
13 impeachment by omission is not allowed absent unusual  
14 circumstances.

15 JUDGE FAHEY: The problem is, though, those  
16 - - - in Williams, we said that "Defendant's  
17 selective silence couldn't be used against him." But  
18 that was a case of direct examination, not cross-  
19 examination. That's really the distinction we're  
20 talking about here, aren't we?

21 MS. CABRERA: Correct. I mean Williams was  
22 in the - - - in the case-in-chief in that case, the  
23 prosecution was in the case-in-chief - - -

24 JUDGE FAHEY: Right.

25 MS. CABRERA: But Williams is helpful here

1 because there was a - - - a discussion, a lengthy  
2 discussion, of the law on this.

3 JUDGE FAHEY: I remember.

4 MS. CABRERA: Where the court, as Your  
5 Honor - - - where the court discusses impeachment by  
6 omission as well and specifically discusses Savage -  
7 - -

8 JUDGE FAHEY: We discussed Savage and - - -  
9 Savage and Roth - - - Rothschild.

10 MS. CABRERA: And Rothschild, yes, which  
11 Rothschild isn't - - - isn't relevant here but - - -  
12 and - - - and respondent agrees on that. But it - -  
13 - in Williams, as reaffirmed in - - - in Pavone, it -  
14 - - it reaffirmed the principle that Savage is really  
15 the exception to the rule, and the rule is that  
16 impeachment by omission is just simply allowed absent  
17 unusual circumstances and Savage was one of those  
18 unusual circumstances. And if you look at - - -

19 JUDGE STEIN: So you're not asking us to  
20 overrule Savage?

21 MS. CABRERA: No.

22 JUDGE STEIN: You just want to limit it to  
23 that. And - - - and can you talk a little bit about  
24 the interplay of Savage and Pavone?

25 MS. CABRERA: Sure. I think with - - -

1 with Savage, I mean as Savage makes clear, you know,  
2 even if you look at the - - - the first sentence of  
3 Savage, it really goes through all the facts that the  
4 court considered in - - - in the decision in  
5 determining that that was one of the unusual  
6 circumstances that would permit impeachment by  
7 omission. In that case, it - - - or in this case, in  
8 contrast to Savage, we have a preMirand - - -  
9 preMiranda defendant. He was never given the  
10 opportunity to narrate the facts of this case.

11 JUDGE STEIN: Can't that work both ways,  
12 though, because if he had been Mirandized, wouldn't  
13 he be more likely to remain silent than - - - than  
14 not?

15 MS. CABRERA: Well, when you have the - - -  
16 the big distinction, is that when you have a  
17 Mirandized defendant, they've been on - - - they're  
18 on notice of their - - - of their right to silence.  
19 They've decided to waive that right and they - - -  
20 and it generally then follows by an interrogation  
21 from detectives where they're being asked and offered  
22 the opportunity to discuss the facts of their case.  
23 That's just not what happened here, and Bornholdt  
24 talks about that, getting the opportunity to - - - to  
25 specifically discuss the facts - - -

1                   JUDGE STEIN: Yeah, but - - - but here it  
2 was spontaneous, so I mean to me it seems more likely  
3 that if - - - if it's spontaneous and he's - - - he's  
4 wondering why - - - why he's being arrested and - - -  
5 and the other guy isn't, to - - - to talk about what  
6 the other guy did to him and - - - and he just  
7 doesn't do that.

8                   MS. CABRERA: Well, there - - - I mean  
9 there could be a whole host of reasons as to why he -  
10 - - he didn't come out with the most helpful fact at  
11 that moment. I mean it could be - - - you know,  
12 here, Mr. Chery is a nonnative English speaker. You  
13 know, he quickly blurts out the first thing that  
14 comes to mind just noting the general unfairness of  
15 the situation. There was other factors, though. And  
16 that's what Savage really explains that there - - -  
17 that we have to consider to determine what exactly is  
18 a natural - - - an unnatural omission.

19                   JUDGE PIGOTT: Can't he - - - can't he say  
20 all that, though? In other words, if - - - if we say  
21 that you can't impeach him on it, then the fear is  
22 that that means that a defendant can make up anything  
23 he or she wants, you know, subsequent to the  
24 Mirandized, you know, remaining silent and - - - and  
25 you can't cross-examine him on it. You can't ask

1 him, you know, why you didn't say that when you had  
2 the opportunity to.

3 MS. CABRERA: Well - - -

4 JUDGE PIGOTT: And if you did say it, as in  
5 this case, why not ask him, you know, why didn't you  
6 bring all this out, you know, when you were - - -  
7 when you were asked by the police, and he can explain  
8 because I didn't want to say it or what. But - - -  
9 but to say you can't ask him, it seems to me, is  
10 almost, you know, encouraging perjury.

11 MS. CABRERA: Well, it doesn't encourage  
12 perjury but - - - if he never actually had the  
13 opportunity to express his - - - his side of the  
14 story. I mean he - - - he was never sat down and  
15 asked what happened. He just on his own blurted - -  
16 -

17 JUDGE PIGOTT: Well, suppose what he said  
18 was untrue.

19 MS. CABRERA: Okay.

20 JUDGE PIGOTT: Your - - - your argument is  
21 that the People can't cross-examine him about it, so  
22 this untrue story is going to be given to the jury  
23 untested.

24 MS. CABRERA: But it's not that the  
25 statement - - - the purpose of impeachment of

1 omission is not that the statement's untrue. It's  
2 that the omissions of a new statement at trial is  
3 untrue, and so the omissions have to be deliberate  
4 when they're made.

5 JUDGE PIGOTT: No, but my - - - but you see  
6 my point? Let's assume you don't - - - that that's  
7 not your client, but if - - - if someone gets on the  
8 stand having remained silent but then tells this  
9 perjured story, your rule would say, well, the People  
10 just have to put up with that. They can't - - - you  
11 can't impeach him and say why didn't you bring that  
12 out before and - - - and ask him questions about - -  
13 - or her questions about what they're now testifying  
14 to.

15 MS. CABRERA: No, we're not asking for a  
16 rule that broad. We're asking for various - - -  
17 we're asking, first off, really, that this court  
18 reaffirm Savage, the principles in Savage, where this  
19 court allowed impeachment by omission, actually. And  
20 we're - - - we're really just asking that - - - that  
21 this court limit the rule so that impeachment of a  
22 defendant for - - - for omissions made during the  
23 course of a spontaneous statement are - - - are not  
24 allowed.

25 JUDGE ABDUS-SALAAM: Is - - -

1 JUDGE STEIN: Isn't that - - - oh, I'm  
2 sorry. Go ahead.

3 JUDGE ABDUS-SALAAM: Is it - - - my voice  
4 is almost gone so my colleague's being deferential.  
5 Assume we agree with you, and I'm not saying we will,  
6 but is this harmless error?

7 MS. CABRERA: The - - - this error could  
8 not be deemed harmless at all. First, the - - - the  
9 evidence was just simply not overwhelming at all in  
10 this case, and I discuss that a lot in point two, as  
11 well, of my brief dealing with the missing witness  
12 instruction. But there was a lot of factual disputes  
13 and contradictory testimony. And I - - - I can go  
14 through all of them but one that was a significant  
15 one was the fact of the white envelope. That was  
16 supposedly the target of the - - - of the search, and  
17 it was never vouchered. The officer for the first  
18 time discusses the white envelope at trial. It's  
19 actually - - - it's not in the felony complaint,  
20 either. And so meanwhile, you have two other  
21 witnesses who state - - -

22 JUDGE RIVERA: But - - -

23 MS. CABRERA: - - - there was no white - -  
24 - white envelope.

25 JUDGE RIVERA: But didn't the - - - didn't

1 the officer already testify to what the officer  
2 claimed he had said?

3 MS. CABRERA: He - - - I mean he - - -

4 JUDGE RIVERA: So isn't that already before  
5 the jury, one version versus the other?

6 MS. CABRERA: Are we - - -

7 JUDGE RIVERA: Isn't the damage done to the  
8 - - - to that extent?

9 MS. CABRERA: I mean the - - - I mean I  
10 think - - -

11 JUDGE RIVERA: Obviously, I understand - -  
12 -

13 MS. CABRERA: Yes.

14 JUDGE RIVERA: - - - the People want to  
15 pursue this on cross.

16 MS. CABRERA: Yes.

17 JUDGE RIVERA: But isn't the information  
18 already out there? The jury's wondering, wow, you  
19 didn't say that - - -

20 MS. CABRERA: Well, the - - -

21 JUDGE RIVERA: - - - when they had you.

22 MS. CABRERA: Well, the information is out  
23 there but it's a - - - you know, in this case, the  
24 prosecutor then in summation discusses the fact that  
25 he didn't, and it really just hammers home this

1 principle of - - -

2 JUDGE FAHEY: But isn't - - - taking it - -  
3 - I - - - we understand your point about how it can  
4 be used. I think that's what you're saying and I - -  
5 - I understand that. But when you look through the -  
6 - - the court's jurisprudence on this particular  
7 issue, it seems to me the key distinction is between  
8 the People going forward with a - - - a defendant  
9 doesn't say something and you're using - - - the  
10 People try to prove his guilt by something that he  
11 did not say, he or she did not say. That is a  
12 markedly different thing from a defendant coming  
13 forward and saying this was my version of the events  
14 and the People then challenge it on cross-  
15 examination.

16 In Pavone, that was in cross-examination.  
17 And that's a plurality decision with no precedential  
18 value because of that. I think there were three - -  
19 - there were five of us but it was a three-to-two  
20 split on - - - on the legal applicably. In Savage,  
21 it's an older case, but as - - - as I remember  
22 Savage, Savage is also cross-examination case. And  
23 it seems to me here we're faced with that same  
24 distinction again.

25 And what you're asking us to do is is to

1 say something entirely different from the People not  
2 being able to use the proof directly in their own  
3 case by silence, by what you didn't say. That seems  
4 to be clearly constitutionally banned in any form,  
5 even selective silence, as we said in Williams.  
6 Entirely different from challenging your version of  
7 what happened with another version or comparing the  
8 two of them.

9 MS. CABRERA: Well, you know, the - - - the  
10 prosecution - - - if the prosecution were going to  
11 then, let's say on summation, present what Mr. Chery  
12 said to the officer and then state immediately  
13 thereafter this is what Mr. Chery stated on direct  
14 examination. That's permissible. We're not  
15 disputing that. What we are saying is that the  
16 prosecution can't then go into summation stating,  
17 well, he didn't say this, he didn't say that he  
18 didn't say any of this. He's lying.

19 JUDGE STEIN: But when he - - -

20 MS. CABRERA: And not just lying, he  
21 perjured himself.

22 JUDGE STEIN: When he says I told the  
23 police officer that he had hit me with the board, for  
24 example, and then - - - on cross - - - you know, then  
25 there's impeachment saying he never told me or, you

1 know, about that. Why isn't that fair comment on the  
2 evidence, then, in summation?

3 MS. CABRERA: Well, it's - - - it's because  
4 it's - - - I'm really more focused on the silence  
5 surrounding it. You know, that was one specific fact  
6 - - -

7 JUDGE STEIN: When there's - - - when  
8 there's testimony about whether he did or didn't say  
9 it, that - - - that has to - - -

10 MS. CABRERA: Yeah.

11 JUDGE STEIN: - - - refer to silence. But  
12 how else - - - you know, how else to do it?

13 MS. CABRERA: Well, I think that that's a  
14 very specific fact.

15 JUDGE STEIN: But isn't that what happened  
16 here?

17 MS. CABRERA: Well, no. There were also  
18 other facts, for example, the girls running out of  
19 the store and he said, no, I didn't say that. We're  
20 - - - that's really more of what we're discussing. I  
21 think it is fair game if - - - if the defendant says,  
22 you know, no, I did tell the officer that. Then the  
23 - - - then the prosecutor can respond. But here,  
24 we're really more focused on the situations where our  
25 client testified that he did not inform the officer

1 and then the prosecution to then comment on that  
2 silence, specifically.

3 CHIEF JUDGE DIFIORE: Counsel, your time is  
4 up.

5 MS. CABRERA: Thank you.

6 CHIEF JUDGE DIFIORE: Thank you.  
7 Counsel.

8 MS. CURRAN: May it please the court, my  
9 name is Patricia Curran, and I represent the People  
10 on this appeal.

11 JUDGE GARCIA: And, counsel, just - - - I  
12 hate to interrupt you but to start where we just  
13 ended here on the - - - what I think is the scope  
14 which is what's somewhat troubling to me, it seems  
15 our rule - - - and maybe I'm wrong on cross or  
16 direct, is to admit this type of testimony you have  
17 to show that it was unnatural to omit certain facts  
18 from the statement.

19 And his statement, as far as I can tell in  
20 this case, was "Why isn't this other individual going  
21 to jail, he kicked my bike, he should go to jail."  
22 But the cross, as your opponent was just alluding to  
23 is "You didn't bring up that these two girls got  
24 thrown out of the store and you didn't say the owner  
25 said get away from my store. And you didn't tell him

1           you got hit with a wooden board. And you didn't tell  
2           him you saw him chasing girls out of the store." And  
3           it seems to me what the prosecution did here was use,  
4           I mean, excited utterance to open the door to you  
5           didn't do, you didn't do, you didn't do, you didn't  
6           do, which to me does not seem to be the purpose of  
7           this narrow exception for using silence.

8                         So if in this statement that the defendant  
9           made there was something - - - or if the - - - what  
10          Judge Stein was saying, it's a contradictory  
11          implication, but if there was something necessarily  
12          omitted from that that anyone, even in excited  
13          utterance, would say then you can cross on that. But  
14          it doesn't open the door for a laundry list of - - -  
15          from one excited utterance to a laundry list of but  
16          you didn't say, but you didn't say, but you didn't  
17          say.

18                        MS. CURRAN: Well, Your Honor, the focus of  
19          Savage is on the unnatural nature of the omission  
20          here.

21                        JUDGE GARCIA: Right.

22                        MS. CURRAN: What the defendant said at the  
23          scene was when they were unhandcuffing the victim and  
24          leaving him handcuffed, why aren't you arresting him  
25          too? He kicked my bike.

1 JUDGE GARCIA: Why isn't he going to jail?  
2 He kicked my bike.

3 MS. CURRAN: Why didn't - - -

4 JUDGE GARCIA: He should go to jail.

5 MS. CURRAN: Why aren't they arresting him  
6 too.

7 JUDGE GARCIA: Right.

8 MS. CURRAN: He kicked my bike.

9 JUDGE GARCIA: Right.

10 MS. CURRAN: Now at trial, he then  
11 testifies not only did the victim kick his bike, but  
12 the victim also attacked him with a wooden board, hit  
13 him multiple times - - -

14 JUDGE ABDUS-SALAAM: Why is - - -

15 MS. CURRAN: - - - and then - - -

16 JUDGE ABDUS-SALAAM: Counsel, why - - - why  
17 is that so unnatural if the way that the defendant  
18 saw this event unfolding was that it started with the  
19 victim kicking his bike and that's - - - was the  
20 first thing that came out of his mouth. It started  
21 because he kicked my bike, and then this - - - these  
22 other things happened, these other things happened.

23 MS. CURRAN: Your Honor, this defendant  
24 could say whatever he wanted to at this point. He  
25 chose to stop his statement saying only the piece

1 about the bike and then at trial talking about the  
2 very vicious and brutal attack - - -

3 JUDGE RIVERA: But isn't that exactly - - -

4 MS. CURRAN: - - - that he claimed he had.

5 JUDGE RIVERA: - - - the problem with - - -  
6 with the silence?

7 MS. CURRAN: I'm - - -

8 JUDGE RIVERA: The - - - with this issue  
9 about using the silence and omission of these partial  
10 silence or full omissions? There are a variety of  
11 reasons why someone might not speak, and what - - -  
12 what one person might see is what you're suggesting  
13 is this is unnatural under this circumstances might  
14 be, as we're hearing from other people, certainly,  
15 Judge Garcia, maybe it's not so unnatural given the  
16 circumstances, as Judge Abdus-Salaam is suggesting.  
17 And that's, in part, the problem with allowing the  
18 use of the silence.

19 MS. CURRAN: You mean as opposed to what  
20 the court found in Williams and Pavone?

21 JUDGE RIVERA: Right.

22 MS. CURRAN: And Williams and Pavone are  
23 obviously very different. In Williams, the People  
24 affirmatively used the defendant's silence as  
25 affirmative use of his guilt. That's not the case

1 here. In this case - - - and by the way, in Williams  
2 the defendant doesn't testify. They bring this all  
3 out through - - - through the officer, and that's  
4 very key also. Here, the Savage exception is focused  
5 totally on cross-examination if the defendant  
6 testifies, not on putting forth affirmative evidence  
7 of guilt.

8 JUDGE GARCIA: The idea of that - - -

9 MS. CURRAN: And the - - -

10 JUDGE GARCIA: - - - is in Savage that what  
11 he - - - the defendant said it's unnatural under  
12 those circumstances for him to have omitted to say X  
13 and Y. So I think you have to look at what the  
14 defendant said and then say was it unnatural for them  
15 to say X and Y. And here, he makes this spontaneous  
16 statement, it's not a thirty-page confession and then  
17 he says I'm not talking anymore, which is essentially  
18 why isn't that going - - - guy going to jail, he  
19 kicked my bike. Which opens the door, apparently, to  
20 why didn't you say he chased women out of the store  
21 earlier? It - - - there's no logic in that to me.  
22 There's no reasonable relationship to - - - between  
23 the questions that were asked and what might be  
24 considered an unnatural omission under the  
25 circumstances and the substance of what the statement

1           - - - circumstances made in the substance of the  
2 statement.

3           MS. CURRAN: The number of questions that  
4 the prosecutor asks is because the defendant puts on  
5 a fairly lengthy story about what happened.

6           JUDGE GARCIA: Right. And you certainly, I  
7 think as was pointed out, could get up in summation  
8 and say here's what we heard, here's what we heard at  
9 the time of the arrest, did he - - - did you hear  
10 this, you know, did - - - that's argument. Maybe  
11 they would object, maybe they wouldn't. This is  
12 you're using a specific and limited exception to use  
13 silence to cross-examine a defendant who made a  
14 specific statement, and it's an excited utterance,  
15 pretty much, and you're using that to open the door  
16 to say why didn't you say these ten things also. It  
17 just seems like that doesn't - - - isn't logical  
18 application of the rule in Savage.

19           MS. CURRAN: Under Savage, obviously, the  
20 court thinks, and we obviously believe the same, that  
21 this was an unnatural omission. And getting back to  
22 something that Judge Rivera brought up, the defendant  
23 could have offered why he didn't say these things.  
24 It really goes to the weight of the evidence, not the  
25 admissibility. He could have said, well, I don't

1 trust police officers or I didn't get a chance to say  
2 anything.

3 JUDGE GARCIA: That's assuming you get to  
4 ask it. But the question is do you get to ask it  
5 originally so he has to explain it that way? And - -  
6 - and my problem is with do you get to ask it.

7 MS. CURRAN: Certainly, in the facts in  
8 Savage, the court found that what the defendant had  
9 omitted to say was significantly unnatural. And - -  
10 -

11 JUDGE RIVERA: Does it matter that the - -  
12 - the statement sentences that you're referring to  
13 are inculpatory someone else without an attempt to  
14 exculpate himself? And he's not saying don't arrest  
15 me arrest that person.

16 MS. CURRAN: Well, I - - -

17 JUDGE RIVERA: Or did I misunderstand the  
18 statement?

19 MS. CURRAN: I think that the statement  
20 defendant said here was both. He was trying to  
21 exculpate himself - - -

22 JUDGE RIVERA: How is that?

23 MS. CURRAN: - - - by inculpatory the  
24 victim.

25 JUDGE RIVERA: Isn't he saying too - - -

1 MS. CURRAN: Yes.

2 JUDGE RIVERA: - - - as in T-O-O as in - -

3 -

4 MS. CURRAN: Yes.

5 JUDGE RIVERA: - - - that person should be

6 treated the same as opposed to I should not be

7 treated this way, only they - - -

8 MS. CURRAN: Yes.

9 JUDGE RIVERA: - - - should be treated this  
10 way?

11 MS. CURRAN: He says you - - - why aren't  
12 you arresting him too?

13 JUDGE RIVERA: Too.

14 MS. CURRAN: He kicked my bike.

15 JUDGE RIVERA: So he's - - - he's not  
16 asking at that point don't arrest me. Saying you  
17 should arrest them too. So any - - - in any event,  
18 assume that my point is correct and the way one would  
19 interpret that, does that matter for purposes of this  
20 analysis?

21 MS. CURRAN: Matter whether it - - - that  
22 it's - - -

23 JUDGE RIVERA: It's - - -

24 MS. CURRAN: - - - not incriminating at the  
25 time?

1 JUDGE RIVERA: Correct.

2 MS. CURRAN: No.

3 JUDGE RIVERA: Not an exculpatory  
4 statement?

5 MS. CURRAN: No. We believe that it  
6 doesn't. And by the way, the defendant didn't  
7 preserve that argument. But there's no reason why an  
8 unnatural omission has to be focused or stem from an  
9 - - - an initially incriminating statement. The  
10 defendant could have said anything he wants. The  
11 focus is whether it's unnatural.

12 JUDGE RIVERA: And that - - - that gets  
13 back to why people might be silent or say things.

14 MS. CURRAN: What? I'm sorry.

15 JUDGE RIVERA: That goes back to why people  
16 might be silent or say things or say only part of  
17 things not fully appreciating what you have just  
18 argued, which is something that doesn't, on its face,  
19 incriminate you is nevertheless something that may  
20 suggest you're not credible and reliable and that you  
21 are fabricating your statement, your story, because  
22 that's Savage, right, you're trying to fabricate so  
23 you're just not reliable and - - - and credible.

24 MS. CURRAN: But the defendant had the  
25 opportunity to offer those sugg - - - suggestions - -

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JUDGE RIVERA: But we're back to - - -

MS. CURRAN: - - - if he wanted to.

JUDGE RIVERA: - - - Judge Garcia's point -

- -

MS. CURRAN: Well - - -

JUDGE RIVERA: - - - which is you - - - you first got to make the case for why you should be asked initially before you say now the burden is on you to explain yourself.

MS. CURRAN: But the court - - - and the defendant is not asking that this court overrule Savage. It's simply a matter of whether the court believes this court is unnatural like the court below.

JUDGE GARCIA: Savage was a pretty lengthy post-arrest statement with details of the crime and the cross was what was omitted from that statement in the course of a pretty lengthy narrative tied to what normally would have been in, I'm presuming from what they - - - how they described it, a pages-long confession or at least a lengthy and detailed confession. I think the problem here is you have almost an excited utterance and you want to use it like a Savage statement. And it seems to me the

1           exception should be tied to the specific statement  
2           that was made not the Savage rule applies because you  
3           made a statement and something's not in it.

4                   MS. CURRAN:   But in this case, Your Honor,  
5           the defendant poses the question to himself which  
6           his, officers, why aren't you arresting him, too, and  
7           then he gives his answer.  And the answer, it turns  
8           out, we find out at trial, was not complete.  He  
9           focused his own attention on - - -

10                   JUDGE GARCIA:  He's - - - well, he's  
11           handcuffed to the tree or wherever he had him.  But -  
12           - - so to get beyond that, because I think time is  
13           running out, do you want to address the harmless  
14           error point?

15                   MS. CURRAN:  Certainly, obviously, we  
16           believe that the admission or the - - - the questions  
17           here were harmless.  The jury already had heard from  
18           the police officer what the defendant had said about  
19           the victim kicking his bike.  When they then heard  
20           what the defendant said later as to what had  
21           transpired, I think as one of the judges already  
22           said, the cat was already out of the bag.  The  
23           evidence here was overwhelming.  The defendant was  
24           arrested at the scene.  There was no question of  
25           identity.  The two weapons used during the robbery

1 are found, the wooden plank and the piece of metal on  
2 the ground, and he has the robbery proceeds in his  
3 possession.

4 CHIEF JUDGE DIFIORE: Ms. Curran, do you  
5 care to address the legal sufficiency argument that's  
6 been raised here on physical injury?

7 MS. CURRAN: The physical injury point?

8 CHIEF JUDGE DIFIORE: Yes.

9 MS. CURRAN: First, I want to point out  
10 that the defendant was also convicted of first-degree  
11 robbery, so whatever the court should find as to  
12 physical injury doesn't matter. But there was  
13 plainly physical injury here. This victim had a cut  
14 to his hand, he had extensive bruising to his back  
15 and his legs. Chiddick tells us - - - this court's  
16 decision in Chiddick tells us to look at the way in  
17 which the injuries were inflicted. Here, the  
18 defendant's unapprehended accomplice used the wooden  
19 board to hit the victim several times. He testified  
20 that he experienced pain for approximately ten days,  
21 though not all ten days.

22 JUDGE RIVERA: If - - - if all you had was  
23 his - - - his testimony about his subjective  
24 experience, would that be enough?

25 MS. CURRAN: I think it would be but that's

1 not the case here because you have other witnesses  
2 testifying about some of his injuries. Obviously,  
3 the ones on his back and the ones under his clothing  
4 were hidden from view. And I know the defense makes  
5 a big argument about the fact that he didn't go to  
6 the hospital, but he explained that. He didn't have  
7 insurance, and he couldn't pay for that. And I also  
8 would like to point out that these kinds of injuries  
9 are not the kinds of injuries that he would have  
10 necessarily needed medical treatment for. They were  
11 bruises and a cut to the hand. So - - -

12 CHIEF JUDGE DIFIORE: Thank you.

13 MS. CURRAN: - - - we believe that the  
14 court correctly found sufficiency here. Thank you  
15 very much.

16 CHIEF JUDGE DIFIORE: Thank you.

17 Ms. Cabrera. Ms. Cabrera, if one were to  
18 think that Mr. Chery were trying to exculpate himself  
19 at the scene, wouldn't it be most natural for him to  
20 lead with the strongest fact that he thought he had  
21 which was somebody's beating me with a piece of wood  
22 rather than someone's kicking my bicycle?

23 MS. CABRERA: Well, no. First, there could  
24 be many reasons as to why - - - as I mentioned  
25 earlier, as to why somebody may not provide the most

1           exculpatory statement at that given moment. But it's  
2           - - - it's also just not the - - - the determination  
3           as to what is an unnatural omission is just simply as  
4           to whether or not more - - - more mitigating facts  
5           exist out there. You know, Savage makes clear what -  
6           - - what else we should be considering.

7                         And I'd also like to note, you know, in  
8           terms of the excited utterance analogy here and  
9           because the - - - as Judge Garcia noticed - - -  
10          noted, this is pretty much an excited utterance,  
11          excited utterances are reliable for their  
12          truthfulness and that's why they're allowed in. Not  
13          because of their completeness. You know, and - - -  
14          and I think that's important because that's what  
15          we're dealing with here. We're dealing with was his  
16          statement sufficiently complete, and he - - -

17                         JUDGE PIGOTT: Well, he testified. I mean  
18          you don't need an excited utterance to get it in if  
19          he's testifying himself.

20                         MS. CABRERA: Oh, yes. No. I mean we're  
21          not - - - of course, but we're - - - it's really more  
22          just to analogize it. And - - - and I think here we  
23          have a situation where - - - where, you know, Mr.  
24          Chery just simply blurted out quickly the first thing  
25          that came to his mind, as Judge Abdus-Salaam noted,

1           you know, the initial interaction that - - - that - -  
2           - you know, one of the earlier interactions that they  
3           had. And that's what - - - to then hold it against  
4           him later on at trial when he was never sat down,  
5           asked, and interrogated about it is just simply un -  
6           - - unfair. And so, you know, for that we would ask  
7           that - - - that Your Honors reverse the judgment of  
8           conviction and order a new trial.

9                           CHIEF JUDGE DIFIORE: Thank you.

10                          MS. CURRAN: Thank you, Your Honors.

11                                   (Court is adjourned)

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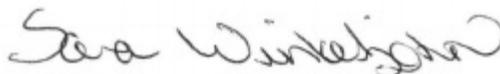
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lyxon Chery, No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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