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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

GLENFORD C. HULL,

No. 81
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
April 28, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 81, People v. Glenford C. Hull.

3 Counsel.

4 MR. EDELSTEIN: Good afternoon, Your
5 Honors; I would like to reserve three minutes for
6 rebuttal.

7 CHIEF JUDGE DIFIORE: Certainly.

8 MR. EDELSTEIN: May it please the court, my
9 name is Jonathan Edelstein. I represent the
10 defendant-appellant Glenford Hull. Our position is
11 that the opinion of Justice Lynch at the Appellate
12 Division was correct. The record of this case
13 supports either of two things: either an accidental
14 discharge or a shot fired with intent to kill,
15 nothing in between. Chance Caffery was killed with a
16 shot directly to his forehead from just inches away.
17 If the defendant fired that shot accidentally, that
18 supports acquittal or possibly manslaughter in the
19 second degree but not manslaughter in the first. If
20 he fired the shot intentionally, as the People said
21 in their summation, you don't shoot someone in the
22 forehead and intend to cause serious physical injury.

23 JUDGE RIVERA: But - - - but it is a
24 struggle, right?

25 MR. EDELSTEIN: Well - - -

1 JUDGE RIVERA: So if it was - - - if the
2 jury thought there was a struggle and he's trying to
3 get out of the struggle, could he not have tried to
4 shoot him in a manner that would seriously injure him
5 so he could escape? He had already made clear that
6 he felt very vulnerable and afraid of the victim.

7 MR. EDELSTEIN: Except there's no testimony
8 from anybody, including the defendant who was on the
9 stand, that that was his intent, and I would point
10 the court particularly to the Rielly case in which
11 there was very similar - - -

12 JUDGE RIVERA: The - - - the intent to be
13 determined from the factual circumstances, right?
14 That's the - - - that's the jury as a trier of fact
15 to make that determination, correct?

16 MR. EDELSTEIN: Well, there was also a jury
17 in the Rielly case, Your Honor, and the Rielly case
18 involved very similar testimony to this case
19 regarding a struggle over the gun. In Rielly, the -
20 - - there was evidence, including, I believe, the
21 testimony of Rielly, the defendant, that the gun went
22 off during a struggle with the victim, and the
23 Appellate Division said that this is exclusively
24 consistent with acquittal on the ground of accidental
25 discharge that it - - - that the fact that there was

1 a struggle, in and of itself, is not something that
2 supports man one. Certainly, I think what we learn
3 from the Rielly case, and from others cited in the
4 briefs, is that the fact the evidence refutes a
5 greater charge does not automatically mean that it
6 supports the lesser one. It could support acquittal
7 or a third charge without supporting - - -

8 CHIEF JUDGE DIFIORE: What about Lasdon,
9 counselor? What about Lasdon?

10 MR. EDELSTEIN: Lasdon?

11 CHIEF JUDGE DIFIORE: Ford, Lasdon.

12 MR. EDELSTEIN: Oh, Ford.

13 CHIEF JUDGE DIFIORE: Um-hum.

14 MR. EDELSTEIN: Well, the - - - the Ford
15 case involved a testimony that there was a statement
16 that says give up the box or be shot. This was an
17 argument over a radio, and during that course of
18 that, the defendant says give up the box or be shot.
19 It could certainly be inferred from that that the
20 purpose of firing the shot was not to kill the victim
21 but to secure the radio. In addition, the struggle
22 apparently continued for about ten minutes after the
23 shooting, which I think would also support that there
24 was - - - that he didn't consider the shooting - - -
25 that the defendant in Ford did not consider the

1 shooting to be the be all and end all of - - - of the
2 struggle, that he wasn't trying to end the struggle,
3 he was just trying to obtain his radio, and that was
4 his object throughout where there was no similar
5 testimony here.

6 And there are a number of cases, including
7 the Kelly case, which the prosecution does not
8 distinguish in its brief and which I would submit,
9 you know, certainly, from the recitation of facts in
10 the habeas decision, involved facts very similar to
11 this, that there was an argument, that the defendant
12 said you're played out, and then fired a single shot
13 from about three feet away, apparently, with very bad
14 aim because he did not hit the person he intended to
15 shoot but instead shot another person and killed
16 them. And the Kelly case, both the federal court and
17 the state court, the Appellate Division, found that
18 there was no place for a man one charge here.

19 And I would point also that although in
20 Kelly and in some of the other cases cited by both
21 parties, the man one charged was requested by the
22 defendant rather than the prosecution, the standard
23 on appellate review is the same. Regardless of who
24 requested the charge, courts look to whether the
25 evidence viewed in the light most favorable to the

1 defendant supports it. So a case in which a charge
2 is requested by the defendant is equally instructive
3 here to one where, as in this case, it was requested
4 by the prosecution. And I would - - - I would submit
5 that in the face of cases like Rielly and Kelly, that
6 there's - - - was no room in this record for a charge
7 of manslaughter in the first degree.

8 Now I would like to briefly discuss a
9 couple of the matters cited by the majority. The
10 majority stated that if Mr. Hull had intended to
11 kill, he could have fired the shot while Mr. Caffery
12 was behind the door or while he was charging up the
13 stairs. Now with respect to the door, obviously,
14 when you're on the other side of a door from someone,
15 you don't know exactly where his body is and where
16 each part of his body is. And I would submit that
17 firing a shot from behind a door would be less
18 indicative of intent to kill.

19 JUDGE FAHEY: So - - - so let me say - - -
20 let me ask this. What you're really asking us to do,
21 then, is to deprive (sic) what's been the depraved
22 indifferent analysis to this particular situation in
23 - - - in terms of the way we look at the intent here;
24 is that correct?

25 MR. EDELSTEIN: Your Honor, I - - - I would

1 not suggest that I'm asking the court to apply
2 depraved indifference analysis.

3 JUDGE FAHEY: You're asking - - - you're
4 asking us to say that it wasn't - - - that he
5 couldn't have done the crime unless it was
6 intentional, and so there - - - either it has to be
7 murder two or manslaughter two.

8 MR. EDELSTEIN: That is what we - - - that
9 is what we suggest.

10 JUDGE FAHEY: The problem I have with that
11 approach here is - - - in the sufficiency analysis,
12 is - - - is that it would seem any evidence of a
13 struggle over the gun back and forth could be a basis
14 for a jury analysis, and all the cases that we look
15 at, Ford, Oliveri, Stoker (sic), they seem - - - they
16 - - - they're in similar factual patterns, I guess,
17 is what I'm pointing to. In those situations, there
18 seems to be a struggle immediately before the
19 shooting that took place and that was sufficient to
20 establish the necessary intent for manslaughter one.
21 And here, while there - - - there is an admitted
22 struggle on the record, even though your client says
23 I didn't struggle with the gun, there seems to be
24 sufficient proof to establish that there was a
25 struggle so there's a legal sufficiency.

1 MR. EDELSTEIN: Well, Your Honor, we - - -
2 first of all, the way that the lesser included charge
3 analysis has been framed by this court is a
4 sufficiency analysis because you look into whether
5 the evidence in the light most favorable to the
6 defense - - -

7 JUDGE FAHEY: No, I - - - I agree with you
8 on that.

9 MR. EDELSTEIN: Yes.

10 JUDGE FAHEY: That's - - - that's fine.

11 MR. EDELSTEIN: But - - -

12 CHIEF JUDGE DIFIORE: Counsel, your light
13 is on. Do you care for an extra moment to move to
14 the Facebook issue?

15 MR. EDELSTEIN: May I answer Judge Fahey's
16 question first? But yes, I would care - - -

17 CHIEF JUDGE DIFIORE: That's your choice.

18 MR. EDELSTEIN: - - - for one extra minute
19 on that.

20 CHIEF JUDGE DIFIORE: Go ahead.

21 MR. EDELSTEIN: In - - - what I would
22 submit is that in the Ford case, and in the other
23 cases that are cited by the majority, there was more
24 than a struggle in and of itself. In Ford, as I
25 discussed before, there's the statement give up the

1 box or be shot which elucidates the defendant's
2 purpose in firing the shot. In Oliveri, the
3 defendant was hit in the armpit. I think a jury
4 could infer that a shot to the armpit is not intended
5 to be lethal. You know, we - - - we've discussed
6 these cases in the briefs, and we believe that for
7 this reason a struggle in and of itself - - - there's
8 no blanket rule that where there's a struggle a man
9 one charge is appropriate because in Rielly there was
10 also a struggle and the court found that man one was
11 not appropriate.

12 CHIEF JUDGE DIFIORE: We have your point on
13 that.

14 MR. EDELSTEIN: Okay. Finally, with
15 respect to the Facebook issue, the People did not
16 dispute that a 270.35 issue was a mode of proceedings
17 error, and the Garbutt case so found. So I would
18 submit that any failure to object or even consent by
19 defense counsel was irrelevant.

20 And what happened here was that the trial
21 court learned of a fact, which all parties agree that
22 it was required to investigate, and then it didn't
23 investigate that. It investigated something else.
24 It got sidetracked on Facebook posts by the jurors as
25 opposed to the Facebook posts - - -

1 JUDGE RIVERA: So what should the judge
2 have done?

3 MR. EDELSTEIN: Well, I think the judge
4 should have started by bringing in Mrs. Kelly (ph.)
5 or at least giving her a call, taking her testimony
6 over the phone, regarding what is this exact Facebook
7 post that started the - - - the dispute rather than
8 getting sidetracked on other ones.

9 JUDGE RIVERA: Well, does it matter - - -

10 MR. EDELSTEIN: Who made this post?

11 JUDGE RIVERA: Well, does it matter what -
12 - - what she says? Doesn't it matter what the jurors
13 say?

14 MR. EDELSTEIN: Well, but she would have
15 been able to identify who made this Facebook post
16 because she was the one who reported it. And then -
17 - -

18 JUDGE RIVERA: So you're suggesting that
19 other than the two jurors that the judge spoke with
20 may have been involved in this post and that's where
21 the judge failed?

22 MR. EDELSTEIN: Well, this posting was,
23 according to Mrs. Kelly, by a juror's family. So by
24 interviewing only the jurors and having his clerk
25 look for posts by only the jurors, it didn't find - -

1 - the judge didn't find posts by defendant's families
2 - - - or jurors families. Mrs. Kelly could have said
3 well, the post was made by Mrs. Smith, the husband of
4 Mr. Smith. And then the judge could have called in
5 Mr. Smith and said - - -

6 JUDGE RIVERA: Another juror is your point?

7 MR. EDELSTEIN: Yes. Yes.

8 JUDGE RIVERA: Okay.

9 CHIEF JUDGE DIFIORE: Okay. Thank you,
10 counsel.

11 MR. EDELSTEIN: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. HUBBARD: May it please the court, John
14 Hubbard for the respondent. Let me talk about
15 Rielly. Rielly could be easily distinguished.
16 Rielly had the victim being shot three times at close
17 range to the head and other vital parts of the body.
18 That doesn't help the defendant here. Let me talk
19 about Kelly, just to mention Kelly. Kelly was a case
20 where a defendant pulled a gun in a crowded room,
21 fired the gun at close range, and hit somebody else.
22 The habeas - - - the habeas application there has
23 some facts, and that habeas application indicated
24 that there was no evidence that the defendant
25 intended only to scare - - -

1 JUDGE RIVERA: Well, that's certainly not
2 what the prosecutor said on summation, right?

3 MR. HUBBARD: Judge, you're talking about
4 Kelly?

5 JUDGE RIVERA: Didn't the prosecutor say on
6 summation - - - no, in this case.

7 MR. EDELSTEIN: Oh, no. In summation we
8 argued - - -

9 JUDGE RIVERA: In this case, didn't the
10 prosecutor - - -

11 MR. HUBBARD: - - - we argued murder two.

12 JUDGE RIVERA: Yeah.

13 MR. HUBBARD: We argued murder - - - murder
14 two. You have the shot range - - -

15 JUDGE RIVERA: Well, perhaps I
16 misunderstood the summation. I thought the summation
17 was there's no way you could see this other than - -
18 -

19 MR. HUBBARD: Right.

20 JUDGE RIVERA: - - - because he shot him
21 right in between the eyes.

22 MR. HUBBARD: Yes. Yeah, they argued that,
23 Judge. But again, they're dealing with the trial
24 evidence, and the trial evidence was evidence of a
25 struggle. The defendant took the stand and talked

1 about having slippery hands because he was preparing
2 meat. The defend - - - the - - - the 911 calls came
3 in about hey, I shot my friend.

4 JUDGE PIGOTT: Well, that's - - - that's
5 all logical. I don't - - - I don't find anything
6 extraordinary about that. I - - - to follow up on
7 what Judge Fahey had asked your opponent, we went
8 through this depraved indifference stuff and - - -
9 and giving a charge to the jury that really looked
10 like a way - - - a way to - - - almost like a mercy
11 thing, you know. Yeah, he - - - he really killed him
12 but there's oth - - - there's factors so we'll do
13 depraved indifference thinking they were - - - they
14 were doing a - - - a reverse charge. And so we had
15 cases where the defense then came in and said I've
16 been convicted of depraved indifference murder. I
17 intended it. It was my goal to - - - to murder.
18 Therefore, I walk out of this prison because I was
19 acquitted of murder and - - - and convicted of
20 something I didn't do. The facts, in this case, are
21 you say, the People say, murder, murder, murder.

22 MR. HUBBARD: Yeah.

23 JUDGE PIGOTT: He's saying accident,
24 accident, accident. And somehow, in between, there's
25 this thought that oh, maybe he shot to wound or - - -

1 or to seriously injure and there's no - - - where's -
2 - - where's, other than speculation, you know, that
3 he may have shot, you know, I can't - - - I can't get
4 there. I'm wondering where we get that, where the
5 intent comes from?

6 MR. HUBBARD: Judge, we're only left with
7 what the record is.

8 JUDGE PIGOTT: Exactly.

9 MR. HUBBARD: So it's got to be speculation
10 to a certainty and advocacy of it.

11 JUDGE PIGOTT: No, it's - - - I don't mean
12 to fence - - - fence with you on that, but I mean,
13 you say here are the facts that show that he intended
14 to seriously injure, and I'm having trouble finding
15 that.

16 MR. HUBBARD: Okay.

17 JUDGE RIVERA: Or facts from which the jury
18 could infer.

19 MR. HUBBARD: I'm sorry?

20 JUDGE RIVERA: Or facts from which the jury
21 could infer the intent?

22 MR. HUBBARD: Again, you see right after
23 the shooting, the - - - the first thing that the
24 defendant does is calls 911 and says I shot my
25 friend. They instruct him - - -

1 JUDGE PIGOTT: Yeah.

2 MR. HUBBARD: Well, I think it goes to
3 state of mind. It certainly does.

4 JUDGE PIGOTT: I can call my friend and say
5 I shot a deer. I mean - - - that doesn't mean I'm -
6 - - I'm admitting to a - - -

7 MR. HUBBARD: I agree.

8 JUDGE PIGOTT: - - - a crime.

9 MR. HUBBARD: I agree. But it's part of
10 the thing that the jury heard, you know. That - - -

11 JUDGE PIGOTT: I know. But on that - - -
12 maybe I'm not being clear. That's okay.

13 JUDGE ABDUS-SALAAM: Was there any
14 testimony about this defendant aiming to shoot the -
15 - - the victim in any way or that he didn't aim to
16 shoot anyone?

17 MR. HUBBARD: This is what the defendant
18 says. The defendant said he - - - I had my gun, I -
19 - - I went to get my gun, I came back, I had it with
20 my hands down. He exits his locked apartment door to
21 look down the landing to see who's there. His
22 twelve-year-old daughter's next to him. He says that
23 the defend - - - the victim comes up in a rage and
24 goes after his neck, and he says he - - - he raises
25 his arms, there's some contact with his right hand,

1 the gun goes off. That's what the defendant said.

2 And I would sub - - - submit it's - - -

3 JUDGE GARCIA: But, counsel, doesn't he
4 also say I wasn't aiming there. I wasn't aiming for
5 nothing. I just wanted to stop his forward movement?

6 MR. HUBBARD: He absolutely said that,
7 Judge. It's in the context. I think, and rightfully
8 pointed out by my colleague, of raising the arm - - -
9 raise - - - during the - - - he was raising his arms
10 to defend himself. So if you have no other
11 questions, I'll sit down.

12 JUDGE RIVERA: Do you want to address the
13 Facebook issue?

14 JUDGE ABDUS-SALAAM: Yeah.

15 MR. HUBBARD: Judge, Facebook issue. So
16 the court atte - - -

17 JUDGE RIVERA: I mean shouldn't the judge
18 have tried to find out the source of the postings?
19 Perhaps it was not the two jurors that the judge had
20 spoken with?

21 MR. HUBBARD: My - - - my recollection is a
22 court attendant says my wife sees something on
23 Facebook. It's a - - - it's a posting by a juror
24 that they're hung or something. He - - - the judge
25 instructs the clerk to look at all the Facebook

1 pages, okay, and finds the two jurors who presumably
2 had some connection on Facebook or mention on
3 Facebook. The nature of the posts were hey, I got
4 grand jury today - - - or, I'm sorry, I got jury
5 duty. I'm going to - - - it's going to be a long
6 day, something like that. He brings them both in,
7 does the inquiries, asks defense counsel, are you
8 satisfied and defense counsel says yes, the defendant
9 says yes.

10 CHIEF JUDGE DIFIORE: Is this a mode of
11 proceedings error, counsel?

12 MR. HUBBARD: Judge, probably it is.

13 CHIEF JUDGE DIFIORE: Thank you.

14 MR. EDELSTEIN: Your Honors, first of all,
15 as to the Facebook, the - - - page 532 of the
16 appendix is very clear that the report that Richard
17 (ph.) Kelly received from his wife indicated that
18 there were posts by family members of jurors. "FYI,
19 family members of jurors have been posting jury
20 updates on Facebook. There is - - - exclamation
21 point, "There is one juror that is holding out." So
22 it was very clear from the report that was given to
23 the court that these were posts by family members,
24 not by the jurors themselves. And I would submit
25 that the court then got sidetracked and did not

1 perform the investigation.

2 JUDGE RIVERA: Could have said - - - if it
3 had said friends of the juror? If - - - if the
4 postings - - - or if the statement was friends of the
5 jurors - - -

6 MR. EDELSTEIN: Well - - -

7 JUDGE RIVERA: - - - as opposed to family
8 member or members?

9 MR. EDELSTEIN: I would submit that the
10 judge would still be required to ascertain the
11 information easily available to him by calling Mrs.
12 Kelly in- - -

13 JUDGE RIVERA: What if it had said I heard
14 there's a hold out? What about that?

15 MR. EDELSTEIN: If it's just Mrs. Kelly
16 saying I heard there's a holdout?

17 JUDGE RIVERA: Yeah.

18 MR. EDELSTEIN: Then call Mrs. Kelly and
19 ask her where did you get that information and she
20 says, well, I'm just hearing things, end of
21 investigation.

22 JUDGE PIGOTT: Why - - - why would it be
23 the end of the investigation? Aren't they all under
24 - - - under direction not to discuss the case with
25 anyone?

1 MR. EDELSTEIN: Well, they - - -

2 JUDGE PIGOTT: I mean you can't - - - you
3 can't go him and kick it around with your kids and
4 you - - - and you can't talk to your neighbor - - -

5 MR. EDELSTEIN: Yeah.

6 JUDGE PIGOTT: - - - about it, either, can
7 you?

8 MR. EDELSTEIN: They - - - they certainly
9 are, Your Honor. I guess what I was suggesting is
10 that if the investigation - - - if the judge were to
11 call Mrs. Kelly and Mrs. Kelly could not produce a
12 name and said, you know, I - - - this is just buzz
13 around town, and there was no way - - - you know, if
14 the investigation led to a dead end and there was no
15 way to trace it to anybody - - -

16 JUDGE PIGOTT: Well, let's assume there's a
17 buzz around town that there may be a holdout juror or
18 something. I mean isn't the judge supposed to call
19 everybody in and say maybe you forgot - - -

20 MR. EDELSTEIN: Yeah.

21 JUDGE PIGOTT: But let me emphasize the
22 fact that you're not to discuss this case with anyone
23 until you've reached a verdict?

24 MR. EDELSTEIN: Oh, yes, Your Honor, or
25 possibly even to call in each individual juror and

1 ask whether he's the holdout.

2 JUDGE PIGOTT: Okay.

3 MR. EDELSTEIN: Or ask one of them to
4 identify a holdout.

5 JUDGE RIVERA: Or - - - or ask them if they
6 had participated in Facebook postings related to the
7 case; is that what the judge should have done?

8 MR. EDELSTEIN: Correct, Your Honor. He
9 could have done any or all of those things. But I
10 think that he - - -

11 JUDGE RIVERA: What - - - what was the
12 judge - - - judge's directive regarding the use of
13 social media during the trial to the jurors? Do you
14 know?

15 MR. EDELSTEIN: Offhand, I don't - - - this
16 was a trial in, I believe, 2006.

17 JUDGE RIVERA: Um-hum.

18 MR. EDELSTEIN: So I think this was before
19 directives regarding social media became common. I
20 don't recall that there was one, although I would
21 certainly be able to look in the record and see if
22 the court wants to hear further from me on that.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

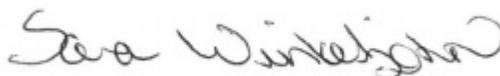
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Glenford C. Hull, No. 81 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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