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New York Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

DOCKET NOS.
KA16-02210
KA16-01293

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

M. ROBERT NEULANDER,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THE CONVICTION WAS NOT SUPPORTED BY SUFFICIENT PROOF AND WAS AGAINST THE WEIGHT OF THE EVIDENCE 2

A. The Insufficiency Claim Is Preserved 2

B. The People Failed To Prove Murder 3

C. The People Failed To Prove Evidence Tampering 10

D. The Verdict Was Against The Weight Of The Evidence 10

II. JUROR MISCONDUCT IMPAIRED NEULANDER'S RIGHT TO AN IMPARTIAL JURY 12

III. A PATTERN OF PROSECUTORIAL MISCONDUCT DEPRIVED NEULANDER OF A FAIR TRIAL 18

IV. TRIAL COUNSEL'S ERRORS THROUGHOUT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE 25

A. Trial Counsel Failed To Object To Extensive Prosecutorial Misconduct 25

B. Trial Counsel Failed To Seek Preclusion Of Green's Methodologically Flawed Testimony 26

C. Trial Counsel Failed To Call Pizzola And Knapp Based On A Misunderstanding Of The Law 28

D. Trial Counsel Failed To Use Impeachment Material To Cross-Examine Leestma 31

E. Trial Counsel's Cumulative Errors Rendered His Representation Ineffective 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

Dietz v. Bouldin,
136 S. Ct. 1885 (2016) 13

Dyer v. Calderon,
151 F.3d 970 (9th Cir. 1998) 12

Eze v. Senkowski,
321 F.3d 110 (2d Cir. 2003) 34

Parker v. Mobil Oil Corp.,
7 N.Y.3d 434 (2006) 26

People v. Anderson,
123 A.D.2d 770 (2d Dep't 1986) 16

People v. Barnes,
267 A.D.2d 1020 (4th Dep't 1999) 27

People v. Brown,
48 N.Y.2d 388 (1979) 12

People v. Brown,
61 A.D.3d 1427 (4th Dep't 2009) 34

People v. Cilberg,
255 A.D.2d 698 (3d Dep't 1998) 17

People v. Clark,
81 N.Y.2d 913 (1993) 15

People v. Cocco,
305 N.Y. 282 (1953) 17

People v. Crimmins,
26 N.Y.2d 319 (1970) 17

People v. Cyrus,
48 A.D.3d 150 (1st Dep't 2007) 28

People v. De Lorenzo,
45 A.D.3d 1402 (4th Dep't 2007) 24

People v. Finch,
23 N.Y.3d 408 (2014) 3

People v. Gordon,
50 A.D. 3d 821 (2d Dep't 2008) 20

People v. Grajales,
294 A.D.2d 657 (3d Dep't 2002) 19

People v. Gross,
26 N.Y.3d 689 (2016) 33

People v. Henry,
95 N.Y.2d 563 (2000) 26

People v. Jamison,
24 Misc. 3d 1238(A) (Sup. Ct., Kings Cnty. 2009) 16

People v. King,
27 N.Y.3d 147 (2016) 26

People v. Lamar,
83 A.D.3d 1546 (4th Dep't 2011) 11

People v. Leonard,
252 A.D.2d 740 (3d Dep't 1998) 17

People v. Martin,
177 A.D.2d 715 (2d Dep't 1991) 16

People v. McIntosh,
274 A.D.2d 740 (3d Dep't 2000) 32

People v. Melendez,
140 A.D.3d 421 (1st Dep't 2016) 20

People v. Middleton,
54 N.Y.2d 42 (1981) 26

People v. Morgan,
77 A.D.3d 1419 (4th Dep't 2010) 31

People v. Negron,
161 A.D.2d 537 (1st Dep't 1990) 23

People v. Noll,
24 A.D.3d 688 (2d Dep't 2005) 28

People v. Paperno,
54 N.Y.2d 294 (1981) 18

People v. Ramsey,
134 A.D.3d 1170 (3d Dep't 2015) 25

People v. Redd,
141 A.D.3d 546 (2d Dep't 2016) 21

People v. Reed,
22 N.Y.3d 530 (2014) 3, 5, 7

People v. Rios,
26 Misc. 3d 1225(A) (Sup. Ct., Bronx Cnty. 2010) 16

People v. Romandette,
111 A.D.2d 1040 (3d Dep't 1985) 24

People v. Rozier,
143 A.D.3d 1258 (4th Dep't 2016) 25, 34

People v. Smith,
290 A.D.2d 391 (1st Dep't 2002) 17

People v. Stanley,
87 N.Y.2d 1000 (1996) 20

People v. Tatum,
54 A.D.2d 950 (2d Dep't 1976) 19

People v. Whitaker,
289 A.D.2d 84 (1st Dep't 2001) 27

People v. Williams,
50 A.D.3d 472 (1st Dep't 2008) 16

People v. Wilson,
93 A.D.3d 483 (1st Dep't 2012) 15

People v. Wright,
25 N.Y.3d 769 (2015) 21, 34

United States v. Brown,
79 F.2d 321 (2d Cir. 1935) 17

United States v. Colombo,
869 F.2d 149 (2d Cir. 1989) 12

Statutes, Rules, and Other Authorities

C.P.L. §470.05 3

Douglass Dowty, *DA: Neulander failed polygraph test in wife's murder (takeaways from legal battle)*, Syracuse.com (Apr. 27, 2016), http://www.syracuse.com/crime/index.ssf/2016/04/da_neulander_failed_polygraph_test_in_wifes_murder_takeaways_from_legal_battle.html.. 25

INTRODUCTION

This was a paper-thin case. There was no eyewitness, no murder weapon, no realistic motive, and no history of violence between the Neulanders. Instead, the People relied on testimony from the Medical Examiner, who had opined to a reasonable degree of certainty that Leslie died from a fall; Green, who testified on the bloodstains based on bizarre, and legally inadequate, experiments; and three other medical witnesses, who conceded the limitations of their opinions and offered speculation inconsistent with the People's theory of the case.

The People's strategies to keep the verdict in place simply highlight the insufficiency of the evidence. They repeatedly mischaracterize the record, advance baseless claims of perjury, and improperly inject extra-record "facts" that were not before the jury. They even fault Neulander for not doing more to disprove Leslie's murder. But it was the People's burden to prove their case, and they gloss over the reasons why their experts provided no reasonable basis for the jury to exclude innocent explanations of the evidence.

The People's efforts to withstand the other challenges to the verdict are similarly flawed. As to juror misconduct, they ignore the trial court's findings that Lorraine hid evidence of her improper communications and lied about it under oath, and have no response to the key authorities compelling reversal. As to prosecutorial misconduct, they revert to mischaracterizing the record and offer arguments completely divorced from the governing precedent. And as to ineffective assistance, they offer further misrepresentations and unsubstantiated generalities, and fail to identify any case upholding a conviction marred by similar attorney ineffectiveness.

ARGUMENT

I. THE CONVICTION WAS NOT SUPPORTED BY SUFFICIENT PROOF AND WAS AGAINST THE WEIGHT OF THE EVIDENCE

A. The Insufficiency Claim Is Preserved

The People acknowledge that Neulander moved to dismiss at the close of both the People's case and the defense case, and made arguments in support of his motion, but contend that "[t]o the extent that defendant now makes specific claims in his brief not articulated at the close of proof, those arguments are unpreserved." (People's Br. 29). It is unclear which arguments the People claim are unpreserved, and the conclusory nature of their preservation argument shows it is not serious.

Indeed, trial counsel argued that the proof was insufficient on the murder count because it was "predicated entirely on" insufficient and circumstantial opinion evidence, which was undermined by the "contradictory" nature of the prosecution experts' testimony. (R-2257). In response, the prosecutor discussed four of its experts' medical testimony, the blood spatter testimony of Green, and Neulander's alleged "consciousness of guilt." (R-2260). Defense counsel also explained why the proof of evidence tampering was insufficient (R-2257-60), and the prosecutor responded (R-2261). The trial court then considered whether, in light of the circumstantial evidence presented, "it can be inferred that evidence of the defendant's criminal activity flowed naturally from the facts proved and excluded every reasonable hypothesis of innocence." (R-2265). The court denied the motion for dismissal (R-2265), and denied Neulander's renewed motion at the close of the defense case (R-2740).

As on appeal, trial counsel challenged the sufficiency of the evidence based on the circumstantial nature of the case and the People's reliance on experts instead of fact witnesses. The People's appellate brief also mirrors their defense of sufficiency at trial. Most importantly,

the trial court had the opportunity to consider what is now before this Court. The preservation rule is easily satisfied. C.P.L. §470.05(2) (issue preserved if "the court expressly decided the question raised on appeal"); *see People v. Finch*, 23 N.Y.3d 408, 414 (2014) (warning against "overbroad application" of preservation rule; recognizing that purpose of rule is to enable "trial courts to avoid error, and also alert[] the People to the claimed deficiency in the proof").

B. The People Failed To Prove Murder

To uphold a conviction in an entirely circumstantial case, a court must determine whether a jury "could rationally have excluded innocent explanations of the evidence." *People v. Reed*, 22 N.Y.3d 530, 535 (2014). The People fail to acknowledge this legal standard; they do not even try to show that it was satisfied. Instead, the People repeatedly cite expert testimony that did not exclude innocent explanations for Leslie's death, and is therefore insufficient as a matter of law.

1. *Leslie's head injury*. The People tout the credentials of its pathologists and cite their testimony about Leslie's head injury as if it were dispositive. (People's Br. 29-30). However, the People tellingly fail to acknowledge that three of their experts admitted on cross-examination that Leslie's head injury could have been caused by a single impact with the shower bench, and that certain features of the injury—i.e., the contrecoup—are expected in falls. (Br. for Defendant-Appellant ("Def. Br.") 14-15). Even if Leslie's injury was more serious than what the prosecution experts would "expect" from a fall in the shower (People's Br. 30), the Neulanders' shower was larger than a typical shower, permitting someone to fall without being slowed by contact with a shower wall, and it contained a marble bench with a sharp edge (R-3774).

Indeed, Stoppacher was the only expert who examined Leslie's body, and he concluded at the time, to a reasonable degree of medical certainty, that Leslie died from a fall. (R-1571,

4168, 4172). He was aware that the police had suspicions about Leslie's death (R-1522), and could have listed manner of death as "undetermined circumstances" or "pending investigation" (R-1585). He chose not to do so. Although Stoppacher later changed his opinion, he admitted that the change was not based on medically relevant evidence. (R-1588-89). As a result, neither his testimony, nor the testimony of the other experts who acknowledged that Leslie's head injury could have been caused by the marble shower bench, provide a reasonable basis to exclude the possibility of a fall.

Although Baden claimed that the head injury resulted from multiple impacts, and thus an attack (R-1625), it is undisputed that, because Leslie had only one blood-letting injury, the multiple-impact theory would have required Neulander to strike Leslie in the exact same location each time (R-1607 (Stoppacher)). This would be inconsistent with the People's theory that Neulander first attacked Leslie's in the bedroom and then continued to assault her as they struggled into the bathroom. (R-2873, 2881). And the notion that Neulander could have hit precisely the same spot on back of Leslie's head multiple times is implausible, and certainly not proof beyond a reasonable doubt.

2. *Other injuries*. The People contend that a "layperson could review the photographs of Leslie's other injuries and reasonably conclude that those injuries did not occur from a fall in the shower." (People's Br. 30). But the law requires more.

Again, the only expert to examine Leslie's other injuries, Stoppacher, initially concluded that Leslie fell in the shower, was carried from the shower to the bedroom, and was attended to by a group of emergency responders. It was also undisputed that Leslie fell at a wedding in the days before her death. (R-1954). When Stoppacher changed his opinion, it had nothing to do with Leslie's other injuries. (R-1588-89). (The People claim Stoppacher changed his opinion

based on information he received from Pizzola (People's Br. 16), but Stoppacher denied that Pizzola's opinion "caused [him] to reassess" his own (R-1616). Indeed, Pizzola is not a medical expert and so was unable to speak to Leslie's injuries.) Stoppacher alone is sufficient to show that there was no reasonable basis for rejecting innocent explanations for the other injuries.

The People's efforts to explain the cause of these injuries are pure speculation. For example, they argue that Leslie's cheek abrasion was "*consistent* with 'some kind of imprint with force against the left cheek, which is caused by an object that has a similar pattern on it,' such as pressure from a cloth or bedding that has a similar pattern." (People's Br. 30 (emphasis added)). But mere consistency is not sufficient proof, *see Reed*, 22 N.Y.3d at 535, and the People identify no item at the crime scene which matched the alleged "pattern" that would have supported the homicide theory. Similarly, the People argue that "injuries to Leslie's neck and arms were consistent with trauma" (People's Br. 30), but cannot show that these injuries are inconsistent with the fact that Leslie was carried through a hallway, down multiple steps, and to the bedroom where emergency responders made repeated efforts to revive her. Finally, the People cite Baden's testimony that an abrasion to Leslie's finger was "consistent with a ring being ripped off" (People's Br. 31), but point to no evidence substantiating such speculation.

The testimony about Leslie's facial injuries is of particularly limited value, because none of the prosecution experts considered that Leslie underwent a plastic surgery procedure in the weeks before her death. (Def. Br. 15). This procedure made her face far more susceptible to injury than normal. (R-2514-15, 4194-97).

3. *Time of death*. The People's theory was "that defendant had hours after he inflicted the debilitating head injury to stage the slip-and-fall and discard the evidence that he

could not cover-up by moving Leslie's body." (People's Br. 32). The evidence on time of death, however, did not prove this scenario.

The People cite body temperature, but ignore that their experts agreed it was a "crude" tool to establish time of death. (R-1603, 1667). Body temperature clearly cannot prove the People's timeline beyond a reasonable doubt, as evidenced by the wide time-of-death range offered by the prosecution experts, some of which disproved the People's case. (Def. Br. 18). Baden's testimony was particularly suspect because it incorporated an assumption, lacking factual basis or medical foundation, that Leslie's body temperature was artificially elevated because she had spent a sufficiently extended period under a hot shower. (R-1638).

Nor does the rigor mortis evidence fill the gap. Stoppacher examined Leslie's body soon after her death and could assess the progression of rigor mortis. He agreed that Leslie could have died as late as 7:15 a.m. (R-1604). Baden did not examine Leslie's body, and ignored that rigor mortis had just begun to set in when paramedics arrived at the scene. (Def. Br. 18). He acknowledged that rigor mortis "show[s] up first in . . . the mouth muscles," and that it could "become apparent within a half an hour" after death (R-1638, 1674).

The time of injury evidence was also inconclusive. Perhaps because Leestma's testimony regarding red neurons was insufficient (Def. Br. 19), the People suggest that there was other evidence showing that Leslie was injured hours before she died (People's Br. 32). But the cited testimony does not bear this out. Stoppacher simply acknowledged that the bleeding behind Leslie's eye could mean she "may have been alive for some period of time" after her injury (R-1569), but he offered no testimony on how long or short that might have been. And other aspects of Leestma's testimony established no definite timeline: Leestma testified that the facial injuries simply would "take some time to evolve" (R-1742), and admitted ignoring the sensitive

condition of Leslie's skin from her recent plastic surgery (R-1786). With respect to bleeding under Leslie's scalp, he suggested that it could take "maybe a couple of hours" to develop, but that he could not "be precise about that" (R-1743) and that "bleeding after death can certainly occur" (R-1744).

4. *Blood evidence*. The People completely ignore the various methodological flaws in Green's experiments and are unable to contest that because Green failed to test alternative explanations for the bloodstains, her testimony provided no basis for the jury to "exclude[] innocent explanations of the [blood] evidence" either. *Reed*, 22 N.Y.3d at 535.

Instead, the People try to distance themselves from Green's junk science by suggesting that her testimony was based on a "review of scene photographs in conjunction with her 20 years of scene experience and experiments." (People's Br. 32). Not true, according to Green. She testified that her experiments gave her opinion "scientific[]" value and removed the "subjectivity" from her analysis. (R-2186). The conclusions she offered at trial were based on the specific experiments she performed. (Def. Br. 13-14, 50-55). Having relied on Green's experiments below, the prosecutor cannot disavow them now.

5. *Motive*. The People argue that Neulander killed his wife due to "breakdown in [the] marital relationship." (People's Br. 33). It is true that Neulander and Leslie had begun a trial separation and were sleeping in separate bedrooms in the months before her death, but that is hardly motive for murder. Indeed, Leslie's family and friends testified on Neulander's behalf and reported no animosity, let alone violence, between the couple (R-2269, 2294, 2616), making any such motive all the more implausible.

Perhaps recognizing this, the People resort to baseless innuendo, vaguely referring to "Leslie's relationship with another man." (People's Br. 42). There was no evidence of any

romanatic "relationship" with another man introduced at trial, and their improper effort to taint this Court with "evidence" never presented to the jury should not be countenanced.

6. *Neulander's account*. The People concede that the "law most often views consciousness of guilt evidence as weak" but nevertheless rely on Neulander's statements to law enforcement. (People's Br. 35-36). This fails, because the People have mischaracterized the record, which does not show that Neulander ever knowingly made any false statements.

First, the People argue that Neulander's statements to law enforcement about "steam" in the shower prove that he staged the shower scene, because the steam system in the master bathroom would have automatically shut off after 20 minutes. (People's Br. 35). (The shower had a "steam" function that could create additional steam beyond what the hot water naturally produces.) But Neulander never told investigators that the steam function had been activated, and there is no proof that it was. Although Neulander generally explained that the shower had a steam function (R-3886, 4029-30), he said only that the fully enclosed shower was steamy when he opened the shower door (R-3892-93, 3897, 4029, 4034, 4059). This is unremarkable and consistent with the prosecution's own evidence. (R-1454 (Kurgan, testifying that steam from the shower "was fogging up the lens of [his] camera," requiring him to "shut [the water] off to keep the lens clear")).

Second, the People claim that during his December 2013 interview he "could not remember what he was wearing on the morning of Leslie's death," but that in his February 2014 interview, Neulander fabricated a memory of wearing a long-sleeved shirt and removing it while he was still in the bedroom in order to explain away "the blood spatter on the wall." (People's Br. 35). The People misrepresent the interviews. In December 2013, Neulander told the prosecutor that he put on "a pair of [] pajamas" after he finished showering; the prosecutor did

not ask him about the length of his pajama sleeves. (R-3880). In February 2014, he told the detective that he recalled putting on long-sleeved pajamas after showering. (R-4024). Neulander's removal of his shirt did not come up in his first interview, and only came up at the end of the second interview when the detective specifically asked whether Neulander recalled doing anything in the bedroom that could have resulted in "blood being transferred." (R-4039). There was no discussion of any specific stains (R-4039-40), and the speculation that between his interviews Neulander devised a story to explain away the specific stains on the wall finds no support in the record. The People further suggest that Neulander, in the midst of the trial, asked Jenna to falsely testify that she had possession of the shirt sometime after Neulander removed it. (People's Br. 35). Yet again, there is zero evidence supporting this inflammatory allegation.

7. *Jenna's testimony*. The People insist that Jenna's testimony supports the conviction. (People's Br. 36-39). But they rely on her prior statements and argue about what those statements mean for the case "if [they are] true" (People Br. 37), rather than her actual testimony. But it is black letter law that prior inconsistent statements cannot be used as affirmative evidence. (Def. Br. 44; *see infra*, Point III). At most, Jenna's statements to law enforcement might impact her testimony's weight; they are not evidence of Neulander's guilt.

In any event, Jenna's testimony contained at worst an immaterial inconsistency about which phone she used to reconnect the 911 call. (Def. Br. 20-21). Because Jenna saw her mother as soon as she entered the bathroom (R-2632), there is simply no basis for the People's speculation that Jenna picked up the water closet phone, verbally reacted to seeing blood in areas through which her mother had yet to move, and only then "walk[ed] deeper into the bathroom" and saw her mother for the first time. (People's Br. 37).

The People also accuse Jenna of committing perjury to help the defense. (People's Br. 37-39). There is no basis whatsoever for this inflammatory accusation. Jenna was very close to her mother and cooperated fully with the investigation into Leslie's death. (R-2608-09). She had no motive to lie. Not one of Leslie's family members accused Neulander of homicide; on the contrary, they staunchly defended Neulander and believed in his innocence. (R-3663-66). The People's accusations are baseless, offensive, and do nothing to prove the People's case.

C. The People Failed To Prove Evidence Tampering

Because the proof on the murder count was insufficient, the proof on the evidence tampering count was necessarily insufficient as well. (Def. Br. 21). The problems with Smith's testimony simply underscore the weakness of the evidence on the count.

The People attempt to rehabilitate Smith's testimony (People's Br. 34), but ignore that she was not in a position to testify to which sheets were on the bed on the morning of September 17, 2012, because she had not worked in the days before (R-1853, 1855). Nor do they grapple with the fact that Smith had no recollection of the sheets around the time of Leslie's death and had no explanation for how her memory improved more than two years later. (R-1871).

D. The Verdict Was Against The Weight Of The Evidence

The deficiencies in the People's proof are magnified when its weight is considered. The People claim their case was "essentially undisputed by credible defense proof" (People's Br. 40), but once again their arguments are belied by the record.

First, the People denigrate Spitz's testimony as "ludicrous" (People's Br. 41), but fail to acknowledge that his opinion was identical to Stoppacher's initial determination that Leslie died from a fall. Spitz identified innocent explanations for Leslie's injuries, and certainly demonstrated that there was no reason to favor one medical explanation over the other. *See*

People v. Lamar, 83 A.D.3d 1546, 1547 (4th Dep't 2011) (where circumstantial evidence "support[s] equally strong inferences" of guilt or innocence, reversal is required).

Second, the People claim that Kish spent the majority of his testimony "criticizing the crime scene documentation and making inconclusive findings." (People's Br. 41). It is unclear how this helps the People's case. Kish opined that the bloodstains in the bathroom and bedroom were consistent with Neulander's account. (R-2353-54, 2367-71). He was not willing to mimic Green's junk science, and he moderated his conclusions in light of the incomplete scene investigation.

Third, the People question whether Leslie suffered from vertigo (People's Br. 42), but the evidence on this point was substantial and included testimony from Leslie's sister, her personal trainer, and a longtime friend. (Def. Br. 9). Even a prosecution expert opined that vertigo could "certainly" cause a person to fall (R-1759), and Leslie's vertigo would rationally explain why Leslie might have experienced a significant fall in the shower.

Finally, the People improperly suggest that Neulander should be faulted for not doing more to exonerate himself. (People's Br. 43 ("The timeline in events in this case shows that the People provided defendant with numerous opportunities to dispel the extremely suspicious circumstances surrounding his wife's death."); *see also* People's Br. 39 ("Defendant did not dare to testify [o]n his own behalf and instead, sadly, had his daughter take the stand in his defense.")). But the People had the burden of proving guilt beyond a reasonable doubt; Neulander had no obligation to prove his innocence, or to testify. The People cannot overcome their failure to prove their case by casting aspersions on Neulander's exercise of his constitutional rights. The fact that they resort to such improper arguments reveals just how deficient their proof was.

II. JUROR MISCONDUCT IMPAIRED NEULANDER'S RIGHT TO AN IMPARTIAL JURY

The trial court found that juror Johnna Lorraine engaged in improper text conversations throughout trial with friends and family who invariably expressed negative views about Neulander and the defense, and that she committed further misconduct when she failed to report these conversations to the court. It further found that Lorraine deleted evidence of her misconduct and that she falsely testified under oath that she had always followed the court's instructions. This misconduct posed a "substantial risk of prejudice" to Neulander's rights, *People v. Brown*, 48 N.Y.2d 388, 394 (1979), and Neulander's conviction should be vacated.

The People simply ignore these findings, the key legal errors identified in the opening brief, and the authorities that compel reversal here. Instead, they repeat the trial court's errors.

1. The People's analysis rests on a misunderstanding of the law in two key respects.

First, the People blithely ignore that Lorraine's dishonesty and efforts to cover up her misconduct create an independent risk of prejudice. (Def. Br. 32-33 (collecting cases)). A juror whose deceptions help ensure that she remains on a jury presents the risk that she has a specific "view on the merits," *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989), or a "personal bias against the defendant," *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir. 1998) (en banc), and, by failing to comply with a court's admonitions, cannot be trusted to fairly execute "her responsibilities as a juror," *id.* The People completely ignore these cases, and the trial court's express findings about Lorraine's dishonesty and obstruction of justice.

Second, they contend that the "'real evil' the court's instruction [to the jury] intend[s] to avoid involves jurors obtaining outside information" and argue that the text messages Lorraine received contained no such information. (People's Br. 52). The People simply ignore that a

defendant's right to an impartial jury is also undermined where a juror is exposed to third-party opinions about the defendant or the defense. (Def. Br. 31 (collecting cases)).

This case illustrates why. After confirming that the court would not review Lorraine's text messages, Flanagan told Lorraine that she had "read so[] much" about Neulander's prosecution and knew "every possible detail that the public"—not the jury—"[wa]s allowed to know." (R-3418). She wrote that she was "anxious to hear someone testify against Jenna" and that her "mind [was] blown that [Jenna was not] a suspect." (R-3418, 3422). These messages were sent during and immediately after Jenna's testimony, casting doubt on a critical aspect of the defense at a critical time.

The text messages from other people further increased the risk of prejudice. Even if those messages did not contain extra-record facts, they contained negative opinions about Neulander and, together with the messages from Flanagan, left no doubt that Lorraine's family and friends thought he was guilty. This risked that Lorraine, whether consciously or not, would conform her views to theirs. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016) (discussing ways in which jurors may conform consideration of case to "apparently innocuous comments" or other people's "emotions" toward a particular verdict).

As a result of their crabbed view of the law, the People ignore the most troubling risks to Neulander's right to an impartial jury, and fail to give due consideration to the misconduct that requires Neulander's conviction to be set aside.

2. The People's strained efforts to downplay the seriousness of Lorraine's misconduct fare no better.

First, the People ignore the trial court's findings regarding Lorraine's efforts to cover up her misconduct. The court agreed that Lorraine "engaged in imprudent text conversations" (R-

35) and that she understood that the rules prohibited her third-party conversations (R-24). The court also found that Lorraine committed misconduct "by failing to report her missteps in a timely manner, despite the fact that she had ample opportunity to do so." (R-35). And the court held that in deleting evidence from her phone, Lorraine "clearly displayed a consciousness that she had engaged in misconduct." (R-24). Notably, Lorraine's sworn assertion that she had "followed [the court's] instructions" at all times (R-3321) came *after* she had deleted her phone data and thus Lorraine was already "conscious[]" that she had violated these rules (R-24).

The People fail to acknowledge these findings and seek to downplay the significance of the deleted messages, arguing that if Lorraine had deleted the messages in preparation for her meeting with the prosecutor, "she would have deleted everything on her phone." (People's Br. 54 (internal quotations marks and brackets omitted)). But if anything, partially deleting the messages with Flanagan reflects a more precise deception on Lorraine's part: DiTota was not aware of the messages with Lorraine's father or Sampere, allowing Lorraine to delete these messages in their entirety. In contrast, Lorraine had shared one of Flanagan's messages with DiTota (R-19), and DiTota referred to this in her affidavit (R-3085). As a result, Lorraine could not delete all of Flanagan's messages, and instead presented an edited version of the conversation with Flanagan to the prosecutor.

Second, the People's attempts to recharacterize the text messages lack common sense. The People suggest that "make sure he's guilty!" was merely "an advisement to ensure defendant's guilty beyond a reasonable doubt before convicting him" (People's Br. 48); that Flanagan's bewilderment that "that [Jenna was not] a suspect" was but a "neutral observation" (People's Br. 52); and that Sampere's references to Neulander as "scary" were "innocuous" because "Sampere's texts made it clear that [Sampere] did not know what defendant looked like

and [Lorraine's] response made it clear that she already knew what defendant looked like." (People's Br. 49). Lorraine herself did not interpret the messages this way, and the People's magical thinking cannot strip these messages of their obvious bias against Neulander.

Third, that Lorraine did not reveal her own opinions in the text messages (People's Br. 50-51, 53), and told her friends that she would have more to tell them once the case was done (People's Br. 52), does not mean that the messages she received were not prejudicial. That she could have engaged in additional misconduct does not obviate the prejudice Neulander suffered from the misconduct she plainly did commit. Moreover, the suggestion that Lorraine appreciated the court's rules (People's Br. 52 ("[The] text messages also showed that she understood that she should not consider any prejudicial information from outside sources . . . .") is absurd. Lorraine's own conduct, both in communicating with third-parties and in covering up those communications, reveals that she was unable or unwilling to observe the court's admonitions.

Finally, the cases sustaining convictions that the People say involve similar misconduct are easily distinguishable. Most importantly, not a single case involved a juror who hid evidence of her misconduct and lied about it to the court. Given Lorraine's undisputed cover-up efforts, analogizing this case to cases that did not involve such deceptions represents a failure to evaluate this case on its "unique facts." *People v. Clark*, 81 N.Y.2d 913, 914 (1993).

Moreover, the content and context of the communications in the People's cases are quite different, and none involve private conversations between close individuals as was the case here. For example, in *People v. Wilson*, the messages had nothing to do with the defense or the defendant, but concerned "trials in general," and the juror never engaged the individuals posting publically on Facebook in conversation. 93 A.D.3d 483, 485 (1st Dep't 2012). In *People v. Martin*, one juror told other jurors *after the verdict* that he had learned the defendant was

"crazy," but provided undisputed testimony that he had made this up in order to comfort "several of the other jurors [who] were visibly upset." 177 A.D.2d 715, 716 (2d Dep't 1991). In *People v. Rios*, a juror sent a Facebook request to a trial witness, but the request contained no content and there was "no communication" between the juror and the witness prior to the rendition of the verdict. 26 Misc. 3d 1225(A), at *4 (Sup. Ct., Bronx Cnty. 2010). Finally, in *People v. Jamison*, no one spoke to the juror about the case—eliminating the prospect that she would be influenced by others; the juror merely shared the basic facts of the case and unsuccessfully asked a question about DNA evidence at a dinner. 24 Misc. 3d 1238(A), at *3 (Sup. Ct., Kings Cnty. 2009).

People v. Anderson, in contrast, undercuts the People's claims. 123 A.D.2d 770 (2d Dep't 1986). There, a number of trial spectators stared at certain jurors in the elevator, and one juror was asked "what do you think about the case" by someone claiming to be the defendant's cousin. *Id.* at 771. The jurors reported these contacts to the court, and the court held an inquiry. The jurors assured the court "that they could still be fair and impartial, and could determine the guilt or innocence of the defendant based on the evidence." *Id.* Satisfied, the court denied the defendant's motion for a mistrial. *Id.* at 772. The Appellate Division reversed, holding that the trial court had impermissibly circumscribed defense counsel's ability to question the jurors. *Id.* at 774. It explained that a juror's assurances that "he could render an impartial verdict based solely on the evidence . . . have no talismanic power to convert a biased juror into an impartial one." *Id.* (internal quotation marks omitted). The reversal also implicitly recognized that even "stares and a very cursory conversation" in which a juror rebuffed a neutral question about the case could so prejudice a defendant that the verdict would need to be set aside. *Id.* at 773.

The remaining cases the People cite are even further afield from the circumstances here. *See People v. Williams*, 50 A.D.3d 472, 474 (2008) (1st Dep't 2008) (no prejudice from incident

that "was, if anything, beneficial to defendant"); *People v. Smith*, 290 A.D.2d 391, 391 (1st Dep't 2002) (jurors reported to court that spectator sought their opinion on case and they declined to speak with him); *People v. Cilberg*, 255 A.D.2d 698, 700 (3d Dep't 1998) (prior to deliberations, court inquired into comment from one juror to another juror and determined that jurors had not prejudged the case); *People v. Leonard*, 252 A.D.2d 740, 741 (3d Dep't 1998) (no prejudice from comment by juror to court staff *after deliberations*); *United States v. Brown*, 79 F.2d 321, 324 (2d Cir. 1935) (juror's vague comment about likely outcome of trial did not "show[] a premature conclusion by the jury").

3. Ultimately, the People implore this Court to defer to the trial court. (People's Br. 44 (citing principle that trial court's "findings of fact" are generally "upheld on appeal")).

But this appeal does not turn on disputed findings of fact. The text messages speak for themselves, and the trial court agreed that Lorraine engaged in prohibited conversations and attempted to hide them from the court. Instead, the court's errors were principally legal ones—namely, it limited its review to whether the text messages contained specific information beyond the record, and ignored the risk of prejudice created by Lorraine's cover-up efforts. (Def. Br. 31-33). This Court should not defer to the trial court's flawed application of the law.

Nor does the trial court's limited credibility determination preclude reversal. Although there are reasons to reject Lorraine's testimony that she based her vote to convict strictly on the trial evidence (Def. Br. 35), the Court of Appeals has made clear that reversal may be warranted even where the trial court has accepted such testimony. *See People v. Crimmins*, 26 N.Y.2d 319, 324 (1970); *People v. Cocco*, 305 N.Y. 282, 286 (1953). The People ignore these authorities and, like the trial court, ignore the "*subconscious* effect" that the text messages might have had. *Crimmins*, 26 N.Y.2d at 324.

In light of the multiple biased communications Lorraine received and her efforts to hide those communications from the court, the risk of prejudice is substantial, and Neulander's conviction should be vacated.

III. A PATTERN OF PROSECUTORIAL MISCONDUCT DEPRIVED NEULANDER OF A FAIR TRIAL

In his closing argument, the prosecutor expressed his personal opinions on pivotal issues, acted as an unsworn witness, misrepresented the record, encouraged improper use of impeachment evidence, and appealed to the jury's sympathy. The People do not grapple with any of the authorities holding that this misconduct deprived Neulander of a fair trial (Def. Br. 36-45), nor do they identify any caselaw of their own that would excuse the prosecutor's behavior. Instead, the People try to minimize the prosecutor's improprieties by misrepresenting what the prosecutor did on summation and ignoring certain instances of misconduct in their entirety. Their arguments are belied by the record and contrary to the law.

Although trial counsel failed to object to any of the prosecutor's misconduct, this Court's precedent makes clear that review in the interest of justice is warranted. (Def. Br. 45-46). The People do not oppose such discretionary review. The proof in this case was hardly overwhelming, and Neulander should be granted a new trial.

1. *Personal opinions*. The People do not dispute the firm prohibition against prosecutors sharing personal opinions with the jury, particularly given "the danger that the jury, impressed by the prestige of the office of the District Attorney, will accord [them] great weight." *People v. Paperno*, 54 N.Y.2d 294, 301 (1981). Instead, the People attempt to recast the prosecutor's opinions as something else entirely.

First, the People argue that the prosecutor's statement that he "kn[ew] Jenna thought her dad killed her mother" (R-2882) was simply a "stylistic" and "proper" way to comment on

alleged inconsistencies in Jenna's testimony. (People's Br. 57). But there was no evidence supporting the prosecutor's inflammatory claim about Jenna's state-of-mind, and the prosecutor was certainly not permitted to tell that jury that he thought, let alone "knew," what Jenna was thinking. The prosecutor's statement is no different from the prosecutor's comment in *People v. Tatum* that "the attorneys for the defendants . . . didn't believe the defendants' story, and yet expected the jury to believe it." 54 A.D.2d 950, 950 (2d Dep't 1976) (reversing in interest of justice). The People ignore this case, and the only authority they cite stands for the uncontroversial proposition that using the "personal pronoun 'I'" does automatically render every statement a personal opinion. *People v. Grajales*, 294 A.D.2d 657, 658 (3d Dep't 2002).

Second, the People similarly attempt to recast the prosecutor's opinions about the vertigo evidence as a fair response to the alleged "incredibility of [the vertigo] defense." (People's Br. 57). But the fact that the defense pointed to Leslie's vertigo as a possible explanation for her fall in the shower does not open the door to statements of opinion, and the prosecutor's statements—that it appeared to him that Leslie simply "tripped on a boardwalk" in Israel, and that the defense had presented "silly nonsense about a vertigo attack"—are precisely what the law prohibits. (Def. Br. 36-37 (collecting cases)).

The People also claim that even if the prosecutor had "denigrated defendant's vertigo 'defense,' it was not a pivotal aspect to defendant's case." (People's Br. 57). But Leslie's vertigo provided a clear explanation for her fall, and the People cannot dismiss it so cavalierly.

Finally, the People suggest that labeling defense arguments about a fall in the shower "[a]bsurdities" (R-2866) was valid argument that "the items found in the shower were not scattered about as if someone had just fallen in the middle of taking a shower." (People's Br. 57). As the record shows, the prosecutor said nothing of the sort (R-2866), and prosecutors are

prohibited from denigrating the defense in such a manner. *See, e.g.*, *People v. Gordon*, 50 A.D. 3d 821, 822 (2d Dep't 2008) (improper to "characteriz[e defense] as 'ridiculous' and 'absurd'").

2. *Acting as an unsworn witness.* The People try to evade the prosecutor's improper reenactment of Jenna's testimony by denying it was a reenactment. Instead, they claim, the prosecutor simply gave a "verbal reiteration of Jenna's testimony" and performed "a few minor physical actions, such as crouching down and putting his arms out." (People's Br. 58).

But the People tellingly fail to address a key point: the prosecutor started his phone's timer, placed the phone on the jury box, walked through Jenna's purported movements, and showed the jury the final time. (R-2882-83, 4637-38). As in *People v. Stanley*, this timed reenactment of a witness's testimony "created nonrecord evidence, which defendant could not test by cross-examination," and in "simulating the witness's conduct," the prosecutor became an unsworn witness. 87 N.Y.2d 1000, 1001 (1996). That the prosecutor did not "measure[] out the distance of the Neulander master suite in the courtroom" or account for other variables (People's Br. 57) does not mean that a reenactment did not take place. *Cf. People v. Melendez*, 140 A.D.3d 421, 425 (1st Dep't 2016) (improper demonstration where prosecutor used rolled up paper to simulate gun flashes). On the contrary, it reinforces that the reenactment was inaccurate, and highlights why creating misleading and untested evidence during summation is prohibited.

3. *Misrepresentation of facts.* Remarkably, the People make further misrepresentations in their brief in order to try to paper over their misrepresentations at trial.

First, the People purport to contest that the prosecutor misrepresented the defense expert's time of death testimony (People's Br. 58), but the record speaks for itself. Spitz testified that Leslie's time of death was "7 to 7:30." (R-2504). The prosecutor told the jury that Spitz had testified that her death "occurred *much, much earlier* than 7:00 a.m." (R-2880 (emphasis

added); *see also* R-2869 ("If Leslie Neulander has fallen to the ground, hit her head, split her skull open, as even the defense expert says has to have happened before 7:00 a.m. . . .")).

The People also contend that, even if the prosecutor misrepresented the evidence, "what the lawyers said" is of little consequence because the court instructed that the jurors' "recollection, understanding and evaluation of the evidence control[]." (People Br. 58). But these are standard instructions given in every case and do not affect the well-settled principle that "[s]tatements that misrepresent evidence central to the determination of guilt" are grounds for retrial. *People v. Wright*, 25 N.Y.3d 769, 780 (2015); *see also People v. Redd*, 141 A.D.3d 546, 549 (2d Dep't 2016) (granting new trial where prosecutor, *inter alia*, misstated time-of-death testimony). The People do not cite a single case holding that these standard instructions remedy the misconduct that occurred here.

Second, the People argue that the prosecutor did not misrepresent the blood evidence because his comments "were based on proof presented at trial in the form of photographs." (People's Br. 59). This is false.

The prosecutor's repeated claim that there was not blood on the coffee cup lacked a record basis because the cup was never collected or tested; no witness testified that the cup was blood free; only parts of the cup were photographed and the photographs that did exist showed unexplained discoloration on the front; and an emergency responder admitted to handling the cup before it was photographed. (Def. Br. 40-41). Moreover, the inference that the prosecutor was urging—that the purported lack of blood proved that the cup was placed on the nightstand after an assault—was additionally misleading because the photographic evidence did not clearly depict blood on most of the items on the nightstand (i.e., the alarm clock, answering machine, glasses, iPad, telephone, and television remote) or on the nightstand itself. (R-3802).

The prosecutor's claims that there was blood under Leslie's pajamas and in the water closet were equally baseless. None of the scene photographs depict what was under the pajamas or document blood in the water closet. (R-3749-53, 3758-61, 3776-77, 3978-87, 4191). Furthermore, no emergency responder looked under the pajamas, the pajamas were not collected for testing, and a prosecution witness testified that there was no blood inside the water closet. (R-1309).

The photographs also provided no basis for the prosecutor to instruct the jury to "look at" the pictures of the south bedroom wall and conclude that the blood depicted was "all non diluted." (R-2874). The People claim that "[d]efendant's own witness stated that the blood did not appear to be diluted in the photographs" (People's Br. 59), but this misrepresents Kish's testimony. He explained that the "images that were provided, [which] have no real close-up images of those particular stains," did *not* permit a definitive determination regarding dilution. (R-2369). He emphasized that because he "couldn't zoom in on [the stains]" to closely examine them, it was impossible to "exclude [the possibility of dilution] to any degree of certainty." (R-2369). The prosecutor told the jury the exact opposite.

Third, the People pretend that, in discussing Neulander's statements to law enforcement, the prosecutor merely "assert[ed] that there were discrepancies and [it was] for the jury to accept or reject this argument based on a review of the statements that were admitted at trial." (People's Br. 59). This is not what happened. The prosecutor repeatedly told the jury that Neulander changed his account to conform to new facts about the coffee cup that Neulander supposedly learned during the course of the investigation. (Def. Br. 42). In so doing, the prosecutor not only misrepresented Neulander's statements during his December 2013 and February 2014 interview, but fabricated the supposed impetus to lie. (Def. Br. 42-43). The People ignore these

facts as well as the clear authority holding that such comments are improper. *See People v. Negron*, 161 A.D.2d 537, 538-39 (1st Dep't 1990) (vacating conviction where prosecutor suggested that defendant conformed his testimony where defendant made statements before alleged impetus for fabrication occurred).

Finally, the People argue that the "photographic evidence presented at trial" (People's Br. 59) justified telling the jury that the bathroom phone was "clearly . . . working" (R-2865). But nothing in the cited photograph—even if one looks "very, very closely," as the prosecutor encouraged (R-2865)—sheds any light on whether the phone worked or not. (R-3770).

4. *Improper use of impeachment evidence.* The People do not contest that the prosecution used impeachment material as affirmative evidence in his summation, but rather appear to argue that after the prosecutor cross-examined Jenna with the statements, the statements were somehow incorporated into her testimony and any use of them was fair game. (People's Br. 59). This reflects a profound misunderstanding of the law. As the court instructed the jury,

> If a witness has made such inconsistent statements or omissions, you may consider whether and to what extent they affected the truthfulness or the accuracy of that witness's testimony here at trial. The contents of a prior statement are not proof of what happened. You may use evidence of a prior inconsistent statement only to evaluate the accuracy or the truthfulness of that witness's testimony here at trial.

(R-2901). And precisely because Jenna's prior statements could not be used "as affirmative evidence," they were not admitted into the record. (R-2779).

When the prosecutor used Jenna's prior statements to offer an alternative account of Jenna's actions during the 911 call (R-2883-84, 2886), the prosecutor advanced those statement as, in the court's words, "proof of what happened." Doing so is prohibited. *See, e.g.*, *People v.*

Romandette, 111 A.D.2d 1040, 1041 (3d Dep't 1985) (improper for prosecutor to cite impeachment evidence as direct evidence during summation).

5. *Appeal to sympathy*. Finally, the People claim that the prosecutor's final comments were not an appeal the jury's sympathy, but an "appropriate[]" argument about what the trial evidence established. (People's Br. 60).

Tellingly, the People leave out what the prosecutor actually said: "I told you Leslie Neulander would be the most important witness in this case. Please, please just try to hear her. She's telling you who did this with her blood, her struggle and her wounds. Please listen." (R-2886-87). Such an emotional appeal to achieve justice for a victim is exactly what the caselaw, which the People conspicuously ignore, prohibits. (Def. Br. 44-45).

* * *

Remarkably, the prosecutor's pattern of misconduct continues into these proceedings. In defending against Neulander's legal insufficiency and weight of the evidence claims, the People improperly, and repeatedly, refer to the results of a polygraph test. (People's Br. 13, 35, 43). The polygraph results—and certainly the People's characterization of those results—are not part of this case, because polygraph examinations are so widely understood to be unreliable that they are inadmissible throughout the United States. *See People v. De Lorenzo*, 45 A.D.3d 1402, 1402 (4th Dep't 2007); 22 Fed. Prac. & Proc. Evid. § 5169.3 (2d ed.).

It is plain that the People invoke the polygraph to poison the well for any new trial, just as they did in responding to the 440 motion below. (R-4721, 4752-53). This tactic has already had its desired effect, with the headline in the local story covering the 440 motion reading "DA: Neulander failed polygraph test in wife's murder." Douglass Dowty, *DA: Neulander failed polygraph test in wife's murder (takeaways from legal battle)*, Syracuse.com (Apr. 27, 2016),

http://www.syracuse.com/crime/index.ssf/2016/04/da_neulander_failed_polygraph_test_in_wife s_murder_takeaways_from_legal_battle.html. It also leaves no doubt about the prosecutor's willingness to act improperly in order to ensure a conviction in this incredibly weak case.

IV. TRIAL COUNSEL'S ERRORS THROUGHOUT TRIAL CONSTITUTED INEFFECTIVE ASSISTANCE

A. Trial Counsel Failed To Object To Extensive Prosecutorial Misconduct

Although the People recognize that "an attorney can be found ineffective for failing to object to prosecutorial misconduct," they argue that this case involves "isolated errors" that are insufficiently "grievous" to constitute ineffective assistance. (People's Br. 63).

But the prosecutor's misconduct was far from isolated and touched on every important aspect of this case, including the medical evidence (misrepresentations of fact), the blood evidence (misrepresentations of fact), Leslie's vertigo (personal opinions), Neulander's statements (misrepresentations of fact), and Jenna's testimony (personal opinions, improper reenactment, misuse of impeachment evidence).

Such extensive misconduct is not even necessary, as cases like *People v. Ramsey*, 134 A.D.3d 1170 (3d Dep't 2015), and *People v. Rozier*, 143 A.D.3d 1258 (4th Dep't 2016), make clear. The People try to distinguish these cases on the ground that they "involve two very clear instances of misconduct" and, in contrast, Neulander has not identified any comments that were a "'flagrant distortion' of evidence or had a 'detrimental effect' on defendant." (People's Br. 63 (citations omitted)). Not so. The prosecutor's misconduct was detrimental precisely it because concerned all of the key issues before the jury, and examples of "flagrant distortions" include the prosecutor's misrepresentations of the blood evidence and his blatantly false claims about the defense expert's time of death testimony. Moreover, the misconduct here was much more extensive than the misconduct in *Ramsey* and *Rozier*.

The cases that the People cite are easily distinguished. (People's Br. 63). *People v. Henry* did not even involve prosecutorial misconduct, but concerned whether counsel was ineffective for calling a witness who buttressed the defendant's principal defense but was discredited as an alibi. 95 N.Y.2d 563, 566 (2000). In *People v. King*, the Court of Appeals considered whether counsel rendered ineffective assistance because he failed to object to comments such as "hell hath no fury as a woman scorned," which wrongly implied that the defendant, a woman, was particularly capable of committing the charged crimes out of jealousy. 27 N.Y.3d 147, 159 (2016). Although the Court agreed the comments were improper, it recognized a "strategic [reason] not to object to the inflammatory comments out of a reasonable belief that the jury would be alienated by the prosecutor's boorish comments." *Id.* Given this, and the isolated nature of trial counsel's error, it held that counsel had not rendered ineffective assistance. *Id.* The prosecutor's comments here did not stand to backfire, and there was no strategic reason for trial counsel to let them stand unchallenged.

B. Trial Counsel Failed To Seek Preclusion Of Green's Methodologically Flawed Testimony

The People do not even pretend to defend the various methodological flaws infecting Green's testimony. Instead, they argue that moving to preclude her testimony would have been pointless because "evidence of blood spatter interpretation . . . has long been deemed reliable." (People's Br. 64 (internal quotation marks omitted)). This misses the point. Even where a category of expert testimony is generally reliable under *Frye*, the trial court must determine whether "accepted techniques were employed" in the particular case. *People v. Middleton*, 54 N.Y.2d 42, 50 (1981). Neulander's claim has always focused on this "separate and distinct" admissibility requirement, *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006); he contends that counsel was ineffective "because he failed to argue that the specific defects in Green's

methodology made her testimony inadmissible" (R-4668; *see also* R-4844-45). The People simply ignore Neulander's actual argument, and misplace their reliance on cases rejecting *Frye* challenges. *See People v. Whitaker*, 289 A.D.2d 84 (1st Dep't 2001); *People v. Barnes*, 267 A.D.2d 1020, 1021 (4th Dep't 1999).

As a result, the People do not dispute that Green's testimony was unreliable because she failed to account for relevant variables (Def. Br. 50-52); made unfounded assumptions (*id.* at 52-53); and failed to test alternative explanations (*id.* at 53-55). In fact, they provide only one offhand response to these well-documented flaws: it is "unrealistic" to expect an experiment to "mimic the exact event that occurred in order to be valid, particularly in blood spatter cases." (People's Br. 64).

This statement at most concerns the first of the three independent grounds for precluding Green's testimony, and even as to that, it falls short. The law is clear that an expert may not offer an experiment as proof of how a particular event occurred unless there is "substantial similarity" between the experiment and the conditions under which the event might have occurred. (Def. Br. 50-51 (collecting cases)). The People, as they did below, effectively agree that Green's experiments lacked the requisite similarity. (People Br. 64; R-4766 ("At no point during her testimony did Karen Green state that her experiment was setup to recreate what she believed occurred on September 17, 2012."). Because Green failed to design an experiment consistent with that legal requirement, her testimony should not have been admitted.

Finally, the People urge this Court to adopt the trial court's determination that trial counsel made a tactical "decision not to try to preclude Green's testimony" because he wanted "the jury to hear from both Green and Kish." (People's Br. 64). Yet this is based on the same flawed premise that the basis for preclusion was *Frye* and, therefore, precluding Green would

have resulted in preclusion of Kish as well. None of Green's methodological defects infected Kish's testimony, and trial counsel could have sought preclusion of Green's unreliable testimony without undermining his ability to call Kish. There was no strategic reason not to do so.

C. Trial Counsel Failed To Call Pizzola And Knapp Based On A Misunderstanding Of The Law

Trial counsel admitted on the record that he believed he was legally barred from calling Pizzola and Knapp. The People cannot recast trial counsel's clear legal error as a sound strategy.

1. The record refutes the People's argument that trial counsel made a tactical decision not to Pizzola and Knapp as witnesses, as trial counsel admitted to the Court that he believed he had no legal authority to subpoena either expert to testify. (R-2758). As a result, trial counsel was ineffective for having proceeded based on a flawed understanding of the law. (Def. Br. 60 (collecting cases)).

The People cannot bypass the relevant authorities by pretending that trial counsel never confessed to his error. For example, in *People v. Cyrus*, the trial court had rejected the defendant's ineffective assistance claim on the ground that defense counsel had a "'tactical reason' for making the inquiry" that opened the door to prejudicial testimony from a prosecution witness. 48 A.D.3d 150, 158 (1st Dep't 2007). The Appellate Division reversed. It held that because "counsel admitted on the record that he 'inadvertently' opened the door to the testimony," the alleged tactical reason was "refuted by the record." *Id.*; *accord People v. Noll*, 24 A.D.3d 688, 689 (2d Dep't 2005) (counsel's failure to request *Huntley* hearing could not be considered a "strategic decision" because counsel admitted on record that he only learned of defendant's statements after trial had begun).

Trial counsel admitted to his error on the record. Inaccurate post-hoc rationalizations on his behalf cannot magically make that admission disappear.

2. Even if trial counsel had chosen not to call Pizzola and Knapp for strategic reasons, his purported strategy—using the reports on cross-examination, requesting a missing witness charge, pointing out the People's failure to call Pizzola and Knapp during counsel's summation (People's Br. 66)—was not one a reasonably competent attorney would pursue.

First, the cross-examination strategy was bound to fail, as the record demonstrates. Trial counsel's attempted use of the reports was frustrated by repeated objections, all of which the court sustained. (R-1612-13, 2130-31, 2137-38, 2198). The sole question trial counsel succeeded in asking backfired, as it permitted Stoppacher to suggest that Pizzola had determined that "the blood spatter around the bed . . . had features of blunt force injury." (R-1613). Yet this was a misleading description of Pizzola's report, which recognized that these stains might also have "originated from the removal of a bloody garment in the area between the bed and ceiling/wall" and advised that any analysis of the blood evidence was "hindered since the scene was incompletely investigated." (R-4316-17). By the close of the People's case, it was obvious (as it should have been from the get-go) that the cross-examination "strategy" was doomed by hearsay rules. There was no justification for trial counsel's failure to call Pizzola and Knapp at that point, and the People do not even try to identify one.

Second, trial counsel's request for a missing witness charge was not a reasonable strategy because the request was certain to be rejected. In fact, one of the many reasons why the Court declined to give a missing witness charge is that "the defense could have called Knapp and/or Pizzola as witnesses on behalf of the defendant." (R-2777). This is precisely the legal issue that trial counsel failed to appreciate.

Third, pointing out the People's failure to call Pizzola and Knapp during summation was of no value because the jury had not been appraised of the myriad ways in which their reports undercut the People's case.

3. The People also suggest that trial counsel strategically chose to "call Paul Kish to attack the People's blood spatter evidence and the incomplete scene investigation instead of calling Officer Knapp who only would have provided cumulative testimony." (People's Br. 65). In so arguing, the People concede that the substance of Knapp's report was favorable to defendant. Yet they wrongly suggest that trial counsel had to, and in fact did, choose between the two witnesses. The witnesses would have served different purposes, and only Knapp's testimony could demonstrate that the People cycled through experts until they found one who would ignore the limitations of the blood evidence and offer bogus experiments as definitive proof of Leslie's murder.

4. Finally, the People contend that calling either expert as a witness would have been a "disastrous strategy" because, "[w]hile some aspects of Pizzola and Knapp's reports may have helped defendant, their reports supported the prosecution's theory." (People's Br. 65).

The People identify no aspect of Knapp's report containing disastrous information, but argue that Knapp "did not have the qualifications that the other experts possessed." (People's Br. 65). The People provide no factual basis for this claim, and in fact they were the ones who asked Knapp to perform a "Bloodstain Interpretation Examination" in the first place. (R-4332).

As to Pizzola, they argue that his report was "more damning than Green's trial testimony since he went one step further than Green and asserted that the blood staining on the drawn shades behind the bed were likely not in that position when the blood spatter was deposited on them." (People's Br. 66-67). What Pizzola actually said is that "there are many different

positions of the shade that would permit its various facets to be struck by the droplets," and the claim that the "semi-open position" depicted in scene photographs might have prevented their deposit was "difficult to assess." (R-4622).

In any event, this was but a minor point in a report that was critical of the scene investigation and acknowledged innocent explanations for the bloodstains. (Def. Br. 58, 61). The defense did not need Pizzola to fully exculpate Neulander. His testimony would have materially undermined Green's testimony, and even if it was inconclusive in certain respects, that alone is sufficient to establish reasonable doubt.

In this sense, this case is easily distinguished from *People v. Morgan*, 77 A.D.3d 1419 (4th Dep't 2010). (*See* People's Br. 65). There, the court determined that counsel was not ineffective for failing to call a particular witness because that witness would have undercut the defense case by "corroborat[ing] the People's eyewitnesses." *Id.* at 1420. Pizzola and Knapp could not definitively say that the blood evidence proved homicide. Such testimony would not have "corroborated" the People's case, but undermined it, supporting the defense argument that the blood evidence was insufficient proof of a homicide and demonstrating that the prosecution had shopped for a witness who was willing to overlook the investigative shortcomings and ignore the innocent explanations for the bloodstains at issue.

D. Trial Counsel Failed To Use Impeachment Material To Cross-Examine Leestma

The People say that they "do not concede" that Leestma's red neuron testimony was inconsistent with his prior statements, but do not explain how the testimony can be reconciled with his earlier statements. (People's Br. 67). The record speaks for itself. Whereas Leestma testified at trial that red neurons take "at least a couple hours" to develop, he previously testified that they could "develop in as little as thirty minutes" (R-4789; *see also* R-4796-97, 4805), and

opined in his report and textbook that they could develop in "an hour" (R-4417-18, 4468). The People's efforts to minimize trial counsel's glaring failure to use impeachment material are unavailing.

1. The People argue that trial counsel made a "reasonable and strategic" decision to focus his cross-examination on aspects of Leestma's testimony that "he believed he could discredit" and to "avoid highlighting the red neuron testimony by sparring with Dr. Leestma who already conceded to the jury that other pathologists might disagree with his timeframe." (People's Br. 67). This makes no sense. The prior inconsistent statements consisted of Leestma's own words, and there was nothing but upside to showing the jury that Leestma had conformed his opinion about red neurons to better fit the People's theory of the case.

As such, this case is indistinguishable from those finding counsel's failure to impeach a witness with prior inconsistent statements to be ineffective assistance. (Def. Br. 63). The People ignore these authorities, and the case they cite is entirely inapposite. (People's Br. 67 (discussing *People v. McIntosh*, 274 A.D.2d 740 (3d Dep't 2000)). The defendant in *McIntosh* claimed that his trial counsel was ineffective for not cross-examining a witness at a suppression hearing with the witness's allegedly inconsistent statements from a preliminary hearing. 274 A.D.2d at 742. But the court rejected the defendant's claim because the transcripts revealed *no* inconsistencies. *Id.* Here, the opposite is true, and there was no reason not to impeach Leestma with his inconsistent statements.

2. The People argue that there was other evidence relating to time of injury at trial (People's Br. 68), presumably to suggest a lack of prejudice.

As discussed above, however, this evidence was equivocal and hardly proof of the People's alleged timeline of events. (*See supra*, Point I.B). Red neurons were the centerpiece of

the timeline that the prosecutor presented to the jury. The prosecutor zeroed in on Leestma's red neurons testimony during his closing argument (R-2881), and it was the only expert testimony that the jury reviewed (R-3018). There was no reason for trial counsel not to impeach Leestma with his own statements, and the prejudice that Neulander suffered after counsel failed to do so is clear.

3. Finally, the People fault the defense for failing to secure an affidavit "from an expert stating disagreement with Dr. Leestma's testimony." (People's Br. 68 (citing *People v. Gross*, 26 N.Y.3d 689 (2016)). This makes no sense. Unlike *Gross*, this is not a case in which the defendant claims that counsel should have called an expert witness to testify on a particular topic without providing any foundation for that expert's expected testimony. Trial counsel had access to the prior statements that contradicted Leestma's testimony at trial. He simply, and inexplicably, failed to use them.

E. Trial Counsel's Cumulative Errors Rendered His Representation Ineffective

When considered together, trial counsel's errors—his failures to object to rampant prosecutorial misconduct, to object to blood spatter testimony based on a patently unreliable methodology, to call valuable witnesses due to a flawed understanding of the law, and to use available impeachment material—are more than sufficient to warrant reversal of Neulander's conviction. The People completely ignore the cumulative effect of these errors, and instead contend that other aspects of trial counsel's performance made up for his numerous deficiencies. (People's Br. 61-62).

But a defendant's right to effective assistance is not satisfied simply because his attorney did not fail at every step along the way. The law does not set such a low bar. A single error can mandate reversal even if there are other positive aspects to counsel's performance.

For instance, in *People v. Wright*, the Court of Appeals found counsel ineffective based only on his failure to object to the prosecutor's improper closing remarks about the strength of the DNA evidence. 25 N.Y.3d at 780. That defense counsel had pursued, until the prosecutor's summation, "a rather effective defense strategy of identifying the weaknesses of the DNA evidence" did not stop the Court of Appeals from vacating the conviction. *Id.* at 783.

In *People v. Rozier*, counsel similarly failed to object to the prosecutor's comments regarding the DNA evidence during summations. 143 A.D.3d at 1259. This Court found counsel ineffective, even though it identified no other deficiencies in counsel's trial performance and even though counsel had successfully moved to suppress inculpatory statements that the defendant made following his arrest. *Id*. And in *People v. Brown*, this Court found ineffective assistance based solely upon trial counsel's failure to object to the admission of certain medical records. 61 A.D.3d 1427, 1428 (4th Dep't 2009); *accord Eze v. Senkowski*, 321 F.3d 110, 112 (2d Cir. 2003) (ineffective assistance possible even where counsel "performed competently in certain respects").

None of these cases, or any other decision, precludes a finding of ineffective assistance simply because an attorney made some efforts to mount a defense. Here, but for the myriad errors discussed above, the evidence relating to key aspects of this case would have been much more favorable to Neulander, and the jury would not have heard the District Attorney's baseless and prejudicial comments on summation. When viewed in its totality, trial counsel's performance fell far short of the standard set by the state and federal constitutions.

CONCLUSION

For the reasons stated above and in the opening brief, the conviction should be reversed. Alternatively, the judgment should be vacated and the case remanded for a new trial.

Dated: New York, New York
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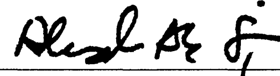

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