

1 was important for them to know -- not in ad  
2 nauseum -- but I remember the Court inquiring as  
3 to how far you want to go back or what the  
4 situation was -- but it was important for the jury  
5 to understand what their relationship was at that  
6 time, which would explain some of the unusual  
7 behavior between these two parties.

8 For example, Mr. Wallace, who was with  
9 Mr. Stephen that evening, going home, remaining  
10 home and his wife, who had nothing to do with  
11 this, showing up at the scene and relaying  
12 information back and forth for several hours until  
13 five in the morning.

14 It was important for the jury to understand  
15 what was going on between the two at the time and  
16 why Mr. Wallace may have been in that area, her  
17 change of clothes back and forth, that goes  
18 directly to the credibility of those two  
19 witnesses.

20 With regard to Number Five: this Court is  
21 well aware of the issue with the cell phone  
22 texting.

23 And that is the crux of our motion for new  
24 trial, Judge.

25 In that we move for a mistrial based on Kara

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1 Wallace utilizing her cell phone on the witness  
2 stand during her testimony in view of the jury.

3 I guess unbeknownst to the Court and myself  
4 or the State while we were at bench conferences  
5 that were occurring and then was brought to our  
6 attention later on by Deputy Flanigan. People in  
7 the courtroom saw it and that's how it was brought  
8 to the bailiff's attention.

9 At that point the Court addressed it, I guess  
10 we dealt with it, I don't know if that was the  
11 following day that we had dealt with it or the  
12 same day. I'm not sure or recall.

13 THE COURT: I think we dealt with it on  
14 multiple days.

15 MR. FOOTE: Well, right. And, so the first  
16 day -- the fact that the Court inquired, the jury  
17 didn't know anything about it, or at least we  
18 believed they didn't know anything about it, the  
19 Court denied our motion for mistrial and we moved  
20 forward.

21 We believe that that conduct on the stand is  
22 clearly improper and probably unprecedented even  
23 before this Court. I've never, actually,  
24 witnessed that.

25 But the fact that she is on the stand pretty

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1 much violates this Court's ruling, the rule of  
2 sequestration of contacting anyone while she's  
3 under oath on the stand. We moved for mistrial  
4 that was denied.

5 On the following day a juror themselves then  
6 goes to Deputy Flanigan and brings up to the  
7 Deputy that she observed Ms. Wallace utilizing the  
8 cell phone on the witness stand. And this juror,  
9 as we subsequently learned, was very distraught  
10 about this and felt that she had somehow  
11 compromised, you know, the movement of the trial  
12 and held things up.

13 And I personally observed her just leaving  
14 the building, you know, in tears because she felt  
15 that she did something wrong by coming forward and  
16 letting the Court know about the behavior.

17 Now, at this point, I think it raises the  
18 level of fairness or unfairness to now the jury  
19 themselves. The persons that are in trust that  
20 are rendering this important decision now have  
21 some other issue that has been interjected into  
22 their duties as to determine whether or not, you  
23 know, something unusual was going on.

24 The Court, the State and the Defense we went  
25 back and forth as to what to do. It was agreed to

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1 bring the jurors out one by one and ask them could  
2 they, besides knowing of that or observing this  
3 activity or at least knowing about it, could they  
4 remain fair and impartial. Would it affect their  
5 ability to move forward and execute their duties  
6 as jurors?

7 Obviously, they all answered yes. And our  
8 position would be after five days of rigorous  
9 testimony, I mean, they're going to go forward.

10 But what weight they actually gave that  
11 activity -- there was some discussion that because  
12 it was a defense witness maybe it would be helpful  
13 or not, but in analyzing this afterwards, it was a  
14 witness called by the defense and may be held  
15 against the defense that our witness is on the  
16 phone texting to someone else or utilizing the  
17 cell phone.

18 The Court inquired of Ms. Wallace under oath  
19 on several occasions which she gave various  
20 stories over two days. She indicated on the  
21 second day that she was up in Chiefland it would  
22 take her about three hours to get back down in the  
23 presence of myself and Mr. Rosario and then showed  
24 up 20 or 30 minutes later.

25 I mean, that just shows that her ability to

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1 tell the truth was at issue and she wasn't candid  
2 with this Court. She told Deputy Flanigan that  
3 she was reviewing it for missed calls. She told  
4 the Court that she was reviewing photographs.

5 The second day when the jury saw it and the  
6 Court ordered her back in the Court, the Court was  
7 concerned with what she was texting. We don't  
8 know. And then she comes in and under questioning  
9 says, "Yes. Text went out." From that point,  
10 okay, who was she texting? Then she admits that  
11 she's texting Jim Wallace, who was a witness for  
12 the State just previous on the day before.

13 THE COURT: I don't believe that ever  
14 happened.

15 MR. FOOTE: Yes.

16 THE COURT: I don't believe she ever admitted  
17 she was -- she said a text automatically went out.

18 MR. ROSARIO: A form text that automatically  
19 went out and Jim Wallace did call in during that  
20 time period. That's what her testimony said.

21 MR. FOOTE: That the text went out to her  
22 husband, Jim Wallace --

23 THE COURT: Right.

24 MR. FOOTE: -- who was a witness in the case  
25 who testified earlier.

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1           And Judge, that just smacks up unfairness and  
2           in speaking to my client that that -- at that  
3           point whatever effect that may have had on the  
4           jury and, obviously, we don't have the benefit of  
5           being in the deliberation room at that point, but  
6           it was a witness called by the defense and it may  
7           have been held against Mr. Stephen that our  
8           witness is on the stand texting.

9           The jury has no understanding in the former  
10          trial she was originally listed as a witness by  
11          the State and called by the State. And our  
12          purpose of calling her is to show the  
13          contradiction and rebuttal of Jim Wallace's  
14          testimony with regard to the voicemails he was  
15          receiving, that he was just letting her know she  
16          was at home. But, she actually stated, "No, there  
17          was something important you need to call me on  
18          that first 1:09 call.

19          So, this activity with the phone led us to  
20          move, again, for the Court to grant a mistrial.  
21          In the fundamental fairness there's a witness on  
22          the stand in some form is communicating outside of  
23          this courtroom to someone else in some way.

24          And she wasn't honest in her statement to the  
25          Court. I recall that when she said a text

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1           inadvertently went out or automatically went out.  
2           The Court actually looked at her for a moment  
3           because that was new information that didn't come  
4           up the previous day when she was under oath.

5           And, that in itself, a witness on the stand  
6           and the jury seeing that and the jury having to be  
7           individually polled regarding that activity,  
8           certainly would have some affect on how this  
9           matter was decided. And if there's any benefit to  
10          that that should go to Mr. Stephen giving the  
11          severe nature of these charges.

12          And, so, the fact that our motion for  
13          mistrial was denied is the reason why we're  
14          asking, once again, for the Court to grant this  
15          motion for new trial.

16          Subsequent to all those activities we motion  
17          the Court -- the defense motions the Court to  
18          grant our motion to issue a subpoena duces tecum  
19          for the phone records of Kara Wallace so that all  
20          parties involved, including my client, would be  
21          assured that nothing improper occurred.

22          And because of the brevity that these phone  
23          companies keep this information that's why we  
24          wanted to get a motion subpoena duces tecum, I  
25          don't think that was prejudice to anyone, but it

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1 would have settled that question as to whether or  
2 not something actually went out there.

3 The Court denied that motion. I know the  
4 Court inquired or stated to us that she  
5 volunteered to show us her phone. I just felt it  
6 improper that a witness is going to now, you know,  
7 come to me and dictate how evidence should come  
8 in. And in speaking with the Court with regard to  
9 cellular technology and texting it's very easy to  
10 delete a message off of a phone. So, her showing  
11 me a phone in court would have done nothing. We  
12 would have liked to have seen those phone records  
13 from the phone company, which only keeps text for  
14 a certain amount of time. Much less time than  
15 they do actual phone calls -- records of phone  
16 calls.

17 And so, on behalf of my client we move for  
18 that motion so that the phone company could send  
19 those records over. That was then denied upon our  
20 motion.

21 With regard to Number 10: the Court heard  
22 and admitting unreliable evidence collected in an  
23 unreliable manner, which was created several years  
24 after the date of offense for the sole purpose of  
25 litigation. And this prejudiced our client.

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