COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 33

FIDEL VEGA,

Appellant.

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20 Eagle Street
Albany, New York
March 26, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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CHIEF JUDGE DIFIORE: Number 33, the People of the State of New York v. Fidel Vega.

MS. REID: Good afternoon, Your Honors. With the court's permission, I'd like to reserve two minutes for rebuttal.

CHIEF JUDGE DIFIORE: You may have two minutes.

MS. REID: Thank you.

CHIEF JUDGE DIFIORE: You're welcome.

MS. REID: If Your Honors have no preference for where I begin, I'd like to start with the justification charge in this case and explain why it was erroneous for the trial court below to conflate the elements of dangerous instrument and deadly physical force.

The First Department's holding below that dangerous instrument element of second degree assault, quote, "necessarily implies that defendant used deadly force" is categorically and demonstrably false. As this court already is, I'm sure, aware, the definitions are not identical. Dangerous instrument definition is more expansive than the - - -

JUDGE RIVERA: But to the extent that you're talking about use, isn't that where you've got the complete overlap? That is to say, if the jury finds that, based on the use, because anything could be a dangerous instrument, based on the way it's used by the defendant, it's a

dangerous instrument, doesn't it, in this case, on these facts, overlap with the use of deadly force?

MS. REID: I think, Your Honor, the - - - the initial problem with that is that I think that question kind of goes to issues of inconsistent verdicts or repugnant verdicts.

JUDGE FAHEY: But we wouldn't want to establish a per se rule that every use of a dangerous instrument equates to use of dangerous force. For instance, a belt can or cannot be a dangerous instrument. In this you can argue that it was a dangerous instrument and used with deadly force here, but it could also have been used with ordinary force, right?

MS. REID: Exactly, Your Honor. That's the - - -

JUDGE FAHEY: All right. That's your point, isn't it?

MS. REID: That's the point, and the - - -

JUDGE FAHEY: Let me just finish the thought.

MS. REID: Yeah.

JUDGE FAHEY: So if that's the core of your point - - -

MS. REID: Yes.

JUDGE FAHEY: - - - that it's a case-by-case analysis, then don't we have to look and say, under the circumstances of this case, was the charge correctly given,

and if there was an error, was it reversible?

MS. REID: Your Honor, I think - - - so there's two - - - there's two ways that I want to address that question. The - - - the first way that I want to address it is to point out that neither the First Department nor the trial court in this case, when giving this instruction, gave it under the pretenses that under the circumstances in this case there was no way the jury could determine - - -

JUDGE FAHEY: I think you're correct about that, but let's assume, for purposes of my question, that that - - - that's what's confronting us now because we can do the same thing even if they didn't.

MS. REID: Yes, Your Honor, and I think even if you - - - even if you put aside that, you know, what the reasoning was behind the lower court's decision, I think in this case the facts do not make out a suggestion that the two are necessarily linked. For instance, there was testimony below from Melissa herself that, you know, her four-year-old son was right there with her, and she was worried that he was going to get hit with the belt, and so she threw a blanket over him and was laying on top of him while, you know, her father was kind of beating her with the belt.

So a jury in this case could have found that the belt was a dangerous instrument because of the threat to

E.A., her son, who was right there, and you know, her father was indiscriminately wailing on her with it, according to her testimony. The jury could have said, whoa, you know, that, a four-year-old right there could have been hit with the belt; that makes it a dangerous instrument. But the way that it was actually used which, you know, was completely against Melissa, there was no testimony that E.A. was harmed - - -

JUDGE RIVERA: I'm not sure I understand what the argument is about the charge being wrong. Wasn't the jury charge that first you have to figure out if it's a dangerous instrument, and that's based on the use, and once you do that then you're moving to this question of deadly force. Why is that charge wrong? What's wrong with that?

MS. REID: So my argument in - - - in that hypothetical, Your Honor, is that there was - - - there was a way, based on the factual circumstances, that the jury could have found that the instrument was used in a dangerous manner, i.e., somebody, you know, wailing it with a four-year-old right there, that could be considered a dangerous instrument in terms of use. But the force used, the actual force element was only against Melissa, and that was not deadly. And so there are - - - there are situations like that, you know, hypothetical ways you can just - - -

JUDGE STEIN: Was there a charge of assault against the child?

MS. REID: No, Your Honor, there was no charge of assault that - - -

JUDGE STEIN: Okay. So as I understand it, the court instructed the jury as to what the dangerous instrument was in the context of the assault charge. So wouldn't that have to mean that, if the jury was to find it, then it was in terms of its use against the daughter not the grandson?

MS. REID: I don't think so, Your Honor. While the assault charges were specifically related to Melissa, the court never said, you know, you have to only consider the use of the dangerous instrument as it relates to Melissa. The Court defined "dangerous instrument" and said if you find this - - - the - - -

JUDGE STEIN: But the court defined "dangerous instrument" in the context of the assault charge. And the assault charge was only against her, right? So it wouldn't - - -

MS. REID: Yes, Your Honor, the assault charge was against her, but I think the - - - the issue comes when if you're - - - if you're doing this sort of analysis based on purely the facts of the crime or the facts of the incident, there are ways of considering the facts that

would make these two definitions which, you know, are not identical, they can be harmonized in ways based on the - - - based on the - - - the testimony.

JUDGE FAHEY: Here he was charged with assault 3 and the jury instruction was on ordinary physical force, and then on assault 2, he was charged with deadly physical force, correct?

MS. REID: Yes.

JUDGE FAHEY: And an element there is the use of a dangerous instrument which isn't there in assault 3. So that's the core of our definitional problem. So let - - - as I said to you before, assuming you're correct that there may be some conflation, analytically, by the Appellate Division or the trial court, in this case it seems that a separate charge was given reflecting the appropriate amount of force that would apply to the specific charge.

And the facts of the case - - - I - - - I looked at the photos, and it reflected that someone had been - - - that had been hit severely and hit ten times with a belt. And there's a broken door frame going into the room. That's a separate part of your argument, but it certainly establishes the atmosphere within which these assaults took place.

That says to me that we're into an "individual circumstances" case not a hard and fast rule that whenever

you say dangerous instrument you always say deadly physical force. Courts may be wrong about that, though. There's a Third Department case that seems to draw a distinction clearly; I think it's Powell. And - - - and perhaps that's the way we should be looking at this case. In other words, not as a constant misapplication of the law, but in the circumstances of this case, was the charge correctly given.

MS. REID: Your Honor, I think - - - and you know, I think in the circumstances of this case we can't say, because there was so - - - there would - - - the testimony that, you know, she was hit ten times, that was her testimony. But since we're talking about justification charge, you have to view the evidence in the light most favorable to Mr. Vega. And he said that he only hit her three to five times.

And again, you know, the idea that he - - - you know, spanking an adult, or not - - - like, hitting an adult with a belt three to five times, I think, you know, the jury made a determination, but I don't think that that's deadly force as a matter of law. And I - - - and the - - -

JUDGE FEINMAN: Let's just be clear; it's not just the belt; it's the buckle.

MS. REID: Well, according to her testimony, Your Honor, but again, this is in the light most favorable to

Mr. Vega, he said that he didn't use the - - - the buckle. He said it was just the belt.

CHIEF JUDGE DIFIORE: Counsel, do you care to move to the sufficiency issue before your time is up?

MS. REID: Sure, Your Honor. I want to point out that - - - and - - - and with respect to the burglary charge, there's no jurisprudential support for the idea that a trespass is committed every time a parent, sibling, or child enters into the bedroom of another - - - another member of their family. While it's certainly the case that individual rooms within - - - within a larger structure can be considered separately or secured - - - or occupied, this was just not - - -

JUDGE FAHEY: Was the "separately secured unit" argument preserved?

MS. REID: It was, Your Honor, and you know - - -

JUDGE FAHEY: Was it really? I - - - I thought it was unpreserved. Is that the one you're relying on Finch for?

MS. REID: So we're not relying on Finch per se. Our argument was always that counsel preserved it at trial, and in addition to that, there was this well thought out, well laid out argument against it in the pre-trial motion to dismiss.

JUDGE STEIN: I thought at trial the argument was

really about license not about the definition of a dwelling or - - - or a building.

MS. REID: Well, Your Honor, at trial, counsel said this is Mr. Vega's mother's apartment, where he had lived in for most of his life, and that this was a bedroom within that apartment, and that there were no keys, and it couldn't be locked, and you know, to me, and I think to - - -

JUDGE FAHEY: But the door was locked, wasn't it?

MS. REID: According to Melissa's testimony it was locked, yes, but - - -

JUDGE STEIN: And the photographs would appear to support that testimony.

MS. REID: Yes, so when I said "not locked" I meant counsel was talking about the fact that it could - - - there were no keys to kind of secure it separately from the rest of the apartment. So those arguments convey that this is a family home; this is not, you know, some sort of SRO arrangement where, you know, you might have, you know, people living separate lives inside the home. That was the - - -

JUDGE FAHEY: I'm lost on there; what's an SRO arrangement?

MS. REID: Oh, sorry, single resident occupancy, like a normal apartment leasing arrangement.

JUDGE FAHEY: Yes.

MS. REID: And so, but it clear - - -

JUDGE STEIN: Hasn't there been at least a case that said that co-roommates - - -

MS. REID: Yes.

JUDGE STEIN: - - - in - - - in a single apartment?

MS. REID: Yes, there has been a case that says if you're a roommate, if you have a - - - I mean, that's why I mentioned the SRO arrangement. That would be kind of an SRO arrangement where you have co-tenants. There was a case where it said a co-tenant can't go into another co-tenant's bedroom without permission. But this is not the kind of - - - that wasn't - - - that's not the kind of household that we have here. There was no rent being paid. No - - - nobody's name was on the lease other than the grandmother. There was just - - - Melissa testified that her father had come into her room before and she'd never told him that he needed to ask her permission and that her son had gone into his grandfather's room before without permission from the father.

There was no evidence here that this was anything other than a familial household other than the fact that Melissa said she had a key and that she locked her door. But my bedroom door, when I was growing up as a kid, had a

lock on it, and I couldn't tell my mom, you know, don't come in here while I'm not here; this is my room.

CHIEF JUDGE DIFIORE: And counsel, as to the final issue, do you care to address that one which you spoke to, the final one?

MS. REID: Sure, Your Honor. As to the final issue, the - - - the relevance of Melissa's psychiatric history was - - - was established below. The court said I understand why this is relevant. The issue arose when the court said you don't have a good-faith basis for asking her whether she had been hospitalized because I don't - - - basically I don't believe her family. So counsel had information from her - - - from Melissa's family members.

JUDGE FAHEY: Why not call one of the family members then?

MS. REID: I don't - - - Your Honor, based on - - - based on the court's own instruction, counsel said I have - - - you know, her family members told me this. The court said I don't believe them. So for the - - - as an initial matter, I'm not quite sure that calling them - - - the court seemed to just discount Melissa's family members altogether. I don't know that calling them to say anything to - - - to the court would have been useful. But the court didn't ask that.

JUDGE WILSON: It might have preserved an issue

for us.

MS. REID: Well, I think the issue here is that the court said - - - they went back and forth about it for a while. The court said I'm not letting you do this, she said, but I know this from her family, and the court said that's not good enough; I want medical records or an expert testimony.

Counsel had requested medical records prior to trial and, you know, based on the record, it doesn't seem like she ever got them. And since she didn't have them and she couldn't, you know, force Melissa to sign a HIPAA waiver to give her - - -

JUDGE RIVERA: Did she say that to the court? Did she say I've requested them; they haven't been turned over?

MS. REID: No, Your Honor, she didn't say any - - - when the court - - - she didn't say that she had req - - - I think the issue is that the prior counsel had requested them and so, you know, the defense requested them. This particular attorney did not. But the People also didn't say we gave the medical records, there wasn't anything in there about, you know, hospitalization, so I don't know where this is coming from. Their whole sole argument was, well, this is her family and you know, why would we believe her family. But her family is poised to know more about

her mental health history than anybody else. And the court - - - I think it's - - - the - - - the case law only requires a good-faith basis; it doesn't require proof beyond a reasonable doubt. Good-faith basis is a reasonable basis - - -

JUDGE RIVERA: Well, why didn't counsel argue any of that? Was counsel required to argue any of that to preserve it?

MS. REID: I don't think so, Your Honor. I think counsel initially asked the question. The prosecution objected. After that initial objection and court saying I don't understand, you know, what you're doing, counsel said: her family members told me that she was hospital - - - hospitalized. The Court says, I think that's a fishing expedition, I don't - - - you know, that's just speculation. She says - - - counsel reiterated, no, I have this information from her family members. And at that point the court - - -

JUDGE RIVERA: What's the import of saying "okay"? When counsel says "okay", what's the import of that?

MS. REID: Yeah, so at the point counsel said "okay", the court had again said, no, it's not good enough; you need medical records. When counsel says "okay", I think the import of that, and a fair reading of that is

okay, I don't have medical records, and you've made your ruling, so I guess, you know, I'm not going to keep going back and forth. By that point she'd already asked twice and reiterated twice that this was her family member's testim - - - or what her family members had told her. And the court said twice: I don't really care what her family says; I want medical records.

At that point, what else could she say but okay, unless they wanted to keep going back and forth about it continuously? So counsel did really all she could do here by asking and asking again and the court repeatedly saying no.

CHIEF JUDGE DIFIORE: Okay. Thank you, Ms. Reid.

MS. REID: Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MR. STROMES: Good afternoon. May it please the court. David Stromes for the People.

With the court's permission, I'll respond in reverse order. I think Ms. Reid's argument exposes exactly why the cross issue is not preserved below because counsel said none of the things that Ms. Reid just very eloquently presented to the court. When the court said, look, I have two problems with your offer of proof: one, her family's also his family, so just because they said she was hospitalized, I think I need a little more than that. And

two, you say you're going to use it to impeach her credibility. I don't know what - - - what being bipolar has to do with whether or not you're believable on the stand. So you - - - you're going to have to give me some more if this is to be admitted for this purpose. And counsel said okay. That was the end of the inquiry. The Court's entitled to think, great, if counsel wants to bring this up again she's been told what she needs.

Very briefly, as to the medical records, all we have in this record is a pre-trial request saying to the People, pursuant to normal discovery obligations, if you have medical records, you've got to give them to us.

JUDGE RIVERA: But doesn't the CPL says that, if in the course of addressing an objection the court rules on the question that's presented, that that preserves the issue? Why doesn't it preserve - - - it's obviously the court decided: no, no, no, you can't come up here just telling me that the family has told you; you've got to do something or you've got to present something more. That is the ruling of the court.

MR. STROMES: The Court - - - respectfully, Your Honor, the court didn't say no; the court simply said not yet. And when counsel - - -

JUDGE RIVERA: But no based on the way that counsel had wanted to proceed which is I have information

from the family and I want to make an inquiry based on that. And the court says that you cannot do.

MR. STROMES: And I think that - - - I think that if counsel truly disagreed with that, instead of saying okay, Ms. Reid has identified all the ways that counsel could have proceeded instead.

JUDGE RIVERA: But that's my question. Does the CPL require that, once this is a ruling that's in response to an objection, the People's objection?

MR. STROMES: I believe it does because this court's law interpreting that provision of the CPL talks about ways you can acquiesce to a ruling which basically unpreserves or leaves - - - leaves any remnant of it unreserved - - - unpreserved.

Very quickly, on the merits, this is an abuse-of-discretion standard. It can't fairly be said that the trial judge abused its discretion as a matter of law by requiring this order of proof.

Moving over, with this court's permission, to the burglary. As several of Your Honors noted, that claim too is unpreserved. What counsel said, in asking for a trial order of dismissal, on page A380 of the record: "I don't believe the People have met their burden to show that he didn't have permission or authority." She goes on: "He entered the bedroom in that apartment that was in the name

of his mother who never said she didn't give him permission to be there." She goes on, still quoting, "Melissa had allowed her father to enter her apartment in the bedroom in the past."

Nowhere in any of that is the word "dwelling" or the words "permission" or "authority". I'm sorry, excuse me, only the words "permission" or "authority"; nowhere in there are the words "separately secured or occupied". That's how you preserve this claim.

I'm happy to speak to Finch, if the court wants, but it doesn't apply in this situation for the reasons stated in my brief. As Finch even said, traditional trial protests are required in most cases.

In terms of the merits of the dwelling arguments, everything that counsel talked about, in terms of this being some sort of a familial household, that all came from the defense case. This issue would have to be viewed, at this point, in the light most favorable to the People.

And Melissa told a very different story. Pages A78 to A84 of the record, she says - - - on page A84, you probably have the best evidence: "It was my room; nobody should be in there but me."

On page A78 she talks about what sounds a lot like a tenancy for services agreement. She wants to stay with her grandmother. She doesn't have money. She can't

afford to pay rent because she's not working, so she agrees to do chores around the house in exchange for this room. And in the light most favorable to the People, giving the People the benefit of all reasonable evidentiary inferences, that's sufficient to make out the dwelling element.

Simply, as to any other complaints about what brothers and sisters may do, this is not a situation where a minor child is living with parents, and there is no immediate family member exception to burglary.

Moving to the justification charge, unless there are further questions about that, what the judge very much did do here was determine that if the jury were to determine that defendant actually used the belt as a dangerous instrument, there would be no remaining reasonable view of the evidence that the defendant used only ordinary force.

As Judge Rivera points out, this is not an attempt case. This is not - - -

JUDGE WILSON: What do you then make of the prosecutor's response, after the jury note comes back, when she says we have to prove that it was capable of causing it, not that it actually occurred. So even after the instructions are given, the prosecutor still is not thinking this is just a use case but is thinking I can

prove it any way, use or - - - or threat or attempt.

MR. STROMES: Respectfully, Your Honor, you can use force without causing serious physical injury, and that was the context of that conversation was the jury asked for - - - the jury sent a note asking for clarification on the definition of dangerous instrument and serious physical injury, and all the prosecutor was saying is those two don't have overlap.

And the Second Department actually said it in a case called - - - I think it was Johnson or Jackson - - - that, look, you can - - - you can shove someone with ordinary force and have serious physical injury result because they fall down and hit their head in a certain way. But the point on the charge was the judge gave the jury a correct and nonconfusing conditional charge. If you find that the belt was actually used as a dangerous instrument then you have to apply deadly force justification under the facts of this case.

JUDGE WILSON: Well, the judge doesn't say "actually used" but says - - -

MR. STROMES: Well, he does say "used".

JUDGE WILSON: He says "used as I previously defined it".

MR. STROMES: Yes.

JUDGE WILSON: And "use as I previously defined

it" included both attempt and threat?

MR. STROMES: That - - - that may well be true, but there's no reasonable view of the evidence here that the belt was only attempted or threatened to be used. I - - - I guess, Your Honor, if we take a step back, judges have always been the gatekeepers in terms of charges. No charge can be given unless there's a reasonable view of the evidence that supports it. And from defendant's own mouth, I hit her with the belt. We all see the pictures; they are unmistakably belt buckle imprints upon her, even a month after the crime. So under the - - - under the unique facts of this case, you do have complete overlap between dangerous instrument and deadly force because there's just no reasonable view of the evidence that it was merely used or attempted to be used.

The People are not advocating for, and the First Department did not create any sort of bright line rule that whenever you have a dangerous instrument as an element of a crime you necessarily have to use the deadly physical force instruction.

As I said in my brief, I can't think of an example in the assault context, but there may well be one out there, and there's no reason to close the door on that discussion. All that we're going to talk about is reasonable view of the evidence. Justification is not a

hypothetical exercise. It's not like when you discuss legal repugnancy, which is a completely different context, you are instructed to look in the hypothetical. Justification, the opposite is true. Justification, you have to look at what a reasonable view of the evidence shows.

And the reason that this instruction was really correct, if we want to add repugnancy into the discussion, I mean, we live with inconsistent verdicts when we get them, but we don't give instructions that condone them or that permit the jury to speculate and reach that kind of an inconsistent conclusion.

JUDGE RIVERA: Does it matter that his testimony is that - - - or his position is - - - defendant's position is that he didn't use the belt buckle, just the belt? Does that matter here?

MR. STROMES: That doesn't matter here for two reasons. One, the jury would still have to first find that it constitute - - - that he - - - that he used the belt as a dangerous instrument. I think it would be hard pressed for the jury to actually find that without finding that he used the - - - the buckle, or at least it's much easier if they find that he used the buckle. And the judge made it clear this was not a hypothetical exercise. He tells the jury "if you determine this", "after you determine this".

JUDGE WILSON: Doesn't McManus say that, at least in circumstances involving mens rea we do give instructions that may lead to logically inconsistent results?

MR. STROMES: What McManus says is - - - McManus says you can't restrict the justification instruction based on the elements of the crime. We're in full accord with that. We're not asking this court to say any time you have a dangerous instrument element you must have a deadly physical force instruction.

McManus talked about justification in the context of depraved indifference homicide. Other cases have taken that and talked about it in the context of other mental states. That's just - - - that's just not what's going on here. We're take - - - we're asking the court to apply longstanding law but justification to apply it only to the reasonable view of the evidence.

And Judge Rivera, just to get back to your other question, a reasonable view of the evidence, even in the light most favorable to the defense, is not one at war with common sense. And we can all see the belt buckle imprints in the photographs. So whatever defendant said about that, that doesn't have to be taken into account when given the justification instruction.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. STROMES: Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MS. REID: Yes, Your Honor. I just want to respond to a couple of points briefly. I guess first I'll start with the burglary charge and the preservation question. The - - - the - - - counsel's statement that - - - about the keys and the ability to lock the door from the outside versus the inside and the - - - the presence of keys or no keys clearly goes to the question of whether there's a securely occupied or securely separate occupied space.

And on the merits, while Melissa did say this is my room, nobody should be in here, she also said this is Maria's house, she has the key to the room, so if I'm not home and if she wants to go in my room, I can't tell her no, you can't go into my room because it's her apartment.

I have a landlord. My landlord doesn't have a key to my apartment, and I don't have to worry about coming home from work one day and finding my landlord in my apartment. That's just not how landlord-tenant relationships work. Your landlord is not all - - -

JUDGE FEINMAN: I think most leases actually require that - - - they have some access, but in case of an emergency like a pipe bursts - - - but never mind.

MS. REID: Well, I mean, I know my landlord doesn't have a key, so I don't know how he would get in.

But even if they did have a key, the idea is of right of possession. So the person in the apartment has the right of possession and the landlord can come in - - - you know, give notice and say I need to come because I need to fix something. But they just can't show up anytime they want and come into your apartment without notifying you. And that's exactly what the - - - the relationship was here, like, people were going inside of each other's bedrooms without notice, without permission. That's not a landlord-tenant relationship as in a co-tenancy.

And I also want to point - - - just turning to the justification point briefly again. You know, I offered one example of how the jury could have reconciled dangerous instrument and deadly force in this case. Another example of how the jury could have reconciled that is, you know, Melissa testified that, you know, her father kept hitting her and he would have kept going if not for the grandmother coming into the room and basically taking the belt from him or making him stop. So the jury could have found in that situation that the belt was a dangerous instrument, you know, in the way he was using it. And if he had been continuing to use it, maybe it would have been capable of causing, you know - - -

JUDGE STEIN: Well, but isn't the capability of causing separate from whether it actually causes? In other

words, if I - - - let's say I - - - I - - - I shoot a gun at you - - -

MS. REID: Um-hum.

JUDGE STEIN: - - - right? And it just grazes your arm or your shoulder; it really doesn't cause any inj - - - any injury. Isn't that the use of a dangerous instrument?

MS. REID: Yes, Your Honor. I'm not arguing, and I'm not making the argument that, you know, it has to actually cause serious physical injury. The only - - - the only point I'm making is that this - - - a dangerous instrument element in this case could have been found without the jury also finding that Mr. Vega used deadly force.

The jury could have said in the way that this weapon was used or this belt was used, it could - - - you know, it could have constituted a dangerous instrument. Fine. Does that necessarily mean that hitting Melissa with the belt constituted deadly force? And I think the answer to that question is no, for any reasonable person.

The court below said this is not deadly force as a matter of law. The prosecution asked the court to charge deadly force as a matter of law, and the court said, no, I think this is a jury question; it's not clear that it's deadly force as a matter of law. But the charge the court

gave basically told the jury if you find this element satisfied, this dangerous instrument element satisfied, then it's basically deadly force as a matter of law. And I don't think, in any case, unless it is deadly force as a matter of law, that courts should be instructing the jury to - - - to apply that standard.

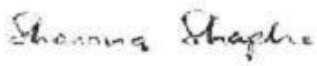
CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. REID: Thank you.

(Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Fidel Vega, No. 33, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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