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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 201

LUIS ORTIZ,

Appellant.

20 Eagle Street
Albany, New York 12207
November 18, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Ortiz,
2 Number 201.

3 One second, counsel.

4 Counselor, do you want any rebuttal time?

5 MR. KUMAR: Yes, I'd like to reserve two
6 minutes of my time for rebuttal.

7 CHIEF JUDGE LIPPMAN: Two minutes, you have
8 it. Go ahead.

9 MR. KUMAR: May it please the court, Anant
10 Kumar for Mr. Luis Ortiz. Mr. Ortiz's retrial
11 presents two separate errors warranting reversal.
12 First, in contravention of this court's decision in
13 People v. O'Toole, the prosecution was allowed to
14 present evidence that Mr. Ortiz allegedly used a
15 razor as part of the events. He - - -

16 CHIEF JUDGE LIPPMAN: What did the - - -
17 what did the first trial demonstrate, in regard to
18 the razor?

19 MR. KUMAR: The first jury's verdict
20 necessarily concluded that the razor was not involved
21 at all.

22 CHIEF JUDGE LIPPMAN: How? From the
23 burglary one, burglary two?

24 MR. KUMAR: Yes. From the acquittal of
25 burglary one, involving use or threatened use of a

1 dangerous weapon, and also notably, acquitting Mr.
2 Ortiz of robbery in the first degree, also predicated
3 on use or threatened use of a dangerous instrument.

4 CHIEF JUDGE LIPPMAN: Is it not conceivable
5 that that sort of - - - we don't know exactly what -
6 - - why the jury did what it did, or under O'Toole,
7 is it clearly the issue of the razor blade is - - -
8 is out?

9 MR. KUMAR: It is clearly the involvement
10 of the razor blade, because the only evidence they
11 heard as to the razor blade's involvement was that
12 Mr. Ortiz allegedly held it to complainant Nunez's
13 throat. Under those circumstances, it is clearly
14 used or threatened to be used, and it is a dangerous
15 instrument. No one disputes that it could sever an
16 artery and cause damage in a manner - - -

17 JUDGE RIVERA: Well, how - - -

18 JUDGE PIGOTT: Let's assume - - - let's
19 assume for a minute that you've got somebody who's
20 charged with vehicular homicide and speeding. And
21 because of the lapse of time, the speeding ticket is
22 - - - is dismissed on statute of limitations grounds.
23 Okay? Can they introduce the speed in the trial?

24 MR. KUMAR: Well, Your Honor, in fact,
25 Goodman, I believe, speaks to this. And it

1 recognizes that sometimes there'll be procedural
2 issues that - - - that come in to complicate the
3 issue. But here, we have a definitive finding and a
4 reasonable finding by the first jury.

5 JUDGE PIGOTT: Is that a "yes", that they
6 could bring in the speed?

7 MR. KUMAR: Yes.

8 JUDGE PIGOTT: All right.

9 MR. KUMAR: They could, be - - -

10 JUDGE PIGOTT: So - - - so in this case,
11 they're not going to - - - they're not going to
12 convict you of robbery first or any of the charges
13 with respect to the blade, but - - - but in order to
14 let the jury know what went on here, why wouldn't
15 they be able to bring in the facts as they evolved?

16 MR. KUMAR: You - - -

17 JUDGE PIGOTT: Otherwise you're - - -
18 you're deceiving the jury, aren't you?

19 MR. KUMAR: Your Honor, that same concern
20 came up in People v. O'Toole, and - - -

21 JUDGE PIGOTT: Yeah, it sounds like the
22 dissent in O'Toole, doesn't it?

23 MR. KUMAR: It - - - it certainly does,
24 Your Honor, and un - - - the court - - - the majority
25 of the court said that you could excise a gun from a

1 forcible robbery case. In that situation, the gun
2 was clearly a central part of their narrative. It
3 explained how the victim was drawn out from the
4 barber shop. If the gun can be removed from O'Toole
5 despite that concern, the razor can be removed here.

6 And indeed, our case is even stronger than
7 O'Toole, because here, you already have an account
8 that omits mention of the razor, and here I'm talking
9 about Pura Nunez's 911 call. In that 911 call, she
10 gives a narrative account of what's happening, and
11 she says the thief pushed his way in. She responds
12 to several specific questions by the 911 operator.
13 Is the thief armed? No. The only weapon she
14 mentions - - -

15 JUDGE STEIN: But wasn't - - - I mean, she
16 was focused on what was happening right then and
17 there, and the questions that were being asked of
18 her, I - - -

19 MR. KUMAR: Your Honor, at some point in
20 that call, if it were true that a razor had been held
21 to her throat, her life had been threatened that way,
22 it would have come out, both in narrative form and in
23 response to specific - - - repeated specific
24 questions. Questions, is anyone hurt? She simply
25 did not mention it, and that explains why the jury -

1 - - the first jury rejected that portion of
2 complainant's accounts.

3 CHIEF JUDGE LIPPMAN: But there are lots of
4 different narratives here as to what went on. The
5 stories are very different.

6 MR. KUMAR: There are two competing
7 narratives. There's the complainant's story that
8 this was a dangerous home invasion and that there's -
9 - - there's Mr. Ortiz's testimony that this was an
10 altercation because he was being insulted in front of
11 his girlfriend. And what happens - - -

12 JUDGE RIVERA: But you're trying to add a
13 third narrative, right? Because the - - - that
14 narrative about the home invasion, you say, can be
15 done without the use of a weapon, right? So you're
16 actually breaking that narrative down into yet
17 another narrative?

18 MR. KUMAR: The narrative can be told - - -

19 JUDGE RIVERA: The question is, is that
20 contradictory and - - - and result is, as Judge
21 Pigott has already said, in deceiving the jury?

22 MR. KUMAR: It is not tantamount to
23 deceiving the jury. The first jury already found
24 with reasonable basis that there was no razor
25 involved. Does the story - - -

1 JUDGE STEIN: What if the jury had found
2 that there was a razor? They had the razor in
3 evidence at the first trial, right? Couldn't they
4 have found that - - - taking a look at this razor and
5 say this is completely dull; this is incapable of
6 causing serious physic - - - physical injury?

7 MR. KUMAR: Your Honor, neither of the
8 parties disputed it. No one argued that in
9 summation. The court, in fact - - - the first jury
10 was instructed - - -

11 JUDGE STEIN: Does it matter that nobody
12 argued it?

13 MR. KUMAR: It does when you start to look
14 at this court's precedent - - - Acevedo, O'Toole - -
15 - which are talking about realistic, reasonable,
16 rational readings of the record. There is simply no
17 record support for this claim of a nondangerous
18 instrument. Again, the evidence they heard is that
19 it was held to Ms. Nunez's throat, and that her life
20 was threatened in that manner.

21 Under those circumstances, the partial
22 acquittal definitively tells us, just as it did in
23 O'Toole, that they found that the razor blade wasn't
24 involved.

25 JUDGE PIGOTT: Well, then why did the judge

1 allow it? What was his reasoning?

2 MR. KUMAR: The judge engaged in a sort of
3 relevance analysis, which seemed to miss the point of
4 collateral estoppel. And that is one reason, I
5 believe, they let it in. The judge at that time
6 didn't have, maybe, the clarity, the persuasive force
7 of O'Toole, to rely on. The judge's decision was
8 made before O'Toole was decided.

9 CHIEF JUDGE LIPPMAN: What about the other
10 issue, counsel? The witness issue? The lawyer
11 becoming a witness?

12 MR. KUMAR: Yes. Indeed, Your Honor, Mr.
13 Ortiz was separately prejudiced because the
14 prosecution was allowed to engage in a misleading and
15 unfair impeachment with his attorney's statement from
16 arraignment - - -

17 CHIEF JUDGE LIPPMAN: The stipulation
18 didn't take care of the problem?

19 MR. KUMAR: The stipulation did not take
20 care of the problem for several reasons. The biggest
21 reason being that the stipulation cannot cure the
22 glaring advocate witness problem here. So counsel,
23 of course, has to explain - - - once this impeachment
24 is allowed at all, has to explain to the jury that it
25 was a mistake.

1 JUDGE PIGOTT: Can this never be done? I -
2 - - I agree with you. I was kind of - - - I was kind
3 surprised that anyone would do it, number one, but
4 then I think counsel cited cases where it was
5 allowed.

6 MR. KUMAR: Your Honor, the cases that have
7 been cited from this court, Brown, and then the
8 adoption of the decision in Rivera, those are
9 qualitatively different situations. In one of those
10 cases, it was a Sandoval hearing. It wasn't
11 arraignments. They - - - you had hours to discuss -
12 - - over months to discuss wi - - - with your client
13 the facts of the case, and in the other, it was a
14 written sworn affirmation.

15 This court has already - - - already held
16 in cases like Burgos-Santos and Rodriguez, you can't
17 use a withdrawn alibi notice to impeach the
18 defendant. And in that situation, you're switching
19 from something like "I wasn't even there" to
20 justification. Here, on its face, it's a reasonable
21 mistake. At that time, counsel simply confused razor
22 with knife.

23 JUDGE RIVERA: Did - - -

24 CHIEF JUDGE LIPPMAN: Did the counsel have
25 to be relieved? Did the judge have to relieve the

1 counsel?

2 MR. KUMAR: Once the impeachment was
3 allowed, the only realistic course of action was a
4 mistrial. Again, this was a credibility contest
5 between Mr. Ortiz and the complainants. Having
6 allowed the impeachment, Mr. Ortiz's credibility was
7 severely damaged. At that point, you - - - you can't
8 unring that bell. And you - - - you can't simply
9 relieve counsel and have a new counsel step in. The
10 only option would be - - - was a mistrial at that
11 point. And it - - - before - - -

12 JUDGE FAHEY: How many - - - another - - -
13 another tack here is, how many arraignments had
14 counsel handled that night that Mr. Ortiz was
15 arraigned?

16 MR. KUMAR: I'm sure she had handled - - -
17 as she represented on the record as an officer of the
18 court - - - some thirty arraignments at that point.

19 JUDGE FAHEY: Over what time period?

20 MR. KUMAR: In a single night.

21 JUDGE FAHEY: Okay. She was - - - was she
22 assigned that night or had she been assigned before?
23 Was she assigned an arraignment or - - -

24 MR. KUMAR: I do not believe she had any
25 involvement with the case before arraignments.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
2 hear from your adversary and then you'll have
3 rebuttal.

4 Counsel?

5 MS. RENO: May it please the court,
6 Catherine Reno for the Office of the Bronx District
7 Attorney.

8 CHIEF JUDGE LIPPMAN: Counsel, how could
9 they - - - how could the first trial - - - how could
10 the - - - the razor blade issue not have been
11 determined when they - - - when they throw out the -
12 - - a burglary one and - - - and leave two?

13 MS. RENO: Well, there are any number of
14 reasons, one of which - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but what's
16 their reason - - - what's the reasoning that would
17 allow the razor blade to be introduced in the second
18 trial?

19 MS. RENO: Well, defendant has a very heavy
20 burden. He has to establish that they necessarily
21 decided, not that they probably decided, not that
22 they liked - - -

23 CHIEF JUDGE LIPPMAN: What else could they
24 have decided in that situation, when you know what
25 one requires and you know what two requires?

1 MS. RENO: Well, what they could have - - -
2 one of the things they could have decided is that
3 this razor, in this - - - the way it was used, wasn't
4 a dangerous instrument. That was a factual
5 determination to be made by the jury. The razor was
6 in evidence. It was a dull - - -

7 CHIEF JUDGE LIPPMAN: The razor wasn't a
8 dangerous instrument?

9 MS. RENO: It - - -

10 CHIEF JUDGE LIPPMAN: In this particular
11 context?

12 MS. RENO: Yes, there was testimony from
13 Nunez saying that it was against her ne - - - it was
14 being held against her neck. When defendant was
15 punched, she didn't even sustain a scratch. And - -
16 -

17 CHIEF JUDGE LIPPMAN: If I had a razor
18 against my neck, I might think that that's a
19 dangerous instrument.

20 MS. RENO: Sure, but they - - - the jury
21 heard testament - - - testimony otherwise, and in
22 summations, defense counsel again said, oh, it's
23 miraculous that she had this - - - this supposed
24 razor to her neck and yet she doesn't have a scratch,
25 that sort of a thing.

1 CHIEF JUDGE LIPPMAN: Well, let's assume
2 it's a razor, not a supposed razor.

3 MS. RENO: And - - - exactly, but it - - -
4 she didn't even have a scratch; therefore it's very
5 plausible that the jury thought that this wasn't
6 actually - - -

7 JUDGE RIVERA: Isn't it plausible they
8 don't - - - they don't believe that Mr. - - - I
9 forgot his name - - - Valenzuela - - - went at - - -
10 at the defendant, while the razor's at her neck, and
11 that's why you don't have what you call the "nick".

12 MS. RENO: That's possible. I mean, there
13 are - - -

14 JUDGE RIVERA: They don't have to believe
15 everything they say, right?

16 MS. RENO: No.

17 JUDGE RIVERA: They can take whatever - - -
18 the can believe whatever part they want to believe -
19 - -

20 MS. RENO: Exactly, the point being that it
21 - - - that defendant hasn't - - - I - - - isn't able
22 to show that they wouldn't - - - they necessarily
23 decided this. If it's - - -

24 JUDGE RIVERA: But your whole - - - wasn't
25 your whole - - - wasn't your whole theory that he was

1 using a dangerous weapon? That's your entire theory
2 of that case.

3 MS. RENO: That he was using a weapon and
4 that was how he gained entry. But that is for the
5 jury to decide whether this was an actual dangerous
6 instrument. Unlike in - - - in - - - excuse me, in
7 O'Toole, where there was an element of a firearm
8 being displayed, it just had - - - the jury just had
9 to find that something resembling a firearm or that
10 appeared to be a firearm was displayed, not that it
11 actually was a firearm.

12 Here, one of the elements was that this
13 razor actually constituted a dangerous instrument.
14 And looking at the court's instructions of what a
15 dangerous instrument was, something readily capable
16 of causing death or serious physical injury in the -
17 - - in the manner it's used.

18 JUDGE RIVERA: So how - - - how? Cutting
19 your vein or - - - how was - - -

20 MS. RENO: It's - - - it is pos - - - of
21 course, it's possible, but it is also very possible
22 that this jury - - -

23 JUDGE FAHEY: So it's more credible say
24 that it couldn't have been a dangerous gun than it
25 could have been a razor that wasn't sharp enough to -

1 - - to hurt you?

2 MS. RENO: Well, the element is - - - it -
3 - - it was different. It was just display of - - -
4 of something that appeared to be a firearm versus
5 that this razor actually constituted a dangerous
6 instrument.

7 CHIEF JUDGE LIPPMAN: So then how would you
8 use the razor blade in the - - - in the next trial?

9 MS. RENO: I - - -

10 CHIEF JUDGE LIPPMAN: In other words, what
11 would be the - - - the contentions after the - - -
12 the burglary one is - - - is thrown out. What's - -
13 - what's the contention about the razor blade that
14 makes any sense, given what you're saying that it's
15 not a dangerous instrument?

16 MS. RENO: Well, the People are - - - would
17 be unable to prove their case and their - - - the
18 witness' story without the razor blade is - - - is
19 absurd. It's laughable that some guy comes into an
20 apartment building midday in an open lobby, grabs a
21 woman with one hand, and she's - - -

22 CHIEF JUDGE LIPPMAN: And with the - - -
23 and with the razor blade?

24 MS. RENO: And with the razor blade it
25 makes a lot of sense, because these people are

1 terrified. This woman has a very traumatic
2 experience of having a blade against her throat,
3 that's how defendant is able to push his way into the
4 apartment with absolutely no resistance.

5 JUDGE RIVERA: So why does Valenzuela lunge
6 at her?

7 MS. RENO: I'm sorry?

8 JUDGE RIVERA: What - - - what makes that
9 credible? Why is Valenzuela lunging at her if
10 there's a blade to her throat?

11 MS. RENO: Because he's - - -

12 JUDGE RIVERA: He's going to kill her.

13 MS. RENO: He's - - - he's scared for the -
14 - - you know, his wife. He's trying to protect her.
15 It's his gut reaction.

16 JUDGE RIVERA: How is that when she's got a
17 razor blade - - - your theory of the case, razor
18 blade right at her throat; she's - - - she testified
19 I'm scared to death.

20 MS. RENO: Right, and that was his gut
21 reaction was, I'm - - - I'm scared that he's going to
22 kill this - - - the woman who I love, and so that was
23 his gut reaction was - - - was punching. It doesn't
24 - - - that's - - - that was his testimony.

25 JUDGE RIVERA: Well, one could potentially

1 say, I mean, he'll slip - - - and slip - - -

2 JUDGE FAHEY: Can we - - -

3 JUDGE RIVERA: - - - slip and slit her
4 throat, it doesn't really make that much sense, does
5 it?

6 MS. RENO: That was his testimony.

7 CHIEF JUDGE LIPPMAN: Counsel, what about
8 the - - - the other issue with the - - - the counsel
9 as a witness?

10 MS. RENO: This was completely appropriate
11 in this case. The - - - under - - -

12 JUDGE FAHEY: Yeah, can we talk a little
13 bit about this, because just let me - - - counsel
14 comes in. You arraign thirty people in - - - in an
15 hour. I don't know. Let's say, you're - - - you're
16 arraigning thirty people. Someone you've never
17 talked to before. You talk to him for two seconds.
18 You come up and you give a version of events that is
19 inaccurate. It's not under oath. It's not been the
20 product of any stipulation before by anyone else.
21 It's not the product of any sworn statement. You may
22 not even have the papers in front of you.

23 Yet, you want to use that as if it's a
24 prior sworn statement or testimonial evidence to
25 impeach a - - - a defendant. Doesn't that seem to be

1 - - - well, first off, it's a little unfair. My - -
2 - my friend Judge Lippman is - - - is one of the few
3 of us up here who always talks about fairness, and
4 this really does seem to be a bit unfair. I think
5 he's right on that point.

6 MS. RENO: Well, counsel there - - -
7 defense counsel was speaking as an officer of the
8 court, and she made very clear that this was based on
9 her conversation with defendant only.

10 JUDGE STEIN: Talking about unfair, why
11 wasn't this raised before the trial began, that you
12 were going to bring this in?

13 MS. RENO: The People didn't have the
14 minutes yet. The People, as soon as they received
15 the minutes, disclosed them to the court.

16 JUDGE PIGOTT: Which is the third leg of
17 this thing. I - - - I'm surprised, as - - - as
18 professionals and as lawyers, you wouldn't say to
19 her, you know, by the way, we're going to bring up
20 the fact that - - - that your client told you at
21 arraignment what he said. I mean, why wouldn't you
22 tip him off?

23 MS. RENO: It's - - - it's my understanding
24 that - - - that the prosecutor in this case hadn't
25 ever ordered the arraignment minutes, and then this

1 similar situation happened in a trial that his
2 colleague was handling, and he thought, oh, I should
3 check out the arraignment minutes in this case.

4 CHIEF JUDGE LIPPMAN: So once this - - -

5 MS. RENO: So he ordered them - - -

6 CHIEF JUDGE LIPPMAN: Once - - - once this
7 happened, the horse is out the barn. Why not a
8 mistrial?

9 MS. RENO: Well, first of all there was no
10 need for a mistrial. The stipulation was able to
11 solve any - - - any problems here.

12 CHIEF JUDGE LIPPMAN: The stipulation cured
13 the problem?

14 MS. RENO: Yes.

15 CHIEF JUDGE LIPPMAN: You say this and I
16 say that - - -

17 JUDGE FAHEY: Oh, don't - - -

18 CHIEF JUDGE LIPPMAN: - - - and that's it.

19 JUDGE FAHEY: It couldn't have. All it did
20 was reiterate the statement that was in the record.
21 So you stipulate to the record, but that doesn't take
22 away the unfairness of the - - - of what's being
23 offered in proof.

24 MS. RENO: It's - - - it's not unfair. His
25 - - - his coun - - - his counsel made clear that she

1 was representing what he had told her. She said, my
2 understanding from Mr. Ortiz is. She didn't say I
3 have - - -

4 JUDGE STEIN: She didn't give an
5 explanation for that, and her - - - her whole
6 credibility, even with the stipulation and the way it
7 was used and the way it was referred to by the
8 People, left her credibility about her - - - her
9 reasoning wide open for the jury.

10 MS. RENO: Her credibility wasn't at issue
11 here.

12 JUDGE PIGOTT: Yes, it was.

13 JUDGE STEIN: Yeah, it was.

14 JUDGE RIVERA: How could it be?

15 MS. RENO: That's what the trial court
16 found.

17 JUDGE RIVERA: She says - - - she says, I
18 am incorrect; that's not what he told me. I made a
19 mistake. And then you go and attack - - - well, not
20 you, the - - - the prosecutor at the trial goes and
21 attacks her, suggests she's perjuring herself.

22 MS. RENO: She's not perjuring herself,
23 this is - - - it's up to the jury to decide. And - -
24 - and the trial was right - - -

25 JUDGE RIVERA: Decide what? She says I was

1 wrong. That is not what he told me. And then the
2 People at - - - at trial say, well, it's up to you to
3 decide whether or not that's true or - - - or false.

4 MS. RENO: Well, the People didn't have to
5 agree that she made a mistake. There's absolutely no
6 conclusive evidence that she made a mistake.

7 JUDGE RIVERA: Exactly. You're putting her
8 credibility at issue when you do that.

9 MS. RENO: It was not - - -

10 CHIEF JUDGE LIPPMAN: Why wasn't counsel
11 relieved? Why wasn't relieved at that point?

12 MS. RENO: She wasn't relieved because she
13 didn't need to be relieved. It was - - - it wasn't a
14 big - - - she - - -

15 JUDGE FAHEY: Someone's statement is in
16 evidence and they - - - they cannot be called to
17 testify, because she's ongoing counsel. Didn't she
18 have to be relieved?

19 MS. RENO: No. She didn't have to be
20 relieved. The stipulation protected her credibility
21 in the sense that she wasn't - - - she wasn't
22 subjected to cross-examination. She didn't have to
23 explain why she made a mistake - - -

24 JUDGE PIGOTT: If halfway - - -

25 MS. RENO: - - - or how she remembered

1 this.

2 JUDGE PIGOTT: If halfway through the - - -
3 the trial, the - - - the People were going to put on
4 a police officer and for some reason he got the date
5 wrong or he came in late. And the DA said to the
6 defense lawyer, yeah, Bonehead, you know, got the
7 wrong courtroom. Can - - - can the defense then,
8 when the police officer gets on, he says, isn't it
9 true that your nickname is Bonehead? I mean,
10 wouldn't that be unfair?

11 MS. RENO: I - - - I suppose in that
12 situation it would be unfair, but here, counsel was
13 making this representation to gain a favorable
14 ruling. Saying that the understanding comes from
15 defendant himself gives it a certain gravitas, and he
16 - - - counsel was trying to get a favorable bail
17 ruling here. So I think that's very different - - -

18 JUDGE FAHEY: So let's say that's true.

19 MS. RENO: - - - in this context.

20 JUDGE FAHEY: Then it's argument. And
21 sometimes arguments aren't entirely accurate. Some -
22 - - that happens all the time, right? We all - - -

23 MS. RENO: Sure.

24 JUDGE FAHEY: It happens all the time in
25 the profession. So that being the case, it's not a

1 factual assertion. Once again, it's simply a form of
2 advocacy. If we punish advocacy, how are people
3 going to be able to effectively do their job?

4 MS. RENO: Here, it was - - - the - - - the
5 stipulation allowed - - -

6 JUDGE FAHEY: Do you see the dangers of
7 this rule that - - - that you're pushing? The danger
8 of the rule is, is that we take - - - when people - -
9 - when advocates come in and push the limits of what
10 the truth is or what the facts are, and we start
11 punishing them in - - - in a situation where they're
12 advocating, not where they're signing a statement or
13 giving something under oath, we - - - we're creating
14 a really dangerous precedent.

15 MS. RENO: Well, the - - - otherwise,
16 defense attorneys will be able to misrepresent or lie
17 to the courts to get a favorable - - -

18 JUDGE PIGOTT: Oh, stop. You know, I - - -
19 I have it on a pretty good authority that defense
20 attorneys are about as honorable as district
21 attorneys.

22 MS. RENO: Okay, well, then, I'll end on -
23 - -

24 CHIEF JUDGE LIPPMAN: You agree to that,
25 don't - - - you agree to that, counsel?

1 JUDGE PIGOTT: Yeah, can we - - - can we
2 concede that?

3 MS. RENO: Oh, sure, certainly.

4 JUDGE FAHEY: She can concede that.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. RENO: Absolutely, but I - - - if I can
7 just make - - -

8 JUDGE RIVERA: Well, as a general
9 proposition, you're just questioning - - - you're
10 impugning her in this case. That's all.

11 MS. RENO: Just if I can make one final
12 point.

13 CHIEF JUDGE LIPPMAN: One quick point,
14 counsel.

15 MS. RENO: This - - - all of this that she
16 made a mistake was presented to the jury. And it was
17 up to the jury to decide - - -

18 CHIEF JUDGE LIPPMAN: We - - - we
19 understand that that's your position.

20 MS. RENO: - - - whether or not this even
21 mattered. Okay.

22 CHIEF JUDGE LIPPMAN: Okay, we get it.

23 MS. RENO: Thank you, Your Honor.

24 CHIEF JUDGE LIPPMAN: Thank you.

25 Counselor, rebuttal?

1 MR. KUMAR: Yes, Your Honor. No one
2 disputed at the first trial that the razor was a
3 dangerous instrument. You can look at the
4 summations. You can look at - - -

5 CHIEF JUDGE LIPPMAN: Your adversary says
6 that it's near the throat but it did - - -
7 miraculously there's no damage, so not a dangerous
8 instrument.

9 JUDGE PIGOTT: Your Honor, the judge
10 basically instructed the jury that this involved use
11 of a dangerous instrument, in this case, a razor.

12 JUDGE PIGOTT: But you're not going to get
13 - - -

14 MR. KUMAR: No one - - -

15 JUDGE PIGOTT: You're not going to get
16 convicted of rob one or burglary first or whatever
17 there's - - - in the second trial.

18 MR. KUMAR: It's not just about the - - -
19 the pure double jeopardy concerns. It's - - -
20 collateral estoppel is recognized because there is
21 unfairness in forcing a defendant - - -

22 JUDGE PIGOTT: You can argue prejudice, but
23 I - - - I - - - yeah, I don't get the collateral
24 estoppel on a - - - on a simple issue of fact like
25 this. I - - -

1 MR. KUMAR: Well, Your Honor, O'Toole
2 controls here. And - - -

3 JUDGE PIGOTT: Regrettably.

4 MR. KUMAR: And this court has established
5 since Acevedo - - -

6 CHIEF JUDGE LIPPMAN: Your argument is they
7 throw out the burglary one, that's the end of the
8 razor blade, period?

9 MR. KUMAR: Correct. And in addition, the
10 - - - the rob - - -

11 CHIEF JUDGE LIPPMAN: The robbery, yeah.

12 JUDGE PIGOTT: I don't - - - I don't
13 remember whether they had - - - did they have the
14 razor blade at the first trial?

15 MR. KUMAR: Yes.

16 JUDGE PIGOTT: Okay. Because - - - because
17 I was thinking of a scenario where they - - - they
18 find the weapon afterwards or there are facts that
19 now become known that were not known at the time of
20 the first trial. Are they nevertheless precluded
21 from introducing that evidence?

22 MR. KUMAR: That would be a very difficult
23 and - - - and complicated case. I think that'd be a
24 very specific case-by-case evaluation.

25 JUDGE PIGOTT: Well, it wouldn't be

1 collateral estoppel is my point. You - - - you'd - -
2 - if they did not have the razor at the first trial
3 and nevertheless tried to argue dangerous instrument
4 and they lost, and then they said, we found the
5 instrument, and it's - - - it turns out it's a
6 straight razor and it is pretty dangerous, and we
7 want to - - - we want to use that even though we
8 can't convict of robbery first. Could they do it?

9 MR. KUMAR: Perhaps, because the first
10 jury's verdict wouldn't stand as a definitive
11 rejection of that version of events.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. KUMAR: Thank you, Your Honor.

14 CHIEF JUDGE LIPPMAN: Thank you both.
15 Appreciate it.

16 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Luis Ortiz, No. 201, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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