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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 48

ENRIQUE RIVERA,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 18, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Number 48, People v.  
2 Rivera.

3 Counselor, do you want any rebuttal time?

4 MS. HULL: Two minutes, Your Honor, please.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
6 ahead.

7 MS. HULL: Good afternoon. My name is  
8 Leila Hull from Appellate Advocates, representing  
9 Enrique Rivera.

10 Here, in a six-person bar fight, it is  
11 impossible to rule out recklessness based on these  
12 injuries.

13 CHIEF JUDGE LIPPMAN: What about his own  
14 statements at - - - you know, at trial?

15 MS. HULL: We don't have to rely on those  
16 statements only; we have also the brother's  
17 testimony, and that is what kind of really fleshes  
18 out this melee, this frenzy - - -

19 JUDGE GRAFFEO: Is there really a question  
20 - - -

21 JUDGE RIVERA: How do you overcome the  
22 medical evidence? How do you overcome that medical  
23 evidence?

24 MS. HULL: The medical evidence can be  
25 overcome on the basis of the fact that even at the -

1 - - even if he was using the knife deliberately, he  
2 could still have been acting in conscious disregard  
3 of what the consequences were.

4 CHIEF JUDGE LIPPMAN: Is that based on - -  
5 - is your - - - your contentions there based on his  
6 statements to the police - - -

7 MS. HULL: No, but - - -

8 CHIEF JUDGE LIPPMAN: - - - at the station  
9 house?

10 MS. HULL: - - - that - - - that could be  
11 based on just the con - - - the fact that there was a  
12 fight with punches flying and that if somebody was  
13 even - - -

14 CHIEF JUDGE LIPPMAN: Why couldn't it be  
15 based on his - - - on his statements at the station  
16 house?

17 MS. HULL: It could be, if the court feels  
18 it would be necessary, but we don't have to rely on  
19 the statements alone. We can rely - - -

20 JUDGE SMITH: Are you making the - - - are  
21 you asking us to make a universal rule that any time  
22 there are more than five people in a bar fight  
23 there's a reasonable view of the evidence that it  
24 wasn't intentional?

25 MS. HULL: No. I think if there's five

1 people who are - - - with punches flying, that makes  
2 - - -

3 JUDGE READ: Well, isn't that the  
4 definition of a bar fight?

5 MS. HULL: I thought - - - I'm sorry; I may  
6 have misunderstood Justice Smith's question.

7 JUDGE READ: Well, I think the question was  
8 are you making a universal rule now, any time there's  
9 a melee of any - - - any sort in a bar, that you  
10 could always - - - it could always be reckless; there  
11 can never be an intentional - - -

12 MS. HULL: Not necessarily. I think  
13 there's certain - - - certainly there are injuries  
14 that could go - - - that could render the - - - the  
15 bar fight irrelevant - - -

16 CHIEF JUDGE LIPPMAN: How about - - -

17 MS. HULL: - - - but these do not.

18 CHIEF JUDGE LIPPMAN: How does Butler fit  
19 into that equation?

20 MS. HULL: Butler involves thirty-four stab  
21 wounds, nine of which were potentially fatal. That  
22 is far - - - the number and the severity of those  
23 wounds are far more serious than what you have here.  
24 And here you have wounds that do not - - - are not  
25 determinative of someone's mens rea. They're all

1 concentrated in the shoulder area, two in the back  
2 that are to the shoulder blades - - -

3 CHIEF JUDGE LIPPMAN: So your position is -  
4 - -

5 MS. HULL: - - - those are nonfatal.

6 CHIEF JUDGE LIPPMAN: - - - reasonable  
7 view?

8 MS. HULL: This is a reas - - - absolutely,  
9 a reasonable view that has to be viewed in the light  
10 most favorable to the defendant.

11 CHIEF JUDGE LIPPMAN: What about - - -

12 JUDGE RIVERA: But how - - -

13 CHIEF JUDGE LIPPMAN: - - - the  
14 intoxication charge? What does that have to do with  
15 all of this?

16 MS. HULL: Well, that there's a - - - the  
17 alcohol is also a factor. You have people who are  
18 drinking. You have people who are in - - - in this  
19 melee, and that even somebody's use of the - - - of a  
20 knife in a - - - in a deliberate sense, can still be  
21 a conscious disregard of the dangers that that poses.  
22 There are - - - I mean this court - - -

23 JUDGE GRAFFEO: You got the intoxication  
24 charge - - -

25 MS. HULL: Yes.

1 JUDGE GRAFFEO: - - - correct?

2 MS. HULL: Yes.

3 JUDGE ABDUS-SALAAM: Counsel - - -

4 MS. HULL: And - - -

5 JUDGE ABDUS-SALAAM: Counsel, do you rely  
6 at all on the videotaped statement? I know you - - -  
7 Judge Lipmann asked you about this, but I'm curious  
8 about his demo - - - your client's demonstration, in  
9 the videotaped statement, about how he might have  
10 wielded the knife. And he showed some kind of angle  
11 that was different than just waving it around. Do  
12 you rely on that?

13 MS. HULL: We don't have to rely on that,  
14 no. Even if we accept the ME's testimony about how  
15 the - - - how the - - - how the knife was used in an  
16 upward/down manner, that can - - - someone - - -  
17 because of the location of the injuries and the  
18 nature of the injuries, and the context in which it  
19 occurred, it doesn't rule out recklessness, and that  
20 is a jury question. At the end - - -

21 JUDGE GRAFFEO: Well, did any - - -

22 MS. HULL: - - - of the day - - -

23 JUDGE GRAFFEO: Did any of the other  
24 participants, any of the other bar patrons, indicate  
25 that they saw your client waving a knife around?

1 MS. HULL: No, they actually saw him tap  
2 his chest. They never even saw him touch the back,  
3 which actually suggests that their testimony isn't  
4 very reliable at all. Again, this is - - -

5 JUDGE GRAFFEO: Well, wouldn't - - -

6 MS. HULL: - - - a jury question.

7 JUDGE GRAFFEO: But couldn't that be  
8 interpreted by the jury as - - - as that he really  
9 wasn't waving it around; he intentionally stabbed  
10 this individual - - -

11 MS. HULL: But it doesn't rule out - - -

12 JUDGE GRAFFEO: - - - victim?

13 MS. HULL: - - - the - - - the brother's  
14 testimony of a frenzy of a fight, and that anybody's  
15 action in that context was reckless.

16 JUDGE READ: So that's what we're looking  
17 at? It's - - - what are the factors that you are  
18 relying on to say that the reckless charge should  
19 have been given?

20 MS. HULL: The brother's testimony,  
21 evidence of intoxication, and I also think it's  
22 important for this court to - - - to note that at the  
23 first trial, recklessness was submitted to the - - -  
24 to the jury, and that jury struggled long and hard,  
25 asking for reinstruction on all counts, including

1 reckless manslaughter, including sp - - - also  
2 specifically about recklessness.

3 JUDGE READ: So again, his brother's  
4 testimony and what else? What other factors?

5 MS. HULL: The brother's testimony, which  
6 talked about punches flying and - - - you know, he  
7 had to push through a crowd of people, and he's  
8 talking, exchan - - -

9 JUDGE GRAFFEO: I think our difficulty is -  
10 - -

11 MS. HULL: Um-hum.

12 JUDGE GRAFFEO: - - - we see a lot of these  
13 barroom - - -

14 MS. HULL: Right.

15 JUDGE GRAFFEO: - - - brawl cases. And  
16 unfortunately, there's a lot of violence that's  
17 associated sometimes in some of these cases. So when  
18 is it that you would give intentional and the  
19 reckless LIO and when wouldn't you? We're trying to  
20 determine what makes this case fall into the  
21 potential reckless category.

22 MS. HULL: In gene - - - in general, these  
23 types of cases, these questions - - -

24 JUDGE GRAFFEO: Because there's always  
25 intoxication and there's always a frenzy and there's

1 always punches flying.

2 MS. HULL: And - - -

3 JUDGE GRAFFEO: Otherwise, it's not a  
4 barroom brawl.

5 MS. HULL: Right. But generally, that's -  
6 - - that's why it should go to the jury. In these  
7 cases, they should generally go to the jury, because  
8 there are a lot of factors - - -

9 JUDGE ABDUS-SALAAM: But there is - - -

10 MS. HULL: - - - that are dependent on a  
11 find - - - I'm sorry.

12 JUDGE ABDUS-SALAAM: There has to be a  
13 reasonable view of the evidence presented to that  
14 jury, right?

15 MS. HULL: Yes.

16 JUDGE ABDUS-SALAAM: So you - - - you can't  
17 be saying that in every case where there is a brawl  
18 and something else that - - - you know, a brawl and  
19 an intoxication, there should be a reckless charge.  
20 There has to be something else in this case, in the  
21 evidence in this case. And although you say you're  
22 not relying on the videotaped statement, it helps  
23 you, right? So - - -

24 MS. HULL: Certainly, but it's not the only  
25 thing - - -

1 JUDGE ABDUS-SALAAM: - - - does that help -  
2 - - I know it's not the only thing, but that may push  
3 it over the line of whether it's a reasonable view of  
4 the evidence in this case versus some general brawl,  
5 is what I'm trying to point out to you.

6 MS. HULL: Yes, no, and I would absolutely  
7 agree. I think there is this - - - I would disagree  
8 that in - - - in where you have a - - - when you do  
9 have a brawl, that it - - - I understand that they're  
10 common, but the fact that they're common doesn't mean  
11 that you need additional evidence to push it over the  
12 edge.

13 JUDGE SMITH: You say there was a - - -

14 MS. HULL: Confu - - -

15 JUDGE SMITH: You say there was a  
16 reasonable view - - -

17 MS. HULL: Yes.

18 JUDGE SMITH: - - - of the evidence. Tell  
19 us what the reasonable view is. Pretend you're  
20 arguing to a jury in favor of a reckless manslaughter  
21 verdict. Tell me, as a juror, what I should find  
22 happened, based on this evidence.

23 MS. HULL: You could find that this man was  
24 trying to repel an attack, use the knife, and  
25 consciously disregarded the danger that that posed,

1           which is - - -

2                         JUDGE SMITH:   Can you be any more specific  
3           as to what happened?

4                         MS. HULL:   Well, the brother's testimony is  
5           that - - - that he - - - that there is five to six  
6           people involved, violent - - - you know, angry words  
7           are being exchanged.  At some point, he turns around,  
8           and punches started flying.  Furniture was actually  
9           tossed at one point.  So it is just - - - it's very  
10          confusing in that - - - in that context anybody's - -  
11          - anybody's actions could be consciously disregarding  
12          the danger - - -

13                        CHIEF JUDGE LIPPMAN:  But I - - - but I  
14          echo Judge Abdus-Salaam's comment; does it really  
15          help you, what he said at the - - - at the station,  
16          the video?  Isn't that really something that really  
17          helps you?

18                        MS. HULL:   It - - - it does, but it's not -  
19          - - it's not - - -

20                        CHIEF JUDGE LIPPMAN:  I understand, but - -  
21          -

22                        MS. HULL:   - - - the baseline.  I think  
23          that there is enough in the record regardless of the  
24          - - - regardless of the - - - of the - - - of the  
25          statement, which absolutely is helpful.  I - - - I

1 agree with the court completely.

2 JUDGE SMITH: Apart from the statement,  
3 what do you have, other than the fact that it was a  
4 melee?

5 MS. HULL: You have the evidence that there  
6 was people who were drinking, and that contributes to  
7 the melee. I mean, the - - - the point here - - -

8 JUDGE GRAFFEO: And can you - - - and how  
9 would you respond to the medical evidence that came  
10 in?

11 MS. HULL: Even someone's deliberate use of  
12 that knife does not necessarily mean that he had a  
13 conscious - - - conscious - - -

14 JUDGE GRAFFEO: Even the depth - - -

15 MS. HULL: - - - intent to - - -

16 JUDGE GRAFFEO: Even the depth of the  
17 wounds?

18 MS. HULL: Again, he could be repelling an  
19 attack. It could be a con - - - that doesn't - - -  
20 that doesn't rule out recklessness.

21 JUDGE RIVERA: How are you repelling the  
22 attack with the wounds in the back?

23 MS. HULL: Well, people are moving back and  
24 forth. That actually shows how chaotic this thing  
25 was.

1 JUDGE RIVERA: Don't you have to then go  
2 over? I - - - I'm still having great difficulty  
3 understanding how you get over the medical evidence.

4 MS. HULL: Well, the med - - - well, I  
5 think because this - - - the fact that you have  
6 injuries to the front and to the back of the deceased  
7 actually shows that this is a much more confusing  
8 encounter, even if, you know, these are downward - -  
9 - these are - - - these were downward movements,  
10 you're having him moving back and forth. He could be  
11 propelling himself towards the - - - towards - - -  
12 towards the - - - towards appellant, and also moving  
13 back. That's how - - - because at no point is there  
14 any testimony that he turned around, that appellant  
15 got behind him. That shows that this is confusing,  
16 that there is a frenzy.

17 JUDGE RIVERA: And - - -

18 MS. HULL: And again, the first - - -

19 JUDGE RIVERA: - - - there's evidence that  
20 he moved - - -

21 MS. HULL: - - - jury struggled with this.

22 JUDGE RIVERA: And there's evidence that  
23 he's moving the knife up and down, as opposed to left  
24 and right?

25 MS. HULL: Well, there's no - - - nobody

1 actually sees this knife. And that's actually  
2 another factor why this should go to the jury. No  
3 one ac - - -

4 CHIEF JUDGE LIPPMAN: No one sees the knife  
5 goes in; is that what you're saying?

6 MS. HULL: Nobody sees the knife. There's  
7 no testimony about the knife. None of the People's  
8 witnesses see this knife. The only reason we know  
9 there's a knife is because of the wounds themselves.  
10 So it's really - - - that's - - - and so that's the  
11 only basis.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MS. HULL: I mean, it's a clear basis.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MS. HULL: Sorry. Thank you.

16 CHIEF JUDGE LIPPMAN: Thanks, counsel.

17 MR. NEUBORT: May it please the court. My  
18 name is Solomon Neubort, and I represent the People.

19 CHIEF JUDGE LIPPMAN: Counsel, why wouldn't  
20 a reasonable view here - - - why couldn't this be  
21 reckless? What - - - between the video, between the  
22 confusion that's going on, between the testimony of  
23 the brother, why - - - why couldn't you - - - no  
24 one, as your adversary just indicated - - - no one  
25 sees the knife go in, much less the knife - - - why -

1 - - why isn't this very different than Butler?

2 MR. NEUBORT: The defendant said, in this  
3 case, in his pre-trial statement - - - I remember on  
4 - - - in his trial testimony he said he didn't have a  
5 knife at all. So viewing his testimony - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah, but they  
7 could believe - - -

8 MR. NEUBORT: - - - he didn't commit the -  
9 - - the murder at all.

10 CHIEF JUDGE LIPPMAN: - - - one part. They  
11 could believe one thing he said and not believe  
12 another, right?

13 MR. NEUBORT: That's true, Your Honor. But  
14 his testi - - -

15 CHIEF JUDGE LIPPMAN: Why isn't this very  
16 different from Butler?

17 MR. NEUBORT: His - - - the defendant's  
18 pre-trial statements, all three of them - - -

19 CHIEF JUDGE LIPPMAN: But - - -

20 MR. NEUBORT: - - - his oral - - -

21 CHIEF JUDGE LIPPMAN: But isn't Butler very  
22 different?

23 MR. NEUBORT: Well, Your Honor, if you're  
24 asking about Butler, whether the evidence - - -

25 CHIEF JUDGE LIPPMAN: I'm asking in light

1 of what you have here, isn't it very different than a  
2 case like Butler?

3 MR. NEUBORT: It's different from the case  
4 of Butler, but there's no reasonable view of the  
5 evidence - - - you have to have not just sheer  
6 speculation. In - - - in Discala, this court said -  
7 - -

8 CHIEF JUDGE LIPPMAN: No one saw - - -

9 MR. NEUBORT: - - - you don't resort to - -  
10 -

11 CHIEF JUDGE LIPPMAN: No one sees the  
12 knife. Why - - - why is it sheer speculation?

13 MR. NEUBORT: Well, it's - - - it's not  
14 true - - -

15 CHIEF JUDGE LIPPMAN: Why isn't it  
16 reasonable view that there's lots of drinking, lots  
17 of scurrying about between these different people,  
18 lots of confusion, different statements from the  
19 defendant; why isn't it a reasonable view that hey,  
20 this could have been reckless?

21 MR. NEUBORT: Because you have to look at  
22 every piece of evidence of what happened here and you  
23 can't just throw - - -

24 CHIEF JUDGE LIPPMAN: Is it just the  
25 medical examiner that you're hanging on?

1 MR. NEUBORT: No. The - - -

2 CHIEF JUDGE LIPPMAN: What is it?

3 MR. NEUBORT: Well, first of all - - -

4 CHIEF JUDGE LIPPMAN: What is it that they

5 - - -

6 MR. NEUBORT: - - - there were two  
7 eyewitnesses who, although they didn't see the knife  
8 in the defendant's hand, said that moments before the  
9 defendant (sic) was stabbed they saw the - - - the  
10 defendant hit the - - - or shove or punch the victim  
11 in the spot where - - -

12 CHIEF JUDGE LIPPMAN: What did the brother  
13 - - - what'd the brother say?

14 MR. NEUBORT: The brother didn't say  
15 anything about the - - - about the stabbing. The  
16 brother didn't see the defendant and the victim  
17 interacting at all. All the defendant's brother said  
18 - - - Julio says there was a bar fight; that's his  
19 testimony. Now, it would be one thing if Julio said  
20 I saw the defendant and the victim and they were  
21 tussling and there was - - - they were going at it  
22 and they're in arm-to-arm combat, and so there was a  
23 stab wound, and maybe it was inflicted without - - -  
24 without intent to commit serious physical injury or  
25 death. But that's not the testimony. Julio just

1           said there was a bar fight. That can't support a - -  
2           - a reasonable view of the evidence.

3                         JUDGE ABDUS-SALAAM: The testimony that was  
4           different from the first trial and this trial where  
5           recklessness was charged in the jury in the first  
6           trial; what made this - - - this second trial  
7           different?

8                         MR. NEUBORT: I - - - I don't know what the  
9           difference was, but the fact that a - - - a charge  
10          was charged at the first trial doesn't require a  
11          court to submit it at the second trial. It's just -  
12          - -

13                        CHIEF JUDGE LIPPMAN: And the jury had  
14          trouble with - - - and the jury had trouble with it.

15                        MR. NEUBORT: The jury didn't - - - there's  
16          no evidence the jury had trouble with it.

17                        JUDGE PIGOTT: I don't think - - -

18                        MR. NEUBORT: The jury had trouble with - -  
19          -

20                        JUDGE PIGOTT: Excuse me. I don't think  
21          Judge Abdus-Salaam's question was, you know, that  
22          juries can make different decisions. The question  
23          was what - - - what differing facts were there that -  
24          - - that the judge in the first trial found it  
25          reasonable grounds to believe that negligence ought

1 to be charged?

2 MR. NEUBORT: I - - - I don't know, and it  
3 may very well be that the court gave an instruction  
4 that wasn't necessary, just like the court in this  
5 case gave an - - - an intoxication charge that the  
6 defendant really wasn't entitled to, but he gave him  
7 a gift. So the fact that a court gives an  
8 instruction at one trial doesn't mean that the court  
9 is required to give it - - -

10 JUDGE PIGOTT: No, I know that.

11 MR. NEUBORT: - - - at another trial.

12 JUDGE PIGOTT: I just thought it was a good  
13 question, because obviously somebody listened to the  
14 facts of this case and decided that the charge should  
15 be given, which, you know, kind of makes some sense,  
16 I suppose. And now someone else says it should not  
17 be given. And you're arguing that it wasn't even  
18 preserved.

19 MR. NEUBORT: That's correct, Your Honor.  
20 And I would point out - - -

21 CHIEF JUDGE LIPPMAN: But doesn't the  
22 intoxication charge in this case help them, help the  
23 defendant?

24 MR. NEUBORT: No, Your Honor, there was no  
25 - - - there was no - - -

1 CHIEF JUDGE LIPPMAN: Of no significance?

2 MR. NEUBORT: There was no - - -

3 CHIEF JUDGE LIPPMAN: There's no general  
4 relationship between one and the other?

5 MR. NEUBORT: There was no evidence of  
6 intoxication whatsoever. This court - - -

7 CHIEF JUDGE LIPPMAN: You just said that a  
8 judge can make a decision, and that's what you're  
9 stuck with in that case, just like in the other case  
10 it was reckless. There was an intoxication charge  
11 here; doesn't that help defendants?

12 MR. NEUBORT: This court in Butler said  
13 that where the court gives an intoxication charge, it  
14 doesn't bind the court to give a - - - a reckless  
15 manslaughter charge based on - - -

16 CHIEF JUDGE LIPPMAN: It's not - - -

17 MR. NEUBORT: - - - intoxication.

18 CHIEF JUDGE LIPPMAN: - - - binding, but  
19 there's some relationship, isn't there?

20 MR. NEUBORT: There - - - there is some  
21 relationship, but the court gave - - - the trial  
22 court, in our view gave - - -

23 CHIEF JUDGE LIPPMAN: But you're picking  
24 and choosing where - - - where one thing works and  
25 where it doesn't. In the first case, reckless charge

1 doesn't matter. In the second case, there was no  
2 reckless, but you have an intoxication charge; it  
3 doesn't matter.

4 MR. NEUBORT: This court is - - - is bound  
5 to view the evidence and - - - and to just look at it  
6 whether or not it was required or not required, and  
7 not to look at what the judge did with respect to  
8 some other charge, whether or not there was an  
9 intoxication charge. This court has already held  
10 that in Butler. You don't look at whether there was  
11 an intoxication charge.

12 CHIEF JUDGE LIPPMAN: Yeah, yeah, but we  
13 just - - - but I asked you before, isn't this case  
14 starkly different from Butler?

15 MR. NEUBORT: It's starkly different from  
16 Butler in - - - in the number of stab wounds, but not  
17 in about the intoxication. This court, when talking  
18 about intoxication, said that the fact that a court  
19 gives an intoxication charge doesn't bind the court  
20 to give a lesser charge of - - - of manslaughter.

21 JUDGE PIGOTT: How do you construe the  
22 evidence when you're determining whether to give the  
23 charge or not?

24 MR. NEUBORT: Well, it's in the light most  
25 favorable to the defendant, but in this case there

1 was - - -

2 JUDGE PIGOTT: Can we go back to this  
3 question that's still bothering me? If you construe  
4 it in the light most favorable to the defendant, what  
5 was different in - - - in the first trial as opposed  
6 to this trial, that - - - that changed that?

7 MR. NEUBORT: I didn't read the - - - the  
8 first trial transcript, so I - - - I couldn't tell  
9 you, but it really is irrelevant for purposes of this  
10 court's decision.

11 JUDGE SMITH: Your argument is the first  
12 judge may have erred.

13 MR. NEUBORT: That's correct, and that's  
14 what I said earlier, Your Honor.

15 JUDGE GRAFFEO: And what's your view of the  
16 medical proof in this case?

17 MR. NEUBORT: The medical - - -

18 JUDGE GRAFFEO: Why couldn't - - - why  
19 couldn't the situation be the way your adversary  
20 described it?

21 MR. NEUBORT: Because it's not consistent  
22 with any of the evidence at trial. The evidence at  
23 trial - - - the People's evid - - - testimony was the  
24 defendant - - - that the defendant stabbed the victim  
25 suddenly and spontaneously, not - - - no bar fight at

1 all. The defendant said, I didn't stab the victim at  
2 all, in his trial testimony. And in his - - - and in  
3 his videotaped statement, he said I swung the knife  
4 this way, which cannot possibly result in three - - -  
5 he said I swung it indiscriminately at a crowd, but  
6 he stabbed the - - -

7 JUDGE SMITH: Suppose he had not recanted  
8 that at trial. Suppose he had stuck to it and said  
9 the same thing at trial on the teeth of the medical  
10 evidence; could the - - - is the jury entitled to  
11 believe him?

12 MR. NEUBORT: Well, two things. First of  
13 all, Your Honor, if you just had the defendant's pre-  
14 trial testim - - -

15 JUDGE SMITH: Well, why don't - - -

16 MR. NEUBORT: - - - pre-trial - - -

17 JUDGE SMITH: Well, why don't you start  
18 with yes or no? Is the jury - - - could the jury  
19 accept that testimony if he gave it at trial?

20 MR. NEUBORT: The jury could not - - - if  
21 the jury accepted that testimony, they would have had  
22 to acquit the defendant, because it was so  
23 inconsistent with the medical testimony that they  
24 would have had to conclude that when the defendant -  
25 - - remember, the defendant didn't admit to stabbing

1 the victim. He admitted to swinging the knife in the  
2 - - - in the victim's presence.

3 JUDGE SMITH: I guess maybe let me refine  
4 my question a little. If the - - - if the same  
5 statement that he gave on the video had been given  
6 under oath at trial and subject to cross-examination,  
7 and had been the theory of the defense at trial,  
8 would that be enough to establish a reasonable view  
9 of reckless manslaughter?

10 MR. NEUBORT: No, Your Honor, because  
11 again, if they credited his statement, it wouldn't  
12 require submission of the lesser included; it would  
13 require acquittal, because the defendant, again,  
14 didn't admit to stabbing the victim. What he did was  
15 he admitted to swinging the knife in the victim's - -  
16 - in the victim's presence - - -

17 JUDGE SMITH: Implicitly he - - - yeah, and  
18 he said he was sorry, so he - - - what he admitted  
19 was that he - - - that he was swinging the knife and  
20 it just somehow got into the - - -

21 MR. NEUBORT: No, Your Honor. He said  
22 after he left - - - he said I didn't know that I  
23 stabbed anyone. He was only saying I'm sorry because  
24 it turns out the police tell him that he stabbed  
25 someone.

1 JUDGE SMITH: Okay. But it's - - -

2 MR. NEUBORT: So - - -

3 JUDGE SMITH: It's implicit that he did.

4 MR. NEUBORT: No, Your - - - well, Your  
5 Honor, our view is that he - - - he stabbed the  
6 victim. But if the jury were to - - - to credit the  
7 defendant's testimony or pre-trial statement to that  
8 effect, the only conclusion that would be consistent  
9 with the unrebutted, irrefutable medical evidence  
10 would be that some unknown third person stabbed the  
11 victim - - -

12 JUDGE PIGOTT: But you don't know - - -

13 MR. NEUBORT: - - - even though the  
14 defendant waved the knife in his presence.

15 JUDGE PIGOTT: You don't know at that  
16 point. In other words, you may be right, it would  
17 end up in an acquittal, but at the time you're  
18 looking for a charge to the jury, if the defendant  
19 said, you know, I - - - I'm innocent of this thing,  
20 but, at a minimum, I am entitled to this reckless  
21 charge. Would you agree that he would be, if as - -  
22 - under Judge Smith's hypothetical?

23 MR. NEUBORT: No, Your Honor. Again, it's  
24 not about - - - this is not about - - - this is not  
25 about - - -

1 JUDGE SMITH: Let me - - -

2 MR. NEUBORT: - - - sheer speculation.

3 There has to be a reasonable view of evidence - - -

4 JUDGE SMITH: Let me follow a little more -

5 - -

6 MR. NEUBORT: - - - actual evidence - - -

7 JUDGE SMITH: Let me - - - I'll give him  
8 just a little more testimony. He makes the same  
9 statement he made on the video, and then he says, and  
10 it's now clear to me that I wasn't careful, that I  
11 was - - - that I was careless with that knife and it  
12 went into somebody, and I'm terribly sorry, and I  
13 killed a man by accident and I guess I was reckless.  
14 Is - - - now is there a reasonable view of the  
15 evidence for reckless manslaughter?

16 MR. NEUBORT: If the manner in which he  
17 said that he inflicted the - - - the stab wounds  
18 would be consistent with the - - -

19 JUDGE SMITH: You still - - -

20 MR. NEUBORT: - - - medical evidence - - -

21 JUDGE SMITH: He still has to be consistent  
22 with the medical evidence or the jury can't believe  
23 him?

24 MR. NEUBORT: Well, in this case, if you  
25 just have the defendant's testimony without - - -

1 again, but that's not what happened here. The  
2 defendant didn't admit to stabbing the victim.

3 JUDGE SMITH: Okay. Okay.

4 MR. NEUBORT: And - - -

5 JUDGE SMITH: That's right. It's a - - -  
6 it's a hypothetical; what's the answer to it?

7 MR. NEUBORT: That would be a closer  
8 question, but not the facts under this case. And in  
9 this case also, I would point out that the error was  
10 harmless, because it just simply was inconsistent  
11 with - - -

12 JUDGE RIVERA: Well, would it be - - -

13 MR. NEUBORT: - - - the defendant's  
14 testimony.

15 JUDGE RIVERA: - - - pure - - - following  
16 up on this hypothetical, would it be pure speculation  
17 - - - would this be your argument? It would be pure  
18 speculation if the jury decided, well, he's saying  
19 he's - - - it's - - - he's swinging it left and right  
20 and not up and down, and somehow it appears  
21 inconsistent with the medical - - - the medical  
22 testimony, but the reality is because it's a - - -  
23 it's a barroom brawl, he may not fully be conscious  
24 of the way he was swinging that knife, plus he was  
25 drinking.

1                   MR. NEUBORT: He said that he didn't know  
2 that he stabbed anyone, but stabbed someone five  
3 inches deep and cut through a rib. It's just not  
4 possible for him to have done it in the manner that  
5 he said.

6                   JUDGE READ: So really your whole case  
7 hinges on the medical testimony. You're saying  
8 there's just no way it could be reckless, in view of  
9 the medical testimony.

10                  MR. NEUBORT: It's - - - it's not just  
11 medical testimony; it's the medical evidence. It's  
12 not just the - - -

13                  JUDGE READ: Well, that's what I mean.

14                  MR. NEUBORT: - - - the medical evidence -  
15 - - if the medical - - -

16                  JUDGE READ: It's really - - - - you really  
17 rely on the depth of the stab wounds.

18                  MR. NEUBORT: Well - - - well, sure and the  
19 number.

20                  JUDGE READ: Your case.

21                  MR. NEUBORT: There were three - - - he  
22 said he swung it indiscriminately at a crowd and yet  
23 stabbed one person.

24                  JUDGE READ: So that's what it - - - it  
25 comes down to the depth and the number of the stab

1 wounds. It can't possibly be reckless because of  
2 those physical facts.

3 MR. NEUBORT: That's - - - that's correct,  
4 Your Honor, and - - - and just one - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. NEUBORT: Just one - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, finish your

8 - - -

9 MR. NEUBORT: - - - little point is that  
10 the defendant is now saying that - - - that well,  
11 maybe the - - - the stab wounds - - - maybe he did  
12 intend to stab the victim and but maybe he intended  
13 to stab the victim but didn't intend to cause serious  
14 physical injury or death. That's not preserved. The  
15 defendant's argument at trial was that he - - - his  
16 argument - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. NEUBORT: - - - in this when he  
19 preserved it was that he was just swinging it and had  
20 no intention of stabbing anyone - - -

21 CHIEF JUDGE LIPPMAN: Thank you.

22 MR. NEUBORT: - - - and now is saying he -

23 - -

24 CHIEF JUDGE LIPPMAN: Thanks.

25 MR. NEUBORT: - - - he intended. I'm



1 scenario, there's a reasonable view in this case,  
2 because - - - because of everything we've already  
3 discussed - - -

4 CHIEF JUDGE LIPPMAN: Counsel - - -

5 MS. HULL: - - - in terms of the - - -

6 CHIEF JUDGE LIPPMAN: Counsel, as Judge  
7 Read just said, your adversary seems to be hanging on  
8 the medical evidence. Why can you still win, despite  
9 the medical testimony and evid - - - that seems to be  
10 where your adversary's mostly relying.

11 MS. HULL: One, because this is very  
12 distinct from Butler in terms of the - - - in terms  
13 of the injuries we're talking about. Those - - -  
14 these injuries are not determinative of mens rea.  
15 Mens rea depends on a - - - a wide range of factors,  
16 all of which needs to be considered the totality of  
17 the evidence here. The other - - -

18 JUDGE SMITH: Are you - - - are you saying  
19 that any time anyone inflicts a stab wound like this  
20 that a jury can find it was reckless?

21 MS. HULL: If the fact - - - or with  
22 factors like these, then yes. I mean, it's - - -  
23 again, you can't look at the wounds in isolation.  
24 They have to be considered - - -

25 CHIEF JUDGE LIPPMAN: So the medical

1 evidence is not in a vacuum; is that what you're  
2 saying?

3 MS. HULL: Absolutely.

4 CHIEF JUDGE LIPPMAN: That your argument  
5 is, as opposed to your adversary, that despite that  
6 medical evidence, there's enough around it to give a  
7 reasonable view? I mean, is that the thrust - - -  
8 the gist of what you're saying?

9 MS. HULL: Said better than I have today.  
10 Thank you.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MS. HULL: So - - -

13 JUDGE RIVERA: You're saying the medical  
14 evidence can be viewed, in light of this barroom  
15 brawl, to actually support - - -

16 MS. HULL: Yes.

17 JUDGE RIVERA: - - - your position.

18 MS. HULL: Given the position and nature of  
19 these wounds which are targeting the shoulder area.

20 JUDGE GRAFFEO: You're saying even if he  
21 did five inch deep and hit and penetrated the rib, he  
22 wouldn't be aware of that?

23 MS. HULL: He may not have been aware of it  
24 when he did it, when he started doing it, when he  
25 moved his hand, when he acted that way, yes, because

1           it's - - - it's that he's - - -

2                       JUDGE SMITH:  Can't every murderer who ever  
3           lived say that - - - or person guilty of intentional  
4           manslaughter?

5                       MS. HULL:  But we do need to look at the  
6           evidence in the light most favorable to the  
7           defendant, and here, while any defendant may say  
8           that, here we have evidence to look at in - - - in  
9           his favor that supports submitting this charge.

10                      JUDGE RIVERA:  What about - - - what about  
11           the People's position that if he was really just  
12           swinging the knife, surely someone else would have  
13           been injured?

14                      MS. HULL:  That is a factor for the jury to  
15           consider; this is a jury question.  And the court  
16           took that determination away from the jury.

17                      CHIEF JUDGE LIPPMAN:  Okay.

18                      MS. HULL:  Thank you.

19                      CHIEF JUDGE LIPPMAN:  Thanks.  Thank you  
20           both.

21                      (Court is adjourned)

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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 Matter of People of the State of New York v. Enrique Rivera, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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