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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 132

OLIVERIO GALINDO,

Appellant.

20 Eagle Street
Albany, New York 12207
June 3, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 132, People v.
2 Galindo.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: I think you could
5 start.

6 MS. CABRERA: I could start?

7 CHIEF JUDGE LIPPMAN: Do you want any
8 rebuttal time?

9 MS. CABRERA: Two minutes of rebuttal - - -

10 CHIEF JUDGE LIPPMAN: Two minutes, go
11 ahead.

12 MS. CABRERA: - - - please, Your Honor.

13 CHIEF JUDGE LIPPMAN: Why don't you get
14 started?

15 MS. CABRERA: May it please the court,
16 Marisa Cabrera on behalf of Mr. Galindo. Were the
17 only evidence of Mr. Galindo's possession of a weapon
18 was during an accidental shooting, the evidence was
19 legally insufficient as the prosecution could not
20 solely rely upon the presumption to prove its case.

21 CHIEF JUDGE LIPPMAN: Wasn't there other
22 evidence? Are you discounting the - - - the other
23 evidence?

24 MS. CABRERA: There - - - there really was
25 no other evidence.

1 JUDGE GRAFFEO: What about his statements
2 to Flores?

3 MS. CABRERA: The statement - - - well, the
4 st - - - using the statements to Florence - - - well,
5 to - - - I'm sorry, to Flores, was that there was an
6 accidental shooting, and that he then threw out the
7 wea - - - disposed of the weapon in a trash bin
8 outside the hospital.

9 JUDGE GRAFFEO: Well - - - well, maybe I
10 should ask you, what do the People have to prove to
11 get to the presumption?

12 MS. CABRERA: Okay, so the - - - the - - -

13 JUDGE GRAFFEO: What - - - what's miss - -
14 - what do you say is missing?

15 MS. CABRERA: Is missing? The possession
16 element, specifically prior to the moment of
17 discharge, because we know that the possession at
18 that moment of the accidental shooting was
19 unintentional at that moment, and that's consistent
20 with their theory. And thereafter, Mr. Galindo's
21 intent, as we saw, was to dispose of the weapon.

22 JUDGE ABDUS-SALAAM: Right, are you saying
23 he unintentionally possessed the gun, or he
24 unintentionally shot his cousin?

25 MS. CABRERA: Well, it's - - - it's - - -

1 it's really that it was an unintentional shooting of
2 the weapon. His intent at that point - - -

3 JUDGE SMITH: But - - -

4 JUDGE RIVERA: Doesn't it only establish
5 that, as Judge Abdus-Salaam is saying, that he didn't
6 intend to shoot this person, not that he didn't have
7 the intent to use it in particular way against
8 someone else?

9 MS. CABRERA: Correct, but that would
10 require then the speculation that he possessed the
11 weapon prior to that. That he had this weapon at his
12 - - -

13 CHIEF JUDGE LIPPMAN: But you know - - -
14 but we know that he showed the gun to the cousin,
15 right? His testimony is that - - -

16 MS. CABRERA: We have - - - we have Flores
17 saying, and there's a lot of reliance, as to the lan
18 - - - the, you know - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but - - - and
20 we know he disposed of it afterwards?

21 MS. CABRERA: Yes.

22 CHIEF JUDGE LIPPMAN: And we know that he
23 lied, you know, to the - - - to Flores, and - - - and
24 - - - and, you know, we know that he tried not to get
25 - - -

1 MS. CABRERA: Yeah.

2 CHIEF JUDGE LIPPMAN: - - - the cousin to
3 testify, or at least there's evidence as to all of
4 those - - -

5 MS. CABRERA: That he didn't want him to.

6 CHIEF JUDGE LIPPMAN: Yeah, there's
7 testimony as to all those things. Isn't that - - -
8 is that something or nothing or it - - -

9 MS. CABRERA: That's fear - - - I mean,
10 that's fear of criminal liability. That's fear of,
11 you know - - -

12 CHIEF JUDGE LIPPMAN: Is consciousness of
13 guilt but not - - -

14 MS. CABRERA: But consciousness of guilt,
15 you know - - - the case law is pretty clear that it's
16 not very indicative of - - -

17 JUDGE RIVERA: But why are that - - - why
18 is that not for the jury to decide what it means?

19 MS. CABRERA: Because this is still - - -
20 there has to be the proof of actual possession.

21 JUDGE SMITH: Well, but if I - - - if - - -
22 if I told you that I shot my cousin with a gun by
23 mistake, wouldn't you feel comfortable inferring that
24 at some point I possessed a gun?

25 MS. CABRERA: Well, it could have been - -

1 - there - - - there are so many - - - there's twenty
2 minutes of we just simply don't know what happened in
3 this case.

4 JUDGE SMITH: Yeah, but there's one minute
5 where you do.

6 MS. CABRERA: And - - - and that one minute
7 it could be that Mr. Galindo picked the gun up off
8 the street.

9 JUDGE SMITH: A lot of things - - - a lot
10 of things could be, but isn't the jury entitled to
11 make the common sense inference that most people who
12 shoot people possess weapons?

13 MS. CABRERA: Well, the possession of the
14 weapon, though, was so important in this case, as to
15 why Mr. Galindo had it. We just don't know. If he
16 had - - -

17 JUDGE SMITH: Okay, well, that - - - you
18 seem to - - - I thought you were arguing before that
19 they never even proved possession?

20 MS. CABRERA: They - - - they didn't prove
21 possession prior to the point of the accidental
22 shooting. And all we know is that Mr. Galindo had
23 possession at the moment - - -

24 CHIEF JUDGE LIPPMAN: Wait, but we know he
25 was - - -

1 MS. CABRERA: - - - he didn't have unlawful
2 intent.

3 CHIEF JUDGE LIPPMAN: - - - but we know he
4 was showing the gun to the cousin. That doesn't do
5 anything?

6 MS. CABRERA: But showing the gun to the
7 cousin could be so many things. The cousin was
8 outside of the - - - was - - -

9 CHIEF JUDGE LIPPMAN: But we have a
10 particular time frame here that pretty much narrowed
11 it down - - -

12 MS. CABRERA: Yes.

13 CHIEF JUDGE LIPPMAN: - - - to when he - -
14 - when that happened and when the accident happened.

15 MS. CABRERA: Yes.

16 CHIEF JUDGE LIPPMAN: We know it's a very
17 small time frame, don't we, from the - - - the video?

18 MS. CABRERA: It's a small time frame, but
19 there are so many things that could have happened.
20 For example, the cousin, who had been gone for
21 multiple hours from the bar, came back. At that - -
22 - during that point in time, it's very likely that he
23 perhaps brought the weapon back to the bar, since it
24 was very clear the prosecution established that there
25 was no gun policy - - - guns weren't allowed at this

1 place of business.

2 JUDGE ABDUS-SALAAM: But haven't - - -
3 wouldn't the story be then that the cousin was
4 showing the gun to Mr. Galindo, not the other way
5 around?

6 MS. CABRERA: Or it could have been, I got
7 this gun, I don't know how to use it or something,
8 and Galindo's looking at it. Or it could have been a
9 third person was there. We don't - - -

10 JUDGE RIVERA: Lots - - - there's lots of
11 speculate - - -

12 JUDGE GRAFFEO: Isn't - - - isn't that what
13 he said?

14 JUDGE RIVERA: - - - and that's lots of
15 speculation.

16 MS. CABRERA: But that's the - - - but I
17 guess that's the whole problem. There's lots of
18 speculation - - -

19 JUDGE RIVERA: Okay.

20 MS. CABRERA: - - - in this case as to that
21 - - - as to this - - -

22 JUDGE GRAFFEO: I'm going to go back to my
23 first question. What do the People have to show to
24 get the benefit of the presumption? Because, say we
25 take a different fact pattern.

1 MS. CABRERA: Yes.

2 JUDGE GRAFFEO: Somebody's walking down the
3 street with a loaded gun. Don't they get the benefit
4 of the presumption?

5 MS. CABRERA: Absolutely, and that's a very
6 different case.

7 JUDGE GRAFFEO: So why is it that if you
8 discharge the gun, you're not responsible, but if you
9 just display the gun, you are responsible under the
10 statute?

11 MS. CABRERA: The key different - - -

12 JUDGE GRAFFEO: That doesn't make a lot of
13 sense.

14 MS. CABRERA: It - - - the reason why it
15 makes sense in this case, is because there was no po
16 - - - there was no demonstration that Mr. Galindo was
17 carrying the gun around. We have no idea how he came
18 to possess the gun. And that is the key distinction
19 between this case and the typical case where - - -

20 JUDGE GRAFFEO: And there's no reasonable
21 inferences here?

22 MS. CABRERA: At the - - - no, because
23 there's - - - it would be pure speculation. All we
24 know is that at the moment in which he came to
25 possess the gun, there was only - - - it - - - his

1 only intent was unintentional.

2 JUDGE GRAFFEO: Well, the co - - - the
3 cousin never made any comments in the hospital or - -
4 -

5 MS. CABRERA: No - - -

6 JUDGE GRAFFEO: - - - in the trial, that he
7 found the gun.

8 MS. CABRERA: No, he didn't. I mean, the
9 cousin - - - the cousin didn't testify.

10 JUDGE GRAFFEO: So nobody possessed the
11 gun?

12 MS. CABRERA: We're not - - - we're not - -
13 -

14 JUDGE GRAFFEO: This gun just fell from the
15 heavens and went off.

16 MS. CABRERA: Well, we're not suggesting
17 that, but it's possible that they, A, found it on the
18 street, or that a third party came in and met them.

19 CHIEF JUDGE LIPPMAN: Are you say - - - are
20 - - -

21 MS. CABRERA: We don't - - - that's very
22 likely.

23 CHIEF JUDGE LIPPMAN: Are you saying that
24 there - - - is it your position that there is no
25 evidence here other than the presumption, period?

1 MS. CABRERA: Yes. There were - - - I
2 mean, this was the sole insufficient basis - - -

3 JUDGE RIVERA: No, but you have - - -

4 MS. CABRERA: - - - and - - - and even so,
5 with just - - -

6 JUDGE RIVERA: But your whole argument is
7 that because it discharges, you can't count that
8 possession - - -

9 MS. CABRERA: No - - -

10 JUDGE RIVERA: - - - and I don't understand
11 that. But one - - - why - - - does he only need to
12 show the possession? You don't have any issue with
13 the intent?

14 MS. CABRERA: Well, the - - - the
15 possession is a predicate fact to justify the
16 presumption.

17 JUDGE SMITH: But if we - - - but if we - -
18 - if we - - - if we disagree with you about
19 possession, is the case over, or do you have another
20 argument?

21 MS. CABRERA: Well, that - - - I guess, it
22 would depend - - -

23 JUDGE SMITH: Let's suppose we - - - we
24 decide that there's sufficient evidence of possession
25 here. Do we take the rest of the day off or have you

1 got something else to tell us?

2 MS. CABRERA: Well, the - - - the issue is
3 still that there's no proof of any sort of unlawful
4 intent in any respect - - -

5 CHIEF JUDGE LIPPMAN: Where does the intent
6 have to be - - -

7 MS. CABRERA: - - - in addition to that.

8 CHIEF JUDGE LIPPMAN: - - - directed at?

9 MS. CABRERA: Anyone, really. But there
10 was no evidence that he used - - - that he intended
11 to use it - - -

12 CHIEF JUDGE LIPPMAN: Intended to use it
13 against someone other than the - - -

14 MS. CABRERA: Exactly. Exactly.

15 CHIEF JUDGE LIPPMAN: - - - then the
16 cousin?

17 JUDGE ABDUS-SALAAM: In a case like Plaxico
18 Burress who shot himself in a club, would the People
19 have the ability to rely on the intent - - - on the
20 presumption in that case?

21 MS. CABRERA: And - - - yes, because that's
22 different, again, because he - - -

23 JUDGE ABDUS-SALAAM: Why is it different?

24 MS. CABRERA: Because, again, he's carrying
25 the weapon at that moment in time. We know that

1 Plaxico Burress had a gun on his body in his
2 possession.

3 JUDGE SMITH: So - - - so you're - - -
4 you're conceding that the facts of that case - - -
5 somebody is walking into a nightclub with a gun, and
6 the gun goes off, that that will support a conviction
7 for a possession with intent to use unlawfully
8 against another?

9 MS. CABRERA: That - - - that would be - -
10 - that would present a different factual pattern.

11 JUDGE SMITH: Well, yeah, I know it's
12 different. The question is, would it - - - would it
13 be sufficient?

14 MS. CABRERA: I think so - - -

15 CHIEF JUDGE LIPPMAN: Do you know if that's
16 what he was convicted of?

17 MS. CABRERA: I'm sorry?

18 JUDGE PIGOTT: Do you know if that's what
19 he was convicted of?

20 MS. CABRERA: I'm sorry, who? Plaxico
21 Burress?

22 JUDGE PIGOTT: Yes.

23 MS. CABRERA: I'm - - - I'm not - - - I'm
24 not familiar.

25 JUDGE ABDUS-SALAAM: He didn't intend to

1 accidentally shoot himself.

2 MS. CABRERA: Shoot himself, yes.

3 JUDGE ABDUS-SALAAM: But - - -

4 MS. CABRERA: But - - - but again, the
5 possession of the - - - there's - - - there's a
6 difference in this case versus that, in that Plaxico
7 Burrell, we know for a fact, that he was - - - he
8 decided to take this weapon, put it on his body, and
9 go to this nightclub.

10 JUDGE GRAFFEO: So - - - so the People are
11 never going to get the benefit of the presumption if
12 there's not some other witness to indicate that they
13 saw the person carrying - - -

14 MS. CABRERA: No, that - - -

15 JUDGE GRAFFEO: - - - a handgun?

16 MS. CABRERA: - - - that's not true,
17 because it's often times, for example, in - - - in
18 stop-and-frisk cases where they'll find a gun on the
19 - - - on the defendant's body. That's a different
20 scenario. I mean, we just - - - and the cops testify
21 that, you know, that they found this gun, and the
22 jury can decide - - -

23 JUDGE GRAFFEO: Right, that's the - - -

24 MS. CABRERA: - - - to accept or reject it.

25 JUDGE GRAFFEO: - - - the witness saying

1 they're carrying it.

2 MS. CABRERA: I mean, perhaps - - - well, I
3 guess how else would - - - would the - - - would it
4 be discovered then that they had the weapon. I - - -

5 JUDGE SMITH: On the issue of intent, why
6 can't the jury infer from the attempt to - - - to
7 secrete the witness from the - - - from his saying to
8 the anonymous woman, tell him not to come to court.
9 Why can't - - - why can't the jury infer from that
10 that the - - - a guilty knowledge that he did have an
11 unlawful intent and that the witness - - - if the
12 witness came to court, that would be - - - become
13 known.

14 MS. CABRERA: I think that's a big jump in
15 terms of assumptions and speculation as to that - - -
16 that my client would - - - would know that - - - that
17 this was an issue of unlawful intent, as much as it
18 was they're putting me on trial for this, and I
19 really don't want to go to jail for anything - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MS. CABRERA: - - - so.

22 CHIEF JUDGE LIPPMAN: You'll have your
23 rebuttal time. Thanks.

24 MS. CABRERA: Thank you.

25 CHIEF JUDGE LIPPMAN: Counselor? What is

1 your evidence of intent?

2 MR. MARINELLI: Well, beginning with the
3 defendant's possession of the - - -

4 CHIEF JUDGE LIPPMAN: Beyond the
5 presumption?

6 MR. MARINELLI: The - - - there's the
7 defendant's possession of the weapon, and there's
8 this fact that - - -

9 CHIEF JUDGE LIPPMAN: Wait.

10 MR. MARINELLI: - - - the weapon was a
11 firearm.

12 CHIEF JUDGE LIPPMAN: Not his possession of
13 the weapon, that - - - that he was showing it, you
14 mean.

15 MR. MARINELLI: Well, that's - - - that's -
16 - -

17 CHIEF JUDGE LIPPMAN: I mean, where's your
18 evidence of possession?

19 MR. MARINELLI: The evidence of - - -

20 CHIEF JUDGE LIPPMAN: I think that's what
21 she said. We don't know he - - - what do you know?
22 What's your evidence?

23 MR. MARINELLI: The evidence of the
24 possession is the defendant says he's showing the
25 gun, which - - -

1 CHIEF JUDGE LIPPMAN: Yeah?

2 MR. MARINELLI: - - - supports the
3 inference that - - - that it is his property.

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. MARINELLI: Af - - - in the wake of the
6 shooting, he also - - - he retains possession
7 initially, and brings it with him, and only loses the
8 - - - disposes of the gun when he's at the hospital -
9 - -

10 JUDGE SMITH: Af - - - after the shooting,
11 we don't know it was loaded, do we?

12 MR. MARINELLI: The - - - well, I think it
13 would be a presumption against common sense to think
14 there was only a single round in the weapon.

15 JUDGE PIGOTT: Well, if we - - -

16 JUDGE SMITH: There's got to be a last one
17 sometime. Maybe it shot - - -

18 JUDGE PIGOTT: He was convicted of two
19 crimes, right?

20 MR. MARINELLI: Yes.

21 JUDGE PIGOTT: He was convicted of
22 possessing any loaded firearm, that's sub (3), and
23 1(b), which is with intent to use the same
24 unlawfully. What was the difference in the proof
25 that you got both convictions?

1 MR. MARINELLI: The - - - oh, the
2 difference in the proof would be the presumption of
3 unlawful intent and the - - -

4 JUDGE PIGOTT: The presumption. Now, in -
5 - - now, with respect to the presumption, of course,
6 the only evidence that seemed to have come in was the
7 fact that he took his - - - his cousin to the
8 hospital, because his cousin had been shot. So where
9 - - - what does that do to the inference, in light
10 of, for example, what we said in *Levy*, which there
11 must be a high degree of something for the jury to
12 rely on?

13 MR. MARINELLI: Well, I tell you that there
14 is other proof: the fact that the defendant
15 initially lied about the shooting to Flores and - - -

16 JUDGE PIGOTT: Well, who - - - who was he
17 going to use it against?

18 MR. MARINELLI: The - - -

19 JUDGE PIGOTT: What was the intent - - -
20 who was he going to use it against?

21 MR. MARINELLI: We don't know specifically.
22 We weren't required to say specifically.

23 JUDGE PIGOTT: Right, but did you have any
24 idea? In other - - - in other words, if the guy says
25 I wasn't - - - you know, I wasn't going to use it

1 against anybody. I did - - - I accidentally shot
2 somebody; there was no intent whatsoever. Where do
3 you get the - - - where do you get the - - - the
4 inference?

5 MR. MARINELLI: Well, I think the - - -
6 saying that the shooting was accidental is irrelevant
7 to the presumption that the legislature has endorsed
8 for generations - - -

9 JUDGE PIGOTT: Well, I get you - - -

10 JUDGE SMITH: Why - - - why does the
11 presumption make sense? What's the logic behind the
12 presumption?

13 MR. MARINELLI: That when arms themselves,
14 they intend to use the weapon unlawfully, and - - -

15 JUDGE GRAFFEO: And it has to be - - -

16 CHIEF JUDGE LIPPMAN: And what's the - - -
17 what's the evidence - - -

18 JUDGE GRAFFEO: And it has to be a loaded
19 gun, right? That's - - - that underlies the
20 presumption - - -

21 MR. MARINELLI: It's - - -

22 JUDGE GRAFFEO: - - - that you are carrying
23 a loaded firearm?

24 MR. MARINELLI: Right, it's - - - it's
25 actually any weapon. I think the fact that it's a

1 loaded firearm, and really there isn't a lot of
2 innocuous uses for it, only strengthens the
3 inference.

4 CHIEF JUDGE LIPPMAN: But how does your - -
5 - your evidence, aside from the presumption, show
6 intent? I get it on possession. I get what you're
7 saying, he had it at the beginning; he had it at the
8 end, whatever. How does it - - - how does it show
9 intent?

10 MR. MARINELLI: The fact that the defendant
11 originally lies about the shooting to his friend
12 Flores. When Flores asks him - - -

13 CHIEF JUDGE LIPPMAN: That shows intent to
14 hurt somebody else?

15 MR. MARINELLI: It negates the inference as
16 to any innocuous explanation for possession. And - -
17 -

18 JUDGE SMITH: Well - - - well, but wouldn't
19 - - - I mean, even if you didn't intend - - -
20 wouldn't it quite likely that you'd lie about
21 something like that, even if you - - - even if you
22 just wanted the gun for self-defense? I mean, this
23 isn't the sort of thing you'd go around bragging
24 about, that you shot your cousin by mistake?

25 MR. MARINELLI: I mean, we also, when - - -

1 you know, he's talking to his confidante, his close
2 friend, his mentor, Flores. When Flores asked him
3 where he got the gun, defendant won't tell him.
4 There is the phone call later where he's saying
5 trying to - - - telling the woman to - - -

6 JUDGE SMITH: Well, that would - - - that
7 would support an inference that he got it - - - that
8 he got it illegally, but that doesn't mean he
9 intended to use it unlawfully. So he thinks I - - -
10 he thinks I need a gun for self-defense. Then he - -
11 - then he buys unlawfully. You didn't prosecute him
12 for that.

13 MR. MARINELLI: The - - - well, the
14 inference on experience and the legislature do some
15 deference on this - - -

16 JUDGE PIGOTT: But why do you need two? In
17 other words, I - - - I always miss this. You got
18 somebody with possession of a loaded firearm. Is
19 that a C felony?

20 MR. MARINELLI: Yes.

21 JUDGE PIGOTT: Done. Instead, you got to
22 charge him with possession with intent, using an
23 inference, and the only - - - I mean, he - - - he
24 can't speak English. He's got his cousin working in
25 the restaurant with him, who he accidentally shoots,

1 and we're saying, well, you know, there's entitled -
2 - - there's an inference here that he's going to use
3 it unlawfully.

4 And I - - - I'm trying to get to the
5 inference. I mean, I get the inference, but what was
6 - - -

7 MR. MARINELLI: Well, the - - - I mean,
8 there's an attack on the other conviction here, so
9 that's why sometimes multiple counts - - -

10 JUDGE PIGOTT: I'm sorry; I missed your
11 first part.

12 MR. MARINELLI: There's an attack on the
13 second conviction for possession outside the home. I
14 think that's a lot of times - - - there was actually
15 some discussion about whether they were only going to
16 submit one count to the jury, but here the court - -
17 - the trial court - - - found it better to submit two
18 counts - - -

19 JUDGE RIVERA: The presumption on intent is
20 rebuttable - - -

21 MR. MARINELLI: Yes.

22 JUDGE RIVERA: - - - correct? So, it's - -
23 - it's not mandatory to conclude that merely based on
24 possession that he intended to harm a third person,
25 even if the legislature thinks the likelihood is

1 pretty high, correct?

2 MR. MARINELLI: Absolutely, Your Honor, and
3 that's why it doesn't infringe on the jury's function
4 at all to - - -

5 JUDGE PIGOTT: Not necessarily the jury's
6 function, but also there presumption of innocence,
7 right?

8 MR. MARINELLI: Yeah.

9 JUDGE PIGOTT: Because the defendant does
10 not have to prove anything. So you have a high
11 standard to prove that inference, I guess, or proving
12 an inference is the way to say it.

13 MR. MARINELLI: Precisely. And if I may,
14 you mentioned Levya earlier, and, you know, I do
15 think there's other evidence of the defendant's
16 intent, but possession, I think, would be enough. Of
17 course in that case, the court was addressing the
18 presumption that if you're in a car with drugs, that
19 the defendant possesses the drugs. I mean, this is
20 what the court say in - - -

21 JUDGE PIGOTT: Yeah, I get possession, but
22 I don't - - - I don't - - - I'm still missing the - -
23 - gees, I mean, if he - - - I would think if he's
24 going to do something nasty, he would have left his
25 cousin on the sidewalk, or said, you go in, tell them

1 something else. But I mean, he walks into the
2 hospital with him.

3 MR. MARINELLI: Well, again, an accident
4 may have preempted whatever purpose he had the gun
5 for originally, but - - - and, if I could tell you,
6 just to - - - again, in Levya what you said about the
7 presumption there, none of the defendants here
8 disputed the fact that they were in the car, nor did
9 they argue that the drugs were not found in it.
10 These were the two underlying facts which the statute
11 requires to be proved before the presumption applies.
12 Once the presum - - - the prosecution had proved
13 them, it was entitled to rely on the presumption as
14 part of its prima facie case.

15 JUDGE SMITH: As - - - as part.

16 JUDGE PIGOTT: Was that presumption with -
17 - - with intent to sell?

18 MR. MARINELLI: No, that was simply
19 possession.

20 JUDGE PIGOTT: That's what I mean. I mean,
21 I get the possession here. I'm just looking at the
22 intent to - - -

23 MR. MARINELLI: Well, I would submit that
24 the inference here is even stronger than the
25 automobile - - -

1 JUDGE SMITH: Could the jury have - - -
2 could the jury have convicted on the presumption
3 alone?

4 MR. MARINELLI: The - - -

5 JUDGE SMITH: On the intent?

6 MR. MARINELLI: On the - - - yes. I think
7 that's what Levy was saying in that passage that - -
8 -

9 JUDGE RIVERA: But - - - but if - - - if
10 it's - - - even if it's rebuttable, doesn't that
11 shift the burden - - - doesn't that then force the
12 defendant to come forward to explain a reason for
13 carrying the gun?

14 MR. MARINELLI: Not necessarily. There's a
15 case that we cited in the People's brief, Edwards,
16 that was actually resolved on a weight of the
17 evidence claim. But there I don't think it was - - -
18 I'm pretty sure it was the People's case - - - there
19 was evidence the defendant kept a knife bolted to his
20 bed, in plain view, in his house, and so - - - what
21 the Third Department found was that - - - rebutted
22 the presumption - - - it seemed clear the defendant
23 had it for self-defense. They rebutted the
24 presumption of unlawful intent.

25 JUDGE ABDUS-SALAAM: So if - - - if the

1 defendant here told his boss, you know, I got this
2 gun for self-defense, and then I was showing it to my
3 cousin, and then Mr. Flores testified to that, would
4 that have rebutted the presumption?

5 MR. MARINELLI: The - - - I think it would
6 have left a jury issue, because the jury would have
7 been permitted to sit through the defendant's story
8 and make, you know - - -

9 JUDGE ABDUS-SALAAM: So he wouldn't have
10 had to take the stand. He could've gotten that
11 information in through Mr. Flores?

12 MR. MARINELLI: Exactly. And he could have
13 argued on it, and I point out the - - - you know, in
14 this case, that, you know, it came in through the
15 People's case that the defendant had told Flores that
16 the ac - - - the shooting was accidental. Like I
17 said, I don't think that rebuts anything, but, you
18 know, the defendant was looking to the People's case
19 to try to - - - in order to try to argue that the
20 presumption here was rebuttal.

21 JUDGE RIVERA: Risky business, depending on
22 Flores' credibility - - -

23 JUDGE GRAFFEO: Right.

24 JUDGE RIVERA: - - - in your example.

25 MR. MARINELLI: The - - -

1 JUDGE RIVERA: Risky business for the
2 defendant. I still don't see how you haven't shifted
3 the burden over to the defendant. They've got to
4 prove something.

5 MR. MARINELLI: Well - - -

6 JUDGE RIVERA: Under - - - under your
7 analysis, it sounds like they do have to prove
8 something.

9 MR. MARINELLI: Well, the - - - they have
10 no burden of coming forward. It's simply learned it
11 from the facts - - -

12 JUDGE SMITH: Also, the - - - as I
13 understand your position, the jury could reject the
14 inference.

15 MR. MARINELLI: Yes.

16 JUDGE SMITH: The jury - - -

17 MR. MARINELLI: If they were explicitly
18 instructed.

19 JUDGE SMITH: Even if the defendant does
20 nothing, the jury can still - - - can still acquit.
21 The judge isn't telling them, if you find these
22 facts, you must convict.

23 MR. MARINELLI: Precisely. It's - - - you
24 may, but are not required, and that's why time and
25 again, it's been found - - - that language - - -

1 JUDGE RIVERA: Yes.

2 MR. MARINELLI: - - - is not - - -

3 JUDGE RIVERA: Well, it's the nature of a
4 rebuttable presumption, but if the presumption is,
5 what - - - what innocent person is going around
6 carrying a loaded gun - - -

7 MR. MARINELLI: Yeah.

8 JUDGE RIVERA: - - - it's pretty hard to
9 sit back as a defendant and not come up with
10 something.

11 MR. MARINELLI: Yeah, well, it's funny;
12 there's a - - - I would tell you that the, you know,
13 the fact that the Supreme Court case that uses this
14 reasoning - - - you know, the fact that maybe you
15 don't see the presumption rebutted frequently may
16 just be a sign that it's a pretty solid presumption.
17 So for these reasons, we ask that you affirm.

18 CHIEF JUDGE LIPPMAN: Okay, thanks,
19 counselor.

20 MR. MARINELLI: Thank you very much.

21 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

22 MS. CABRERA: Just wanted to highlight one
23 thing that opposing counsel noted. He stated that
24 when the presumption's function is that one arms
25 themselves, they can - - - they intend to use the

1 weapon unlawfully.

2 That's the key problem here. There was no
3 - - - and that - - - with the analogies that were
4 presented earlier. That's really the difference.
5 There's - - - when one - - - there was no evidence
6 that Mr. Galindo actually went and armed himself with
7 - - - and that's the - - - the factual gap here.

8 And nevertheless, there was just simply no
9 evidence of unlawful intent other than the
10 presumption. And you know, Allen talks about that.
11 It says, you know - - - and it mentions the sole in -
12 - - it cannot be the sole insufficient basis for a
13 finding of guilt.

14 And that's what it was here. It - - - it -
15 - - the prosecution hung its hat on this presumption,
16 and it relieved them of their burden as to that
17 element.

18 And - - - and with that said, Your Honors,
19 we would ask that you reverse the decision.

20 CHIEF JUDGE LIPPMAN: Okay, counselor.

21 MS. CABRERA: Thanks.

22 CHIEF JUDGE LIPPMAN: Thanks. Thank you
23 both.

24 (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. Oliverio Galindo, No. 132 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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