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No. 132
The People &c.,
Respondent,
v.
Oliverio Galindo,
Appellant.

Marisa K. Cabrera, for appellant.
Christopher P. Marinelli, for respondent.

ABDUS-SALAAM, J.:

During the early morning hours on September 21, 2009,
defendant Oliverio Galindo shot his cousin Augustine Castaneda in
the leg. He accompanied his cousin to the hospital and was later
arrested at Broome Street Bar in Manhattan where he and Castaneda

were employed. Defendant was indicted on two counts of criminal possession of a weapon in the second degree, one count for possession of a loaded firearm with the intent to use it unlawfully against another (Penal Law § 265.03 [1] [b]), and the other for possession of the same outside his home or place of business (id. at [3]).

At trial, the People presented evidence that, shortly after 1:00 a.m. on the date in question, defendant and Castaneda parted ways with their co-workers in front of Broome Street Bar. Castaneda did not appear to be injured at that time. About 20 minutes later, however, defendant and Castaneda arrived at Bellevue Hospital for Castaneda to be treated for a gunshot wound to the leg. Several hours later, defendant returned to Broome Street Bar to work Castaneda's shift as a dishwasher. Luis Flores, defendant's manager and friend, testified that, when he asked defendant why he was covering Castaneda's shift, defendant initially told him that he and Castaneda had been "mugged outside the restaurant" and that Castaneda had been shot during the course of the robbery. When Flores pressed defendant for more details, defendant eventually admitted that he was the one who shot Castaneda "outside the restaurant." Defendant told Flores that he was "showing the gun" to Castaneda when it "went off as an accident." Defendant later "dumped" the gun in a "big container" near the hospital. In addition to this testimony, the People admitted into evidence the transcript of a recorded

telephone call defendant placed to an unidentified woman while in prison, during which defendant urged the woman to tell his cousin "not to go to court." Defendant did not present any evidence at trial and his motions to dismiss the indictment, made at the close of the People's case and the close of all proof, were denied.

Prior to deliberations, the trial court instructed the jury, without objection by defendant, that if the People proved "beyond a reasonable doubt that the defendant possessed a loaded firearm," the jury "may, but [was] not required to, infer" that defendant possessed the weapon with the "intent to use the same unlawfully against another." The jury returned a verdict convicting defendant of both counts of second-degree criminal possession of a weapon, and defendant was sentenced to two concurrent, determinate prison terms of four years, to be followed by three years of post-release supervision.

The Appellate Division affirmed, stating that "the circumstances of defendant's possession of a loaded firearm, viewed in light of the statutory presumption of unlawful intent (Penal Law § 265.15 [4]), provided legally sufficient evidence of defendant's intent to use a weapon unlawfully against another" (People v Galindo, 101 AD3d 408, 408 [1st Dept 2012]). A Judge of this Court granted defendant leave to appeal (21 NY3d 912 [2013]), and we now affirm.

A person is guilty of criminal possession of a weapon

in the second degree when "with intent to use the same unlawfully against another, such person: . . . possesses a loaded firearm" (Penal Law § 265.03 [1] [b]). Penal Law § 265.15 (4) provides that "[t]he possession by any person of any weapon . . . is presumptive evidence of intent to use the same unlawfully against another" person. Defendant, asserting that the evidence was legally insufficient to support his conviction under Penal Law § 265.03 (1) (b), challenges the use of the statutory presumption of unlawful intent based on the circumstances of this case, where the People presented no direct evidence of intent and Flores's testimony suggested that defendant shot his cousin accidentally. We find no error in the application of the statutory presumption and conclude that the evidence supporting defendant's conviction was legally sufficient.

"A statutory presumption is a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial" (People v Leyva, 38 NY2d 160, 168 n 3 [1975]). This evidentiary device "[is] a staple of our adversary system of factfinding," which often requires "the trier of fact to determine the existence of an element of the crime – that is, an 'ultimate' or 'elemental' fact – from the existence of one or more 'evidentiary' or 'basic' facts" (County Court of Ulster County v Allen, 442 US 140, 156 [1979], denying federal writ of habeas corpus sub nom People v Lemmons, 40 NY2d 505 [1976]). The presumption of unlawful intent

under Penal Law § 265.15 (4), like all statutory presumptions in New York, is a permissive presumption (People v McKenzie, 67 NY2d 695, 696 [1986]), meaning that "[it] allows, but does not require, the trier of fact to accept the presumed fact, and does not shift to the defendant the burden of proof" (Matter of Raquel M., 99 NY2d 92, 95 [2002], citing Allen, 442 US at 157).¹

The purpose of a statutory presumption is to allow a particular fact to be established by "inferential" proof (Leyva, 38 NY2d at 168 [describing the presumption under Penal Law § 220.25]). Before the presumption may apply, the People must establish beyond a reasonable doubt the predicate fact or facts "the statute requires be proved" (id. at 169; see Allen, 442 US at 156). If the People succeed in this endeavor, they are entitled to rely on the presumption, which "forms part of the support for their prima facie case" against the defendant (Leyva, 38 NY2d at 168; see Allen, 442 US at 156 [with a permissive presumption, "the basic fact may constitute prima facie evidence of the elemental fact"]; Matter of Raquel M., 99 NY2d at 96). The presumption may be rebutted by any evidence in the case; that is, evidence presented by the defendant or the People (see Matter of Raquel M., 99 NY2d at 95; Leyva, 38 NY2d at 167, 169).

¹ By contrast, a "mandatory presumption . . . tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts" (Allen, 442 US at 157).

Evidence rebutting the presumption will not "negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions" (Leyva, 38 NY2d at 169). In other words, the presumption "receives the same treatment that any other 'fact' so thoroughly controverted would receive" (id. at 170).

The predicate fact the People must prove to trigger the presumption of unlawful intent under Penal Law § 265.15 (4) is possession of "any weapon." Once the People have proven this fact beyond a reasonable doubt, the unlawful intent presumption becomes part of the People's prima facie case, which the defendant may rebut with contrary proof or, as in this case, he or she may rely on the People's evidence to rebut the presumption. It is then for the jury, after proper instructions by the court, to weigh the competing inferences and determine whether to accept or reject the presumption. Where, as here, the defendant contends that his conviction is not supported by legally sufficient evidence, we review the evidence in a light most favorable to the People, and will not disturb a conviction as long as there exists "any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (People v Bleakley, 69 NY2d 490, 495 [1987]).

Applying these principles, we conclude that the

evidence that defendant possessed a loaded firearm, together with the statutory presumption of intent arising from such possession, was legally sufficient to support his conviction for criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b). Viewing the evidence in the light most favorable to the People -- particularly, Flores's testimony that defendant admitted to shooting Castaneda -- a rational jury could have concluded that the People proved, beyond a reasonable doubt, that defendant possessed a loaded firearm (see Penal Law § 265.03 [1] [b]). Since the People established this predicate fact, the jury was entitled, but not required, to infer that defendant intended to use the weapon unlawfully pursuant to Penal Law § 265.15 (4). The jury's decision to accept this inference created by the statutory presumption was reasonable. A rational jury could have concluded that defendant possessed the loaded gun he "showed" his cousin on a public street, and there was no proof at trial suggesting that defendant possessed the gun for a lawful purpose. To the contrary, evidence that defendant disposed of the gun after the shooting, initially lied to Flores about how Castaneda was shot, and urged Castaneda not to come to court support the inference of unlawful intent when viewed in a light most favorable to the People.

Defendant and the dissent argue that defendant's admission to Flores that he accidentally shot Castaneda rebutted any inference of unlawful intent. As the Appellate Division

noted, however (see 101 AD3d at 408), the People never alleged, nor were they required to prove, that defendant specifically intended to use the gun unlawfully against Castaneda or any particular person, only that he intended to use it against "another" person (Penal Law § 265.03 [1] [b]). Thus, while this testimony may have suggested that defendant did not intend to use the gun unlawfully against Castaneda, it was not inconsistent with the inference that he intended to use the gun unlawfully against *someone other* than his cousin. And even if the People's evidence rebutted this inference, the jury was still entitled to weigh all the competing inferences in deciding whether to accept or reject the presumption of unlawful intent. Although the dissent believes the evidence "that defendant had accidentally shot his cousin . . . would appear to negate any intent to use the weapon unlawfully against another" (dissenting op, at 2), the jury reasonably concluded otherwise and we find no legal basis upon which to disturb its verdict.

The dissent claims that without "direct or circumstantial" evidence of defendant's intent, "the jury could not have rationally concluded that defendant's mere possession of a loaded firearm established his intent to unlawfully use it against another" (id. at 2-3). But that is exactly what the Legislature intended Penal Law § 265.15 (4) to permit a jury to do: find that a defendant intended to use a weapon unlawfully merely because he or she possessed that weapon. This permissive

presumption would be superfluous if, as the dissent suggests, the People were required to put forth independent evidence of intent to prove that element of the offense.² Nor can the dissent credibly claim that the presumption of unlawful intent was unconstitutional as applied to defendant here; that is, that there was no "reasonably high degree of probability" that the presumed fact (defendant's unlawful intent) could follow from the basic facts proved directly at trial (defendant's possession of a loaded gun) (Leyva, 38 NY2d at 166, quoting People v McCaleb, 25 NY2d 394, 404 [1969] [internal quotation marks omitted]; see also Allen, 442 US at 156-157; Matter of Raquel M., 99 NY2d at 95-96). In any event, we need not reach this issue since defendant has not challenged the constitutionality of Penal Law § 265.15 (4).

Finally, we have considered defendant's ineffective assistance of counsel claims related to his conviction for second-degree criminal possession of a weapon outside his home or place of business (see Penal Law § 265.03 [3]), and we find them unavailing (see e.g. People v Caban, 5 NY3d 143, 152 [2005]).

² Contrary to the dissent's view, we do not read Allen as requiring the People to provide "ample evidence" of *intent* "other than the presumption to support a conviction" (442 US at 160). Rather, we believe the United States Supreme Court used that phrase to draw the distinction between the proper constitutional analysis of a mandatory presumption, which must be "divorced from [the] facts [of a given case] and based on the presumption's accuracy in the run of cases" (id. at 159), and the analysis of a permissive presumption, which "rest[s] on an evaluation of the presumption as applied to the record before the Court" (id. at 162-163).

Accordingly, the Appellate Division order should be affirmed.

People v Oliverio Galindo

No. 132

PIGOTT, J.(dissenting in part):

Defendant was convicted of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b] [count one] and § 265.03 [3] [count two]). Because the People failed to present proof establishing that defendant, while possessing a loaded firearm, intended to use it "unlawfully against another" (count one), I respectfully dissent.

The People's proof plainly established that defendant possessed a loaded firearm outside his home or place of business (Penal Law § 265.03 [3]),¹ a class C felony. One act, one crime. However, the People claim, and the majority agrees, that the People were entitled to go further and rely on Penal Law § 265.15 (4)'s presumption that "[t]he possession by any person of any . . . weapon . . . is presumptive evidence of intent to use the same

¹ Notably, in 2006, the Legislature inadvertently repealed the crime of possession of a loaded firearm with the intent to use the same unlawfully against another (L 2006, ch 742 § 1), notwithstanding the Attorney General's concern that the legislation contained an "unintended flaw," namely, that "it would significantly reduce the penalties that [could] be imposed on perpetrators of domestic violence who intend to use loaded, illegal firearms to further harm those they victimize" (Mem of Off of Atty Gen, Bill Jacket, L 2006, ch 742, at 6-7). The Legislature corrected that flaw the following month (L 2006, ch 745).

unlawfully against another" in order to pile on a second felony conviction for the same act.

In many cases, the People should be able to rely on such a presumption, but only where "there is ample evidence in the record other than the presumption to support a conviction" (County Court of Ulster County, New York v Allen, 442 US 140, 160 [1979] [emphasis supplied]). There must be "a rational connection between the facts proved directly and the ones to be inferred" (People v Leyva, 38 NY2d 160, 165 [1975]), and the connection must necessarily "assure 'a reasonably high degree of probability that the presumed fact follows from those proved directly'" (id. at 166, quoting People v McCaleb, 25 NY2d 394, 404 [1969]).

Here, there is no such connection. The People were able to directly prove that defendant possessed a loaded weapon, but the only proof the People presented concerning defendant's intent relative to count one was that defendant had accidentally shot his cousin, evidence that would appear to negate any intent to use the weapon unlawfully against another. To be sure, as the majority states, the People need not prove that defendant intended to use the weapon unlawfully against a particular person (majority op, at 7-8); but the People must do more than simply rely on a permissive presumption to meet their burden (see Allen, 442 US at 167; United States v Curcio, 712 F2d 1532, 1541 [2d Cir 1983] ["(a)s long as it is clear that the presumption is not the

sole and sufficient basis for a finding of guilt, it need meet only a more likely than not rather than a beyond a reasonable doubt standard" [internal quotation marks omitted]).

Given the lack of any evidence, direct or circumstantial, concerning defendant's intent to use the weapon unlawfully against another, the jury could not have rationally concluded that defendant's mere possession of a loaded firearm established his intent to unlawfully use it against another. More than likely, having determined that defendant unlawfully possessed the weapon, the jury concluded that the accidental shooting of his cousin must have been an unlawful use against another, the result being a defendant convicted twice for one possession - something the law neither contemplates nor permits. I would therefore reverse and dismiss count one of the indictment.

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Order affirmed. Opinion by Judge Abdus-Salaam. Judges Graffeo, Read, Smith and Rivera concur. Judge Pigott dissents in part in an opinion in which Chief Judge Lippman concurs.

Decided June 26, 2014