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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 167

NORMAN CAJIGAS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 7, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

JONATHAN M. KIRSHBAUM, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorneys for Appellant
74 Trinity Place
11th Floor
New York, NY 10006

BRITTA GILMORE, ESQ.
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Cajigas.

2 MR. KIRSHBAUM: Good morning, Your Honor.

3 CHIEF JUDGE LIPPMAN: Counsel.

4 MR. KIRSHBAUM: Can I reserve two minutes
5 for rebuttal?

6 CHIEF JUDGE LIPPMAN: Sure.

7 MR. KIRSHBAUM: Thank you.

8 CHIEF JUDGE LIPPMAN: Go ahead.

9 MR. KIRSHBAUM: Jonathan Kirshbaum for the
10 appellant. An intent to violate a stay-away-from-
11 the-person provision of an order of protection cannot
12 be used to establish the intent to commit a crime
13 element of burglary. It will always represent the
14 impermissible double counting that was present in
15 Lewis. And the facts of this case show precisely
16 why.

17 CHIEF JUDGE LIPPMAN: Why is that the case,
18 given the statutes about orders of protection and
19 about the particular crime? Why is it that it can't
20 be?

21 MR. KIRSHBAUM: Well, the facts of - - -

22 CHIEF JUDGE LIPPMAN: Wasn't it up to the
23 legislature to change? I mean - - -

24 MR. KIRSHBAUM: Well, the facts of this
25 case show precisely why it's always going to be the

1 impermissible double counting. In this case, the
2 defendant was convicted of this criminal contempt
3 statute which the element was that he had to stay
4 away from the person. But the facts here - - - and
5 the jury was allowed to find that if he violated that
6 pro - - -

7 CHIEF JUDGE LIPPMAN: But that's a crime,
8 right? That's a crime, right?

9 MR. KIRSHBAUM: It is. But he violated
10 that provision solely based on the attempted entry
11 into the apartment where the victim was not even
12 present.

13 JUDGE CIPARICK: So that was the trespass
14 part of it?

15 MR. KIRSHBAUM: Correct.

16 JUDGE SMITH: But he was convicted on an
17 attempt, right?

18 MR. KIRSHBAUM: Yes, it was an attempt to
19 trespass.

20 JUDGE CIPARICK: Yes, burglary.

21 JUDGE SMITH: The jury could find that he
22 wanted to see the victim?

23 MR. KIRSHBAUM: It's definitely true that
24 the jury could have made certain findings as to
25 intent. But the question here is whether - - -

1 JUDGE CIPARICK: He was a harasser. He may
2 have even wanted to assault her. The jury could make
3 these inferences.

4 MR. KIRSHBAUM: It could have made those
5 inferences. But the question is whether the jury was
6 allowed to find, just based on the attempted trespass
7 - - -

8 CHIEF JUDGE LIPPMAN: Why wasn't it enough
9 to violate the stay away from the person? What - - -

10 MR. KIRSHBAUM: Because - - -

11 CHIEF JUDGE LIPPMAN: - - - what's your
12 authority - - - I understand the Fourth Department
13 case. Is that what you're going on?

14 MR. KIRSHBAUM: I am. But it's the logic
15 of Lewis. Because if you - - -

16 CHIEF JUDGE LIPPMAN: Yes, but - - -

17 MR. KIRSHBAUM: - - - if you're about - - -

18 CHIEF JUDGE LIPPMAN: - - - it's not what
19 Lewis - - - what you say is not what Lewis says.

20 MR. KIRSHBAUM: No, I agree. Lewis was
21 much broader. But its application in Lewis - - - the
22 application in Lewis was very narrow, and it didn't
23 talk about the stay-away provision, even though there
24 was a stay-away provision present in that case. And
25 it's critical that this court did not look at the

1 stay-away provision in that case, because that was
2 the clearest path to upholding that conviction.

3 JUDGE SMITH: Where are you suggesting that
4 we draw the line? I mean, suppose - - - on the facts
5 of the Fourth Department's VanDeWalle, or however you
6 pronounce it - - -

7 MR. KIRSHBAUM: VanDeWalle, yes.

8 JUDGE SMITH: - - - you can - - -
9 obviously, you can see how it seems sort of tough to
10 make it a B felony when he came in to hug her good-
11 bye, and she was happy to be hugged.

12 MR. KIRSHBAUM: Um-hum.

13 JUDGE SMITH: What - - - suppose she hadn't
14 been so happy? Is that burglary?

15 MR. KIRSHBAUM: Well, I think in this
16 particular case, we don't need to go as broad,
17 because here the jury was allowed to find that just
18 multiple violations of the stay-away provision - - -

19 JUDGE SMITH: Here, as you understand it,
20 under the court's charge, if he intended to be in her
21 presence, that would be enough, because it's a crime
22 not to stay away from her.

23 MR. KIRSHBAUM: Yes. And I think that when
24 somebody goes to the apartment - - -

25 JUDGE SMITH: Okay, but how - - - is there

1 - - - I mean, I understand you say all we've got to
2 do is decide this case.

3 MR. KIRSHBAUM: Um-hum.

4 JUDGE SMITH: But isn't it hard - - - don't
5 we need to find some viable line? If we're going to
6 say it's okay - - - or it's not okay, it's still a
7 crime; it's still criminal contempt - - - but it's
8 not burglary, to intend to be in the presence of the
9 victim when you enter the apartment - - -

10 MR. KIRSHBAUM: Right.

11 JUDGE SMITH: - - - because - - - when does
12 it become a crime? How do we figure it out?

13 MR. KIRSHBAUM: I mean - - -

14 JUDGE SMITH: Or how does it become
15 burglary?

16 MR. KIRSHBAUM: I mean, I know that it
17 definitely is tricky when it comes to situations
18 where we're talking about communication and contact.
19 I mean, in this case, it can be more narrow and for -
20 - - it can just keep multiple - - -

21 CHIEF JUDGE LIPPMAN: Yes, but doesn't - -
22 - but being more narrow, doesn't it sort of ignore
23 the whole nature of domestic violence today, and what
24 it's about, and where the victim often is put in this
25 situation of sort of having to reject the conduct and

1 have these mixed feelings about whether they want,
2 and the aggressor is always saying, gee, give me one
3 more chance. Don't we have to play into that the
4 science today of what goes on with domestic violence
5 victims? And again, if the legislature wants to
6 change the definition of intent or qualify the
7 criminality of the violation of an order of
8 protection, let them.

9 But where you're saying it, you know, this
10 is the logic of the situation or whatever, how do you
11 square that with this whole dynamic of domestic
12 violence? And that's why you have orders of
13 protection like this that say stay away from the
14 person. Because it's always a question, gee, I just
15 want to kiss you, I just want to make up, I just want
16 to see you one more time. And this is the nature of
17 the beast here.

18 MR. KIRSHBAUM: And I - - -

19 CHIEF JUDGE LIPPMAN: Doesn't that count
20 for anything in the context of what we're dealing
21 with here?

22 MR. KIRSHBAUM: It's definitely tricky.
23 However, I don't believe that the legislature's
24 intent was that every time an order of protection was
25 issued, that it would necessarily be - - -

1 CHIEF JUDGE LIPPMAN: Then let the
2 legislature change the statute.

3 MR. KIRSHBAUM: Well, but that's also what
4 this court said in Lewis, is that an attempted ent -
5 - - when it's a situation where there's an attempted
6 entry, that also can't represent the intent to commit
7 a crime, because then it will always be a burglary.
8 And that's exactly the situation when we're talking
9 about multiple violations of the stay-away provision.

10 JUDGE GRAFFEO: Well, I'm also concerned
11 about a lot of orders of protection, it may not just
12 be the wife or girlfriend, but perhaps also indicate
13 the children, the minors. So if you had this
14 situation where the person subject to the order of
15 protection is at the door talking to his child and
16 saying open the door, I want to come in, I want to
17 come in, do you have the same result?

18 MR. KIRSHBAUM: Well, I'm not quite sure
19 how that's - - -

20 JUDGE GRAFFEO: I mean, that's a lot of
21 pressure on the child. And isn't that what the
22 legislature intended to prevent with these orders of
23 protection?

24 MR. KIRSHBAUM: What we're asking for here
25 is not going to hamper the prosecution's ability to

1 prosecute for burglary. It's not going to hamper
2 their ability to prosecute for criminal contempt.
3 It's clear that the legislature wanted to make
4 certain crimes or certain acts criminal that were - -
5 - that otherwise are noncriminal. And that's why the
6 contempt statute is there.

7 However, it doesn't seem, as a matter of
8 public policy, particularly in a situation like
9 VanDeWalle, that that's now going to be a C violent
10 felony in every situation, where the facts, as a
11 matter of public policy, don't suggest that somebody
12 should be serving lengthy prison sentences when the
13 victim didn't - - - had no problem with him being
14 there or even invited him over. So we're - - -

15 CHIEF JUDGE LIPPMAN: Yes, but the policy
16 cuts a number of directions here. I understand your
17 point. But you understand the point, again, of these
18 particular kinds of orders of protection - - -

19 MR. KIRSHBAUM: Yes.

20 CHIEF JUDGE LIPPMAN: - - - and what
21 they're all about and what we're trying - - - it's
22 trying to deter. So policy, you know - - -

23 MR. KIRSHBAUM: But we're not trying - - -

24 CHIEF JUDGE LIPPMAN: - - - can have a lot
25 of tentacles.

1 MR. KIRSHBAUM: Right. We're not trying to
2 undermine the efficacy of these orders of protection.

3 CHIEF JUDGE LIPPMAN: But in effect, are
4 you doing that?

5 MR. KIRSHBAUM: No, we're not, because he's
6 still going to be - - - the defendants in these
7 situations are still going to be charged with
8 felonies for criminal contempt, as long as it's the
9 second time. But the question is whether or not they
10 should be aggravated up to burglary. And the - - -

11 JUDGE CIPARICK: It's attempted burglary.

12 MR. KIRSHBAUM: Well, attempted burglary
13 here. But - - -

14 JUDGE CIPARICK: A C felony, yes.

15 MR. KIRSHBAUM: - - - still - - - it's
16 still an aggravated felony.

17 JUDGE SMITH: But if she happened to be
18 home and he got in, it would be burglary?

19 MR. KIRSHBAUM: Yes. I mean, whether it
20 was attempted or burglary, it's still getting
21 aggravated up a level from where it is from criminal
22 contempt. And the question really is, where do - - -
23 the logical lines are difficult; I understand. But -
24 - -

25 CHIEF JUDGE LIPPMAN: Yes, but it's up to

1 the legislature if they want to change what we have
2 now.

3 MR. KIRSHBAUM: Well, it's up to the
4 legislature, but - - -

5 CHIEF JUDGE LIPPMAN: You're telling us
6 that's what they intended. That's not what it says.

7 JUDGE PIGOTT: Where would you draw the
8 line? How would you frame it so that - - -

9 MR. KIRSHBAUM: Well, in this particular
10 case - - -

11 JUDGE PIGOTT: Right.

12 MR. KIRSHBAUM: - - - I mean, I think that
13 it's logically clear that multiple violations of the
14 stay-away provision cannot represent the intent to
15 commit a crime element. Obviously, I think the
16 harder situation is contact and communication. But I
17 think, a lot of times, contact and communications get
18 subsumed into the stay-away provision. I think - - -

19 JUDGE PIGOTT: Right. So where would you
20 draw the line in these situations where he's at the
21 door and it's a stay away?

22 MR. KIRSHBAUM: Right. I mean, I think
23 that the jury has to be charged that multiple
24 violations - - - one or more violations of a stay-
25 away provision cannot represent the intent to commit

1 a crime element of burglary. I mean, I think - - -

2 CHIEF JUDGE LIPPMAN: Based on what does
3 that charge have to be made?

4 MR. KIRSHBAUM: Based on - - - well, based
5 on the logic of Lewis. Because what happens is, is
6 that - - -

7 CHIEF JUDGE LIPPMAN: But that's not - - -
8 you're just saying well, you should do it because
9 that would be - - - I think that would be better.

10 MR. KIRSHBAUM: Well, I mean - - -

11 CHIEF JUDGE LIPPMAN: You have no authority
12 to go on.

13 MR. KIRSHBAUM: Well, other than - - -

14 CHIEF JUDGE LIPPMAN: The statutes go
15 against you.

16 MR. KIRSHBAUM: Well, I don't know if the
17 statutes are clear either way. I mean, there's two
18 different crimes. There's criminal contempt. And
19 the question is how to apply burglary in these
20 situations. And Lewis said that an order of
21 protection doesn't automatically mean burglary.
22 However, if you allow a multiple violations of a
23 stay-away provision to represent the intent to commit
24 a crime element, then it will be. An order of
25 protection will always be burglary.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's
2 see what your adversary - - -

3 JUDGE PIGOTT: Can I just - - -

4 CHIEF JUDGE LIPPMAN: Oh, sorry. Judge
5 Pigott?

6 JUDGE PIGOTT: - - - one thing. If I'm - -
7 - maybe I'm misunderstanding. If in the order of
8 protection, you know, they always have those little
9 check boxes. And the attempt to burglarize - - - are
10 you saying if there's four boxes checked, that you
11 can't charge four, you have to - - - you can charge
12 one but you can't charge four?

13 MR. KIRSHBAUM: Well, I mean, I think that
14 the criminal contempt crime itself only refers to - -
15 - the intent is to the intent to violate the order of
16 protection. And the actual act is failure to stay
17 away from the person identified - - -

18 JUDGE PIGOTT: Right.

19 MR. KIRSHBAUM: - - - in the order. So I'm
20 not quite sure whether you would charge multiple
21 counts. I mean, here it was prosecuted as the
22 attempt to enter was enough to establish a violation
23 of failing to stay away from the person.

24 JUDGE PIGOTT: Okay.

25 MR. KIRSHBAUM: So I don't - - - I mean, I

1 think that that's how it can be prosecuted every
2 time. So I don't know if - - - and I assume that you
3 were just talking about the stay-away provision?

4 JUDGE PIGOTT: I see. You're just saying
5 that under these circumstances, it's subsumed in the
6 stay away, the burglary. You can't do one without
7 the other.

8 MR. KIRSHBAUM: Well, I mean, I think that
9 that's true, if you're arguing that the intent to
10 commit a crime element is a second violation of that
11 stay-away provision.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.
13 Counselor?

14 MS. GILMORE: It's now afternoon, Your
15 Honor. Good afternoon.

16 CHIEF JUDGE LIPPMAN: Yes, thank you.

17 MS. GILMORE: My name is Britta Gilmore for
18 the People.

19 As Your Honors have noted, the charge in
20 this case was perfectly consistent with this court's
21 decision in Lewis. What defendant here wants is
22 something more than Lewis.

23 JUDGE SMITH: Well, and then you - - - as
24 you read Lewis, it says that just entering isn't a
25 crime, but entering with intent to be in the presence

1 of the victim is a crime?

2 MS. GILMORE: Yes, indeed.

3 JUDGE SMITH: I keep saying crime.

4 Obviously it's a crime. So in Lewis, the - - - he
5 obviously did intend to be in the victim's presence.
6 Does Lewis have any meaning at all?

7 MS. GILMORE: Absolutely. Lewis says very
8 specifically - - - Lewis effectively reaffirms the
9 Graves (ph.) Gaines analysis in burglary, which is
10 because a burglary is trespass plus an intent, your
11 burglary can't be shown by trespass plus an intent to
12 trespass. There's a merger, there's a double
13 counting.

14 So what Lewis says is it just clarifies
15 that in the context of a restraining order and says
16 if you're relying on the restraining order to show
17 your trespass, the violation of the stay-away-from-
18 the-premises position - - - I believe Lewis says
19 "dwelling" not "premises", but they're effectively
20 the same - - - if you would rely on the stay-away-
21 from-the-premises portion of the provision, you may
22 rely on other portions of the - - - other provisions
23 in the order to establish your intent crime for
24 burglary. That's literally the language that is in
25 Lewis and that - - -

1 CHIEF JUDGE LIPPMAN: Satisfies the first
2 element, right?

3 MS. GILMORE: No. The violation of the
4 stay-away-from-the-premises - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MS. GILMORE: - - - provision, satisfies
7 the first element.

8 CHIEF JUDGE LIPPMAN: Exactly.

9 MS. GILMORE: And an intention to violate
10 any other provision of the order, other than that
11 barring entry to the dwelling, can provide your
12 intent crime. That includes the violation that would
13 be committed by staying away from the person; it
14 includes a violation that might be committed by
15 perhaps leaving - - - writing her messages in the
16 apartment inside, for example; and any further
17 violation of any of the other provisions.

18 JUDGE SMITH: So if you intend to say
19 hello, then that's a burglary?

20 MS. GILMORE: Yes. Potentially.

21 JUDGE SMITH: Doesn't that - - - doesn't it
22 seem kind of tough to make it a C felony to - - -
23 it's obviously criminal contempt.

24 MS. GILMORE: But - - -

25 JUDGE SMITH: But did the legislature

1 really intend to subject someone to fifteen years for
2 the intention to say hello?

3 MS. GILMORE: Well, the legislature, number
4 one, clearly intended for felony consequences to be
5 available for just the violation of contempt. And I
6 think if you look at the sort of paired legislative
7 histories of burglary and the orders of protection,
8 what you see is nothing but a continuing expansion of
9 protections, efforts to create further tools to
10 combat something that we recognize is a resistant - -
11 -

12 CHIEF JUDGE LIPPMAN: And isn't the point
13 that the stay-away-from-home provision is important.

14 MS. GILMORE: It's - - -

15 CHIEF JUDGE LIPPMAN: It's not just stay
16 away from home, but gee, if you go, and you don't
17 have any bad - - - it's because of the nature of this
18 crime that stay away from home means it, and unless
19 that's enforced in a way that says we mean it, there
20 can be tragic consequences - - -

21 MS. GILMORE: Certainly.

22 CHIEF JUDGE LIPPMAN: - - - I think is the
23 theory. Is that right?

24 MS. GILMORE: No, absolutely right, Your
25 Honor. And I mean, I think it's also important to

1 say that while defendant wants to conflate the two
2 provisions and say stay away from the premises is
3 always going to be stay away from the person, it's
4 very clearly factually true that that's - - - that
5 that's not going to be true all of the time. We will
6 have situations where there's a violation of the
7 stay-away-from-the-premises provision that don't
8 involve violation of this contact-the-person
9 provision. And those would never be - - -

10 JUDGE SMITH: Can you give an example of
11 that?

12 MS. GILMORE: Certainly. He waits outside
13 the apartment. He watches her leave and go to work,
14 drive away in her car. He goes into the apartment in
15 violation of the restraining order. There's your
16 trespass.

17 JUDGE SMITH: So what's his motive for
18 doing that?

19 MS. GILMORE: He wants to smell her shoes.
20 It could be any number of things. He wants to sit in
21 the chair he used to sit in, in the apartment, for
22 example. There are any number of reasons he might
23 want to go in there.

24 It could be a burglary if he went in and
25 then - - - if we could make out a case that he

1 intended to engage in property damage, et cetera.
2 And that would have nothing to do with contact with
3 the person. That would have to do with entry to the
4 premises plus intent to commit a crime.

5 JUDGE PIGOTT: Is VanDeWalle wrongly
6 decided, then, in your view?

7 MS. GILMORE: Yes. Yes. I think it's
8 wrongly decided for a couple of reasons. Number one,
9 it's just not what Lewis says. And number two, I
10 think that as I think Judge Lippman pointed out,
11 VanDeWalle ignores the fundamental realities of
12 domestic violence. The court there substitutes its
13 judgment for the jury and effectively decides that
14 that was welcome behavior. I don't think that that's
15 a fair conclusion on the facts.

16 JUDGE SMITH: Well, the jury - - - are you
17 saying the jury found it unwelcome?

18 MS. GILMORE: Clearly, by their verdict.

19 JUDGE SMITH: Well, wait a minute, even if
20 it's welcome, it's a crime?

21 MS. GILMORE: Yes. It is.

22 JUDGE SMITH: So the jury didn't have to
23 find - - -

24 MS. GILMORE: Well, the jury didn't have to
25 find that. You're correct. I misspoke.

1 JUDGE PIGOTT: It's a strict liability
2 statute?

3 MS. GILMORE: It's definitely strict
4 liability as to contempt. In the burglary context, I
5 don't know if it's necessarily as clear. I think we
6 might have a situation in burglary - - - and maybe
7 it's not really a sense of strict liability or not.
8 But I think there's a very strong possibility if we
9 presented the case that I think everybody is worried
10 about, the case where the protected party invites the
11 prohibited party over, effectively inviting them to
12 violate the order, I think that there is a question
13 of whether or not - - - number one, I'm not sure that
14 any prosecutor would consider that a burglary. And
15 number two, I think that there's a strong likelihood
16 that a judge, a grand jury, and a jury, would also
17 consider that a failure of proof, that in the context
18 of the - - -

19 JUDGE SMITH: But isn't it nervous-making -
20 - -

21 MS. GILMORE: - - - intent to - - -

22 JUDGE SMITH: - - - when you're defending a
23 statute by saying oh, don't worry; no one's ever
24 going to prosecute the extreme cases?

25 MS. GILMORE: I'm sorry, I didn't - - -

1 JUDGE SMITH: They won't unless there's
2 someone they're really out to get or if there's an
3 irresponsible prosecutor somewhere. Shouldn't we try
4 to interpret the statute in a way that doesn't leave
5 a prosecutor discretion to go after cases that
6 clearly shouldn't be prosecuted?

7 MS. GILMORE: I think that's definitely a
8 consideration in interpreting the statute, but I
9 think there are all kinds of considerations in
10 interpreting it. And I think the legislature's clear
11 approach to these crimes is perhaps a much more
12 compelling question.

13 And there are many, many situations where
14 we respect and recognize the fact that the prosecutor
15 has broad discretion to choose to treat a course of
16 conduct in different ways. Bent MetroCards provide
17 one example of that. Sex crimes may be prosecuted in
18 an extremely wide array of ways, resulting in
19 consequences from an A misdemeanor to a B felony,
20 perhaps even more.

21 So I think it's inherent in the system that
22 we realize prosecutorial discretion is one of the
23 controls available. And when we weigh that against
24 the clear legislative intent here, in a situation
25 where these - - - both the burglary statute and the

1 have the tool here. I mean, maybe some of them are
2 saying it. But it certainly would be possible to
3 hold that the evidence here was ample to support
4 conviction. The question is whether he's entitled to
5 a charge saying, in effect, that if all he intended
6 was completely innocuous conduct, it's not burglary,
7 it's only criminal contempt.

8 MS. GILMORE: Well, and there's certainly
9 no basis in law, as Judge Lippman noted, there's no
10 basis in law to effectively carve out some portions
11 of this order, an order that was put in place by a
12 judge, after a proper hearing.

13 JUDGE SMITH: What harm would it do if they
14 had to give, in these kind of cases, the sort of
15 charge, the VanDeWalle charge, that the defendant
16 asked for? What practical - - - I understand your
17 legal argument. Maybe you're right. But what
18 practical harm would it do?

19 MS. GILMORE: One, I think, it permits - -
20 - I think it does some violence, if you will, to the
21 restraining order, but - - - because let's remember
22 that this is an order put in place by a judge - - -

23 JUDGE SMITH: It's still criminal contempt.
24 We're just saying that if all he wanted to do was say
25 hello, you convict him only of the misdemeanor.

1 MS. GILMORE: But there's absolutely no
2 reason in law or in common sense to determine that
3 something that not only has been judged by the
4 legislature to be a crime, but defendant is on notice
5 that it is a crime several times over, there's no
6 reason to suddenly remove that from the ambit of the
7 burglary statute, when that's one of the tools that
8 the legislature clearly intended to provide. There's
9 no basis for that.

10 We could charge those counts separately if
11 wanted to. We could pursue them independently, and
12 thus they are independent crimes. They will often
13 occur together, but they could occur independently.
14 And there's simply no basis to treat one differently
15 than the other, particularly when the fundamental
16 adjudication that there is a danger here is just very
17 clear.

18 JUDGE SMITH: It's a good argument, but you
19 aren't quite answering my question as to what
20 practical harm would it do if they had to give that
21 charge?

22 MS. GILMORE: I'm not sure practical harm
23 is the question. The question is whether or not
24 we're able to reach - - -

25 JUDGE SMITH: Okay. You're sustaining an

1 objection - - -

2 MS. GILMORE: - - - the conduct that needs
3 to be punished.

4 JUDGE SMITH: - - - to my question.

5 MS. GILMORE: Yes, I am.

6 JUDGE SMITH: Okay.

7 CHIEF JUDGE LIPPMAN: Okay. Thanks,
8 counselor.

9 MS. GILMORE: Thank you, Your Honors.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

11 MR. KIRSHBAUM: Thank you. This is the
12 extreme case. This was a situation where it was
13 undisputed that the victim was not in the apartment
14 and they prosecuted him for violating the staying-
15 away-from-her provision. So this is the extreme
16 case.

17 And in a situation like this, where the
18 only act was the attempted entry, then it means that
19 automatically, the order of protection means it's
20 going to be a burglary. So - - -

21 JUDGE SMITH: But wouldn't the case be more
22 extreme if she had called him up and said, hey, you
23 know, I was probably a little hasty; why don't you
24 come on over?

25 MR. KIRSHBAUM: Certainly. I mean, I think

1 it would be more extreme from a public policy
2 standpoint. From the point of view of multiple
3 violations of a stay away provision, this is that. I
4 mean, if she said I'm not going to be there, but go
5 to the apartment anyways, then maybe.

6 And I think that Judge Smith is really
7 addressing a major concern here, which is that there
8 are going to be situations - - - when Lewis is read
9 as broadly as it is, there's going to be situations
10 where people are going to be over-penalized for
11 conduct that outside of the order of protection would
12 be considered noncriminal.

13 JUDGE SMITH: Okay. But I mean, what your
14 adversary's saying is yeah, there are risks
15 everywhere, and there are risks that people will be
16 over-penalized. There's also a risk that if we don't
17 enforce these orders of protection very aggressively,
18 somebody's going to get hurt. And isn't it for the
19 legislature to choose which risk to run?

20 MR. KIRSHBAUM: Well, I mean, I think that
21 the position that we're taking is not going to
22 prevent them from prosecuting for these orders of
23 protection. The order of protection is going to be
24 in place. They can prosecute them multiple times.
25 These are felonies with potential terms of

1 imprisonment.

2 However, the question is how aggravated
3 should it be? And in situations like the one present
4 here, where logic does not show that there was an
5 additional intent beyond entering to the apartment,
6 or at least the jury wasn't allowed to find it that
7 way, then it means that in every situation the People
8 are always going to be allowed to prosecute it as
9 multiple violations of the stay-away provision, which
10 means order of protection equals burglary.

11 And I think that that's just giving too
12 much discretion to the People, and I don't think
13 that's what the legislature intended.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 Thanks.

16 MR. KIRSHBAUM: Thank you.

17 CHIEF JUDGE LIPPMAN: Thank you both.
18 Appreciate it.

19 (Court is adjourned)

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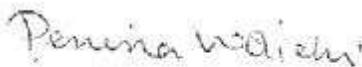
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Norman Cajigas, No. 167 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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