

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 57

EMMANUEL ALMONTE,

Appellant.

20 Eagle Street
Albany, New York
June 6, 2019

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

DAVID J. ROBLES, ESQ.
DAVIS POLK & WARDWELL, LLP
Attorney for Appellant
450 Lexington Avenue
New York, NY 10017

JOSHUA P. WEISS, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
198 East 161st Street
Bronx, NY 10451

Karen Schiffmiller
Official Court Transcriber



1 JUDGE RIVERA: People v. Emmanuel Almonte.

2 MR. ROBLES: Good afternoon, Your Honors. May it
3 please the court, my name is David Robles, pro bono counsel
4 for the defendant-appellant Emmanuel Almonte. With the
5 court's permission, I'd like to reserve two minutes for
6 rebuttal.

7 JUDGE RIVERA: You have it.

8 MR. ROBLES: Thank you, Your Honor.

9 JUDGE FEINMAN: So if - - - if I can start you
10 right where I started on the last case about lesser
11 included, what is your reasonable view of the evidence that
12 the defendant's injuries here were caused by anything other
13 than a gun?

14 MR. ROBLES: Your Honor, there was no gun
15 recovered in this case, and by the complainant's own
16 admission, he tumbled down multiple flights of stairs, came
17 into contact with - - -

18 JUDGE FEINMAN: Did he ever - - - did anybody say
19 that the head - - - hit his head and cracked it open?

20 MR. ROBLES: So - - -

21 JUDGE FEINMAN: The stairs hit his head and
22 cracked it open?

23 MR. ROBLES: The complainant never said that.

24 JUDGE FEINMAN: And he was cross-examined upon
25 that?



1 MR. ROBLES: He was not cross-examined about that
2 point.

3 JUDGE FEINMAN: So what's the evidence that the
4 stairs caused the crack in his head?

5 MR. ROBLES: The - - - the - - - the complainant
6 testified that he came into contact, that he fell down the
7 stairs, and that he came into contact with the stair
8 railing. And the standard here is whether there, as the
9 court knows, in the light - - - viewed in the light most
10 favorably to the defense - - -

11 JUDGE WILSON: Well, can you be very precise
12 about the testimony, because I thought he said he threw
13 himself down the stairs, not that he was thrown by the
14 defendant, and that he clung to the railing, but not that
15 he hit his head on the railing. Am I wrong?

16 MR. ROBLES: Your Honor, he said that he - - - he
17 did say he was - - - he was - - - that he threw himself
18 down the stairs, that he was dragged down the stairs, and
19 that he did hang on to - - - hang on to the railing, and at
20 one point he says, that he's hit with a gun against a pole.
21 And when asked specifically, the doctor who was - - - who
22 treated him when ask - - - when the doctor was asked
23 specifically whether a stair railing could have caused
24 these injuries, she couldn't rule that out.

25 JUDGE FEINMAN: Well, no medical witness is ever



1 going to - - - who - - - unless they happen to be an
2 eyewitness - - - be able to tell you precisely how it
3 happened, because, you know, they're asked these questions
4 to a reasonable degree of medical certainty typically, and
5 - - - so - - - so I'm not really sure that her testimony
6 gets you anywhere.

7 I mean, and the only testimony we really have
8 about what happened in the stairwell is the witness'. So
9 the question comes back to exactly what Judge Wilson is
10 asking and what I've been asking, which is, what's the
11 evidence beyond speculation that would make it, you know, a
12 reasonable view of the evidence to say that there's a
13 lesser included that should have been charged here?

14 MR. ROBLES: So Your Honor, this was, by the
15 complainant's own admission, a messy altercation, and the
16 jury here sent up a note asking specifically whether the
17 stairs or the railing could be a dangerous instrument. And
18 I would respectfully suggest that - - -

19 JUDGE FEINMAN: And that - - - that that was
20 actually in response to something that they were invited to
21 consider in the summation, by defense counsel. And - - -
22 and so my question is, when the judge is evaluating - - -
23 before that happens - - - whether to give a charge, you
24 know, what is the evidence that the judge should have
25 looked at, and that was, you know, pointed to by defense



1 counsel requesting the charge, that would support it?

2 MR. ROBLES: Here, the - - - when - - - when the
3 - - - when defense counsel specifically asked for the jury
4 to be instructed on assault in the third degree, the judge
5 paused, and - - - and said, that is interesting; I need to
6 consider that. And - - - and even - - - and made a ruling
7 to not include assault in the third degree, without any
8 explanation. Defense counsel specifically said that, in
9 quoting the - - - the medical expert, that any sharp edge,
10 whether metal, wood, or glass, could have caused these
11 injuries. The only testimony, the only evidence of a gun
12 in this case, comes from the complaining witness. There is
13 no gun recovered. There's no video - - -

14 JUDGE FEINMAN: That's not recovered because the,
15 you know - - - the arrest doesn't happen for a day and a
16 half.

17 JUDGE RIVERA: So - - - so counsel, let's start -
18 - -

19 JUDGE FEINMAN: I mean, I think you'd have a
20 stronger argument if the police had responded immediately.

21 JUDGE RIVERA: Counsel, what's the standard that
22 we have to apply?

23 MR. ROBLES: The court needs to - - - the - - -
24 the court should look at the evidence in a light - - - look
25 at the record in a light most favorable to defendant, and



1 determine whether there's any rational basis for the defend
2 - - - for the - - -

3 JUDGE RIVERA: So - - - so what's speculative if
4 the jury chooses to discount that a gun is used? Doesn't
5 believe that part of it. What - - - what's speculative
6 about a person being dragged up and down a flight of stairs
7 several times, throwing himself down a flight of stairs,
8 what's speculative about an inference that maybe along the
9 way they hit their head?

10 MR. ROBLES: There - - - there is - - - I would
11 respectfully say, there is nothing speculative about that.
12 This is, you know - - -

13 JUDGE RIVERA: Does anything in our case law say
14 that someone expressly has to say that during testimony or
15 during med - - - with medical documentary evidence?

16 MR. ROBLES: It - - - it does not, and - - -

17 JUDGE FEINMAN: Well - - -

18 JUDGE STEIN: But where - - - where - - - whereas
19 here, you have the - - - the - - - the victim stating
20 affirmatively that this is what happened. I was hit with a
21 gun. And - - - and - - - and said a whole lot of other
22 things. What - - - I think we have said that, yes,
23 generally you can accept portions of testimony and reject
24 others, but - - - but you can't - - - where there's a - - -
25 where there's an overall consistency, and no reason to - -



1 - to question, you can't parse testimony, piece by piece.
2 So to me, this seems a little bit like parsing his
3 testimony, and what would be the basis for doing that?

4 Where he himself - - - he has an opportunity to
5 say anything a - - - about what happened. He could have
6 said, yeah, and I hit my head when I fell down the stairs.
7 Anything. And doesn't. He says they hit me with a gun.
8 That's why I - - - I was bleeding and I needed stitches.
9 So what is the basis for parsing that testimony in that
10 way?

11 MR. ROBLES: So here, Your Honor, it would be - -
12 - it wouldn't be arbitrary or rational, which is, I
13 believe, the language that the court used in Scarborough to
14 - - - to talk about parsing out testimony. Here, the
15 complainant himself says, he goes down the stairs, he's
16 dragged down the stairs, he's hit against the railing. And
17 so - - - and - - - and again, the - - - the standard here
18 is just, is there any rational basis for the jury to have
19 believed that he committed assault in the third degree.

20 JUDGE FEINMAN: You're saying that there's
21 testimony by him that he hit his head on the railing?

22 MR. ROBLES: Yes, Your Honor.

23 JUDGE FEINMAN: Where is that in the record?

24 MR. ROBLES: There is. He says that he was hit
25 with a gun against the pole.



1 JUDGE FEINMAN: And are you further saying that
2 he actually testified in this record that he hit his head
3 on the stair?

4 MR. ROBLES: He says - - - he says he was - - -
5 he does - - - he does not say I hit my head on a stair
6 clearly. But the - - - we know from - - - that the jury
7 had had a view here, and it was concerned, and had serious
8 concerns about whether a gun was involved at all in this
9 case.

10 JUDGE FEINMAN: Right. And that - - - as I, you
11 know, said earlier, I think is in response to the
12 summation, which, you know, is - - - is fair, given that
13 there was no objection that the summation was departing
14 from the evidence.

15 But if I can, I want to change your focus to the
16 issue about the excited utterance. And - - - and in
17 particular, in our particular jurisprudence as it stands
18 now, do we look at any one factor as dispositive, or do we
19 look at the totality of the circumstances to determine
20 whether something is an excited utterance, such as, you
21 know, whether there's still a stimulating event, the time
22 that's passed for reflection, and all the other factors
23 that have been mentioned in our case law.

24 MR. ROBLES: Judge, I believe under Edwards, the
25 decisive factor, the determinative factor, is whether the



1 surrounding circumstances show that the - - - the declarant
2 was exercising reflective capacity when the statement was
3 made.

4 JUDGE FEINMAN: Okay. And - - - and is there a
5 time limit on that?

6 MR. ROBLES: There is none. No, time - - - time
7 - - - there's no specific time limit. In this case, Your
8 Honor, and I would - - - I would respectfully suggest that
9 this court's decisions in People v. Cantave, and People v.
10 Vasquez, compel - - - compel the result that this call was
11 improperly admitted. Before this call even takes place,
12 the - - - the attackers have fled the scene. The declarant
13 has gone into his home, had a conversation with his mother
14 about the event, and by his own admission on the stand, has
15 chosen not to tell his sister what's going on, because he
16 made a decision that it was better off that she didn't
17 understand - - -

18 JUDGE FAHEY: It - - - it seems, though, that
19 your - - - your argument has - - - there's two parts to the
20 excited utterance argument, the way I understand it. First
21 is, did the court abuse its discretion in letting it in,
22 and secondly, a - - - you make an argument that the excited
23 utterance exception should be abolished as a policy matter.
24 Let's assume that the first part is preserved, personally I
25 think it was, but there - - - there may be disputes about



1 that, but let's assume the first part is preserved. It's a
2 tough standard to say he abused his discretion here.

3 So even though you get to the issue in front of
4 us, how do - - - how does - - - how do we say that - - -
5 that this was an irrational decision by the court?

6 MR. ROBLES: What the court did here, if - - - if
7 - - - in analyzing the call - - - the court just looked at
8 the call itself in isolation.

9 JUDGE FAHEY: Well, would - - - let me ask you
10 this. Say you're the judge. What I would say - - - I'd
11 look at it and say, well, how long was it between events?
12 Would we be saying as a matter of law that this ten-minute
13 gap would be enough to say that the excited utterance
14 exception shouldn't be allowed in here?

15 MR. ROBLES: No, Your Honor, we wouldn't be - - -

16 JUDGE FAHEY: So we shouldn't rely on the time
17 exclusively?

18 MR. ROBLES: Correct.

19 JUDGE FAHEY: What should we rely on? What other
20 factors?

21 MR. ROBLES: In this case, the court should rely
22 on the fact that the - - - the declarant was in his
23 apartment, his attackers had fled, he's responding to
24 questions. He's not just blurting things out unprompted.
25 He - - - and - - - and look at the cases in, for example,



1 in People v. Vasquez, where there was a similar situation,
2 in which the declarant was alleged to have been hit with a
3 gun - - -

4 JUDGE FEINMAN: Well - - -

5 MR. ROBLES: - - - goes into - - -

6 JUDGE FEINMAN: I'm sorry, finish.

7 MR. ROBLES: Goes into his home, speaks to his
8 mother, and answers questions from a 911 operator. And
9 this court found that even though the declarant sounded
10 agitated and was upset for the next twenty-four hours, that
11 the declarant possessed reflective capacity, and therefore
12 the - - - the call wasn't an excited utterance.

13 JUDGE FEINMAN: What about the fact - - -

14 JUDGE RIVERA: Well, the single, most important
15 thing, which is to say who these people are, since he knows
16 them personally, when - - - when did he reveal that
17 information?

18 MR. ROBLES: That reve - - - the declarant's ask
19 - - - and I see my time is up.

20 JUDGE RIVERA: Please answer that question.

21 MR. ROBLES: The declarant is asked a series of
22 questions aimed at identifying - - - eliciting the identity
23 of his alleged attackers. He's known these - - - by his
24 own admission, he's known the defendant his entire life.
25 They dated the same girl. And despite being asked all of

1 those questions, doesn't say who they are.

2 Immediately after the call, he goes on a canvas
3 of the neighborhood with police officers to look for the -
4 - - to look for these - - - the alleged attackers, and
5 again, doesn't disclose their identity; doesn't disclose
6 their address.

7 JUDGE RIVERA: He does say he knows them.

8 MR. ROBLES: He does say he knows them.

9 JUDGE RIVERA: But he doesn't give their names?

10 MR. ROBLES: He doesn't, which in - - - in our
11 view, Your Honor - - -

12 JUDGE RIVERA: Does he ever give their names?

13 MR. ROBLES: He gives their names twenty-four
14 hours later.

15 JUDGE RIVERA: Okay.

16 Thank you, counsel.

17 JUDGE FEINMAN: Did the 911 operator ask the
18 name?

19 MR. ROBLES: She did not, but she asked a series
20 of questions about it.

21 Thank you, Your Honor.

22 JUDGE RIVERA: Thank you.

23 JUDGE WILSON: Judge Rivera, may I - - - may I
24 have one more?

25 JUDGE RIVERA: Oh, yes, sorry. I'm sorry.



1 JUDGE WILSON: I'm sorry.

2 JUDGE RIVERA: Judge Wilson has a question.

3 JUDGE WILSON: I wanted to know - - - let's
4 assume this is error. Why isn't it harmless on the
5 following theory? The court says we're not going to admit
6 this. Victim takes the stand, says there was a gun, gets
7 cross examined about whether there really was a gun, and on
8 - - - on redirect, prosecutor says, didn't you tell the 911
9 operator there was a gun, and then introduces the statement
10 through - - - to rebut, essentially, the cross-examination
11 this was fabricated. Why doesn't it come in anyway?

12 MR. ROBLES: This call wouldn't come in. This
13 wasn't a prior consistent statement. This is - - - wasn't
14 - - - that wasn't the scenario - - -

15 JUDGE WILSON: As to the gun?

16 MR. ROBLES: - - - in this case. Correct.

17 JUDGE WILSON: Right, as to the gun.

18 MR. ROBLES: Correct. And what the prosecution
19 did here was essentially hang its hat on this call. Now
20 the - - - we are unaware of any court that has ever ruled
21 that is - - - particularly this court, and the prosecution
22 certainly hasn't cited any cases, in which improperly
23 admitted hearsay was cured through cross-examination or the
24 harm was even lessened. And so this call wouldn't have
25 come in under any circumstance - - - this call wouldn't - -



1 - our view is that the call wouldn't have come in under any
2 circumstance, and wouldn't have come in as a prior
3 consistent statement either.

4 JUDGE RIVERA: Thank you.

5 MR. ROBLES: Thank you.

6 MR. WEISS: Good afternoon, Your Honors - - -

7 JUDGE STEIN: Counselor - - -

8 MR. WEISS: - - - may it please the court - - -

9 JUDGE STEIN: - - - have we - - - did we recently
10 say that the - - - this question of whether it's an excited
11 utterance is a mixed question of law and fact?

12 MR. WEISS: That's correct, Your Honor. This - -
13 - this is a mixed question of law and fact that - - -

14 JUDGE STEIN: So if - - - if - - - if we - - - do
15 we have to find that there was error in admitting this
16 statement, as a matter law, if there's record support for
17 the trial court's finding that the victim had time for
18 reflection?

19 MR. WEISS: No, Your Honor. The scope of review
20 current at - - - at present is limited to whether or not
21 there was record support for the trial court's conclusion,
22 and we submit that there was ample support for that
23 determination. The minimal amount of time that passed
24 between the assault and the call, the seriousness of the
25 injuries, the fact that the victim was bleeding profusely



1 from his head, and the - - - the tone and - - - the tone
2 and tenor of his complaint on the call, his - - - his
3 foremost and paramount concern on securing medical
4 attention as quickly as he could, as well as the - - - the
5 - - - as well as what was transpiring in the background. A
6 - - - a listening of the tape reveals that the victim's
7 mother was audibly distressed, and - - -

8 JUDGE RIVERA: Yeah, well, what - - - what's also
9 revealed is that he's obviously talking to other people,
10 the sister and the mother, before he's making any comments
11 to the dispatcher. That when he has the opportunity to
12 provide key information to identify his attackers, because
13 he knows them personally, he doesn't.

14 Doesn't that go against - - - this is, to me, not
15 a question of - - - a mixed question of fact and law,
16 except all the factual determinations of the judge about
17 what's - - - what is being said on the call and the time
18 that expires. The question is whether or not the - - -
19 what appears to be calculated choices means, that this
20 particular individual had time to reflect and make
21 decisions, that then take it outside of the framework of
22 the excited utterance exception.

23 MR. WEISS: We - - - we - - - we would
24 respectfully disagree. The - - - on the call, it's - - -
25 it's apparent that the victim's foremost concern is



1 obtaining medical attention. As - - - as he continues to
2 voice his complaints, his - - - his ailments, his need for
3 medical attention, the dispatcher, understandably, but
4 nonetheless, interrupts him to ask more pointed questions,
5 more investigatory questions, aimed at the attack itself.

6 JUDGE RIVERA: Yeah, and if you wanted to cut
7 that off, you would either continue to talk about your
8 injuries or you'd give the names.

9 MR. WEISS: Well - - -

10 JUDGE RIVERA: Is there - - - what - - - the - -
11 - the point of all those questions is to help eventually
12 find the attackers and you've got their names.

13 MR. WEISS: Absolutely, but the thing that - - -

14 JUDGE RIVERA: And then it's twenty-four hours
15 before you give up the names.

16 MR. WEISS: That is correct. But the victim was
17 never asked to - - - to specify the names of his assailants
18 on the call.

19 JUDGE RIVERA: But isn't that the main thing one
20 would give up? Why are you saying that they're Dominican?
21 Why are you saying the sweater they're wearing, when this
22 is the main thing that you would reveal? It takes more
23 thought to remember the color of the sweater, than it does
24 to remember a person you know from high school.

25 MR. WEISS: When the police are called to



1 initially investigate a crime, the name - - - the names of
2 the actual suspects is far less consequential than the - -
3 - than the actual physical - - -

4 JUDGE RIVERA: But we're not talking about the -
5 - - the police and the way they might think they would best
6 investigate. You're talking about the person who's just
7 been attacked.

8 MR. WEISS: Correct. But over the call, the - -
9 - the complainant provides a physical descrip - - -
10 description of who his assailants are. All his answers are
11 responsive to the inquiries directed to him - - -

12 JUDGE RIVERA: Well, I don't know.

13 MR. WEISS: - - - by the dispatch.

14 JUDGE RIVERA: Okay, counsel, let me ask you if -
15 I - - - if we can move now to the - - -

16 MR. WEISS: Certainly.

17 JUDGE RIVERA: - - - lesser included - - - no,
18 no, no, of course not - - - the lesser included. What is
19 speculative about listening to testimony that someone is,
20 for several minutes, being dragged up and down a staircase,
21 up against railings, throws himself down a flight of scares
22 - - - stairs, pleads twice, please don't kill me, that in
23 that melee, in that altercation that's very fast paced,
24 that he might have been injured on the head in the course
25 of that by hitting something. What's - - - what's



1 speculative about that?

2 MR. WEISS: What's speculative is the complete
3 absence of any evidence adduced during the trial that would
4 tend to show - - -

5 JUDGE RIVERA: But do you - - - do you - - - why
6 is it not an appropriate inference that when you're in an
7 altercation, where two people are beat - - - pummeling you,
8 and you're going back and forth, being dragged up and down
9 staircases, that you might actually hit your head?

10 MR. WEISS: Because that's inconsistent with the
11 entirety of the testimony that was presented during the
12 trial.

13 JUDGE RIVERA: But of course, we've said that the
14 jury could reject something and accept something else, and
15 they might have decided that the People did not establish -
16 - - excuse me. They established - - - excuse me.

17 JUDGE FEINMAN: Scarborough, I'm sorry.

18 JUDGE RIVERA: Yeah, let me just finish this
19 point, thank you. Established the use of a gun. So if
20 they could do that, why can't they then - - - why isn't
21 there enough? It's a low threshold to have a - - - enough
22 reasonable evidence there to conclude that he might have
23 hit his head against a staircase or the railing.

24 MR. WEISS: Because any such finding would not
25 rest on any evidentiary basis. If I could direct this



1 court to page 190 of the record, in which the victim
2 explains the matter in which he came into contact with the
3 stairs, and he states that he latched onto the handrail
4 with his hands, in order to prevent his assailants from
5 continuing the attack by dragging him down the stairs.

6 JUDGE RIVERA: But - - - but he's already been
7 dragged up and down the stairs?

8 MR. WEISS: He has - - - he has - - - he's been
9 dragged down the stairs at least once by this point.

10 JUDGE WILSON: If this was a slip-and-fall case
11 and the plaintiff said, I tripped on the stairs, I think
12 there was a slippery object there, I have a head wound,
13 wouldn't it be a fair inference that the head wound came
14 from hitting your head on the stairs?

15 MR. WEISS: The problem in this case, Your Honor,
16 is there no evidentiary hook. There's no evidentiary hook
17 here that would bridge the jury to making this finding - -
18 -

19 JUDGE RIVERA: But of course, there is.

20 MR. WEISS: - - - based on the evidence.

21 JUDGE RIVERA: Of course, there is. He's
22 testifying that the head injury comes from a gun. They
23 might discount that. But he's also testifying that this
24 altercation has gone on over several minutes, back and
25 forth, in this - - - up at the hallway, down at the



1 hallway. He's fearful that he's going to be killed by
2 these people. And then you have, of course, the - - - the
3 doctor who says, yes, it's a hard, sharp object. I don't
4 know what it's made of; I can't say it's made of metal,
5 wood, or glass. And - - - and says yes, it's consistent
6 with a gun, but can't discount something else.

7 MR. WEISS: Right, well - - -

8 JUDGE RIVERA: It just - - - it just strikes me
9 as very odd for the People to argue that it is - - - would
10 be so speculative, that in this kind of an altercation,
11 this kind of aggressive, physical attack, that it's pure
12 speculation that he might have hit his head on the
13 staircase or the railing.

14 MR. WEISS: Yes, Your Honor. There - - - but
15 again, there - - - there still has to be an evidentiary
16 link - - -

17 JUDGE RIVERA: All right, let's say we disagree
18 with you.

19 MR. WEISS: Okay.

20 JUDGE RIVERA: Sorry, because I know you're going
21 to run out of time, and I know my colleagues have many
22 other questions - - -

23 MR. WEISS: Yes.

24 JUDGE RIVERA: - - - but I - - - I definitely
25 what to get to this one, because I - - - I find this very



1 difficult to figure out from the briefing. Let's say we
2 disagree with you. Let's say it was error. It - - - does
3 the robbery count also? Robbery counts also have to get
4 reversed or just the assault counts?

5 MR. WEISS: It wouldn't impact the integrity of
6 the robbery convictions - - -

7 JUDGE RIVERA: Right.

8 MR. WEISS: - - - because those - - - those
9 counts rest on complete - - - completely different elements
10 that - - - that do not overlap with any of the assault
11 charges. And the jury - - - the jury was fairly able of -
12 - - of parsing out the conduct that corresponded to the
13 robbery or - - - to the robbery and the assault crime.

14 JUDGE WILSON: Well, this will expose my
15 ignorance about criminal law, but could he be remitted for
16 sentencing on a lesser included without a new trial, on the
17 - - - on the assault charge?

18 MR. WEISS: I - - - Your Honor, I - - - I don't -
19 - - I don't know that off the top of my head, so I don't
20 want to lead you astray.

21 JUDGE WILSON: Okay.

22 JUDGE GARCIA: Counsel, could we just get back to
23 one issue that Judge Wilson was asking your - - - your
24 adversary about, which is on the har - - - kind of harmless
25 error analysis. If this was precluded as an excited



1 utterance, and the declarant who's testifying here, he is
2 crossed on, you know, there's a gun, you're saying there's
3 a gun now, could the statement from the 911 call that there
4 was a gun come in as a prior consistent statement to rebut
5 a charge of recent fabrication?

6 MR. WEISS: Your Honor, it - - - it likely could
7 have come in under - - - under a dif - - - under a
8 different theory. And that - - - and that point actually
9 would dovetail with my response to the defendant's last
10 contention in his brief. The fact that had - - - had this
11 been - - - had this been excluded for whatever reason, we
12 could have offered - - - we could have offered the
13 statement or at least portions of it under some alternative
14 theory, had the argument been appropriately - - -

15 JUDGE RIVERA: But don't we have to decide this
16 on the one exception you argued?

17 MR. WEISS: Correct, correct, Your Honor. It - -
18 -

19 JUDGE FEINMAN: So - - - I'm sorry. I - - - I
20 don't know if you finished answering Judge Rivera.

21 MR. WEISS: Oh, no, I - - - I had nothing.

22 JUDGE FEINMAN: But I had another question.

23 MR. WEISS: Yes.

24 JUDGE FEINMAN: So, what I want to understand is
25 your view of how Scarborough applies to this case, or



1 whether or not the def - - - appellant is correct, that
2 it's distinguishable.

3 MR. WEISS: Well, just - - - just as in
4 Scarborough - - - just as in Scarborough, there - - - there
5 was - - - here there was no basis for - - - for parsing the
6 victim's testimony, for selectively dissecting it, because
7 his testimony was unwavering and consistent throughout.
8 His - - - his - - - the - - - the 911 call largely - - -
9 his testimony - - - the 911 call largely corroborated his
10 testimony. You have a straightforward, unfaltering version
11 of events. So the - - - so the jur - - - so the jury was
12 faced with the choice to either credit the version of - - -
13 of ev - - - to credit it, or reject everything outright.

14 JUDGE FEINMAN: And what - - -

15 JUDGE RIVERA: But I don't understand that. I'm
16 sorry; I'm not understanding that. Why would they have to
17 reject - - - am I understanding you correctly, when you say
18 "reject everything outright" as in that - - - that there
19 even was an attack?

20 MR. WEISS: Well, re - - - rejecting it to the
21 extent - - - to the extent that these defendants were
22 responsible for the attack. I think everybody agrees that
23 there was an assault.

24 JUDGE RIVERA: Yeah, but then, I'm just finding
25 it difficult, if he's acquitted on the top count of the



1 robbery, right, so they're rejecting the gun?

2 MR. WEISS: Well, it's important - - - it's
3 important to remember that this isn't a legally repugnant
4 verdict, and we don't - - - we don't know why - - -

5 JUDGE RIVERA: I'm not so persuaded, but they
6 didn't - - -

7 MR. WEISS: Right.

8 JUDGE RIVERA: - - - object to that, so we're
9 kind of stuck with it.

10 JUDGE STEIN: It could've - - - they could've
11 rejected the fact that while they were taking the - - - the
12 phone from him, they didn't use the gun.

13 MR. WEISS: Correct.

14 JUDGE STEIN: That the - - -

15 MR. WEISS: Right.

16 JUDGE STEIN: Right.

17 MR. WEISS: It - - - it was theoretically
18 possible that he committed the assault - - -

19 JUDGE RIVERA: Yeah, but my problem with your
20 argument on that - - --

21 MR. WEISS: - - - with the - - -

22 JUDGE RIVERA: - - - I know you made that
23 argument in the brief, is that that strikes me that you're
24 parsing this. And you're parsing this - - - you're
25 compartmentalizing, and you're arguing we shouldn't, right?



1 MR. WEISS: Well, all - - - all - - - all we - -
2 - all of us can do right now is surmise what took - - -
3 what took place in - - - in the deliberation room.

4 JUDGE STEIN: But - - - but didn't the victim say
5 they were kicking him and - - - and punching him during
6 that time, so that it wouldn't be inconsistent with his
7 testimony, would it? To say that they weren't hitting him
8 with the gun while they were taking the phone?

9 MR. WEISS: Well - - -

10 JUDGE STEIN: That's consistent with his
11 testimony.

12 MR. WEISS: Well - - - well, the doctor testified
13 - - - Dr. Morris testified that the lacerations that he
14 sustained to his head, could not have been caused by
15 punches or kicks. That they were consistent with a sharp
16 object.

17 JUDGE STEIN: No, no, no, but what I'm saying is,
18 is that this took place over a long period of time, so that
19 - - -

20 MR. WEISS: Right.

21 JUDGE STEIN: - - - the - - - the injuries that
22 he claimed were made by the gun, may have been made during
23 some other part in the melee, other than when they were
24 physically taking the gun - - - the - - - I'm sorry - - -
25 the phone from him.



1 MR. WEISS: Certainly, what you're saying is
2 hypothetically possible. But once - - - but once again,
3 it's not within the confines of the existing proof on this
4 record. And I would just ask that this court affirm the
5 order of the Appellate Division.

6 JUDGE RIVERA: Thank you, counsel.

7 MR. WEISS: Thank you.

8 MR. ROBLES: Your Honors, there's no need to
9 surmise anything here about what the jury was thinking. We
10 know the jury passed up a note that asked whether the
11 stairs or the railing could be considered a dangerous
12 instrument. And that right there is - - - is - - - shows
13 that there was a - - - some rational basis - - -

14 JUDGE RIVERA: Well, let's say we agree with you
15 - - - can you address this question about whether or not
16 all the counts get reversed or just the assault?

17 MR. ROBLES: The prosecution's theory of the case
18 on each of the charged counts here was that a gun was used
19 during the course of a robbery. And I'd urge the court
20 respectfully to look at the prosecutor's summation at A-250
21 in the record, where the prosecutor marches through each of
22 the elements to the jury of all of the robbery counts,
23 including the robbery counts that legally don't require a
24 gun, robbery - - - both robbery in the second degree
25 accounts (sic). And the prosecutor said that the force



1 element required for a forcible taking in each of those
2 robberies was satisfied, because I quote, "Brian hits him
3 with a gun and Emmanuel takes his phone."

4 The jury here was presented with a case in which
5 a gun was inextricably linked to all of these charges, and
6 without having had the option of choosing - - - of - - - of
7 deliberating, even deliberating, on assault in the third
8 degree, which didn't require a gun, we don't know how the
9 jury would have decided those counts. Those are factually
10 related counts that should fall as we - - - as well, if
11 there was a failure to include - - - to charge on the
12 lesser included.

13 On the 911 call - - -

14 JUDGE RIVERA: Can you address Judge Wilson's
15 question to your adversary about the sentencing?

16 MR. ROBLES: I - - - I don't know, again, off the
17 top of my head, Your Honor, about the sentencing. Our
18 position - - -

19 JUDGE WILSON: I don't either. I wouldn't say
20 both.

21 MR. ROBLES: Our position would be that there
22 wouldn't - - - that - - - that failure to instruct in the
23 lesser included here would require a new trial on all
24 accounts, because of the way the prosecution chose to
25 present this case to the jury.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

On the 911 call, in the - - - in the People's - -
-

JUDGE RIVERA: Your light has gone off, so very
quickly, counsel.

MR. ROBLES: Oh, sorry. The 911 call, the Pe - -
- the People rely on this call. They say they can sit down
after they play it during summation, and the jury requested
it two times, so any suggestion that the - - - the
admission of the call was harmless error, we would
disagree.

JUDGE RIVERA: Thank you, counsel.

MR. ROBLES: Thank you, Your Honor.

JUDGE RIVERA: Thank you.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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 The People of the State of New York v. Emmanuel Almonte, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: June 12, 2019

