No. 52
The People &c.,
Respondent,
v.
Angel L. Cruz,
Appellant.

James Eckert, for appellant.
Stephen X. O'Brien, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed and a new trial ordered.

Defendant was charged with two counts of Assault in the First Degree for allegedly stabbing two men during a brawl outside a bar. At trial, defendant interposed the defense of

misidentification. During deliberations, the jury submitted a note requesting to see the written statement prepared by a police officer and signed by defendant in which he made certain admissions. Although the exhibit was ostensibly only to be used to refresh the police officer's recollection, Supreme Court received and marked this exhibit in evidence over the objection of defense counsel. Later, Supreme Court, outside the presence of the jury, reversed its ruling and determined that this written statement was not evidence, re-marking it as a court exhibit. Supreme Court failed to instruct the jury accordingly, however. The jury retired to deliberate and first requested certain exhibits that had been marked in evidence, which were provided.* Later, the jury requested to see the written statement signed by defendant, which it also believed was in evidence. Nothing in the record suggests that the judge received the jury note or discussed its contents with the parties.

Defendant appealed from the judgment convicting him of two counts of first degree assault citing a violation of CPL 310.30 and People v O'Rama (78 NY2d 270 [1991]). The Appellate Division initially reserved decision on defendant's appeal and remitted the case to Supreme Court for a reconstruction hearing to determine "whether there was a jury note and, if so, what

* Indeed, the record in this case reflects that, prior to the commencement of deliberations, the parties agreed to allow the jury to review exhibits admitted in evidence upon its request.

action was taken with regard to the jury note" (People v Cruz, 42 AD3d 901 [4th Dept 2007] [internal quotation marks, modifications and citations omitted]).

At the reconstruction hearing, the trial judge stated that he had no independent recollection of receiving the particular jury note at issue. He discussed his standard practice with the parties and noted that he generally allows juries to review exhibits admitted in evidence upon their request without reconvening, provided that the parties are in agreement as they were here. Significantly, he stated that, had he been told that the jury in this case requested a court exhibit not in evidence, he would have reconvened the proceeding in the presence of defendant. The Appellate Division, applying the presumption of regularity, affirmed the judgment (People v Cruz, 57 AD3d 1453 [4th Dept 2008]).

Typically, "a presumption of regularity attaches to judicial proceedings" (People v Velasquez, 1 NY3d 44, 48 [2003]; see also People v Harrison, 85 NY2d 794, 796 [1995]). Here, the Appellate Division erred in holding that the presumption had not been overcome. The record shows that there was a significant, unexplained irregularity in the proceedings in that defendant established that the jury requested an exhibit not in evidence; it was reasonable for the jury to believe the exhibit to be in evidence, since it heard the trial court receive the item, but was not privy to the court's subsequent reversal of that ruling;

and the request was never brought to the judge's attention. Thus, there is no basis in the record to conclude that the jury was informed by anyone that the item was not in evidence, and the jury may have received the exhibit in error.

We conclude that defendant met his burden of rebutting the presumption of regularity by substantial evidence. That evidence includes the trial judge's statement at the reconstruction hearing that he never saw the note, that he did not reconvene with counsel, and that he did not know if the exhibit was ever shown to the jury. Nor can we agree with the Appellate Division's determination that, even if the jury received this unadmitted exhibit in error, such error was harmless, since the exhibit contradicted defendant's misidentification defense at trial (cf. People v Bouton, 50 NY2d 130, 137 [1980]).

We need not reach defendant's remaining arguments.

People v Angel Cruz

No. 52

LIPPMAN, Chief Judge (concurring):

At trial, each of the two assault victims gave testimony to the effect that defendant stabbed him outside a “little bar” in Rochester on the night of February 2, 2003. In addition, the arresting officer testified that upon arriving at the scene he

observed defendant with a knife in his hand. Defendant and his father, on the other hand, testified that defendant had been misidentified –- that a fight had broken out inside the bar and that defendant, his father and his uncle were attempting to extricate themselves and leave the scene when the police arrived. Defendant denied possessing a knife or stabbing anyone on the occasion charged.

After his arrest, defendant gave a statement to a police officer. The statement, as transcribed by the officer, included the phrase, "I took the knife from him and started kicking his ass." Defendant disputed whether he had, in fact, said this and in pretrial proceedings it was stipulated, in lieu of a Huntley hearing, that the statement could be used to impeach defendant but would not be admissible for the truth of the matter asserted on the People's case. Defendant was confronted with the above-quoted portion of his statement on cross-examination and immediately afterward the prosecutor requested that the entire statement, which had been marked for identification as exhibit 28, be admitted in evidence for the jury's examination. The court, over defendant's objection and in the presence of the jury, purported to accede to this request. Subsequently, after defendant's re-direct testimony and out of the jury's presence, the court said it had been mistaken and that it had not intended to receive exhibit 28 as evidence. Although the exhibit was, accordingly, not received, the jury was not advised that the

evidentiary ruling announced in its presence had been countermanded.

On the People's rebuttal case, the police officer who had taken defendant's statement testified, and in connection with his testimony the prosecutor again sought admission of the statement. The court responded "At the present time I will receive it only as a Court Exhibit," and directed that the statement be marked "Court Exhibit 1."

The record reflects that the jury, while deliberating, sent the court a note requesting a readback of certain testimony and to see specified evidentiary exhibits. The court directed that the note be marked "Court Exhibit 2." The note was read to and discussed with counsel and afterward the jury was advised that the requested testimony would be read back by the court reporter. As to the exhibits, the court stated that he assumed that they had already been delivered.

There is nothing in the trial minutes indicating that any further communication was received from the jury until it informed the court that it had reached a verdict.

In preparing defendant's appeal, counsel found among the trial exhibits a jury note marked as "Court Exhibit 3" in which the "report signed by Angel Cruz" was requested. Defendant argued that, inasmuch as there was no indication that the note was disclosed to counsel or responded to by the court, the requirements of CPL 310.30 and People v O'Rama (78 NY2d 270

[1991]) had not been met. Defendant contended that this failure constituted a mode of proceedings error involving a matter of substance and that reversal was therefore required (see id.). Although noting that "it appears on the record before us that there was a jury note" and that "the record is silent with respect to the court's response to the note," the Appellate Division did not conclude that there had been a mode of proceedings error, as defendant urged; it instead held the appeal in abeyance and remitted the matter for a reconstruction hearing to determine if there was a jury note and what, if anything, was done in response to any such note (42 AD3d 901 [4th Dept 2007]).

At the subsequently held "reconstruction hearing" (really just a conversation between the court and counsel with some testimony from the court reporter), no one had any independent recollection of events at issue, which had transpired some four years before. The court was of the view that the trial had been accurately recorded and, although he had no memory at all of the events in question, he thought it probable that he never received the jury note. He initially expressed the view that the requested exhibit must simply have been given to the jury as a matter of course. But, upon being reminded by counsel that the exhibit had not been received in evidence, said that, in that case the exhibit would not have been given to the jury, because that wasn't done. The court did say, however, that if he had been given the note, "we would have reconvened because it's not a

People's exhibit, it's not a defense exhibit." At the hearing's conclusion, the court offered the unsolicited view that, in the absence of substantial evidence to the contrary, the presumption of regularity would require the conclusion that the jury had not been given the unadmitted court exhibit.

The record of this very useful exercise in hand, the Appellate Division resumed its consideration of defendant's appeal. The court affirmed defendant's convictions, concluding that although there had been a jury note and the note had not been addressed by the trial court, the defendant had not been seriously prejudiced as a result. In reaching this conclusion the Appellate Division relied on pre-O'Rama decisions, evidently requiring a showing of "serious prejudice," whose continued vitality is marginal at best after O'Rama (see O'Rama, 78 NY2d at 279 [rejecting People's argument in reliance upon People v Agosto (73 NY2d 963, 966 [1989]) and People v Lourido (70 NY2d 428, 435 [1987]) that a showing of specific prejudice was essential to support reversal for noncompliance with CPL 310.30]), and found significant the trial court's statements to the effect that unadmitted court exhibits were not typically given the jury (57 AD3d 1453 [4th Dept 2008]).

I agree with and join in the result the Court has reached directing a reversal and a new trial, but the outcome of this appeal should not turn upon whether the jury was given the unadmitted court exhibit, something which we cannot know on this

record and upon which the presumption of regularity manifestly does not shed any light. The fundamental problem in this case is that there is no record as to how the jury note requesting an unadmitted, potentially inculpatory statement by defendant was dealt with. This is precisely the kind of problem that compliance with CPL 310.30 and People v O'Rama is meant to obviate and there appears no reason why this appeal should not be decided on the ground that those authorities were not complied with; the completely dispositive issue properly before us is whether defendant's right to be present and participate in his defense with the assistance of counsel was violated by the patent absence of any notice to defendant and his counsel of the jury note or of an opportunity to be heard in accordance with the mandate of CPL 310.30 and O'Rama.

There was not at the time of defendant's trial in 2004 any question as to what a trial court must do upon receiving a jury note requesting instruction on a substantive matter. CPL 310.30 and People v O'Rama, decided more than a decade before, are painstakingly clear in this regard: notice to counsel and an opportunity to be heard as to how the jury's inquiry should be dealt with are indispensable in satisfaction of a defendant's basic entitlement to be present and participate with the assistance of counsel at all critical stages of the trial, and their denial will ordinarily be viewed as inherently prejudicial and reversible, even where there is no showing of specific

prejudice (O'Rama, 78 NY2d at 279-280). The trial court was well aware of this and, in fact, stated at the reconstruction hearing that, if he had received the jury note requesting an unadmitted exhibit, he would have reconvened the trial and addressed the note with counsel.

As the trial court retrospectively recognized, the inquiry was plainly upon a matter of substance. The jury's request for defendant's statement suggested rather strongly that it believed defendant's entire transcribed post-arrest statement had been admitted as evidence and should therefore be available to it. Indeed, the jury must have so concluded from the court's apparent grant in its presence of the prosecutor's request that the statement be received in evidence -- an evidentiary ruling never to its knowledge retracted. Any competent defense counsel, upon learning of such a request for an unadmitted, potentially inculpatory statement by his or her client, would at a minimum urgently request that the jury be instructed by the court that the statement was not in evidence. The People's contention that the jury note would not have merited discussion, is, in the present context, untenable.

Nor should it avail the People or deter this Court in applying O'Rama that the note may not have been brought to the trial judge's attention. Here, it should be noted parenthetically that the presumption of regularity works very much against the inference the People would draw, since it would

appear highly irregular that the court, having directed that the prior jury note be marked "Court Exhibit 2," would have had no part at all in the marking of the jury note at issue as "Court Exhibit 3"; it does not seem likely that the exhibit became a "court exhibit" without the court's knowledge.** In any case, even if the jury note had been dealt with entirely by nonjudicial court personnel, who either supposed wrongly that the note sought an admitted exhibit, which could simply be given the jury without further ado, or equally wrongly supposed, as the People do now, that the note raised no properly judicial concerns, the result from the defendant's perspective is the same. Whether by reason of the actions of the trial judge or nonjudicial court personnel, defendant was denied notice of and the opportunity to participate in framing a response to a jury inquiry upon a substantive matter, and the jury went uninstructed upon that matter, which, involving as it did an issue as crucial as the admissibility of defendant's post-arrest statement to the police -- an issue that was supposed to have been resolved by stipulation in lieu of a Huntley hearing -- was quintessentially one that required a "meaningful" response from the trial court under this Court's precedents (see O'Rama, 78 NY2d at 276; People v Malloy, 55 NY2d 296, 301 [1982]).

**The Court, of course, also directed that the first court exhibit, defendant's statement, be marked as such.

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Order reversed and a new trial ordered, in a memorandum. Judges Graffeo, Read, Smith and Pigott concur. Chief Judge Lippman concurs in result in an opinion in which Judges Ciparick and Jones concur.

Decided April 6, 2010