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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 56

SERGIO CERDA,

Appellant.

20 Eagle Street
Albany, New York
May 19, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 56, The People of
2 the State of New York v. Sergio Cerda.

3 Counsel?

4 MS. ALDEA: Good morning, Your Honors. May it
5 please the court, my name is Donna Aldea. I represent
6 Sergio Cerda, and I would respectfully request two minutes
7 rebuttal.

8 CHIEF JUDGE DIFIORE: You may.

9 MS. ALDEA: Your Honors, this case arises at the
10 intersection between the rape shield law and the
11 constitutional right to present a defense. In this case,
12 the trial court's rulings, compounded by the prosecutor's
13 use for those rulings on summation, ultimately deprive the
14 defendant of the ability to provide a defense in this case.

15 JUDGE CANNATARO: How many rulings are we talking
16 about?

17 MS. ALDEA: Excuse me, Your Honor?

18 JUDGE CANNATARO: Do you have specific rulings
19 you want to point to, or is this a cumulative effect of
20 many rulings?

21 MS. ALDEA: So it is a cumulative effect of many,
22 but the one that I want to focus on specifically is the
23 preclusion of the DNA and serology report. So in this
24 case, I think that the DNA and serology report was the most
25 probative piece of evidence that supported the defense that



1 the injuries in this case, which were absolutely essential
2 to corroborate the complainant's account, had actually - -
3 - were actually had an innocent alternative explanation.

4 So what the DNA and serology report would have
5 shown, and what counsel proffered to the court, was it
6 would have shown that the complainant's own saliva was
7 found in sufficient quantity to be detected on her vulva
8 and on three stains on her underwear, which would have
9 supported his defense that the injuries, the petechiae that
10 were observed, could have been caused by masturbation or by
11 her self-rubbing. It also showed - - -

12 JUDGE CANNATARO: Could a jury permissibly arrive
13 at that conclusion without engaging - - - and again, this
14 is what I think the trial judge was getting at, in - - - in
15 speculation?

16 MS. ALDEA: Yes, Your Honor. The court - - - the
17 - - - the jury could arrive at that conclusion because,
18 obviously, if that report had shown - - - if the report had
19 been admitted into evidence, what it would have suggested
20 or what it would have shown is the presence of saliva in
21 sufficient quantities for detection in those areas, under
22 these circumstances where all that was alleged was digital
23 penetration, would have strongly suggested or corroborated
24 the defense that the complainant had either rubbed herself
25 or had inserted something self-lubricated, inserted



1 something herself into her vagina.

2 JUDGE CANNATARO: Well, but that's where you get
3 into trouble with the rape shield law, because now you're
4 trying to show sexual conduct.

5 MS. ALDEA: No, Your Honor. So the reason that
6 the rape shield law doesn't apply here as to that, and
7 there are two other areas in that report that I want to go
8 into as well, but the reason that it doesn't apply as to
9 that is because the rape shield law was designed to prevent
10 the use of a victim's promiscuity to assail her credibility
11 with respect to a report.

12 It was not designed, as this court has stated in
13 Williams and has recognized in other cases, to prevent a
14 defense from being corroborated or forged, and in this
15 case, there was no attempt to assail the complainant's
16 credibility by saying that she self-lubricated, licked her
17 fingers, or licked something and inserted it into her
18 vagina.

19 That was never the attempt, and it wouldn't even
20 work. It doesn't even make sense for a teenager. It - - -

21 JUDGE CANNATARO: It might not have been the
22 intent, but it could have been the effect, and I'm thinking
23 now specifically about the court's gatekeeping function, to
24 admit probative evidence that's not unduly prejudicial or
25 would require speculation on the part of the jury. Isn't -



1 - - that's still a valid process, isn't it?

2 MS. ALDEA: Well, so what I'll do to answer that,
3 I'll answer it in two ways. The first way is I'll flip it
4 around. Let's say what had been found was the defendant's
5 saliva on her vulva and underwear. There would be no
6 question that that would automatically be relevant to
7 establishing or tending to suggest - - - it would have been
8 admissible to tend to suggest that he had, in fact,
9 digitally penetrated her.

10 So the converse is also true. When you have her
11 saliva there, it's equally relevant, and this, by the way,
12 is a test of relevance, so what the rape shield law
13 requires or what it necessarily does not apply to is
14 evidence that is relevant to prove defense. Relevant is a
15 very low standard. It means more likely than it would be
16 without the evidence, and then that leads me to the second
17 part.

18 This wasn't just saliva. What we also had in
19 this DNA report was prostate specific antigen that was
20 found in sufficient quantities to be detected by the
21 Ceretec test inside of the complainant's vagina. Now, this
22 was not a case where there was an allegation of penile
23 penetration or anything that would have resulted in PSA, so
24 that was relevant and was excluded.

25 And then finally, there were two other men's DNA,



1 not the complainant's, that were mixed in one of the saliva
2 samples from her underwear. So along with her own saliva
3 was a mixture of saliva from two other men.

4 JUDGE WILSON: Saliva?

5 MS. ALDEA: Yes, Your Honor, saliva.

6 JUDGE WILSON: Not just undifferentiated DNA?

7 MS. ALDEA: No, Your Honor, because it was taken
8 from a saliva sample, and so what makes it conclusive for
9 the presence of saliva other than presumptive was the fact
10 that there was DNA that was recovered from that saliva, so
11 it was a mixed saliva profile of her - - - of her saliva
12 along with two male saliva on her underwear.

13 So this is - - - this is essentially what was
14 excluded. Now, compounding this error is the way that the
15 prosecution used this evidence on summation, and
16 specifically, what happened here is that once the evidence
17 was excluded, the court did allow the defense attorney to
18 still argue from a common sensical standpoint that the
19 injuries could have been self-inflicted.

20 However, once the defense attorney did that, the
21 prosecutor argued, quote, these claims were ridiculous as
22 there was, quote, no evidence that she had rubbed or
23 inserted anything into her own vagina. And what the
24 prosecutor said is, now, Mr. Gann got up here, and he gave
25 you a few alternative theories about that injury, what that



1 trauma to I.O.'s vagina could be.

2 Alternate theories that were never once
3 confirmed. Alternate theories that are not supported by
4 the evidence, and then the - - -

5 JUDGE CANNATARO: Was there an objection made to
6 that comment during summation?

7 MS. ALDEA: No, Your Honor, but this is not being
8 raised as an independent prosecutorial misconduct point.
9 This is being raised to show how the jury was misled and
10 how the rape shield law was ultimately used not as a shield
11 to protect the complainant but as a sword to eviscerate the
12 defense.

13 JUDGE WILSON: You're saying it goes to the
14 harmfulness of the error?

15 MS. ALDEA: Correct, Your Honor, and so
16 ultimately, the prosecutor said, this is a direct quote,
17 there is no evidence that she rubbed herself, and that's
18 because it doesn't exist. That's because it didn't happen,
19 because I.O. did not inflict that injury upon herself.

20 So not only was the evidence improperly excluded,
21 but then the prosecution used it in the most harmful
22 possible way to ultimately eviscerate the defense and
23 mislead the jury as to what actually existed.

24 Excuse me, I'm having a hard time breathing. Can
25 I just pull my mask down a little bit?



1 CHIEF JUDGE DIFIORE: Not permitted. Why don't
2 you take a break for a moment?

3 MS. ALDEA: Okay, just for a second to breathe.
4 Okay.

5 JUDGE RIVERA: While you're taking that second to
6 breathe, Counsel, let's say we disagree with the way you
7 have just articulated this particular argument. I thought
8 you had as an alternative that it was ineffective
9 assistance. Did I miss something?

10 MS. ALDEA: No, Your Honor. So the ineffective
11 assistance of counsel alternative comes from the fact that
12 to the extent that there was overarching prosecutorial
13 misconduct, not just in this regard, but also in other
14 regards, so I will say this. The record here, I think - -
15 - one - - - one of the more disturbing things is that the -
16 - - the summation in this case has been described before
17 this court by my adversary as commendable.

18 In over twenty-five years of practice, I don't
19 think I've seen many summations that were less commendable
20 than this one. This is a case where the prosecutor not
21 only insinuated that evidence didn't exist that she knew
22 did, not just with respect to this, but also with respect
23 to the feces stain on the underwear and other things. But
24 then the prosecutor here actually went as far as to
25 insinuate that sixty-seven-year-old Mr. Cerda, who had a



1 spotless criminal record, was actually a serial rapist who
2 had just never been caught before, so this is not a
3 commendable summation. This is a very disturbing, very
4 troubling summation that should be recognized for that.

5 JUDGE GARCIA: Counsel, I'm sorry. Counsel?

6 MS. ALDEA: Yes?

7 JUDGE GARCIA: That last statement on the serial
8 rapist, whatever was actually said, that was objected to?

9 MS. ALDEA: Yes, Your Honor.

10 JUDGE GARCIA: And there was a remedial
11 instruction given?

12 MS. ALDEA: Correct, Your Honor.

13 JUDGE GARCIA: So is your ineffective assistance
14 claim, then, based on failure to move for a mistrial?

15 MS. ALDEA: Yes, Your Honor, in part, and a
16 failure to object to the extent that what counsel did was
17 insufficient to preserve any of these issues or to the
18 extent that what counsel did was insufficient to alert the
19 court to the way that this evidence was being miscast by
20 the prosecution, then that was ineffective. So that is an
21 alternative argument under People v. Wright; the court can
22 reach that.

23 Now, I will say that with respect to the serial
24 rapist argument, even though, ultimately, the court did - -
25 - the court initially said overruled, and then it said,



1 well, I'll sustain to the extent that there is no proof in
2 this case that Mr. Cerda is a serial anything. The
3 prosecutor then immediately jumped on that comment and
4 said, well, we don't know what happened in other cases;
5 we're here to talk about what happened here, which
6 actually, I think, compounded the prejudice and the error,
7 here.

8 I think the counsel overall was forced to try
9 this case with both hands tied behind his back, and that's
10 not what the rape shield law is designed to do. It's not
11 what the rape shield law was ever meant to do or what it
12 requires, and it also stem - - - it went beyond just the
13 rape shield rulings and into rulings that dealt in general
14 with the complainant's character and her basis of
15 knowledge.

16 So throughout this trial, counsel tried on many
17 occasions - - - I won't go into all of them in the limited
18 time that I have left, but tried on many occasions to point
19 out that this complainant had, in fact, been exposed to
20 sexting, to sexually explicit material, to allegations in
21 fact in the sexting that specifically referred to digital
22 penetration of her vagina.

23 So that was inconsistent with the prosecutor's
24 overarching argument that this complainant was innocent and
25 that she therefore lacked the basis of knowledge to



1 fabricate these allegations, and so that, too, was a
2 depravation that compounded, so to get back I guess to the
3 first question. This was accumulative, death by a thousand
4 cuts that was compounded by a series of evidentiary rulings
5 that ultimately deprived the defendant of due process
6 because it left the jury with a false impression of what
7 the evidence was in this case and who this complainant was.

8 That is what violates the right to due process,
9 what violates the right to a fair trial, and what
10 fundamentally requires this court to reverse and send it
11 back so that before this man who has been here his entire
12 life, who has built a life for himself in this country with
13 his children, with his family, before he is deported on the
14 basis of these weak allegations to a country that he left
15 as a child, that he doesn't know, he at least be afforded
16 the right to do what he wanted to do from the beginning, to
17 defend himself and to prove with the evidence that exists,
18 compelling scientific evidence that these allegations are
19 false.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MS. ALDEA: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. FUKUDA: Good afternoon, Your Honors. And
24 may it please the court, my name is Andrew Fukuda for the
25 People.



1 Your Honor, as the trial court's preclusion of
2 the certain findings in the forensic lab report was proper
3 because these findings were inconclusive. They raised more
4 questions than answers.

5 JUDGE TROUTMAN: What about the serology?

6 MR. FUKUDA: The - - -

7 JUDGE TROUTMAN: Saliva.

8 MR. FUKUDA: The saliva, yes. So there were two
9 findings to saliva relevant, here. There was the saliva
10 found on the victim - - - on the victim's vulva and also
11 the saliva in the underwater. I'll deal with the victim's
12 saliva on the vulva, first. In order for that item of
13 evidence to be relevant, you would have to make two huge
14 leaps of assumptions and speculation.

15 One is defining of the speck of saliva on the
16 exterior wall of - - - of - - - of the victim's vagina must
17 mean that she masturbated. That's the first speculation
18 that you have to make.

19 JUDGE WILSON: Why do you have to say it must
20 mean that rather than it could mean that?

21 MR. FUKUDA: Well, in order to - - - in order - -
22 - it's relevant - - - that item of evidence is relevant
23 here in as much as it has a causal link to the petechiae
24 injury.

25 JUDGE WILSON: That is it may have a causal link,



1 right, not that it must have a causal link?

2 MR. FUKUDA: Well, I - - - sure, we could say it
3 may have.

4 JUDGE WILSON: Okay, all right.

5 MR. FUKUDA: It may have, and - - - but the
6 second item here is that she must have not only have
7 masturbated, but she must have masturbated with severe
8 force and with terrible pressure. Dr. Miller - - -

9 JUDGE WILSON: Or with - - - or with an object of
10 some sort?

11 MR. FUKUDA: That's possible, but I mean, Dr.
12 Miller testified at trial that in all of his nineteen
13 years, seeing over 10,000 patients, he had never, ever seen
14 a nonvictim teenage patient of his who was sexually active
15 and masturbatory ever display any kind of petechiae
16 injury.

17 JUDGE RIVERA: Well, why doesn't that then just
18 go to the weight as opposed to the admissibility of that
19 evidence?

20 MR. FUKUDA: Well, I think 60.42, subdivision 5,
21 which is the interest of justice clause, it requires the
22 issue of relevance to come in at that point, and I think
23 subdivision 5 is very cognizant of the need to protect - -
24 -

25 JUDGE TROUTMAN: Isn't it relevant based on when



1 the - - - the evidence was recovered from her?

2 MR. FUKUDA: That - - - that - - - it is relevant
3 when I think adding into the mix of relevance as well is in
4 this case, we don't know who, we don't know how the saliva
5 after all may have been passed on to - - - passed - - -
6 placed upon her vulva in the most innocuous of ways. I
7 mean, there are probably dozens of innocuous reasons why an
8 eleven-year-old's saliva might end up on her vulva.

9 JUDGE TROUTMAN: So are you suggesting that the
10 defendant must prove that it - - - that masturbation was
11 the reason that it was there?

12 MR. FUKUDA: No, I think the - - - I - - - I
13 think the - - - the defendant must make a valid offer of
14 proof, and that's from subdivision 5, must make a valid
15 offer of proof that is relevant and that's the calculus
16 that the trial court has to analyze and wrestle with, and
17 finding a speck of saliva on the vulva of an eleven-year-
18 old child may - - - does that - - - does that necessarily
19 denote - - -

20 JUDGE WILSON: Suppose - - - suppose it had been
21 a speck of the defendant's saliva. Would you be making the
22 same argument that it's speculative, it's got to go through
23 these two hurdles that don't - - - can't surmount?

24 MR. FUKUDA: Well, I - - - I think those two are
25 dramatically different scenarios. One is an eleven-year-



1 old girl's - - - her own saliva on her own body, and then
2 now we're talking about a scenario where you have a sixty-
3 three-year-old man's saliva on - - -

4 JUDGE WILSON: The question - - - if the question
5 was, did she harm herself, why isn't her own saliva
6 relevant to that; whereas if the question is, did the
7 defendant harm her, would his saliva be relevant to that?

8 MR. FUKUDA: Well, again, I draw back to Dr.
9 Miller's testimony - - -

10 JUDGE WILSON: Well, I go back to Judge Rivera's
11 question. Why isn't that just weight of the evidence for
12 the jury to hear?

13 MR. FUKUDA: Well, I think this goes back to the
14 rape shield law. Again, this is - - - the rape shield law
15 subdivision 5 is very, very careful in its language when it
16 says this kind of analysis and pre-trial conversation must
17 take place outside of the presence of the jury.

18 JUDGE RIVERA: Yes, but the rape shield law is
19 set up, right, to ensure that when a complainant victim
20 gets on the stand, their character is not attacked, and
21 that that's what the jury is reacting to as opposed to
22 here, where as I understood the defendant's argument, this
23 would have been to show potential fabrication, not to show,
24 look, she's promiscuous and therefore, don't believe her,
25 or therefore, I am innocent, or therefore, acquit me, but



1 rather, there's another explanation for these injuries.

2 MR. FUKUDA: And I think that to reach that other
3 explanation for these injuries requires such flights of
4 speculative fancy that - - - that the judge in this case at
5 trial court was correct in - - - in not permitting these
6 items of evidence in. I mean, that's - - - we're just
7 talking about the - - - the saliva now on the vulva, but
8 with respect as well to the mixture ratio on - - - on the
9 underwear, that's also very highly speculative, that - - -

10 JUDGE TROUTMAN: What about the argument that
11 after this evidence was not allowed in, the manner in which
12 the prosecutor used it?

13 MR. FUKUDA: Well, I'm afraid that - - - that
14 argument is premised on a complete mischaracterization of
15 the record. In - - - in summation, the prosecutor never,
16 never said that there was - - - never said that - - - never
17 made any - - - never said there's no evidence regarding
18 petechiae or the lack of petechiae or saliva.

19 JUDGE GARCIA: Did the prosecutor say there's no
20 evidence that she touched herself? That was what your
21 adversary claimed.

22 MR. FUKUDA: The prosecutor was only responding
23 to the alternate theories that was being raised by defense
24 counsel, and those alternate theories have nothing to do
25 with petechiae or semen or prostate-specific antigen.



1 Those alternate theories were, one, that constipation
2 caused the petechiae injury, and - - - and two, that an
3 itchy vagina caused the victim to scratch herself and that
4 caused petechiae injury.

5 So when the prosecutor said there was no evidence
6 as to that, she was absolutely correct. There was no
7 evidence to that.

8 JUDGE WILSON: Can I ask you - - - can I ask you
9 about the two male DNA samples from the underwear?

10 MR. FUKUDA: Yes.

11 JUDGE WILSON: Are those - - - do you agree that
12 those are samples of male DNA from saliva?

13 MR. FUKUDA: Yes, the forensic lab report found
14 that that - - - that third stain - - - it was a composite
15 of both the victim and two unknown and unknowable male
16 DNAs.

17 JUDGE WILSON: And that that male DNA was from
18 male saliva. Do you agree with that? Is that what the
19 report says?

20 MR. FUKUDA: Yeah.

21 JUDGE WILSON: Okay.

22 MR. FUKUDA: There was two male DNAs found inside
23 the - - - that composite, the mixture ratio.

24 JUDGE WILSON: And that the DNA from those two
25 males was from male saliva? Is it - - - do you - - - is



1 that - - -

2 MR. FUKUDA: I - - - I would - - - yes, I would
3 say that's a correct recitation.

4 JUDGE WILSON: All right. I just wanted to see
5 if there was an agreement about that.

6 MR. FUKUDA: Yes. As to that, I would also
7 quickly note that, again, to have - - - you have to make a
8 speculative leap to assume that the finding of male saliva,
9 specks of it in such low quantities that no Y-STR DNA test
10 could be found and no profile could be drawn, that that
11 must mean that it was - - - it was through sexual conduct.

12 In fact, the victim in this case, she lived with
13 the grandfather and two uncles in her home, and that's in
14 the record, so those - - -

15 JUDGE RIVERA: Yeah. Again, I'm having great
16 difficulty with this, because that again sounds like a
17 weight of the evidence argument that certainly the
18 prosecutor was free to make and present whatever evidence
19 might support that, but I don't see how it's not relevant
20 or admissible. That - - - that's where I'm having
21 difficulty with your position.

22 MR. FUKUDA: Well, I think in the end, the trial
23 court weighed all of these factors. It was - - - it was
24 weighing the - - - these - - - all of these different
25 arguments, and it's within the court's discretion at that



1 point - - - the court is - - - 60.42 subdivision 5 is the
2 gatekeeper to this kind of evidence, and - - - and the
3 court has the discretion to be able to allow evidence in or
4 - - -

5 JUDGE RIVERA: Yes, but even that discretion is
6 restrained, is it not, by the right to present a defense?

7 MR. FUKUDA: Absolutely, but where the defense is
8 premised on layer upon layer upon layer of speculation and
9 assumption, and those - - - those assumptions and
10 speculations can risk, for example, causing the victim to
11 be embarrassed or harassed by - - - by the evidence, then
12 the trial court is well within its right.

13 JUDGE RIVERA: Let me - - - let me ask you,
14 Counsel. If - - - if the court disagrees with you that
15 this is layer upon layer of speculation, does the defendant
16 win?

17 MR. FUKUDA: No, I don't - - - I don't think so,
18 because even if we assume - - - even if we assume, for
19 example, with the - - - with the prostate-specific antigen,
20 let's assume that that's semen. Even that alone doesn't -
21 - - doesn't - - - is not exculpatory evidence for the
22 defendant. The semen, for example, assuming it's semen,
23 could very well belong to the - - - to the defendant.

24 He may have fondled himself beforehand and may
25 have even smeared it on his fingers before he digitally

1 penetrated her, and again, even if it is semen, Dr. Miller
2 has stated that he has never, ever seen, except in trauma
3 victims, regular people who were practicing sex display and
4 have this very significant and traumatic injuries of
5 petechiae injuries.

6 And here, there wasn't just one petechiae injury.
7 There was two and possibly three and also a deep notch
8 injury, so these were four, three, perhaps four different
9 discreet areas - - -

10 JUDGE RIVERA: Counsel, it sounds like a great
11 summation, but I don't see how you keep the evidence out.

12 MR. FUKUDA: Well, I - - - I would - - - I would
13 end here very quickly. I know my time is up. I would just
14 want to say that the evidence here was overwhelming in this
15 case. Moments after the victim was digitally penetrated,
16 she went into the bath - - - she went into the restroom and
17 locked herself and made an immediate prompt outcry which is
18 memorialized almost, like, play-by-play through the text
19 messages to her mother.

20 The victim also sent out a prompt warning to her
21 two cousins to go to their room and - - - and - - - and
22 lock the door. We have forensic evidence here, petechiae
23 and the deep notch. These kinds of evidence are actually
24 rather infrequently found in sex crimes cases, and we also
25 have a verdict, the jury, which came back with a verdict,



1 an overnight verdict very quickly.

2 So I would argue that the evidence in this case
3 was overwhelming.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 Counsel, your rebuttal?

6 MS. ALDEA: Yes.

7 JUDGE CANNATARO: Before you start, can I just
8 ask you about the DNA on the underwear?

9 MS. ALDEA: Yes.

10 JUDGE CANNATARO: What's the process of
11 conclusions or - - - or steps that get you to some defense
12 - - - I guess the defense would be that sex - - - sexual
13 activity was happening with other men, I suppose? How - -
14 - how do you get to that from the - - - from the DNA on the
15 underwear?

16 MS. ALDEA: So this was - - - there was saliva.
17 It was saliva on the underwear, and it was her saliva mixed
18 with that of two other males, so even assuming
19 hypothetically that one of those males might have been Mr.
20 Cerda, although I don't think that's a fair assumption when
21 he offered his DNA for testing and the prosecution refused
22 to test it, so I think that that's fairly improper, but
23 even assuming that that were true, it certainly would have
24 shown that she was engaged in something intimate.

25 It was a mixing of the - - - of her saliva with



1 other men's saliva, and this was not located innocuously
2 on, you know, a place on her jeans or on her shirt. This
3 was located on - - - she had saliva on her vulva. She had
4 prostate-specific antigen inside her vagina - - -

5 JUDGE CANNATARO: I'm - - - I'm just talking
6 about the underwear, though, I - - -

7 MS. ALDEA: - - - and - - - and she had - - -

8 JUDGE CANNATARO: - - - I keep asking myself,
9 well, how could it have gotten there, and my answer, quite
10 frankly, is any one of a hundred ways.

11 MS. ALDEA: Well, but Your Honor, again, to - - -
12 to - - - I guess to reiterate what Judge Rivera said, that
13 goes to weight, and the problem here is that the jury, in
14 order to make a fair credibility assessment, needs to have
15 this evidence so that they can weigh credibility. Now,
16 leading into harmless error, which credibility does, this
17 was not a case where this was overwhelming evidence as the
18 prosecution has characterized it.

19 This was a case where the jury did not believe
20 the complainant and acquitted Mr. Cerda of touching her
21 breasts, which was one of the other counts. Specifically
22 because what is the difference? The difference is in that
23 case, there was no lab report or there was no medical
24 report that showed that she had made that.

25 So conversely, if we have scientific evidence or



1 a lab report suggesting the presence of other people's DNA
2 and saliva on her vulva and prostate-specific antigen
3 inside her vagina, then the jury may well have rejected
4 that Mr. Cerda was the cause of those injuries and may have
5 rejected her account on that as well.

6 Additionally, this was a case where the jury
7 deliberated for two days, asked for multiple read-backs,
8 and the victim's account here was in no means - - - by no
9 means credible. This is a girl who changed her account
10 several times within the course of one evening. One
11 evening. On the night of the incident, she changed her
12 report about whether he merely tried to insert his finger
13 or actually inserted it.

14 She changed her report about whether he inserted
15 his finger three or four times or whether it was for three
16 or four minutes. He - - - she changed her report about
17 whether there was anal penetration or not, whether he
18 touched one breast, both breasts, or none at all, and which
19 hand he used.

20 So you're talking about a very, very weak case
21 that was - - - that came from a very disturbed and troubled
22 young girl who made a report that - - - that ultimately was
23 physically improbable - - - improbable given common
24 experience and the circumstances. The allegation was that
25 this sixty-seven-year-old man first assaulted her for the



1 first time in front of his two granddaughters while sitting
2 together on a couch.

3 Now, you know, I - - - I can't get into off-the-
4 record - - -

5 JUDGE RIVERA: Well, Counsel, let me interrupt
6 you. If - - - if defendant proffers what defendant says is
7 proof of an alternative theory, can't a court conclude that
8 it - - - it has absolutely no basis, there's no way to ever
9 - - - for a jury ever to make the same conclusion that the
10 defendant wishes to argue, which I think - - - I may be
11 wrong, but I think that's what your adversary is arguing.

12 MS. ALDEA: Your Honor - - -

13 JUDGE RIVERA: There's just an implausible
14 theory. Nothing supports it.

15 MS. ALDEA: Your Honor, everything supports that
16 these injuries were caused by some other or could have been
17 caused by some other source than Mr. Cerda, and what's more
18 is, again, this was not the innocent complainant that the
19 people tried to show that she was. This was not a young
20 child with no basis of knowledge or experience to fabricate
21 these allegations because she had never seen or experienced
22 anything like this before.

23 Everything in this record supported that this was
24 a sexually experienced young girl. She was disturbed, that
25 may be, but this is the defense. The defense is that these



1 injuries do not corroborate her account, and the jury needs
2 to know that for credibility.

3 I would also note that with respect to Dr.
4 Miller's report, which my adversary has talked about, the
5 jury is free to disregard an expert witness - - - witness's
6 conclusion just like any other witness. In this case, Dr.
7 Miller said - - - or he concluded that the two petechiae,
8 these are pinhead-sized injuries on a hymen that were
9 observed in this case, could have been and were consistent
10 with insertion of defendant's finger into her vagina, but
11 were not consistent, my adversary argues, with insertion of
12 anything else into her vagina.

13 That's just not reasonable. The jury is free to
14 reject that. They did not reject it in this case because
15 the prosecutor - - - when the defense attorney argued that
16 on summation, the prosecutor retorted, we have no evidence
17 of that, and on that, I do need to address what my
18 adversary said about the fact that, allegedly, I've
19 misrepresented the record.

20 I did not misrepresent the summation at all when
21 I talked about what it is that the prosecutor did or said.
22 The prosecutor called the defense arguments ridiculous and
23 specifically - - - this is at page A40, A43, and A45,
24 talked about the alternate theories about what the trauma
25 could have been, said that they were never confirmed, that



1 they were, quote, not supported by the evidence, that all
2 of the evidence in the record contradicts the theory about
3 the petechiae being caused by self-inflicted rubbing
4 because there is nothing in the medical record to support
5 that, and then concluded there is no evidence she rubbed
6 herself, and that's because it doesn't exist.

7 That's because it doesn't happen. This evidence
8 did exist, and Your Honors, on that point, too, the feces.
9 The feces is very relevant here because it's yet another
10 example of the same type of conduct or misconduct by the
11 prosecutor in - - - in basically distorting the truth here
12 based on a ruling that she obtained from the trial court.

13 So in this case, the defense - - - the defendant
14 himself and his - - - and his granddaughter testified that
15 the complainant went to the bathroom and locked herself in
16 and claimed that she was having stomach problems, and so
17 the feces on the underwear, and I would direct this court
18 to look at a picture of the underwear that was put into
19 evidence, this is at A319 in the appendix, that the feces
20 on the underwear, which was a pretty large substantial
21 stain in this case was consistent with the defendant and
22 his granddaughter's testimony on this point.

23 And it also would have corroborated the fact that
24 there may have been a source of irritation. The prosecutor
25 succeeded in keeping out evidence that the stain was



1 actually feces, and then when defense counsel attempted to
2 elicit that it was feces from the prosecution's expert, the
3 prosecution elicited from that expert that this in fact
4 might have been playground dirt.

5 This is after the prosecutor admitted that in the
6 DNA report she had excluded, there was confirmation that
7 this was a feces stain, and then on summation again, she
8 argued that there was no evidence of any kind of feces
9 stain, that we don't know what the stain is, which was
10 simply false.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 MS. ALDEA: Thank you, Your Honors.

13 (Court is adjourned)

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

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of Sergio Cerda v. The People of the State of New York, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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