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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 124

ISIDORO MARRA,

Appellant.

20 Eagle Street
Albany, New York 12207
May 28, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Marra.
2 Counselor?

3 MR. FERLAZZO: Hello, Your Honor. May I -
4 - -

5 CHIEF JUDGE LIPPMAN: Would you like any
6 rebuttal time?

7 MR. FERLAZZO: I would like two minutes, if
8 I could, Your Honor.

9 CHIEF JUDGE LIPPMAN: Two minutes, sure.
10 Go ahead.

11 MR. FERLAZZO: Judge, this case brings back
12 the old saying, a picture is worth a thousand words,
13 because there were seven pictures, seven bits of
14 evidence which showed bruises and red marks of a
15 woman in a hospital gown, hours after she left the
16 Villa Isidoro, which is owned by my client. And
17 those seven pictures were not connected to Mr. Marra,
18 as the record shows. It's no different than the --
19 the picture of the judges above you; they're stamped
20 with the words of their name. In this case, when the
21 evidence went into the record, Judge Kirk stamped the
22 name Villa - - - or Mr. Marra into it.

23 Now, the DA here knew the rule. He states
24 on appeal that all you need is authenticity, and if
25 it's authentic, you keep 'em out unless it's

1 gruesome. That's not the rule. If you look at page
2 - - -

3 JUDGE SMITH: You mean, you let 'em in
4 unless it's gruesome.

5 MR. FERLAZZO: Pardon me, Your Honor?

6 JUDGE SMITH: You mean you let 'em in
7 unless it's gruesome.

8 MR. FERLAZZO: That's correct. That's the
9 analysis. But if you look at their own - - - at the
10 record at page 51, the DA knew what was going on.
11 After Mr. Eini (ph.) objected, he said, "Obviously
12 there needs to be a foundation laid as to their
13 admissibility", and he talks about this manipulation
14 rule.

15 JUDGE SMITH: Well, they have - - - well,
16 they have to be relevant. But why - - why weren't
17 they relevant? Why couldn't a jury find that the - -
18 - some of the bruises which were fresh were the
19 result of an attempt to have sex with a sleeping
20 woman?

21 MR. FERLAZZO: For two reasons, Your Honor.
22 First of all, as a threshold matter, the nurse, Nurse
23 Paula (ph.), who testified, never adopted this
24 manipulation theory. She was a rape crisis nurse
25 with seventeen years' experience, and she had seen

1 thousands of similar injuries.

2 JUDGE GRAFFEO: Didn't she testify some
3 looked fresh and some appeared to be older - - -

4 MR. FERLAZZO: Yes, you (sic) did - - - you
5 (sic) did, Your Honor.

6 JUDGE GRAFFEO: - - - older, so - - -

7 MR. FERLAZZO: Exhibit 12 - - -

8 JUDGE GRAFFEO: So didn't the jury hear
9 that there was a distinction in what the photographs
10 depicted?

11 MR. FERLAZZO: Judge, what they - - - and
12 some of these pictures have both, red marks and
13 bruises. The bruises, she said, are too old.
14 Exhibit 12 - - -

15 CHIEF JUDGE LIPPMAN: You're not saying
16 it's totally irrelevant, are you?

17 MR. FERLAZZO: Yes, I am, Your Honor. And
18 here's why - - -

19 CHIEF JUDGE LIPPMAN: Even as to the fresh
20 marks?

21 MR. FERLAZZO: Yes, even fresh marks. She
22 never tied it in. She - - - she was asked did the
23 victim, the complaining witness, ever ask if - - -
24 say that these were attributed to Mr. Marra. She did
25 not. The nurse was asked if she ever asked for a

1 history. She did not. Then the nurse was asked, do
2 - - - do you even know when these occurred, and she
3 said no.

4 JUDGE SMITH: Well, but the complainant's
5 testimony is that she was asleep. How would she know
6 - - - how could she know - - - the whole point is
7 that the bruises were - - - may - - - may well have
8 been - - - at least the prosecution's theory is the
9 bruises came while she was unconscious.

10 MR. FERLAZZO: Right, and - - -

11 JUDGE SMITH: So how can she testify to
12 that?

13 MR. FERLAZZO: Well, she can testify what
14 occurred before, Your Honor. And if you look at page
15 51, the prosecutor admitted - - - obviously they have
16 to be tied to become relevant. But I think if the
17 victim testifies, prior to going out that evening she
18 did not have these bruises, and when examined by
19 medical personnel she had them, there's your
20 foundation.

21 JUDGE SMITH: So you're - - - so you're
22 saying that if she had - - - if she had said I didn't
23 have the bruises before, it would have been
24 admissible?

25 MR. FERLAZZO: Unless she were to show also

1 - - - Judge, there's two things here. There's a - -
2 - a situation where she claims she was raped, then a
3 two-hour period before the hospital. She left the
4 Villa Isidoro, came back in, and then she went to
5 this other place where a 911 call was occurred. But
6 yes, in this situation she testified to one injury.
7 She had no trouble saying, at the time I fell off
8 this couch I injured my elbow.

9 JUDGE SMITH: And - - -

10 JUDGE RIVERA: But she was conscious by
11 then?

12 MR. FERLAZZO: Yes.

13 JUDGE RIVERA: These are bruises pre, or
14 marks pre - - -

15 MR. FERLAZZO: But - - -

16 JUDGE RIVERA: - - - right? That's the - -
17 -

18 MR. FERLAZZO: But - - -

19 JUDGE RIVERA: That's the theory of the
20 prosecution.

21 MR. FERLAZZO: Yes, Your Honor. And all
22 she had to say was when I went into the Villa, before
23 I went to dinner, I took a shower, I saw my face; I
24 didn't have a bruise on my face. There was one
25 bruise on the face, one on the thigh, one on the calf

1 - - -

2 JUDGE PIGOTT: What did the - - -

3 MR. FERLAZZO: - - - several on the back.

4 JUDGE PIGOTT: What - - -

5 JUDGE RIVERA: How is it prejudicial? How
6 is it prejudicial, considering the rest of the
7 evidence?

8 MR. FERLAZZO: Well, Judge, you know how
9 it's so prejudicial? Judge Kirk sentenced this man
10 first time ever having committed a crime, seventy
11 people - - - including famous artists, Len Tantillo,
12 looking at all the pictures around here - - - on his
13 behalf. Judge Kirk said this was a violent crime.
14 There was no violence in this case. The only
15 violence were the seven uncharged photographs of
16 assault. This was an assault. Someone hit this
17 woman, touched this woman; it just wasn't Mr. Marra.
18 And there was no proof that she, before she went to
19 the Villa, did not have bruises, none, or red marks,
20 none. There's no proof, in fact there's implied
21 proof in the record, that things may have occurred
22 after she left the Villa.

23 JUDGE ABDUS-SALAAM: Well, counsel, you - -
24 - you said that the nurse indicated that some of the
25 bruises were older, so - - -

1 MR. FERLAZZO: Yes.

2 JUDGE ABDUS-SALAAM: - - - she had some
3 bruises before she came to the Villa.

4 But I - - - I have a more basic question
5 here. What was the objection when these photographs,
6 other than the one that was not objected to - - -
7 what was the - - - what was the basis of that
8 objection? Was it that the photographs were
9 irrelevant or prejudicial, or was it that they - - -
10 there was no foundation?

11 MR. FERLAZZO: Judge, it was twofold.
12 There was a motion in limine, and in the motion in
13 limine, if you look at page - - - Appendix A-37 of
14 the record, the Appellate Division said it was only
15 on timeliness. He was sandbagged three days before.

16 JUDGE GRAFFEO: The Appellate Division said
17 that this particular objection was unpreserved.

18 MR. FERLAZZO: And what's interesting - - -

19 JUDGE GRAFFEO: I think that's what the
20 judge - - -

21 MR. FERLAZZO: Yes.

22 JUDGE GRAFFEO: - - - was asking you about.

23 MR. FERLAZZO: And I'm going to show where
24 it was preserved. Judge, by the way, Mr. Carpenter,
25 the ADA, did not state at the Appellate Division that

1 it was unpreserved, because it was preserved. When
2 you look at page 51 of his own response, Judge Kirk
3 said okay, DA, what's your response? He says, well,
4 he had a chance to see 'em before, plus I know I have
5 to show the issues of both factual and legal
6 foundation. And under Medina, as Judge Lippman
7 pointed out, if the judge rules on the very issues at
8 appeal - - - and he did, he looked at relevance, he
9 looked at probative value and prejudicial value, Your
10 Honor.

11 JUDGE SMITH: So you're saying the judge
12 considered and decided the relevance issue.

13 MR. FERLAZZO: Well, he did, Your Honor,
14 and you know why he did? He said - - - in his motion
15 in limine he just said it's relevant, it's not
16 prejudicial, because he relied on the representation
17 from counsel, on page 51 of the Appendix, that if a
18 victim testifies prior to going out that evening she
19 didn't have those bruises, and when examined she did,
20 there's enough of a foundation.

21 JUDGE SMITH: Well, then - - -

22 MR. FERLAZZO: He relied on that.

23 JUDGE SMITH: Well, then maybe - - - maybe
24 that's - - - maybe that's the problem. If it's just
25 a question that she didn't testify about that,

1 shouldn't - - - when that promise wasn't kept, wasn't
2 it up to the defense lawyer to call that to the
3 judge's attention and say, wait a minute, Judge, she
4 didn't say what he told you she was going to say?

5 MR. FERLAZZO: Well, Judge, in a perfect
6 world with a meaningful representation, I would say
7 yes. He did object to foundation. And for some
8 reason, this defense attorney was trying to preserve
9 time for the court, and he asked before, if I
10 continue with the word foundation, is that
11 sufficient?

12 JUDGE PIGOTT: I got that impression that
13 when the motion for limine was made, that the debate,
14 once it was over, was that Mr. Eini was going to say,
15 I'm going to object, and my code word, almost, is
16 going to be foundation - - -

17 MR. FERLAZZO: Correct, Your Honor.

18 JUDGE PIGOTT: - - - because we don't want
19 to argue this whole thing again in front of the jury.

20 MR. FERLAZZO: But just to make sure
21 counsel - - - or Your Honor has the answer, on page
22 37 of the Appendix, Mr. - - - in paragraph 5, he
23 objects to "both surprise and prejudice by the
24 presentation of these photographs. And the
25 prosecution should be" - - -

1 JUDGE SMITH: So that's different from
2 irrelevance, isn't it?

3 MR. FERLAZZO: Well, Your Honor, that's
4 just one. I wanted to point out that it was
5 different. The Appellate Division, again, without
6 even an objection by the DA's office, said that it
7 was only on timing. It was more than timing.

8 And what's important, Judge, too, there's
9 an admission in the Appellate Division. The People
10 admitted that there was no connection between the
11 bruises and the - - - Mr. Marra. They stated in page
12 29 of their brief, we never attempted to attach it or
13 to do it.

14 JUDGE PIGOTT: When all is said and done,
15 what difference does it make, other than - - - I mean
16 you raised the issue on sentence - - -

17 MR. FERLAZZO: Judge - - -

18 JUDGE PIGOTT: - - - sentencing. We don't
19 have sentencing in front of us.

20 MR. FERLAZZO: No, you don't. I think the
21 difference is the harmless error analysis, and in
22 this court's decision in Chestnut, it has to be
23 overwhelming. You have to have overwhel - - -

24 CHIEF JUDGE LIPPMAN: Why isn't it
25 overwhelming evidence as to the identity?

1 MR. FERLAZZO: Well, Judge, the identity -
2 - - there's no question as to identity; the question
3 is penetration. There was no DNA evidence here of
4 penetration. The Appellate Division was disturbed by
5 that. In fact, we argued sufficiency at the
6 Appellate Division. They found barely sufficient - -
7 - sufficiency. And what they - - -

8 JUDGE SMITH: But what - - -

9 JUDGE GRAFFEO: They found was against the
10 - - -

11 JUDGE SMITH: - - - what do the bruises
12 have to do with penetration?

13 MR. FERLAZZO: What would - - - Judge, the
14 bruises had to do with uncharged - - -

15 JUDGE SMITH: You're saying that
16 penetration's a close issue and this could have
17 inflamed the fact finder?

18 MR. FERLAZZO: No, Your - - - yes, Your
19 Honor, number one. Number two, the inflammation's
20 irrelevant, because if you look at the Appellate
21 Division, they said a different result could have
22 occurred. They said, in their own words - - -

23 JUDGE SMITH: So you're basically saying
24 it's not overwhelming because it was close on
25 penetration?

1 MR. FERLAZZO: It can't be overwhelming.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 Thank you, counselor.

4 MR. FERLAZZO: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Counselor?

6 MR. CARPENTER: Thank you, Mr. Chief
7 Justice, Justices of the court. In dealing with the
8 issue of violence, first of all, when the court did
9 sentence this defendant as a violent felony, he is
10 sentencing him as a violent felony; that's what the
11 legislature states that rape in the first degree is;
12 it is a violent felony. And that's what the court
13 meant when he made that comment.

14 JUDGE PIGOTT: Did you need these pictures?

15 MR. CARPENTER: Did I need those pictures?
16 That's a judgment call, Your Honor, that I made - - -

17 JUDGE PIGOTT: That's why I'm asking you.

18 MR. CARPENTER: - - - in the middle of the
19 trial. When a prosecutor puts forth evidence, they
20 put forth what they believe is relevant, that there's
21 proper foundation. Then they put forth in good faith
22 evidence of the crime.

23 CHIEF JUDGE LIPPMAN: Yeah, but did you
24 connect these pictures?

25 MR. CARPENTER: I believe I did, Your

1 Honor.

2 CHIEF JUDGE LIPPMAN: How - - -

3 MR. CARPENTER: Here's - - -

4 CHIEF JUDGE LIPPMAN: How were they

5 connected?

6 MR. CARPENTER: They were connected, first

7 of all - - -

8 CHIEF JUDGE LIPPMAN: What was the - - -

9 MR. CARPENTER: I consider the victim's
10 body, in this case, the scene of the crime, in
11 essence, okay? So these are crime scene photos. She
12 testified that she went immediately to the hospital
13 after - - - after stopping at - - -

14 JUDGE PIGOTT: Well - - -

15 MR. CARPENTER: - - - at her boyfriend's

16 JUDGE PIGOTT: - - - did - - -

17 MR. CARPENTER: - - - residence.

18 JUDGE PIGOTT: - - - did you need 'em?

19 MR. CARPENTER: Well, I don't know, Your
20 Honor. I can't decide what the jury based their
21 decision on. I think they're relevant. I think
22 they're probative, they corroborate her testimony. I
23 think they're proper.

24 JUDGE PIGOTT: Okay.

25 JUDGE GRAFFEO: You didn't object on

1 preservation grounds in the Appellate Division,
2 correct?

3 MR. CARPENTER: Well, the only objection
4 made at the time of trial, both in the motion in
5 limine and during the trial itself, was as to
6 foundation. Counsel objected as to foundation. I
7 believe we laid a proper foundation. They were
8 authenticated properly by the - - - the person - - -

9 JUDGE SMITH: The question is what you
10 argued - - - what you argued in the Appellate
11 Division - - - did you argue preservation?

12 MR. CARPENTER: Well, I think that - - -

13 JUDGE GRAFFEO: Did you claim their
14 objection was inadequate - - -

15 MR. CARPENTER: I do.

16 JUDGE GRAFFEO: - - - to preserve the
17 issue?

18 MR. CARPENTER: I think what they're trying
19 to do right now is bootstrap relevance with
20 foundation. They're trying to combine it all into
21 one, and they're not the same thing. Foundation - -
22 -

23 JUDGE ABDUS-SALAAM: But did you argue that
24 at the Appellate Division? That's the question,
25 counsel.

1 MR. CARPENTER: I didn't argue the case at
2 the Appellate Division, but was it argued on our
3 behalf? I don't know, Your Honor. I didn't see the
4 oral arguments. I wasn't present for them. So I
5 can't - - - I can't answer that in good faith.

6 JUDGE PIGOTT: You have - - - you have a
7 victim, as they point out, there's an issue on
8 penetration. The only - - - the only - - - I guess
9 it was the testimony of the victim who's - - - but
10 she's the one who then went to her boyfriend, went to
11 her former father of her child, finally went back to
12 the - - - went - - - went to them with the defendant.
13 I mean, they - - - they drove together to - - - and
14 then when - - - when she gets to the house of her
15 boyfriend, he says you're waking up my sister. I
16 mean, he didn't appear to be particularly upset about
17 this whole scene.

18 So when you - - - when the whole thing gets
19 delivered, could those pictures have been the tipping
20 point for a jury to say, you know, we don't know what
21 happened here, but, you know, he roughed her up and
22 therefore we're going to find it the way we did?

23 MR. CARPENTER: I don't believe so, Your
24 Honor. With all due respect, I believe that the
25 victim testimony alone, that when she woke up and had

1 the defendant's penis in her vagina, was enough for a
2 conviction.

3 JUDGE PIGOTT: Well, she says that, but all
4 of the DNA proves otherwise, or it - - - it does - -
5 - I shouldn't say proves otherwise; there is no proof
6 of penetration, other than her testimony.

7 MR. CARPENTER: The - - - well, that's - -
8 - of direct penetration, that is absolutely - - -

9 JUDGE SMITH: I mean - - -

10 MR. CARPENTER: - - - correct, Your Honor.

11 JUDGE SMITH: - - - granted that it's
12 sufficient; you're not saying that the evidence of
13 penetration is overwhelming, are you?

14 MR. CARPENTER: I think, Your Honor, when
15 you couple not only the victim's direct testimony,
16 but the testimony of all of the other witnesses who
17 saw the victim in her unconscious step (sic) - - -
18 state - - -

19 JUDGE SMITH: Okay. But they can't testify
20 to penetration.

21 MR. CARPENTER: Absolutely. But I think
22 then when you also couple the fact that the
23 defendant's DNA was found in her exterior perineum, I
24 think that also corroborates her testimony.

25 JUDGE PIGOTT: That makes it an attempted.

1 MR. CARPENTER: Well, I mean, she was
2 there, Your Honor, as was - - -

3 JUDGE PIGOTT: Right.

4 MR. CARPENTER: - - - the defendant. We
5 could only - - - we only heard from one of the
6 people, and he - - - and she testified directly that
7 - - -

8 JUDGE ABDUS-SALAAM: Well, there was a
9 statement - - -

10 MR. CARPENTER: - - - he - - -

11 JUDGE ABDUS-SALAAM: - - - by the
12 defendant, right, to the state trooper?

13 MR. CARPENTER: There were several, Your
14 Honor, and - - -

15 JUDGE ABDUS-SALAAM: But there was a
16 statement to the effect that, what if I could prove
17 she came on to me first.

18 MR. CARPENTER: Absolutely.

19 JUDGE ABDUS-SALAAM: Would - - - would you
20 consider that some sort of admission, or how should
21 we evaluate that?

22 MR. CARPENTER: He made several admissions.
23 I have a handful that I would like to directly point
24 out that was on the record. He had no idea if
25 anything happened that night. He doesn't recall

1 anything about sex.

2 JUDGE SMITH: I mean, I can see that you
3 have an overwhelming case of a sexual assault. To me
4 the problem is whether you've got an overwhelming
5 case that it was a rape, especially since the DNA was
6 not in the vagina; the DNA was only in the exterior.

7 MR. CARPENTER: That is correct, Your
8 Honor. But you couple that with the victim's
9 testimony, and - - - and the admissions by the
10 defendant, and one of the admissions was, in addition
11 to what if I can prove she came on to me first, did
12 it happen? Did it not? It is possible. I do not
13 remember. That is not a man who's saying this did
14 not happen. But - - -

15 JUDGE SMITH: But that doesn't sound like
16 an overwhelming case as to exactly what did happen.

17 MR. CARPENTER: No, but I think when you
18 couple that with the victim's direct testimony, Your
19 Honor. There's cases where that's all we would have
20 is the victim's testimony. Are we about to discount
21 the testimony - - -

22 JUDGE PIGOTT: No, no - - -

23 MR. CARPENTER: - - - of her (sic) victim -
24 - -

25 JUDGE PIGOTT: - - - but her testimony - -

1 - her testimony on that is based upon the fact that
2 she could not give consent, that she was - - - that
3 she was unconscious, and she woke up. And she says
4 she had two glasses of wine; somebody else says she
5 had five. She thought she was drugged. There's no
6 evidence that she was drugged. So the question of
7 how good is her testimony saying there was
8 penetration, is one, obviously, for the jury here.
9 And then you wonder, you know, what - - - what tipped
10 them to the - - - to the rape as opposed to a simple
11 - - - I shouldn't say simple, but a sexual assault or
12 an attempted rape.

13 MR. CARPENTER: Well, she - - - she
14 testified directly that when I woke up a man was
15 kissing my cheek and he had his penis in my vagina.
16 I don't know how more powerful evidence you could
17 have than - - - than a woman's testimony in that
18 regard. And then when you couple it with all of the
19 other evidence in the case, I believe there's
20 overwhelming evidence of guilt.

21 JUDGE PIGOTT: No, but I mean, isn't it
22 their argument - - - I mean, obviously when somebody
23 says that, it's pretty serious. But when they say
24 that the only DNA is exterior, and then you, on your
25 summation, say maybe he used a condom, when there's

1 no evidence of that at all, one of their arguments is
2 that you - - - you know, you introduced into the - -
3 - into the - - - the mix here, testimony - - - you
4 testified, and that testimony was speculative and
5 should not have been - - - and should not have been
6 allowed.

7 MR. CARPENTER: Well, I asked the - - - the
8 jury to draw a reasonable inference from the evidence
9 in the case, and I think that's proper for - - - for
10 a prosecutor to do; it is proper for a defendant to
11 do.

12 JUDGE PIGOTT: But if you had - - - if
13 you'd brought it into the case-in-chief, couldn't
14 they have then cross-examined the police officer, did
15 you find, you know, a prophylactic, you know, was
16 there - - - was there any indication of any - - - I
17 mean, there would have been a lot of questions that
18 could have come up that were gone because you're - -
19 - you're summing up at the end of the case.

20 MR. CARPENTER: Well, Your Honor, counsel -
21 - - appellant, in his brief, at page 31, I believe,
22 actually puts forth that the defense counsel below
23 had a duty to - - - to investigate as to whether or
24 not a condom was used. And they're asking me to - -
25 - to prove a negative, in essence. Suppose - - - I

1 would submit to the court that he possibly did ask
2 the defendant were you wearing a condom, and we don't
3 know the answer, but supposedly the defendant said I
4 was.

5 JUDGE PIGOTT: Well, he doesn't have a
6 burden of proof.

7 MR. CARPENTER: He doesn't, Your Honor, but
8 they're trying - - - they're saying in their brief
9 that he does have a duty, under the effective
10 assistance of counsel, to ferret that - - - that
11 question out.

12 JUDGE PIGOTT: I see your point.

13 MR. CARPENTER: So then your - - -

14 JUDGE SMITH: Going back - - - going back
15 for a minute to the photographs, doesn't your
16 adversary have a point that you really should have
17 asked the - - - the complaining witness, did you have
18 those bruises before you went to the restaurant.

19 MR. CARPENTER: Well, the complaining
20 witness couldn't testify to that, Judge - - -

21 JUDGE SMITH: Oh, no, wait - - -

22 MR. CARPENTER: - - - that's why she - - -

23 JUDGE SMITH: No, wait a minute. She could
24 testify whether she had them before she went to the
25 restaurant.

1 MR. CARPENTER: Well, I think that, given
2 the evidence of the - - - the marks on her back, I
3 don't know that she honestly could have. I - - - I
4 have asked her whether or not she - - - she had those
5 marks - - -

6 JUDGE GRAFFEO: You're claiming all the
7 bruises that the nurse said appear to be older, that
8 she wouldn't have known she had those?

9 MR. CARPENTER: No, in - - - no, I'm not
10 claiming that, Your Honor. I think some of those
11 bruises did indicate that they were there prior to -
12 - -

13 JUDGE GRAFFEO: So - - -

14 MR. CARPENTER: - - - and I think counsel
15 did an excellent job at - - -

16 JUDGE GRAFFEO: - - - couldn't you have
17 asked her that question?

18 MR. CARPENTER: She didn't - - -

19 JUDGE GRAFFEO: Look at these bruises in
20 the photograph; were you aware you had these on your
21 body prior to this incident?

22 MR. CARPENTER: And I believe she - - - she
23 told me at the time that she had one on her leg that
24 pre-existed. She had one bruise on - - - on her leg.

25 JUDGE SMITH: Well, the question is why - -

1 - without - - - without that - - - I mean, she may
2 have told you, but she didn't tell the jury.

3 MR. CARPENTER: Um-hum.

4 JUDGE SMITH: Without her telling the jury
5 that, do you really have a foundation for the
6 photographs?

7 MR. CARPENTER: For all of the photographs,
8 or the one depicting the leg? Your Honor, I would
9 suggest and submit to the court that with regard to
10 the fact that she was unconscious, she couldn't, in
11 good faith, tell us how she obtained those marks.

12 JUDGE PIGOTT: No, you're missing the
13 point, though. I mean, she obviously, before she
14 went - - - became unconscious, walked into a bed &
15 breakfast, and she must have known what she looked
16 like, if she had bruises or not. And there were - -
17 - and there were a number of them; it wasn't just one
18 on the leg, there were a number of them. The nurse
19 said it looked like they had pre-existed any trauma
20 that night.

21 MR. CARPENTER: Right, and that's what she
22 testified to, and she's the medical expert in that,
23 and I couldn't dispute that. I didn't ask her,
24 Judge; I can't argue that I did. She wasn't asked,
25 so I couldn't put forth that.

1 But I would say that even if those - - - if
2 the court erred in admitting those photographs into
3 evidence, it was harmless, given all of the other
4 evidence in the case, especially the direct testimony
5 of the victim. We may not have had any DNA in this
6 case, but we did have DNA, and the location where it
7 was found, coupled with her testimony and the
8 testimony of all of the other witnesses, I believe,
9 is overwhelming evidence of guilt.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.
11 Thank you.

12 MR. CARPENTER: Thank you, Your Honor.

13 MR. FERLAZZO: Yes, Your Honor. Just
14 briefly, a couple quick points. Counsel's Appellate
15 Division brief did never - - - never raised the issue
16 saying it was not preserved. I'd like to submit it,
17 if I could, to the court. I was at oral argument.
18 There was never any statement by the Herkimer County
19 DA's Office, and their brief should speak for itself.

20 JUDGE PIGOTT: Well, he's not arguing that.

21 JUDGE GRAFFEO: We're allowed to search the
22 record - - -

23 MR. FERLAZZO: Okay.

24 JUDGE GRAFFEO: - - - and make that
25 determination.

1 MR. FERLAZZO: So that's number one.
2 Number two, Your Honor, the statement - - - the
3 alleged statement, it was not probative of any crime
4 charged. Again, he could have had an assault
5 argument. They could have had lesser included, but
6 he didn't.

7 By the way, there was DNA taken of the cheek.
8 She claimed she woke up and there was kissing on her
9 cheek. No DNA was found there.

10 I'd like to just focus, if I could, on the
11 condom issue. Counsel will never - - - Mr.
12 Carpenter, with all due respect, will not give a
13 straight answer to the question: Did you have a
14 factual basis for the condom? And the answer is no.
15 What he had was a testimony from the nurse that she
16 gave HIV antibiotics - - -

17 JUDGE PIGOTT: Well, I forget, but was it -
18 - -

19 MR. FERLAZZO: - - - because her concern -
20 - -

21 JUDGE PIGOTT: - - - was it part of the
22 defense summation?

23 MR. FERLAZZO: Well, Judge, what the
24 defense said was - - - he did one thing right. And
25 actually he gave meaningful representation to the

1 People. He ruined the best witness there was. But
2 what he did say was one thing. Do two wrongs make a
3 right? I don't think so. I really don't. If Mr.
4 Eini said something wrong, he should have objected.
5 But the key is - - - is here with the - - -

6 JUDGE SMITH: Well, but he - - - he made
7 the argument, which is a perfectly reasonable
8 argument, that the absence of DNA in the vagina was -
9 - - was strong - - - yeah, was evidence that no
10 penetration ever occurred. It's a perfectly
11 legitimate argument.

12 MR. FERLAZZO: Correct.

13 JUDGE SMITH: Why can't the DA respond to
14 that by saying there could be other reasons; he could
15 have worn a condom. The absence of DNA in the vagina
16 is not conclusive proof that there was no
17 penetration. What's wrong with that as argument?

18 MR. FERLAZZO: Well, the first thing that's
19 wrong with it, he has to have a factual basis for it.
20 He should have asked his client. The second thing is
21 the medical record - - -

22 JUDGE SMITH: Yeah, but he doesn't have a
23 client. I mean, he - - -

24 MR. FERLAZZO: Well, he should have asked
25 the complaining witness.

1 JUDGE SMITH: I mean, she - - - she's very
2 likely not to know.

3 MR. FERLAZZO: Well - - -

4 JUDGE SMITH: You know, why is - - - why is
5 the fact that that possibility exists not something
6 the jury - - - that you can legitimately call to the
7 jurors' attention?

8 MR. FERLAZZO: Because it's pure
9 speculation. The DA's office here speculates what
10 they did, and what Mr. Eini did. He - - - what Patty
11 Putnam (ph.), the witness who came down the stairs of
12 the room, first person to see it, the mother of the
13 boyfriend, she said this victim never said that she
14 was raped. She was mad at her boyfriend for taking
15 her money, going to a bar, and hanging out, or going
16 to her home and having inter-relations with his
17 sister, or, quote, "sister". He took off on his
18 girlfriend. She was madder than hell. And that's
19 what happened here. She goes to her boyfriend's, and
20 she didn't - - - counsel made a misstatement, and I
21 can't allow this to occur every time I see him in
22 court. He said - - - I ask you to look at the record
23 - - - he said she went directly from her boyfriend's
24 to the hospital. There's a 911 tape that Mr. Eini
25 couldn't even get into evidence, dragging a woman - -

1 - the same second 911 tape; he got his in, Mr. Eini
2 couldn't get it in - - - a woman being dragged - - -
3 this woman; he couldn't get it in. If he - - -

4 JUDGE SMITH: Well, it is hear - - - I
5 mean, it's hard to get hearsay evidence in.

6 MR. FERLAZZO: Well, all he had to do was
7 call the witness. But Mrs. Putnam, who was there,
8 the very first person, she said no, there was never a
9 statement. And on summation - - -

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. FERLAZZO: - - - on summation, if I
12 may, Your Honor, just briefly?

13 CHIEF JUDGE LIPPMAN: Very briefly.

14 MR. FERLAZZO: Mr. Eini said, oh, Patty
15 Putnam, goodbye. He disregarded his own best
16 witness. He helped the prosecution. If you gave him
17 an equal representation, it was to the People.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. FERLAZZO: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: Thank you both.

21 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of THE PEOPLE OF THE STATE OF NEW YORK v. ISIDORO MARRA, No. 124 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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