

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**1215**

**KA 15-01397**

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND NEMOYER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUNG V. VO, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 22, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant contends, and the People correctly concede, that Supreme Court improperly precluded him from presenting evidence tending to establish that the complainant had a reason to fabricate the allegations against defendant (*see generally People v Hudy*, 73 NY2d 40, 56 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]; *People v McFarley*, 31 AD3d 1166, 1166-1167 [4th Dept 2006]), and that a new trial must therefore be granted (*see McFarley*, 31 AD3d at 1166).

It is well settled that " '[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations' " (*People v Horton*, 145 AD3d 1575, 1575-1576 [4th Dept 2016], quoting *Chambers v Mississippi*, 410 US 284, 294 [1973]). "It is also well settled that in presenting the defense, counsel for the defendant 'may establish, during both cross[-]examination and on [defendant's] direct case, the [complainant's] . . . motive to lie . . . This is not a collateral inquiry, but is directly probative on the issue of credibility' " (*id.* at 1576). Here, as in *People v Ocampo* (28 AD3d 684, 686 [2d Dept 2006]), "the excluded evidence was not speculative . . . or cumulative . . . , as it went directly to the credibility of the complainant[, and] the defense counsel offered a good faith basis for the excluded

line of questioning [and evidence]." "Because it cannot be said that there is no reasonable possibility that the error contributed to the verdict, the error cannot be deemed harmless beyond a reasonable doubt and reversal therefore is required" (*McFarley*, 31 AD3d at 1167; see generally *People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant also correctly contends that the court erred in permitting the People to present prompt outcry testimony that exceeded the proper scope of such testimony. Although "evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place" (*People v McDaniel*, 81 NY2d 10, 16 [1993]), such evidence is limited to "only the fact of a complaint, not its accompanying details," including the identity of the assailant (*id.* at 17; see *People v Rice*, 75 NY2d 929, 932 [1990]). We thus conclude that the court erred in permitting two of the three prompt outcry witnesses to testify concerning the identity of the alleged assailant (see generally *McDaniel*, 81 NY2d at 17; *Rice*, 75 NY2d at 932).

We thus conclude that either error, alone, would justify reversal and that the cumulative effect of the errors denied defendant a fair trial (see generally *People v Shanis*, 36 NY2d 697, 699 [1975]).

Based on our determination, the remainder of defendant's contentions are academic.