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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

PAPERS SEALED

-against-

No. 52

RANDOLFO DIAZ,

Respondent.

PEOPLE,

Respondent,

PAPERS SEALED

-against-

No. 53

BILL WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York 12207
February 14, 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

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Appearances:

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1 CHIEF JUDGE LIPPMAN: 52 and 53.

2 Counselor, go ahead. Take your time.

3 MS. ROSS: Your Honors, my name is Ruth
4 Ross, and I'm here representing the appellant which,
5 in this case, is the People.

6 The trial court properly allowed the
7 People's expert to testify about how an adult may
8 groom a child victim of sexual abuse to comply with
9 the adult abuser's demands.

10 JUDGE SMITH: Before you even can get to
11 that, did the victim in this case testify to any
12 grooming?

13 MS. ROSS: Yes, she did, yes. In fact, the
14 victim testified how initially they were just playing
15 a kissing game where the defendant would kiss her on
16 her arm and work his way up to her lips, how he would
17 massage her, how initially started with - - -

18 JUDGE SMITH: Sorry I - - - I'm sorry I
19 interrupted you.

20 MS. ROSS: Okay.

21 JUDGE SMITH: Go ahead.

22 MS. ROSS: Yes. The complainant in this
23 case - - - the reason that the expert was relevant
24 and important in this case was that the victim
25 exhibited a variety of behaviors that might seem to

1 the layman juror to be inconsistent with her having
2 been sexually abused. She failed to report the abuse
3 for over a year, even though her mother was living in
4 the home.

5 JUDGE SMITH: I thought - - - the Appellate
6 Division seemed to think that victim behavior is okay
7 for expert testimony but offender behavior is not.

8 MS. ROSS: Well - - -

9 JUDGE SMITH: Is that - - - is that the way
10 you read their opinion?

11 MS. ROSS: Yes, and I think - - -

12 JUDGE SMITH: Then are right or wrong?

13 MS. ROSS: - - - they misunderstood. Yes,
14 I - - - they were certainly wrong in this regard
15 because the - - -

16 CHIEF JUDGE LIPPMAN: Counselor - - -

17 MS. ROSS: - - - expert - - -

18 CHIEF JUDGE LIPPMAN: - - - let me stop you
19 for a second. Do you want any rebuttal time?

20 MS. ROSS: Oh, yes, Your Honor, two
21 minutes. Thank you.

22 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
23 Continue.

24 MS. ROSS: Thank you for reminding me.

25 CHIEF JUDGE LIPPMAN: Sorry to disturb your

1 thought. Go ahead.

2 MS. ROSS: The expert in this case was not
3 ever talking about what defense alleges they were
4 which is typical offender behavior.

5 JUDGE PIGOTT: But can't you think of ways
6 that you'd say - - - you know, if you look at a
7 typical bank robber, they usually hang out in banks,
8 you know, they'll - - - they go in and out. They - -
9 - they have an interest in money, and all of a
10 sudden, everybody's looking over at the - - - at the
11 judge saying, geez, he's in and out of the bank all
12 the time and he's interested in money and so he must
13 be a bank robber.

14 MS. ROSS: That's not what happened in this
15 case. That's what happened in Ciaccio, I don't know
16 if I'm pronouncing that, which is what the Appellate
17 Division relied on but did so incorrectly, and in
18 fact, this court in People v. Spicola suggested that
19 Ciaccio is not a relevant factual pattern to compare
20 to a child sexual abuse case. In a child sexual
21 abuse case, you are talking about the reactions of a
22 child to being sexually abused.

23 JUDGE PIGOTT: I get the - - - I get the
24 child part. I get where maybe sometimes - - - I
25 mean, a jury's - - - I give them more credit than

1 other people do, I guess, but they know. I mean, you
2 know, if a child gets on and says this is what
3 happened to me, they're either going to believe it or
4 not.

5 MS. ROSS: And in this case they obviously
6 did, but if I may get back - - -

7 JUDGE PIGOTT: Then when you add on and
8 say, by the way, if you - - - if you want to talk a
9 little bit about the - - - about the perp here, guess
10 what, you know, he does this, he does this, you know
11 - - - not this person, but we have an expert that
12 says it's him, it's him, it's him, it's him.

13 MS. ROSS: Well, but she was very careful
14 in explaining that she had never interviewed the
15 complainant, she had no familiarity with the facts in
16 the case, but she was talking about generalized
17 research studies based on verified cases of abuse.

18 JUDGE SMITH: Were there - - - were there
19 any hypothetical-type questions that seemed to track
20 the facts of the case?

21 MS. ROSS: Not in this case, no, Your
22 Honor.

23 JUDGE SMITH: That would make a difference,
24 wouldn't it?

25 MS. ROSS: It might, depending on the facts

1 of the case. But in this case - - -

2 JUDGE GRAFFEO: Well, if there's - - - if
3 there's particularly unique facts and the
4 hypothetical comes very close to paralleling the
5 situation, isn't that crossing the line a bit?

6 MS. ROSS: Not according to this court's -
7 - -

8 JUDGE GRAFFEO: Because then it seems to
9 contradict - - - it would seem to contradict an
10 expert's earlier statement that I didn't interview
11 the complainant, I don't really know about that
12 situation, I'm not addressing that situation.

13 MS. ROSS: And it would be dependent on the
14 facts in that case. In this case, that did not
15 happen. She was testifying to - - - not to
16 specifics; she was never asked any hypotheticals.
17 But particularly, what is important here is that
18 although, Your Honor, Judge Piggott thinks that
19 jurors are very familiar with the aspects of a
20 child's behavior who's been sexually abused - - -

21 JUDGE PIGOTT: No, I think they're smart.

22 MS. ROSS: - - - from age eight to ten.

23 JUDGE PIGOTT: I said I think they're
24 smart.

25 MS. ROSS: The fact is that the defense

1 here, through its cross-examination, implicitly and
2 explicitly in summation, relied on the complainant's
3 failure to come forward for more than a year when the
4 abuse was going on - - -

5 JUDGE SMITH: I think - - - I think
6 everyone - - -

7 MS. ROSS: - - - the fact - - -

8 JUDGE SMITH: I mean, we - - - well, the
9 failure to come forward - - - it's pretty well
10 established that you can have an expert on that. But
11 are you accepting the proposition there's a line
12 between victim behavior and offender behavior?

13 MS. ROSS: There is a line which was not
14 crossed in this case.

15 JUDGE SMITH: So you think - - - you would
16 agree that it's always bad to put in expert evidence
17 about offender behavior?

18 MS. ROSS: If the offender behavior, like
19 in this case, was only to describe what the child is
20 reacting to - - -

21 JUDGE SMITH: And - - - then you're saying
22 it's permissible when it explains victim behavior?

23 MS. ROSS: Yes, but - - -

24 JUDGE SMITH: Why? Why not just - - - I
25 mean, in a drug case, we allow experts to testify

1 that offender - - - that - - - that people who are
2 drug dealers package their goods in certain ways.
3 What's wrong with allowing offender behavior in a sex
4 case?

5 MS. ROSS: Personally, I don't think there
6 is anything - - -

7 JUDGE SMITH: Okay. Yeah, I won't get much
8 resistance from you.

9 MS. ROSS: Right. But that's not the law
10 in New York. There are states that - - - that do
11 allow - - - do allow an expert to give, sort of, a
12 profile or a mode of operation - - -

13 JUDGE SMITH: What - - - what - - - what
14 case says it's not the law in New York?

15 MS. ROSS: Excuse me?

16 JUDGE SMITH: What case says it's not the
17 law in New York?

18 MS. ROSS: I believe People v. Spicola says
19 it is - - - when the - - - it is proper to offer
20 expert behavior to explain the behaviors - - - excuse
21 me - - - expert testimony to explain the behaviors of
22 a victim which might be puzzling to a jury and - - -

23 JUDGE RIVERA: Okay, but I don't think that
24 is so much the issue. It's whether or not by the way
25 this particular expert testifies that you're really

1 not so much focused, for your purposes, on the
2 victim's behavior as you are - - - and as you say,
3 profiling or otherwise suggesting what this defendant
4 has done to cause that complainant's behavior.

5 MS. ROSS: She never talks about what this
6 victim - - - what this defendant has done.

7 JUDGE RIVERA: Oh, I understand that, but
8 there are ways, of course, of asking it so that
9 you're very close.

10 MS. ROSS: I - - - it is possible in some
11 cases that it might cross the line, but it did not do
12 so in this case.

13 JUDGE PIGOTT: How do we decide that? To
14 follow up with what Judge Rivera was asking, this
15 expert did not talk to the victim.

16 MS. ROSS: No.

17 JUDGE PIGOTT: That's clear.

18 MS. ROSS: Yes.

19 JUDGE PIGOTT: It's not clear whether or
20 not she talked to the prosecuting attorney, and I
21 would - - -

22 MS. ROSS: I believe there is a colloquy
23 somewhere in the record. She was never asked if she
24 talked to the prosecutor.

25 JUDGE PIGOTT: Right. I'd be shocked if

1 she didn't. I mean, you're going to put a witness
2 on; you might as well prepare them.

3 MS. ROSS: But it is this expert's
4 practice, and I believe she says that, to not be
5 familiar with the facts of the case - - -

6 JUDGE PIGOTT: I get - - -

7 MS. ROSS: - - - not that she just didn't
8 know - - - she didn't personally interview the
9 complainant here but that she is not familiar with
10 the facts of the case, and she says repeatedly, I am
11 not here to talk about the specifics of this case.

12 JUDGE PIGOTT: Right. But if - - - I mean,
13 if I'm the prosecutor and I'm going to put a witness
14 on, I want to know what the witness is going to
15 testify to. I'm not going to put a witness on that's
16 not going to help - - - you know, is not going to be
17 relevant to the case, so I'm going to ask questions
18 like does the fact that - - - that the perp here
19 watches certain movies, is that a factor? Now, she
20 hasn't talked to the perp - - -

21 MS. ROSS: Right.

22 JUDGE PIGOTT: - - - and she hasn't talked
23 to the victim, but she certainly has an opinion with
24 respect to that.

25 MS. ROSS: But - - -

1 JUDGE PIGOTT: And there could be six or
2 eight things, you know, that profile - - -

3 MS. ROSS: Yes.

4 JUDGE PIGOTT: - - - this person. Is that,
5 in your view, okay?

6 MS. ROSS: There is no evidence that any
7 such thing happened in this case.

8 JUDGE PIGOTT: But is it okay?

9 MS. ROSS: But if you are asking whether,
10 in a hypothetical case, a prosecutor might be
11 entitled to ask hypothetical questions that track the
12 facts of this case, this court's decision in Spicola
13 says yes, that - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but you agree
15 that there's a thin line, right? It's a hard line to
16 draw?

17 MS. ROSS: One has to be certainly very
18 careful, and it is helpful when the expert says,
19 listen, I really don't know the facts of this case.
20 If the prosecutor is then allowed - - -

21 JUDGE SMITH: But then - - - yeah. But
22 then it's easy enough to say, oh, I'm glad you don't
23 know, so you - - - so now let me just ask some
24 hypothetical questions, I don't want you to think it
25 had anything to do with this case; suppose he watched

1 Deep Throat last night, that have anything to do with
2 this case?

3 MS. ROSS: I think that is, perhaps - - -

4 JUDGE SMITH: I mean, the witness can get
5 around it.

6 MS. ROSS: That's perhaps too specific.

7 JUDGE SMITH: But you're saying it didn't
8 happen here.

9 MS. ROSS: If I may also go on to the
10 second point which is the fact that the trial court
11 was also correct in precluding the testimony of the
12 proffered defense witness, the mother's ex-boyfriend.

13 JUDGE PIGOTT: Not on a hearsay grounds,
14 though, right?

15 MS. ROSS: On hearsay grounds, certainly.

16 JUDGE PIGOTT: The only thing that was - -
17 - that he was going to testify to was that it was
18 said.

19 MS. ROSS: He was only going to - - - he
20 was - - - it was hearsay for one very important
21 reason, and that is he never heard what the
22 complainant said; he only heard what the mother said.
23 And even then, we don't know what the complainant
24 said.

25 JUDGE PIGOTT: Well, the mother said it

1 never came to her attention, and he was going to say
2 yes, it did.

3 MS. ROSS: Right, but - - -

4 JUDGE PIGOTT: That's not hearsay.

5 JUDGE SMITH: Well, why is that not a prior
6 inconsistent statement?

7 MS. ROSS: Because we don't know what the
8 complainant said. We have Martinez (ph.) filtering
9 what was - - -

10 JUDGE SMITH: We know what the - - - the
11 mother testified.

12 MS. ROSS: Right.

13 JUDGE SMITH: The mother test - - - the
14 mother said, I never knew about this. The ex-
15 boyfriend comes on and says yes, she did. I don't
16 see what the - - - why that's not a contradiction.

17 MS. ROSS: Be - - - if I can fully explain.
18 Because we don't know what was said. This is a five-
19 year-old child.

20 JUDGE SMITH: What do you mean you don't
21 know what was - - - of course we don't know; we
22 weren't there. All we have is evidence.

23 MS. ROSS: Yes, but we don't have evidence
24 as to what was said. We have Martinez saying the
25 mother said that I touched her inappropriately. Do

1 we believe the five-year-old used the word
2 "inappropriately"?

3 JUDGE PIGOTT: No, and - - -

4 MS. ROSS: No.

5 JUDGE PIGOTT: - - - the mother said that
6 that - - - that never was - - - that that was never
7 brought to her - - - that - - -

8 JUDGE SMITH: The mother said the child
9 never accused him of abuse.

10 MS. ROSS: Yes.

11 JUDGE SMITH: He says - - - he says the
12 mother told me she did. Explain to me again why
13 those are not inconsistent.

14 MS. ROSS: The trial court precluded it
15 because it is collateral - - - it is collateral
16 evidence - - - it's extrinsic evidence of a
17 collateral matter. The matter is whether the
18 complainant ever made an accusation against someone
19 other than defendant when she was five years old and
20 under circumstances - - -

21 JUDGE SMITH: You - - - is that really such
22 a - - - I mean, you make it sound as though who could
23 possibly care. Isn't it kind of unusual for five-
24 year-olds to accuse people of sexual abuse? I've
25 never actually encountered it.

1 MS. ROSS: Well, that's why there would
2 have to be a mini-trial within a trial if the - - -
3 if Martinez - - -

4 JUDGE SMITH: Yeah, but couldn't a jury - -
5 - couldn't you imagine a reasonable juror who hears,
6 oh, she was accusing - - - this complaining witness
7 was accusing somebody else when she was five? Maybe
8 this is a rather unusual sort of complainant.

9 MS. ROSS: That's why it is so important
10 that we don't know what was said. This was a five-
11 year-old - - - even assuming that any such thing was
12 true and that Martinez - - -

13 JUDGE SMITH: Well, yeah, but - - -

14 MS. ROSS: - - - was not making this up - -
15 -

16 JUDGE SMITH: - - - the prosecution
17 position said nothing was said.

18 MS. ROSS: Yes, that is correct. That is -
19 - - that is our position. But even assuming for the
20 sake of argument that something was said to Martinez
21 where the child complained in some way about
22 something he had done, that's really all we know.
23 With a five-year-old child talking about someone - -
24 -

25 JUDGE SMITH: Something sexual that he had

1 done.

2 MS. ROSS: - - - clearly, the mother and
3 the complainant at trial both understood it to be a
4 sexual nature. But if, for instance, because we're
5 talking about an incident six years ago, if it was
6 something where Martinez, who was at the time living
7 with the family - - - excuse me - - -

8 CHIEF JUDGE LIPPMAN: Okay. Finish your
9 answer, counselor, but you'll have your rebuttal
10 time.

11 MS. ROSS: Thank you - - - and was
12 presumably involved in caregiving for the child, did
13 the - - - did he spank her at some point - - -

14 JUDGE PIGOTT: No, but the question is - -
15 -

16 MS. ROSS: - - - for something that she had
17 - - -

18 JUDGE PIGOTT: - - - in the presence of the
19 ex-boyfriend and the complainant's mother, the
20 complainant had recanted and admitted she lied.
21 That's - - - that's what the question was.

22 MS. ROSS: Because we don't know what she
23 said, could it have been she "recanted", in quotes,
24 because the mother explained that Mr. Martinez
25 helping her wipe herself after she went to the

1 bathroom was not inappropriate. And where the
2 complainant and the mother, by the time of trial six
3 years later, are thinking of something sexual, the
4 fact that we don't - - - the fact that they said no
5 such thing ever happened, they would have to be
6 recalled to the stand and say, well, was there
7 anything that ever happened - - -

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MS. ROSS: Okay.

10 CHIEF JUDGE LIPPMAN: Thanks, counselor.

11 MS. PERVUKHIN: Good afternoon. May it
12 please the court, my name is Anna Pervukhin. I'm
13 here representing Mr. Diaz.

14 The Second Department made the right
15 decision to reverse in this case. This was a very
16 troubling and unusual case where - - -

17 CHIEF JUDGE LIPPMAN: What's the most
18 troubling part about why it was reversed? The
19 grooming testimony? What?

20 MS. PERVUKHIN: The grooming testimony was
21 problematic, but I think the most troubling thing
22 about - - -

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MS. PERVUKHIN: - - - what happened in this
25 case is that, in effect, you had the expert come in

1 and proffer what was essentially profile-type
2 evidence, a propensity-type argument saying here's a
3 pattern, here's how - - -

4 CHIEF JUDGE LIPPMAN: Describing the
5 defendant?

6 MS. PERVUKHIN: Well, in mirroring the type
7 of stuff that - - -

8 JUDGE SMITH: Well - - -

9 MS. PERVUKHIN: - - - the victim alleged -
10 - -

11 JUDGE SMITH: - - - what beside the
12 grooming - - -

13 MS. PERVUKHIN: - - - happened.

14 JUDGE SMITH: What beside the grooming was
15 part of this pattern?

16 MS. PERVUKHIN: Oh, yes. So one of the
17 questions that was asked was are there different ways
18 that a child can be engaged in sexual activity, and
19 the - - - the expert gave various examples like
20 introducing sexual activity in the guise of a game.
21 She mentioned pornography specifically. She
22 specifically mentioned the use of sex toys. And
23 those are all very idiosyncratic details - - -

24 JUDGE SMITH: I guess.

25 MS. PERVUKHIN: - - - that - - -

1 JUDGE GRAFFEO: If they're - - - if they're
2 not - - -

3 MS. PERVUKHIN: - - - mirrored the
4 allegations in this case.

5 JUDGE GRAFFEO: - - - idiosyncratic, if
6 they are common - - -

7 MS. PERVUKHIN: Well, even if - - -

8 JUDGE GRAFFEO: - - - in child sex abuse
9 cases, what is it - - - because we have - - - we've
10 said several times that experts come in and can
11 testify on this topic of what the syndromes are that
12 some of these children exhibit. So if those are
13 common characteristics, are they not - - - are they
14 not to testify to those?

15 MS. PERVUKHIN: Well - - - well, Your
16 Honor, with the testimony about the children and how
17 victims typically react, the real concern there is
18 about defense attorneys potentially exploiting
19 misconceptions about how child victims react in this
20 type of situation, and that's something we don't want
21 to see happen. That's something that this court
22 wanted to make sure it could prevent in Spicola.

23 CHIEF JUDGE LIPPMAN: So where do you draw
24 the line, again? What - - - how do you know whether
25 it goes over that line - - -

1 MS. PERVUKHIN: Well, the reasonable place
2 to draw the - - -

3 CHIEF JUDGE LIPPMAN: - - - like the kind
4 of situation that Judge Graffeo is saying where these
5 are basically, you know, the characteristics, not
6 that it's specifically designed to the defendant?
7 How do you know where to - - -

8 MS. PERVUKHIN: Well, when you're talking
9 about child victims and how they typically react and
10 what they typically do, then that is, in fact,
11 relevant for dispelling juror misconceptions and - -
12 -

13 JUDGE SMITH: You're saying it's beyond the
14 ken.

15 MS. PERVUKHIN: Exactly, exactly, Your
16 Honor.

17 JUDGE SMITH: Well, but could there not be
18 offender behaviors that are beyond the ken? I mean,
19 I don't - - - I don't think everybody knows the
20 typical way in which child abusers gain their
21 victim's confidence.

22 MS. PERVUKHIN: Well, Your Honor, I think
23 that this court in Riback held that, in fact,
24 unfortunately, jurors do know about this basic kind
25 of stuff - - -

1 JUDGE READ: Well, are you - - -

2 MS. PERVUKHIN: - - - even if - - - even if
3 - - -

4 JUDGE READ: - - - are you just saying it's
5 just too dangerous and therefore that kind of - - -
6 because it comes too close to propensity evidence and
7 therefore should be treated differently?

8 MS. PERVUKHIN: Yes, that's - - - that's
9 the - - - that's the other argument, is that even if
10 there is some - - - there's some jurors that might
11 not know about this and there would be some
12 relevance, it would have some educational value,
13 when you compare that value in terms of educating the
14 jury to the tremendous prejudice of bringing in this
15 type of profile evidence where you're saying look at
16 this pattern, who fits the pattern. I mean, that's
17 so incredibly prejudicial, and that's the kind of
18 argument that in other situations is not permitted.

19 JUDGE RIVERA: Is there - - - is there any
20 point in time when it's on the other side of the line
21 where you could see that - - - that some of that
22 testimony might be appropriate or fall within prior
23 cases?

24 MS. PERVUKHIN: Yes, Your Honor. If you
25 had a situation like, for example, what you had in

1 Spicola where the defense attorney is staking the
2 whole defense on the theory that someone doesn't meet
3 the profile of how a typical sex offender behaves,
4 then I think would be fair to let the prosecution
5 rebut that argument.

6 JUDGE SMITH: You say if the door is
7 opened?

8 MS. PERVUKHIN: Correct.

9 JUDGE RIVERA: Or the defendant brings it
10 in?

11 MS. PERVUKHIN: Correct.

12 JUDGE READ: But short of that, it's never
13 appropriate if it's offender behavior?

14 MS. PERVUKHIN: No, I don't think that
15 offender behavior is appropriate. It's too much of a
16 propensity-type argument and it's got the imprimatur
17 of an expert which gives it greater weight in the
18 eyes of a jury.

19 JUDGE SMITH: In this - - - in this case,
20 which - - - where did the expert come closest to
21 opining on the facts of the case? Is it the sex
22 toys?

23 MS. PERVUKHIN: I think it would be page 3
24 - - - 388 of the record. I think it was really when
25 they're talking about the introduction of games and

1 the use of pornography. And I think that that was,
2 you know, so closely tracked, so closely mirrored the
3 allegations that the complainant in this case made.

4 JUDGE PIGOTT: Did you want to talk about
5 the - - - the boyfriend?

6 MS. PERVUKHIN: Yes, Your Honor. First of
7 all, with respect to the hearsay argument, this
8 clearly was not hearsay. It wasn't being admitted
9 for the truth of the matter asserted. The statement
10 was that Mr. Martinez had allegedly touched her
11 private parts.

12 JUDGE SMITH: Well, the statements - - -

13 MS. PERVUKHIN: No one was trying to prove
14 that she had touched his - - - or that he had touched
15 her, that - - - it was being admitted - - -

16 JUDGE SMITH: But Martinez - - -

17 MS. PERVUKHIN: - - - for proof of falsity.

18 JUDGE SMITH: Martinez didn't - - -
19 Martinez didn't claim to have heard the child say
20 that, or did he?

21 MS. PERVUKHIN: No. He claimed that - - -

22 JUDGE SMITH: He - - - he attributed it to
23 the mother.

24 MS. PERVUKHIN: Right.

25 JUDGE SMITH: And the mother said she never

1 said any such thing.

2 MS. PERVUKHIN: Correct.

3 JUDGE SMITH: So you want - - - you want
4 Martinez to testify that the mother did say such a
5 thing.

6 MS. PERVUKHIN: Correct. The - - -

7 JUDGE SMITH: And then - - - and this - - -
8 so you are - - - whether it's for the truth of the
9 matter stated really depends on whether you take
10 seriously the idea that impeachment is different from
11 the truth of the matter stated, but in any event,
12 it's impeachment.

13 MS. PERVUKHIN: Well, certainly, the People
14 brought in on their direct case - - - on their direct
15 case they brought in the mother saying that she was
16 not aware of any of these kinds of allegations. And
17 this was - - - this was a part of a pattern that
18 defense counsel was trying but prevented from
19 establishing that this was actually a pattern of
20 making false and very troubling allegations, which is
21 a very unusual circumstance. And the People had the
22 mother take the stand and say no, I wasn't aware of
23 any such pattern. At that point, just for - - - for
24 rebutting that, it would have been admissible in
25 addition to the fact that - - - I mean, this was - -

1 - this testimony that they were trying to bring in,
2 that they were prevented from bringing in, this was
3 the heart of his defense, I mean, the heart of the
4 defense in this case.

5 JUDGE PIGOTT: Her truthfulness was an
6 issue.

7 MS. PERVUKHIN: Right. I mean, her
8 truthfulness was an issue, and the real issue was
9 that this was an individual who, as this court said
10 very unusually, it seemed to have a pattern and a
11 very troubling pattern of making these kinds of
12 allegations.

13 JUDGE SMITH: Your adversary says you're
14 opening the door to a mini-trial of what happened
15 when the child was five years old. They'll have to
16 recall witnesses who say, well, she was five years
17 old and who remembers, but I think she - - - there
18 might have been this incident or there might have
19 been that incident. Wouldn't - - - wouldn't you
20 distract the jury from the main issue?

21 MS. PERVUKHIN: Well, I - - - I don't think
22 - - - this was the main issue; this was the main
23 issue in the case. Whether or not this child had a
24 history of making prior false allegations - - -

25 JUDGE SMITH: Well, that - - -

1 MS. PERVUKHIN: - - - and whether or not
2 this fit into the pattern - - -

3 JUDGE SMITH: Well, maybe - - -

4 MS. PERVUKHIN: - - - really - - - really -
5 - -

6 JUDGE SMITH: - - - it wasn't the main - -
7 - I see your point, maybe it wasn't the main issue,
8 but it's not exactly irrelevant.

9 MS. PERVUKHIN: Exactly, Your Honor. Even
10 if it had entailed an elaborate proceeding, that
11 would have been appropriate given how critical this
12 evidence was in proving Mr. Diaz's innocence.

13 JUDGE SMITH: Is there - - - is this the
14 sort of area where there's a measure of discretion in
15 the trial court?

16 MS. PERVUKHIN: Well, I think that the only
17 discretion is in whether or not this type of evidence
18 is being proffered in bad faith. I mean - - -

19 JUDGE SMITH: I'll make you - - - now
20 you're going to think more of discretion. Does the
21 Appellate Division have discretion to reverse the
22 trial court on this?

23 MS. PERVUKHIN: Well, yes.

24 JUDGE SMITH: I thought so. Yeah.

25 MS. PERVUKHIN: Yes. I mean - - -

1 JUDGE SMITH: You're not really saying the
2 trial court has no discretion and the Appellate
3 Division has plenty, are you?

4 MS. PERVUKHIN: No, that's not what I'm
5 saying. But I'm saying that in this type of
6 situation, you know, really, this was evidence that
7 was so critical to the defense, and if it wasn't
8 being - - - if it wasn't being proffered in bad
9 faith, then the jury should have had the opportunity
10 to decide how much weight to give this evidence, how
11 much weight to give to the fact that she was five,
12 how to resolve these issues. The jury should have
13 had a chance - - -

14 JUDGE SMITH: What about the Mandel case?

15 MS. PERVUKHIN: What, specifically, about
16 the Mandel case?

17 JUDGE SMITH: Maybe I got the name wrong.
18 We - - - I think we - - - I think we held that they
19 didn't have to let in some kind of - - - some kind of
20 evidence like this. Maybe I - - - go - - - go ahead.
21 Ignore me.

22 MS. PERVUKHIN: I'm afraid I'm going to
23 have to do that because I can't quite recall which
24 case that is.

25 CHIEF JUDGE LIPPMAN: Okay. Continue,

1 counselor. Anything else? What else do you have?

2 MS. PERVUKHIN: Your Honor, the main point
3 I want to really make is that this was a very unusual
4 and very troubling case. This was a case where you
5 had a complainant who had testified that she had
6 repeatedly been violently raped, and the medical
7 evidence didn't bear that out. And there was an
8 expert that testified on behalf of Mr. Diaz who
9 usually, in most cases, testified for the
10 prosecution, and he came in and he testified for the
11 defense, and he said that this isn't consistent, this
12 isn't - - - the medical - - - the medical evidence
13 isn't consistent with her testimony. And the jury
14 was really troubled by that. The jury acquitted on
15 the top count. They deadlocked multiple times. This
16 was a really troubling case for them and rightfully
17 so. And if they had had a chance to hear that
18 evidence that defense counsel wanted to put forth - -
19 -

20 JUDGE SMITH: I found Mandel. Let me read
21 you a sentence out of - - - out of the case.

22 MS. PERVUKHIN: Okay.

23 JUDGE SMITH: "The court" - - - "the trial
24 court rejected evidence that includes proof of prior
25 alleged false rape complaints made by the victim.

1 There was no sufficient proof offered that the
2 complaints were indeed false, and no showing was made
3 that the particulars of the complaints, the
4 circumstances or manner of the alleged assaults or
5 the currency of the complaints were such as to
6 suggest a pattern casting substantial doubt on the
7 validity of the charges made." Isn't that all true
8 in this case?

9 MS. PERVUKHIN: No, Your Honor. And thank
10 you very much for reading me that quote. There's two
11 ways that that case, which I now remember, can be
12 distinguished. First of all, this was, indeed, part
13 of a pattern. You had - - - you had a father figure
14 in the home who was being accused of - - - who was
15 being accused of sexual abuse, so it's - - - clearly
16 there were clear similarities between this false
17 allegation and the false allegation - - - or what we
18 believe is a false allegation - - - in the criminal
19 trial. In Mandel, there was - - - there were
20 differences.

21 And then also in Mandel, there wasn't that
22 proof of falsity that you have here. Here, there's
23 no question that this was - - - this allegation that
24 she made when she was five was truly false. First of
25 all, you had the father come in and say this never -

1 - - I never touched her, I - - - this didn't happen.
2 He wouldn't have been coming into court, I would
3 suggest, to make that argument if it had, but also -
4 - -

5 JUDGE SMITH: The average sex abuser
6 doesn't volunteer to testify - - -

7 MS. PERVUKHIN: Well - - -

8 JUDGE SMITH: - - - about complaints - - -

9 MS. PERVUKHIN: Well - - -

10 JUDGE SMITH: - - - against him, yeah.

11 MS. PERVUKHIN: Right. The average sex
12 abuser doesn't volunteer for this type of thing. But
13 also, the lawyers asked the complainant, who was on
14 the stand; she was already testifying about having
15 been abused. There was no reason for her to deny
16 that she had been abused by Mr. Martinez if, in fact,
17 that had happened, but she said no, he never touched
18 me.

19 CHIEF JUDGE LIPPMAN: Okay, counselor.
20 Thanks.

21 MS. PERVUKHIN: So that - - - thank you.

22 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

23 MS. ROSS: Yes. Thank you, Your Honors.

24 If I might just make a couple of points.

25 First of all, regarding the grooming testimony, if it

1 were error, it was harmless error.

2 CHIEF JUDGE LIPPMAN: Why was it harmless?

3 MS. ROSS: The expert testified for over
4 sixty pages and the grooming testify - - - testimony
5 occupied less than two pages.

6 JUDGE SMITH: For harmless error, don't you
7 usually have to have overwhelming proof?

8 MS. ROSS: The - - - I believe that the
9 jury correctly found the defendant guilty and that
10 there was - - -

11 JUDGE SMITH: Well, yeah - - -

12 MS. PERVUKHIN: - - - overwhelming proof -
13 - -

14 JUDGE SMITH: - - - but that - - - that
15 doesn't make it overwhelming.

16 MS. ROSS: No.

17 JUDGE SMITH: The jury sweated about it
18 quite a lot.

19 MS. ROSS: They - - - the jury undoubtedly
20 acquitted of the top count because there was
21 conflicting medical testimony.

22 CHIEF JUDGE LIPPMAN: But I think it's fair
23 to say this was far from overwhelming.

24 MS. ROSS: No, I don't think that's fair to
25 say, Your Honor.

1 JUDGE GRAFFEO: Pretty hard in he-said/she-
2 said cases without any corroboration that it's - - -

3 MS. ROSS: Well, there was partial
4 corroboration - - -

5 JUDGE GRAFFEO: - - - overwhelming, isn't
6 it?

7 MS. ROSS: - - - in the recovery of the
8 videos and the sex toys from the bedroom. But the
9 fact is this is a child who gave astoundingly
10 detailed, sensory-based testimony about what
11 defendant's actions felt like, how some things - - -
12 sex acts - - - tickled at first but felt
13 uncomfortable, how some sex acts hurt at first and
14 then hurt less and then even felt good. It - - -
15 these are not factors that a - - - an eight- or a
16 nine- or a ten-year-old child - - -

17 JUDGE SMITH: I - - -

18 MS. ROSS: - - - can glean from - - -

19 JUDGE SMITH: I think it's a reasonable
20 argument. Does that really make an overwhelming case
21 when you say, gosh, she was so convincing, it's
22 overwhelming. I thought overwhelming had to have
23 more than one witness who can really testify well.

24 MS. ROSS: In a child sex abuse case,
25 there's almost never more than one witness.

1 JUDGE SMITH: Well, maybe a lot of them
2 aren't overwhelming.

3 MS. ROSS: But I think this is as strong as

4 - - -

5 CHIEF JUDGE LIPPMAN: When you have a very

6 - - -

7 MS. ROSS: - - - a sex crime - - -

8 CHIEF JUDGE LIPPMAN: - - - credible

9 witness, it's overwhelming - - -

10 MS. ROSS: - - - you had - - -

11 CHIEF JUDGE LIPPMAN: - - - evidence? That

12 can't be what you're saying, that you have one

13 witness who comes across well. That doesn't make it

14 overwhelming.

15 MS. ROSS: Where there is no motive to lie,

16 where - - -

17 CHIEF JUDGE LIPPMAN: That makes it

18 persuasive, but it's not overwhelming.

19 JUDGE PIGOTT: But she did lie, didn't she?

20 MS. ROSS: What?

21 JUDGE PIGOTT: She did lie.

22 MS. ROSS: I don't think she did.

23 JUDGE PIGOTT: Really?

24 MS. ROSS: Yeah. The - - - most of the - -

25 - all of the testimony that the defense witnesses put

1 on where they claim she was a liar are all events
2 that happened after she was raped. And so we don't
3 know how the year and a half of abuse at what she
4 thought of as her grandfather's hands made her
5 hypersensitive to things that might have been
6 innocuous to somebody else - - -

7 JUDGE SMITH: Doesn't that make it - - -

8 MS. ROSS: - - - that she interpreted as
9 sexual assaults.

10 JUDGE SMITH: - - - all the more important
11 to bring out an incident that happened beforehand?

12 MS. ROSS: No, not given the court - - -
13 this court's decision in People v. Mandel and an
14 application of common sense. Even assuming what
15 Martinez said was true, which the People do not
16 concede, you have a five-year-old making a vague
17 allegation, the content of which we do not know, the
18 context of which we do not know, about something
19 which when confronted by her mother and who knows
20 what that confrontation entailed - - -

21 JUDGE PIGOTT: Well, the physical
22 examination, it seems to me, put some of her
23 testimony in doubt, did it not?

24 MS. ROSS: Not according to the People's
25 medical expert.

1 JUDGE PIGOTT: Well, I know, but I mean,
2 that - - - when we talk about harmless error, I'm - -
3 -

4 MS. ROSS: Well, but that's why the jury
5 acquitted of the top count where the medical evidence
6 would be possibly important.

7 JUDGE PIGOTT: They did not believe her.

8 MS. ROSS: Excuse me?

9 JUDGE PIGOTT: They didn't believe her.

10 MS. ROSS: No, I would - - - if they didn't
11 believe her, they would have acquitted him of all
12 counts.

13 JUDGE SMITH: But they found reasonable
14 doubt as to the truth of her testimony.

15 JUDGE PIGOTT: Right - - -

16 MS. ROSS: No, I don't think they did.

17 JUDGE PIGOTT: - - - on the top count.
18 Well, they must have.

19 MS. ROSS: I think they were troubled by
20 the conflicting medical testimony where you had what
21 are the People's medical experts saying you can have
22 full penetration without - - -

23 JUDGE SMITH: Yeah, but it should have been
24 evident - - - but if you're sure that every word she
25 says is true, you convict on all counts, right?

1 MS. ROSS: Well, if you can compromise and
2 convict on a count where the medical testimony is
3 absolutely irrelevant - - -

4 JUDGE SMITH: Even though you're out of
5 time, I have one more question which is where do you
6 stand on discretion? To what extent was this - - -
7 is a ruling on a - - - like the ruling on the ex-
8 boyfriend discretionary. And if it is discretionary
9 in the trial court, does the Appellate Division have
10 discretion to overrule them?

11 MS. ROSS: This was certainly within the
12 proper exercise of discretion by the trial court.

13 JUDGE SMITH: But not of the Appellate
14 Division?

15 MS. ROSS: I think the appell - - -

16 JUDGE SMITH: All the discretion is in the
17 trial court with you; with her, it's all in the
18 Appellate Division.

19 MS. ROSS: Right. But I think the
20 appellate court relied on incorrect cases. The
21 Appellate Division - - - the Appellate Division
22 relied on cases in which a defendant was not even
23 allowed to cross-examine.

24 JUDGE SMITH: Okay. But you're not saying
25 that the Appellate Division has less broad discretion

1 than the trial court, or are you?

2 MS. ROSS: No, I'm not.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.

4 Thanks, counselor. You'll be back, counselor.

5 MS. ROSS: I'll be back for the next - - -

6 CHIEF JUDGE LIPPMAN: Counselor, you want
7 some rebuttal time?

8 MS. HUTCHINSON: Two minutes, please, Your
9 Honor.

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

12 MS. HUTCHINSON: Good afternoon. May it
13 please the court, my name is Kendra Hutchinson. I
14 represent the other appellant in this matter, Mr.
15 Bill Williams.

16 In this case, by contrast to my colleague's
17 case, there are actually three reasons why the expert
18 testimony was improperly admitted. The first one we
19 discussed - - -

20 CHIEF JUDGE LIPPMAN: You have a little
21 different situation here, right, in that you have a
22 judge trial?

23 MS. HUTCHINSON: Yes, we do, Your Honor.
24 Yep, this is - - -

25 CHIEF JUDGE LIPPMAN: And that changes the

1 dynamics, doesn't it?

2 MS. HUTCHINSON: It changes it to some
3 extent, actually, and in fact, that becomes one of
4 the errors in this case, Your Honor, because - - -

5 JUDGE GRAFFEO: And you have two victims,
6 so it's a bit different.

7 MS. HUTCHINSON: And there were two
8 complainants in this case, Your Honor. And it has
9 been discussed before, the testimony that was abuser
10 focused in this case was irrelev - - - was irrelevant
11 to dispel any mis - - - misconceptions about victim
12 behavior, and it was a functional equivalent of a
13 guilty opinion in this case.

14 JUDGE SMITH: You had some pretty pointy-
15 type hypotheticals in your case.

16 MS. HUTCHINSON: Are you referring to the
17 consistent with - - - the opinion about the - - -

18 JUDGE SMITH: Yes.

19 MS. HUTCHINSON: - - - consistent with?
20 Yes, Your Honor. Those were - - - and - - - and I
21 would note, also, that these occupied seven out of
22 the ten or eleven pages that this - - - that this
23 witness testified. There were eleven questions. And
24 the - - -

25 CHIEF JUDGE LIPPMAN: But the judge was

1 quite direct about what he was leaving in for and why
2 he was doing it and - - -

3 MS. HUTCHINSON: But the judge - - -

4 CHIEF JUDGE LIPPMAN: - - - and he had
5 heard some of this before.

6 MS. HUTCHINSON: Well, the judge - - -

7 CHIEF JUDGE LIPPMAN: I mean, this wasn't
8 just a flip decision by the judge. He seemed to have
9 a sense of what he wanted to do here and why.

10 MS. HUTCHINSON: Well, Your Honor, the very
11 first question that elicited a ruling by the judge,
12 the - - - the - - - Dr. Lewittes was permitted to
13 testify that it was consistent with the syndrome to
14 have a child straddle an adult man who lived in the
15 home and not call out for help even to another child
16 sleeping in another room. When defense counsel
17 objected to this, the court overruled it, evincing
18 its belief that this was - - - was permissible
19 testimony for it to consider.

20 CHIEF JUDGE LIPPMAN: So this is too right
21 on, too close for comfort to the defendant?

22 MS. HUTCHINSON: I mean, absolutely, Your
23 Honor. I mean, this is one of the most idiosyncratic
24 - - - I mean, it encompasses the - - - all of the
25 very, very highly specific facts of this case, and

1 the court, by overruling defense counsel, indicated
2 that it would consider it and I'd also note that in
3 the very beginning, when defense counsel objected
4 initially to the admission of this expert testimony,
5 the court informed the parties that if it found it
6 was not necessary it would let them know later. It
7 never let them know.

8 JUDGE SMITH: Well, what about how - - -

9 JUDGE RIVERA: Where do we draw the line on
10 the expert testimony? Where is it - - - on one side
11 it's acceptable expert testimony; the other side,
12 you've gone too far?

13 MS. HUTCHINSON: Well, there's two lines
14 here, Your Honor. The first line is the one as to
15 abuser-focused testimony. We had suggested that it
16 is never - - - unless the defense brings it up or
17 contests it or, as in Riback where the behavior
18 alleged to be exhibited is so bizarre that no jury
19 could possibly understand it, we would - - - we would
20 contend that this court's decades of jurisprudence
21 have set out a rule that such testimony is relevant
22 to explain puzzling victim behavior and that's where
23 the line should be.

24 JUDGE SMITH: But never puzzling offender -
25 - - or almost never puzzling offender behavior? Why

1 not?

2 MS. HUTCHINSON: Your Honor, unfortunately,
3 as my colleague pointed out, this - - - this - - - in
4 this case at least, Your Honor - - - in this case at
5 least, the behavior that's - - - you know, the
6 alleged grooming behavior, the - - - the, you know,
7 winning over the trust of a child and then finding
8 times to be alone with them - - - juries understand
9 this. As - - - as Judge Piggott was noting earlier,
10 they're a little - - - they're smarter than that, and
11 this court has actually recognized this.

12 JUDGE SMITH: Okay. But, I guess, why
13 shouldn't we take the questions one at a time. If
14 it's beyond the ken, it's beyond the ken. If it's
15 not, it's not. What does it matter whether it's
16 victim or offender?

17 MS. HUTCHINSON: It's not beyond the ken -
18 - - first of all, it's not beyond the ken of jurors,
19 but in this case I'd also note it is not beyond the
20 ken of the fact finder who specifically said he knew
21 it.

22 JUDGE PIGOTT: What was the - - - what was
23 the point - - - maybe I'm getting off the point that
24 you're trying to make, but of the - - - of the judge
25 saying that he'd heard this - - - this - - - this

1 expert before and that he was letting the People
2 present him to give the defense a chance to ask
3 questions? I - - - I - - - it sounded like he was
4 introducing facts from a different case.

5 MS. HUTCHINSON: Quite frankly, I - - - we
6 don't know why the judge would want to introduce, you
7 know, damaging testimony for the defense - - - that's
8 not particularly helpful for the defense. Defense
9 counsel objected at that time, and the court even
10 noted I'm not going to preclude it. So, you know,
11 clearly it's considering it and clearly he stated
12 that he knew this testimony before. Now, getting
13 back - - -

14 CHIEF JUDGE LIPPMAN: Doesn't he say he's
15 kind of doing it for your benefit to some degree?

16 MS. HUTCHINSON: Yes, but how - - - how
17 testimony that improperly comments on the facts of a
18 case and states that fact after fact after fact is
19 consistent with child abuse would be helpful to the
20 defense is sort of beyond me, Your Honor.

21 And to get back to Judge Rivera's other
22 question, what the line would be, there's another
23 line in this case that was crossed that's - - -
24 that's different than my colleagues and that's what
25 we keep adverting to here which are these specific,

1 fact-specific, question after question after question
2 that - - - that completely subsume all of the
3 evidence in this case. This court condemned it in
4 Banks - - - People v. Banks. I mean, that was a
5 pretty bright-line rule that the court laid out.
6 This has been followed noncontroversially by the
7 Appellate Division for - - - for the decades since,
8 and there's no reason to revisit that rule in this
9 case. Now - - -

10 JUDGE SMITH: What about harmless error?

11 MS. HUTCHINSON: This error was not
12 harmless, Your Honor, not in this case.

13 CHIEF JUDGE LIPPMAN: Why is the evidence
14 here not overwhelming?

15 MS. HUTCHINSON: Well, first of all, we
16 know that the fact finder considered it. We also
17 know that the People argued it extensively during
18 summation. So as in Riback, where this court found
19 that the error could not have been harmless, I would
20 - - -

21 JUDGE SMITH: Well, the chief judge asked
22 you if the evidence was overwhelming. I mean, I
23 understand that doesn't do it. It could be
24 overwhelming and you still didn't have a fair trial.
25 But was it overwhelming?

1 MS. HUTCHINSON: Your Honor, this was a
2 case of credibility, so no. This was a case of
3 credibility. My client got up. He testified. He
4 denied the allegations.

5 JUDGE SMITH: But it was - - -

6 MS. HUTCHINSON: There were two - - -

7 JUDGE SMITH: - - - credibility two against
8 one, though.

9 MS. HUTCHINSON: There were two
10 complainants. There was - - - to get back to your
11 question, Your Honor, there were - - - there was some
12 medical corroboration - - - or at least the People
13 alleged it was - - - as to one, but there wasn't as
14 to the other. This was a classic case of he-
15 said/she-said but for this one medical evidence.

16 I'd also like to note that in point two we
17 assailed trial counsel for, in essence, you know,
18 throwing his client under the bus in this case, Your
19 Honor. If my client had had a better lawyer here,
20 there is some doubt about whether or not this - - -
21 this medical evidence could have stood in the same
22 way or if this expert evidence would have even gotten
23 in in the first place.

24 CHIEF JUDGE LIPPMAN: But you agree that
25 more than one witness makes a difference?

1 MS. HUTCHINSON: Well, I mean, of course it
2 makes a difference, Your Honor. That's more - - -
3 that's additional evidence. But here we would - - -
4 we would absolutely contend that in light of the
5 scope of this error, at least eight pages out of the
6 expert's testimony was devoted to improper testimony.
7 And in light of the prosecution's summation, this
8 could not have been harmless in this case, absolutely
9 not, in light of the fact also that the judge
10 specifically considered it. We know the judge did
11 because he overruled all of - - - of the lawyer's
12 objections and because he said he would inform the
13 parties later if he deemed it not necessary. In this
14 instance, it could not have been harmless in this
15 case.

16 I - - - I also - - - I just want to bring
17 up something that - - - that has not come up in here
18 on this case, but I'd like to bring it up because it
19 came up earlier. It's irrelevant that the - - - that
20 the - - - that the - - - that the expert professed to
21 have no opinion. There was no opinion - - - you
22 know, no opinion about the facts of the case or had
23 never, you know, interviewed the complainants or
24 anything like that. In Banks, the - - - the expert
25 never gave an opinion, just testified hypothetically.

1 That is exactly what - - -

2 JUDGE SMITH: Well, then, your point is if
3 the witness says I don't know anything about the
4 facts of this case and I have no opinion about them
5 and the prosecutor says, okay, I'll tell them to you
6 in the form of a hypothetical, what's your opinion,
7 that sort of negates the point.

8 MS. HUTCHINSON: Exactly. I mean, it's a
9 functional equivalent of opinion, Your Honor, despite
10 the expert's disavowal of it.

11 And I also just want to say, I mean, I
12 think the court appreciates this, but I'd just like
13 to make the point that this is not Spicola. I mean,
14 this - - - this case was not decided by Spicola. My
15 adversary wants to, you know, paint this picture of
16 this being inextricably intertwined. It's very easy.
17 Some testimony speaks about abusers or offenders and
18 some of it speaks about victims. The testimony that
19 was approved in Spicola spoke about victims; this
20 doesn't. This - - - or at least the testimony that
21 we're complaining about in this instance.

22 I'd also like to just, finally, bring up,
23 this should not have been - - - any of this testimony
24 should not have come in. The judge knew it. There
25 was no reason - - - it was not beyond his ken. There

1 was no reason for it to come in.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. HUTCHINSON: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks, counselor.

5 MS. ROSS: Hang on a sec. I left my other
6 bag right here.

7 CHIEF JUDGE LIPPMAN: Go - - - go ahead,
8 counselor. Take your time. You're switching books,
9 hats, whatever you're switching. Go ahead.

10 MS. ROSS: That's it exactly. The - - -

11 CHIEF JUDGE LIPPMAN: Counselor, was it
12 clear to you that they - - - that the judge
13 considered what your adversary thinks are clearly
14 inappropriate testimony that kind of mirrors the
15 accusations against the defendant?

16 MS. ROSS: No. I think the judge made it
17 clear when he was admitting the expert testimony that
18 he was only going to be considering it for a proper
19 reason. He repeatedly stated I - - - he is familiar
20 with Lewittes's testimony. He testifies in general
21 about the - - -

22 JUDGE SMITH: I heard it before. It
23 doesn't - - - didn't - - - doesn't sound to me as
24 though don't worry, I know what to use it for.

25 MS. ROSS: It is certainly puzzling that he

1 said that because, in fact, the People would have to
2 put in their evidence from their expert if they ever
3 wanted to rely on it - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but - - -

5 MS. ROSS: - - - in arguing - - -

6 CHIEF JUDGE LIPPMAN: But does there come a
7 point where you're going to have a judge trial and
8 the judge says, I know, I know what's right and
9 what's not right, where there's a lot of
10 inappropriate material that comes in that you have to
11 wonder whether the judge knows what's - - - you know,
12 what it should be used for and what shouldn't or - -
13 - you know what I'm saying? Is that if there's a lot
14 of questions that, again, track the accusations
15 against the defendant, doesn't there come a time when
16 even in a single judge trial that's a problem?

17 MS. ROSS: Well, in this case, the defense
18 was - - -

19 CHIEF JUDGE LIPPMAN: That's not the case
20 here?

21 MS. ROSS: I don't think that's the case
22 here.

23 CHIEF JUDGE LIPPMAN: Why not?

24 MS. ROSS: Because the defense explicitly
25 argued that the fact that there was always another

1 child present of the same age that should have - - -
2 that the child who is being abused could have cried
3 out to meant that their test - - - that their
4 testimony was not credible, and so - - -

5 JUDGE SMITH: Yeah, and the point - - - the
6 whole point of your question was to say, oh, yes, it
7 is credible.

8 MS. ROSS: It is to elucidate why a child -
9 - - it was not - - - unlike people - - -

10 JUDGE SMITH: I mean, you can certainly
11 have an expert - - - at least I would think you could
12 have an expert say yes, it's common enough for
13 children not to cry out while they're being abused.
14 But the question is, "Doctor, is it consistent with a
15 syndrome of a child living in her own home with a man
16 who is her mother's live-in boyfriend, if this man
17 would have this child straddle him with the child on
18 top of him that this child would not call out to
19 another child similar in age who is sleeping in the
20 very next room?" - - - Isn't that getting kind of
21 close to the facts of the case?

22 MS. ROSS: Well, it's obviously paralleling
23 the facts, Your Honor, but that is - - - according to
24 this court's decision in Spicola, it's not improper
25 because the People - - -

1 JUDGE SMITH: I thought in Spicola we said
2 there were not objections to the specific questions.

3 MS. ROSS: I - - - I would have to check,
4 Your Honor, but yes. But here they - - - the court
5 indicates that it is receiving it for the proper
6 reason, which it describes, which is I understand
7 he's testifying in general about a - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but that's a
9 contradiction. I mean, it can't have it both ways,
10 right? It can't be exactly the same unusual factual
11 allegations here and at the same time say it's just
12 illustrative. I mean - - -

13 MS. ROSS: I think - - -

14 CHIEF JUDGE LIPPMAN: - - - isn't that
15 directly contradictory to say that?

16 MS. ROSS: It would be more of a problem if
17 this was actually a jury trial, but where - - - where
18 the judge has said, listen, I know he's only talking
19 about the generalities, I know he's - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but that's
21 ridiculous given the facts of this case, isn't it?

22 MS. ROSS: No, I don't - - - I would
23 suggest - - -

24 CHIEF JUDGE LIPPMAN: That's a generality -
25 - -

1 MS. ROSS: - - - that it's not ridiculous.

2 CHIEF JUDGE LIPPMAN: That's a generality,
3 that particular sequence that Judge Smith read is a
4 generality?

5 MS. ROSS: It was certainly - - -

6 CHIEF JUDGE LIPPMAN: What could be more
7 specific?

8 MS. ROSS: Well, but he's talking about
9 even in circumstances where a child knows that there
10 is someone else - - -

11 CHIEF JUDGE LIPPMAN: He's saying, even in
12 the circumstances of this case is what this is,
13 right? In reality, that's what the question is,
14 right?

15 MS. ROSS: It is certainly very closely
16 parallel, but this - - - it is not the situation, for
17 instance, in People v. Banks which is where the - - -
18 the - - - where the expert was asked - - - was
19 describing behaviors of the child victim that were
20 not at all inexplicable to a jury, where a child who
21 had been sexually assaulted violently acted
22 traumatized afterwards so - - -

23 JUDGE PIGOTT: This is off the point a
24 little bit, but I was bothered by the judge saying,
25 you know, that he'd heard this - - - all this

1 testimony before and he's letting it - - - I got the
2 impression he was saying to the defense lawyer, maybe
3 you haven't heard this guy before, I have, I'm going
4 to let it in, and if you got any questions, you know,
5 maybe you'll learn something from this expert and
6 then you can cross-examine him if you want, which led
7 me to believe that you didn't need the expert because
8 apparently this judge knew all about child's - - -
9 the syndrome, so - - -

10 MS. ROSS: That certainly is the
11 implication, but I think it was - - - the judge was
12 certainly correct in letting it in here because the
13 judge could not rely on the prior representation - -
14 - its own prior knowledge in an unrelated case.

15 JUDGE PIGOTT: Sure you can - - - well, not
16 in an unrelated case, but I mean, the only reason you
17 bring in an expert is to tell somebody something they
18 don't already know.

19 MS. ROSS: And your question is, Your
20 Honor? I'm sorry.

21 JUDGE PIGOTT: If he already knew it, then
22 he doesn't need the - - - he doesn't need the doctor
23 to come in and tell him what child sex abuse syndrome
24 is because he already knows it and he's saying, I've
25 already heard - - - I know this stuff, I'm letting it

1 in so you, defense lawyer, can cross-examine him if
2 you want.

3 MS. ROSS: I don't know what - - -

4 JUDGE RIVERA: But to help understand so
5 you don't listen to a particular - - -

6 MS. ROSS: Right. I - - - I - - -

7 JUDGE RIVERA: - - - testimony with a
8 particular ear.

9 MS. ROSS: I don't know the judge's reasons
10 for that, but it was certainly properly admitted here
11 because the People were entitled to respond to
12 explicit defense arguments that the fact that one
13 child was being sexually abused for over a year, was
14 always present in the home with at least another
15 child her age, were reas - - - were reasons to
16 discount her testimony about the sexual abuse
17 altogether. And of course, with regards to the
18 second child who was actually raped - - -

19 JUDGE SMITH: But, I mean, isn't that the
20 problem? Obviously, the defense is entitled to make
21 that argument and you're entitled to make the
22 argument, no, it's not, that children often don't cry
23 out. But you're not entitled to put an expert on to
24 say - - - you could not ask the expert, Doctor, you
25 heard that witness and you heard the defense lawyer

1 say it wasn't credible, do you agree with the defense
2 lawyer? You can't do that, can you?

3 MS. ROSS: No, and that did not - - -

4 JUDGE SMITH: And isn't that - - - isn't
5 that virtually what you did?

6 MS. ROSS: To the extent that any of the
7 questions were excess - - - I mean, the People are
8 allowed to ask questions that present their facts and
9 - - - in a hypothetical situation. That's the
10 purpose of a hypothetical.

11 JUDGE SMITH: Well, when you - - -

12 MS. ROSS: And if here - - -

13 CHIEF JUDGE LIPPMAN: That's a law that
14 they could - - -

15 MS. ROSS: - - - to the - - -

16 CHIEF JUDGE LIPPMAN: - - - that they could
17 present exactly the situation - - - exactly the facts
18 in our case and ask for an opinion even though it's
19 supposed to be a hypothetical and not about the facts
20 of our case?

21 MS. ROSS: To the extent that it was overly
22 precise in this case - - -

23 CHIEF JUDGE LIPPMAN: Well, it was overly
24 precise. You would agree with that?

25 MS. ROSS: It would have been better if it

1 was a little more general, but I don't think it was
2 the point of reversible error, given the facts of
3 this case - - -

4 CHIEF JUDGE LIPPMAN: Why not?

5 MS. ROSS: - - - which - - - because - - -

6 CHIEF JUDGE LIPPMAN: Why not?

7 MS. ROSS: - - - it was, in fact,
8 overwhelming evidence of guilt.

9 CHIEF JUDGE LIPPMAN: Okay. So why - - -
10 so tell us what's overwhelming and why it's harmless.

11 MS. ROSS: Because there was - - -

12 CHIEF JUDGE LIPPMAN: You got the two
13 witnesses.

14 MS. ROSS: There were two witnesses. There
15 was medical evidence to support the rape allegation
16 for the one child who testified to her rape. There
17 was no plausible motive to lie. There was a
18 previously loving familial relationship with both
19 complainants. There was - - -

20 JUDGE SMITH: You didn't have the kind of
21 impeachment of the complainant that you had in Diaz,
22 did you?

23 MS. ROSS: No, you did not, but there is
24 still here - - -

25 JUDGE SMITH: I don't want to put you in a

1 conflict, but this is a rather substantially stronger
2 case than Diaz for the People.

3 MS. ROSS: Certainly any case where there's
4 two complainants and medical evidence and no prior
5 allegations thrown into the mix, there it is
6 obviously a stronger factual case for the People.
7 But that does not mean that in the other - - - that
8 the trial court - - - I mean the Appellate Division
9 was correct in reversing Diaz, either.

10 But here, any error was certainly harmless
11 because even to any extent that the expert was given
12 overly detailed factual patterns in its hypothetical,
13 the court, whatever other things it may have said,
14 made it clear that the court understood that the
15 expert is not testifying that the defendant abused a
16 child, that the expert is not testifying that he
17 believed or knew what the other - - - what either
18 complainant had said, that he understood - - - and
19 the court said this on repeated occasions - - - he's
20 just telling you what the five stages are, he's just
21 telling you about - - -

22 CHIEF JUDGE LIPPMAN: He's telling who - -
23 -

24 MS. ROSS: - - - you know, the general
25 pattern - - -

1 CHIEF JUDGE LIPPMAN: He's telling who, the
2 defense counsel about it?

3 MS. ROSS: I'm sorry, Your Honor.

4 CHIEF JUDGE LIPPMAN: He's telling who?
5 He's telling the defense counsel?

6 MS. ROSS: He's telling both parties that I
7 understand the proper purpose, and usually it is
8 defense counsel because defense counsel did object.

9 But I'd like to also point out that the
10 defense never argued below that there was any kind of
11 offender profiling going on here. The - - - the - -
12 - the defendant's pre-trial objection was very
13 nonspecific. And then at trial, when the witness is
14 testifying, the defendant objects when the expert
15 starts going into the five stages, and he said I
16 think - - - I thought this was just about outcry and
17 now here there's so many stages, there are these five
18 stages, and if a jury was here, they'd be associating
19 this with my client.

20 This is clearly, based on the preceding
21 colloquy, referring to the five stages and that he
22 was expecting a more focused testimony just about
23 outcry, and the trial court correctly says I think
24 he's getting to it but he's going to explain how the
25 five stages relate to delayed outcry.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.
2 Thanks, counselor.

3 MS. HUTCHINSON: Just very briefly. It's
4 clear that the fact finder here considered this - - -
5 considered this; in particular the hypotheticals.

6 CHIEF JUDGE LIPPMAN: What about - - - what
7 about harmless here? Why is that not harmless even
8 if we agree with you?

9 MS. HUTCHINSON: Okay. I would really
10 point to People v. Mercado. That's an Appellate
11 Division case that this court has cited in two of its
12 own cases, actually, approvingly. In that case, the
13 error was exactly the same. The court found it not
14 harmless and reversed because this was a case solely
15 about credibility. This was a case - - -

16 CHIEF JUDGE LIPPMAN: But in the context of
17 this case with two witnesses and medical evidence.

18 MS. HUTCHINSON: Okay. So, Your Honor, we
19 do have two witnesses, that is correct; the People
20 had two witnesses in this case. I would point out
21 once again, however, that the witnesses conferred
22 before they came forward to any adult figures about
23 their outcry, and that is another part of the
24 evidence in this case. And I would also point out
25 that - - - that the allegedly corroborative, you

1 know, medical evidence existed only as to one of the
2 complainants. So, in essence, if you took out that
3 complainant and you talked about all of the counts to
4 do with all the - - - the other complainant, it
5 simply becomes a credibility case. You cannot say
6 that it's harmless in a case such as this, Your
7 Honor, particularly when the court explained that it
8 was going to consider it and overruling the defense
9 counsel's repeated objections.

10 To the extent that the People are
11 contending that this - - - that this issue is not
12 preserved, they're incorrect. This - - - you know,
13 defense counsel objected. He said this was about
14 outcry, People, you said this was going to be outcry,
15 this is not about outcry, and if a jury were here, I
16 mean, clearly inartful but, you know, speaking to the
17 fact finder, if a fact finder - - - you know, the
18 jury were here, they would be associating this with
19 my client. Nothing more is necessary.

20 JUDGE SMITH: That - - - he was really
21 being tactful, wasn't he? He said I understand that
22 you would never be confused, Judge, but some
23 hypothetical fact finder might be.

24 MS. HUTCHINSON: You know, perhaps,
25 perhaps, Your Honor, perhaps that's exactly - - - I

1 didn't think of that, but that's a very good point.
2 And it's clearly preserved, Your Honor; it really is,
3 on the facts of this case.

4 CHIEF JUDGE LIPPMAN: Okay. Thank you,
5 counselor.

6 MS. HUTCHINSON: Thank you very much.

7 CHIEF JUDGE LIPPMAN: Thank you all.
8 Appreciate it.

9 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Randolph Diaz, No. 52, and People v. Bill Williams, No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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