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## **Criminal Law - Prosecutorial Mistake Results in Sexual Assault Retrial - Commonwealth v. Angel Luis Alvarez, 103 N.E.3D 1202 (Mass. 2018)**

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**CRIMINAL LAW—PROSECUTORIAL MISTAKE  
RESULTS IN SEXUAL ASSAULT RETRIAL—  
COMMONWEALTH V. ANGEL LUIS ALVAREZ, 103  
N.E.3D 1202 (MASS. 2018).**

In a criminal trial, it is the role of a prosecutor to argue zealously in order to secure a conviction of the defendant.<sup>1</sup> However, a prosecutor's argument is flawed when she misspeaks in her opening or closing argument and introduces facts not supported by evidence that was submitted over the course of the trial.<sup>2</sup> Such an error is only deemed non-prejudicial if the court is "sure that the error did not influence the jury, or had but very slight effect."<sup>3</sup> In 2018, the Supreme Judicial Court of Massachusetts ("SJC"), in *Commonwealth v. Angel Luis Alvarez*,<sup>4</sup> considered whether "the prosecutor's closing argument was prejudicial error, where she told the jury of critical corroborative evidence that was not presented at trial."<sup>5</sup> The SJC held that the defendant's convictions must be vacated and the case remanded for a new trial because the court could not "say with assurance that the prosecutor's improper closing argument could not have influenced the jury to convict."<sup>6</sup>

The Commonwealth's case relied on the credibility of Camila,<sup>7</sup> a twelve year old girl, who testified to enduring multiple acts of sexual abuse by the defendant when she was between the ages of six and nine.<sup>8</sup> The defendant is Camila's godfather and married to her aunt.<sup>9</sup> During trial, Camila recalled several instances where the defendant sexually assaulted her when the two were alone together.<sup>10</sup>

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<sup>1</sup> See *Commonwealth v. Rutherford*, 71 N.E.3d 481, 486 (Mass. 2017) (explaining that prosecutors are permitted to forcefully argue to secure convictions).

<sup>2</sup> See *Commonwealth v. Hrabak*, 801 N.E.2d 239, 244 (Mass. 2004) (quoting *Commonwealth v. Flebotte*, 630 N.E.2d 265, 268 (Mass. 1994)) (summarizing holding).

<sup>3</sup> See *id.* (laying out standard court uses to determine whether error is non-prejudicial).

<sup>4</sup> 103 N.E.3d 1202 (Mass. 2018).

<sup>5</sup> See *id.* at 1205 (emphasizing issue before SJC).

<sup>6</sup> See *id.* at 1212 (explaining holding and reasoning of SJC's decision to remand).

<sup>7</sup> A pseudonym is used in place of the child's real name.

<sup>8</sup> See *Alvarez*, 103 N.E.3d at 1205-06 (showing how prosecution relied solely on testimony of Camila).

<sup>9</sup> See *id.* at 1206 (pointing out relationship between victim and defendant).

<sup>10</sup> See *id.* at 1206-07 (highlighting where Camila provided details of abuse). Camila testified that on one occasion, during a family party, the defendant took Camila to his house, where he placed her "on top of him" and "his penis touched [her] vagina." *Id.* at 1206. Camila further testified that

After the first alleged sexual assault, Camila returned home and asked her mother if she could shower because she felt “wet and sticky and gross.”<sup>11</sup> Camila later testified that when she confided in her mother about her sexual abuse, she spoke of the first sexual assault and said “I told them how I felt gross and wet; that’s why I wanted to take the shower.”<sup>12</sup> This incident of sexual assault was the only assault that Camila indicated that the defendant had ejaculated, and therefore, the prosecutor understood that corroboration of Camila feeling “wet and sticky” from another source would increase the perceived validity of Camila’s testimony.<sup>13</sup> The prosecutor, however, failed to elicit this testimony from either Camila or her mother during trial, yet referenced the alleged corroboration during her closing argument.<sup>14</sup> Nevertheless, a Superior Court jury found the defendant guilty on three counts of rape of a child and one count of indecent assault and battery upon a child.<sup>15</sup>

The SJC was tasked with determining whether the error in the prosecutor’s closing argument was prejudicial enough to potentially influence the jury in their decision to convict the defendant.<sup>16</sup> The SJC held that since the sole witness in the Commonwealth’s case was a child, the prosecutor misspoke when referencing the corroborative testimony during her opening statement and closing argument, and in addition, defense

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following the said assault her vagina felt “sticky,” “wet, and disgusting.” *Id.* Additionally, Camila testified that whenever the defendant picked her up from school, he parked his car behind a restaurant and “place[d] his hand under her pants and underwear and into her vagina.” *Id.* Furthermore, she testified that on one occasion when she was six or seven years old, while she waited for a ride to a family party at the defendant’s apartment, the defendant walked up to Camila, pulled down his pants and underwear, and put his penis into Camila’s mouth, telling her to “suck it and do it.” *Id.* “Every time Camila slept at the defendant’s apartment, he tried to assault her. She would respond by pushing and kicking him, and the defendant would remain quiet and walk out of the room.” *Id.*

<sup>11</sup> See *Alvarez*, 103 N.E.3d at 1206 (providing evidence where prosecutor wrongfully stated there was corroboration).

<sup>12</sup> See *id.* (emphasizing outrageous testimony of Camila that majority ended up discrediting).

<sup>13</sup> See *id.* at 1208 (showing motive of prosecutor to add corroboration in closing statement).

<sup>14</sup> See *id.* at 1208-09 (explaining how prosecutor wrongfully used unsolicited evidence in closing argument). During the prosecutor’s closing argument, she stated to the jury “[m]om told you, ‘She did come home one day and ask[ed] to take a bath, and I thought it was weird, because she had taken a bath that morning.’ That’s corroboration.” *Id.* at 1209. The defense counsel objected at the close of the prosecutor’s argument and stated that there was no evidence submitted that the mother provided any sort of corroboration of Camila’s testimony that she told her mother she wanted to take a bath. *Id.* The defendant also claimed the trial judge erred in two additional ways: (1) by allowing Camila’s treating physician to testify as an expert witness, and (2) by providing the jury with inadequate instructions. *Id.* at 1214-16.

<sup>15</sup> See *Alvarez*, 103 N.E.3d at 1205 (highlighting charges defendant convicted of).

<sup>16</sup> See *id.* at 1209 (showing type of balancing test SJC conducted).

counsel's timely objection did not result in remedial jury instructions, thus, the defendant's conviction must be reversed and remanded for a new trial.<sup>17</sup>

Under Massachusetts case law, statements made during closing arguments are limited to the evidence that has been submitted throughout the trial.<sup>18</sup> If a prosecutor, in a closing argument, mistakenly includes evidence that was not presented during trial, the mistake

will be allowed only if the court is assured that the mistake did not influence the jury in their decision to convict the defendant.<sup>19</sup> Whether the mistake influenced the jury enough to affect a conviction will usually depend on whether the mistake went to the "heart of the case."<sup>20</sup> Regardless of the severity of the crime, the SJC has found prejudicial error stemming from prosecutorial misstatements, which results in an ultimate reversal of the defendant's conviction.<sup>21</sup> The SJC will determine the strength of the prosecution's case, absent the mistake, before deciphering the weight of a prosecutorial mistake.<sup>22</sup> The overall strength of the prosecution's case is often primarily reliant on the credibility of the witnesses called to testify.<sup>23</sup>

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<sup>17</sup> See *id.* at 1213 (holding that prosecutor's wrongful use of evidence not admitted during trial warranted vacating conviction).

<sup>18</sup> See *Commonwealth v. Rutherford*, 71 N.E.3d 481, 486 (Mass. 2017) (stating parameters for closing arguments).

<sup>19</sup> See *Commonwealth v. Beaudry*, 839 N.E.2d 298, 304 (Mass. 2005) (clarifying when prosecutorial mistake is non-prejudicial).

<sup>20</sup> See *Commonwealth v. Pearce*, 695 N.E.2d 1059, 1061 (Mass. 1998) (setting forth when mistake is material to case); see also *Commonwealth v. Barbosa*, 972 N.E.2d 987, 990-91 (Mass. 2012) (finding erroneously admitting hearsay to corroborate testimony of Commonwealth's witness material to jury's ultimate decision); *Commonwealth v. Rollins*, 803 N.E.2d 1256, 1260 (Mass. 2004) (introducing only police officer's witness and not others); *Commonwealth v. Walker*, 653 N.E.2d 1080, 1085 (Mass. 1995) (introducing only victim's testimony and nothing else); *Commonwealth v. Stevens*, 400 N.E.2d 261, 262 (Mass. 1980) (affirming defendant's conviction despite prosecutorial mistake because Commonwealth's case was strong regardless of mistake).

<sup>21</sup> See *Beaudry*, 839 N.E.2d at 305 (finding error in conviction when victim was sole witness); *Commonwealth v. Loguidice*, 650 N.E.2d 1254, 1255-56 (Mass. 1995) (demonstrating how prosecutorial mistakes can result in conviction reversal even if crime was severe); see also *Commonwealth v. Hrabak*, 801 N.E.2d 239, 240 (Mass. 2003) (finding Commonwealth's case weak when victim's testimony was sole evidence); *Commonwealth v. Scheffer*, 683 N.E.2d 1043, 1045 (Mass. App. Ct. 1997) (finding error when victim's testimony was only evidence); *Commonwealth v. LaCaprucia*, 671 N.E.2d 984, 985 (Mass. App. Ct. 1996) (reversing defendant's conviction because of prosecutorial mistake when sole witness was sexual assault survivor).

<sup>22</sup> See *Commonwealth v. Flebotte*, 630 N.E.2d 265, 268 (Mass. 1994) (addressing prejudicial effect of admitting improper testimony).

<sup>23</sup> Compare *Barbosa*, 972 N.E.2d at 990, and *Stevens*, 400 N.E.2d at 262, with *Beaudry*, 839 N.E.2d at 300, and *Hrabak*, 801 N.E.2d at 240 (distinguishing circumstances where victim testimony is strongly credited).

A party will often call expert witnesses to testify when their “specialized knowledge would be helpful to the jury.”<sup>24</sup> When an expert witness is the treating physician of the child victim of sexual abuse and is testifying to the characteristics of the sexually abused child, the SJC has held that the testimony must “be confined to a description of the general or typical characteristics shared by child victims of sexual abuse.”<sup>25</sup> However, the SJC has also held that certain expert testimony from a treating physician can be admitted when it would be of substantial value to the jury’s understanding of the issue at hand.<sup>26</sup> When the probative value of the expert witness testimony is used to debunk the assumption that all child victims of sexual abuse suffer physical injuries to their genitals, the SJC has held that the Commonwealth does not need to call a non-treating physician expert to testify.<sup>27</sup>

A defendant is allowed to present evidence of alleged inadequacies of police investigations, as it permits the jury to consider whether there is reasonable doubt regarding the defendant’s guilt or innocence.<sup>28</sup> Defense counsel may argue that an inadequate police investigation should lead to an acquittal for his or her client.<sup>29</sup> However, the judge ultimately has discretion in whether to provide the jury with a *Bowden* instruction.<sup>30</sup>

In *Commonwealth v. Alvarez*, the SJC reversed the defendant’s conviction and remanded the case for a new trial because the court could not

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<sup>24</sup> See *Commonwealth v. Pytou Heang*, 942 N.E.2d 927, 943 (Mass. 2011) (explaining when expert witnesses are allowed). See *Commonwealth v. Federico*, 683 N.E.2d 1035, 1037-38 (Mass. 1997) (stating characteristics of sexually abused children are proper subjects for expert witness testimony).

<sup>25</sup> See *Federico*, 683 N.E.2d at 1038 (limiting expert testimony regarding child victims of sexual abuse).

<sup>26</sup> See *id.* at 1040 (“In the absence of evidence of physical injury, a medical expert may be able to assist the jury by informing them that the lack of such evidence does not necessarily lead to the medical conclusion that the child was not abused.”).

<sup>27</sup> See *Commonwealth v. Quincy Q.*, 753 N.E.2d 781, 793-94 (Mass. 2001) (allowing treating-physician to testify as expert witness).

<sup>28</sup> See MASS. G. EVID. § 1107(a) (2018) (stating evidence of inadequate police investigation may be admissible).

<sup>29</sup> See *Commonwealth v. Fitzpatrick*, 977 N.E.2d 505, 519-20 (Mass. 2012) (summarizing holding). Defense counsel is permitted to make a *Bowden* argument regardless of whether a judge agrees to give a *Bowden* instruction to the jury. *Id.* at 520. However, a jury instruction that directs the jury to rely on evidence rather than assumptions may be perceived by the jury as undercutting a defendant’s permissible *Bowden* argument. *Id.*; see also *Commonwealth v. Gilmore*, 506 N.E.2d 883, 886 (Mass. 1987) (holding that judge’s instruction cannot undermine defendant’s argument).

<sup>30</sup> See *Commonwealth v. Lao*, 948 N.E.2d 1209, 1218 (Mass. 2011) (articulating judge’s discretion regarding *Bowden* instruction). In *Commonwealth v. Bowden*, 399 N.E.2d 482, 491 (Mass. 1980), the court held that “[t]he fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to the defendant’s guilt in the minds of the jurors.” *Id.*

assure that the “prosecutor’s improper closing argument could not have influenced the jury to convict.”<sup>31</sup> Chief Justice Gants, writing for the court, articulated that while the prosecution is allowed to argue fervently for a defendant’s conviction, prosecutors must limit their closing arguments to what was properly admitted into evidence throughout the duration of the trial.<sup>32</sup> The SJC held that even though the trial judge instructed the jury not to consider the closing argument as part of the evidence used during deliberation, the court could not “be confident that the jury recognized that the prosecutor erred and that the mother never gave this [corroborating evidence].”<sup>33</sup> Although the court recognized the seriousness of the crime for which the defendant was convicted, it was reminded that it also had vacated past defendants’ convictions when there was prejudicial error.<sup>34</sup>

The SJC recognized the potential danger in allowing a witness who personally treated the child victim of sexual abuse to testify as an expert witness.<sup>35</sup> However, the court acknowledged the importance of the testimony elicited by the Commonwealth, holding that it was not required to call a non-treating physician expert to offer an opinion that Camila’s treating physician already offered.<sup>36</sup> Additionally, the SJC identified the right of a defendant to contest the adequacy of a police investigation.<sup>37</sup> Conversely,

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<sup>31</sup> See 103 N.E.3d 1202, 1212 (Mass. 2018) (explaining limitations of closing arguments).

<sup>32</sup> See *id.* at 1209 (forbidding prosecutors from utilizing information outside of evidence during closing arguments); see also *Commonwealth v. Rutherford*, 71 N.E.3d 481, 486 (Mass. 2017) (limiting closing arguments to facts before jury).

<sup>33</sup> See *Alvarez*, 103 N.E.3d at 1210 (explaining severity of prosecutor’s misstatement). The SJC held that the prosecutor’s misstatement was the only corroborating evidence to support Camila’s testimony and the other corroboration that the prosecutor offered during the trial “amounted to almost nothing.” *Id.*

<sup>34</sup> See *Commonwealth v. Beaudry*, 839 N.E.2d 298, 305 (Mass. 2005) (acknowledging court’s history of reversing convictions for serious crimes); *Commonwealth v. Loguidice*, 650 N.E.2d 1254, 1255-56 (Mass. 1995) (demonstrating how prosecutorial mistakes can result in conviction reversal for severe crimes).

<sup>35</sup> See *Commonwealth v. Federico*, 683 N.E.2d 1035, 1039 (Mass. 1997) (acknowledging risk presented when treating physician acts as expert witness). Although the SJC recognized this risk, the court ultimately held that it had “not yet imposed the blanket prohibition proposed by the defendant that would bar a treating physician from offering any expert opinion in all child sexual abuse cases.” *Alvarez*, 103 N.E.3d at 1215.

<sup>36</sup> See *Alvarez*, 103 N.E.3d at 1216 (explaining SJC’s holding regarding physician testimony); *Commonwealth v. Quincy Q.*, 753 N.E.2d 781, 793-94 (Mass. 2001) (allowing treating-physician to testify as expert witness). The SJC acknowledged the importance of Camila’s treating physician’s (Dr. Forkey) testimony as it related to the jury’s understanding of information outside of a layperson’s knowledge. *Alvarez*, 103 N.E.3d at 1215. Dr. Forkey opined generally, that it was “‘very uncommon’ to find physical injury on the genitals of victims of sexual abuse and that ‘[t]he absence of physical trauma is not inconsistent with abuse.’” *Id.* Dr. Forkey did not explicitly reference Camila’s situation during this testimony. *Id.*

<sup>37</sup> See *Alvarez*, 103 N.E.3d at 1216 (summarizing holding). The defendant claims that the detective’s investigation into Camila’s allegations was inadequate. *Id.* at 1216.

the court held that when a judge “tells the jury to decide the case based solely on the evidence rather than on guesswork or conjecture, it is unlikely that the jury will hear that instruction as a derogatory comment on the defendant’s *Bowden* argument.”<sup>38</sup> Due to the potential impact that the prosecutor’s misstatement could have on the jury, the SJC ultimately rejected Camila’s credibility as a witness, vacated the defendant’s convictions, and remanded the case.<sup>39</sup>

Whether intended, the SJC enforced a strong precedent with its decision.<sup>40</sup> The sole testimony of a child survivor of sexual assault was invalidated because the court decided it was not strong enough to outweigh a prosecutorial mistake.<sup>41</sup> While the court asserts that its decision was not influenced by the sexual assault charges, the dissent compares the court’s history of discrediting the sole testimony of a sexual assault survivor, while crediting the testimony of witnesses and victims “in the face of an error in cases without sexual assault charges.”<sup>42</sup> It is necessary to properly evaluate

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<sup>38</sup> See *id.* at 1218 (explaining how judge’s instruction would not diminish defendant’s *Bowden* argument).

<sup>39</sup> See *id.* at 1219 (determining Camila’s credibility as witness did not outweigh mistake of prosecution).

<sup>40</sup> See *id.* at 1220 (Cypher, J., dissenting) (asserting basis for dissenting). In her dissent, Justice Cypher acknowledged the importance of the “undisputed, consistent, and clear testimony of a survivor of sexual assault.” *Id.* The majority’s decision allows a perpetrator of a heinous crime, such as child sexual assault, to walk away from any and all consequences because of a prosecutor’s slight mistake or misstatement. *Id.*

<sup>41</sup> See *id.* (acknowledging court’s decision regarding Camila’s credibility). Moreover, Justice Cypher recognizes the court’s history of assessing the testimony of sexual assault survivors more critically than the testimony of victims of other crimes. *Id.* This type of unfair, uneven analysis of testimony ultimately results in a “. . .disservice to all future victims [of sexual assault] whose interests are represented by imperfect prosecutors.” *Id.*

<sup>42</sup> See *id.* at 1221 (explaining court’s history of upholding credibility for victims of non-sexual offenses). Compare *Commonwealth v. Barbosa*, 972 N.E.2d 987, 990-98 (Mass. 2012), and *Commonwealth v. Rollins*, 803 N.E.2d 1256, 1260 (Mass. 2004), and *Commonwealth v. Walker*, 653 N.E.2d 1080, 1085 (Mass. 1995), and *Commonwealth v. Stevens*, 400 N.E.2d 261, 262 (Mass. 1980), with *Commonwealth v. Beaudry*, 839 N.E.2d 298, 305 (Mass. 2005), and *Commonwealth v. Hrabak*, 801 N.E.2d 239, 240 (Mass. 2003), and *Commonwealth v. Scheffer*, 683 N.E.2d 1043, 1045 (Mass. App. Ct. 1997), and *Commonwealth v. LaCaprucia*, 671 N.E.2d 984, 985 (Mass. App. Ct. 1996) (comparing court’s analysis of prosecutorial mistake with or without sexual assault charges present). For example, in *Barbosa*, the defendant was indicted for first degree murder and multiple firearms offenses. 972 N.E.2d at 989. The case against the defendant was “strong” even though all identifying witnesses were impeached for prior inconsistent statements and the judge erroneously admitted hearsay to corroborate the testimony of the Commonwealth’s witness. *Id.* at 990-98. Compare *Barbosa*, 972 N.E.2d at 989, with *Beaudry*, 839 N.E.2d at 300 (stating defendant was indicted by court and convicted for sexual offenses against his daughter). In *Beaudry*, the only witness to the abuse was the victim herself, and similar to *Alvarez*, the SJC held that the prosecutor’s closing argument was improper and prejudicial and reversed the defendant’s conviction. *Beaudry*, 839 N.E.2d at 300; *Alvarez*, 103 N.E.3d at 1221 (Cypher, J., dissenting). When “evaluating the Commonwealth’s evidence in the face of an error in cases without sexual assault charges, our jurisprudence frequently credits testimony of witnesses and victims . . . [y]et when performing the

and critique the effect of a prosecutorial mistake, yet it is also crucial that the court think pragmatically about the effect its decisions will have on future cases.<sup>43</sup> The prosecutorial mistake “was an insignificant portion of [the] closing argument, occupying a mere five lines out of approximately nine transcribed pages.”<sup>44</sup> The majority seems to disregard the indescribable amount of courage it took Camila to testify and recall the horrific events that she endured at the hands of someone she considered family.<sup>45</sup>

Furthermore, the SJC properly allowed the Commonwealth to call Camila’s treating physician, Dr. Forkey, as an expert witness.<sup>46</sup> Expert witness testimony is crucial in facilitating the jury’s understanding of topics that fall outside the knowledge of the average layperson.<sup>47</sup> Even though there is a potential risk in allowing a treating physician to testify as an expert witness, the SJC did not hold that Dr. Forkey’s testimony was being used as

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same analysis in cases of sexual assault, the testimony of victims appears to be given comparably less weight.” *Alvarez*, 103 N.E.3d at 1221 (Cypher, J., dissenting). Chief Justice Gants rebuts Justice Cypher’s dissent and proclaims that the inclusion of a sexual assault charge does not alter the way the court approaches the analysis. *Alvarez*, 103 N.E.3d 1213 n.4. (majority opinion). Chief Justice Gants insists that the court’s decision did not rest on its perceived credibility of Camila’s testimony, but rather the misstatement by the prosecutor and the potential effect of the mistake on the jury. *Id.*

<sup>43</sup> See *Alvarez*, 103 N.E.3d at 1220 (Cypher, J., dissenting) (admitting difficulty of evaluation). Justice Cypher acknowledged the difficulty in bringing forward a claim of sexual assault and realized that the majority’s decision had the potential to prevent future claims out of fear that perpetrators would not be punished in the face of a prosecutorial mistake. *Id.* Justice Cypher also commented on the majority’s focus on “Camila not displaying the behavioral characteristics of a ‘normal’ child who has suffered abuse” and how this focus created a “de facto corroboration requirement, necessitating a child without physical symptoms or eyewitnesses to display enough emotional trauma to be credible.” *Id.* at 1223. This type of requirement from the court forces “a child to walk a tightrope of being behaviorally symptomatic enough to be believed, but not too emotional so as to be deemed unreliable.” *Id.* at 1223-24. It is completely unreasonable to require such a reaction from any survivor of sexual assault, but especially a child survivor. *Id.* Oftentimes, there are no other witnesses to these vulgar acts and therefore it is of the upmost importance that the courts credit the valid testimony of the survivors. *Id.* at 1224.

<sup>44</sup> See *id.* at 1223 (criticizing majority’s reliance on such small error). It is unlikely that such a small portion of the prosecutor’s closing argument would have such an overwhelming effect on the jury, as to require a vacated conviction and a new trial. *Id.*

<sup>45</sup> See *id.* at 1220 (summarizing holding). Camila was able to recall, in detail, each incident of abuse and her strong testimony should have been enough to affirm the defendant’s conviction, despite the minor misstatement from the prosecutor. *Id.* at 1222.

<sup>46</sup> See *id.* at 1216 (majority opinion) (reiterating no abuse of discretion regarding physician’s testimony).

<sup>47</sup> See *Commonwealth v. Pytou Heang*, 942 N.E.2d 927, 943 (Mass. 2011) (“The purpose of expert testimony is to assist the trier of fact in understanding evidence or determining facts in areas where scientific, technical, or other specialized knowledge would be helpful.”). The SJC acknowledged its prior precedent of allowing experts to testify on the behavioral and emotional reactions of children survivors of sexual assault as this material was typically beyond the common knowledge of a jury member. *Alvarez*, 103 N.E.3d at 1214.

a mechanism to bolster Camila's credibility as a witness.<sup>48</sup> Instead, the court held that Dr. Forkey's testimony had the potential to be extremely beneficial to the jury, by way of explaining that the lack of physical injury on a sexual assault survivor does not necessarily yield the conclusion that the child was not abused.<sup>49</sup> Ultimately, Dr. Forkey's testimony was only used to help the jury understand the facts of Camila's case and therefore, it was properly admissible for the jury's consideration.<sup>50</sup>

Finally, the SJC properly concluded that the trial judge's refusal to give a *Bowden* instruction did not prejudice the defendant.<sup>51</sup> While there is truth to the defendant's assertion that risks may arise from inadequate police investigation, the trial judge ultimately has discretion in deciding to issue a *Bowden* instruction.<sup>52</sup> The trial judge's jury instruction did not undermine the validity or strength of the defendant's *Bowden* defense.<sup>53</sup> The SJC properly decided that the strength of the defendant's *Bowden* defense was reliant on the evidence provided regarding the alleged inadequacy of the police investigation.<sup>54</sup> This decision dissuades future litigants from relying on jury instructions,<sup>55</sup> and instead properly urges them to supply ample evidence in order to support their claims.<sup>55</sup>

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<sup>48</sup> See *Commonwealth v. Federico*, 683 N.E.2d 1035, 1039 (Mass. 1997) (acknowledging risk presented when treating physician acts as expert witness). The unique characteristics of sexually abused children warranted the need for expert witness testimony. *Id.* at 1037-38.

<sup>49</sup> See *Alvarez*, 103 N.E.3d at 1216 (describing why court thought physician's testimony was important). The SJC recognized the importance of Dr. Forkey's testimony since the jury may have been "under the mistaken understanding that certain types of sexual abuse always or nearly always causes physical injury or scarring in the victim" *Id.* (quoting *Federico*, 683 N.E.2d at 1039 n.13).

<sup>50</sup> See *Alvarez*, 103 N.E.3d at 1216 (explaining use of expert testimony). Dr. Forkey's testimony was elicited to ensure that the jury did not draw an improper inference from the absence of genital injury on Camila to the conclusion that the abuse never happened. *Id.*

<sup>51</sup> See *id.* at 1218 (summarizing SJC's holding regarding *Bowden* instruction).

<sup>52</sup> See *Commonwealth v. Lao*, 948 N.E.2d 1209, 1218 (Mass. 2011) (articulating judge's discretion regarding *Bowden* instruction). The defendant argued that his argument, which included a *Bowden* defense, was undermined by the trial judge's refusal to give a *Bowden* instruction to the jury. *Alvarez*, 103 N.E.3d at 1216. However, the SJC held that the trial judge's instructions did not require the jury to reject the *Bowden* defense which was raised by defense counsel. *Id.* at 1218.

<sup>53</sup> See *Alvarez*, 103 N.E.3d at 1218 (discussing other circumstances where *Bowden* argument would be undercut). When a judge instructs the jury to "decide the case based solely on the evidence rather than on guesswork or conjecture, it is unlikely that the jury will hear that instruction as a derogatory comment on the defendant's *Bowden* argument." *Id.*

<sup>54</sup> See *id.* (summarizing court's decision to rely on evidence provided regarding *Bowden* instruction).

<sup>55</sup> See *id.* (explaining court's decision regarding *Bowden* instruction). The SJC did not find any problems with the trial judge's decision to not give a *Bowden* instruction because it realized that the defendant's *Bowden* defense was not compromised by the lack of instruction. *Id.* Instead, the court focused on requiring a defendant to provide the court and jury with sufficient evidence of police investigation inadequacies to support a *Bowden* argument. *Id.*

In the end, the court's decision favored technicalities over logic and resulted in the reversal of a conviction that was properly decided. A child must possess inordinate amounts of courage to relive his or her most traumatizing moments of abuse on a witness stand and in front of a room full of strangers. While the importance of judicial proceedings and rules should not be cast aside, it is crucial that the court consider all of the effects of its decisions, especially ones that involve children subjected to the most atrocious crimes. In the midst of a very open and candid discussion regarding sexual abuse, society can only hope that the voices of sexual assault survivors are always given the credibility they rightfully deserve. Unfortunately, in *Alvarez*, the majority found that Camila's credibility did not trump the prosecutor's mistake. One can only wonder whether Camila's testimony would have been as heavily discounted by the majority if she was an adult, and if this was any crime other than sexual assault.

*Danielle Paulson*