

Appeals court rules Sussex County man may show jury photos of his body in sex assault case

By [Christopher Dela Cruz/The Star-Ledger](#)

July 24, 2009, 6:41PM

BUTLER -- A State appellate court will allow a Vernon man, who argues he is caught in a case of mistaken identity in a sex-assault case, to show a jury photos of his private parts - images he contends contradict the victim's description of her attacker.

In a decision released late this afternoon, the State Appellate Division overturned a Superior Court judge's ruling prohibiting explicit photos of Andrew Pena from being introduced as evidence in his upcoming trial in Superior Court in Morristown.

Pena's defense attorney, Alex Pagano, wanted the photos admitted into evidence at trial because he said they dispute the woman's description of her attacker's genitals.

On Wednesday, Superior Court Judge Salem Ahto ruled the photos were inadmissible and agreed with prosecutors who wanted the photos blocked. A defense representative took the photos of Pena in jail in September, they argued, and there is no way to recreate in jail the motivation and circumstances the assailant had during the attack two years ago.

The victim picked Pena out of a lineup, a fingerprint from her vehicle was a match to Pena and a footprint matched his shoe, authorities said. Pena also told police he was at the scene, prosecutors said.

A ruling by a two-judge appellate panel stated the photos go to the heart of a defendant's constitutional right to confront witnesses, and prosecution concerns involve "the weight of the evidence, not its admissibility," meaning it should be left up to a jury to decide the relevance of the photos.

"We knew the judge was wrong -- we wanted to protect our client's rights," Pagano said.

Morris County Prosecutor Robert Bianchi said his office will not appeal the latest ruling.

"We're ready to go forward. I'm glad we resolved it now, rather than go through a whole trial and have it reversed later on," Bianchi said. "We're not afraid of the ruling. We'll confront the evidence."

Jury selection has been under way in the trial in Superior Court in Morristown, and is expected to be completed Monday, followed by opening arguments.

The assault occurred Jan. 28, 2007, at 3:15 a.m. when the woman waited inside a car parked near G&A Bagels off southbound Route 23 as her friends went inside, an arrest affidavit said. A man sweeping outside the store told the woman she couldn't park there and directed her to the back of the building, where the attack occurred, the affidavit said.