

Defense attorney says photos will help clear Vernon man accused of sexual assault in Butler

By [Katherine Santiago/The Star-Ledger](#)

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BUTLER -- A lawyer today told a jury photographic evidence of his client's genitals will help prove the Vernon man did not sexually assault a woman outside a Butler bagel shop.

Defense attorney Alex Pagano said Andrew Pena, 41, was near the scene of the 2007 assault, but he was not the attacker.



Patti Sapone/The Star-Ledger

Andrew Pena, left, and his attorney Alex Pagano, center, listens to Robert Lane, executive assistant prosecutor, during opening arguments at Morris County Superior Court today.

"It was a vile, despicable act of rape, but Mr. Pena didn't do it," Pagano said during opening arguments in Superior Court in Morristown.

He said photos taken of Pena's genitals were crucial to his client's defense and will contradict the woman's description of the attacker having a larger-than-normal penis.

Last week, the state Appellate Division overturned a Superior Court judge's ruling prohibiting explicit photos of the defendant's genitals. Prosecutors had wanted the photos blocked because they said there is no way to recreate in jail the motivation and circumstances the assailant had during the attack two years ago.

Today, Pagano said Pena was a victim in the case.

"Being prosecuted for something you didn't do makes you a very tragic victim," he said.

But moments after the 13-member jury was empanelled late this afternoon, Morris County Executive Assistant Prosecutor Robert Lane told jurors the evidence will show Pena exposed himself and "violently" pulled the woman out of her parked Saturn, then removed her clothes and underwear and forced her to touch his genitals.

"It's the worst nightmare any girl could be put through," Lane told the jury.

The assault occurred Jan. 28, 2007, at 3:15 a.m. when the woman, then 19, waited for friends near G&A Bagels, off Route 23. A man sweeping outside the store told the woman she couldn't park where she was and directed her to the back of the building.

Lane said a matching fingerprint on the car and a matching footprint made in the light snow, along with the victim's identification of the attacker from a lineup, are being offered as evidence.

The prosecutor also said the boot print at the scene matched the shoes recovered at Pena's house during a police search. He added tire marks at the scene are consistent with the those on the vehicle Pena owned.

Lane also said that following Pena's arrest, the defendant blurted out, "I was there ... I told the victim to move her car because she was in my way."

Lane added, "You're going to hear him place himself at the crime scene."

Pagano suggested that because the bagel shop is open 24 hours and was busy at the time, the attacker could have been virtually anyone.

He also said there are two doors on the side of the shop, one of which leads to upstairs apartments currently occupied by three people.

"There were many other people who could have committed this crime," Pagano said.

The defense attorney said the attacker had been described as wearing a red snowboarding jacket and colorful cap, and only a "small portion" of his face was visible. He said neither the coat nor the cap was found when police searched Pena's home.

"Their evidence is not going to show that Mr. Pena is guilty. It won't even come close," Pagano said.

Pena, formerly of Pompton Lakes, was charged Feb. 1, 2007, in Butler with sexual assault, criminal sexual contact and criminal restraint in the January attack. He has pleaded not guilty and remains in the Morris County jail in lieu of posting \$1 million bail.

He was convicted in Wayne in 2002 and Paramus in 2003 on disorderly persons charges of lewdness for exposing his genitals to two women in store parking lots during daytime hours, according to testimony and court records.

The victims of the lewd acts testified in Superior Court in February. The Wayne victim, who was 20 at the time, said she heard a man in the car parked next to hers say "You are so beautiful." When she turned and saw the man masturbating, she wrote down his license plate number and called police. In court, she identified that man as Pena.

The victim in the Paramus incident was 17 when she saw a man with his genitals exposed at the Garden State Plaza mall. She said she thought he was urinating on a car, but he waved at her while holding his genitals. She then alerted mall security. In court, that victim could not positively identify Pena as the Paramus suspect.

It has not been determined whether those prior acts will be introduced as evidence.

The trial resumes Tuesday before Superior Court Judge Salem Ahto.