COURT OF APPEALS CURTAILS USE OF *MOLINEUX* AND *SANDOVAL* EVDENCE

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INTRODUCTION

In a recent ruling that has riled and rattled sex crime victims and their advocates, the Court of Appeals reversed Harvey Weinstein’s convictions for Criminal Sex Act 1st degree and Rape 3d degree because the trial court erroneously admitted testimony of prior uncharged acts of non-consensual sex between the once-powerful movie mogul and three aspiring actress, and permitted the prosecution to cross examine him about those and a slew of other bad acts that would have assailed his general character without shedding any meaningful light on his credibility as a witness had he testified.

In the court’s view, evidence of the other sexual encounters which occurred both before and after those charged in the indictment was unnecessary and unduly prejudicial because the defendant’s intent to have forcible sex with the victims, if believed by the jury, was readily inferable from the acts themselves. Therefore, what was offered as proof of the defendant’s intent to engage in forcible sex and knowledge of the absence of consent constituted impermissible evidence of the defendant’s predisposition toward sexual violence (*People v Weinstein*, \_NY3d\_, 24 NY Slip Op 02222 [2024], citing *People v Molineux*, 168 NY 264 [1901]).

Moreover, the trial court’s decision to allow the prosecution to cross examine the defendant about the charged crimes, uncharged sexual encounters, and other bad acts that the Court described as “breathtakingly inclusive” of loathsome behavior not particularly germane to credibility, in concert with the *Molineux* ruling, deprived defendant of his right to a fair trial and the opportunity to present a complete defense. (Citing, inter alia, *People v Crimmins*, 36 NY2d 230 [1975], *California v Trombetta*, 467 US 479 [1984] and *Crane v Kentucky*, 476 US 683 [1985]).

THE CHARGES AND COMPETING THEORIES OF THE CASE

The defendant was tried and convicted of Criminal Sex Act 1st degree and Rape 3rd degree (and acquitted of Rape 1st degree and Predatory Sexual Assault) stemming from sexual encounters with two different victims (A and B) in 2006 and 2013 respectively after he allegedly raped an actress (C) in the early 1990’s. He was sentenced to a determinate state prison term of 23 years followed by 5 years of post-release supervision (PRS). (He is currently serving a 16-year-sentence in California for similar crimes committed there. An appeal is pending).

The People’s theory was that Weinstein orchestrated private encounters with aspiring actresses in either his hotel room or apartment in Manhattan, wherein on the pretext of helping them with their careers, had non-consensual sex with them by use of physical force (e.g., blocking their exit, pulling them into the bedroom, throwing them on the bed) to overcome their resistance.

The defense, by contrast, argued that the defendant believed these liaisons to be consensual sexual transactions in which the complainants willingly traded sexual favors for the promise of help with their careers (one got a job as a production assistant on a television show) and entrée into the glamorous world of Hollywood (including attending exclusive Academy Award receptions, and travelling overseas with one of the most powerful men in show business).

THE CASE AGAINST WEINSTEIN

Victim A testified that she had met Weinstein in 2004 in his hotel room to discuss a job opportunity. He commented on her body and asked for a massage which she refused. A week later, he invited her to travel abroad with him and on one occasion, barged into her apartment.

Two years later, he invited her to a movie premiere in Los Angeles. The night before in New York City, he invited her to his apartment where he tried to kiss her, which she rebuffed. He then pulled her toward him and groped her after which he took her into the bedroom and pushed her onto the bed. As she resisted, he held down her wrists, pressed down with his considerable girth and, after she relented, performed an act of oral sex.

Sometime after the LA trip, he had sexual intercourse with her (this time without physical resistance) and called her derogatory names. She said that despite her confusion and embarrassment, she continued to maintain a professional relationship with Weinstein because she wanted employment.

Over the next couple of years, she met with him in London to “pitch an idea,” and sent him e-mails thanking him for his support with “lots of love.”

Victim B met Weinstein at a party in 2013. After expressing interest in her career, he took her to an Academy Award dinner and later invited her to his hotel room where he tried to kiss her “like crazy.” Thereafter, she tried to establish a “real relationship” with him which involved several sexual encounters. On one occasion, he attempted to inveigle into her into a menage-a-trois with another actress which they both declined.

Sometime later, at a Manhattan hotel, Weinstein invited her to his room and asked for sex for which she said there was “no time.” He then blocked her exit, told her to undress. He directed her to get on the bed where he had sex with her against her wishes. She said he also had forcible sex with her in a LA hotel room.

She said she maintained a relationship with Weinstein (which included occasional sexual encounters and friendly emails) out of fear for her safety and to maintain her professional prospects. When he later learned that she was seeing another actor, he reportedly told her that she owed him “one more time” (*Id*., at \*4).

Victim C, a veteran actress testified that Weinstein raped her in her New York City apartment in 1994 which was not reported until years later when the above-referenced matters came into public light. He continued to solicit her attention after the incident and had her act in a movie that his company was producing. (She said that she was unaware of the producer until after-the fact).

THE *MOLINEUX* WITNESSES

Victim 1 testified that she met the defendant in 2004 in a New York City night club where he offered to help with her career. She later met him in a hotel room for a “networking event” which devolved into a groping incident that made her recoil. A few weeks later, he met her in another hotel room, dressed only in a bathrobe. He said he would get her work only if she had sex with him and his assistant. After she refused, he said, “you’ll never make it in this business if you don’t change your attitude.”

Victim 2, a waitress/ “want-to-be” actress, met Weinstein in 2005 in a lounge where he gave her his contact information. He then escorted her to a secluded terrace where he pushed up against her and started to pleasure himself. A couple of weeks later, she was invited to read for a part but was told upon arrival at the studio that Mr. Weinstein wanted to see her at his apartment. When she arrived, he dragged her into the bedroom, threw her down on the bed and raped her. He then brought her back to the studio. She did not get the part.

Victim 3, an actress, was introduced to Weinstein in LA in 2013. He invited her to his hotel room where he led her to the bathroom, pulled down her dress and masturbated. When she protested, he replied, “how else can I know if you can act.”

At the conclusion of these witnesses, the trial court instructed the jury that their testimony was admitted on the issues of whether the defendant intended to engage in the sex acts complained of and the victims consented. (The final instructions included the issues of forcible compulsion and lack of consent).

The People were also permitted to call a forensic psychologist to testify about counter-intuitive behaviors of sexual assault victims (e.g., maintaining a relationship with their offenders) and to dispel certain “rape-myths” (e.g., that most rapes are committee by strangers), and the defense was allowed to call an expert on the effects of trauma on human memory.

AD AFFIRMS

The First Department (207 AD3d 33 [1st Dept 2022]) affirmed the convictions, finding that the trial court did not abuse its discretion in admitting the *Molineux* evidence and in ruling that the defense could cross examine the defendant about the above-referenced conduct as well other bad acts including that the defendant allegedly: directed a witness to lie to his wife, applied for a passport with a false social security number, told a woman he could ruin her professionally after which he offered her a book deal, withdrew from a business deal and encouraged others to pull their financing, hid a woman’s clothes, forced his staff to superimpose an actresses’ head-shot onto a photo of another woman’s nude body for a movie poster, scheduled a meeting with a woman under false pretenses, threatened employees, threw food at a restaurant, threated to cut off a colleague’s private parts and assaulted his own brother in a meeting.

The court held that the *Molineux* evidence was relevant to show that the defendant knew or should have known from his past experiences with unwilling actresses that the victims of the charged crimes would not consent to have sex with him as a quid-pro-quo for career assistance absent the use of forcible compulsion. In the court’s view, their consent was irrelevant to the defendant whose only interest in them was sexual.

COURT OF APPEALS REVERSES

The Court held that the dual rulings had a “synergistic” effect of bolstering the victims’ testimony with impermissible propensity evidence and in thwarting his right to present a defense (i.e., testify) by the threat of cross examination about many prior bad acts that painted him as an odious creature worthy of revulsion and contempt rather than just disbelief (citing, inter alia, *People v Grant*, 7 NY3d 421 [2006], *People v Wing*, 63 NY2d 754 [1984]).

Noting that the entire case turned on the victims’ credibility (which the defense attacked, in part, by highlighting their self-serving motives and continued contact with Weinstein), the court deemed it an abuse of discretion to admit untested allegations of bad behavior which effectively decimated the defendant’s character but shed little if any light on relevant issues in the case and had little bearing on his credibility.

BLISTERING DISSENTS

The dissenting judges (Singas, J. and Cannataro, J,), laid into the majority for setting back hard-won advances in Evidence Law based on outdated and stereotypical notions that ignore or misapprehend the dynamics and complexities of sexual offenses involving parties who know each other and experience an imbalance of power between them (citing, inter alia, People v Taylor, 75 NY2d 277 [1990]).

The dissenters were baffled by the majority’s determination that the uncharged sexual assaults were not relevant (as opposed to unfairly prejudicial) because, in their view, those incidents tended to dispel the defense’s theory that the defendant believed that the victims of the charged crimes consented to having sex with him in exchange for the career boost that he could provide them.

As the dissenter’s saw it, since a good-faith belief (in consent) can negate the mens rea element of the crime, the jury, in theory at least, could have credited the victims’ testimony and still conclude that the defendant honestly thought that he had their consent (based on their desire to advance their careers).

Consequently, since the defendant’s mental state and the issue of consent were squarely in issue in a case where the defense attacked the victims’ credibility (by suggesting they consented for self-serving reasons and continued to engage with the defendant), the other incidents were relevant to show that the defendant had to know from experience that force would be necessary to accomplish his singular objective.

Consequently, in the dissenters’ view, these prior acts were probative of the defendant’s intent to engage in sex by forcible compulsion and of his knowledge that consent was not forthcoming. As the dissent (Singas, J.) observed, “these *Molineux* witnesses’ negative reactions to the defendant’s sexual advances elucidated for the jury that the defendant was fully aware that he could not assume consent simply because they crossed the threshold into his apartment or hotel room” (*Id*., at \*23, citing, inter alia, *People v Bradley*, 20 NY3d 128 [2012]).

Similarly, the other dissenter noted that the (*Molineux*) evidence was properly admitted showing that the sex was not transactional (as the defense alleged) but was part of situations devised by the defendant to engage in sex with the victims regardless of their consent.

Both dissenters agreed that the trial court did not abuse its discretion in its Sandoval rulings since the bad acts were either directly probative of dishonesty or demonstrated the defendant’s willingness to advance his own self-interest of that of others.

PENULTIMATE THOUGHT

After, Weinstein, defense counsel representing accused sex offenders should make sure that trial judges think twice before opening the flood gates to a torrent of prior bad act evidence that has only marginal relevance to material issues in the case or to the defendant’s credibility.

In the *Molineux* context, the People must first demonstrate the relevance of the proposed evidence to some issue or than propensity and explain why it’s necessary (e.g., to prove, motive, intent knowledge etc. which is not readily inferable from the act itself), and then the court must balance the probative value of such evidence against the potential for undue prejudice (i.e., confusing or misleading the jury or suggesting a predisposition toward criminality).

Conversely, under *Sandoval*, counsel should be prepared to demonstrate how and why the proposed cross examination would delve into matters that are either too remote, not probative of truthfulness, or just too inflammatory to be mentioned.

As *Molineux* observed in 1901, “no person accused of illegality may be judged on proof of uncharged crimes that serve only to establish (his/her) propensity for criminal behavior” (168 NY at 310). And, as noted in *Weinstein* 123 years later, prior bad act evidence should be limited to conduct that truly bears on credibility, and it is an abuse of discretion to admit untested allegations of nothing more than bad behavior that destroys a defendant’s character.

LEGISLATIVE (OVER)REACTION

In the wake of the *Weinstein* reversal, the New York State Senate passed a bill that would permit the introduction of prior of prior sexual assaults into evidence at trial. The bill would bring New York into sync with California’s Evidence Code (Evidence Code § 1108) which allows evidence of uncharged sexual offenses to show the defendant’s propensity toward such conduct (*People v Fitch*, 55 Cal.App.4th 172 [1997]). Cooler heads, however, prevailed, and the bill did not pass the assembly. For the moment, the goal posts will remain in place.