

NEW YORK COURT OF APPEALS ROUNDUP

COURT OF APPEALS OVERTURNS WEINSTEIN CRIMINAL CONVICTION

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The Court of Appeals recently overturned the criminal conviction of noted Hollywood producer Harvey Weinstein. The majority opinion, written by Judge Jenny Rivera and joined by Chief Judge Rowan D. Wilson, Appellate Division, Second Department Justice Betsy Barros and Appellate Division, Third Department Justice Christine M. Clark, reversed a decision of the Appellate Division, First Department that had affirmed Weinstein's conviction. Judge Madeline Singas wrote a dissenting opinion joined by Judges Michael Garcia and Anthony Cannataro, and Cannataro wrote a dissenting opinion joined by Singas and Garcia. Judges Shirley Troutman and Caitlin Halligan took no part in the decision.

In an extremely well-publicized case, the defendant was charged by the Manhattan District Attorney's Office with one count of first-degree criminal sexual act under Penal Law Section 130.50(1) based on an alleged sexual assault on a victim (Complainant A) in July 2006; one count of first-degree rape under Penal Law Section 130.35(1) and one count of third-degree rape under Penal Law Section 130.25(3) based on an alleged sexual assault on a second victim (Complainant B) in March 2013; and two counts of predatory sexual assault under Penal Law Section 130.95(2) based on allegations that he engaged in the alleged sexual assaults against Complainants A and B after having raped a third victim in 1993 or 1994.

The trial court granted the prosecution's pretrial application to admit testimony regarding certain uncharged crimes and other bad acts pursuant to *People v. Molineux*, 168 NY 264 (1901), in order to establish defendant's intent and his understanding of the complainants' lack of consent. *People v. Weinstein*, 207 A.D.3d 33, 40 (1st Dep't 2022). The prosecution was permitted to adduce testimony, inter alia, from three other women (the *Molineux* witnesses) regarding the defendant's sexual misconduct toward them before and after the charged conduct at issue in this case.

The court also granted the prosecution's pretrial application, pursuant to *People v. Sandoval*, 34 NY2d 371 (1974), to cross-examine defendant regarding 28 prior bad acts over an almost 30-year period including, inter alia, the sex offenses against the three *Molineux* witnesses, and whether defendant used a friend's Social Security number to obtain a passport, told people to lie to his wife, scheduled a business meeting with a woman under false pretenses, abandoned a colleague by the side of a road in a foreign country, screamed and cursed at restaurant staff, told a private intelligence firm to manipulate or lie to people, physically attacked his brother, threatened to cut off a colleague's genitals with gardening shears and engaged in other acts of violence and bullying. *Weinstein*, 207 A.D.3d at 68.

The trial court denied defendant's motion to dismiss the third-degree rape charge on statute of limitations grounds and defendant proceeded to trial before a jury on all counts. The evidence at trial included testimony from Complainants A and B. They both testified about incidents in which the defendant allegedly forced them to engage in sexual acts against their will. They both also testified about continued apparently friendly personal and professional contact with the defendant after the incidents, and one of the complainants testified that she subsequently engaged in a consensual sexual relationship with the defendant.

The three *Molineux* witnesses testified about defendant's unwanted sexual advances under the pretext of meeting with them about their acting careers. After the three witnesses testified, the court instructed the jury that their testimony could not be considered to determine whether the defendant had a propensity to commit the charged offenses, but rather could only be considered with respect to "the question of whether the defendant intended to engage in the sexual acts, and whether each of the complaining witnesses consented."

The defendant did not testify, but during cross-examination and summations his counsel questioned the credibility of the complainants based on their continued personal and professional relationship with defendant after the alleged assault and, in the case of one complainant, her subsequent consensual relationship with defendant.

The defendant was acquitted of both counts of predatory sexual assault and the first-degree rape count, but was convicted of criminal sexual act in the first degree and rape in the third degree. He was sentenced to 23 years in prison followed by five years of post-release supervision. The defendant appealed to the First Department, which affirmed his conviction in a unanimous decision. *Weinstein*, 207 A.D.3d at 72. Leave to appeal was granted by the Court of Appeals.

The majority rejected the defendant's argument that the third-degree rape conviction should be reversed because the charge was filed 69 days outside CPL 30.10(2)(b)'s then-applicable five-year statute of limitations. The prosecution had relied on the tolling provision of CPL 30.10(4)(a), which excludes periods of time during which a defendant is not in New York.

The defendant argued that the tolling provision only applies to non-residents, but the court found no support for the defendant's interpretation in the statute's text or in authorities applying the statute and it affirmed the lower courts' ruling that the charge was timely filed.

The majority did find, however, that the trial court's admission of the *Molineux* witnesses' testimony and its *Sandoval* ruling constituted reversible error.

The majority explained the scope and purpose of *Molineux*'s general prohibition on the introduction of evidence of other, uncharged crimes. It noted that such evidence cannot be admitted if it only shows the defendant's propensity to commit the charged offense, but that *Molineux* recognized several non-exclusive exceptions such as when the evidence helps to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more related crimes, and the identity of the person charged. 168 NY at 293.

An appellate court reviewing a *Molineux* ruling follows a two-step process. First, the court determines whether the prosecution has identified an issue other than propensity to which the evidence is relevant. This is a question of law subject to de novo review. If the court determines that the evidence is relevant to an issue other than propensity, then the court balances the evidence's probative value against the prejudice its introduction caused the defendant. The lower court's application of this balancing test is subject to review on an abuse of discretion standard.

The majority found that the trial court's ruling here was error, as a matter of law, because the testimony of the three *Molineux* witnesses was not necessary for any non-propensity purpose. The majority rejected the argument that the testimony was relevant to the issue of consent and noted that there is no equivocality regarding consent when a victim says no to a sexual attack and attempts to physically resist their attacker as was alleged here.

The majority also found that the trial court's *Sandoval* ruling violated defendant's right to testify and was an abuse of discretion. Prior bad acts can be admissible in certain circumstances such as when they tend to show a willingness on the part of the defendant to place the advancement of their self-interest ahead of the interests of society because the expectation is that they might do so again on the witness stand. While admitting that the prior conduct at issue was "appalling, shameful and repulsive," the majority found that it had little probative value as to the defendant's lack of veracity and, accordingly, was inadmissible.

There were two strongly worded dissents by Singas and Cannataro. They argued that consent was a real issue in this case and that the trial court's discretionary rulings on the prosecution's *Molineux* and *Sandoval* applications should not be disturbed on appeal. They also expressed serious concern with the effect that the majority's ruling will have on sexual violence prosecutions in the future.

Although the defendant's conviction was reversed by the Court of Appeals, he will not be enjoying freedom any time soon as the Manhattan District Attorney's Office has announced its intention to retry him. In addition, he was convicted of separate sexual offenses in Los Angeles and will serve a 16-year prison sentence in California after serving his time in New York or receiving an acquittal at retrial unless his pending appeal of the California conviction is ultimately successful.

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