DEFENDING SEX OFFENSE CASES IN THE WAKE OF WEINSTEIN

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June 30th, 2020

In early March of this year, not long before the reality of COVID 19 hit home, former Hollywood/Manhattan movie mogul and Oscar-winning producer (for Pulp Fiction and Shakespeare in Love), Harvey Weinstein was hit with the harsh reality of a combined 23-year-sentence in state prison upon his convictions for Criminal Sex Act 1st degree (a class B felony) and Rape 3rd degree (a Class E felony) following a jury trial in State Supreme Court in Manhattan.

After several reportedly exhausting and stressful days of deliberation, the jury of seven men and five women found Weinstein guilty of these two offenses involving the 2006 sexual assault upon a former production assistant in Weinstein’s apartment and the 2013 rape of an aspiring actress in a Manhattan hotel.

The jury acquitted Weinstein of Rape 1st degree in connection with the 2013 incident and found him not guilty of Predatory Sexual Assault (which carried a potential life sentence), charged in connection with both incidents. (They were based on a 30-year-old uncharged claim of forcible rape [which the jury apparently rejected] by another actress who testified that Weinstein barged into her apartment [though allowed in by a doorman], and attacked her. She later described the incident as “that crazy thing I did with Harvey “and did not recall whether it happened in 2003 or 2004.

The Manhattan District Attorney, who had come under fire from the media and victim advocacy groups for taking a pass on prosecuting Weinstein in 2015 for the alleged groping of an Italian actress during a “business meeting” despite the presence of a taped controlled call in which Weinstein allegedly apologized, and in 2011 for not prosecuting a wealthy financier for allegedly raping a hotel maid in 2004, and for declining to go after Weinstein for the alleged sexual assault of a college student (in a meeting to discuss “acting opportunities”), back in 2004, hailed the guilty verdict as ushering in a new era for sex offense prosecutions.

In each case, the District Attorney, like many prosecutors, appears to have been deterred from going forward by the belief that the victims carried too much baggage (inconsistencies in their stories or prior allegedly false or unfounded accusations against others), to make them credible enough to establish the defendant’s guilt beyond a reasonable doubt.

Emboldened by the jury’s verdict (despite evidence that the victims continued to carry on friendly and  sexual relationships with Weinstein after the fact), the DA made it clear that sexual assault is not just a crime committed by strangers upon unsuspecting victims in dark alleys, but involve men who not only know their victims, but use their power over their careers and lives to control them and keep them silent.

During the trial, prosecutors portrayed Weinstein as a vicious and manipulative sexual predator who used his power and influence not only to take advantage of his victims, but to ensure their silence by threatening to ruin them professionally if they spoke against him. Prosecutors also took on the defense’s “continued contact with Weinstein” credibility attack by arguing that it was all part of the defendant’s efforts to keep his potential accusers close and under his controlling influence.

Apparently, Weinstein who had reportedly abused over 90 women going as far back as 1978, had paid some of them off to keep them quiet. Others who rebuffed him were reportedly maligned by him in the industry as being “difficult to work with,” which was hardly helpful to their careers.

Weinstein’s defense attorney, a prominent female trial lawyer, went after the victims, portraying them as opportunists who used sex with Weinstein (however unpleasant it may have been),  to further their own careers only to change their tune from consent to compulsion after stories that chronicled  a long and sordid history of sexual abuse of actresses by Weinstein were reported in the New Yorker Magazine and New York Times in October 2017. Not long thereafter, Weinstein was indicted for the sexual assaults upon the two women whose complaints resulted in the aforementioned convictions.

The cross examination of one of the victims which was described as blistering, caused her to sob uncontrollably and experience a panic attack which prompted the judge to adjourn the proceedings to another day. How the jury responded to this approach is unclear, but they did acquit the defendant of the more serious rape charge, finding insufficient evidence of forcible compulsion, but enough to establish the absence of consent.

Critical to the People’s case, it seems, was testimony from three other actresses who recounted similar sexual assaults by Weinstein (allegedly committed on the pretext of discussing their careers or movie roles), in his hotel room or his apartment. This evidence of prior uncharged crimes (which were otherwise barred by the statute of limitations), was admitted to establish a pattern of abuse, i.e. common scheme or plan. (See People v. Molineux 168 NY 264 [1901]).

Similar evidence also appeared to carry the day in the second trial of Bill Cosby after the trial court admitted testimony from five victims of uncharged similar sex crimes allegedly committed by the once-popular comedian. In the first trial which resulted in a hung jury/mistrial, only one other witness was permitted to testify about prior bad acts. In that case, as with Weinstein, there was clearly strength in numbers (and presumably testimony that the jury found sufficiently credible to establish guilt beyond a reasonable doubt).

At Weinstein’s sentencing, the judge not only took into account the uncharged crimes described by the other alleged victims, but also considered the defendant’s long history of (now reported) abuse involving many other victims. The defense described the sentence upon a 67-year-old, ailing person (Weinstein who recently had back surgery, was escorted from court in a wheelchair), with no prior convictions, as an overreaction to public pressure and political correctness. Victim Advocates hailed it as just desserts for a violent sexual predator who had been using his power and privilege to stifle his victims (only one had spoken out publicly against him before 2017) and evade punishment for decades.

Also important to the prosecution’s case was the testimony of Barbara Ziv, a psychologist who also testified for the prosecution in the Cosby case. The purpose of her testimony, which the jury appears to have credited, was to educate the jury by debunking certain myths and misconceptions about rape (e.g. that it occurs mostly between strangers when the opposite is true), and to explain why victims (whether wives, girlfriends or acquaintances), may continue to have contact (including sexual relations) with their abusers (e.g. in an effort to rationalize or normalize the traumatic event, because they may depend on that person in some way, whether personally or professionally, or out of fear of reprisal); and may not report the offense until long after the fact, if at all (e.g. out of embarrassment, shame, guilt, self-blame, fear of being dismissed or discouraged  by insensitive police or disbelieved by pusillanimous prosecutors).

If the Weinstein case has indeed enlightened the public (and by extension future juries), to the dynamics and complexities of sexual abuse and its effects on victim behavior in the age of the  “Me Too” movement, then criminal defense attorneys who represent defendants accused of sex crimes are well advised to take great care in terms of how they go about selecting jurors, challenging the People’s proof (in particular, cross examining  victims) and framing their defenses.

Prosecutors may well be more likely than ever before not only to pursue more indictments, but to call expert witnesses to explain counter-intuitive victim behaviors as symptoms of the abuse rather than as a basis for incredulity. That is why counsel should consider spending as much time in voir dire as the court will  allow exploring jurors’ attitudes about sexual assault (e.g. “has anyone here or close to you been a victim of  sexual assault, and, if so, how does  it affect you and your ability to be a  fair juror in this case,?” “Does anyone think that if a person accuses another person of sexual assault, then it probably happened, i.e. is the fact of an accusation alone enough to make you believe that it probably happened or should such an accusation be tested, like any other serious accusation, to see if it is credible?” (Questioning along these lines may, depending on the circumstances, have to take place in private especially if someone has been a victim or is close to someone who was a victim).

Jurors (not unlike any member of the public), undoubtedly have a wide range of opinions and beliefs about people who claim to be the victims of sexual assault. When, for example, Christine Blasey Ford testified before the United States (US) Senate about an alleged sexual attack upon her over thirty years ago by (now US Supreme Court Justice/then nominee) Brett Kavanaugh, some commentators described her as highly credible, even before she testified.

Others described her as appearing genuine, unpolished and down-to-earth when she answered questions from Democratic senators as well as from the female prosecutor retained by the Republicans to cross examine her. Still others, including former sex crime prosecutors and defense attorneys, described her as incredible based on her inability, among other things, to accurately recount when and where the incident occurred and who all was present.

Kavanaugh, in contrast, depending on where one sits, came across as either a humble and then justifiably indignant victim of an eleventh-hour ambush by Democrats bent on blocking his appointment with false accusations, or as a privileged, petulant ex-frat boy who drank too much in his youth, abused women and got away with it. Admittedly, the proceedings were a  circus-like spectacle of a judicial confirmation hearing (and not a trial with a reasonable doubt standard of proof), but obviously, as far as the controlling voices of the Senate were concerned, Blasey Ford’s testimony was not enough to prevent Kavanaugh’s ascension to the nation’s  highest court.

The point is that counsel has to explore prospective jurors’ attitudes about such matters before putting them in charge of their client’s fate. Someone who thinks that all such victims must be telling the truth, or who take offense when a victim’s credibility is challenged on cross examination, whether, with prior inconsistent statements, evidence of bias, motive to fabricate or behavior that belies a sexual attack, should probably not be seated.

Counsel should also find out whether prospective jurors have any particular feelings about the Me Too movement (or other similar causes) or whether they belong to, support or otherwise follow any victim advocate groups

That said, counsel must tread firmly but cautiously when attacking the People’s proof, making sure to confront the victim directly but always with respect and civility, not only because they’ve already been through some version of hell, but also to avoid coming across as a villain or bully who is re-victimizing them by putting them on trial for telling their story. And, if you are going to go after the victim for lying, you had better have the goods and make sure that there is no credible, sympathetic, alternative explanation (e.g. “I told the admitting nurse I was raped by  a stranger because my boyfriend [the actual rapist], was right outside the room when I spoke to her.”).

 It is probably a good idea to tell jurors during voir dire that you will be challenging the victim’s testimony, and make sure that they understand why you will be doing so (and eliminate those people who appear uncomfortable with or take offense at the idea). It may also be advisable to ask questions that underscore the importance of the presumption of innocence, burden of proof, (no adverse inference if the defendant doesn’t testify), and make sure, to the extent that it’s possible, that jurors embrace the notion that the right to a fair trial by an impartial jury includes the right of confrontation of one’s accusers. (Jurors should also be forewarned of any unpleasant or graphic evidence that they may see or hear-tell about, and counsel should excuse any jurors who may equate emotional testimony with automatic guilt).

If the People call an expert witness to describe or explain counter-intuitive victim behaviors (e.g. delayed reporting, remaining with the offender, recanting etc.), counsel must prepare for cross examination and attempt, where appropriate, to get the witness to concede that sometimes people remain with their alleged assailant because they were not, in fact, assaulted (or the encounter was not as violent, one-sided or “non-consensual” as described), and that sometimes (especially in connection with incidents occurring a long  time ago), people can make up facts that did not actually happen, or add details that inaccurately embellish the story.

In appropriate cases, counsel may also want to consider calling an expert witness to testify about the malleability and fallibility of human memory which, especially in relation to traumatic or stressful events, can cause people to add false details over time that they may well believe to be true

A famous example involves Brian Williams, former NBC News anchor who was relegated to the late-night spot on MSNBC for falsely recounting that he was in a helicopter that was shot down by ground-fire when he was reporting on the invasion of Iraq in 2003. When he first reported the story, he correctly stated that he was in a helicopter flying behind the one that was hit, but after several years and many re-tellings, the story changed to the more harrowing rendition. While many thought that he purposely lied to burnish his reputation, others said that it made no sense for him to do so in light of his original, on-the-record rendition and the fact that others involved could (and readily did) refute his later account.

Experts on human memory have explained that our memory is not, contrary to popular belief, like a video tape that can be replayed with accuracy and completeness. Rather, when we recall an event, we retrieve bits and pieces which can be infused with added details which actually did not happen. With traumatic or chaotic events (e.g. being caught in the path of gunfire or sexually assaulted), the brain may focus only on those details essential to survival and the blanks may be filled in later with added facts [whether real or imagined],which make up the new narrative.

Also, the act of recounting an event (i.e.re-activation of episodic memory), reportedly can trigger those parts of the brain that are involved in both truth-telling and fabrication which can result in a combination of fact and fiction, all of which the teller may believe to be true. (This may be worth considering when cross examining victims who may sincerely believe that what they’re saying happened actually happened even if it didn’t. So rather than paint the victim as a vindictive liar, (which may be appropriate in some instances), it may be better to refer to her as misguided or possibly deluded by jumbled memories.

Other high-profile examples include Hillary Clinton’s erroneous report of coming under direct gunfire on a Bosnian air strip, and George W. Bush’s recounting of watching the plane (on tv) hit the World Trade Center when in fact he was walking into a Florida grade-school classroom to read a story to a group of young children. (Whether they were “making up stories” as politicians sometimes do or simply misremembering and embellishing the details of stressful events is uncertain, but suffice it to say that there are other possible  explanations that may account for such phenomena besides bald-face mendacity).

When the verdict was announced in New York, Harvey Weinstein was reported to have muttered, “ but I’m innocent” before being shuffled out of court in handcuffs and then taken by ambulance to the hospital on account of severe chest pain. Like Bill Cosby before him, the once powerful producer looked like a fragile and befuddled old man who didn’t quite grasp the significance of what had just happened.

Weinstein reportedly appeared equally confused at sentencing when, after being pilloried by prosecutors and portrayed by the victims as a cunning and manipulative sexual predator who had used his power and privilege to victimize  scores of women over several years, he said, “I thought it was all consensual.”

Weinstein’s defense counsel took a hard charge at the victims, prompting some advocates to describe her tactics as “dirty tricks” that “exploited the victims’ trauma,” by attacking them relentlessly on the witness stand. She achieved some measure of success with the acquittal on the most serious (predatory sexual assault and rape 1st) charges (suggesting that the jury parsed through the evidence and separated what was credible to them and what was not), but for Weinstein, who still faces similar charges in Los Angeles for the alleged sexual assault of two actresses two days apart in February 2013, the likelihood of his ever leaving prison in an upright position seems highly unlikely.

Whether one takes an aggressive or more measured approach in defending such cases and, particularly, in cross examining the victims, counsel should keep in mind that the landscape of sex offense prosecutions appears to have changed, and what people may have once thought about sex offenses, how victims should behave and what makes them credible (or not) may not be the same.

* Information about the Weinstein trial was gleaned from on-line articles from the New York Times, the Washington Post, The Atlantic and Forbes Magazine.

\* Information about human memory  studies was obtained from on-line articles from the  Washington Post and LA Times reporting on research by Professors Elizabeth Loftus, University of California at Irvine, David Schafter, Harvard University, Ken A. Paller, Northwestern University and Daniel Simons, University of Illinois.