MOLINEUX AND SANDOVAL EVIDENCE — TWO SIDES OF THE SAME COIN.

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In view of the presumption of innocence and the burden of proof in criminal cases, courts are generally concerned (but not unwilling) when it comes to admitting evidence of prior bad acts of the defendant (whether charged, uncharged or resulting in a conviction), as affirmative proof in the prosecution's case-in-chief, or to impeach the defendant's credibility as a witness if he/she chooses to testify in his/her own behalf.

In the former scenario, the worry is that the fact-finder will find the defendant guilty not so much because of the quality and quantum of evidence of guilt of the crime(s) charged, but because his/her prior conduct reflects a predisposition toward criminal behavior which he/she has revealed again, true to form. In the latter, the problem is the jury considering such evidence as proof of predilection toward criminality rather than evidence that simply calls the defendant's credibility as a witness into question.

In either case, if the purpose of the proof is offered to show that the defendant acted in conformity with prior wrongs, acts or a general criminal bent, case law and the New York Rules of Evidence (e.g. 4.21, 6.17, 6.19), (People v Molineux 168 NY 264 [1901], People v Sandoval 34 NY3d 371 [1974]), forbid it. (See also People v Bradley 20 NY3d 128 [2012], People v Morris 21 NY3d 588 [2013]: evidence of uncharged crimes is inadmissible if its only purpose is to show that the defendant is likely to have committed the crime charged or to show bad character).

The rationale of the "no-propensity" evidence rule is more a matter of fairness than logic (after all, past is often prologue), because proof of other crimes is thought to misdirect the fact-finders' attention to collateral matters, and to invite conviction based on past sins rather than upon evidence of the crime currently charged. (People v Frumusa 29 NY3d 364 [2017]). As noted in People v Resek 3 NY3d 385, 389 (2004), "the admission of uncharged crime evidence is a delicate business fraught with danger that such testimony may improperly divert the jury from the case at hand or introduce more prejudice than probative value."

That is not to suggest, however, that evidence of prior crimes/bad acts are never admitted in the People's case-in-chief. Quite to the contrary, Molineux and its progeny give trial court's wide latitude to admit such evidence when it is more probative than prejudicial to establish an important fact (e.g the defendant's motive, his/her identity as the perpetrator) or a material element of the crime(s) charged (e.g. intent, knowledge), absence of mistake or accident, or to show opportunity, preparation, common scheme or plan or to rebut an innocent explanation.

Such evidence may also be admitted (frequently in crimes of domestic violence, sex abuse and child abuse), to elucidate the background and nature of the relationship between the defendant and the victim, to complete the narrative of events leading up to the crime, to put criminal conduct into context (see People v Jackson 8 NY3d 869 [2007] concurring opinion), to explain the issuance of an order of protection or to explain why the victim may have delayed reporting the crime to others. (See, for example, People v Justice 99 AD3d 1213 [4th dep't 2012], People v Hernandez 2019 NY Slip Op. 50109[u] [1st dep't 1/25/19]. People v Ennis 2013 NY Slip Op. 04915 [4th dep't 4/18/13]), People v Nelson 57 AD3d 441 [4th dep't 2008]).

Unlike the Federal Rules of Evidence (404[b][2A-B] regarding affirmative use of prior bad act evidence, and the New York Rule with respect to impeachment of the defendant (CPL 240.43) requiring the Prosecution, upon the defendant's request, to provide PRE-TRIAL NOTICE of the specific instances of misconduct that they intend to introduce at trial, the usual (and preferred) practice with respect to Molineux evidence is for the Prosecution to make a MOTION IN LIMINE (in writing) to obtain the court's permission to introduce such evidence against the defendant in their case-in-chief.

The on-the record procedure for determining the admissibility of Molineux evidence is generally as follows:

1. The proponent of such evidence (i.e. the People) must IDENTIFY THE NON-PROPENSITY PURPOSE for which the evidence is offered, (note that the examples set forth in the Molineux case are considered to be illustrative rather than exhaustive), and demonstrate its probative value on a RELEVANT issue in the case (e.g. motive, intent, identity).

2. Defense counsel may then argue that the issue/fact upon which the evidence is offered is not relevant, or that such evidence is not necessary (e.g. where intent is readily inferable from the act alleged (see, for example, People v Alvino 71 NY2d 233 [1987], People v Vargas 88 NY2d 856 [1990]), or its admission would UNDULY PREJUDICE the defendant by tending more to show criminal propensity than provide proof on some other relevant issue in the case. (People v Hudy 73 NY2d 233 [1987]).

   It is important to keep in mind that the PEOPLE BEAR THE BURDEN OF ESTABLISHING THE PROBATIVE VALUE OF SUCH EVIDENCE (and that the defendant committed such prior bad acts) by CLEAR AND CONVINCING EVIDENCE. (People vRobinson 68 NY2d 541 [1986]). Such evidence, if allowed, MUST ALSO BE IN ADMISSIBLE FORM. (See People v Meadow 140 AD3d 1596 [4th dep't 2016]: error to admit murder victim's HEARSAY statements to her sister without any identified exception; People v Brooks 31 NY3d 939 [2018]: hearsay evidence of defendant's prior threats against victim, while relevant, were improperly admitted as "background").

3. The court must BALANCE the probative value of the proffered evidence (e.g. how old is it, what is its nature, how necessary is it to the People's case on the issue in question, what other evidence is there on the matter) against the potential for UNDUE PREJUDICE (i.e. that the jury is more likely to consider it as evidence of propensity than of the relevant point for which it purports to be offered), and then MAKE A RULING ON THE RECORD whether or not to admit the evidence. MAKE NO MISTAKE: prior bad act evidence is ALWAYS PREJUDICIAL, but whether or not it qualifies as UNDULY PREJUDICIAL will invariably depend on the particular facts and circumstances of each case. Judges generally enjoy a broad range of discretion with respect to evidentiary rulings (People v Sorge 301 NY 198 [1950], and they are not likely to be reversed unless that discretion has been abused (and the proof in the case otherwise is not so overwhelming as to render the error harmless).

4. If the court decides to admit the evidence of prior bad acts, defense counsel SHOULD REQUEST and the court MUST GIVE the jury a LIMITING INSTRUCTION which sets forth the permissible purpose for which the evidence will be received and may be considered during deliberations. The failure to so request can result in WAIVER of the issue for purposes of appeal. (See People v Burrell 120 AD3d 911 [4th dep't 2014] and People v Williams 107 AD3d 1516 [4th dep't 2013]).

The general rule with respect to prior bad acts to prove IDENTITY is that evidence of an uncharged crime that has distinctive (i.e. signature) characteristics in common with the charged crime may be admitted to prove identity unless the defendant's identity AS PERPETRATOR OF THE CRIME CHARGED is conclusively established by other other evidence.

In People v Agina 18 NY3d 600 (2012), the Court of Appeals, liberally interpreted the rule (in the People's favor) to admit evidence of a prior similar sexual assault by the defendant upon his ex-wife to prove his identity as the perpetrator of a sado-masochistic type of attack upon his current wife which the defendant denied committing. Although the defendant was obviously well-known to his wife (and admitted being with her for at least part of the weekend during which she was assaulted), the Court reasoned that he had put his IDENTITY AS THE ASSAILANT in issue by essentially calling his wife (who was the People's only eyewitness to the crime) a liar. Therefore, testimony from the ex-wife about a similar sadistic attack was deemed relevant to the issue of identity.

The dissent faulted the majority for sanctioning the admission into evidence of highly-prejudicial, similar bad act evidence ostensibly to prove identity when the parties knew each other and all the defendant did was deny committing the acts in question and accuse the victim of falsely implicating him. The dissenter pointed out that "Molineux cautions against liberal use of the identity exception, (and) there cannot be many cases where evidence of separate and distinct crimes with no unity or connection in motive, intent or plan will serve to legally identify the person who committed one as the same person who is guilty of the other." (id at 606). The majority obviously saw it differently and may have been unfavorably disposed toward the defendant who admitted to arguing with the victim on the weekend in question and had no plausible explanation on cross examination for the victim's injuries.

THE SANDOVAL SIDE OF THE COIN: USE OF PRIOR CRIMES AND BAD ACTS TO IMPEACH:

In New York State (as in most jurisdictions), the credibility of a witness, including a defendant in a criminal case, may be impeached (i.e. challenged and impugned), by asking him/her IN GOOD FAITH (i.e. a reasonable belief based on facts), whether he/she has been convicted of a SPECIFIED OFFENSE (including a felony, misdemeanor or violation), or whether he/she has committed a particular vicious, criminal or immoral act act (whether an uncharged crime or other act of self-interest or dishonesty) that is RELEVANT TO CREDIBILITY (i.e. accuracy and truthfulness of his/her testimony).

While a defendant puts his/her credibility on the line like any other witness who takes the oath, (and is, therefore, subject to traditional attacks on his/her perception, recall, truthfulness), courts recognize that he/she she risks more than his/her reputation for veracity (i.e. his/her liberty) when he/she testifies. Consequently, the scope and breath or cross examination of the defendant must first be addressed to and determined (outside the jury's presence) by the sound discretion of the trial judge. (People v Sandoval 34 NY2d 371 [1974]. See also People v Ocasio 47 NY2d 55 [1979]).

In Sandoval, the defendant, who was charged with murder, moved pre-trial to preclude the prosecution from cross examining him about several prior crimes and convictions. The trial court parsed through his prior record and ruled that the People could inquire about a 10-year-old Disorderly Conduct conviction and nine-year-old misdemeanor Assault conviction (with some room to probe the underlying facts) but not elicit his convictions for Gambling, V&T infractions, DWI, Contributing to the Delinquency of a Minor and an arrest for Felony Assault which resulted in a dismissal.

Citing, inter alia, People v Schwartzman 24 NY2d 241 (1969), and approving of the pre-trial procedure to determine admissibility of prior bad act evidence, the Court noted that trial judges must, on a case-by-case basis, delicately balance the probative value of the evidence against the risk of prejudice that it presents to the defendant's right to a fair trial. If the court determines that such evidence will have a disproportionate and improper impact such that the defendant may be convicted on account of his past (rather than upon the evidence of the crime charged), or will DISSUADE THE DEFENDANT from testifying altogether for that very reason, (thereby depriving jury of relevant and material testimony and obstruct the fact-finding process), the court should exclude it.

Some factors to consider include the age of the prior act(s), whether they were crimes of impulse or calculation, acts of addiction and uncontrollable habit or deliberate determination, whether they revel a tendency to place self-interest over principle or the concerns of others, whether they reflect upon honesty and truthfulness (e.g. perjury, theft, lying fraud, bribery and/or acts of deceit).

The court also noted that it is the DEFENDANT'S BURDEN to demonstrate that the prejudicial effect of such evidence (i.e. that the jury will convict based on perceived propensity or predisposition), substantially outweighs its probative value (with respect to the defendant's credibility) to warrant its exclusion. In Sandoval, Court held that the trial court did not abuse its discretion in deciding which priors to allow on cross examination.

The procedure to be followed is set forth in CPL 240.43 referenced at the outset. Upon the DEFENDANT'S REQUEST, the prosecutor "shall notify the defendant of all specific instances of (his/her) prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the (defendant's) credibility." Such notification...shall be made IMMEDIATELY PRIOR to the commencement of JURY SELECTION" (or the court may order that such notice be given and make a determination three days before jury selection).

Counsel is well advised, then, if seriously considering calling the defendant (who has a criminal history) to testify, to require the prosecutor to lay his/her impeachment cards on the table so that persuasive arguments can be made to exclude at least some of them (either as being only marginally relevant to credibility based on age or subject matter, or because they are unduly prejudicial). If the court determines that some or all of the prior bad acts or convictions are fair game for cross examination, then counsel and the client have to do a cost-benefit analysis (e.g. "how well did the People's case go in," "how will I come across to the jury?"), remembering that the decision to testify is a fundamental one that belongs to the defendant. (People v Robles 115 AD3d 30 [3d dep't 2014, Rock v Arkansas 483 US 44 [1987]).

If the defendant decides to take the stand, then it may well be a good idea to elicit the priors on direct exam (and perhaps include any pertinent explanation, if credible and unimpeachable), and to keep in mind that any prior conviction that is denied or the subject of equivocation can be proven by extrinsic evidence (e.g. a certificate of conviction). (See NY Evidence Rule 6.19[1][iii]). The defendant may NOT, however, be questioned about YO or JO adjudications (but the court may allow inquiry into the underlying acts) nor may he/she be questioned about crimes (or the underlying facts) of high he/she was acquitted. Also, if the defendant denies a prior bad act, the prosecutor is BOUND by his answer (and, therefore, may not introduce extrinsic evidence to contradict his/her answer).

in People v Duffy 36 NY3d 371 (1975), the Court of Appeals, citing People v Kass 25 NY 123 (1969), re-iterated the principle that a defendant who testifies may be cross examined upon a good faith basis with respect to vicious, immoral and criminal acts provided the purpose is to impeach him/her rather than to suggest a propensity to commit crime. (See also People v Zackowitz 254 NY 192 [1930]).

The defendant in Duffy was on trial for Robbery and Grand Larceny. The victim alleged that the defendant and a co-hort forcibly stole five dollars and some change from him when he asked them for help starting his car. The defendant testified that the victim gave him the money so he could find someone to help him jump his car. On cross examination, the prosecutor was permitted to ask the defendant about his daily use of heroin over a three year period (several bags a day, the cost of which exceeded his claimed income).

Although it could have (and probably should have) been argued that heroin use is a crime of addiction with little bearing on credibility (except insofar as it may affect one's perception and recall), and that the questions about his income (vis-a-vis the cost of his habit), arguably suggested a propensity to steal to make up the difference, the Court, concluded that it reflected a "demonstrated determination" to place his own self interest over that of society which "goes to the heart of honesty and integrity"(citing People v Sandoval supra at p.371).

Noting the trial court's broad discretion with respect to the scope of cross examination (citing People v Sorge supra), the court felt that the defendant opened the door when he claimed ignorance of the volume of his daily drug use, and counsel's "standing objection" (to the line of questioning as opposed to specific objections to specific questions), was, in the court's view, inadequate. The Court also noted that the defendant failed to specify in advance the specific prior conduct that he believed should be precluded.

In People v Weston 51 AD2d 881 (4th dep't 1976), the Fourth Department held in this Burglary/Rape/Robbery case that it was improper to allow the prosecutor to question the defendant about the facts underlying two pending indictments arising from similar incidents which occurred within a couple of weeks of the crimes for which the defendant was on trial. In the court's view, the inquiry tended toward revealing a criminal propensity (as well as a similar M.O. in a case where identity was not in issue), and NOT a "disposition toward incredibility" (as argued by the People), and, therefore, should not have been allowed.

It should also be noted that a defendant who testifies does NOT waive his/her privilege against self-incrimination with respect to pending unrelated charges (NY Evidence Rule 6.17[3], People v Arroyo 46 NY2d 928 [1979]), but he/she could be impeached if he/she opens the door with testimony that invites contradiction with the facts underlying such charges (People v Cantave 21 NY3d 374 [2013]). Counsel is well advised then to move to preclude any such inquiry during Sandoval proceedings. (A defendant also cannot be questioned about facts underlying a case that is pending on appeal (People v Smith 87 NY2d 715 [1996]).

Much more recently, in People v Horn 2020 NY Slip Op. 04712 (4th dep't 8/20/20), the Fourth Department held that the trial court, in this murder case in which the victim was beaten to death with a fireplace poker and the defendant gave different statements about what happened, (1. "I killed him in a state of rage," 2. "It was self-defense," 3. "I hit the victim out of fear that I would be killed by the co-defendant who hit him first several times"), properly allowed the prosecutor to cross examine the defendant about LYING to his girlfriend (who testified against him) in order to get her to have unprotected sex with him, and about a conviction for CRIMINAL IMPERSONATION.

In the court's analysis, both the (non-criminal) act of lying and the crime of impersonation (pretending to be someone else), were relevant to credibility because they involved acts of dishonesty (citing People v Chebere 292 AD2d 323 [1st dep't 2002], People v Roberts 197 AD2d 867 [4th dep't 1993] and People v Thomas 165 AD3d 1636 [4th dep't 2018]). The court also noted that the defendant's claim of undue prejudice with respect to questions about his sex life was unpreserved since he only objected on the grounds of relevance.

It is worth noting that while Sandoval proceedings pertain to defendants who are considering testifying, trial courts may, upon motion in limine, address the permissible scope of cross examination of witnesses for the prosecution or the defense. In People v Taylor 2019 NY Slip Op. 04008 (2d dep't 5/22/19), the defendant moved (albeit unsuccessfully as it turned out), to preclude the prosecutor from asking his elderly alibi witness about a 32-year-old conviction for Manslaughter stemming from the stabbing death of her mother. The defendant argued that she was his only witness, and allowing inquiry into an old and very serious crime would be unduly prejudicial.

The court noted that while it is always important for trial courts to weigh the probative worth of such evidence (with respect to credibility) versus the potential for unfair prejudice, witnesses are not exposed to the same risks (of conviction and deprivation of liberty) as defendants who testify, and this witness had a long history of criminal convictions that went well beyond the act of matricide which the defendant sought to keep from the jury. The court held that it was not an abuse of discretion to expose the jury to the full breadth of her criminal past (including the homicide), in assessing her credibility as a witness.

One factor that is sometimes cited as a basis for precluding inquiry into a prior conviction (at least its nature), is its similarity to the crime for which the defendant is on trial. The concern is that a jury who hears that the defendant committed the same crime before, he is likely up to old tricks and, therefore, must be guilty again. While similarity between prior crimes and current charges can, under certain circumstances, foreclose inquiry (at least into the type of conviction or the underlying acts), it is by no means an obstacle in all cases.

In People v Hayes 97 NY2d 203 (2002), the Court of Appeals overturned the Appellate Division's reversal of the defendant's convictions for the forcible rape and robbery of his wife who had been hiding out in a motel on account of domestic abuse. The Court held that it was NOT an abuse of discretion to permit cross examination of the defendant both as to the FACT and the NATURE of certain convictions for Assault, Sex Abuse, Aggravated Sexual Assault and Kidnapping.

Noting that trial courts are not bound by fixed rules when weighing probative value against undue prejudice, and neither similarity of the priors (nor the fact that the defendant may be the only source of evidence on a material issue such as forcible compulsion), require a blanket limitation on impeachment, the court held that such convictions reflected the defendant's willingness to place his own self-interest over the interests of society, which goes to the heart of honesty and integrity. (Citing, inter alia, People v Rahman 46 NY2d 882 [1979], People v Mattiace 77 NY2d 269 [1990], People v Pavao 59 NY2d 782 [1983]).

The Court observed that in the absence of any absolute prohibition on inquiry into the nature of prior similar crimes, the trial court properly weighed the competing concerns and exercised its discretion to admit some convictions and preclude others, and the fact that the defendant may have been his only witness (to rebut the victim's claim of forcible compulsion), arguably increased the importance of fully exploring his credibility in this "he said-she said" kind of case. (In light of the Court's ruling, the defendant elected not to testify).

In contrast, see People v Calderon 146 AD3d 967 (2d dep't 2017) where the court held that it was error to permit cross examination into the nature of the defendant's prior robbery conviction, including that he put a knife to the victim's throat. In the case on trial, the defendant was charged with the knifepoint rape of a woman who suffered from bi-polar disorder and drug addiction. The victim spent the night at his apartment (which the defendant claimed she frequently visited to smoke crack and trade sex for money to buy more drugs), and didn't formally report the attack to law enforcement until four years later when she saw the defendant at a hospital. (She reportedly told a couple of patrol officers what happened the next morning, but they apparently did not take her seriously).

Since the proof, in the Appellate Division's view, was far from overwhelming, it was held to be error to permit cross examination about the facts of another crime that involved the threatened use of a knife, and the defendant was the only defense witness to contest the victim's claim of forcible compulsion. (As in Hayes, the defendant chose not to testify in light of the court's Sandoval ruling, which, in the appellate court's estimation, deprived the jury of important evidence and impeded the validity of the fact-finding process. (Citing People v Grant 7 NY3d 421 [2006]).

The dissent found the majority's analysis to fly in the face of People v Hayes supra which upheld the impeachment use of prior convictions which were nearly identical to the crimes for which the defendant was on trial. Here, the use of a knife in an entirely different crime was, in the dissenter's view, far less prejudicial than eliciting prior similar sex crimes in a sex crime prosecution. The dissent also noted that the majority cavalierly ignored People v Levy 290 AD2d 565 (2d dep't 2002) where the court upheld the trial judge's decision to permit inquiry into a prior knifepoint assault where the defendant was on trial for rape.

As is evident, Sandoval rulings are very case sensitive and fact-specific, and the decisions of trial judges to permit inquiry into prior convictions and other bad acts will generally not be disturbed on appeal absent an abuse of discretion in a case that otherwise lacks overwhelming evidence of guilt.

Obtaining an advanced ruling on the permissible subjects and scope of cross examination can serve to prevent the disclosure of at least some unwanted skeletons, inform the defendant's decision whether or not to testify, and if so, to help address appropriate questions (to take the sting out of cross examination), in jury selection.

Unlike federal court where a defendant must testify (and subject him/herself to the slings and arrows of impeachment), and get convicted before appealing an adverse ruling with respect to cross examination, in state court, the defendant, if convicted, can argue that his decision not to testify was unfairly and prejudicially affected by the chilling effect of the court's ruling.

Better that the People's case-in-chief comes in poorly (and free of Molineaux evidence), so that the prospect of the defendant having to testify and be subject to impeachment (or take an appeal) is rendered moot.