

Kings County Criminal Bar Association

May 15, 2008

Molineux Reversals  
“The Crime of Uncharged Crimes”

Hon. Joel M. Goldberg  
Kings County Supreme Court

## Molineux Reversals

Hon. Joel M. Goldberg

### I. General Errors

People v. Alford, 33 AD3d 1014 (2<sup>nd</sup> Dept. 2006) - DNA lab report contained results of a match with a second victim – defense counsel failed to move to redact.

People v. Pittman, 49 AD3d 1166 (4<sup>th</sup> Dept. 2008) - prior attempted shooting of police officer improperly admitted at trial of attempted shooting of another police officer. Prior shooting not “sufficiently unique” to prove “identity” – was not probative of “motive” – “intent” to kill may easily be inferred from the commission of the act itself.

*See* People v. Beam, 57 NY 2d 241, 251 (1982) citing, People v. Condon, 26 NY2d 139, 142 (1970) - **may use evidence of uncharged crime to show “identity” unless identity is “conclusively established” by witnesses to charged crime.**

People v. Foster, 295 AD2d 110 (1<sup>st</sup> Dept. 2002) - uncharged pickpocketing improperly admitted to show defendant’s identity; **two-part process** for determining admissibility of uncharged crime: (1) the applicable “exception” and (2) “judicial balancing test” of probative value vs. undue prejudice; must give limiting instruction to jury.

People v. Hunter, 32 AD3d 611 (3<sup>rd</sup> Dept. 2006) - error to show uncharged burglary when “intent to commit a crime therein” was easily inferred from the act itself.

People v. Ely, 68 NY2d 520 (1986) and People v. Ward, 62 NY2d 816 (1984) - tape recordings of defendants not redacted to eliminate “prejudicial matters” not related to crimes charged.

## Molineux Reversals

Hon. Joel M. Goldberg

People v. Resek, 3 NY3d 385 (2004) - limiting instruction regarding uncharged crime for which Grand Jury voted not to indict defendant made matters worse for the defendant. Court simply should have given limiting instruction to the trial jury that the Grand Jury dismissed the charge and that the evidence of the uncharged crime was being admitted solely to explain why the defendant was arrested and searched.

*See* People v. Tosca, 98 NY2d 660 (2002) and People v. Till, 87 NY2d (1995) - **uncharged crimes may be admitted to “complete the narrative” or “provide necessary background information to explain ambiguous facts.”**

People v. Crawford, 4 AD3d 748 (4<sup>th</sup> Dept. 2004) - evidence of prior “similar” assault on same c/w improperly introduced where there was insufficient evidence that the defendant committed the prior crime.

*See* People v. Robinson, 68 NY2d 541 (1986) - **identity of the defendant as the perpetrator of the uncharged crime, if not conceded or adjudicated, must be established by “clear and convincing evidence” – don’t want a “trial within a trial.”**

People v. Simmons, 29 AD3d 1219 (3<sup>rd</sup> Dept. 2006) - evidence of prior “similar” assault on different c/w the day before improperly admitted – **mere similarity of the two crimes does not establish a “common scheme or plan.”**

*See* People v. Fiore, 34 NY2d 81 (1974) - “common scheme or plan” exception applies to two or more crimes “so related that proof of one tends to establish the other” – mere similarity is not sufficient.

People v. Harris, 23 AD3d 1038 (4<sup>th</sup> Dept. 2005) - error on *voir dire* to restrict defense counsel from questioning prospective jurors regarding their ability to follow an anticipated limiting instruction regarding an uncharged crime.

## Molineux Reversals

Hon. Joel M. Goldberg

### II. Sex Crimes

People v. Jackson, 8 NY3d 869 (2007) - defendant on trial for forcible and statutory rape of 14 year-old girl. Trial court admitted evidence of uncharged prior forcible rape of girl's 19 year-old babysitter, because during the uncharged rape, the defendant said to the babysitter, in substance: "[the 14 year-old] is lucky I was there, because if I was not there, it would have been her." – Admitted by trial court as "a statement of future intent and motive."

Defendant was acquitted of the forcible but convicted of the statutory rape.

– HOW DID THE COURT OF APPEALS RULE ?? –

People v. Gorghan, 13 AD3d 908 (3<sup>rd</sup> Dept. 2004) - error to allow in trial of rape of defendant's 21 year-old step-daughter evidence that defendant had sex with her beginning at age 8 continuing to age 16; court did not properly apply balancing test of probative value vs. undue prejudice.

People v. Buskey, 45 AD 3d 1170 (3<sup>rd</sup> Dept. 2007) - error to allow in sexual abuse trial of 13 year-old evidence that defendant "made advances" to three other teenage girls in the same manner; "A REPETITIVE PATTERN IS NOT A COMMON SCHEME OR PLAN" – uncharged acts not admissible to show "absence of mistake" or "motive" – no evidence that c/w was aware of defendant's actions to the other girls to explain c/w's state of mind (fear) at time of crime.

*See* People v. Lewis, 69 NY2d 321 (1987) - error to show 10 non-charged acts of incest (non-forcible) with the same c/w; testimony not necessary to explain any ambiguity in c/w's testimony.

*See* People v. Hudy, 73 NY2d 40 (1988) - error in teacher's trial of sexual abuse of 8 students to show teacher did it to 9<sup>th</sup> student, even though defense was that the 8 students "conspired" to make up the accusation – improper evidence of propensity.

## Molineux Reversals

Hon. Joel M. Goldberg

*See* People v. Vargas, 88 NY2d 858 (1996) - error in rape case where defendant claims consent to show forcible rape of 4 other victims - improper propensity evidence.

People v. Cook, 93 NY2d 840 (1999) - WHERE UNCHARGED SEX CRIMES INVOLVE THE SAME C/W AND USE OF FORCE, THE RESULT IS DIFFERENT -

-prior acts of violence towards the same c/w admissible in trial of forcible rape of defendant's girlfriend, allegedly raped 3 times over an 11-week period before reporting the crimes.

People v. Toland, 284 AD2d 798 (3<sup>rd</sup> Dept. 2001) - WHERE THERE ARE NO WITNESSES TO THE SEXUAL ASSAULT BECAUSE VICTIM DIED, COURTS VIEW EVIDENCE OF OTHER CRIMES UNDER A DIFFERENT STANDARD-

-3 former girlfriends of defendant permitted to testify defendant tied them up in a similar manner victim found tied up and that when so tied up the sex they had became violent.

**“WHERE PEOPLE’S CASE RELIES HEAVILY ON CIRCUMSTANTIAL EVIDENCE TO ESTABLISH IDENTITY, EVIDENCE OF OTHER CRIMES TO ESTABLISH MOTIVE IS NOT ONLY MATERIAL, IT IS VIRTUALLY A CONTROLLING FACTOR FAVORING ADMISSIBILITY” – assuming there is “clear and convincing evidence” the defendant committed the uncharged crimes.**

People v. Reilly, 19 AD3d 736 (3<sup>rd</sup> Dept. 2005) - error in sexual abuse trial where defense was consent, although defendant had used ladder to enter c/w's bedroom window, to show that defendant was subsequently arrested in a “peeping tom” incident involving another woman's bedroom; the two incidents were not sufficiently similar to show the defendant's intent to commit sexual abuse.

Citing *Robinson*, court held that **evidence of uncharged crime to show intent to commit crime charged must be established by “highly probative” evidence of intent to commit the crime charged.**

## Molineux Reversals

Hon. Joel M. Goldberg

People v. Greene, 306 AD2d 639 (3<sup>rd</sup> Dept. 2003) - defendant convicted of forcibly raping and molesting his daughter over a 5-year period; court properly allowed evidence of defendant's threats to c/w's mother and sister: admissible as evidence of forcible compulsion and to explain why acts not reported.

Yet, **reversed because no limiting instruction given** at time uncharged crimes admitted and in final charge.

People v. Sanders, 303 AD2d 694 (2<sup>nd</sup> Dept. 2003) - defendant convicted of sexually abusing niece 4 times from ages 10 to 12; error to admit testimony of another niece that defendant also sexually abused her 4 times from ages 11 to 29; -evidence not necessary to prove an element of the crime charged and was used to establish propensity to commit this type of crime.

People v. Fleegle, 295 AD2d 760 (3<sup>rd</sup> Dept. 2002) - reversal for prosecutor's reference to uncharged sex crimes against same victim in opening statement where no prior ruling obtained permitting mention of these crimes – even though defense counsel made no objection.

### III. Domestic Violence

People v. Wlasiuk, 32 AD3d 674 (3<sup>rd</sup> Dept. 2006) - murder conviction reversed based on **too much evidence of prior acts of domestic violence** (20 prior acts) even though trial court gave limiting instruction that prior acts of violence were not admitted to show propensity to assault wife – prosecution claimed murder was “culmination of escalating pattern of domestic violence” – and argued for a new Molineaux exception: “state of the parties’ marriage.”

## Molineux Reversals

Hon. Joel M. Goldberg

People v. James, 19 AD3d 616 (2<sup>nd</sup> Dept. 2005) - CONTRAST TO WLASIUK - Defendant's prior assaults on wife (unknown number) properly admitted in murder trial to show defendant's intent and refute defendant's contention that death was accidental and "to provide background material to allow the jury to understand the relationship between victim and defendant."

People v. Capace, 273 AD2d 320 (2<sup>nd</sup> Dept. 2000) - circumstantial evidence murder case where defendant shot ex-wife's new boyfriend; prosecution permitted to show uncharged crimes against ex-wife, ex-wife's other boyfriends, and ex-wife's divorce lawyer to show motive (ie, jealousy, thereby tending to show identity), to complete the narrative, and because uncharged crimes "inextricably interwoven" with charged crime – limiting instructions given to jury.

People v. Bierenbaum, 301 AD2d 119 (1<sup>st</sup> Dept. 2002) - circumstantial evidence murder case (defendant allegedly threw wife's body out of private plane) - prosecution allowed to show prior act of choking wife and introduce letter from defendant's psychiatrist sent to wife which warned wife of defendant's danger to her – letter arguably provided motive to kill wife to prevent her from using letter in pending divorce case – **In a domestic violence homicide, evidence of prior violence, even one act, is highly probative and differs from evidence merely showing that defendant assaulted people other than the victim which would only show propensity.**

People v. Westerling, 48 AD3d 965 (3<sup>rd</sup> Dept. 2008) - Defendant convicted of rape, kidnaping, and violating order of protection relating to girlfriend; defendant claimed c/w consented to everything; court properly allowed several **specific prior uncharged acts** of assault, gunpoint threats, and property damage – relevant to establish relevant facts in issue in the case; however, conviction reversed because court also allowed evidence of over 100 **unspecified** prior acts of assault – no balance made as to probative value of these acts vs. undue evidence of propensity.

## Molineux Reversals

Hon. Joel M. Goldberg

### IV. Drug Cases

People v. Green, 35 NY2d 437 (1974) - police standing on the street observing defendant's apartment allegedly see defendant throw drugs out apartment window; error to show police went to defendant's apartment one month before "on a narcotics complaint" and were refused admittance – Dissent argued that prior act necessary to explain why police were targeting the apartment for investigation.

People v. Dobre, 298 AD2d 770 (3<sup>rd</sup> Dept. 2002) - marijuana found in defendant's car console and trunk – proper to also show marijuana found on defendant's person to show "knowing" possession of charged drugs – Reversed because court also allowed testimony about street-level packaging and sale of marijuana – defendant was not charged with sale or possession with intent to sell.

People v. Chaney, 298 AD2d 617 (3<sup>rd</sup> Dept. 2002) - uncharged drug sale to confidential informant used to obtain search warrant resulting in drugs being found in defendant's closet along with the "buy money" from the uncharged drug sale – Error to allow evidence of uncharged drug sale to show intent to sell drugs found in the closet – **"evidence of uncharged sale 'not needed' to prove intent to sell the charged drugs"** – Court did not "articulate its reasons" for finding the probative value outweighed the undue prejudice.

People v. Fishon, 47 AD3d 591 (1<sup>st</sup> Dept. 2008) - CAN A DEFENDANT INTRODUCE EVIDENCE OF AN UNCHARGED CRIME ?

-Defendant charged with two drug sales to same undercover officer and claimed "agency" defense – Defendant acquitted of one sale (found guilty only of possession as a misdemeanor) and HUNG JURY on the other sale.

-At the re-trial, defendant wanted to show circumstances of the other sale and inform jury that the agency defense had been accepted in that case.

-Evidence of uncharged sale properly excluded as a matter of discretion by the trial court because “circumstances of the two sales were different” and the jury’s finding in the uncharged case was “not probative” of whether the defendant was also an agent in the charged sale.

**EVIDENCE OF OTHER CRIMES (*MOLINEUX*)<sup>i</sup>**  
(Limiting Instruction From Criminal Jury Instructions)

There is evidence in the case that, on another occasion, the defendant [(engaged in criminal conduct) (was convicted of a crime) or (*specify*)]. That evidence was not offered, and must not be considered, for the purpose of proving that the defendant had a propensity or predisposition to commit the crime(s) charged in this case.<sup>ii</sup> It was offered as evidence for your consideration on the question of (*specify*). If you find the evidence believable, you may consider it for that limited purpose and for none other.<sup>iii</sup>

-also may add-

*[If you do not believe this evidence, or do not find it tends to prove (the purpose for which it which it was introduced) you should disregard it entirely.]*

1. See *People v. Molineux*, 168 N.Y.2d 264 (1901) (*Molineux* evidence may be admitted, for example, to establish motive, opportunity, intent, preparation, common scheme or plan, identity, absence of mistake or accident).

2. See *People v. Mees*, 47 N.Y.2d 997 (1979)

3. In appropriate circumstances, it has been held permissible for a court to allow the introduction of evidence of uncharged crimes to prove, among other things, the defendant's identity as the perpetrator of the charged crime (see, e.g., *People v. Beam*, 57 N.Y.2d 241 [1982]; *People v. Alexander*, 294 A.D.2d 118 [1st Dept. 2002]), his motive for committing it (see, e.g., *People v. Mees*, 47 N.Y.2d 998 [1979]; *People v. Barnum*, 169 A.D.2d 887 [3rd Dept. 1991], lv. denied 77 N.Y.2d 958), his intent while doing so (see, e.g., *People v. Bayne*, 82 N.Y.2d 673 [1993]; *People v. Scotti*, 232 A.D.2d 775 [3rd Dept. 1996], lv. denied 89 N.Y.2d 946), his guilty knowledge (see, e.g., *People v. Marrin*, 205 N.Y. 275, 281-282 [1912]; *People v. Spitaleri*, 231 A.D.2d 593 [2nd Dept. 1996], lv. denied 89 N.Y.2d 867), or that his actions were taken in concert with another (see, e.g., *People v. Carter*, 77 N.Y.2d 95, 107 [1990], cert. denied 499 U.S. 967; *People v. Jackson*, 39 N.Y.2d 64, 68 [1976]), or were part of a common scheme or plan (see, e.g., *People v. Duffy*, 212 N.Y. 57, 66-67 [1914]; *People v. Fiore*, 34 N.Y.2d 81 [1974]; *People v. Smith*, 283 A.D.2d 189, 190 [1st Dept. 2001], lv. denied 97 N.Y.2d 643), or were not the product of accident or mistake (see, e.g., *People v. Henson*, 33 N.Y.2d 63, 72 [1973]; *People v. Taylor*, 220 A.D.2d 705 [2nd Dept. 1995])

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