

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33250
O/kmb

_____AD3d_____

Argued - November 10, 2011

MARK C. DILLON, J.P.
DANIEL D. ANGIOLILLO
ANITA R. FLORIO
THOMAS A. DICKERSON, JJ.

2010-11721

DECISION & ORDER

The People, etc., respondent,
v Guy Clarke, appellant.

(Ind. No. 09-00138)

Anthony M. Giordano, Ossining, N.Y., for appellant.

Francis D. Phillips II, District Attorney, Goshen, N.Y. (Lauren E. Grasso and Andrew R. Kass of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Orange County (DeRosa, J.), rendered December 9, 2010, convicting him of sexual abuse in the first degree (two counts) and sodomy in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is reversed, on the law, and a new trial is ordered.

At trial, the complainant was permitted to testify about an uncharged allegation of sexual abuse committed by the defendant. The complainant could not recall when the abuse happened, but testified in detail as to what had occurred. The County Court instructed the jury that it could consider this evidence solely for the purpose of determining a lack of mistake. Following the trial, the defendant was convicted of sexual abuse in the first degree (two counts) and sodomy in the second degree. We reverse and order a new trial.

As the defendant correctly contends, the County Court erred in permitting the introduction of evidence of the uncharged allegation of sexual abuse. Although evidence of uncharged crimes may be admitted to prove, inter alia, intent or absence of mistake (*see People v Dorm*, 12 NY3d 16, 19), such evidence must be excluded if it has no additional relevance to a

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specific issue, because there is a very real danger that the trier of fact will overestimate its significance (*see People v Hudy*, 73 NY2d 40, 55). Here, there was no reasonable possibility that the jury would infer that the defendant's acts of sexual abuse lacked intent such that it was necessary to prove an absence of mistake. Moreover, the defendant did not contest the element of intent or offer mistake as a defense, but, rather, denied that he had committed the acts of abuse (*see People v Gautier*, 148 AD2d 280, 286-287; *People v Bagarozzy*, 132 AD2d 225, 235-236). Therefore, the probative value of the evidence of the uncharged act of sexual abuse was outweighed by its prejudicial effect, and the County Court's limiting instructions were untimely and insufficient to cure the prejudice caused by the erroneous admission of this evidence (*see People v Allen*, 85 AD3d 1042; *People v Barbato*, 82 AD3d 1112; *People v Wilkinson*, 71 AD3d 249, 256-257). Furthermore, the County Court's error was not harmless (*see People v Crimmins*, 36 NY2d 230).

Accordingly, the judgment of conviction must be reversed and a new trial ordered.

In light of our determination, the defendant's remaining contentions either are without merit or have been rendered academic.

DILLON, J.P., ANGIOLILLO, FLORIO and DICKERSON, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court