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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,  
  
Respondent,  
  
-against- (Papers sealed)  
  
TIMOTHY BREWER, No. 175  
  
Appellant.

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20 Eagle Street  
Albany, New York  
October 18, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn  
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1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is number 175, the People of the State  
3 of New York v. Timothy Brewer.

4 MR. SHIFFRIN: May it please the court, I'd like  
5 to request three minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: Yes, sir.

7 MR. SHIFFRIN: Thank you, Your Honor. In this  
8 case, in which the only issue was whether the charged  
9 conduct, not who did it or why, it was prejudicial error to  
10 grant the district attorney's Molineux application and - -  
11 - and to admit and - - -

12 JUDGE RIVERA: Well, what's - - - what's the bad  
13 act - - -

14 MR. SHIFFRIN: The - - -

15 JUDGE RIVERA: - - - that the jury heard about?

16 MR. SHIFFRIN: The - - - combination of bad acts.  
17 The - - - the testimony was it was permitted pursuant to  
18 the - - - to the Molineux proffer was that my client  
19 regularly smoked crack, which is illegal, and he did so  
20 while having a shirt over his head while women were  
21 sexually servicing him, including while his partner was  
22 watching - - - his partner, at times, was watching other  
23 women do that.

24 JUDGE ABDUS-SALAAM: So that - - - the smoking  
25 crack was a crime. That's not a bad act.

1 MR. SHIFFRIN: That part's - - - well, it's a  
2 combination, it's a crime and bad act. I would argue that  
3 the behavior I just described would be - - - would be  
4 considered a bad or immoral act in any society. In Sodom  
5 and Gomorrah, they would have frowned upon that. The  
6 definition of this court - - -

7 JUDGE STEIN: Having - - - getting oral sex from  
8 - - - from an - - -

9 MR. SHIFFRIN: Oh, no.

10 JUDGE STEIN: - - - adult partner is a bad act?

11 MR. SHIFFRIN: No.

12 JUDGE RIVERA: Consensual?

13 JUDGE STEIN: Consensual?

14 MR. SHIFFRIN: No. No. The - - - in this case,  
15 it's not - - - it's - - - again, it's - - - let's not cut -  
16 - - you know, cut out the critical facts. He's receiving  
17 sexual - - - receiving oral sex from a woman he's not - - -  
18 he's not even able to witness because he had a shirt over  
19 his head while smoking crack. That - - - that relationship  
20 - - -

21 JUDGE ABDUS-SALAAM: What if he had been sucking  
22 on a lollipop, instead?

23 MR. SHIFFRIN: The - - - if - - - if indeed that  
24 - - - if there was a lollipop involved instead - - -  
25 instead of sex - - - perhaps it wouldn't be sexual

1 propensities in a case where that's - - - that's the  
2 allegation here. The conduct that's involved here is - - -  
3 I would - - - I would think is a bad or immoral act under  
4 any community or any society.

5 JUDGE PIGOTT: Well, the crack is. Not - - - I  
6 mean I don't know how long you want to argue the sex, but I  
7 - - -

8 MR. SHIFFRIN: Not at all.

9 JUDGE PIGOTT: Okay.

10 MR. SHIFFRIN: I'd like - - - the - - - in this  
11 case, the proffer was on one ground only. The only ground  
12 on the proffer was to show the family dynamics. The - - -  
13 there was - - - if you look at the record on page 9 and 10,  
14 the DA said: "This evidence is relevant to understand the  
15 relationship and dynamic between the victims and the  
16 defendant as well as the entire immediate family." That  
17 was the only ground offered for the - - -

18 JUDGE FAHEY: So the - - - there was no  
19 discussion of a common scheme or plan or completing the  
20 narrative? I thought there was discussion of completing  
21 the narrative.

22 MR. SHIFFRIN: There - - - there was not.

23 JUDGE FAHEY: I see.

24 MR. SHIFFRIN: The discussion that occurred later  
25 on in the record - - - that was - - - that was the proffer,

1 on pages 23 to 26 of the record, is when the - - - when the  
2 court considered the admission of this evidence. There was  
3 never any reference to common scheme and plan; there was  
4 never a reference to this being an MO. What - - - what the  
5 court said - - -

6 JUDGE ABDUS-SALAAM: But wasn't there some  
7 reference to it would go toward supporting the credibility  
8 of these young witnesses - - -

9 MR. SHIFFRIN: What - - -

10 JUDGE ABDUS-SALAAM: - - - who - - - who wouldn't  
11 know anything about this unless they had been abused?

12 MR. SHIFFRIN: That phrase that they wouldn't  
13 know anything about it did not come out in pretrial.  
14 That's important. The - - - there was never argued  
15 pretrial that it would be admissible for that purpose. The  
16 Appellate Division in - - - in affirming the admission and  
17 use of this testimony - - - and by the way, and there's no  
18 limiting instruction ever given.

19 The Appellate Division held it admissible for two  
20 reasons. First, they held it wasn't a Molineux bad act,  
21 something which was not preserved below by the district  
22 attorney. And again, in People v. Katz it's the obligation  
23 of the People to put forth - - - put forth the ground for  
24 the admission of Molineux evidence. They did so. They  
25 were limited to their theory. They can't change theories

1 the same way defendants can't come up with new grounds to  
2 argue on appeal. I try. I fail.

3 The other thing is the argument the DA made is it  
4 corroborates the testimony of these two complainants. It  
5 only corroborates if you accept that he had a propensity to  
6 do that. The - - - it's corroborative because the argument  
7 is he did it before, therefore, it's more likely he'd be -  
8 - - he did it again.

9 JUDGE GARCIA: No. Isn't the argument on that  
10 front that they described a specific circumstance, the  
11 shirt over his head, and your defense, I'm assuming, is you  
12 made that up. And this shows that on other occasions he  
13 engaged in this same type of practice which goes to rebut  
14 an argument you made this up because he does this. So  
15 you're more likely to have actually seen it, not he's more  
16 likely to have committed this crime.

17 MR. SHIFFRIN: The - - - a couple of things. Our  
18 defense was it didn't happen, not that - - - not that they  
19 made up the details. This is a - - - this is the claim  
20 that they didn't see it, therefore, they couldn't know  
21 about it, suggested only one sense. The other sense that  
22 is applicable here is they could have heard about it. This  
23 is not your typical house. This is a house where the  
24 girls' mother testified how she was selling crack through  
25 the window, how she was allowing women to come in - - -

1 JUDGE GARCIA: But you're certainly free to argue  
2 that.

3 MR. SHIFFRIN: - - - and they asked for  
4 prostitution.

5 JUDGE GARCIA: I mean that would be an argument  
6 you could make that he - - - they saw this conduct. They  
7 didn't experience the conduct. But that doesn't mean they  
8 can't get the evidence in on a - - - on a credibility  
9 issue.

10 MR. SHIFFRIN: Respectfully, it's - - - that's  
11 backwards. The district attorney makes a proffer to try to  
12 get evidence in to corroborate - - - their client - - -  
13 their complainants by showing my client has a propensity to  
14 engage in just the charged behaviors. The - - - in order  
15 for that to have any - - - any credibility, they have to -  
16 - - they can't say what he could have done - - -

17 JUDGE GARCIA: No, no. But that's he does this  
18 with other children.

19 MR. SHIFFRIN: - - - to the front door if they  
20 don't establish the back door. There's not a burden on the  
21 defendant to - - -

22 JUDGE GARCIA: Excuse me. Wouldn't that be he  
23 does this with other minors? That's propensity. This is  
24 not I'm getting in this proof to show that he commits this  
25 conduct with other children under the age and he did it

1 here. It's to show that he engages in this type of other  
2 behavior that they claim they've witnessed in the course of  
3 this crime.

4 MR. SHIFFRIN: The - - - two things about that.  
5 One, the other behavior the - - - it's a unique pattern is  
6 a type of MO. This court has held repeatedly that MO  
7 evidence is only - - - is only admissible if either  
8 identity or intent are an issue, which is not the case  
9 here. It corroborates because there's something unusual or  
10 unique about it. That's what - - - that's the question you  
11 ask. It corroborates that if there's - - - if the  
12 proponent of that evidence is able to get it in there to  
13 show, not for propensity, to show that it must be true.  
14 The only way it can come in to show it must be true is the  
15 - - - the burden is on the People to establish that - - -  
16 that they could not have heard about this. Again, this is  
17 a house where people are coming - - -

18 JUDGE FAHEY: Can we - - -

19 JUDGE RIVERA: Why is it not about identity? Is  
20 it - - - you're saying that the defendant didn't challenge  
21 that the abuse occurred?

22 MR. SHIFFRIN: He - - - challenging that the  
23 crime occurred, that the acts occurred, is not challenging  
24 identity. This is the putative stepfather. No one was  
25 claiming that it was a different guy who committed the

1 acts. No one was claiming that it was question of intent.  
2 These either happened or didn't happen. Identity was - - -  
3 was not equivocal in this case, the proof. The - - -

4 JUDGE ABDUS-SALAAM: Counsel, I - - -

5 JUDGE FAHEY: The acts that the - - - I'm sorry,  
6 Judge. Go ahead.

7 JUDGE ABDUS-SALAAM: No. I'm just having a  
8 little problem here because the People did make a Molineux  
9 application. But I'm having difficulty actually seeing the  
10 testimony that they wanted to admit as Molineux evidence.

11 MR. SHIFFRIN: Two - - - two things about that.  
12 To the extent that it's not Molineux evidence, the People  
13 are bound by their argument that it was Molineux evidence.  
14 They never - - - they never argued that it wasn't, number  
15 one. Number two, again, this court has repeatedly held  
16 that Molineux is greater than just criminal evidence. It's  
17 - - - it's acts that are considered either bad or immoral  
18 acts. I cite in my brief, at length, cases of - - -

19 JUDGE ABDUS-SALAAM: Yeah. But you're - - -  
20 you're trying to fit the - - - the sexual act with the  
21 crack as an immoral act, but we - - - I think we pretty  
22 much established that consensual sex among adults is not an  
23 immoral act.

24 MR. SHIFFRIN: But I guess, to the extent the  
25 definition of immoral is conduct not conforming to accepted

1 patterns of behavior, I would - - - I would suggest that  
2 not all consensual sexual acts are necessarily moral - - -  
3 moral acts for purposes of Molineux.

4 CHIEF JUDGE DIFIORE: Thank you, sir.

5 JUDGE FAHEY: Could - - -

6 CHIEF JUDGE DIFIORE: Counsel.

7 JUDGE ABDUS-SALAAM: Judge?

8 JUDGE FAHEY: Judge, would it be all right if I  
9 just asked one question?

10 CHIEF JUDGE DIFIORE: Yes. Of course.

11 JUDGE FAHEY: I just wanted to give - - -

12 CHIEF JUDGE DIFIORE: Counsel, just one moment.  
13 Come back to the podium.

14 JUDGE FAHEY: - - - Mr. Shiffrin a chance. Yeah.  
15 I just want to know, let's assume it's a Molineux error.  
16 Why isn't it harmless?

17 MR. SHIFFRIN: In - - - in this case in which  
18 there was no corroborative evidence, number one. The - - -  
19 the biological evidence actually was inconsistent with the  
20 - - - with the complainants' allegation. The complainant  
21 alleged that she spit out the semen onto the shirt. The  
22 shirt was examined and the - - - and her saliva or DNA was  
23 not there. My client testified that - - - and denied the  
24 allegations. This was - - - this is People v. Vargas. Two  
25 different versions of events, credibility is the entire

1 thing. And the - - - this is what changed credibility  
2 because the DA argued in summation we - - - we know they  
3 must be telling the truth because how else did they know.  
4 That this - - - that's the critical evidence in the case.

5 CHIEF JUDGE DIFIORE: Thank you, sir.  
6 Counsel.

7 MR. SHOEMAKER: Good afternoon. May it please  
8 the court, Robert Shoemaker for the People. Molineux only  
9 applies to prior crimes or bad acts. But whether or not  
10 the acts here - - - whether or not Molineux actually  
11 applied to them, the acts here were admissible because they  
12 were not proffered, they were not offered to show  
13 defendant's bad character or his propensity towards crime.  
14 Rather, this is as the Appellate Division held, the stated  
15 purpose of the evidence was to corroborate details of the  
16 victims' testimony.

17 JUDGE PIGOTT: Do you have to balance that at  
18 all?

19 MR. SHOEMAKER: So there's - - - there's the is  
20 it admissible and then there's the probative prejudicial  
21 balancing. And in here - - - in this case, the defense  
22 attorney only objected as to the probative prejudicial.  
23 The trial court ruled that it was not unduly prejudicial.  
24 He said I think it was but it was more probative than  
25 prejudicial.

1           In the motion here that the People made, they  
2           didn't use the word "corroborate." We used the word  
3           "credibility" a few times, and I think that goes to two  
4           different things. One, it does go to the corroboration.  
5           How could they, they victims, have possibly known about  
6           this unless they were subjected to it. It also goes to the  
7           fact that they're seven and nine years old. And if you  
8           have these two young girls come in and testify about, you  
9           know, a bat cave and shirts over the head and the guy's  
10          nickname is Thor, I think a jury might not know quite what  
11          to make of that. But - - -

12                    JUDGE ABDUS-SALAAM: They - - - they - - - were  
13           they that age when the trial occurred, or were they that  
14           age when the crime occurred?

15                    MR. SHOEMAKER: When the crime occurred I think  
16           they were seven and nine, and I think the trial was like a  
17           year later. So - - -

18                    JUDGE ABDUS-SALAAM: So one of them was ten by  
19           then and the other was eight?

20                    MR. SHOEMAKER: Yes.

21                    JUDGE ABDUS-SALAAM: Okay.

22                    MR. SHOEMAKER: Correct.

23                    JUDGE RIVERA: So I'm confused. You're - - -  
24           you're arguing that this is to offset what the jury might  
25           think is pure fantasy and therefore, deal - - - address his

1 defense of it's fabricated?

2 MR. SHOEMAKER: Yeah. It goes to their  
3 credibility both as to whether they're fabricating or  
4 basically just how to understand. I think if you look in  
5 the motion, it's how is the jury going to understand all  
6 these things that are going to come out unless we have this  
7 evidence in. And as the Appellate Division held, the  
8 proclivities were not Molineux evidence but the smoking  
9 crack was Molineux evidence. In this case, it was not  
10 unduly prejudicial. I cite some cases in my brief. There  
11 was no drug crime charged here.

12 JUDGE PIGOTT: Yeah. But if - - - if the jury's  
13 told this guy's a crackhead, isn't that prejudicial,  
14 whether your charge him or not?

15 MR. SHOEMAKER: It is prejudicial. It's also  
16 probative. And it's more probative than prejudicial.

17 JUDGE PIGOTT: What's the probative part?

18 MR. SHOEMAKER: It's part of this whole act.  
19 This is the - - - it's part of the corroboration. It's the  
20 - - - the thing that the girls witnessed was the whole act.  
21 It was the crack, it was the shirt, it was the bat cave.

22 JUDGE PIGOTT: Couldn't - - - I mean couldn't the  
23 judge say, you know, I get the shirt, I get the bat cave, I  
24 get - - - you know, but we're not going to drag drugs into  
25 this because, you know, if you get a jury over here that

1 thinks drugs are bad, this guy's dead before he gets on the  
2 stand?

3 MR. SHOEMAKER: A judge could do that. A judge  
4 could also do what the judge did here, and that's within  
5 the judge's discretion. So - - -

6 JUDGE PIGOTT: Well, always? I mean - - - well,  
7 that's kind of my point. I mean to me that seems like a  
8 serious thing to say he had a shirt over his head, he was  
9 in the bat cave, and by the way, he committed three murders  
10 last year. I - - - I don't think the three murders are  
11 relevant. By the way, he's a crackhead. I'm not sure  
12 that's relevant. And it seems to me that you could find  
13 somebody who had a son, a daughter, a relative, or  
14 something that was involved in drugs that you didn't know  
15 about in the jury who now all of a sudden says this son-of-  
16 a-gun is going away. I don't care what the testimony is.

17 MR. SHOEMAKER: Well, it's not necessarily just  
18 that he was a crackhead. It's that he smoked cracked while  
19 having these sexual acts performed on him.

20 JUDGE PIGOTT: And you think that was necessary?

21 MR. SHOEMAKER: I think it was - - - it was  
22 necessary to corroborate the two victims' testimony that  
23 they - - - how would they have possibly known this is the  
24 very specific unique thing that he does unless they were  
25 actually subjected to it, and it is a very specific, unique

1 thing. And while they're arguing the Molineux motion, the  
2 judge says something like that's a pattern that these  
3 victims are a part of.

4 And it is - - - it's up to the discretion of the  
5 trial court. We know the judge exercised his discretion  
6 because he did not allow the People to get into three out  
7 of the five areas they wanted to get into on the Molineux  
8 proffer. He also required specificity. I think we wanted  
9 to get into a lot more instances of this and the judge said  
10 no, you need an actual day and you need an actual person in  
11 order for you to be able to testify about this.

12 CHIEF JUDGE DIFIORE: Counsel, would you address  
13 the issue of the mom's testimony regarding the reporting by  
14 the child of the sexual assault to her?

15 MR. SHOEMAKER: The excited utterance?

16 CHIEF JUDGE DIFIORE: - - - excited utterance.

17 MR. SHOEMAKER: Yeah. I read that as an excited  
18 utterance. My argument is that it's an excited utterance.  
19 I think the judge said spontaneous utterances, but I think  
20 it's clear that he meant excited utterance. The testimony  
21 of the mom showed that the victim, it had just happened,  
22 the victim was still emotional from it. The People tried  
23 to - - - the prosecutor in this case tried to offer the  
24 outcry of the other victim and the judge did not allow us  
25 to get into that because I think it was too late at that

1 point. So my argument is it's an excited utterance. It  
2 comes in. She's still emotional. I cited some cases on  
3 that, also, in my brief. If there are no other questions -  
4 - -

5 JUDGE FAHEY: Yeah. I had - - - I had asked  
6 opposing counsel about harmless error. Do you want to  
7 address it? Assume - - - assume that this was an error,  
8 there was no limiting instruction.

9 MR. SHOEMAKER: I'm not sure it's harmless. It's  
10 - - - this case is all based on the testimony of the - - -  
11 the complainants.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. SHOEMAKER: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel.

15 MR. SHIFFRIN: Just briefly, again, the People  
16 are arguing that it was admissible for purposes of  
17 corroborating, not the ground argued before the trial  
18 court. I don't think you could read the papers below and  
19 find any argument by the district attorney that it was  
20 admissible for that purpose. This court in Concepcion,  
21 LaFontaine, People v. Ingram have said you can't switch  
22 theories. If this should not have been a Molineux proffer,  
23 that the People could have done and say we're making a  
24 Molineux proffer, however, we don't believe this is  
25 necessarily under Molineux, just - - - just to protect

1 ourselves.

2 JUDGE ABDUS-SALAAM: Counsel, would the arguments  
3 have been any different if - - - if there were some other  
4 theory? Didn't - - - didn't both sides basically argue  
5 that this evidence was - - - well, the People argued this  
6 evidence was admissible and gave its reasons, and the  
7 defendant argued against the admission.

8 MR. SHIFFRIN: Very different argument. The  
9 People argued it was admissible for one purpose, for family  
10 dynamics. The defense attorney said - - - argued in  
11 response the prejudice over - - - outweighs the relevance  
12 for that purpose. There was not an argument ever made that  
13 it was relevant for confirming or corroborating the girls'  
14 versions of events. The - - - because the argument wasn't  
15 made, the defense counsel didn't respond to the argument  
16 that wasn't made. The - - - that's the unfairness of - - -  
17 of affirming on a theory that was - - - that wasn't made.  
18 As well - - -

19 JUDGE ABDUS-SALAAM: The defense was - - - the  
20 defense was not at all on notice that it was going to be  
21 the credibility of these witnesses that was going to be at  
22 issue?

23 MR. SHIFFRIN: The - - - of course credibility is  
24 at issue. But it - - - that wasn't the purpose that it - - -  
25 - that wasn't the ground that was argued. Now it should

1 have - - - it should have been a limiting instruction. If  
2 - - - if it was admitted for the one purpose that was - - -  
3 that was sought, the question of - - - should have given a  
4 limiting instruction.

5 JUDGE ABDUS-SALAAM: Did the defendant ask for a  
6 limiting instruction?

7 MR. SHIFFRIN: No. And it's important. In  
8 People v. Resek, this court had held that when - - - when  
9 there's a violation of Molineux and things come in, you can  
10 consider, and the court did, the majority over the  
11 dissent's objection to footnote three in the dissent,  
12 considered the prejudicial impact of the failure to give a  
13 limiting instruction even though it wasn't requested.

14 There was - - - if, to the extent that the court  
15 doesn't want to continue and follow Resek, then counsel was  
16 ineffective in not - - - in not requesting the limiting  
17 instruction in a case where the - - - the evidence was so  
18 prejudicial. To go back to Judge Fahey's question, the - -  
19 - the court held and stated this is obviously very  
20 prejudicial. And that - - - in response to the - - - to  
21 the Molineux application, that's page 26 of the record, the  
22 court recognized the prejudice. It sought - - - its  
23 admission sought for a single - - - a single purpose and  
24 there was nothing done to ensure the jury is limited to  
25 that one purpose. Thank you.

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CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Timothy Brewer, No. 175 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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