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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

RICHARD M. LEONARD,

No. 19  
20

Appellant.

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20 Eagle Street  
Albany, New York  
February 8, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matters on this  
2 afternoon's calendar are appeals numbers 19 and 20, the  
3 People of the State of New York v. Richard Leonard.

4 Counsel.

5 MR. SHIFFRIN: May - - - may it please the court,  
6 if I may - - - can I have two minutes reserved for  
7 rebuttal?

8 CHIEF JUDGE DIFIORE: Yes. You may, sir.

9 MR. SHIFFRIN: Thank you, Your Honor. There was  
10 no legitimate, strategic reason for counsel to fail to have  
11 the jury learn that the only trial witness who claimed to  
12 have observed the charged sexual crime on the day of the  
13 event told the police that he had not seen anything  
14 specific but merely believed that my client had done  
15 something inappropriate. By contrast, two-and-a-half years  
16 later at trial, the witness testified that he had seen my  
17 client's hand, in his word, on her wet vagina with his  
18 fingers down there. Could not be more - - -

19 JUDGE ABDUS-SALAAM: Counsel, I'm - - - I'm - - -  
20 could I just stop you because I'm a little confused about  
21 what the basis of your ineffective assistance of counsel  
22 claim is. Is it that trial counsel failed to get the  
23 police report admitted into evidence or that trial counsel  
24 failed to confront the star witness, if you will, with  
25 statements that he made in the police report or elsewhere?

1                   MR. SHIFFRIN: The - - - my contention - - - our  
2                   contention below and - - - and here is that the  
3                   ineffectiveness was the failure to attempt to impeach the  
4                   witness with respect to the statement, first by asking  
5                   questions to the witness about the fact that at the day of  
6                   the charged event he said he had not seen anything  
7                   specific, and then if - - - if the witness didn't  
8                   acknowledge that, then to fail to try to get the report  
9                   into evidence. This court, back in December of this - - -  
10                  of last year in People v. Patterson, cited with approval  
11                  two cases for the proposition that a police report can be  
12                  used for purposes of impeachment even though the - - - the  
13                  person who gave the statement did - - - was not under a  
14                  business duty.

15                  JUDGE STEIN: But could - - - could counsel have  
16                  thought that perhaps the fact that he even reported it  
17                  immediately like that might have worked to - - - to the  
18                  disadvantage of the defense - - -

19                  MR. SHIFFRIN: Not in the facts of this case.

20                  JUDGE STEIN: - - - being raised.

21                  MR. SHIFFRIN: In this case, he didn't report it.  
22                  What happened, and this is the - - - the key, is he was  
23                  questioned because this witness assaulted my client on that  
24                  day, and - - - and on the day he had the greatest motive to  
25                  justify his assault by saying I assaulted Mr. Leonard

1 because I observed him, and with specificity, sexually  
2 touching his girlfriend. He did not say that. Instead, he  
3 said I didn't see anything specific.

4 JUDGE STEIN: No. But he - - - but he did say he  
5 saw something.

6 MR. SHIFFRIN: He - - - he said he thought - - -  
7 he said, in his words at page 91 in the record, is I did  
8 not see anything specific. I believed that Mr. Leonard was  
9 in - - - did something - - - was doing something  
10 inappropriate. That's extremely different than his - - -

11 JUDGE WILSON: Well, that - - - how different is  
12 it, though, right? He's a seventeen-year-old at the time,  
13 right, and he says I didn't see anything specifically. And  
14 then later, his trial testimony is I saw her hand but I  
15 didn't see whether there was penetration or what was really  
16 going on. I mean isn't there some chance you do that  
17 cross-examination and what the jury concludes is that it's  
18 somewhat consistent given that he's seventeen years old?  
19 And you beat up on a seventeen-year-old on the stand too  
20 much and the jury is sympathetic?

21 MR. SHIFFRIN: Again, two - - - two different  
22 things. First of all, respectfully, the - - - the trial  
23 testimony that I - - - I saw a wet vagina, his hand on and  
24 his fingers down there could not be more inconsistent than  
25 - - - than a general statement I didn't see anything

1 specific, I just believed he was doing something  
 2 inappropriate. But more importantly, what counsel did was  
 3 not merely fail to try to impeach this witness with respect  
 4 to his prior inconsistent statement. He made a false state  
 5 - - - argument not supported by the record that the - - -  
 6 that the witness had made a prior consistent statement.  
 7 And the - - - and he argued in his summation that the  
 8 witness tried to - - - ten days after this event tried to  
 9 justify his assault on my client by saying that he had - -  
 10 - he had seen something specific. The - - - this argument  
 11 - - -

12 JUDGE GARCIA: That - - - I'm sorry, counsel.  
 13 That came out at the trial, the assault?

14 MR. SHIFFRIN: The - - -

15 JUDGE GARCIA: The facts of the assault?

16 MR. SHIFFRIN: Yes. The facts of the assault  
 17 came out at trial. The - - - by arguing that there's a  
 18 prior consistent statement, which is not true, as opposed  
 19 to making the argument there was a prior inconsistent  
 20 statement, the counsel doubly hurt my client. Because - -  
 21 -

22 JUDGE FAHEY: Can - - - can I just clarify though  
 23 - - -

24 MR. SHIFFRIN: Sure.

25 JUDGE FAHEY: - - - just Mr. Shapiro, you know

1 the record better than I am. Did - - - or, yeah, Mr.  
2 Shiffrin, you know the record better than I am. Did Valle  
3 actually use the words in this - - - the police report, in  
4 the incident report, that he didn't see anything specific?

5 MR. SHIFFRIN: He - - - the report - - - the  
6 report is unsworn just so it's - - - just so it's clear.  
7 The - - - that's the language in the report on page 91  
8 recorded by the officer is that he said he didn't see  
9 anything specific. The - - -

10 JUDGE FAHEY: Right. The - - - the signed  
11 statement, you know, the voluntary statement that he made,  
12 did he actually use those words?

13 MR. SHIFFRIN: There - - -

14 JUDGE FAHEY: I'm a little unclear on that.

15 MR. SHIFFRIN: There's not a signed statement by  
16 Mr. - - - there's not a signed statement that day by Mr.  
17 Valle, just so it's clear. Mr. - - - Mr. Valle's statement  
18 to the police officers recorded in a - - - in a police  
19 report that the officer had a duty - - - a business duty to  
20 - - - to record that report accurately. Mr. Valle was not  
21 under a duty but that was - - - that's how that report came  
22 down. There was not a sworn - - - there was not any  
23 statement by Mr. Valle that day with respect to what he  
24 observed.

25 JUDGE FAHEY: Let - - - let me back up. 10/7/07

1 - - -

2 MR. SHIFFRIN: Correct.

3 JUDGE FAHEY: - - - Valle signs a statement,  
4 right? You're right. And in that statement did he use the  
5 words he didn't see anything specific - - -

6 MR. SHIFFRIN: He - - - he - - -

7 JUDGE FAHEY: - - - that he could have been then  
8 impeached with later?

9 MR. SHIFFRIN: He didn't sign a statement on  
10 10/7/07 with respect to what he observed. There's nothing  
11 - - - nothing on - - - in that statement on 10/7 about what  
12 he observed. Okay. That - - -

13 JUDGE ABDUS-SALAAM: I'm sorry. You're saying in  
14 the voluntary statement there was nothing about what he  
15 observed?

16 MR. SHIFFRIN: In terms of specificity?

17 JUDGE ABDUS-SALAAM: No.

18 MR. SHIFFRIN: The - - -

19 JUDGE ABDUS-SALAAM: It - - - but he did say I  
20 saw the - - - "I saw Rich standing over and doing  
21 something."

22 MR. SHIFFRIN: Doing something. Nothing about -  
23 - - again, going back to the - - -

24 JUDGE ABDUS-SALAAM: But that was consistent with  
25 what he - - - the police - - -

1 MR. SHIFFRIN: That's consistent with what my  
2 client testified. My client's version from day one on 10/7  
3 was - - - was that he was - - - he was up there but she - -  
4 - she had - - - in his state - - - in the police report had  
5 got sick and was cleaning up. Again, up there doing  
6 something, nothing - - - nothing specific inappropriate is  
7 very, very different, respectfully, than saying I saw a  
8 hand on a wet - - - on a wet vagina with a finger down  
9 there. The - - - that would discredit - - - at the time he  
10 made that statement on 10/7, this witness was charged with  
11 assault. He had every reason to try to justify his assault  
12 by saying he saw - - - saw a lot, he saw something very bad  
13 happen.

14 CHIEF JUDGE DIFIORE: But isn't it possible that  
15 defense counsel was just trying to avoid highlighting the  
16 consistencies here?

17 MR. SHIFFRIN: Highlighting the consistencies,  
18 that's the argument by the - - - by the People. The  
19 consistencies are basically irrelevant. And there was no  
20 argument that she was upstairs - - - upstairs passed out and  
21 he was down - - - down below. There's nothing in the - - -  
22 in the consistencies that in any way would support a crime.  
23 There's nothing in the - - - either the statement made by  
24 Mr. Valle on 10/7 or on the police report which would  
25 justify even charging Mr. Leonard with - - - with a sexual



1 assault on a - - -

2 JUDGE WILSON: Well, the consistency that she was  
3 passed out with her underwear and pants down, I mean, that  
4 seems consistent with an assault. I don't want to take up  
5 your time on that, though. I think you might want to move  
6 to the Molineux.

7 CHIEF JUDGE DIFIORE: Yes.

8 MR. SHIFFRIN: Yeah. With - - - with respect to  
9 Molineux, I want to deal with the failure of counsel to  
10 seek a limiting instruction because the - - - the key with  
11 Molineux, of course, is that evidence of prior crimes  
12 cannot come in for propensity. But the jury doesn't know  
13 that unless they're told that. The - - - the failure of  
14 counsel to seek a limiting charge - - - charge both when  
15 the witness testified and in the closing instructions  
16 combined with the failure to object to the use by the DA in  
17 summation of the prior event creates the real danger that  
18 the jury was considering - - - considering that prior - - -  
19 the prior uncharged crime for propensity especially given  
20 the similarity.

21 JUDGE FAHEY: So - - - so you're going after  
22 Molineux on an ineffective assistance of counsel?

23 MR. SHIFFRIN: That's raised - - - that's raised  
24 in point 3D is that - - -

25 JUDGE GARCIA: But also you're going on the

1 Molineux substantive ruling, as well?

2 MR. SHIFFRIN: I - - - raised that, also. But -  
3 - - but I'm focusing now - - - because the totality of the  
4 representation between the failure to have the jury ever  
5 learn of the prior inconsistent statement, the failure to  
6 have any - - -

7 JUDGE STEIN: Can I ask you just quickly about  
8 whether the - - - the People ever advanced a specific  
9 purpose for using that Molineux evidence?

10 MR. SHIFFRIN: Yes. They did. They talked about  
11 showing intent, motive - - -

12 JUDGE STEIN: Motive - - - motive to get her  
13 drunk, intent - - -

14 MR. SHIFFRIN: Yes. Yes. But - - -

15 JUDGE STEIN: Okay. And is there - - - is there  
16 really any distinction between what they were saying that  
17 they're - - - maybe I should ask them. Never mind.

18 MR. SHIFFRIN: Okay.

19 CHIEF JUDGE DIFIORE: Thank you, Mr. Shiffrin.

20 MR. SHIFFRIN: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MR. SHOEMAKER: Good afternoon. May it please  
23 the court, Robert Shoemaker for the People. This is not a  
24 case of ineffectiveness. This is a case of disagreement  
25 with counsel's trial strategy, and the definition has not

1 established that trial counsel's failure to utilize these  
2 prior statements from the witness demonstrated a lack of  
3 strategy.

4 JUDGE STEIN: What about the Molineux failure to  
5 ask for a limiting instruction?

6 MR. SHOEMAKER: So that could also have been part  
7 of his strategy. His strategy, essentially, what we see in  
8 the opening and the closing, the opening at page 229 of the  
9 appendix, the closing at 362 to 363, is that the victim and  
10 her then-boyfriend were locked into these allegations. He  
11 - - - he wanted to show the whole thing - - - defense  
12 counsel wanted to show the whole thing was a fabrication.  
13 So as for - - - looking at the Molineux in the context of  
14 an ineffectiveness claim, defense counsel didn't want to  
15 draw attention to these 2005 allegations because, again,  
16 his defense strategy was that these 2005 events could never  
17 have occurred. The defendant actually took the stand and  
18 said he wasn't even living there at the time. So I think -  
19 - -

20 JUDGE STEIN: But don't you think that those two  
21 - - - or her - - - her testimony about the prior events was  
22 like the elephant in the room in this whole case? I mean  
23 no - - - you know, she - - - she doesn't remember anything.  
24 And - - - and, you know, he - - - he's got some credibility  
25 issues. So how could that not have been, you know, a

1 serious issue?

2 MR. SHOEMAKER: Well, it's very strong Molineux  
3 evidence that we sought to use and that I argue was  
4 properly used. Defense counsel had the choice to address  
5 it in his summation or - - - or address it by asking the  
6 court to give a limiting instruction. Or defense counsel  
7 had the option to not address it and just argue that it's -  
8 - - this is all a fabrication. So the - - - I - - -

9 JUDGE FAHEY: Well, let's take a step back.  
10 Let's go to the substantive issue itself. Forget about  
11 ineffective assistance of counsel.

12 MR. SHOEMAKER: Sure.

13 JUDGE FAHEY: For Molineux to go in there you - -  
14 - it has to be linked up with some material issue that's  
15 relevant in the case. Not - - - not in the 2005 case, but  
16 in the present case. What material issue is it relevant to  
17 in this case?

18 MR. SHOEMAKER: Sure. So it's material because  
19 it shows the motive for serving or overserving the alcohol,  
20 the unlawful dealing, the motive behind that why did  
21 defendant want to get the victim drunk.

22 JUDGE FAHEY: I can't say - - -

23 JUDGE STEIN: Isn't that - - -

24 JUDGE FAHEY: - - - that I see that at all. I  
25 would have thought maybe - - - I thought you really relied

1 on background on completing the narrative, and I thought  
2 that's what the court relied on.

3 MR. SHOEMAKER: Well, there's three - - - there's  
4 three reasons. So one is the motive, this - - - and this  
5 is what Fourth Department decided, motive, what I just  
6 said; intent as far as the sexual gratification, why is he  
7 actually doing this and then sexual gratification was  
8 something that we had to prove at trial; and the background  
9 the - - - to completing the narrative. And those are the  
10 three reasons - - -

11 JUDGE ABDUS-SALAAM: But doesn't the crime itself  
12 suggest both the first two, the motive and the intent?

13 MR. SHOEMAKER: The crime itself can suggest  
14 those. Defendant's, I guess his defense, was that this was  
15 a mistake where he was placed and everything. His defense  
16 was that he was cleaning up vomit. So our burden to prove  
17 the case beyond a reasonable doubt, in order to do that, we  
18 can use any evidence that is admissible. In this case, the  
19 Molineux evidence was - - -

20 JUDGE ABDUS-SALAAM: A mistake, I'm sorry, that  
21 he was cleaning up vomit? What - - - what mistake was  
22 that? That he - - - he never said. His - - - his position  
23 was I didn't touch her. I - - - I had - - - I never did  
24 anything. So what - - - what's the mistake?

25 MR. SHOEMAKER: I guess the mistake in

1 interpreting where he's located. Like the fact that he is  
2 kneeling beside her while she's passed out on the couch.  
3 The Molineux evidence helps to show - - - from the People's  
4 perspective, the Molineux evidence shows that he wasn't  
5 there cleaning up vomit. He was there - - - his intent was  
6 for sexual gratification. He had gotten her drunk - - -

7 JUDGE FAHEY: It seems to be - - -

8 JUDGE RIVERA: But isn't that the whole point?  
9 All you're arguing is, look, he did that before so it must  
10 be why he's doing it now. That's - - - that's exactly what  
11 Molineux is set up not to allow you to do.

12 MR. SHOEMAKER: It - - - well, when it's relevant  
13 for those reasons, that is what it allows you to do. It -  
14 - - it's relevant to show his motive. It's relevant to  
15 show his intent especially - - -

16 JUDGE FAHEY: He committed the same crime before.  
17 You're saying that it's showing his intent to commit the  
18 same crime again. That's not allowed under Molineux.

19 MR. SHOEMAKER: If it's - - - if it's the intent  
20 - - - within his intent is that he's doing this for sexual  
21 gratification.

22 JUDGE FAHEY: See, I - - - if - - - these are  
23 always difficult, you know, these - - - the Molineux issues  
24 are difficult and they're - - - they're complicated. I - -  
25 - I recognize that. But what I'm concerned with sometimes

1 is that it - - - it appears like pure propensity and then  
2 quite often the People then rely on completing the  
3 narrative or background. And most times that makes some  
4 sense, but I'm - - - I'm struggling with it here because it  
5 seems if it applies here without an identifiable element in  
6 this crime, as opposed to some other action that it links  
7 up to, then the - - - the exception would swallow the rule.  
8 That's why I'm - - - I'm addressing the questions that way  
9 to you.

10 MR. SHOEMAKER: And I just think in this case the  
11 Fourth Department correctly held that their - - - I mean  
12 they - - - they explained that in their view, and in my  
13 view, I agree with the Fourth Department decision, that the  
14 - - - the motive was there. This helps to show motive for  
15 the alcohol. It helps to show the intent as far as sexual  
16 gratification. And it helps to show completing the  
17 narrative background, the relationship between these two  
18 individuals.

19 JUDGE STEIN: What is it about their relationship  
20 that relates to this crime? Can - - - can you articulate  
21 that? Because I just don't really understand it. It's  
22 been said, but I - - - I just don't understand what it is.  
23 I mean, yeah, go ahead.

24 MR. SHOEMAKER: In my - - - in my view, it's the  
25 sexual gratification. It's the fact that he is touching

1 her for his own sexual gratification. In 2005 - - -

2 JUDGE STEIN: Again, doesn't that just say he did  
3 it in 2005, therefore, he must also be doing it now?

4 MR. SHOEMAKER: For - - -

5 JUDGE STEIN: To me - - - I don't understand how  
6 that relates to their relationship, exactly.

7 MR. SHOEMAKER: For purposes of sexual  
8 gratification that - - -

9 JUDGE STEIN: I understand.

10 MR. SHOEMAKER: - - - he was - - - he was  
11 breathing - - - in 2005, the testimony is that he was  
12 breathing heavily and - - - and in this particular case, I  
13 - - - I guess don't know another way to put it.

14 JUDGE STEIN: So you're saying that the - - -  
15 that the completing the narrative or explaining the  
16 relationship is the same thing as - - - as showing intent?  
17 It seems to me you're conflating those two.

18 MR. SHOEMAKER: I think they're - - - the facts  
19 of the case are what conflate the two. The - - - his  
20 relationship with her going back to 2005 also shows his  
21 intent in this particular case, which was sexual  
22 gratification - - -

23 JUDGE ABDUS-SALAAM: Counsel, did - - - did the  
24 trial court do any balancing here? Did - - - did the - - -  
25 I didn't see anything in the trial court's decision that



1 said that it weighed whether the probative value of this  
2 evidence outweighed the prejudicial value of this evidence.  
3 And that's - - - that's part of the Molineux equation,  
4 isn't it?

5 MR. SHOEMAKER: So you can see the court did.  
6 Even if it didn't explicitly use those words, you can see  
7 because the People originally asked for three - - - to get  
8 into three areas on Molineux. The court only allowed one  
9 of the three, the most recent of the three. That there, I  
10 would argue, is an exercise of discretion. And as we're  
11 looking at this case for an abuse of discretion, the fact  
12 that the court only allowed one out of the three shows that  
13 the court exercised its discretion but did not abuse its  
14 discretion.

15 JUDGE STEIN: But does that show that the court  
16 analyzed this particular prior act in terms of its  
17 probative versus prejudicial value or it just said - - -  
18 you know, how does that tell us what the court considered?

19 MR. SHOEMAKER: I think it does show that the  
20 court considered that. And we also have - - - there's a  
21 question-and-answer between the court and the prosecutor  
22 about kind of what I'm saying right now, well, why she  
23 needs to get into this prior event. And the prosecutor  
24 says to show sexual gratification.

25 JUDGE RIVERA: It sounds like - - - you know, it

1 sounds like - - -

2 MR. SHOEMAKER: And the court - - - I think the  
3 court took overnight to - - -

4 MR. SHOEMAKER: But it sounds like your - - -  
5 your rule is basically anytime there's a prior sexual bad  
6 act it gets in to show sexual gratification. I don't - - -  
7 I - - - I share some of the uncertainty, I think, is - - -  
8 is being demonstrated by my colleagues' questioning.

9 MR. SHOEMAKER: Well - - -

10 JUDGE RIVERA: Where is this line because  
11 Molineux has a line, and I'm not seeing much of a line in -  
12 - - in what you're promoting here as the rule?

13 MR. SHOEMAKER: Well, the line - - - I mean the  
14 line is, first it has to be relevant, and then it has to be  
15 more probative than prejudicial. The line as we are  
16 looking at it now is did the court abuse its discretion in  
17 this particular case in deciding those two factors in favor  
18 of the People to use this evidence.

19 JUDGE RIVERA: Yes. But you're saying it - - -  
20 it shows sexual gratification because he's touched her in  
21 the past to sexually gratify himself so he's touching her  
22 here to sexually gratifying himself. Again, that sounds  
23 like propensity. What - - - it then sounds like it always  
24 gets in.

25 MR. SHOEMAKER: I - - -

1                   JUDGE RIVERA: It doesn't sound like an  
2 exception. It sounds like you've made it the rule.

3                   MR. SHOEMAKER: Well, I mean, that - - - it  
4 wouldn't always get in. It would - - - it would get in if  
5 it were more probative than prejudicial in the eyes of the  
6 trial court and if it did show any of the Molineux  
7 exceptions.

8                   JUDGE ABDUS-SALAAM: I'm - - - I'm struggling  
9 still with how it's more probative than prejudicial when  
10 these are the exact same charges that were presented to the  
11 grand jury. And am I correct in reading the record that no  
12 true bill was found on these two charges in 2005?

13                   MR. SHOEMAKER: So we don't - - - they weren't  
14 asked to indict a sex abuse charge for 2005. You are  
15 correct that there was no true bill, but they weren't  
16 asked. I don't know if you have that part of the grand  
17 jury notes, but they were not asked. They were only asked  
18 to indict endangering the welfare, which I think they did  
19 but was later dismissed because of the age of the victim,  
20 and then the - - - the two charges that are in this  
21 indictment.

22                   I would - - - unless there are more questions on  
23 Molineux, I'd like to briefly just touch on the general  
24 ineffectiveness. I know there was a question about the  
25 consistency or inconsistency of the statements. I would

1           argue they're actually a lot more consistent, the prior  
2           statement and the testimony at trial. The prior statement  
3           at page 91 of the appendix is that E.V. "didn't see  
4           anything specific." At trial, he actually testified at  
5           page 249, "I can just see his hand, like, touching her,  
6           couldn't specifically see his fingers." So he - - - the  
7           same word is used couldn't specifically see where things  
8           were.

9                           And as I said before, defense counsel's strategy  
10           was that the victim and her then-boyfriend were locked in -  
11           - - almost as a retaliation they were locked into this  
12           testimony because of the assault charges. His strategy was  
13           made clear in his opening and his closing, and this was a  
14           manager - - - matter of strategy, not a matter of  
15           ineffective assistance. Thank you.

16                           CHIEF JUDGE DIFIORE: Thank you, counsel.

17                           Mr. Shiffrin.

18                           MR. SHIFFRIN: Very briefly, with respect to the  
19           Molineux issue, first of all, People v. Hudy this court  
20           held that prior - - - that prior sex acts of a similar  
21           nature generally don't come in unless it fits within an  
22           exception. But what I was arguing before and argue again,  
23           to the extent that the court below might have been correct  
24           with respect to this Molineux holding, it would only be  
25           correct if the jury was specifically instructed that they

1           couldn't consider it for purposes of propensity. That was  
2           the duty of defense counsel. The respondent's arguments  
3           today is that counsel didn't want to emphasize or draw  
4           attention to the 2005 charge, which is odd since the  
5           majority of counsel's summation dealt with the uncharged  
6           2005 event not the charged 2007 event.

7                         In any event, having a - - - a judge instruct a  
8           jury of limits of the testimony is not - - - is in no way  
9           inconsistent with a defense attorney arguing that the - - -  
10          the uncharged events didn't occur. There are two ways to  
11          benefit. And finally - - - by the way, the confusion is  
12          created, as best evidenced by the certificate of  
13          conviction, which - - - on page 18 in the record which  
14          shows a conviction for a 2005 sex assault. Even the court  
15          clerk thought this was case about the 2005 assault, not the  
16          2007 assault.

17                         With resp - - - with respect to the argument that  
18          - - - that counsel made he was locked in, again, that was  
19          an argument that there was a prior consistent statement,  
20          which isn't true. And - - - and it was weaker than the  
21          correct argument that when he - - - when he could have and  
22          should have had his best chance to explain his behavior, he  
23          didn't. And only now years later, which is why - - - in  
24          answer to the question that was asked, my client was not  
25          charged in 2007 with this crime. It was only in 2009, two

1 years later, for the first time did this witness ever come  
2 forward and make the allegations that he observed that in  
3 2007. That was the - - - and that when was - - - he was  
4 indicted two years after that event. There was never a  
5 formal complaint or any other charge of a 2007 sex offense  
6 because it was insufficient evidence because what he told  
7 the police in 2007 was not sufficient to support the charge  
8 which is why counsel needed to have the jury learn that.  
9 Thank you.

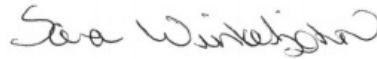
10 (Court is adjourned)

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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. Richard M. Leonard, No. 19, 20 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

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Date: February 14, 2017