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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 21

MILLER-HENDERSON (LASHAWN),

Appellant.

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20 Eagle Street  
Albany, New York  
February 11, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 People v. Miller-Henderson.

3 MS. WEISS: Good afternoon, Your Honors. Clea  
4 Weiss for Lashawn Miller-Henderson. May I please reserve  
5 three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. WEISS: Thank you. Since 1901, in People v.  
8 Molineux, this court has consistently held that prior bad  
9 act evidence must be subjected to, as this court wrote, the  
10 most rigid scrutiny. And as we start considering whether  
11 the evidence in this case was properly admitted, I think it  
12 bears noting that just as in People v. Leonard, the trial  
13 court in this instance did not announce for what purpose it  
14 was admitting this evidence, nor did it conduct any  
15 balancing of prejudice versus probative value.

16 CHIEF JUDGE WILSON: Well, it gave like six or  
17 something different reasons initially, right?

18 MS. WEISS: The court never gave reasons. The -  
19 - - the People proffered every single reason that exists  
20 under the case law for admitting Molineux evidence, and  
21 then the court simply admits it without selecting which of  
22 those reasons.

23 JUDGE SINGAS: I thought the court said it was  
24 for intent to sell, and I thought she made a ruling. I - -  
25 - I think she had a basis of two things. Am I mistaken?

1 MS. WEISS: So - - -

2 JUDGE CANNATARO: I think knowing possession was  
3 the other one, wasn't it?

4 MS. WEISS: Well, so what happens is that she - -  
5 - when she makes her Molineux ruling pre-trial, there's no  
6 reason given, and the reasons are only selected when they  
7 are designing the limiting instruction mid-trial. And when  
8 they're designing the limiting instruction mid-trial, this  
9 is on page 285 and 286 of the appendix, the court is  
10 starting to read the limiting instruction, and the court  
11 says it's offered for your consideration on the question of  
12 tell me what you want me to say. She turns to the  
13 prosecutor, and the prosecutor says, knowing possession and  
14 intent, and that's where we get these two bases.

15 And actually, the court later says intent to  
16 possess, not intent to sell. Of course, intent to sell is  
17 the only intent element of these crimes, so I'm analyzing  
18 those two bases in this case. But ultimately, what we see  
19 in this case is the trial court abdicated its duty to  
20 determine what Molineux exception applies to the trial  
21 prosecutor mid-trial, at the time of the limiting  
22 instruction.

23 And I think, you know, our - - - our assumption  
24 with Molineux is that it's an exception to the rule. It  
25 doesn't come in. The standard rule is that it doesn't come

1 in, and I think the trial court is not submitting this  
2 evidence to much scrutiny in this case.

3 CHIEF JUDGE WILSON: I was sort of wondering,  
4 because the issue - - - it seemed to me the sole issue was  
5 constructive possession. And I was - - - still I'm trying  
6 to figure out how intent figures into that. I'm not - - -  
7 I'm not really clear why it would.

8 MS. WEISS: So the - - - the really - - - the  
9 disputed issue at this trial is - - - is constructive  
10 possession, knowing possession, but of course, on three of  
11 the counts that he's on trial of intent to sell is part of  
12 the element of the crime.

13 CHIEF JUDGE WILSON: Yes, but I thought that the  
14 defense counsel was pretty clear that he wasn't contesting  
15 intent, the intent element of those crimes, that if he was  
16 found to have constructively possessed them, that, you  
17 know, intent would be inferred.

18 MS. WEISS: That's correct. I mean, the intent  
19 element of these crimes is as close to conceding as you can  
20 get without putting in a stipulation that's conceded.  
21 Defense counsel refers to the drugs in this case as the  
22 product.

23 CHIEF JUDGE WILSON: And - - -

24 JUDGE SINGAS: The People still have to prove  
25 that, right? I mean, even if a defendant concedes it, you

1 still have to convince a jury that it was an intent to  
2 sell. So I think the point is well taken, but the People  
3 have a burden of proof of proving all the charges,  
4 regardless if there's a concession or not. The People that  
5 you have to convince are the jury.

6 MS. WEISS: Certainly that's true, and I mean, in  
7 1977, in People v. Cook, this court also wrote that  
8 Molineux evidence has to be relevant and necessary. And I  
9 think that supports my argument that this is a step-one  
10 case as to intent to sell, because it's just not necessary.

11 JUDGE TROUTMAN: Your emphasis on and necessary.  
12 Why is that?

13 MS. WEISS: It's because when evidence  
14 overwhelmingly establishes an element, and you see this in  
15 Weinstein, you see this in Vargas, you see this in Alvino,  
16 when it overwhelmingly establishes an element and it's  
17 uncontestable and uncontested, literally, by the  
18 defendant's chosen trial strategy, it becomes irrelevant as  
19 a matter of law. And it becomes a step-one case.

20 JUDGE CANNATARO: If the evidence of intent was  
21 indeed overwhelming, does that speak to whether the  
22 Molineux error you allege happened here would be harmless?

23 MS. WEISS: It would support the argument - - -  
24 well, I see what Your Honor saying. I think the evidence  
25 as to intent to sell is overwhelming, but when you look at

1 the entire verdict and everything, my position would be  
2 it's not overwhelming because the constructive possession,  
3 the knowing possession element, is not overwhelming. So it  
4 is overwhelming as to one element, and therefore, the  
5 Molineux evidence is irrelevant as a matter of law to that  
6 element. But then under harmless error we are considering  
7 all of the elements of the crime.

8 JUDGE CANNATARO: Well, let me ask you this. If  
9 we were to find that the - - - that there was the only  
10 permissible basis that you could have admitted the Molineux  
11 evidence was on this question of intent, and - - - but it  
12 was, nevertheless, an error to do so here, does that make  
13 the overwhelming nature of the evidence any more important  
14 with respect to harmless analysis?

15 MS. WEISS: I don't think it does, because under  
16 the harmless analysis, we have to look at the People's  
17 proof as to all of the elements. And because the People's  
18 proof in this case, as to knowing possession and dominion  
19 and control, is fairly weak, the evidence is not  
20 overwhelming overall to the trial verdict. We're looking  
21 at, you know, the impact on the jurors if we were to  
22 subtract this evidence.

23 And the other element, I think, that's under  
24 consideration, of course, intent to sell, I believe, falls  
25 under step one. I think it's controlled by Weinstein, but

1 knowing possession is the other aspect that the limiting  
2 instruction - - - instruction is given for this Molineux  
3 evidence. And as to knowing possession, I think that this  
4 court's decision in Telfair directly controls the evidence.  
5 Telfair stands for the concept, and this court has  
6 repeatedly held that prior conduct is not directly relevant  
7 to an element when it's similar only in broad respects.  
8 And just as in Telfair, we have - - -

9 JUDGE CANNATARO: Telfair was a knowledge case,  
10 though, wasn't it? I mean, the - - - the specific Molineux  
11 issue there was knowledge, and you know, I know knowledge  
12 plays in here. But as you say, it's kind of hard to pick  
13 out of this record exactly what the basis was. But if we  
14 take knowledge out of it, does Telfair have that sort of on  
15 all fours applicability here?

16 MS. WEISS: I think it does. It's true that  
17 knowing possession can kind of be seen as knowledge and  
18 then constructive possession, but it is one element.  
19 Knowing possession both as to - - -

20 JUDGE CANNATARO: Are they the same, constructive  
21 possession and knowledge? Because I thought there was a  
22 difference. You know, knowing that what you have are drugs  
23 might be different than having dominion and control over  
24 them because of your physical location with respect to the  
25 drugs.

1 MS. WEISS: I would agree with Your Honor that  
2 conceptually they're different. I guess just in terms of  
3 them being an element under the CJ, when we talk about the  
4 elements of a crime, they both fall under knowing  
5 possession, which is the same as for criminal possession of  
6 a weapon and criminal possession of a controlled substance  
7 in this case. But I think the differences in this case  
8 make it irrelevant to constructive possession and  
9 knowledge.

10 So we've got the location is the most important  
11 one. We've got drugs in a car versus drugs in a home.  
12 That's our first big difference. The drugs in the car are  
13 in open view, right? That Molineux evidence - - - witness  
14 testifies that he can just see them by shining a flashlight  
15 through the windshield of this car. They're just out there  
16 in the open; whereas, in this case, we've got drugs that  
17 are concealed within shoes in the south bedroom.

18 We've got different theories of constructive  
19 possession. In the Molineux evidence, we've got drugs that  
20 are in a car that is registered to Mr. Miller-Henderson;  
21 whereas, in this case, we've got his physical presence in a  
22 home amongst other adults. He's not the lessee of the  
23 home, so we're just sort of relying on his - - - his  
24 presence there as opposed to the car.

25 JUDGE TROUTMAN: So are you saying essentially

1 what they offered it for is he possessed drugs before. In  
2 a different way, he possesses them in that shoe, in that  
3 room?

4 MS. WEISS: And that is purely propensity  
5 evidence, because without the similarity, when it's only  
6 broad - - - and the only - - - the only similarity is it's  
7 a fungible product. It's crack cocaine, and when we're - -  
8 -

9 JUDGE TROUTMAN: Were they even packaged the  
10 same?

11 MS. WEISS: They weren't. In the car, they're in  
12 little baggies and bags, and in the house, it is either  
13 unpackaged or in vials. So - - -

14 JUDGE SINGAS: Well, how do you account for the  
15 acquittals on some of the counts, right? Because I think  
16 your theory is - - - what you're arguing is that the jury  
17 was - - - could be so overwhelmed by the Molineux evidence  
18 and the propensity aspect of it, that, of course, they're  
19 going to find him guilty of these crimes because he's done  
20 it before, so now he's doing it again. But this jury was -  
21 - - was pretty discerning, and that's not what happened  
22 here. So does that - - - should that enter into our  
23 analysis?

24 MS. WEISS: I don't think it should, and I think  
25 that this court's decision in Telfair is pretty clear that

1 you can't read anything from a split verdict. Because just  
2 as you could say that the - - - the jury was discerning,  
3 you could also say that, well, they really didn't think  
4 there was a lot of evidence, but this Molineux evidence  
5 tipped the balance. And they said, this guy's a bad drug  
6 dealer. I think he's got to go down on something, so we'll  
7 convict on some of the counts. So I don't know that the  
8 split verdict can really inform the analysis one way or the  
9 other in this case.

10 And you know, using evidence of dissimilar prior  
11 drug possession to prove current knowing drug possession,  
12 that's just not permitted under Molineux. This was  
13 primarily used as propensity evidence. The People's  
14 summation uses it as propensity evidence. The People's  
15 summation draws attention to the certificate of conviction,  
16 People's Exhibit 24, which was part of the Molineux  
17 evidence.

18 And the trial prosecutor says, I submit to you  
19 that you can use that information here to draw the  
20 inference that he did knowingly possess these items as  
21 well. So it's used in a very straightforward way to say  
22 that he possessed drugs before. He's possessing them  
23 again.

24 And in this case, I would like to address  
25 harmfulness. In this case and under this inquiry, I think

1 it's really important to look at the testimony that was  
2 elicited on cross-examination. And I acknowledge that the  
3 testimony elicited by defense counsel on cross-examination  
4 wouldn't be relevant to the Molineux inquiry, which should  
5 focus on the People's proffer and what the court knew at  
6 the time it made that determination, but when we look at  
7 harmlessness, because the defendant was opposing this  
8 witness being called as a witness at all, I think we have  
9 to look at everything that was brought in under this  
10 witness. And that includes the testimony that really  
11 introduces gun violence into this case and introduces the  
12 specter of guns and open air drug markets. And it - - - it  
13 connects - - -

14 JUDGE HALLIGAN: Do you need that to - - - to  
15 prevail on the harmlessness question, do you think? It  
16 seems - - - it struck me that you were relying on it in  
17 your briefs fairly significantly.

18 MS. WEISS: No, I think - - - I think introducing  
19 the propensity evidence and - - - and the harm caused by  
20 this type of propensity evidence is enough to win on,  
21 especially when you've got four adults in this home. And  
22 the propensity evidence says one of these adults is more  
23 likely than the others to be the bad drug dealer who  
24 possesses them. So I think the propensity, the harm caused  
25 by the propensity, is enough to - - - to get us over

1 harmless error. But I think it's also important to look at  
2 what the People were doing as a matter of strategy in this  
3 case with introducing gun violence. And of course, the  
4 shots - - -

5 JUDGE SINGAS: Was there an objection to the gun  
6 violence part of this?

7 MS. WEISS: Well, so the shots fired - - - part  
8 of the Molineux evidence was part of the People's proffer,  
9 and it was elicited by the People in their direct  
10 examination of Ofc. Lyle.

11 JUDGE SINGAS: So was there an objection is my  
12 question.

13 MS. WEISS: In the written - - - in the written  
14 opposition to the Molineux evidence, trial counsel does say  
15 that this is prejudicial, and I think he was opposing  
16 everything that was proffered, including - - -

17 JUDGE SINGAS: But not specifically the point  
18 that you're making right now?

19 MS. WEISS: Not specifically. That's correct.

20 JUDGE SINGAS: Yeah. Okay.

21 MS. WEISS: Unless there's no further questions,  
22 I'll rest.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. ASHE: Good afternoon, Your Honors. Ryan  
25 Ashe for the People. My main contention here is that

1 focusing on point one is that the Molineux evidence served  
2 to undermine a host of potential defenses that would  
3 undercut required elements in the People's proof. These  
4 are what are generally referenced to as someone being  
5 innocently present or inadvertently present. This goes to  
6 this court's discussion in Telfair about difference between  
7 knowledge and mistake, but also it undercut - - - there is  
8 a viable defense, theoretically, that I didn't know those  
9 drugs were there. That's the main one that we kind of  
10 focus on, but we also lose sight of - - -

11 JUDGE SINGAS: Well, I mean, but I think your  
12 adversary's point is well taken. The People's motion to  
13 introduce this evidence included every single exception  
14 that you can come up - - - come up with under Molineux. I  
15 mean, I think it behooves the People to sort of limit what  
16 it is they're asking for. So what is it that you're saying  
17 you needed that prior evidence for?

18 MR. ASHE: Yeah, Judge, to - - - to focus in on  
19 that. I think that from - - - from my perspective, that's  
20 not - - - that's not something that necessarily cuts  
21 against the argument that this should have been admitted or  
22 not, because the court can only admit for basis that - - -

23 JUDGE SINGAS: Well, I'm just asking what it's  
24 admitted for.

25 MR. ASHE: Yeah, so and - - - so my - - - my

1 point is that knowing possession and intent to sell as an  
2 element - - - as - - - as elements that we have to prove,  
3 those are - - - those are encompassing and they can be  
4 defeated by numerous different types of defenses.

5 JUDGE CANNATARO: I don't know how knowing  
6 possession is viable post Telfair. I mean, the fact that  
7 he might have had drugs at some period in the past,  
8 according to the way I read Telfair, is it tells us nothing  
9 about his knowledge or understanding of what he was doing  
10 at this time.

11 MR. ASHE: I understand your point, and I didn't  
12 expect you to bring it out quite so directly, but I've - -  
13 - I've been pondering the same.

14 JUDGE CANNATARO: Well, I read the majority  
15 decision.

16 MR. ASHE: I've been pondering the same thing.

17 JUDGE RIVERA: Well, this was decided - - - this  
18 - - - this occurred before Telfair, no?

19 MR. ASHE: The trial court's decision occurred  
20 before Telfair, yes, but I think - - -

21 JUDGE RIVERA: Yes, they - - - they didn't have  
22 the guidance, although - - -

23 MR. ASHE: Right.

24 JUDGE RIVERA: - - - I think the law was settled,  
25 but nevertheless. Telfair - - -

1 MR. ASHE: Yeah, one could argue that Telfair - -  
2 -

3 JUDGE RIVERA: To the extent it's a little bit  
4 clearer, it might have helped there.

5 MR. ASHE: One could argue that Telfair is an  
6 application of the current law, so - - -

7 JUDGE RIVERA: One would, and that might be me.

8 MR. ASHE: I think that - - -

9 JUDGE HALLIGAN: One could.

10 MR. ASHE: To your point about Telfair, I do  
11 think I can distinguish this case - - - Telfair from this  
12 case, and I think it's necessary for me to do that in order  
13 to - - -

14 CHIEF JUDGE WILSON: Please, do.

15 MR. ASHE: - - - get through on the knowing  
16 possession element. And I think that in - - - in Telfair,  
17 there were, while I don't want to get - - - I don't want to  
18 get called out immediately on the fact that, yeah, these  
19 are probably different drugs, like physically the different  
20 actual, you know, iota of drugs were different, but - - -  
21 but they were the same type of drug in both cases. In Tel  
22 - - -

23 JUDGE TROUTMAN: How about the fact that  
24 circumstances in the case, the two cases here, are  
25 different?

1 MR. ASHE: So - - - so you're saying the - - -  
2 the circumstances - - -

3 JUDGE TROUTMAN: He's a - - - he was alleged to  
4 have possessed it in a car. They were packaged  
5 differently. He was with different people, and this one,  
6 it's constructive in a house in a shoe on the wall.

7 MR. ASHE: Judge, I think that the prior incident  
8 essentially goes to the - - - the fact that the People had  
9 to call several witnesses - - -

10 JUDGE TROUTMAN: The fact that he possessed crack  
11 before he possessed it this time, too?

12 MR. ASHE: Well, the - - -

13 JUDGE TROUTMAN: That's propensity.

14 MR. ASHE: Well, think about that the - - - the  
15 People had to call several witnesses to explain to the  
16 jury, who from - - - I think we're supposed to assume  
17 they're laymen, that they - - - this is how a drug gets  
18 produced from - - - in - - - in this case, from a cookie in  
19 its most whole form, down to street sale.

20 And so the fact that the prior incident was the  
21 most on the street version of that line of production, I  
22 think is actually relevant because we're - - - we're  
23 arguing that it's the same type of behavior here. We're  
24 just maybe instead of the last single step, we're two or  
25 three steps - - -

1 JUDGE TROUTMAN: So he possessed crack before,  
2 but in the line of production, he was just intercepted at a  
3 different time, an earlier time, before it got to the  
4 street. Is that what you're suggesting?

5 MR. ASHE: Yeah, that's - - - that's - - - yeah,  
6 that's - - - that's a succinct way of putting it, I think.  
7 The - - - my - - - my argument for why the prior incident  
8 was relevant here, I think, is partially because I - - - I  
9 don't think that the incidents are too dissimilar. They're  
10 similar in some respects, yes, but I think the position  
11 where - - -

12 CHIEF JUDGE WILSON: Well, they're less similar  
13 than in - - - they're less similar than in Telfair, no? In  
14 Telfair he's constantly saying it was my girlfriend's gun,  
15 and it was in a piece of luggage.

16 MR. ASHE: Yeah.

17 CHIEF JUDGE WILSON: And it was still in a piece  
18 of luggage. It was still a girlfriend. It was the same  
19 gun.

20 MR. ASHE: Well, the interesting thing - - - and  
21 so this is now we're being directed back to Telfair, so the  
22 - - -

23 CHIEF JUDGE WILSON: Right. I thought we were  
24 still there.

25 MR. ASHE: The interesting - - - the thing about

1 Telfair is that they were different guns and he was  
2 interposing the same defense.

3 CHIEF JUDGE WILSON: Well, these were different -  
4 - - different crack, right? It wasn't the same crack.

5 MR. ASHE: Yeah, that's what I was getting at.  
6 So I don't want to necessarily try to say that it was, you  
7 know, different - - - or the same drug, right, because they  
8 were different instances of possession, so a different  
9 product. But the - - - in - - - in Telfair, what this  
10 court took into consideration in the relevance analysis,  
11 whether or not it - - - it was actually the prior instance  
12 were relevant to the - - - to the indicted conduct, was the  
13 time difference. And I think that it's fair if this court  
14 is able to argue that ten years makes two incidents too  
15 remote to introduce as prima facie evidence under Molineux  
16 context, then I can argue two years is - - -

17 JUDGE TROUTMAN: So if the drugs here are  
18 properly admissible, is there any time that the prior acts,  
19 the prior convictions, wouldn't come in?

20 MR. ASHE: Well, I think certainly, Judge. I  
21 think that - - -

22 JUDGE TROUTMAN: Well, below you listed all - - -

23 MR. ASHE: Yeah.

24 JUDGE TROUTMAN: - - - the host of all the  
25 exceptions. So if you list them, then you get it.

1 MR. ASHE: Well, no, Judge, I - - - I don't think  
2 so because I don't think that in this case identity wasn't  
3 an issue. We - - - we weren't trying to prove that there  
4 was - - -

5 JUDGE TROUTMAN: Identity was one that you did  
6 not assert, but you did assert a laundry list of stuff.

7 MR. ASHE: Right, I mean, yeah, there - - - there  
8 - - - there are other - - - there are other grounds that -  
9 - - that aren't applicable here. And I think that my  
10 argument is kind of that knowing possession can be - - -  
11 can take up multiple different theories of prosecution and  
12 multiple different theories of defense that - - - that are  
13 perfectly viable.

14 JUDGE TROUTMAN: So the past knowing possession  
15 here, other than propensity, is established how?

16 MR. ASHE: It's established by showing that - - -  
17 and this - - - this comes from case law from - - - back  
18 from Alvino, in the context that when this court was  
19 rationalizing the Molineux rule that getting into someone's  
20 brain about what intent they had at a certain point, what  
21 knowledge they had at a certain point is often unprovable  
22 by conduct, except for when that conduct is repeated. And  
23 so here we want to put the Molineux evidence into the case-  
24 in-chief to show - - -

25 JUDGE TROUTMAN: But you just said repeat it, but

1 doesn't repeat it go to propensity. I did it before, I did  
2 it this time.

3 MR. ASHE: Well, in - - - in the general sense,  
4 yeah. I mean, in the general sense it must. But - - - but  
5 the conduct has to be repeated. I - - - I would say that  
6 propensity could also include arguments that the - - - it  
7 was a different type of crime. This person is a criminal.  
8 They've been convicted of a crime in the past. Therefore,  
9 I put it to you, fact finder, that they committed this  
10 crime because they probably did it. They probably  
11 committed another crime.

12 JUDGE RIVERA: So the more similar the Molineux  
13 evidence is, that comes in, the more it actually looks like  
14 exactly what you've done. That - - - that sounds like  
15 propensity for sure, as opposed to something that - - -

16 MR. ASHE: Well, I think - - -

17 JUDGE RIVERA: - - - isn't quite what - - - what  
18 you're charging him with now.

19 MR. ASHE: Well, I think the - - - well, I think  
20 it would be more of a propensity to show that there were -  
21 - - if the conduct was completely unrelated. I think  
22 that's actually - - -

23 JUDGE RIVERA: Isn't a juror more likely to  
24 believe that if it looks more like what you're charging him  
25 with now that that is - - -

1 MR. ASHE: But - - -

2 JUDGE RIVERA: - - - the likelihood is greater  
3 that he's repeating the conduct of the past?

4 MR. ASHE: But my point is that they would be  
5 more likely to believe that because - - - not because of -  
6 - - of a propensity inference - - -

7 JUDGE RIVERA: Okay.

8 MR. ASHE: - - - but because of its relevant to  
9 whether or not this person was here accidentally,  
10 inadvertently, whether they saw the drugs and knew what  
11 they were and decided to stay, or in this case, take part  
12 in the operation.

13 And I think that if we also look at the intent to  
14 use, we have knowing possession here, and the court admits  
15 this also for intent to use. And there's a lot of  
16 discussion in this case about whether or not intent to use  
17 was conceded. And here it was never stipulated to. So  
18 therefore, the People - - - it's still part of the required  
19 prima facie case the People have to prove.

20 CHIEF JUDGE WILSON: So without - - - without the  
21 Molineux evidence, what evidence is there of constructive  
22 possession and why is that overwhelming?

23 MR. ASHE: Here we think that the defendant being  
24 physically present and what amounts to a - - - a production  
25 of drugs present in - - - not just in passing - - - there's

1 other cases that say that we can't establish, you know,  
2 passing presence, mere presence.

3 CHIEF JUDGE WILSON: So that's true of all the  
4 adults in the house, then?

5 MR. ASHE: Right. He found - - -

6 CHIEF JUDGE WILSON: Including the grandma or  
7 whoever it is, right?

8 MR. ASHE: Well, they - - - I - - - and this  
9 isn't - - -

10 CHIEF JUDGE WILSON: And the children?

11 MR. ASHE: Since the record isn't, is only about  
12 Mr. Miller-Henderson, I'm - - - I'm not sure why those  
13 charges didn't get indicted or - - - or tried - - -

14 CHIEF JUDGE WILSON: Okay.

15 MR. ASHE: - - - about the other, but I believe  
16 they were all - - -

17 CHIEF JUDGE WILSON: So he's present in the  
18 house.

19 MR. ASHE: He's present there. He has a piece of  
20 his mail in the shoe boxes in the bedroom.

21 CHIEF JUDGE WILSON: And the piece of mail is  
22 addressed to him at that address or a different address?

23 MR. ASHE: It is addressed to him in a different  
24 address.

25 CHIEF JUDGE WILSON: Okay.

1 MR. ASHE: And the - - - there's keys on the, I  
2 believe on the windowsill next to where he's sleeping.

3 CHIEF JUDGE WILSON: Keys or a key?

4 MR. ASHE: I believe it's keys to the front door  
5 of the apartment and of the apartment house and - - -

6 JUDGE CANNATARO: But keys just to that building,  
7 not - - - not this other?

8 MR. ASHE: Yeah, it wasn't, like, attached to,  
9 like, a car fob.

10 JUDGE CANNATARO: Where were those keys? Do you  
11 know?

12 MR. ASHE: No, I don't - - - I don't know if he  
13 was - - - I don't think he was - - -

14 JUDGE HALLIGAN: But not attached to - - - sorry.  
15 Go ahead.

16 MR. ASHE: I'm just saying I don't - - - I don't  
17 think - - - he was sleeping at the time when he was  
18 arrested, so there wasn't - - - that wasn't collected.

19 JUDGE HALLIGAN: But the keys, I thought, were  
20 not attached to any belonging of his specifically or any  
21 other keys. So for example back in the day, I don't know  
22 if people still do this, you know, my parents would stick a  
23 key on the windowsill or under the mat or whatever it was.  
24 I didn't think there was anything that differentiated these  
25 keys. There wasn't anything that showed that these keys

1 were specifically his as opposed to keys to get - - - just  
2 get - - - to get into the apartment.

3 MR. ASHE: Well, Your Honor, I would say that  
4 they were keys given to him so he could enter the  
5 apartment.

6 JUDGE HALLIGAN: And we know that because - - -

7 MR. ASHE: Because he's - - -

8 JUDGE HALLIGAN: I know it was on the windowsill.

9 MR. ASHE: Yeah, they're on the windowsill, but  
10 found directly next to where he's sleeping.

11 CHIEF JUDGE WILSON: So he constructively  
12 possessed the keys, which gave him constructive possession  
13 to the drugs?

14 MR. ASHE: I think it's evidence of constructive  
15 possession of - - - because like we - - -

16 JUDGE HALLIGAN: But how would that be any  
17 different than anyone else who can come or go in the house,  
18 like the grandmother, for example? Presumably - - -

19 MR. ASHE: Well - - -

20 JUDGE HALLIGAN: - - - the grandmother has keys  
21 to get into the house.

22 MR. ASHE: Right. But the - - - yeah, but this  
23 kind of goes back to I'm - - - I'm not certain why - - -  
24 how that whether or not the grandmother was charged with  
25 this conduct would be relevant to this analysis.

1 JUDGE HALLIGAN: The children may also have had -  
2 - - I don't remember their ages, but kids may have had keys  
3 to the house, too.

4 MR. ASHE: Yeah, but he was, I think, being given  
5 a key and say you can essentially - - -

6 JUDGE CANNATARO: Were their clothes in the room  
7 that were identified as his?

8 MR. ASHE: There were. There were clothes in the  
9 room that the officers testified belonged to a male and - -  
10 - but they - - - but - - -

11 JUDGE CANNATARO: Let me ask you this. When they  
12 took him away, did he get dressed?

13 MR. ASHE: I believe he was allowed to get  
14 dressed. Yeah.

15 JUDGE CANNATARO: What - - - what did he use to  
16 get dressed?

17 MR. ASHE: That is not specifically testified to  
18 by the officers here.

19 JUDGE CANNATARO: Were there shoes in the room  
20 that were identifiably his?

21 MR. ASHE: He put on a pair of shoes, yes. I  
22 don't - - - well, you said in the room?

23 JUDGE TROUTMAN: What about the shoe on the wall?  
24 Is that established as his, where the drugs were found?

25 MR. ASHE: That's a - - - kind of a - - - I don't

1 want to give a surreptitious answer to that question  
2 because I - - - the jury verdict - - -

3 JUDGE TROUTMAN: They didn't take the shoe?

4 MR. ASHE: Yeah. They didn't collect the shoe  
5 and say that - - - I'm not quite sure exactly what testing  
6 could be proven to be - - - make it his. But sizes and  
7 things like that, that wasn't collected as part of the  
8 evidence here. But I think the - - - my argument is that -  
9 - -

10 JUDGE TROUTMAN: If the shoe were the same size  
11 as his shoe, one could argue that would be circumstantial  
12 evidence that it is in fact his shoe.

13 MR. ASHE: Right.

14 JUDGE TROUTMAN: But - - - but it's not taken.  
15 It's not established what size it is or who it belongs to.

16 MR. ASHE: Well, I think that the - - - the idea  
17 that he's - - - he's sleeping in a room with these shoe  
18 boxes and with the shoes and the paraphernalia is found in  
19 the shoe boxes, and his mail is found in the shoe boxes.

20 JUDGE TROUTMAN: His mail is found in a shoe box.  
21 That established - - - what does the mail establish? I'm -  
22 - - I'm not understanding.

23 MR. ASHE: Sure, Judge. So I don't want to get  
24 too informal about - - - but like, from my perspective, I  
25 think that I would expect someone to be putting things like

1 mail in locations that they had control over and that they  
2 could access when they - - - when they wished and could  
3 access, you know, could keep other people out of too.

4 JUDGE TROUTMAN: You - - - you arrived at the  
5 house and you carried the mail with you. And when you  
6 leave, you're going to take it with you?

7 MR. ASHE: Yeah, Your - - - Your Honor, but I  
8 would - - - I would say that this wasn't mail left by the  
9 front door or things like that.

10 JUDGE TROUTMAN: And it's not mail that has that  
11 address on it.

12 MR. ASHE: It is not mail that has that address.  
13 It's of a different address, yes. But my argument is that  
14 with the keys there, he was allowed to access this - - -  
15 this apartment and - - -

16 JUDGE TROUTMAN: The keys that are not attached  
17 to anything that's identified as his?

18 MR. ASHE: Right. Except - - - except if you  
19 believe the - - - the People's position that the keys are  
20 his, you know, possession of the keys themselves is the  
21 People's argument.

22 JUDGE TROUTMAN: Constructive possession of the  
23 keys?

24 MR. ASHE: Right.

25 JUDGE RIVERA: Where were the keys?

1                   MR. ASHE: Keys were on a windowsill that was  
2                   like, if the bed is in the corner of the bedroom, that  
3                   window is - - -

4                   CHIEF JUDGE WILSON: I'm sorry. Is there a bed  
5                   in the bedroom?

6                   MR. ASHE: It's a bed. It's an inflatable  
7                   mattress that's done up to - - - to be used as a bed.  
8                   That's what - - -

9                   JUDGE TROUTMAN: A temporary mattress, right?

10                  CHIEF JUDGE WILSON: Inflatable?

11                  MR. ASHE: Yeah. Like inflatable. It was not  
12                  like - - - it's not one of those, like, six inch, like,  
13                  camping mattresses. It - - - it looks several feet tall.  
14                  I don't know exactly what.

15                  JUDGE RIVERA: Are the keys within arm's length  
16                  of that bed?

17                  MR. ASHE: I think. I believe so yeah. The - -  
18                  - the window is quite adjacent. The image of - - - of the  
19                  - - - the layout of the room, the window is right there.  
20                  It's not - - - it's not a far window.

21                  JUDGE RIVERA: Where's the shoe box with the  
22                  letter?

23                  MR. ASHE: I - - -

24                  JUDGE RIVERA: The box.

25                  MR. ASHE: They're in - - - they're in that

1 bedroom. I'm not sure exactly.

2 JUDGE RIVERA: But not - - - not in that  
3 position? Not where the keys were?

4 MR. ASHE: Right. There were two separate - - -

5 JUDGE RIVERA: Not on that windowsill?

6 MR. ASHE: Yeah, the shoe box wasn't like on the  
7 windows next to the keys.

8 JUDGE RIVERA: Okay.

9 MR. ASHE: Yes. I see that my light is on. If  
10 the court doesn't have any questions? Thank you.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. WEISS: I'll briefly return to harmless  
13 error, and I'd like to just address the limiting  
14 instruction and that impact on harmless error, and also  
15 just how underwhelming the People's evidence was in this  
16 case. And the limiting instruction context in Molineux is  
17 interesting because while we normally presume that jurors  
18 absolutely follow the instructions that are given in case  
19 after case, this court has recognized that this type of  
20 propensity evidence is so psychologically powerful that  
21 jurors can be unable to follow the limiting instruction.

22 They hear that evidence. And you know, even  
23 though they're told you can only regard it for these  
24 specific things, it's just a little bit too difficult for  
25 humans just being average humans to hear that and actually

1 follow that instruction and set it aside and  
2 compartmentalize it.

3 JUDGE CANNATARO: So are you saying we should  
4 discount the limiting instruction in some way?

5 MS. WEISS: I just think the limiting instruction  
6 is not absolute. It was given in this case. It is an  
7 appropriate limiting instruction. It may mitigate some of  
8 the prej - - - some of the harmlessness, but I think in  
9 this case - - -

10 JUDGE CANNATARO: Prejudice.

11 CHIEF JUDGE WILSON: Some of the harm.

12 MS. WEISS: Some of the prejudice, sorry.

13 JUDGE CANNATARO: Or might mitigate the  
14 harmlessness too, I don't know.

15 JUDGE TROUTMAN: Isn't the extent of what was  
16 offered impacted by whether or not the instruction could be  
17 effective? It was essentially a trial within a trial. His  
18 prior conduct. So how - - - how does that impact an  
19 instruction?

20 MS. WEISS: I think, like with the entire conduct  
21 coming in from the arrest, how that the - - - the street  
22 interaction with the officer, the way the car got towed and  
23 then it got searched and drugs were found the next day.  
24 And then with the certificate of conviction showing two  
25 charges of criminal possession of a controlled substance,

1 two charges of marijuana - - -

2 JUDGE TROUTMAN: Open air market.

3 MS. WEISS: Say again.

4 JUDGE TROUTMAN: Open air market.

5 MS. WEISS: Open air market. You've got just a -  
6 - - it's - - - it is two - - - two circumstances, right,  
7 the - - - the arrest and then the conviction. But it's a  
8 large volume of evidence. So in that way it is like cases  
9 in which Molineux evidence can be considered to be  
10 cumulative. It is just a large part of the evidence  
11 admitted in this case. And then I'll just return - - -

12 JUDGE HALLIGAN: Let me just ask you, what's your  
13 response to the arguments about the mail and the key?

14 MS. WEISS: So the mail in this case is what's -  
15 - - what's striking to me is that it's not just my client's  
16 mail, it's also his father's mail in that shoebox,  
17 strengthening - - - strengthening the inference that this  
18 is his dad's house and he's spending the night there. And  
19 Mr. Ashe argues that the evidence shows that he's not just  
20 present in passing. But I think that's all this evidence  
21 shows that he's on an inflatable mattress that's not even  
22 made. There's not even pillows on it. There's not sheets  
23 on it.

24 JUDGE RIVERA: Why - - - why would you put your  
25 mail with someone else's mail?

1 MS. WEISS: I think - - -

2 JUDGE RIVERA: Unless you always have access to  
3 it, and you see it as your - - - your space.

4 MS. WEISS: I mean, I think a father is carrying  
5 around some things, and he happens to be carrying around -  
6 - - what else is in there? There's a picture of Mr.  
7 Miller-Henderson that's in there. Father's carrying around  
8 a picture of his son. He's got some of his son's mail.  
9 And again, the clothing in that room is shown to be male  
10 clothing, but it's not shown to be Mr. Miller-Henderson's.  
11 They could have introduced photographs of Mr.  
12 Miller-Henderson wearing clothing and said this was his  
13 clothing. There were a lot of easy ways.

14 Judge Troutman, you pointed out you could have  
15 shown the size of the shoes on the wall and say that's the  
16 size of the shoe that fit Mr. Miller-Henderson when he got  
17 dressed.

18 JUDGE RIVERA: The keys that - - - the keys at  
19 arm's length from the bed?

20 MS. WEISS: And again, those keys are not on a  
21 keychain with any other keys to indicate who owns them, so  
22 - - -

23 JUDGE RIVERA: Why are they next to the bed where  
24 he's sleeping?

25 MS. WEISS: Because if he's spending the night at

1 his dad's house, his dad says, here, take the extra set of  
2 keys so you can come and go tonight if you want to, you  
3 know, go out to the corner store or something. There's a  
4 lot of - - - everything in this room, the way Mr.  
5 Miller-Henderson is staying there on this inflatable  
6 mattress looks like a son crashing at his father's house.

7 JUDGE CANNATARO: Overnight, one time, not - - -  
8 not anything more than that?

9 MS. WEISS: That's correct. Yeah. There's  
10 nothing - - - there's just no evidence tying Mr.  
11 Miller-Henderson showing that this is his room in any way,  
12 as opposed to his father's room where he happens to be.

13 JUDGE RIVERA: Crashing there one night with mail  
14 in a shoebox?

15 MS. WEISS: He's got a piece of mail - - -

16 JUDGE RIVERA: Mixed with his father's mail?

17 MS. WEISS: Addressed to him at a different  
18 house.

19 JUDGE RIVERA: Yeah, I know that.

20 MS. WEISS: That happens to be in this shoebox in  
21 that room.

22 JUDGE RIVERA: Yeah.

23 JUDGE CANNATARO: Do you have - - - do you have  
24 any thought on how it got there? If it's addressed to him  
25 at his regular address, I don't know what you want to call

1 it, home address, how did it get into the room?

2 MS. WEISS: The People presented no evidence  
3 about how any of the evidence got into that room. And I  
4 would point out that when we're talking about the south  
5 bedroom where Mr. Miller-Henderson is found, the drugs in  
6 the shoes that are hanging on the wall, and all of the drug  
7 paraphernalia that is in the shoe boxes, it's all  
8 concealed. None of it is in plain view.

9 So Mr. Miller-Henderson could have walked into  
10 that room, gone to sleep, and never have noticed that any  
11 of those items were there. And then as - - - as to the  
12 items in the living room, Mr. Miller-Henderson was never  
13 seen inside of that room. He has - - - there's no evidence  
14 tying him to any other possessions in that room.

15 So the People's evidence in this case was  
16 underwhelming, and the - - - the admission of this Molineux  
17 evidence was not harmless.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. WEISS: Thank you.

20 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Miller-Henderson (Lashawn), No. 21 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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