

People v Sayers

2007 NY Slip Op 31168(U)

May 11, 2007

Supreme Court, Queens County

Docket Number: 0002691/2006

Judge: Stephen A. Knopf

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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF QUEENS: CRIMINAL TERM: PART K-19

 THE PEOPLE OF THE STATE OF NEW YORK : BY: STEPHEN A. KNOFF
 :
 : DATED: MAY 11, 2007
 -against- :
 : INDICTMENT NO. 2691/06
 :
 KARINA SAYERS : SET ASIDE VERDICT
 Defendant :
 -----:

The defendant, Karina Sayers, has filed a motion with this Court seeking an order setting aside her verdict in the above-captured indictment, pursuant to CPL §330.30 (1)&(2). The defendant argues first, the Court's *Molineux* ruling was improper; second, she was substantially prejudiced by the People's delay in turning over *Rosario material*; third, there was juror misconduct; and fourth, the Court's severance ruling was error. The People disagree, and urge this Court to deny the defendant's application.

The charges as to which this defendant was found guilty arose out of an incident that took place on September 14, 2006. On

September 14, 2006, at approximately 7pm, Ms. Aida Padilla, the complaining witness, received a telephone call on her cell telephone from the defendant and her co-defendant/ boyfriend, Anthony Mendez. During this call, the defendant and co-defendant Mendez uttered profanities and threatened to kill Ms. Padilla. Ms. Padilla possessed a valid order of protection on this date. The order of protection specifically prohibited contact between the parties; including telephone calls. After a jury trial, conducted by this Court, the defendant was convicted of one count of criminal contempt in the first degree, one count of criminal contempt in the second degree and two counts of aggravated harassment in the second degree.

Criminal Procedure Law §330.30 governs the situation where a court may set aside a verdict of guilt. The statute provides, in pertinent part, that "At any time after the rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon

the following grounds: 1) Any ground appearing in the record which if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court or 2) That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict..." CPL §330.30 (1)& (2).

MOLINEUX

Evidence of an uncharged crime is inadmissible on the People's direct case if it is offered for no other purpose than to raise an inference that a defendant has a propensity to commit crimes. (See, *People v Molineux*, 168 NY 264 [1901]; *People v Alvino*, 71 NY2d 233 [1987]). Although evidence of prior criminal conduct may have some prejudicial effect, where the prior conduct

is directly probative of the crime charged, it may outweigh that prejudicial effect. (*Alvino, supra. People v Vails, 43 NY2d 364 [1977]*).

It is well-settled that evidence of a prior crime is competent to prove a specific crime charged where it tends to establish 1)motive, 2)intent, 3)the absence of mistake or accident, 4) a common scheme or plan or 5)identity of the person charged with committing the instant crime. (*See, Molineux, supra*). These listed categories are not exclusive, but only illustrative. (*See, People v Carter, 77NY2d 95 [1990]*). Other examples of permissible admissibility include a completion of the narrative and to provide necessary background information for the understanding of the Court and jury (*see Alvino, supra; see also Vail, supra*).

In their pre-trial "*Molineux*" application, the People urged this Court to permit certain "prior act" evidence to be admitted

during their direct case to establish the defendant's motive, intent, absence of mistake, and to provide this Court and the jury with the necessary background information and to complete the complainant's narrative at trial.

In its decision, this Court specifically allowed the introduction of a certain set of facts in the People's case-in-chief. These facts, in sum and substance, included prior abuse by the defendant against the complainant, such as: telephone threats, harassment, as well as an assault by this defendant against the complainant. After testimony was presented as to these incidents, this Court gave the jury specific limiting instructions that such evidence was being admitted on the issue of intent, motive and to provide background material. Indeed, during the testimony of the complainant at this trial, this Court recalls specifically warning the jury not to consider this evidence "solely on the issue of propensity to commit the crime because that would be improper".

This admonition was repeated by this Court in its final instructions to the jury.

The defendant's complaint that the Court's *Molineux* ruling compelled her to testify is unfounded. The defendant asserts that she was forced to testify. This Court recalls that the challenged evidence was elicited from the People's own witness; not the defendant. (See *People v Rojas*, 97 NY2d 32 [2001]). As such, the defendant's Fifth Amendment rights were not impaired by the People's examination of their witness and her testimony about these prior bad events. Accordingly, this Court's *Molineux* ruling did not violate the defendant's constitutional rights.

In addition, the defendant complains that this Court erred in permitting the introduction of the photographs of the complainant's injuries from an earlier time. Here, the defendant has no cause to complain; the photographs were admitted into evidence to rebut the defendant's claim of recent fabrication.

Where a witness' testimony is attacked on cross-examination as a recent fabrication, such rebuttal evidence is permitted. (See *People v McClean*, 69 NY2d 426 [1987]). These photographs were properly admitted to rehabilitate the credibility of the complaining witness. (See *People v Seit*, 86 NY2d 92 [1995]).

After careful scrutiny of the motion papers submitted by the parties and a review of the relevant case law, this Court adheres to its original decision on its *Molineux* ruling. Such testimony was proper to show the defendant's motive, intent, absence of mistake, complete the narrative and to supply the necessary background to assist the Court and jury (see, *Molineux*, generally). Accordingly, this Court stands by its original decision. The defendant's application to set aside his verdict pursuant to CPL §330.30 (1) is denied.

ROSARIO

Criminal Procedure Law §240.45 (1) provides, in sum and

substance, that any written or recorded statement of a witness whom the People intend to call at trial which relates to the subject matter of the witness' testimony must be made available to the defendant before the prosecutor's opening statement. (See, *People v Rosario*, 9 NY2d 286 [1961]). The purpose of this rule is to allow the defendant an opportunity to confront witnesses against him. (See *People v Poole*, 48 NY2d 144 [1979]).

Where there is a delay in disclosure, as in this instant case, it is the role of the court to ascertain whether the defendant was substantially prejudiced by the delay. (See *People v Ranghelle*, 69 NY2d 56 [1986]). Where the defendant has been offered an opportunity to cross-examine the People's witness on the statement at issue, the courts have generally held that the delay does not amount to substantial prejudice. (See, *People v Poladian*, 2 AD3d 755 [2d Dept 2003]).

In this case, the "statement" at issue was a piece of paper

in which the complainant allegedly recorded the dates and times of the threatening calls from the defendant. This paper appeared in the midst of trial, during the middle of the re-direct examination of the complaining witness. (Prior to this moment, the People advised this Court that they thought that this paper was either missing or lost).

The Court recalls that when this document was first produced, both defense counsels objected to its admission into evidence, but then specifically consented to its introduction into evidence. Each defense counsel was able to cross-examine the complainant about the document. In fact, counsels argued vigorously that the complainant had created it during the trial. Each defense counsel utilized this document to show the inconsistencies in the complainant's testimony regarding the time she had received the threatening telephone calls. As the defense counsels were able to effectively cross-examine the complainant about this document,

especially after consenting to its admission, to complain about its admission into evidence is disingenuous. The Court concludes that the defendant suffered no substantial prejudice in the delay of this document's production. (See *People v Page*, 296 AD2d 427 (2d Dept[2002])). As such, the defendant's application to set aside his verdict pursuant to CPL §330.30 (1) is denied.

JUROR MISCONDUCT

Criminal Procedure Law §330.30 (2) provides, in pertinent part, that a verdict may be set aside when a juror engages in improper conduct, which might have affected a substantial right of a defendant and which was not known to the defendant prior to the rendition of the verdict. In order to establish this claim, there must be a specific showing that the action of the juror affected a specific right of the defendant, (see, *People v Rodriguez*, 100 NY2d 30 [2003]). Yet, not every misstep by a juror rises to the level at which a reversal is automatically required. (See, *People*

v Clark 81 NY2d 913 [1993]).

In this case, during a post-verdict discussion with several jurors, in the presence of the Court, prosecutor and defense counsels, one juror inquired whether defense counsels possessed telephone records of their clients.

The defendant submits that this specific question by this one juror was improper conduct in the jury room. This Court find no factual or legal reason to conclude to that such a question by a juror rises to the level of juror misconduct; requiring a new trial. (*See Rodriguez, supra; Clark, supra*). Accordingly, the defendant's application to set aside the verdict pursuant to CPL 330.30 (2) is denied.

SEVERANCE

The defendant Sayers also argues that the Court erred in denying her severance motion. The defendant insists that the Court's *Molineux* ruling as to the co-defendant resulted in

prejudicial spillover, and resulted in her conviction on these charges. However, this Court properly instructed the jury that evidence of other crimes could only be considered as to a particular defendant insofar as it relates to that defendant. This Court finds that the defendant has failed to raise any new factors warranting this Court to deviate from its original severance ruling. The defendant's renewal of her application at this time is without merit, and more appropriately raised on direct appeal, if counsel deems appropriate.

In sum, the defendant's application to set aside his verdict pursuant to CPL 330.30 (1) and (2) is denied for the reason stated above.

The foregoing constitutes the order, opinion and decision of this court.

STEPHEN A. KNOPF, J.S.C.