



The Court of Appeals was busy delving into criminal law this month, with lots of interesting opinions affecting how criminal trials must be run in New York. The most newsworthy, of course, was the Court's reversal of Harvey Weinstein's rape conviction because it was tainted by the introduction of impermissible prior bad acts that tainted the jury's review of the evidence against Weinstein. Let's take a look at those opinions and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CRIMINAL LAW, PRIOR BAD ACTS

[People v Weinstein, 2024 NY Slip Op 02222 \(Ct App Apr. 25, 2024\)](#)

Issue: When may prior convictions or proof of the prior commission of specific, criminal, vicious or immoral acts be introduced or used against a criminal defendant at trial?

Facts: Defendant Harvey Weinstein was charged with various sex crimes for three alleged incidents involving three different complainants. "At the time of the alleged crimes and at the time of the trial, defendant was a well-known, powerful man within the entertainment industry, having produced several award winning and highly profitable films. The prosecution's theory of the case was that defendant abused his power to take advantage of aspiring female actors, like complainants, to coerce them into unwanted sexual encounters. According to the prosecution, the quid pro quo of assisting them with their careers in exchange for sexual favors on demand was both common behavior and a well-known secret throughout the film industry. When his victims resisted his sexual demands, the prosecution argued, defendant used force. Traumatized by defendant's sexual assaults, and fearing retaliation, the complainants never reported the attacks and continued personal and professional relationships with him for years afterwards." The trial court granted the prosecution's application to "admit certain testimony of uncharged crimes and miscellaneous bad acts . . . to establish defendant's intent and his understanding of the complainants' lack of consent" and to cross-examine Weinstein "on a broad range of uncharged bad acts should he testify" that tended to show he abused his power and was untruthful. Weinstein was convicted on two of the counts against him, and the Appellate Division affirmed.

Holding: The Court of Appeals reversed Weinstein's convictions, holding "[e]very person accused of a crime is constitutionally presumed innocent and entitled to a fair trial and the opportunity to present a defense . . . Under our system of justice, the accused has a right to be held to account only for the crime charged and, thus, allegations of prior bad acts may not be admitted against them for the sole purpose of establishing their propensity for criminality. Nor may the prosecution use prior convictions or proof of the prior commission of specific, criminal, vicious or immoral acts other than to impeach the accused's credibility. It is our solemn duty to diligently guard these rights regardless of the crime charged, the reputation of the accused, or the pressure to convict." As the Court explained, the inadmissibility of prior bad acts is the general rule, and the rule has only limited exceptions under *People v Molineaux* (168 NY 264 [1901]): "when such evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial." The first question in the analysis, therefore, is "whether the prosecution has identified some issue, other than mere criminal propensity, to which the evidence is relevant." The Court held that the trial court erred in that first step. The prior bad act evidence admitted against Weinstein merely tended to show his criminal propensity, not his unlawful intent in committing the charged crimes.

CRIMINAL LAW, WITNESS TESTIMONY

[People v Mosley, 2024 NY Slip Op 02125 \(Ct App Apr. 23, 2024\)](#)

Issue: "[W]hen may someone who is not an eyewitness to a crime testify to a jury that the defendant is the person depicted in a photo or video?"

Facts: "On June 10, 2015, police cameras in Syracuse captured a grainy video of a man running through the street and firing three shots into a van. The van promptly drove off, and the responding officers recovered two bullet casings but did not see the shooter." When the People were preparing to present the case against Farod Mosley to the grand jury, "an assistant district attorney showed the video of the shooting to Detective Steven Kilburn. Kilburn identified Mosley as the shooter in the video and repeated his identification to a grand jury, which indicted Mosley." Kilburn then testified at trial and repeated his identification, based upon his prior familiarity with Mosley, even

though he did not personally witness the shooting or see Mosley on the day of the shooting. Since the victims of the shooting did not see the shooter, Kilburn's identification was the only evidence tying Mosley to the shooting. The jury asked to see the video again, and reread Kilburn's testimony, during deliberations, and eventually convicted Mosley.

Holding: The Court of Appeals, however, reversed Mosley's conviction. The Court held, "[d]ue to the widespread deployment of surveillance in public spaces and the ubiquity of private cameras and video recording devices, lay opinion identification testimony has become an increasingly common form of evidence," though its use has presented numerous challenges. "Although use of such testimony may be warranted in certain circumstances, courts must be vigilant that the testimony does not unnecessarily invade the jury's role. Trial testimony by a law enforcement officer may pose additional concerns by drawing attention to a defendant's prior interactions with the police, and efforts to mitigate any prejudice by omitting reference to a law enforcement officer's occupation or providing a cryptic basis for familiarity may constrain the opportunity for vigorous cross-examination." Thus, the Court held, before admitting lay opinion identification testimony, the trial court must apply a "totality of the circumstances test considering whether the witness is familiar enough with the defendant that it is reasonable to believe their testimony would be helpful and reliable, and whether there is reason to believe the jury might require that assistance."

"In making this assessment, courts may consider the witness's general level of familiarity with the defendant's appearance, and whether the witness's familiarity spanned an extended period of time and variety of circumstances. Courts may also take into account whether the witness was familiar with the defendant's appearance at the time the surveillance footage was taken. Also relevant is the witness's familiarity with the defendant's customary manner of dress or clothing on the day of the surveillance footage. Along similar lines, courts should also consider whether the witness references a specific trait the defendant has (such as a distinctive gait, scar, or tattoo), and importantly, whether they identify that trait in the surveillance footage.

The second consideration is whether the jury needs the witness's assistance. Here, courts should consider whether the defendant's appearance changed between the time of the surveillance footage and the trial or whether the defendant disguised himself in the surveillance footage. In addition, courts may consider the quality of the surveillance footage and the extent to which the subject is clearly captured in the frame. Where an image is clear enough—that is, not so crystal clear that the jury could identify a person as capably as any witness, and not so obscure that no witness could readily identify the individual—this factor may weigh in favor of admission." Most importantly, the Court noted, this inquiry should be conducted outside the presence of the jury to avoid any prejudice.

Here, the Court held, Kilburn's limited interactions with Mosley did not make him sufficiently familiar to justify offering his lay opinion identification testimony at trial. In particular, "[f]ar from having interactions with Mosley in a variety of circumstances, Kilburn testified that he had never had 'street' interactions with Mosley, and it is unclear whether he ever interacted with Mosley outside of the police station. Kilburn was not familiar with Mosley's appearance at the time the shooting occurred; he did not meet him until seven months later. Nor did Kilburn know what Mosley was wearing on the day of the shooting." The People also failed to establish that the jury needed the assistance. Thus, the trial court erroneously admitted the identification testimony, and Mosley's conviction had to be reversed.

CRIMINAL LAW, JUROR DISQUALIFICATION

People v Fisher, 2024 NY Slip Op 02129 (Ct App Apr. 23, 2024)

Issue: When may a juror be deemed "grossly unqualified" under Criminal Procedure Law § 270.35, because it was clear she "possessed a state of mind which would prevent the rendering of an impartial verdict?"

Facts: During jury deliberations, one of the jurors disclosed to the trial court that she believed that the defendant had followed her home at the end of the day during the trial. The trial court questioned the juror about it, and she said she was "95%" sure it was the defendant. The juror then told the Judge, upon inquiry, that she still believed she could be fair and impartial, and decide the case only upon the evidence and instructions given by the court. The defendant then moved for a mistrial based upon the juror's disclosure, but the court denied the motion because "it did not credit that Juror Six was actually followed; second and 'even more important,' Juror Six indicated that she could remain fair and impartial." Thereafter, the jury convicted the defendant.

Holding: The Court of Appeals reversed the defendant's conviction, holding that the trial court's decision to deny the mistrial after the juror's disclosure was error. "CPL 270.35 states that if after a jury is sworn, 'the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case the court must discharge such juror.' If no alternate juror is available, the court must declare a mistrial." This rule safeguards two important constitutional rights, the right of the defendant to be tried by a jury that he participated in selecting and the right to an impartial jury. Under the "grossly unqualified" standard, the Court held, "disqualification of a sworn juror requires that the juror's inability to render an impartial verdict be obvious or convincingly demonstrated. The higher standard for sworn jurors ensures that jurors chosen by both parties are not later dismissed because of speculation or minor incidents, which would undermine the voir dire process. Accordingly, in concluding that a juror is grossly unqualified, the court may not speculate as to possible partiality of juror based on her equivocal responses." "A juror who clearly holds a bias directly against the defendant generally cannot render a verdict that respects the defendant's right to an impartial jury. That inability would render her grossly unqualified. Therefore, the only way such a juror may be retained is if there is a showing, including unequivocal assurances, that the juror's bias will not affect her deliberations."

Here, the Court held, the juror’s fear of the defendant, based on her belief that he followed her home—conduct occurring outside the courtroom and not based on the evidence presented at trial—invaded the jury’s deliberations and rendered the juror grossly unqualified to continue as a juror in the case. As the Court explained, “Juror Six’s concern was not about witnesses or collateral matters, but about the defendant’s character, specifically whether he was following her intending to harm or intimidate her.” That is exactly what the jury system based on a presumption of innocence is intended to prevent. And the Court held, the juror’s single word affirmative responses to the trial court’s questioning about whether she could remain fair and impartial failed to cure the juror’s bias against the defendant. Thus, his conviction had to be reversed and a new trial ordered.

SECOND DEPARTMENT

CIVIL PROCEDURE, TORTS, NOTICE OF CLAIM

A. P. v John W. Lavelle Preparatory Charter Sch., 2024 NY Slip Op 02205 (2d Dept Apr. 24, 2024)

Issue: Do the notice of claim requirements of Education Law § 3813(2) and General Municipal Law § 50-e apply to charter schools?

Facts: Following multiple incidents of bullying that the parents brought to a charter school’s attention, including the last when the student plaintiff was pushed from behind and injured her elbow as a result, the plaintiffs sued for negligent supervision. The charter school moved to dismiss, arguing that the plaintiffs failed to serve a notice of claim prior to bringing the tort claims against the charter school. Supreme Court denied the motion.

Holding: The Second Department held, on this issue of first impression, that the notice of claim requirements under Education Law § 3813(2), which applies to public schools, and General Municipal Law § 50-e, which sets forth the procedural requirements that must be followed when a notice of claim is required, do not apply to charter schools. In an extensive analysis of the statutes, the Court held that the Education Law § 3813(2) notice of claim requirement only applies to “any school district, board of education, board of cooperative educational services, [and] school[s]” denoted under Education Law § 4201— “certain schools for the deaf or blind or individuals with disabilities.” Education Law § 3813 therefore specifically identifies the entities for which notices of claim are a condition precedent to suit, including not only school districts and boards of education, but also particular state-supported schools. Nevertheless, a charter school, established pursuant to article 56 of the Education Law, is not one of the entities specified therein.” That legislative omission, the Court held, must be viewed as intentional.

Indeed, the Court rejected the charter school’s argument that it should be considered a “school district” under section 3813(2) because “[t]hrough enactment of the Charter Schools Act, the Legislature authorized the creation of a system of charter schools for the purpose of ‘providing opportunities for teachers, parents and community members to establish and maintain schools that operate *independently of existing schools and school districts.*’” Thus, for the purposes of civil liability, financial obligations, and liability insurance coverage, charter schools are treated as independent from school districts. While the School here emphasizes the term ‘public school’ in the phrase ‘a charter school shall be deemed an independent and autonomous public school,’ it overlooks the terms ‘independent and autonomous’ (Education Law § 2853[1][c]). Since charter schools are independent from school districts with respect to civil liability, financial obligations, and liability insurance coverage, it stands to reason that the extraordinary safeguards of prelitigation notification of claims applicable to school districts, municipalities and other wholly public entities would not apply to charter schools.” Thus, the Court held that Supreme Court properly denied the charter school’s motion to dismiss.

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