

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 81

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Cuba Gooding, Jr.,

Defendant.

AFFIRMATION AND
MEMORANDUM OF
LAW IN SUPPORT OF
PEOPLE'S MOTION
TO ADMIT
MOLINEUX
EVIDENCE AT TRIAL

Ind. No. 3226/2019

JENNA LONG, an attorney admitted to practice before the Courts of this State, affirms under penalty of perjury that:

1. I am an Assistant District Attorney in the New York County District Attorney's Office and am assigned to the prosecution of the above-captioned case.
2. I submit this affirmation and memorandum of law in support of the People's motion to introduce evidence of the defendant's prior sexual abuse of other women. This evidence is admissible pursuant to *People v. Molineux*, 168 N.Y. 264 (1901), as part of the People's case-in-chief, to show (1) the defendant's intent to gratify himself sexually, which is an element of sexual contact and one prong of intent required under Forcible Touching, and (2) lack of mistake or accident on his part.
3. This affirmation is made upon information and belief, the sources of which are Court records and files maintained by the District Attorney's Office.

FACTUAL AND PROCEDURAL BACKGROUND

4. On June 13, 2019, defendant surrendered to the New York City Police Department and was charged in a criminal complaint with Forcible Touching, Penal Law §130.52(1), and Sexual Abuse in the Third Degree, Penal Law §130.55, related to an incident that occurred on June 9, 2019.

5. On October 9, 2019 a grand jury indicted defendant on two counts of Forcible Touching and two counts of Sexual Abuse in the Third Degree related to two incidents: the previously charged incident on June 9, 2019, and a previously uncharged incident which occurred on October 24, 2018.

6. On October 10, 2019, the case was adjourned to October 15, 2019, for the defendant to be arraigned on the indictment in Supreme Court.

Indicted Offenses

7. On October 24, 2018, while at the TAO downtown nightclub, located at 92 9th Avenue, in New York County, the defendant pinched the buttocks of a woman, without her consent. When this woman verbally confronted the defendant immediately after being pinched, defendant claimed that he had only pinched her back, not her buttocks. While continuing to deny his conduct, defendant raised his voice and stated in substance that he would never return to that nightclub again. Earlier that night, the defendant had made a sexually suggestive remark to this same woman.

8. On June 9, 2019, during a party at the Magic Hour Rooftop Bar inside the Moxy Hotel, located at 485 7th Avenue, in New York County, a female patron at the bar sat down and interacted with the defendant and his companion, Claudine DeNiro. The defendant then made sexually suggestive remark to this woman. Defendant placed his hand on this woman's left breast, without her consent, and squeezed her breast. Video surveillance shows the woman sitting down with the defendant and Ms. DeNiro and the defendant briefly interacting with both Ms. DeNiro and the complainant as defendant's hand moved from the complainant's knee to her breast level. Since the defendant's arrest, defendant's attorney, Mark Jay Heller, has maintained in statements to the press that no inappropriate or criminal contact occurred that night.

Uncharged Acts

9. In 2001, at the "W" Hotel in Los Angeles, California, the defendant while in a bar with a group of people approached Molineux Witness ("MW") #1, from behind, without no previous conversation or interaction and rubbed his groin and pelvis against her buttocks while he simultaneously grabbed her buttocks and her breast with his hand.

10. Between approximately February and August in 2003, while present at the Yard House in Long Beach, California, MW #2, and several of her friends, posed for a picture with the defendant. While the picture was being taken, the defendant placed his hand on the MW #2's buttocks and squeezed, without her consent. The defendant then complimented the MW #2's buttocks, saying in substance "you've got a good piece of ass." MW #2 walked away and went with her friends to a table. The defendant again

approached her, while she was standing at the end of the table and bumped the front of his body into the back of her body. He then sat down in an empty seat at her table and remained until one of defendant's companions pulled him away. The defendant at another point the same evening approached the friend of MW #2 and attempted to make sexual advances on that friend as well, and kissed her hand.

11. In approximately 2006, while present at a bar called Chi in Hollywood, California, the defendant approached MW #3 from behind, without any prior interaction, while she was standing at the bar and bit her shoulder, on her bare back. When MW #3 asked the defendant if he just bit her, he shrugged. The woman turned back around to face the bar, at which point defendant bit her bare shoulder blade again. When the MW #3 turned around to face the defendant a second time, he placed his finger to his lips indicating for the woman to remain quiet. The defendant then began to thrust his pelvis against MW #3's leg and attempted to lift the bottom of her shirt up. This interaction ended when one of the defendant's companions came over and pulled him away from the complainant.

12. In approximately 2007, while present at a nightclub in the Hard Rock Hotel in Las Vegas, Nevada, at a movie related event, the defendant called MW #4 and her friends over to his table and forcibly pulled MW #4 towards him in an attempt to kiss her. MW #4 was able to push the defendant away before he kissed her. He then licked her face and grabbed her buttocks with his hand, without her consent. The following

night at another movie related event, the defendant grabbed MW#4's face and kissed her placing his tongue against her closed lips, without her consent.

13. Between approximately August of 2007 to February of 2008, while present at Butter, a nightclub formerly located in lower Manhattan, in New York County, the defendant grabbed MW #5's buttocks and squeezed, without her consent as she walked through a crowd of people to rejoin her friend after using the restroom. When MW #5 turned around to confront the defendant, he smiled and attempted to wrap his hands around her body and caress her. The complainant pushed the defendant away and walked to a different area.

14. On or about February 18-20, 2011, while present at a bar in Los Angeles, California, the defendant grabbed MW #6 by the arm as she walked past him towards the restroom, without any prior interaction. He then placed his hand inside the woman's blouse and squeezed her bare breast while he stated, in substance, "sit on my face, pee in my mouth." The woman pushed the defendant away and stated in substance to him, "you're so nasty." MW #6 returned to the table where she had been sitting without going to the restroom. A short while later, the woman walked towards the restroom again. As she passed by the defendant's group he grabbed her arm a second time. Another individual told the defendant, in substance, to "leave that girl alone" to which the defendant responded in substance, "I want her to sit on my face and pee in my mouth." MW #6 pulled away from the defendant's grasp and went into the restroom.

15. On or about October 11, 2011, while present at Sfuzzi's in Dallas, Texas, the defendant grabbed MW #7's buttocks with his hand, rubbing her buttocks as she attempted to pass by the defendant on her way back to her table. The defendant did not interact with MW #7 before grabbing her buttocks without her consent. The defendant then invited the woman and her friend to join him and some others and complimented her on the animal skin print leggings she was wearing. MW#7 declined the defendant's invitation and went back to her table.

16. On or about November 7, 2013, at a bar inside the Chatwal Hotel, in New York County, MW #8 was at a work event with a group of people. At some point in the evening, the defendant, who had been interacting with the group, grabbed MW #8's buttocks with his hand, without her consent, and licked her neck.

17. In approximately 2014, while present at Café Havana in Malibu, California, the defendant approached MW #9, with no prior interaction, reached under MW #9's skirt and touched her vagina over underwear without her consent. On or about June 27, 2015, MW #9 saw the defendant at the Shore Bar in Santa Monica, California. When she saw the defendant, she struck him about the neck or chest with a closed fist and began to yell at the defendant about what he did to her in 2014. The defendant left the location after this altercation.

18. In approximately early 2015, while present at Nobu in Malibu, California, the defendant approached MW #10 and her friend at the bar. After a brief interaction, the defendant attempted to kiss MW #10 on the mouth, then bit her on her shoulder,

without her consent. When she pushed the defendant off and told him to leave her alone MW #10 observed the defendant place his hand on the front of her friend's dress and move his hand up towards her friend's vagina. MW #10 told the defendant to stop. As the defendant walked away, he made lewd comments to MW #10, including calling her a "fucking cunt" and "stupid bitch." Approximately 6 months prior to this incident, also in Malibu, California the defendant grabbed MW#10's buttocks as he was passing by her in a crowded location and smiled at her after he walked away.

19. Approximately five years ago, while present at Burt's Tiki Lounge in Albuquerque, New Mexico, MW #11 and defendant engaged in a brief conversation about the defendant's movies¹. As MW #11 began to walk away from the defendant and his group of companions, defendant grabbed her buttocks, without her consent. The defendant commented, in substance, that the woman should stop smoking cigarettes.

20. On or about August 16, 2018, at a party held at the Shore Bar in Santa Monica, California, the defendant, after being introduced to MW #12 by a mutual acquaintance stated in substance to her, "Damn, you're hot!" As she attempted to speak to the defendant about a professional appearance for her radio talk show, the defendant asked MW #12 if she were married. Replying that she was divorced, the defendant stated in substance, "all you divorced women are the same." He then asked her to lean in closer to him so he could tell her something. As she got closer to the defendant, he grabbed

¹ Defendant is an Oscar-winning actor.

her buttocks and her breast and forcibly kissed her, inserting his tongue into her mouth, all without her consent. MW #12 then pushed the defendant away from her.

MEMORANDUM OF LAW

Evidence of a defendant's uncharged bad acts is admissible unless its only purpose is to show his bad character or criminal propensity. *People v. Molineux*, 168 N.Y. 264, 291-92 (1901). Such evidence can be used in proving the charged crime when it is relevant to show the defendant's intent, motive, or identity, absence of a mistake or accident, and/or a common scheme or plan. *Id.* at 293.² In the years since the case was decided, the Court of Appeals has viewed the exceptions defined in *Molineux* as "merely illustrative, not exhaustive." *People v. Dorm*, 12 N.Y.3d 16, 19 (2009). If the evidence is relevant to a material issue in the case and is not introduced merely to show the defendant's bad character, the evidence can be admitted so long as the probative value of the evidence outweighs the risk of undue prejudice. *People v. Alvino*, 71 N.Y.2d 233, 242 (1987); *see also People v. Dorm*, 12 N.Y.3d 16, 19 (2009). This evaluation is left to the discretion of the trial court and is reviewed on appeal under an abuse of discretion standard. *People v. Morris*, 21 N.Y.3d 588, 596-97 (2013); *People v. Till*, 87 N.Y.2d 835, 837 (1995).

² Defendant's identity is not at issue and the proposed *Molineux* evidence is not offered for that purpose.

When evidence of uncharged crimes is relevant to an issue at trial, “it is generally held to be admissible on the theory that the probative value will outweigh the potential prejudice.” *People v. Allweiss*, 48 N.Y.2d 40, 47 (1979).

I. Defendant’s uncharged acts are probative of a material issue.

Defendant’s past behavior shows that he routinely approaches women while at bars or nightclubs with whom he has had limited or no prior interaction, and touches them inappropriately. His prior acts demonstrate that his contacts with their intimate parts are intentional, not accidental, and that he is not mistaken about their lack of consent. Frequently the defendant has approached the women described above, either from behind or after little interaction. Looking at these instances, it is clear that the defendant’s actions are intentional, rather than accidental, that he does not mistakenly believe the acts are consensual, and that they are done for the purpose of gratifying his own sexual desire, as well as for the purpose of degrading and abusing the women he has targeted.

To prove the defendant’s guilt of Forcible Touching, the People must prove that the defendant touched the two complainants in the indictment for the “purpose of degrading or abusing such person, or for the purpose of gratifying the [defendant’s] sexual desire.” The People do not have to elect which purpose defendant had when he groped these women. *See People v. Charles*, 61 N.Y.2d 321, 327 (1984) *citing People v. Clougher*, 246 N.Y. 106, 112 (1927). While the gratification of sexual desire may be

uppermost in defendant's mind, it cannot be denied that such groping is degrading and abusive to these women,³ carrying with it the implication that their intimate parts are available to the defendant as he chooses.

To prove the defendant's guilt of Sexual Abuse in the Third Degree, the People must prove that the defendant subjected the two persons in the indictment to "sexual contact," which is defined as the touching of a sexual or intimate part of another person "for the purpose of gratifying sexual desire of either party." Sexual gratification as a purpose driving the defendant's conduct is therefore at issue in each count contained in the indictment.

The People should be permitted to introduce prior instances of conduct which refutes any innocent, non-sexual explanation for the contact and shows that the defendant touches women to gratify himself sexually, given the parts of their bodies he touches, the manner in which he touches them, and the sexual nature of comments that sometimes accompany the contact. The People must prove beyond a reasonable doubt the purpose of sexual gratification even if the defense does not explicitly claim that the contact was not for the defendant's sexual gratification. Moreover, such unwelcome groping of these women's intimate parts is also degrading and abusive, as set forth above.

³ See *Criminal Jury Instruction*, Expanded Instruction on Intent, noting that a jury can infer intent if the result is a "natural, necessary and probable consequence of [defendant's] conduct."

The testimony of the uncharged bad acts is also relevant and probative to negate any argument that defendant believed that the complainants consented to his actions. The pattern of behavior provided by the proposed Molineux witnesses, given the total lack of interaction with defendant recounted by so many of the witnesses, is relevant to negate any suggestion that this behavior was consensual.

This evidence the People are seeking to admit is also highly probative as to defendant's lack of mistake. The evidence of defendant's uncharged misconduct would "tend[] to dispel the notion that there was an innocent explanation for his conduct" and thus be highly probative as to his intent and the improbability that defendant made a mistake. *See People v. Hwang*, 2 A.D.3d 245, 246 (1st Dept. 2003).

A common defense of Forcible Touching and Sexual Abuse in the Third Degree is that the contact was not sexual in nature or meant to degrade, but rather was innocent or accidental, a byproduct of crowded conditions or otherwise accidental. One of the original exceptions to the rule against admitting prior uncharged conduct of the defendant's was to negate the defense of the conduct being accidental or a mistake. *Molineux*, 168 N.Y. at 293.

The defendant, moments after the October 24, 2018 incident, told the complainant that he had only pinched or tried to pinch her back, and not her buttocks. This then raised the claim that any contact with an intimate part of the complainant's body was a mistake on his part.

Defendant's counsel's statements concerning the June 9, 2019 incident also raise a possible defense of the contact being accidental. By maintaining that no inappropriate contact occurred, counsel may seek to claim that any contact defendant had with the complainant's breast was inadvertent during their interactions.

In every incident, charged and uncharged, the defendant: (i) is in a bar (ii) has minimal or no prior interaction with the women; (iii) grabs sexual or other intimate parts of their bodies or kisses or licks the women; (iv) frequently makes sexually explicit comments; (v) when confronted reacts defensively or his mannerism becomes abrupt and rude; and (vi) is frequently ushered away by his companions.

Unquestionably, his pattern of behavior targets women in a sexual, degrading and intentional manner. Exclusion of this evidence would unfairly allow a jury to infer that the two instances charged might be accidental or not sexual or degrading, when the defendant's own prior actions clearly negate those defenses.

While the People may be able to meet our burden without the introduction of prior uncharged acts by the defendant, or with a limited number, the People do not need to limit the evidence offered to the minimal amount, but rather, can "present all the admissible evidence available to them." *People v. Alvino*, 71 N.Y.2d 233, 245 (1987). The Court of Appeals held in *Alvino*, that "it is immaterial that the People could establish a prima facie case without the disputed evidence as they were not bound to stop after presenting minimum evidence." 71 N.Y.2d at 245. Moreover, as it relates to weighing the probative value of the challenged testimony against the risk of undue

prejudice, the People are “entitled to present all the admissible evidence available to them.” *People v. Steinberg*, 170 A.D.2d 50, 73 (1st Dept. 1991), *aff’d*, 79 N.Y.2d 673 (1992).

II. Any prejudice from defendant’s uncharged acts is outweighed by their probative value.

Given that all relevant evidence offered by the prosecution can be expected to prejudice the defense, “[t]he probative value of a piece of evidence is not automatically outweighed . . . merely because the evidence is compelling.” *People v. Brewer*, 28 N.Y.3d 271, 277 (2016). Accordingly, there is a difference between expected and “undue” prejudice: evidence of uncharged crimes is admissible where the prejudice “result[s] from something other than its tendency to prove propensity.” *Id.* (quotation omitted).

For each prior incident the People wish to introduce, the complainants would be present in court to testify as to what happened. The credibility of each witness can be assessed directly by the jury. The jury can credit or discredit their testimony in whole or in part based on their live testimony. They will be available for cross examination by the defense. This limits any prejudice that would result from evidence admitted through reports that would not be subject to cross examination or would seem more reliable simply by virtue of its form. Their testimony would be highly reliable, as they would testify under oath, and their testimony could be easily compared to any prior statements or reports made concerning each incident. The

defense can also explore any corroborating evidence, or lack thereof, for each independent incident.

Moreover, none of the allegations that the People seek to introduce is significantly more severe than the charged conduct. Rather, the *Molineux* incidents are similar in nature and severity; none result in undue prejudice by their nature. Further, the indictment has two incidents charged, separated in time, by location, and with unrelated complainants. As such, the jury will already be aware of more than one allegation of similar nature and severity. All of this mitigates any prejudice and weighs in favor of admission. *See, e.g., People v. Frankline*, 27 N.Y.3d 1113, 1114 (2016) (trial court did not abuse discretion by admitting evidence of defendant's prior mental, sexual, and physical abuse of victim).

The similarity in allegation between the charged offenses and uncharged acts is not a barrier to their admission. Courts have recognized that simply because prior uncharged crimes are the same as or similar to the crime charged, that does not mean that such evidence must be excluded. *See, e.g., Beam*, 57 N.Y.2d 241 (1982) (evidence implicating defendant in prior homosexual assaults admitted in sodomy prosecution); *People v. Ventimiglia*, 52 N.Y.2d 350 (1981) (statements that implicated defendants in prior homicides admitted in murder prosecution); *People v. Walker*, 293 A.D.2d 411 (1st Dept. 2002) (in case of defendant stabbing current girlfriend, admission of prior stabbings of prior girlfriends).

Additionally, any potential prejudice that could arise from the jury hearing additional prior incidents can be cured with an appropriate limiting instruction from the court. The jury can be instructed to not consider any such proof as evidence of the defendant's propensity to commit crimes and only for its permissible reasons. *Morris*, 21 N.Y.3d 588, 598 (2013); *see also People v. Malave*, 60 A.D.3d 410 (1st Dept. 2009) (“[The *Molineux* evidence’s] probative value outweighed any prejudicial effect, which was minimized by the court’s thorough limiting instruction”); *People v. Castillo*, 275 A.D.2d 682, 682 (1st Dept. 2000) (prejudicial effect “minimized by the court’s thorough limiting instruction”); *People v. Thomas*, 26 A.D.3d 241, 242 (1st Dept. 2006) (holding that court’s limiting instruction “minimized any prejudice”). Jurors are presumed to follow the court’s instructions; there is no reason that they would not do so in this case. *Morris*, 21 N.Y.3d at 598.

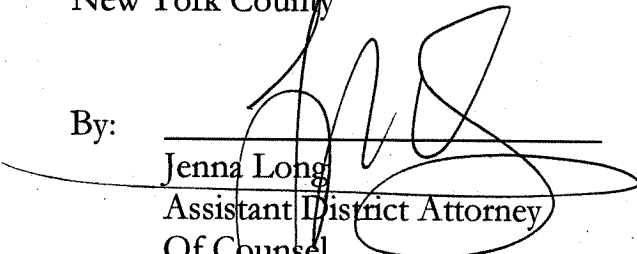
CONCLUSION

For all the foregoing reasons, the People respectfully request that the Court allow all of the above *Molineux* evidence on the People's direct case as evidence of the defendant's intent and the lack of absence or mistake, with an appropriate limiting instruction to the jury. Should the Court only allow a portion of the requested acts, the People respectfully request we be allowed to determine which specific incidents to introduce within the Court's ruling based on number or recency.

Dated: October 15, 2019
 New York, NY

Cyrus R. Vance, Jr.
District Attorney
New York County

By:



Jenna Long
Assistant District Attorney
Of Counsel

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