Prosecuting a Juvenile Delinquency Rape Case Under Recent Amendments to New York State PL §130

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NY Sponsors Memorandum, 2023 A.B. 3340 (February 9, 2023)

FOR REFERENCE ONLY, NOT ATTACHED

Criminal Sexual Act 3rd Degree, NYS Penal Law §130.40 (Repealed effective September 1, 2024)

Criminal Sexual Act 2nd Degree, NYS Penal Law §130.45 (Repealed effective September 1, 2024)

Criminal Sexual Act 1st Degree, NYS Penal Law §130.50(Repealed effective September 1, 2024)

COURT OF APPEALS

95 N.Y.2d 375, 740 N.E.2d 1084, 718 N.Y.S.2d 10, 2000 N.Y. Slip Op. 10303

The People of the State of New York, Respondent,

v.

John F. Carroll, Appellant.

Court of Appeals of New York
130
Argued October 17, 2000;
Decided November 21, 2000

CITE TITLE AS: People v Carroll

SUMMARY

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 22, 1999, which modified, on the law, and, as modified, affirmed a judgment of the Rensselaer County Court (Joseph M. Sise, J.), rendered upon a verdict convicting defendant of rape in the first degree (three counts) and sexual abuse in the first degree (six counts), and sentencing defendant to concurrent terms of 12 1/2 to 25 years of imprisonment for each rape conviction, and to consecutive terms of 2 to 4 years for each sexual abuse conviction, said terms to run concurrently to the terms for the rape convictions. The modification consisted of reducing the sentence for the convictions of rape in the first degree to concurrent prison terms of 8 1/3 to 25 years, and of reducing the sentence for the convictions of sexual abuse in the first degree to consecutive prison terms of 1 1/3 to 4 years, to run concurrent to the terms for rape.

People v Carroll, 263 AD2d 768, reversed.

HEADNOTES

Crimes
Rape
Insufficient Evidence of Penetration--Testimony of Juvenile Victim

(1) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. There was no testimony that defendant put his penis inside the girl. She vaguely recalled feeling "pressure between [her] legs and inside [her] vagina." She never saw defendant's penis and did not remember any other details about the incidents-- what the "pressure" felt like, if it hurt, whether she was clothed or unclothed, or whether defendant was clothed or unclothed. She freely admitted she did not tell the police about feeling "pressure" when she first described the incidents and that, prior to her second interview in which she did recall the pressure, her memory was refreshed by visits to a "doctor" and a counselor. She also asserted during her first interview that she had never had intercourse, only to be told by a police officer after an examination by a nurse practitioner who worked with the police department that she was not a virgin. Even the trial court acknowledged that the girl "couldn't tell" whether intercourse had occurred and suggested other explanations or sources of the pressure. Moreover, there was no testimony from the child with respect to any instrumentality of penetration. ***376**

Crimes
Rape
Insufficient Testimonial or Physical Evidence of Penetration--Medical Testimony

(2) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. Although the inability of the victim to testify with respect to penetration is not conclusive if other evidence existed from which that fact could be established, the testimony of a nurse practitioner, who examined the victim at the behest of the police department, was not consistent with the facts and circumstances surrounding the alleged rape and, thus, did not provide any proof of penetration. The nurse practitioner indicated that an act of first-time forceful penetration would have produced significant tearing and bleeding, but no evidence of such trauma was presented.

Crimes

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Rape
Insufficient Testimonial or Physical Evidence of Penetration--Defendant's Statements

(3) In a sex crimes prosecution involving a juvenile victim, the evidence was not legally sufficient to sustain defendant's convictions for first degree rape since the required element of penetration was not established. Not only was the testimony of the victim and of a nurse practitioner who examined the victim insufficient, defendant's statements did not constitute admissions from which a rational trier of fact could have found beyond a reasonable doubt that penetration occurred. Defendant's statements to the police were not explicit admissions to sexual abuse in general, or penetration in particular. Defendant's statement that the victim was not lying, after being confronted with a false polygraph examination he was told was authoritative that the girl was not lying, was far from a specific admission of having raped her. Rather than an assertion of guilt, defendant's statement was more akin to a statement of one distracted and troubled, of one floundering and confused, probing and seeking the answer to something not known. As such, this statement alone is insufficient to sustain defendant's rape conviction. Defendant's statement that the girl was not lying is even less significant given that no specific allegations were ever revealed to him during the interrogation.

Crimes
Evidence
Tape Recordings

(4) In a sex crimes prosecution, the trial court abused its discretion in failing to allow into evidence a police-recorded and arranged audiotape of defendant's conversation with the juvenile victim in which defendant denied the allegations made by the victim. The prosecution presented testimony that defendant "never denied" the allegations, and defendant's alleged "failure-to-deny" became a major theme in the prosecution's theory of the case. The jury was left with the distorted impression that defendant never, at any time, denied the allegations against him. The rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide. Given this setting, the fact that the court offered to give defendant a limited opportunity to explore whether or not he was specifically asked during the police interrogation if he denied the allegations, did not cure the error in the court's evidentiary ruling. Defendant was not permitted to elicit any testimony regarding his prior denials.

Crimes
Evidence
Excited Utterances--Police-Arranged Telephone Conversation between Crime Victim and Defendant

(5) In a sex crimes prosecution, surreptitiously recorded statements of the defendant, made during a police-arranged conversation between defendant ***377** and the victim, in which the defendant was confronted with the victim's allegations and denied them, were not admissible under the excited utterance exception to the hearsay rule. Excited utterances are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative, preventing the opportunity for deliberation and fabrication. On the particular facts in question, it cannot be said that the trial court abused its discretion in determining that the audiotape, made long after the occurrence of the alleged incidents, was not an excited utterance.

Crimes
Witnesses
Expert Witness--Child Sexual Abuse Accommodation Syndrome

(6) In a sex crimes prosecution involving a juvenile victim, the People properly offered an expert's testimony to explain Child Sexual Abuse Accommodation Syndrome (CSAAS) for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse. The expert's testimony did not attempt to impermissibly prove that the charged crimes occurred. Although the expert testified about CSAAS, he referred to it only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse; he never opined that defendant committed the crimes, that the alleged victim was sexually abused, or even that her specific actions and behavior were consistent with such abuse. In fact, the expert had not interviewed either defendant or the alleged victim, and was not aware of the facts of the case.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Evidence, §§ 865, 882, 884, 885; Expert and Opinion Evidence, §§ 197, 242; Rape, §§ 3, 55, 58, 68.3, 76-81, 88, 90, 94-98, 100, 101.

Carmody-Wait 2d, Criminal Procedure §§ 172:2395-172:2398, 172:2500, 172:2558, 172:2559.

NY Jur 2d, Criminal Law, §§ 1932-1934, 2015, 3904, 3912, 3917, 3956, 3958, 3962, 3966, 3973, 3989.

ANNOTATION REFERENCES

See ALR Index under Evidence Rules; Expert and Opinion Evidence; Rape; Res Gestae.

POINTS OF COUNSEL

O'Connell and Aronowitz, Albany (*Michael L. Koenig* of counsel), and *Robert Rosenthal* for appellant.

I. The trial court's exclusion of vast amounts of material necessary to raise a defense and to confront and cross-examine prosecution witnesses violated Mr. Carroll's State and Federal constitutional rights and requires reversal. (*Davis v Alaska*, 415 US 308; *Smith v Illinois*, 390 US 129; ***378** *Reasonover v Washington*, 60 F Supp 2d 937; *People v Sepulveda*, 105 AD2d 854; *Chambers v Mississippi*, 410 US 284; *People v Ortiz*, 119 Misc 2d 572; *People v Freeman*, 145 Misc 2d 590; *People v Vasquez*, 88 NY2d 561; *People v Edwards*, 47 NY2d 493; *People v Dvoroznak*, 127 AD2d 785.) II. The prosecution's use of inappropriate, inadmissible and unsubstantiated expert testimony requires reversal. (*People v Cronin*, 60 NY2d 430; *People v Taylor*, 75 NY2d 277; *People v Colon*, 238 AD2d 18; *People v Seaman*, 239 AD2d 681; *People v Mercado*, 188 AD2d 941; *People v Knupp*, 179 AD2d 1030; *People v Shay*, 210 AD2d 735; *White v Illinois*, 502 US 346; *Maryland v Craig*, 497 US 836; *Idaho v Wright*, 497 US 805.) III. Conviction of rape counts absent any evidence of penetration requires reversal. (*People v Dunn*, 204 AD2d 919.) IV. Exclusion of evidence explaining how the accusations against Mr. Carroll were created and developed was improper and requires reversal. (*Crane v Kentucky*, 476 US 683; *People v Jovanovic*, 263 AD2d 182.) V. The Court below did not properly consider Mr. Carroll's weight of the evidence argument. (*People v Bleakley*, 69 NY2d 490; *United States v Wade*, 388 US 218; *Idaho v Wright*, 497 US 805; *Brown v Mississippi*, 297 US 278.)

Kenneth R. Bruno, District Attorney of Rensselaer County, Troy (*Bruce E. Knoll* of counsel), for respondent.

I. The lower court's exclusion of the audiotape of the conversation between the victim and defendant did not deprive him of a fair trial. (*People v Wilder*, 93 NY2d 352; *People v Scarola*, 71 NY2d 769; *People v Oliphant*, 201 AD2d 590, 83 NY2d 875; *People v Richardson*, 193 AD2d 969; *People v Dvoroznak*, 127 AD2d 785; *People v Clark*, 128 AD2d 270; *People v Sapia*, 41 NY2d 160, 434 US 832; *People v De George*, 73 NY2d 614; *People v Von Werne*, 41 NY2d 584; *People v Mink*, 267 AD2d 501, 94 NY2d 950.) II. Expert testimony by Dr. Hamill was properly admitted. (*People v Taylor*, 75 NY2d 277; *People v Cronin*, 60 NY2d 430; *People v Fish*, 235 AD2d 578, 89 NY2d 1092; *Werner v Sun Oil Co.*, 65 NY2d 839; *People v Mercado*, 188 AD2d 941; *People v Seaman*, 239 AD2d 681, 91 NY2d 954; *People v Shay*, 210 AD2d 735; *Daubert v Merrell Dow Pharms.*, 509 US 579; *People v Cintron*, 75 NY2d 249; *People v Thompson*, 267 AD2d 602.) III. The evidence of rape was legally sufficient. (*People v Bleakley*, 69 NY2d 490; *People v Ford*, 174 AD2d 853, 78 NY2d 955; *People v Dunn*, 204 AD2d 919, 84 NY2d 907.) IV. The exclusion of irrelevant evidence was proper. (*People v Robinson*, 88 NY2d 1001; *People v Starling*, 85 NY2d 509; *People v Jovanovic*, 263 AD2d 182, 94 NY2d 908.) V. The verdict was not against the weight of the evidence. (*People v Bleakley*, 125 AD2d 687, 69 NY2d 490.) ***379**

OPINION OF THE COURT

Wesley, J.

Defendant was convicted of three counts of rape in the first degree and six counts of sexual abuse in the first degree. Defendant's appeal challenges the legal sufficiency of the proof supporting the rape convictions and several of the trial court's evidentiary rulings, including its refusal to admit into evidence the audiotape of a police-initiated call

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between defendant and his stepdaughter. We conclude that these contentions have merit and that the Appellate Division order sustaining defendant's convictions should be reversed, the counts of the indictment charging defendant with rape dismissed and a new trial ordered on the remaining counts.

I.

In 1997, defendant John Carroll was indicted for three counts of rape in the first degree and six counts of sexual abuse in the first degree arising from allegations brought against him by his then 13-year-old stepdaughter. Defendant had known the girl since she was approximately 2 1/2 years old, when he started dating her mother; they were married in 1989. After the birth of another child, they separated in 1993. Although defendant's relationship with his wife quickly deteriorated and was strained, he maintained contact with the children. His stepdaughter called him on a regular basis and he cared for the children after school.

The allegations against defendant came to light in early March 1997 after the girl told a friend about a dream in which someone named A.J. touched her. The friend spoke to the child's mother, who confronted her daughter about the dream. During the questioning, the mother mentioned the names of several men and asked whether any of them had ever touched her. Her daughter kept nodding no. Finally, she asked if defendant had ever touched her. She repeated the question after the girl did not answer, and the girl, after shaking her head no, began crying and responded yes. The mother called the police several days later.

On March 10, 1997, mother and daughter met with Troy Police Detective Sergeant Steve Weber. The girl told Detective Weber that defendant had been touching her chest and vaginal area since she was six years old. She also indicated to Weber that she was a virgin. Detective Weber arranged for the girl to be examined by Jane Szary, a nurse practitioner who worked ***380** with the Troy Police Department. The nurse practitioner reported that her findings were consistent with vaginal penetration. Weber told the girl that she was not a virgin.

Eight days later, the girl met with New York State Police Investigator Edmund Girtler. During this interview, the child now revealed that, in addition to the prior allegations of abuse, she had felt "pressure" between her legs and inside her vagina since the age of 10. Girtler then instructed her to telephone defendant for the purpose of eliciting incriminating statements which would be monitored and audiotaped. Confronted by his stepdaughter's allegations, defendant vehemently denied any inappropriate conduct, despite her continued accusations. The girl also asked defendant if he thought she was lying. He replied "I don't think you're making it up, I think that you've got different ideas of what may have happened ... You've had a rough life. A lot of things go through your mind."

Later that day, Weber and Girtler went to defendant's workplace and asked him to accompany them to the State police barracks for questioning. During the interview, Girtler confronted defendant with a fake polygraph test indicating that the girl had been truthful in her allegations that defendant had raped and sexually abused her. Defendant indicated that the girl "wasn't lying" and was not "a liar." After nearly three hours of questioning, defendant's attorney contacted the police and all questioning ceased. The defendant did not give a written statement and the officers did not videotape or otherwise record the interview.

Prior to trial, County Court granted the People's motion to exclude the audiotape and prohibited any questions concerning the tape. The court concluded that the tape was hearsay and that the excited utterance exception did not apply.

The only testimony concerning the facts of the three rapes charged in the indictment came from the child. She indicated that each rape occurred in an upstairs apartment at defendant's workplace. Two occurred in 1993 (spring and July) when the girl was nine and the third occurred in the summer of 1994 when she was 10.[1] With respect to each incident, the girl testified that Carroll "rolled me on my back and got on top of me, and I felt pressure between my legs and inside my vagina." She did not remember what she was wearing, if her clothes were on or off, or if defendant had his clothes on or off during ***381** any of the three incidents. When asked if she remembered anything more about the feeling of "pressure," she answered "no." She did not recall if it hurt, stating that she "just remember[ed] the feeling." She indicated that she could not describe the vaginal "pressure" she felt on the first two occasions because she didn't remember. She also stated she never saw defendant's penis.

On cross-examination she admitted that at her initial meeting with Weber, she failed to tell the detective about the incidents of vaginal "pressure." She claimed that, at the time of the first police interview, she "didn't remember exactly what happened," and that prior to the second police interview, her memory was refreshed by visits to a "doctor" and a counselor.

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She also described several incidents during which defendant would come to her apartment after school and put his hands up her shirt or down her pants to touch her. These events occurred between January 1995 and February 1997 and constituted four of the six claims of sexual abuse.

The two police officers testified about defendant's interrogation. When Weber was questioned on direct examination if he specifically asked defendant about the child's allegations against him, he stated that he "asked [defendant] if [the girl] was lying and [defendant] replied that she wasn't lying." Weber was also asked if defendant had denied the allegations "in the beginning." Weber replied, "He never denied that he didn't do it." On cross-examination, Weber testified "He never said he didn't do it, that's right." Following Weber's testimony, defendant sought to introduce the audiotape to impeach Weber's statements on the ground that Weber falsely and unequivocally stated that defendant *never* denied the allegations. The court denied the application, finding that the only inference to be drawn from Weber's testimony was that defendant never denied the allegations in the context of the police interrogation.

Although the questioning of defendant lasted nearly three hours according to Girtler, defendant was never confronted with specific allegations made by the girl. When defendant was shown the fake polygraph test, Girtler also asked him if the child was lying, to which defendant responded "no." Girtler stated that Weber then asked if the girl was a liar, and defendant again said "no." On cross-examination, Girtler also testified that defendant never denied the allegations against him, stating that "He never said, I didn't do it." ***382**

Ms. Szary, the nurse practitioner, also testified. She indicated that she examined the girl and observed an "old transection in her hymenal band at the 7 o'clock position" which was "curved." She noted that if an object is pushed through the hymenal opening of a pre-menstrual child, and it was "a sudden, forceful type of entry, a one-time blow type of thing, it could be very, very damaging, [and] could cause significant tearing and bleeding" resulting in permanent scarring that would be visible years after the fact. The nurse was not asked if the child's condition was consistent with a series of rapes which preceded several incidents of sexual abuse or consistent with the use of some other instrumentality.

Defendant testified and denied all of the accusations against him. One of defendant's former employees testified that the apartment in which the charged acts occurred was frequently entered by employees unannounced during the day for use as a break room.

The jury convicted defendant of all nine counts in the indictment--three counts of rape in the first degree and six counts of sexual abuse in the first degree. Defendant was sentenced to 12 1/2 to 25 years for each rape conviction--to run concurrently with each other--and 2 to 4 years for each of the sexual abuse convictions--to run consecutively with each other but concurrently with the sentence imposed for the rape convictions.

The Appellate Division modified the judgment to correct an illegal sentence and, as so modified, affirmed (263 AD2d 768). The Court concluded that defendant's audiotaped statements were not admissible as an excited utterance and rejected his other evidentiary challenges to the tape's exclusion as without merit. The Court also held that the convictions were supported by legally sufficient evidence. A Judge of this Court granted defendant leave to appeal, and we now reverse.

II.

(1) We first consider whether the evidence is legally sufficient to sustain the rape convictions. Defendant argues that the evidence was insufficient to establish the required element of penetration. We agree.

The standard for review of legal sufficiency of the evidence in a criminal case is whether " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes,* 60 NY2d 620, 621 [quoting *Jackson v Virginia,* 443 US 307, 319]). ***383**

Rape in the first degree is defined by statute as engaging in sexual intercourse with a female less than 11 years old (*see,* Penal Law § 130.35 [3]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00 [1]). Moreover, the testimony of a child victim alone is sufficient because corroboration of sex offenses with respect to child victims is no longer required except in instances not pertinent here (*see, e.g., People v Groff,* 71 NY2d 101, 109; *see also,* Penal Law § 130.16

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[corroboration rule now limited to those sex offenses for which the victim is deemed incapable of consent because of a mental defect or mental incapacity]).[2] Thus, the element of penetration may be established by a child victim's testimony alone (*see, e.g., People v Hatfield,* 256 AD2d 1105, 1106, *lv denied* 93 NY2d 853).

In this case, there was no testimony that defendant put his penis inside the girl. She vaguely recalled feeling "pressure between [her] legs and inside [her] vagina." She never saw defendant's penis and did not remember any other details about the incidents--what the "pressure" felt like, if it hurt, whether she was clothed or unclothed, or whether defendant was clothed or unclothed. She freely admitted she did not tell Weber about feeling "pressure" when she first described the incidents and that, prior to her second interview in which she did recall the pressure, her memory was refreshed by visits to a "doctor" and a counselor. She also asserted during her first interview that she had never had intercourse, only to be told by Weber after Szary's examination that she was not a virgin. Indeed, even the trial court acknowledged that the girl "couldn't tell" whether intercourse had occurred and suggested other explanations or sources of the pressure, for example, "the weight of a male body on top of a child." Moreover, there was no testimony from the child with respect to any instrumentality of penetration.

(2) The girl's inability to testify with respect to penetration is not, however, conclusive, if other evidence existed from which that fact could be established (*see, People v Tench,* 167 NY 520, 522). The nurse indicated that any sudden, forceful entry would ***384** cause "significant tearing and bleeding," but the girl could not remember, and no other evidence established, that she was in any pain after these incidents or that she suffered any other adverse physical reactions consistent with forceful, sudden entry. The first charged act was the rape in the spring of 1993; all the charged acts of sexual abuse occurred on subsequent dates. According to the nurse practitioner's testimony, such a first-time act of forceful penetration would have produced significant tearing and bleeding, no evidence of which existed here. Because the nurse's testimony was not consistent with the facts and circumstances surrounding the alleged rape, it did not provide any proof of penetration (*see, People v Tench, supra,* at 523). Thus, there was no testimonial or physical evidence establishing penetration.

(3) Nor did defendant's statements constitute admissions from which a rational trier of fact could have found beyond a reasonable doubt that penetration did occur. Defendant's statements were not explicit admissions to sexual abuse in general, or penetration in particular (*cf., People v Keefer,* 262 AD2d 791, *lv denied* 94 NY2d 824; *People v Shepard,* 259 AD2d 775, *lv denied* 93 NY2d 979; *People v Bates,* 233 AD2d 937). Under the circumstances, defendant's statement, after being confronted with a false polygraph examination he was told was authoritative that the girl was not lying, was far from a specific admission of having raped her. Rather than an "assertion of guilt," defendant's statement was more akin to a statement "of one distracted and troubled, of one floundering and confused, probing and seeking the answer to something not known" (*People v Leyra,* 1 NY2d 199, 206-207). As such, this statement alone is insufficient to sustain defendant's rape conviction (*see, id.,* at 208 [equivocal statement considered "in proper perspective" was insufficient to sustain conviction]). Indeed, defendant's statement that the girl was not lying is even less significant given that no specific allegations were ever revealed to him during the interrogation. Defendant was only told of vague, general allegations made by his stepdaughter.

In sum, the evidence was not sufficient to establish beyond a reasonable doubt the element of penetration (*see, People v Dunn,* 204 AD2d 919, *lv denied* 84 NY2d 907; *cf., People v Fuller,* 50 NY2d 628). The rape convictions cannot be sustained; the three counts of rape charged in the indictment must be dismissed. ***385**

III.

(4) Defendant also claims that the trial court erred in precluding the police-recorded audiotape of defendant's conversation with his stepdaughter. Under the circumstances presented here, we agree and hold that in light of the testimony that defendant "never denied" the allegations, the trial court abused its discretion in failing to allow the tape or testimony related to that conversation.

(5) Initially, we reject defendant's contention that his taped statements were admissible under the excited utterance exception to the hearsay rule. Trial courts are accorded wide discretion in making evidentiary rulings and, absent an abuse of discretion, those rulings should not be disturbed on appeal (*see, People v Aska,* 91 NY2d 979, 981). Excited utterances "are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to

render the observer's normal reflective processes inoperative" preventing the opportunity for deliberation and fabrication (*People v Vasquez,* 88 NY2d 561, 574; *see,* *People v Edwards,* 47 NY2d 493, 497). On these facts, we cannot say that the trial court abused its discretion in determining that the audiotape was not an excited utterance.

(4) Defendant's alternative argument that the taped conversation should have been admitted to refute the prosecution's claims that defendant never denied the allegations against him has merit.

A court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense (*see,* *People v Hudy,* 73 NY2d 40, 57, *abrogated on other grounds by* *Carmell v Texas,* 529 US 513; *see also,* *Chambers v Mississippi,* 410 US 284, 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]).

At trial, both Weber and Girtler testified that defendant never denied the allegations against him. The People argue that the officers' testimony established only that defendant never denied the allegations during the police interrogation. However, Weber and Girtler both testified that defendant *never* denied the allegations. Moreover, defendant's alleged "failure-to-deny" became a major theme in the prosecution's theory of the case. The prosecutor's summation demonstrates just how important that theory was. ***386**

In her summation, the prosecutor stated that "he didn't outright deny. He never said, you know something, I never touched that child. ... He's a salesman. That's what they do. That's his job, to sell a product. He was making a pitch in here. And he sat there and he faced you. And, my God, members of the jury, it was like he was giving a lecture. ... Members of the jury, he had nine months to think about that. He had all week to think about his story. He's a man who sells things for a living." The prosecutor relied on and accentuated the perception that defendant never asserted his innocence prior to trial and defendant was never permitted to explain the context of his alleged admissions.

Given the officers' testimony that defendant never denied the allegations against him and the exclusion of the taped conversation, the jury was left with the distorted impression that defendant never, at any time, denied the allegations against him. The jury had no way of knowing that there was another point in time at which defendant had the opportunity to deny--and did deny--the allegations. Just as the People are allowed to rebut key assertions of the defense (*see, People v Blakeney,* 88 NY2d 1011), the defendant also is allowed to attempt to disprove the People's theory and rebut their key assertions (*see,* *People v Hudy, supra,* 73 NY2d, at 57-58; *see also, People v Aska, supra,* 91 NY2d, at 983 [Titone, J., dissenting]).

The proposed evidence was not merely relevant to the officers' credibility and was not simply a collateral matter (*see,* *People v Alvino,* 71 NY2d 233, 247). The rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral "has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide" (*People v Knight,* 80 NY2d 845, 847). Such was the case here.

Defendant sought to introduce the tape not only to impeach the officers' credibility, but also to rebut the prosecution's stance--pressed vigorously-- that he never denied the allegations made against him and that he admitted his guilt. The inference that the People wanted the jury to draw from their witnesses was that by never denying the allegations, and by stating that his stepdaughter was not lying upon being confronted by the police, defendant was unmistakably admitting his guilt. This issue was at the heart of the People's case.

Given this setting, the fact that the court offered to give defendant a limited opportunity to explore whether or not he was ***387** specifically asked during the police interrogation if he denied the allegations did not cure the error in the court's evidentiary ruling. Defendant was not permitted to elicit any testimony regarding his *prior* denials. Thus, the trial court's decision under the circumstances was an abuse of discretion and "resulted in a trial that was decidedly skewed in the People's favor" (*People v Hudy, supra,* 73 NY2d, at 58).

IV.

(6) In light of the need for a new trial on the remaining charges of the indictment, we also reach defendant's other contentions concerning the use of expert testimony to explain Child Sexual Abuse Accommodation Syndrome (CSAAS). We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may

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be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand (*see, People v Taylor,* 75 NY2d 277). In *People v Keindl* (68 NY2d 410, 422, *rearg denied* 69 NY2d 823), expert testimony was permitted to "rebut defendant's attempt to impair the credibility of [sexually abused children] by evidence that they had not promptly complained" of the abuse (*People v Taylor, supra,* 75 NY2d, at 288). Here, the People properly offered Dr. Hamill's testimony for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse.

Moreover, Dr. Hamill's testimony did not attempt to impermissibly prove that the charged crimes occurred (*see, id.,* at 293). Although Dr. Hamill testified about CSAAS, he referred to it only generally insofar as it provides an understanding of why children may delay in reporting sexual abuse. Dr. Hamill never opined that defendant committed the crimes, that defendant's stepdaughter was sexually abused, or even that her specific actions and behavior were consistent with such abuse (*cf., People v Mercado,* 188 AD2d 941, 942 [expert permissibly testified to explain the victims' failure to promptly report, but impermissibly testified as to the manifestations of abuse that the children exhibited]). In fact, Dr. Hamill had not interviewed either defendant or his stepdaughter and was not aware of the facts of this case.[3]

Defendant's remaining contentions either lack merit or are unpreserved. ***388**

Accordingly, the order of the Appellate Division should be reversed, the counts of the indictment charging defendant with rape in the first degree dismissed and, as to those counts of the indictment charging defendant with sexual abuse in the first degree, a new trial ordered.

Chief Judge Kaye and Judges Smith, Ciparick and Rosen-blatt concur; Judge Levine taking no part.
Order reversed, etc.

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Footnotes

1 The first two counts of sexual abuse charged in the indictment also occurred during the July 1993 and summer 1994 incidents.

2 Rules of corroboration that exist for other reasons may, however, be required in certain sex offense prosecutions. For example, a child under 12 years of age must understand the nature of an oath before being permitted to testify under oath in the prosecution of any crime (*see,* CPL 60.20 [2]). If a child does not understand the oath, unsworn testimony may be given, but a defendant may not be convicted of any offense solely upon such evidence (CPL 60.20 [3]; *see also, People v Groff,* 71 NY2d at 109-110, *supra*).

3 Defendant's related argument that CSAAS has no reliable scientific basis is not preserved.

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1ST DEPARTMENT

104 A.D.3d 611, 961 N.Y.S.2d 457, 2013 N.Y. Slip Op. 02144

**1 In the Matter of Emanuel G., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, First Department, New York
March 28, 2013

CITE TITLE AS: Matter of Emanuel G.

HEADNOTE

Crimes
Criminal Sexual Act
Sufficiency and Weight of Evidence

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.
Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about February 21, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree (two counts), sexual abuse in the first degree (two counts), sexual misconduct and sexual abuse in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the findings as to sexual misconduct and sexual abuse in the third degree and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. While the victim may have used childlike language to describe matters of anatomy, the totality of his testimony warrants the inference that appellant engaged in anal sexual conduct (Penal Law § 130.00 [2] [b]). As for the sexual abuse counts, the evidence warrants the inference that appellant acted for the purpose of sexual gratification.

Appellant did not preserve his arguments that the court erred in admitting certain medical records and that counsel for the presentment agency engaged in misconduct in cross-examination of appellant and in summation, and we decline to reach these claims in the interest of justice. As an alternative holding, we find that any errors were harmless, particularly in the context of a nonjury trial (*see People v Moreno*, 70 NY2d 403, 406 [1987]). **2

As the presentment agency concedes, the sexual misconduct and third-degree sexual abuse findings should be dismissed as lesser included offenses. Concur—Tom, J.P., Acosta, Saxe and Freedman, JJ. *612

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232 A.D.2d 244, 649 N.Y.S.2d 1

The People of the State of New York, Respondent,
v.
Velton Tenden, Also Known
as Velton Bender, Appellant.

Supreme Court, Appellate Division,
First Department, New York
58741
(October 1, 1996)

CITE TITLE AS: People v Tenden

HEADNOTE

CRIMES
APPEAL
Preservation of Issue for Review --- Rape --- Attempt --- Sufficiency of Evidence

(1) Judgment convicting defendant of attempted rape in first degree and sexual abuse in first degree affirmed --- Defendant's claim that evidence was legally insufficient to establish that he intended to forcibly compel complainant to engage in sexual intercourse is unpreserved for appellate review; in any event, complainant's testimony that defendant entered ladies' room of train station, grabbed her buttocks, demanded sex, pushed her to floor, obstructed her escape, pulled down his fly, and again demanded sex was evidence legally sufficient to establish defendant's intent to commit rape and actions carrying that intent forward to within dangerous proximity of criminal end.

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered October 23, 1992, convicting defendant, after a jury trial, of attempted rape in the first ***245** degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 7 1/2 to 15 years and 3 1/2 to 7 years, respectively, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to establish that he intended to forcibly compel the complainant to engage in sexual intercourse is unpreserved for appellate review (*People v Gray*, 86 NY2d 10), and we decline to review it in the interest of justice. In any event, if we were to review it, we would find that the complainant's testimony, viewed in a light most favorable to the People (*People v Contes*, 60 NY2d 620, 621), that defendant entered the ladies' room of Penn Station, grabbed her buttocks, demanded sex, pushed her to the floor, obstructed her escape, pulled down his fly, and again demanded sex was evidence legally sufficient to establish defendant's intent to commit rape and actions carrying that intent forward to within dangerous proximity of the criminal end (*see, Matter of Khaliek W.*, 193 AD2d 683; *People v Cobb*, 188 AD2d 308, *lv denied* 81 NY2d 969; *see also, People v Kelly*, 166 AD2d 195, *lv denied* 76 NY2d 987; *People v Pereau*, 99 AD2d 591, *affd* 64 NY2d 1055). We further find that the verdict was not against the weight of the evidence.

Concur--Milonas, J. P., Wallach, Nardelli, Tom and Mazzarelli, JJ.

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257 A.D.2d 372, 684 N.Y.S.2d 192, 1999 N.Y. Slip Op. 00001

The People of the State of New York, Appellant,

v.

Juan Cordero, Respondent.

Supreme Court, Appellate Division,
First Department, New York
2505
(January 7, 1999)

CITE TITLE AS: People v Cordero

HEADNOTES

CRIMES
CORROBORATION AS TO SEX OFFENSES

(1) Order which granted motion for trial order of dismissal reversed and verdict finding defendant guilty of sodomy and related offenses reinstated --- Jury found defendant guilty of anally sodomizing complainant, his six-year old nephew --- Trial court erred in refusing to allow complainant to give sworn testimony; even if court's competence determination was correct, court committed independent error in granting motion to dismiss since complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by People (see, CPL 60.20 [3]) --- There was independent evidence tending to establish that complainant was sexually assaulted; complainant's mother and brothers testified that complainant's behavior noticeably changed immediately after incident; in absence of any other explanation for sudden rift between defendant and complainant, latter's changed behavior constitutes corroborative evidence --- Complainant's prompt outcries should have been considered as corroboration of his unsworn testimony since they occurred within short time after criminal incident and predated victim's unsworn testimony --- Defendant's statement to police showed him to have had exclusive opportunity to commit crime; notwithstanding that defendant's statement is exculpatory, all that is necessary is to connect defendant with crime in such way that jury may be reasonably satisfied that witness is telling truth --- Most powerful evidence of corroboration was recovery by police of can of cooking oil used in attack from exact location described by complainant, and identified by him; this corroborative evidence tends to establish both that crime was committed and that defendant committed it; recovery of oil dovetails so perfectly with seven-year old complainant's narrative of events that it significantly enhances reliability of his account --- Viewing evidence of complainant's changed demeanor, his prompt outcries, defendant's statement and recovery of physical evidence cumulatively, as is appropriate, sufficient independent evidence existed to corroborate complainant's unsworn testimony.

CRIMES
WITNESSES
Sworn Testimony by Child

(2) Order which granted motion for trial order of dismissal reversed and verdict finding defendant guilty of sodomy and related offenses reinstated --- Jury found defendant guilty of anally sodomizing complainant, his six-year old nephew --- Trial court erred in refusing to allow complainant to give sworn testimony; even if court's competence determination was correct, court committed independent error in granting motion to dismiss since complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by People --- Record clearly shows complainant possessed sufficient intelligence and capacity to be sworn as witness; he demonstrated his familiarity with his personal circumstances and purpose of his visit to courtroom; he expressed understanding of distinction between telling truth and lying, and that telling truth was 'good thing'; complainant's statement that it was 'important' to tell truth when he was 'talking' in court reflected appreciation and recognition of moral obligation to testify truthfully --- Court's ruling that witness did not appreciate nature of oath or consequences of testifying falsely is not supported by voir dire record; witness was never asked about oath, or even whether he could keep 'promise' to tell truth; some of court's questions were confusing, and other questions were open-ended.

Order, Supreme Court, New York County (Patricia Williams, J.), entered on or about October 7, 1996, which granted defendant's motion for a trial order of dismissal, unanimously reversed, on the law, the motion denied, the jury verdict finding defendant guilty of sodomy in the first degree, sexual

abuse in the first degree and endangering the welfare of a child, reinstated, and the matter remanded for sentencing.

A jury found defendant guilty of anally sodomizing the complainant, his six-year old nephew. The trial evidence established that the complainant stayed at the apartment of his uncle on the night of November 11, 1995, with no one else ***373** present. The complainant woke up in the middle of the night because of a nightmare and asked defendant if he could sleep in his bed. Defendant agreed. Later, defendant removed the complainant's clothes and sodomized him. Defendant stopped in the middle of the assault to lubricate his penis with cooking oil he obtained from a kitchen cabinet.

The next day defendant brought the complainant with him to Brooklyn, and then brought him home. That evening, the complainant reported the incident to his two brothers and mother. The next day, the complainant's mother confronted defendant, who denied the accusation. Ultimately, child welfare officials and the police were alerted, and defendant was arrested. Defendant's statement to the police confirmed the complainant's account of what occurred on November 11-12, except for the sexual assault.

At the close of the prosecution's case, and again after the entire case, defense counsel moved pursuant to CPL 290.10 (1) for a trial order of dismissal. Counsel alleged that the trial evidence was legally insufficient because the complainant's unsworn testimony was not adequately corroborated. The prosecution opposed, arguing that the necessary corroboration was supplied by defendant's statement to the police, evidence of the complainant's changed demeanor after the incident, the complainant's prompt outcries to his brothers and mother, and the recovery by the police of the container of oil used during the attack. The court reserved decision until after the guilty verdict was rendered, but then granted the motion. The court subsequently filed a written opinion rejecting the People's arguments concerning the adequacy of the corroboration of complainant's unsworn testimony.

The People argue on this appeal that the trial court erred in refusing to allow the complainant to give sworn testimony. They further contend that even if the court's competence determination was correct, the court committed independent error in granting the motion to dismiss since the complainant's unsworn testimony was sufficiently corroborated by other evidence adduced by the People. As we agree with both of these arguments, we reverse and reinstate the jury's verdict.

"A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath." (CPL 60.20 [2].) To overcome the rebuttable presumption of incompetence, the infant must demonstrate sufficient intelligence and capacity to justify reception of his testimony (*People v Nisoff,* 36 NY2d 560, 566), and have " 'some conception' " of the obligations of an oath and the consequences ***374** of giving false testimony (*People v Parks,* 41 NY2d 36, 46). In light of the trial court's unique opportunity to participate in the inquiry of the witness, and to observe the witness's maturity and demeanor, the determination of whether the witness is competent to be sworn lies primarily with the trial court, and should not be disturbed unless clearly erroneous (*People v Parks, supra,* at 46; *People v Nisoff, supra,* at 566; *see also, Wheeler v United States,* 159 US 523, 524-525). In making this determination, the court should consider "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former" (*Wheeler v United States, supra,* at 524).

Prior to opening statements, the court examined the complainant outside the presence of the jury to determine if he could give sworn testimony. In response to the court's preliminary questions, the complainant told the court his name (spelling his last name), stated that he was seven years old and said that his birthday was April 13th. He further stated that he was in the second grade and gave his teacher's name. He identified the room he was in as a "courtroom" and the Trial Justice as a "Judge". The court asked the complainant why he was in court, and complainant responded "to talk about something". When the court asked "[w]hat is important when you talk to me about those things?" complainant responded "To tell the truth". The court then instructed him to tell a lie, and complainant responded "Like if I said your coat is green and it is not." Then, pointing to a court officer, the court asked whether it was the truth or a lie that the man was an "astronaut", and the complainant responded "a lie." The court asked whether he was "sure", explaining that although the man definitely didn't look like an astronaut, "sometimes it is tricky about truth and lies ... sometimes you don't know, right?" The complainant responded affirmatively.

The court's examination continued. The following questions and answers were cited by the court as a basis for its ruling:

"COURT: What happens if ... somebody asked you a question, right, like I did about the [astronaut], and you don't know the answer, what do you have to do?

"WITNESS: I don't know, say the truth.

"COURT: You have to tell me that you don't know. Can you do that?

"WITNESS: Um-hum.

"COURT: Are you sure? What happens if you tell a lie?

"WITNESS: Then that means that you lie ... ***375**

"COURT: What happens? What is going to happen if you tell something that is not true?

"WITNESS: I don't know.

"COURT: Is it a good thing to tell a lie or a good thing to tell the truth?

"WITNESS: It is a good thing to tell the truth."

The court then asked the attorneys for each side whether they had any further questions, and both declined. The court announced its ruling that it would not permit the complainant to be sworn, but would, pursuant to CPL 60.20 (2), allow him to give unsworn testimony. The court ruled that the complainant did not sufficiently understand the nature of an oath or the consequences of giving false testimony, as evidenced in part by the fact that "the family is not a churchgoing family so there is not a moral underpinning from some religious basis." The court also stated its concern about the complainant's ability to say that he did not know something, if, in fact, he did not.

Based on our careful review of the voir dire examination of the complainant, we conclude that the court's competence determination constituted an improvident exercise of discretion. The record clearly shows that the complainant possessed sufficient intelligence and capacity to be sworn as a witness (*People v Nisoff, supra*). He demonstrated his familiarity with his own personal circumstances and the purpose of his visit to the courtroom. Further, he expressed a keen understanding of the distinction between telling the truth and lying, and that telling the truth was a "good thing" (*see, People v Young,* 225 AD2d 339, *lv denied* 88 NY2d 971; *People v Shavers,* 205 AD2d 395, *lv denied* 84 NY2d 939; *see also, People v Torres,* 253 AD2d 502). Indeed, complainant's statement that it was "important" to tell the truth when he was "talking" in court reflected an appreciation and recognition of the moral obligation to testify truthfully.

The court's ruling that the witness did not appreciate the nature of an oath or the consequences of testifying falsely is not supported by the voir dire record. The witness was never asked about an oath, or even whether he could keep a "promise" to tell the truth. Rather, some of the court's questions were confusing. Other questions were open-ended, such as "What happens if you tell a lie?" This might elicit a variety of responses from a group of adults, let alone a seven-year old child. While it appears that the court was trying to determine whether the child understood the concept of punishment, "the law does not require that children define abstract concepts with the sophistication of an adult" (***376** *People v Mercado,* 157 AD2d 457, *lv denied* 75 NY2d 922; *see also, People v Cintron,* 214 AD2d 349, *lv denied* 86 NY2d 733). Given the child's demonstrated level of understanding, we have no doubt that more specific and concrete inquiries would have yielded an express recognition of the obligation to tell the truth, and the consequences of not doing so. However, the court declined the prosecutor's request to reopen the inquiry.

Were we to agree that the complainant was not competent to be sworn, we would nevertheless reverse on the ground that the People produced sufficient independent evidence corroborating the complainant's unsworn testimony.* Under CPL 60.20 (3), a defendant may not be convicted of an offense solely upon the unsworn testimony of a complaining witness. Rather, the unsworn witness's testimony must be corroborated by "evidence tending to establish the crime and connecting defendant with its commission." (*People v Groff,* 71 NY2d 101, 104.)

Here, there was independent evidence tending to establish that the complainant was sexually assaulted. The complainant's mother and brothers testified that complainant's behavior noticeably changed immediately after the incident (*see, People v Groff, supra; People v Badia,* 163 AD2d 4, 6; *see also, People v Morse,* 177 AD2d 1015, *lv denied* 79 NY2d 861). When he first returned home, he was quiet and withdrawn, and went immediately to watch television. Despite his previously close relationship with his uncle, the complainant would not come out of his room when defendant

visited after the incident, except when defendant offered him money. In the absence of any other explanation for this sudden rift between defendant and the complainant, the latter's changed behavior constitutes corroborative evidence.

The People also argued that the complainant's prompt outcries to his brothers and mother were further corroboration that a crime occurred. The trial court, citing this Court's decision in *People v Badia* (*supra*), ruled that such evidence failed to possess the requisite independence since it was merely a repetition of the complainant's unsworn testimony. There is conflicting authority on this issue (*compare, People v Page,* 162 NY 272, 276 [rape victim's prompt complaint to neighbor is not " 'other evidence' " within meaning of statute requiring corroboration ***377** for sex offenses]; *People v Badia, supra, with People v Yannucci,* 283 NY 546, 550 [corroborating evidence included victim's prompt complaint]; *People v Reed,* 125 AD2d 343; *People v Kulakowski,* 135 AD2d 1119, *lv denied* 70 NY2d 1007). However, in *People v McDaniel* (81 NY2d 10, 16), the Court of Appeals unambiguously stated: "[E]vidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place". Although *McDaniel* discussed the issue of prompt outcry in a hearsay context, the Court's statement nonetheless supports the People's argument that the complainant's prompt outcries in this case should have been considered as corroboration of his unsworn testimony.

The prompt outcries in this case possessed the requisite independence for corroborative evidence since they occurred within a short time after the criminal incident and predated the victim's unsworn testimony. Thus, these prompt outcries may not be considered mere "repetition" of the complainant's unsworn testimony (*People v Badia, supra,* at 7).

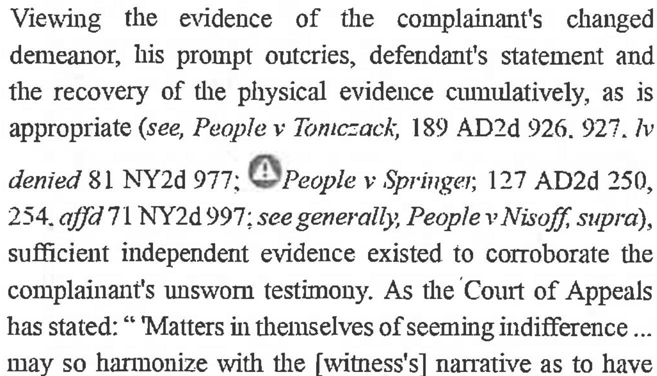
People v Badia (*supra*) is distinguishable. In that case, the victim's prompt complaint was the sole evidence of corroboration in the case. In addition, the complainant had given a prior inconsistent version of the incident, which called into question the reliability of her account. Here, in contrast, other corroborative evidence existed and the complainant gave a detailed, consistent account of the attack. While prompt outcry evidence alone may not suffice to corroborate the testimony of an unsworn witness, it may be considered by the jury on the issue of corroboration under CPL 60.20 (*People v Watson,* 57 AD2d 143, 148, *revd on other grounds* 45 NY2d 867).

Moreover, *Badia* relied on a principle applicable in accomplice corroboration cases that "[c]orroborative evidence may not rely to any extent on the complaining witness's testimony" (*supra,* at 7). That principle applies in accomplice cases because the purpose of the corroboration requirement there is to prevent the falsification of evidence by an accomplice attempting to curry favor with the authorities (*see, People v Groff, supra; People v Hudson,* 51 NY2d 233, 238). However, this is an unsworn witness case, where the purpose of corroboration is to ensure the general trustworthiness of the unsworn testimony (*see, People v Groff, supra,* at 107-108). Accordingly, the principle is far less compelling in these circumstances.

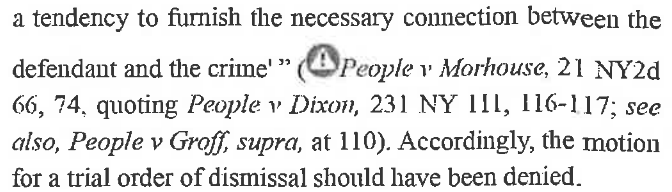
There is also independent evidence connecting defendant to the crime. Here, defendant's statement to the police showed him to have had the exclusive opportunity to commit the crime ***378** (*see, People v Groff, supra,* at 110-111 [under certain circumstances, the opportunity to commit the crime can be sufficient to establish identity]; *see also, People v Dearstyne,* 230 AD2d 953, 959, *lv denied* 89 NY2d 921 [medical record and mother's testimony sufficiently corroborated unsworn testimony since it established defendant's opportunity to commit crime and that crime was committed]; *cf., People v Badia, supra,* at 6 [no evidence even remotely connecting defendant to time and place of the crime]; *People v Doellner,* 87 AD2d 987). Defendant's statement places him in the same bed as the complainant, at the precise time of the alleged attack. Only defendant's denial of any wrongdoing deviates from the complainant's testimony. Notwithstanding that defendant's statement is ultimately exculpatory, "[a]ll that is necessary is to connect the defendant with the crime in such a way that the jury may be reasonably satisfied that the [witness] is telling the truth" (*People v Daniels,* 37 NY2d 624, 630; *People v Groff, supra,* at 110).

Perhaps the most powerful evidence of corroboration was the recovery by the police of the can of cooking oil from the exact location described by the complainant, and identified by him. Although rejected by the trial court as too generic to have any probative significance, in fact, this corroborative evidence tends to establish *both* that a crime was committed and that defendant committed it. While the recovery of the oil would be insignificant if viewed in isolation, it dovetails so perfectly with the seven-year old complainant's narrative of

the events that it significantly enhances the reliability of his account.



Viewing the evidence of the complainant's changed demeanor, his prompt outcries, defendant's statement and the recovery of the physical evidence cumulatively, as is appropriate (*see, People v Tomczack,* 189 AD2d 926, 927, *lv denied* 81 NY2d 977; *People v Springer,* 127 AD2d 250, 254, *affd* 71 NY2d 997; *see generally, People v Nisoff, supra*), sufficient independent evidence existed to corroborate the complainant's unsworn testimony. As the Court of Appeals has stated: " 'Matters in themselves of seeming indifference ... may so harmonize with the [witness's] narrative as to have



a tendency to furnish the necessary connection between the defendant and the crime' " (*People v Morhouse,* 21 NY2d 66, 74, quoting *People v Dixon,* 231 NY 111, 116-117; *see also, People v Groff, supra,* at 110). Accordingly, the motion for a trial order of dismissal should have been denied.

Concur--Rosenberger, J. P., Nardelli, Mazzarelli, Andrias and Saxe, JJ.

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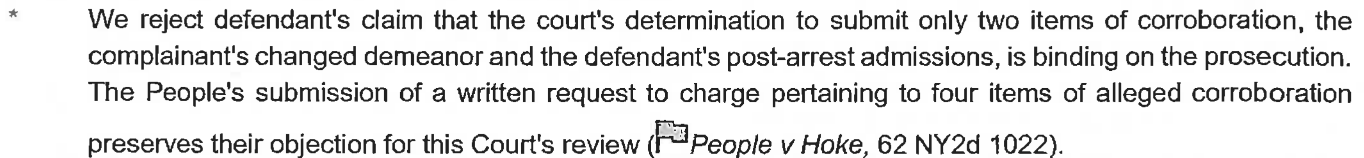
Footnotes



* We reject defendant's claim that the court's determination to submit only two items of corroboration, the complainant's changed demeanor and the defendant's post-arrest admissions, is binding on the prosecution. The People's submission of a written request to charge pertaining to four items of alleged corroboration preserves their objection for this Court's review (*People v Hoke,* 62 NY2d 1022).

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99 A.D.3d 597, 952 N.Y.S.2d 443 (Mem), 2012 N.Y. Slip Op. 07060

**1 In the Matter of Justique R., a Person Alleged to be a Juvenile Delinquent, Appellant.

Supreme Court, Appellate Division, First Department, New York
8235
October 23, 2012

CITE TITLE AS: Matter of Justique R.

HEADNOTES

Crimes
Criminal Sexual Act
Sufficiency of Evidence

Crimes
Witnesses
Unsworn Testimony by Child—Corroboration

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.
Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for presentment agency.
Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 26, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree, sexual abuse in the first and third degrees and sexual misconduct, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence. The five-year-old complainant's unsworn testimony was properly permitted given that the complainant's response during the voir dire demonstrated a sufficient level of "intelligence *598 and capacity to justify the reception thereof" (Family Ct Act § 343.1 [2]; CPL 60.20 [2]; *People v Paul*, 48 AD3d 833, 834 [2d Dept 2008]). The complainant testified that she was in her mother's bedroom watching television when the 13-year-old appellant came into the room, pulled down her pants, and "put his tail in my butt." When asked further questions about "tails," she explained that girls do not have "tails" and that boys "pee and do dee" out of their tails. She described that the "tail" felt hard and it hurt when appellant put it in her butt.

The complainant's testimony was corroborated by the testimony of her mother (Family Ct Act § 343.1 [3]; *People v Paul*, 48 AD3d at 834) who stated that on the evening of the incident, appellant, an extended family member who often plays with her children, was in one bedroom of her apartment playing video games with her 11-year-old son while her daughter, the complainant, was in another bedroom watching television with the door open. At one point during the evening, she looked through the open bedroom door and saw the complainant, who was on the bed, on her hands and knees in a bent over position, with her butt in the air, naked from the waist down, with appellant directly behind her. Appellant was fully clothed, his hands were at his sides, and the top button of his pants was unfastened. The complainant's mother further testified that she asked appellant what he was doing, and he "stumbled, kind of backed away from [complainant] and started to stutter." After she repeated the question, he answered **2 that he had entered the bedroom to ask the complainant if he could borrow a video game. She told appellant to leave, and after he left, she asked her daughter what happened. After hearing what appellant had done, she called the police and took the complainant to the hospital, where she was examined. The record indicates that a rape kit was prepared but was never sent out for testing. The medical records show that the complainant told a doctor that appellant "put his tail on [her] butt" and "stuck his tongue in [her] butt."

The presentment agency met its burden of proof beyond a reasonable doubt. We reject appellant's argument that the inconsistencies in the complainant's testimony, which we find to be minor, render the Family Court's fact-finding determination against the weight of the evidence (*see Matter of Andre N.*, 282 AD2d 273 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]; *compare Matter of Arnaldo R.*, 24 AD3d 326 [1st Dept 2005]). Concur—Saxe, J.P., Sweeny, Richter, Abdus-Salaam and Román, JJ.

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239 A.D.2d 248, 657 N.Y.S.2d 669

The People of the State of New York, Respondent,
v.
Ronnie Green, Appellant.

Supreme Court, Appellate Division,
First Department, New York
60796
(May 15, 1997)

CITE TITLE AS: People v Green

HEADNOTES

CRIMES
APPEAL
Preservation of Issue for Review --- Rape --- Expert Testimony

(1) Judgment convicting defendant of rape affirmed --- While defendant's contention regarding admissibility of testimony by People's child sexual abuse expert is unpreserved for review, expert's testimony was admissible to establish how child could be raped without suffering physical injury and was not offered to prove that victim was raped.

CRIMES
RAPE
Medical Corroboration

(2) Judgment convicting defendant of rape affirmed --- Where complainant's testimony was consistent with slight penetration, absence of conclusive medical corroboration does not negate credible evidence furnished by child victim.

Judgment, Supreme Court, Bronx County (Edward Davidowitz, J.), rendered November 17, 1993, convicting defendant, after a jury trial, of rape in the first and third degrees, and sentencing him, as a second violent felony offender, to concurrent terms of 8 1/2 to 17 years and 2 to 4 years, respectively, unanimously affirmed.

Defendant's guilt was proved beyond a reasonable doubt and ***249** the verdict was not against the weight of the evidence (*People v Bleakley*, 69 NY2d 490). Where the complainant's testimony was consistent with slight penetration, "the absence of conclusive medical corroboration does not negate the credible evidence furnished by the child victim" (*People v Collins*, 166 AD2d 270, 271, *lv denied* 76 NY2d 1020).

Defendant's contention regarding the admissibility of testimony by the People's child sexual abuse expert is unpreserved for appellate review (*see, People v Smith*, 202 AD2d 366), and we decline to review it in the interest of justice. Were we to review it, we would find that the expert's testimony was admissible "to establish how a child could be raped without suffering physical injury and was not offered to prove that the victim was raped" (*supra*). Defendant's remaining contentions are without merit.

Concur--Milonas, J. P., Nardelli, Williams and Andrias, JJ.

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2ND DEPARTMENT

259 A.D.2d 509, 687 N.Y.S.2d 167, 1999 N.Y. Slip Op. 01893

The People of the State of New York, Respondent,
v.
Marvin Williams, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
93230, 96-08944
(March 1, 1999)

CITE TITLE AS: People v Williams

Appeal by the defendant from a judgment of the County Court, Nassau County (Kowtna, J.), rendered September 13, 1996, convicting him of rape in the first degree, rape in the second degree, sexual abuse in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

HEADNOTE

CRIMES
RAPE
Sufficiency of Evidence

(1) Judgment convicting defendant of rape in first degree, rape in second degree, sexual abuse in first degree, and endangering welfare of child affirmed ---Evidence was legally sufficient to establish defendant's guilt beyond reasonable doubt; penetration of vulva or labia constitutes sexual intercourse even though victim's hymen remains intact and there is no penetration into vaginal canal; trial testimony clearly established that, at very least, defendant's penis penetrated complainant's vulva; additionally, complainant's testimony established element of forcible compulsion; fact that complainant did not suffer any physical injuries as result of sexual attack does not render verdict against weight of evidence --- Moreover, inconsistencies between complainant's out-of-court statements and her trial testimony merely created credibility issue which jury resolved in People's favor.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see, People v Contes,* 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Penetration of the vulva or labia constitutes sexual intercourse even though the victim's hymen remains intact and there is no penetration into the vaginal canal (*see, People v Groff,* 71 NY2d 101; *People v Berardicurti,* 167 AD2d 840). Here, the trial testimony clearly established that, at the very least, the defendant's penis penetrated the complainant's vulva. Additionally, the complainant's testimony established the element of forcible compulsion (*see, People v Hodges,* 204 AD2d 739; *People v Solorzano,* 163 AD2d 434). The fact that the complainant did not suffer any physical injuries as a result of the sexual attack does not render the verdict against the weight of the evidence (*see, People v Hodges, supra; People v Gonzalez,* 136 AD2d 735).

Moreover, the inconsistencies between the complainant's out-of-court statements and her trial testimony merely created a credibility issue which the jury resolved in the People's favor (*see, People v Collins,* 188 AD2d 608, 609).

The defendant's remaining contentions are without merit.

Bracken, J. P., Santucci, Goldstein and McGinity, JJ., concur.

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50 A.D.3d 1061, 856 N.Y.S.2d 647, 2008 N.Y. Slip Op. 03671

****1** The People of the State of New York, Respondent
v
Ariel Menendez, Appellant.

Supreme Court, Appellate Division,
Second Department, New York
April 22, 2008

CITE TITLE AS: People v Menendez

HEADNOTES

Crimes
Witnesses
Expert Witness

Although issue was unpreserved for review, sexual assault nurse examiner was qualified to render expert opinion; given education and employment history of witness, who was registered nurse, trial court did not err in permitting her to provide expert testimony—witness's testimony that large percentage of sexual assault victims exhibit no physical injuries to their sexual organs did not shift burden of proof; nor was her testimony speculative, given that it was based upon evidence already received.

Crimes
Witnesses
Expert Witness

Police witness was qualified to render expert opinion in field of blood splatter analysis, as he possessed requisite skill, training, education, knowledge or experience to provide reliable opinion.

Mark Diamond, New York, N.Y., for appellant.
Janet DiFiore, District Attorney, White Plains, N.Y. (Maria I. Wager, Richard Longworth Hecht, and Anthony J. Servino of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester County (Zambelli, J.), rendered July 25, 2006, convicting him of murder in the first degree (two counts), rape in the first degree, and criminal sexual act in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements made to law enforcement officials.

Ordered that the judgment is affirmed.

Since the statements the defendant made to law enforcement officials were not introduced at trial, his contention that they were made without the benefit of *Miranda* warnings (*see* *Miranda v Arizona*, 384 US 436 [1966]) is academic for purposes of this appeal (*see* *People v Nevins*, 16 AD3d 1046, 1048 [2005]; *People v Vanier*, 178 AD2d 501 [1991]; *People v Adames*, 168 AD2d 623 [1990]).

The trial court's preliminary instructions, as a whole, were accurate as to the burden of proof (*see People v Fields*, 87 NY2d 821, 823 [1995]; *People v Belk*, 238 AD2d 346 [1997]; *People v Rodriguez*, 155 AD2d 627 [1989], *affd* 76 NY2d 918 [1990]). Moreover, in the single instance where the preliminary instruction was inaccurate, the defendant declined the issuance of curative instructions (*see People v Young*, 48 NY2d 995, 996 [1980]; *People v Simmons*, 204 AD2d 214, 215 [1994]).

The defendant contends that testimony of a sexual assault nurse examiner should have been precluded because she was unqualified to render an expert opinion and her testimony shifted the burden of proof and was speculative. However, only the defendant's challenge to her testimony as ****2** speculative is preserved for appellate review. In any event, the defendant's contentions are without merit. Given the education and employment history of the witness, who was a registered nurse, the trial court providently exercised its discretion in permitting her to provide expert testimony (*see* ***1062** *Matott v Ward*, 48 NY2d 455, 459 [1979]; *People v Lewis*, 16 AD3d 173 [2005]; *People v Morehouse*, 5 AD3d 925, 928 [2004]). The witness's testimony that a large percentage of sexual assault victims exhibit no physical injuries to their sexual organs did not shift the burden of proof (*see People v Heer*, 12 AD3d 1154, 1155 [2004]; *People v Shelton*, 307 AD2d 370, 371 [2003], *affd* 1 NY3d 614 [2004]; *People v Pann*, 269 AD2d 546 [2000]; *People v Houston*,

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250 AD2d 535 [1998]; *People v Green*, 239 AD2d 248, 249 [1997]; *People v Smith*, 202 AD2d 366 [1994]). Nor was her testimony speculative, given that it was based upon evidence already received (*see Tarlowe v Metropolitan Ski Slopes*, 28 NY2d 410, 414 [1971]; *People v Cruz*, 233 AD2d 102 [1996], *affd* 90 NY2d 961 [1997]).

The defendant's contention that the trial court improvidently exercised its discretion in finding that a police witness was qualified to render an expert opinion in the field of blood splatter analysis is without merit, as the witness demonstrated that he possessed the "requisite skill, training, education, knowledge or experience" to provide a reliable opinion (*Matott v Ward*, 48 NY2d at 459; *see People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Eckhardt*, 305 AD2d 860, 864 [2003]; *People v Rivera*, 236 AD2d 428, 429 [1997]).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt of the crimes charged beyond a reasonable doubt.

Moreover, resolution of issues of credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see People v Romero*, 7 NY3d 633, 644-645 [2006]; *People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]). Upon the exercise of our factual review power (*see* CPL 470.15 [5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]; *People v Price*, 5 AD3d 117, 118 [2004]; *People v Shelton*, 307 AD2d at 371; *People v Slater*, 173 AD2d 1024, 1028 [1991]).

The defendant's remaining contentions are either without merit or do not require reversal. Skelos, J.P., Dillon, Leventhal and Chambers, JJ., concur.

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38 A.D.3d 105, 828 N.Y.S.2d 160, 2007 N.Y. Slip Op. 00139

**1 In the Matter of Jermaine G., Respondent. Presentment Agency, Appellant

Supreme Court, Appellate Division,
Second Department, New York
2005-02953, D-20007/04
January 9, 2007

CITE TITLE AS: Matter of Jermaine G.

SUMMARY

Appeal from an order of the Family Court, Kings County (Jane Pearl, J.), entered February 25, 2005 in a juvenile delinquency proceeding pursuant to Family Court Act article 3. The order granted respondent's motion to dismiss the petition as facially insufficient.

HEADNOTE

Infants
Juvenile Delinquents
Sufficiency of Petition—Utilization of Child Victim's Unsworn Deposition

A juvenile delinquency petition charging the 11-year-old respondent with unlawful sexual contact with his five-year-old cousin (*see* Penal Law § 130.50 [3]; § 130.65 [3]) should not have been dismissed as facially insufficient merely because the child victim's supporting deposition was unsworn. Although the nonhearsay allegations of a juvenile delinquency petition must ordinarily be sworn to in order to satisfy the facial sufficiency requirements (Family Ct Act §§ 311.1, 311.2), the critical test is whether the petition and supporting documents provide assurance both that there is a valid and documented basis for subjecting a juvenile to prosecution, and that there is a measure of reliability regarding the contents of a petition. Here, the formal, notarized written statement of the child victim, in conjunction with the mother's sworn statement corroborating various aspects of the child's allegations, was sufficient to provide both a valid and documented basis for subjecting respondent to prosecution, and a measure of reliability regarding the contents of the petition. Moreover, dismissal of the petition prior to a judicial determination of the allegations would result in not only a grievous harm to the victim, but also, potentially to respondent as well who, if the allegations are proved true, would be in need of professional intervention and help.

RESEARCH REFERENCES

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 80, 107.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:254, 119A:257–119A:259.

5 Law and the Family New York (2d ed) §§ 2:32, 2:33, 2:51.

McKinney's, Family Ct Act §§ 311.1, 311.2.

NY Jur 2d, Domestic Relations §§ 1368–1370, 1376.

ANNOTATION REFERENCE

See ALR Index under Juvenile Courts and Delinquent Children.

*106 FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: juvenile /2 delinquency /2 petition & unsworn /s deposition

APPEARANCES OF COUNSEL

Michael A. Cardozo, Corporation Counsel, New York City (*Barry P. Schwartz* and *Deborah A. Brenner* of counsel), for appellant.
Steven Banks, New York City (*Tamara A. Steckler* and *Daniel Greenbaum* of counsel), for respondent.

OPINION OF THE COURT

Ritter, J.P.

The presentment agency filed a petition pursuant to Family Court Act article 3 to have the respondent, 11-year-old Jermaine G., adjudged to be a juvenile delinquent. The petition alleged that the respondent committed acts which, if committed by an adult, would constitute the crimes of

criminal sexual act in the first degree (oral) (*see* Penal Law § 130.50 [3]), criminal sexual act in the first degree (anal) (*see* Penal Law § 130.50 [3]), and two counts of sexual abuse in the first degree (*see* Penal Law § 130.65 [3]), in that he subjected a child less than 11 years old to sexual contact. Two supporting depositions were annexed to the petition. The first was the statement of the five-year-old alleged victim. The body of the statement reads:

> "Jermaine is my cousin. On the last day that Jermaine lived in the apartment with my family, Jermaine put his pee pee (indicating penis) in my mouth. Jermaine put his pee pee inside of my boom boom (indicating buttocks). It hurt when Jermaine did this to me. My mom walked into the room and Jermaine ran inside his ****2** bedroom.
>
> "Jermaine did this to me many times, definitely more than two times since he moved into our apartment."

The alleged victim's statement did not recite that any false statements therein were punishable as a misdemeanor or otherwise. Further, the jurat does not indicate that the statement was "sworn to." Rather, it reads, "Said to before me this 9th day of August, 2004."

***107** The second supporting deposition was the sworn statement of the alleged victim's mother, who averred:

> "Jermaine G[.] is my nephew. Jermaine came to live with me at the above address in May 2004. Shortly after Jermaine came to live with me in May, I walked into the living room (in the evening) and observed [my son] with his head on Jeramaine's [*sic*] lap. When I walked into the room [my son] jumped up.
>
> "On July 26, 2004 I walked into the living room and I observed [my son] with his shorts and underpants down with his penis exposed. I observed [my son] laying on the couch pulling up his shorts. I observed Jermaine's underwear on the couch next to where [my son] was laying. I went into Jermaine's bedroom and observed Jermaine pulling up his shorts.
>
> "I asked [my son] what happened. [My son] told me in sum and substance 'Jermaine told me to turn round and he pulled my pants down. Jermaine kissed me on the back of my neck and put his pee pee in my boom boom.' 'Pee-pee' is the word [my son] uses for penis and 'boom boom' is the word he uses for buttocks. [My son] stated in sum and substance 'Jermaine does this to me all of the time.' "

After written and oral confessions by Jermaine G. were suppressed, he moved to dismiss the petition. He argued that the petition was facially insufficient because it was not supported by sworn nonhearsay allegations of fact sufficient to establish every element of the offenses charged, to wit: The alleged victim's statement, although sufficient, was not sworn to, and the mother's statement, although sworn to, did not establish every element of the offenses charged.

In opposition, the presentment agency argued that evidence set forth in the supporting depositions, if presented at a criminal trial, would be legally sufficient to prove guilt beyond a reasonable doubt because the unsworn testimony of the child victim was corroborated by the sworn testimony of the mother, whose testimony tended to establish the crimes charged and that the respondent committed them (*see People v Groff*, 71 NY2d 101, 109 [1987]). The presentment agency argued that it would be an absurd result to require the allegations of a juvenile delinquency ***108** petition to meet a greater standard of proof than would be required to prove guilt beyond a reasonable doubt at a criminal trial.

The Family Court granted the Law Guardian's motion and dismissed the petition as facially insufficient. The court noted that the child victim's statement was not sworn and determined that the mother's sworn statement did not establish each and every element of the crimes set forth in the petition. We reverse and reinstate the petition.

A juvenile delinquency petition is sufficient on its face when it substantially conforms ****3** to the requirements as to content prescribed in Family Court Act § 311.1, and:

> "2. the allegations of the factual part of the petition, together with those of any supporting depositions which may accompany it, provide reasonable cause to believe that the respondent committed the crime or crimes charged; and
>
> "3. non-hearsay allegations of the factual part of the petition or of any supporting depositions establish, if true, every element of each crime charged and the respondent's commission thereof." (Family Ct Act § 311.2.)

Although not required by the express language of statute, the Court of Appeals has held that the nonhearsay factual allegations must be sworn to satisfy the facial sufficiency requirement of the Family Court Act (*see Matter of Neftali*

D., 85 NY2d 631, 635 [1995]). The Court reasoned as follows:

> "The sufficiency requirements set forth in Family Court Act § 311.2 are not simply technical pleading requirements but are designed to ensure substantive due process protection to an alleged juvenile delinquent, who can be arrested and deprived of liberty based on the petition. Like a criminal information, the juvenile delinquency petition is the sole instrument for the commencement, prosecution and adjudication of the juvenile delinquency proceeding and, therefore, must comport with the statutory jurisdictional requisites of the Family Court Act." (*Matter of Neftali D., supra* at 634-635 [citations omitted].)

The Court continued:

> "A sworn recital that the factual allegations are accurate ***109** is particularly significant in the context of a delinquency petition not only because it is the sole accusatory instrument used to prosecute the juvenile but, also because there is no independent prior review of the evidence by a Grand Jury-like body. In this regard, we have applied a stringent test when construing challenges to the facial sufficiency of a juvenile delinquency petition to assure that there is a valid and documented basis for subjecting the juvenile to prosecution." (*Matter of Neftali D., supra* at 636 [citations omitted].)

"A verification attesting to the truth of the contents of a document on penalty of perjury is of the same effect as a testimonial oath, which at once alerts a witness to the moral duty to testify truthfully and establishes a legal basis for a perjury prosecution" (*id.* at 635-636). Such a verification "is intended to assure a measure of reliability regarding the contents of the petition" (*id.* at 636). "A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished" (CPL 60.20 [2]).

Applying this requirement where, as here, a child is the only party who can provide the required nonhearsay factual allegations in support of a juvenile delinquency petition, which is often the case in petitions involving allegations of sexual misconduct, presents distinct problems. First, a child under the age of nine is presumed incompetent to testify under oath and may not do so unless the court determines that the child understands the nature of an oath (*see* CPL 60.20). Further, even if false testimony is given under oath, a child under the age of 16 cannot be subjected to criminal liability for perjury (*see* Penal Law § 30.00). A child seven years old or younger cannot even be adjudicated a juvenile delinquent (*see* Family Ct Act § 301.2 [1]). Thus, at least one purpose ****4** served by sworn testimony—to establish a basis to impose punishment for a false statement—will be illusory in many juvenile delinquency proceedings involving child witnesses. However, this does not necessarily mean that the purposes underlying the requirement of sworn testimony will not otherwise be satisfied when a child witness is involved. Common experience suggests that the very nature of the proceedings giving rise to a juvenile delinquency petition (e.g., the giving of a formal statement, the participation of various official agencies, etc.) will be sufficient to impress upon most children the moral duty to testify truthfully and to ***110** alert them to the fact that consequences will ensue if they do not. Concomitantly, this does not mean that the presentation of a sworn statement from a child witness is irrelevant to a determination as to the facial sufficiency of a juvenile delinquency petition. To the contrary, in *Matter of Nelson R.* (90 NY2d 359 [1997]), the Court of Appeals held that the sworn nonhearsay factual statement of a child witness was sufficient to satisfy the facial sufficiency requirement of a juvenile delinquency petition even in the absence of a determination or representation that the child was competent to provide the same.

In *Matter of Nelson R.* (*supra*), the only supporting deposition setting forth nonhearsay factual allegations against the respondent juvenile was from a child less than 12 years old. (At the time *Matter of Nelson R.* was decided, this was below the age of presumed competence to give sworn testimony [*see* L 2000, ch 1, § 11; CPL 60.20].) The deposition was "sworn to" before a notary and recited that, "false statements made herein are punishable as a class A misdemeanor or an act of juvenile delinquency" (*Matter of Nelson R., supra* at 361). The respondent argued that these recitations were not controlling in the absence of a representation that there had been a judicial determination that the child complainant in fact understood the nature of an oath. In upholding the facial sufficiency of the petition, the *Nelson R.* court held:

> "The failure of a petition to state affirmatively that a witness under 12 years of age has been judicially determined competent to swear to a supporting deposition does not render the petition facially insufficient and therefore does not mandate dismissal. Respondent's focus

on the age of the complaining witness here, to the exclusion of all other factors, is misplaced. Although age is a relevant factor in determining the capacity of a person to make a statement under oath, the Family Court Act does not contain any age limitations or requirements for a witness swearing to a supporting deposition. Here, the notary's signature attested to the fact that the complainant had sworn to the truth of her deposition. Thus, there is no indication on the face of the petition that it was not properly sworn to (*cf.*, Family Ct Act § 343.1 [2]). Since the petition here was *facially* valid, any defect in the petition relating to the capacity of the complaining witness to swear to ***111** the supporting deposition was latent and dismissal at the outset of the proceedings was not required." (*Matter of Nelson R., supra* at 362-363 [citations omitted].)

Thus, here, the petition would have been facially sufficient under *Matter of Nelson R.* if the jurat on the alleged child victim's supporting deposition had read "sworn to" rather than "[s]aid to," and/or had there been a recitation in the statement that false statements therein were punishable as a misdemeanor or otherwise. This is true regardless of whether it was ultimately determined that the alleged child victim was competent to give sworn testimony, and/or the fact that he could not have been charged criminally or even adjudicated a juvenile delinquent for making a false statement. However, in light of the discussion, supra, we do not read *Matter of Nelson R.* as holding that there is a talismanic power to the form of the jurat or the recitations within a statement by a child witness such that the absence of the identified language is in all cases fatal to a finding that ****5** a juvenile delinquency petition is facially sufficient. Rather, the critical test identified by the case law is whether the petition and supporting documents provide assurance both that there is a valid and documented basis for subjecting a juvenile to prosecution, and that there is a measure of reliability regarding the contents of a petition. Here, the formal, notarized written statement of the child victim, although not sworn, in conjunction with the mother's sworn statement corroborating various aspects of the child's allegations, was sufficient to provide both a valid and documented basis for subjecting Jermaine G. to prosecution, and a measure of reliability regarding the contents of a petition. Thus, the petition should not have been dismissed as facially insufficient.

Finally, we note that dismissal of the petition here, prior to a judicial determination of the allegations, would result in not only a grievous harm to the victim, but also, potentially to the accused as well; who, if the allegations are proved true, is in need of professional intervention and help. "The overriding intent of the juvenile delinquency article is to empower [the] Family Court to intervene and positively impact the lives of troubled young people while protecting the public" (*Matter of Robert J.*, 2 N.Y.3d 339, 346 [2004]). We perceive no compelling countervailing benefit to be obtained from dismissing the petition at this juncture that would warrant such a result.

Accordingly, the order should be reversed, on the law, without costs or disbursements, the motion to dismiss the petition as ***112** facially insufficient should be denied, and the petition should be reinstated.

Krausman, Florio and Covello, JJ., concur.

Ordered that the order is reversed, on the law, without costs or disbursements, the motion to dismiss the petition as facially insufficient is denied, and the petition is reinstated.

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3rd DEPARTMENT

75 A.D.3d 853, 906 N.Y.S.2d 133, 2010 N.Y. Slip Op. 06119

**1 The People of the State of New York, Respondent-Appellant
v
David Newkirk, Appellant-Respondent.

Supreme Court, Appellate Division, Third Department, New York
July 15, 2010

CITE TITLE AS: People v Newkirk

HEADNOTES

Crimes
Sexual Abuse
Sufficiency of Evidence

***854**

Crimes
Proof of Other Crimes

In sexual abuse prosecution, motion for mistrial on ground that People unduly alluded to prior sexual abuse of victim was denied; although two responses by victim were improper, viewing comments in light of entire testimony and considering overwhelming evidence of defendant's guilt, impropriety was not so egregious as to deny defendant fair trial—prosecutor's comments during summation concerning dynamics of household did not expressly reference any prior crimes or bad acts by defendant and were not so substantially prejudicial as to deprive defendant of fair trial.

Crimes
Sexual Abuse
Evidence

In sexual abuse prosecution, evidence of blood found on victim's sheets and mattress pad was admissible; even if admission of blood evidence was error, in light of fact that there was no evidence that victim was physically injured during incidents or as to whose blood it was or when it was left there, there was no view of evidence which would suggest significant probability that defendant would have been acquitted but for wrongful admission of evidence.

Crimes
Sexual Abuse
Evidence

Insofar as sexual assault nurse examiner who treated victim after alleged incidents testified that there was no evidence of injury to victim, including vaginal tearing, admission of her testimony concerning vaginal tearing in general and use of diagrams of female genitalia did not constitute reversible error.

Crimes
Rape
Sufficiency of Evidence—Penetration

After determining that evidence was legally insufficient to support counts charging defendant with rape in first degree, court should have reduced convictions to lesser included offense of attempted rape in first degree; victim testified that defendant got on top of her, held her hands down, removed her clothes and placed his penis between her legs and rubbed it against her vagina; victim further testified that she squeezed her legs together to prevent sexual intercourse from occurring.

Lewis B. Oliver, Albany, for appellant-respondent. P. David Soares, District Attorney, Albany (Steven M. Sharp of counsel), for respondent-appellant.

Egan Jr., J. Appeals (1) from an order of the Supreme Court (Lamont, J.), rendered April 20, 2006 in Albany County, which partially granted defendant's motion for a trial order of dismissal, and (2) from a judgment of said court, rendered April 20, 2006 in Albany County, upon a verdict convicting defendant of the crime of sexual abuse in the first degree (three counts).

In a six-count indictment, defendant was charged with rape in the first degree (three counts) and sexual abuse in the

first degree (three counts). The indictment was based upon allegations that on May 2, 4 and 6, 2005, defendant raped the victim (born in 1987), his stepdaughter, and sexually abused her by rubbing his penis between her legs while using forcible compulsion. A jury convicted defendant on all six counts. Prior to sentencing, Supreme Court granted defendant's motion for a trial order of dismissal as to the three counts of rape in the first degree, concluding that the People's evidence was not legally sufficient to establish penetration (*see* CPL 290.10 [1]). Supreme Court thereafter sentenced defendant to three consecutive terms of imprisonment of 3½ years for the three sexual abuse in the first degree convictions, resulting in an aggregate sentence of 10½ years. Defendant now appeals from the judgment of conviction and the People appeal from the order dismissing the three rape in the first degree counts. ****2 *855**

Defendant argues that the evidence was legally insufficient to support his convictions for sexual abuse in the first degree, claiming that there was no evidence that he exerted physical force against the victim or implicitly or expressly threatened her. He further contends that the convictions were against the weight of the evidence. Initially, we note that defendant's motion to dismiss, made both at the close of the People's case and at the close of all the evidence, specifically addressed defendant's contention that the evidence was legally insufficient with regard to the rape charges. His challenge to the legal sufficiency of the sexual abuse in the first degree charges, however, was limited to a general motion to dismiss, and he did not specifically advance the grounds upon which he now relies on appeal. Accordingly, defendant failed to preserve the legal sufficiency issue he now raises on appeal (*see People v Finger*, 95 NY2d 894, 895 [2000]; *People v Nesbitt*, 69 AD3d 1109, 1110-1111 [2010], *lv denied* 14 NY3d 843 [2010]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Caston*, 60 AD3d 1147, 1148-1149 [2009]) for which there is no preservation requirement (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

Insomuch as we find here that it would have been reasonable for the factfinder to reach a different conclusion, "[we] must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (*People v Romero*, 7 NY3d 633, 643 [2006] [internal quotation marks and citations omitted]; *see People v Clark*, 51 AD3d 1050, 1051-1052 [2008], *lv denied* 10 NY3d 957 [2008]). Moreover, we must evaluate the evidence from a neutral prospective while extending appropriate deference to the factfinder's credibility (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Barringer*, 54 AD3d 442, 443 [2008], *lv denied* 11 NY3d 830 [2008]).

Defendant was convicted of having subjected the victim to sexual contact by forcible compulsion (*see* Penal Law § 130.65 [1]). Sexual contact is defined as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party" (Penal Law § 130.00 [3]). As relevant here, forcible compulsion is defined as compelling "by either . . . use of physical force; or . . . a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person" (Penal Law § 130.00 [8]). Here, the victim testified that on three separate occasions in May 2005, defendant picked the lock on her ***856** bedroom door, climbed on top of her and, while holding her hands, removed her pajama pants and underwear and rubbed his penis along the outside of her vagina until he ejaculated. The victim testified that she was unable to get away due to defendant lying on top of her and holding her hands. Further, semen samples found on the victim's sheets and on one pair of her underwear were linked, through DNA testing, to defendant. Upon our independent review of the record, and according the jury due deference in its resolution of credibility issues, we conclude that the verdict was supported by the weight of the evidence (*see People v Texidor*, 71 AD3d 1190, 1193 [2010]; *People v Ponales*, 49 AD3d 962, 963 [2008], *lv denied* 10 NY3d 938 [2008]).

Defendant also contends that Supreme Court erred in denying his motion for a mistrial. Defendant argues that the victim's testimony, as well as remarks by the People during summation, referenced prior sexual abuse of the victim by defendant and therefore violated Supreme Court's pretrial *Molineux* ruling that the prejudicial effect of such evidence far outweighed any probative value. At trial, when asked why she did not scream during the course of the alleged incidents, the victim testified, "Because it was something that always happened." The People then asked why she had not told her mother and the victim responded, "Because it's ****3** been going on." At this point defendant objected and immediately moved for a mistrial. Supreme Court reserved decision on the

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motion for a mistrial, but granted defendant's motion to strike both answers. Thereafter, during summation, the People asked the jury to consider "the dynamics of [the victim's] family" and questioned why the victim's bedroom door had been locked, stating that "[t]hese things don't happen in a vacuum" and "this is not something that just out of the blue occurs." Following the People's summation, defendant again moved for a mistrial on the ground that the People unduly alluded to prior sexual abuse of the victim. The court thereafter denied the motions for a mistrial.

It is well settled that "the decision to grant or deny a motion for a mistrial is within the trial court's discretion and its decision will not be disturbed unless it amounts to an abuse of discretion" (*People v Benway*, 217 AD2d 884, 885 [1995]; *accord People v Miller*, 239 AD2d 787, 787 [1997], *affd* 91 NY2d 372 [1998]). Here, despite the fact that the two responses by the victim were improper, viewing the comments in light of the entire testimony and considering the overwhelming evidence of defendant's guilt, we conclude that the impropriety was not so egregious as to deny defendant a fair trial (*see* ***857** *People v Cunningham*, 222 AD2d 727, 730 [1995], *lv denied* 87 NY2d 1018 [1996]). Additionally, although defendant declined Supreme Court's offer of a prompt curative instruction, the court struck the responses and later instructed the jury to disregard all stricken testimony, alleviating any prejudice to defendant (*see People v Young*, 48 NY2d 995, 996 [1980]; *People v Johnson*, 67 AD3d 560 [2009], *lv denied* 14 NY3d 802 [2010]). Regarding the People's remarks during summation, inasmuch as "[r]eversal of a conviction for prosecutorial misconduct is warranted only where a defendant has suffered substantial prejudice such that he [or she] was deprived of due process of law" (*People v McCombs*, 18 AD3d 888, 890 [2005]), we find that, in the context of the trial, the comments concerning the dynamics of the household did not expressly reference any prior crimes or bad acts by defendant and were not so substantially prejudicial as to deprive defendant of a fair trial (*see People v Wilson*, 61 AD3d 1269, 1272 [2009], *lv denied* 14 NY3d 774 [2010]; *People v McKnight*, 306 AD2d 546, 548 [2003], *lv denied* 100 NY2d 596 [2003]).

We also reject defendant's claim that Supreme Court erred by admitting evidence of blood being found on the victim's sheets and mattress pad. Even if defendant was correct in his contention that the admission of the blood evidence was error, in light of the fact that there was no evidence presented that the victim was physically injured during the incidents or as to whose blood it was or when it was left there, we find that "there is no view of the evidence which would suggest a significant probability that defendant would have been acquitted but for the wrongful admission of this evidence" (*People v White*, 41 AD3d 1036, 1038 [2007], *lv denied* 9 NY3d 965 [2007]; *see People v Tatro*, 53 AD3d 781, 785 [2008], *lv denied* 11 NY3d 835 [2008]). We reach a similar conclusion as to defendant's challenge to the admission of testimony from the sexual assault nurse examiner who treated the victim after the alleged incidents. Insofar as the nurse testified that there was no evidence of injury to the victim, including vaginal tearing, the admission of her testimony concerning vaginal tearing in general and the use of diagrams of female genitalia did not, in our view, constitute reversible error (*see People v Rivera*, 70 AD3d 1177, 1181-1182 [2010]). Defendant's remaining challenges on appeal to the admission of evidence during trial were not preserved for our review by a proper objection (*see People v Gray*, 86 NY2d 10, 19 [1995]).

Finally, we find no merit to defendant's contention that his sentence was harsh and excessive and we discern no abuse of discretion or extraordinary circumstances warranting a reduc ***858** tion of the sentence in the interest of justice (*see* ****4** *People v Hodges*, 66 AD3d 1228, 1234 [2009], *lv granted* 13 NY3d 939 [2010]).

Turning to the People's appeal, we reject their contention that the evidence presented was legally sufficient to support a conviction of rape in the first degree. "A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person . . . [b]y forcible compulsion" (Penal Law § 130.35 [1]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00 [1]; *see People v Brown*, 67 AD3d 1197, 1198 [2009]). During her testimony, the victim denied that defendant's penis penetrated her vagina but testified that his penis touched her vagina and rubbed against it without entering it, and that she had squeezed her legs together to prevent penetration. Additionally, her medical records indicate that she informed hospital staff that defendant was unable to penetrate her vagina and the sexual assault nurse examiner testified that the examination of the victim revealed no evidence of bruising, tearing, discharge or blood. Accordingly, as the evidence is legally insufficient to establish penetration, as opposed to external contact of the sexual parts (*see People v Porlier*, 55 AD3d 1059, 1061-1062 [2008]; *compare People v Jacobs*, 37 AD3d 868, 869-870

[2007], *lv denied* 9 NY3d 923 [2007]), we conclude that Supreme Court properly dismissed the three counts as to rape in the first degree.

We do, however, find merit in the People's contention that, after determining that the evidence was legally insufficient to support the counts charging defendant with rape in the first degree, Supreme Court should have reduced the convictions to the lesser included offense of attempted rape in the first degree.[*] In deciding a trial order of dismissal, the court may issue an order dismissing any count of an indictment if the trial evidence "is not legally sufficient to establish the offense charged therein or any lesser included offense" (CPL 290.10 [1] [a]). Based upon our review of the record, the evidence was legally sufficient to sustain the lesser included offense of attempted rape in the first degree (*see* Penal Law §§ 110.00, 130.35; *People v Jackson*, 48 AD3d 891, 892 [2008], *lv denied* 10 NY3d 841 [2008]). Specifically, the victim testified that defendant got on top of her, held her hands down, removed her clothes and placed his penis between her legs and rubbed it against her vagina. The victim fur ***859** ther testified that she squeezed her legs together to prevent sexual intercourse from occurring. Inasmuch as the court should have reduced the convictions to the lesser included offense supported by the evidence, we conclude that the convictions for rape in the first degree should be reinstated and thereafter reduced to convictions for attempted rape in the first degree (*see People v Smith*, 183 AD2d 653, 656 [1992], *lv denied* 80 NY2d 910 [1992]), and we remit the matter to Supreme Court for sentencing on said convictions. In light of the foregoing, the People's remaining arguments are academic.

Cardona, P.J., Peters, Spain and McCarthy, JJ., concur. Ordered that the order is modified, on the law, by reversing so much thereof as partially granted defendant's motion and dismissed counts one, two and three of the indictment charging ****5** rape in the first degree; motion denied to said extent, defendant is convicted of the lesser included offense of attempted rape in the first degree under said counts of the indictment and matter remitted to the Supreme Court for sentencing on said convictions; and, as so modified, affirmed.

Ordered that the judgment is affirmed.

FOOTNOTES

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Footnotes

* Inasmuch as the People made their opposition to the trial order of dismissal known to Supreme Court, we find that this issue was preserved for our review (*see* CPL 470.05 [2]; *People v Caban*, 14 NY3d 369, 373 [2010]).

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185 A.D.2d 472, 585 N.Y.S.2d 889

The People of the State of New York, Respondent,
v.
Curtis White, Appellant.

Supreme Court, Appellate Division,
Third Department, New York
63617
(July 16, 1992)

CITE TITLE AS: People v White

Mercure, J.

Appeal from a judgment of the Supreme Court (Harris, J.), rendered May 10, 1991 in Albany County, upon a verdict convicting defendant of the crime of rape in the first degree.

HEADNOTES

CRIMES
CONFESSION

(1) Supreme Court properly concluded defendant's statement should not have been suppressed; defendant did not controvert police testimony that statement was made immediately after defendant was advised of his Miranda warnings, and record is devoid of evidence which would support defendant's claim statement was involuntarily given.

CRIMES
IDENTIFICATION OF DEFENDANT
Showup Identification

(2) In rape prosecution, Supreme Court properly denied suppression of defendant's showup identification by complainant; showup was conducted within one hour of crime and in close proximity to crime scene, and presence of handcuffs did not render identification impermissibly suggestive; moreover, Supreme Court correctly determined People had established independent basis for in-court identification, given complainant's observations of defendant in bar and during assault.

CRIMES
RAPE
Sufficiency of Evidence

(3) There was sufficient evidence of penetration to support conviction for first degree rape; complainant's testimony penetration had occurred was supported by medical evidence that area of vulva was red and swollen; medical evidence negating presence of semen was consistent with complainant's testimony she was able to escape from defendant soon after penetration occurred; moreover, ejaculation is by no means prerequisite to commission of rape which may occur upon any penetration, however slight.

On the night of June 7, 1990, the complainant left Izzy's Bar in the City of Albany and accepted defendant's offer of a ride home. The complainant testified that defendant then drove to an alley, dragged her out of the car, took off her clothes and raped her. After a struggle, the complainant, wearing only sneakers and socks, was able to get away and run to Central Avenue where she stopped a passing vehicle and asked the driver for assistance. Eventually, after obtaining some clothes, she told the police that she had been raped.

In the meantime, police had received a report of a possible rape in the back of 150 Central Avenue and had already commenced their investigation. The complainant's license was found in a purse which was located at the scene, and further investigation revealed that the complainant had gone to Izzy's ***473** Bar that evening. Investigators dispatched to Izzy's Bar developed information that the complainant had been talking with a heavy-set black man named Gino wearing a "do rag". This description was transmitted to police units and Detective Joseph Hughes, recognizing the described person as defendant, proceeded with another detective to defendant's residence and ultimately located him. Hughes then requested that the complainant be driven by so she could view defendant, who was then in handcuffs. At the ensuing showup, the complainant identified defendant as her assailant. Following indictment and trial, defendant was found guilty of rape in the first degree and sentenced to a prison term of 8 1/3 to 25 years. Defendant now appeals.

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We affirm. Initially, it is our view that Supreme Court properly denied suppression of defendant's showup identification by the complainant. The showup was conducted within one hour of the crime and in close proximity to the crime scene *(see,* *People v Duuvon,* 77 NY2d 541, 544; *People v Riley,* 70 NY2d 523, 529), and the presence of handcuffs did not render the identification impermissibly suggestive *(see, People v Cooper,* 152 AD2d 939, *lv denied* 74 NY2d 846; *People v Thomas,* 105 AD2d 1098). Moreover, Supreme Court correctly determined that the People had established an independent basis for an in-court identification, given the complainant's observations of defendant in the bar and during the assault *(see, People v Ramos,* 42 NY2d 834; *People v Carter,* 158 AD2d 851, 852).

We also reject the contention that there was insufficient evidence of penetration to support the conviction. The complainant's testimony that penetration had occurred was supported by medical evidence that the area of the vulva was red and swollen. Medical evidence negating the presence of semen was entirely consistent with the complainant's testimony that she was able to escape from defendant soon after penetration occurred. Moreover, "ejaculation is by no means a prerequisite to the commission of a rape which may occur 'upon any penetration, however slight' (Penal Law § 130.00 [1])" *(People v Gebert,* 118 AD2d 799, 802, *lv denied* 67 NY2d 943; *see, People v Chilson,* 133 AD2d 931, 932-933, *lv denied* 71 NY2d 893; *People v Kinnard,* 98 AD2d 845, 847, *affd* 62 NY2d 910). Viewing the evidence adduced at trial in a light most favorable to the People *(see,* *People v Contes,* 60 NY2d 620), we find that it was legally sufficient to support the conviction.

We also agree with Supreme Court's conclusion that defendant's statement should not have been suppressed. Defendant ***474** did not controvert police testimony that the statement was made immediately after defendant was advised of his *Miranda* warnings, and the record is devoid of any evidence which would support defendant's claim that the statement was involuntarily given. In these circumstances, there is no basis to disturb Supreme Court's finding that defendant voluntarily waived his right to counsel *(see,* *People v Sirno,* 76 NY2d 967).

Defendant's remaining contentions are unpreserved for appellate review, without merit or constitute harmless error beyond a reasonable doubt *(see,* *People v Crimmins,* 36 NY2d 230).

Mikoll, J. P., Levine, Crew III and Harvey, JJ., concur.
Ordered that the judgment is affirmed.

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55 A.D.3d 1059, 865 N.Y.S.2d 732, 2008 N.Y. Slip Op. 08038

**1 The People of the State of New York, Respondent

v

Robert Porlier, Appellant.

Supreme Court, Appellate Division, Third Department, New York
October 23, 2008

CITE TITLE AS: People v Porlier

HEADNOTES

Crimes
Indictment

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, time frames specified in indictment did not deprive defendant of due process; considering age of victim when abuse began, frequent recurrence of abuse, familial relationship between victim and defendant and unlikelihood of discovery, time span of season (i.e., summer 2001) was sufficiently particularized to permit defendant to prepare defense.

Crimes
Timeliness of Prosecution

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, court properly denied defendant's motion to dismiss based upon his due process right to prompt prosecution; while People charged defendant with crimes that occurred as much as six years earlier, these crimes were serious, defendant was only incarcerated for short time prior to indictment and prosecution obtained indictment less than one month after victim first reported sexual abuse.

Crimes
Confession

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, court properly denied defendant's motion to suppress his written statement; no *Payton* violation occurred, as investigator testified that police never entered defendant's home; defendant agreed to accompany officers to police barracks, was not handcuffed as he rode in front seat of unmarked police car, was administered *Miranda* warnings, was given drink of water prior to questioning, and was not arrested until after he provided written statement.

Crimes
Jurors
Selection of Jury

Court did not err in denying defendant's challenge of juror for cause; while juror indicated that she would have difficulty in carrying out her duties and applying proper burdens, court further questioned her and obtained affirmations that she could fairly and impartially fulfill her obligation to render determination based upon evidence and court's instructions.

Crimes
Rape

Evidence failed to prove that defendant committed crime of rape; defendant denied penetration in both his testimony and his written statement; victim testified that defendant "*tried* to have sex" with her and "tried" to put his penis in her vagina; when prosecutor asked "did his penis make contact with your vagina," victim simply answered "yes"—because evidence was legally insufficient to establish penetration, conviction was reduced to attempted rape in first degree.

Crimes
Corroboration of Admission

Without any proof supporting certain counts of indictment, other than defendant's uncorroborated confession, evidence was legally insufficient and those counts were dismissed.

Crimes
Sexual Abuse

In prosecution arising out of defendant's sexual abuse of young female relative over period of six years, evidence was insufficient to establish that victim was less than age 11 at time that certain conduct occurred, requiring reduction of count charging sexual abuse in first degree; defendant's written confession was vague regarding time periods, and dates victim testified to were all after she turned 11; because evidence established that defendant committed same conduct when victim was less than 14, conviction was reduced from sexual abuse in first degree to sexual abuse in second degree.

Crimes
Witnesses
Child Witness.—Leading questions were properly permitted to clarify or expedite child victim's testimony in sexual abuse case.

Kane, J. Appeal from a judgment of the County Court of ***1060** Washington County (Hall, Jr., J.), rendered June 29, 2007, upon a verdict convicting defendant of the crimes of sexual abuse in the first degree (nine counts), criminal sexual act in the first degree, rape in the first degree, sexual abuse in the third degree and endangering the welfare of a child.

A young female relative informed the State Police that defendant had been sexually abusing her for the past six years. Investigators recorded a controlled phone call between the victim and defendant, and then brought him to the station for an interview. Defendant signed a written statement wherein he admitted to several instances of sexual contact with the victim. A grand jury handed up an indictment charging defendant with sexual abuse in the third degree, criminal sexual act in the first degree, rape in the first degree, endangering the welfare of a child and nine counts of sexual abuse in the first degree. County Court denied defendant's motions to dismiss the indictment and suppress his written statement. After trial, he was convicted on all counts, prompting this appeal.

The time frames specified in the indictment did not deprive defendant of due process. "When time is not an essential element of an offense, the indictment . . . may allege the time in approximate terms," as long as it sets forth a time interval which reasonably informs the defendant of the nature of the accusations to enable the preparation of a defense (*People v Watt*, 81 NY2d 772, 774 [1993]; *see People v Dunton*, 30 AD3d 828, 829 [2006], *lv denied* ****2** 7 NY3d 847 [2006]; *People v Johnson*, 268 AD2d 891, 892 [2000], *lv denied* 94 NY2d 921 [2000]). Considering the age of the victim when the abuse began, the frequent recurrence of abuse, the familial relationship between the victim and defendant and the unlikelihood of discovery, the time span of a season (i.e., summer 2001) was sufficiently particularized to permit defendant to prepare a defense (*see People v Keefer*, 262 AD2d 791, 792 [1999], *lv denied* 94 NY2d 824 [1999]; *see also People v Watt*, 81 NY2d at 774; *People v Morgan*, 246 AD2d 686, 687 [1998], *lv denied* 91 NY2d 975 [1998]). A lack of further specification did not harm defendant here, as his defense was a categorical denial of any abuse or sexual contact (*see People v Morgan*, 246 AD2d at 687; *People v Stevens*, 176 AD2d 997, 998 [1991]).

County Court properly denied defendant's motion to dismiss based upon his due process right to prompt prosecution. While the People charged defendant with crimes that occurred as much as six years earlier, these crimes were serious, defendant was only incarcerated for a short time prior to indictment and the prosecution obtained an indictment less than one month after ***1061** the victim first reported the sexual abuse (*see People v Vernace*, 96 NY2d 886, 887 [2001]).

County Court also properly denied defendant's motion to suppress his written statement. The court's factual findings, which are entitled to deference (*see People v Kreydatus*, 305 AD2d 935, 936 [2003], *lv denied* 100 NY2d 595 [2003]), are fully supported by the testimony of the sole witness at the hearing, a State Police investigator. No *Payton* violation occurred, as the investigator testified that the police never entered defendant's home (*see People v Hansen*, 290 AD2d 47, 53 [2002], *affd* 99 NY2d 339 [2003]; *compare Payton v New York*, 445 US 573, 590 [1980]). The investigator testified that defendant agreed to accompany the officers to the police barracks, was not handcuffed as he rode in the front seat of the unmarked police car, was administered *Miranda* warnings, was given a drink of water prior to questioning, and was not arrested until after he provided a written statement

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(*see People v Kreydatus*, 305 AD2d at 936). Defendant's contrary testimony at trial cannot be utilized to attack the court's decision following the *Huntley* hearing. The hearing transcript does not contain any proof that the statement was obtained involuntarily. Thus, suppression was not warranted.

County Court did not err in denying defendant's challenge of a particular juror for cause. While the juror initially indicated that she would have difficulty in carrying out her duties as a juror and applying the proper burdens, the court further questioned her and obtained affirmations that she could fairly and impartially fulfill her obligation to render a determination based upon the evidence and the court's instructions (*see* CPL 270.20 [1] [b]; *cf. People v Nicholas*, 98 NY2d 749, 751-752 [2002]; *People v McLean*, 24 AD3d 1110, 1111 [2005]).

The evidence fails to prove that defendant committed the crime of rape (count 12). Rape is committed when there is "any penetration, however slight" (Penal Law § 130.00 [1]; *see People v Carroll*, 95 NY2d 375, 383 [2000]; *Matter of Zachary K.*, 299 AD2d 755, 756 [2002]). Here, defendant denied penetration in both his testimony and his written statement. The victim testified that defendant "*tried* to have sex" with her and "tried" to put his penis in her vagina. When the prosecutor asked "did his penis make contact with your vagina," the victim simply answered "yes." Because the evidence is legally insufficient to establish penetration, as opposed to touching or external contact of the sexual parts (*see People v Carroll*, 95 NY2d at 383-384; *People v Dunn*, 204 AD2d 919, 920 [1994], *lv denied* 84 NY2d 907 [1994]), we reduce this conviction to attempted rape in the ***1062** first degree and remit for resentencing on that count (*see* CPL 470.15 [2] [a]; *People v Clark*, 52 AD3d 860, 861 [2008]). ****3**

The evidence is also legally insufficient to support the convictions on counts one, two and four of the indictment. "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed" (CPL 60.50). While "the additional proof required need not corroborate every detail of the confession," there must be some other proof tending to establish that the charged crime was committed (*People v Morgan*, 246 AD2d at 686; *see People v Groff*, 71 NY2d 101, 107 [1987]). Count one alleges that defendant rubbed the victim's buttocks with his hand, count two alleges that he touched and rubbed her buttocks with his penis and count four alleges that he placed his penis in contact with her anus. In her testimony, the victim never mentioned that defendant touched her buttocks or anus with any part of his body. Without any proof supporting counts one, two and four, other than defendant's uncorroborated confession, the evidence was legally insufficient and those counts must be dismissed.

The evidence was insufficient to establish that the victim was less than age 11 at the time that certain conduct occurred, requiring reduction of count three of the indictment charging sexual abuse in the first degree. Defendant's written confession was vague regarding time periods, and the dates the victim testified to were all after she turned 11. Because the evidence did establish that defendant committed the same conduct when the victim was less than 14, the conviction on count three must be reduced from sexual abuse in the first degree to sexual abuse in the second degree. The victim's testimony provided at least some proof to support the remaining counts (*see People v Dunton*, 30 AD3d at 829-830).

We will not disturb County Court's rulings to allow leading questions here. Leading questions, while ordinarily not permissible on direct examination, may be allowed in the trial court's discretion where they are deemed necessary to clarify or expedite a child victim's testimony in a sexual abuse case (*see People v Martina*, 48 AD3d 1271, 1272 [2008], *lv denied* 10 NY3d 961 [2008]; *People v Cuttler*, 270 AD2d 654, 655 [2000], *lv denied* 95 NY2d 795 [2000]).

The prosecutor's summation did not deprive defendant of a fair trial. Most of the statements objected to by defendant constituted fair comment on the evidence or a reasonable response to the defense summation. There was no flagrant or pervasive misconduct so as to deprive defendant of due process (*see* ***1063** *People v Robinson*, 16 AD3d 768, 770 [2005], *lv denied* 4 NY3d 856 [2005]). Defendant's remaining arguments have been reviewed and are without merit.

Mercure, J.P., Peters, Rose and Lahtinen, JJ., concur. Ordered that the judgment is modified, on the law, by reversing so much thereof as convicted defendant of the crimes of rape in the first degree under count 12 of the indictment, sexual abuse in the first degree under count three of the indictment, sexual abuse in the first degree under counts one and two of the indictment and criminal sexual act in the first degree under

count four of the indictment; reduce defendant's conviction under count 12 of the indictment to attempted rape in the first degree, reduce defendant's conviction under count three of the indictment to sexual abuse in the second degree, dismiss counts one, two and four of the indictment, vacate the sentences imposed on all five counts, and matter remitted to the County Court of Washington County for resentencing on counts three and 12 of the indictment; and, as so modified, affirmed.

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299 A.D.2d 755, 751 N.Y.S.2d 69, 2002 N.Y. Slip Op. 08858

In the Matter of Zachary K., a Person Alleged to be a Juvenile Delinquent, Appellant. St. Lawrence County Attorney, Respondent.

Supreme Court, Appellate Division, Third Department, New York
90356
(November 27, 2002)

CITE TITLE AS: Matter of Zachary K.

HEADNOTES

INFANTS
JUVENILE DELINQUENTS
Rape

(1) Evidence established beyond reasonable doubt that respondent engaged in conduct constituting rape in first degree --- physician's testimony as to condition of victim's genitalia in combination with victim's testimony as to sexual contact and pain she experienced with respondent's companion provide sufficient basis for finding of fact that actual penetration, though slight, had occurred; respondent threatened victim with physical injury using knife, tied her up, had some sexual contact with her, and then waited while his companion raped her; this conduct amply supports finding of culpability as accomplice.

INFANTS
JUVENILE DELINQUENTS

(2) Inconsistencies between victim's testimonies at fact-finding hearing and at earlier probable-cause hearing were fully explored by respondent's counsel on cross-examination of victim and responded to by petitioner's counsel on redirect examination, and do not render victim's testimony incredible as matter of law or suggest that victim was mistaken as to essential conduct supporting charges against respondent.

Rose, J.

Appeal from an order of the Family Court of St. Lawrence County (Nelson, J.), entered June 29, 2001, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 3, to adjudicate respondent a juvenile delinquent.

Following a fact-finding hearing, Family Court found that respondent had, among other things, acted in concert with another youth in subjecting a 10-year-old female to sexual intercourse by forcible compulsion. The victim's testimony at the hearing disclosed that respondent, who was then 11 years old, and another older youth lured her into a shed, respondent threatened her with a knife, tied her up and told her to take off her clothes, and she was prevented from leaving until she agreed to let respondent and his companion rape her. The victim then described how each assailant had sexual contact with her for several minutes while the other waited outside. ***756** Deborah Duello, one of the physicians who examined the victim at the hospital, testified that she found redness and a laceration on the victim's external genitalia, although the victim's hymen was intact. Respondent contends that this evidence failed to establish beyond a reasonable doubt that he engaged in conduct which, if committed by an adult, would constitute the crime of rape in the first degree (Penal Law § 130.35 [2]), and that the victim's testimony was so inconsistent with her prior statements as to render it incredible.

On appellate review, Family Court, as the trier of fact, is entitled to have its determinations of witness credibility and resolution of disputed facts "afforded the same weight given a jury verdict" (*Matter of Joseph A.*, 244 AD2d 724, 725, *lv denied* 91 NY2d 813; *see Matter of Robert R.*, 238 AD2d 426, 427). Here, Duello's testimony as to the condition of the victim's genitalia in combination with the victim's testimony as to the sexual contact and pain she experienced with respondent's companion provide a sufficient basis for Family Court's finding of fact that actual penetration, though slight, had occurred (*see* Penal Law § 130.00 [1]; *People v Williams*, 259 AD2d 509, *lv denied* 93 NY2d 1007). In order to sustain respondent's guilt as an accomplice, the evidence, when viewed in a light most favorable to petitioner, must establish beyond a reasonable doubt that he acted with the requisite mental culpability and that, in furtherance thereof, he solicited, requested, commanded, importuned or

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intentionally aided his companion to commit the act (*see* Penal Law § 20.00; *People v Long*, 294 AD2d 614, 616, *lvs denied* 98 NY2d 652; *People v Irving*, 107 AD2d 944, 945; *cf. Matter of John G.*, 118 AD2d 646). Here, respondent threatened the victim with physical injury using a knife, tied her up, had some sexual contact with her, and then waited outside for part of the time while his companion raped her. This conduct in committing the crimes charged amply supports a finding of culpability as an accomplice (*see Matter of Carmelo N.*, 228 AD2d 682, 682-683).

Respondent's citation to various inconsistencies between the victim's testimonies at the fact-finding hearing and at an earlier probable-cause hearing is also unavailing. These inconsistencies were fully explored by respondent's counsel on cross-examination of the victim and responded to by petitioner's counsel on redirect examination (*see Matter of Manuel W.*, 279 AD2d 662, 662-663). Moreover, the inconsistencies cited by respondent all relate to comparatively minor details of the victim's encounter with respondent and his companion. They do not render the victim's testimony incredible as a matter of ***757** law or suggest that the victim was mistaken as to the essential conduct supporting the charges against respondent (*see Matter of Dowayne H.*, 278 AD2d 706, 707; *Matter of Romoan RR.*, 209 AD2d 861, 861). Accordingly, we find Family Court's determination of proof beyond a reasonable doubt as to the charges upon which respondent was found to be a juvenile delinquent amply supported by the record.

Similarly unavailing is respondent's remaining argument that Family Court erred in receiving the results of certain DNA testing on semen samples retrieved from the victim. Because Family Court's conclusion that respondent was an accomplice in the rape of the victim is not at all dependent on the existence or accuracy of these test results, we need not decide whether an adequate foundation was laid for their admission (*see People v Kelly*, 288 AD2d 695, 696, *lv denied* 97 NY2d 756; *People v Hamilton*, 255 AD2d 693, *lv denied* 92 NY2d 1032).

Cardona, P.J., Crew III, Carpinello and Lahtinen, JJ., concur. Ordered that the order is affirmed, without costs.

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4TH DEPARTMENT

261 A.D.2d 872
Supreme Court, Appellate Division,
Fourth Department, New York.

PEOPLE of the State of New York, Plaintiff–Respondent,
v.
Jeffrey HAYES, a/k/a Jimmy King, Defendant–Appellant.

May 7, 1999.

Synopsis
Defendant was convicted in the Erie County Court, Drury, J., of first-degree rape and second-degree burglary arising from incident in which defendant pushed 85-year-old woman into her apartment and raped her. Defendant appealed. The Supreme Court, Appellate Division, held that: (1) evidence of penetration was sufficient; (2) People sufficiently established unbroken chain of custody of deoxyribonucleic acid (DNA) test results; and (3) defendant was not entitled to missing witness charge regarding People's failure to call nurse who handled rape kit.

Affirmed.

Attorneys and Law Firms

****358** Roland Hayes, Buffalo, for defendant–appellant.

****359** Cydney Kelly, Buffalo, for plaintiff–respondent.

PRESENT: LAWTON, J.P., HAYES, WISNER, PIGOTT, JR., and CALLAHAN, JJ.

Opinion

***872** MEMORANDUM:

Defendant was convicted following a jury trial of rape in the first degree (Penal Law § 130.35[1]) and burglary in the second degree (Penal Law § 140.25[2]) arising from an incident in which defendant pushed an 85–year–old woman into her apartment and raped her. Defendant contends that there was insufficient evidence of penetration to support the conviction of rape. We disagree.

Rape in the first degree is defined in relevant part as engaging in sexual intercourse by forcible compulsion (*see,* Penal Law § 130.35[1]). Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (Penal Law § 130.00[1]). Although the testimony of the elderly victim was at times confused, she testified that defendant's penis did in fact penetrate her vagina "[a] little bit" and very slightly. That testimony is supported by medical evidence from the treating physician that laboratory tests revealing the presence of semen in the victim's vaginal canal were consistent with penetration having occurred. The victim's prior inconsistent statements were brought out before the jury, and merely raised an issue of credibility (*see, People v. Collins,* 188 A.D.2d 608, 609, 590 N.Y.S.2d 914, *lv. denied* 81 N.Y.2d 883, 597 N.Y.S.2d 944, 613 N.E.2d 976). The jury's determination must be accorded great weight and should not be disturbed on appeal unless clearly unsupported by the record (*see, People v. Collins, supra,* at 609, 590 N.Y.S.2d 914). Viewing the evidence

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in the light most favorable to the People (*see, People v. Contes,* 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we conclude that the testimony of the victim and her treating physician is legally sufficient to establish that "penetration, however slight", occurred (Penal Law § 130.00[1]; *see, People v. George,* 217 A.D.2d 987, 988, 630 N.Y.S.2d 174, *lv. denied* 86 N.Y.2d 842, 634 N.Y.S.2d 451, 658 N.E.2d 229; *People v. Hobot,* 200 A.D.2d 586, 594, 606 N.Y.S.2d 277, *affd.* 84 N.Y.2d 1021, 622 N.Y.S.2d 675, 646 N.E.2d 1102; *People v. Collins, supra,* at 609, 590 N.Y.S.2d 914).

We reject defendant's contention that County Court erred in admitting the results of the DNA testing into evidence because the nurse who placed the samples in the rape kit did not testify. Although it would have been better to have the nurse testify, ***873** the People sufficiently established an unbroken chain of custody (*see, People v. Julian,* 41 N.Y.2d 340, 343–344, 392 N.Y.S.2d 610, 360 N.E.2d 1310). The testimony of the physician who took the samples from the victim was sufficient to establish the identity of the evidence and that no tampering had occurred.

There is no merit to defendant's contention that the court erred in failing to give a missing witness charge regarding the People's failure to call the nurse who handled the rape kit. Although defendant was aware that the witness would not testify, defendant did not request a missing witness charge until both sides had rested. That request was untimely (*see, People v. Gonzalez,* 68 N.Y.2d 424, 427–428, 509 N.Y.S.2d 796, 502 N.E.2d 583; *People v. Castro–Garcia,* 203 A.D.2d 899, 612 N.Y.S.2d 711, *lv. denied* 83 N.Y.2d 965, 616 N.Y.S.2d 18, 639 N.E.2d 758). Furthermore, defendant failed to establish that the witness would provide noncumulative testimony favorable to the People regarding a material issue (*see, People v. Kitching,* 78 N.Y.2d 532, 536, 577 N.Y.S.2d 231, 583 N.E.2d 944; *People v. Gonzalez, supra,* at 427, 509 N.Y.S.2d 796, 502 N.E.2d 583). In any event, any error is harmless (*see, People v. Crimmins,* 36 N.Y.2d 230, 241–242, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. McCune,* 210 A.D.2d 978, 979, 621 N.Y.S.2d 246, *lv. denied* ****360** 85 N.Y.2d 864, 624 N.Y.S.2d 383, 648 N.E.2d 803). Despite the overwhelming evidence of guilt, defense counsel presented a credible defense that resulted in the dismissal of two charges. Thus, the contention that defendant received ineffective assistance of counsel lacks merit (*see, People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400). Finally, considering the heinous nature of defendant's conduct and extensive criminal record, the court did not abuse its discretion in imposing the maximum permissible sentence.

Judgment unanimously affirmed.

All Citations

261 A.D.2d 872, 690 N.Y.S.2d 358, 1999 N.Y. Slip Op. 04353

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224 A.D.3d 1225, 205 N.Y.S.3d 588, 2024 N.Y. Slip Op. 00502

**1 The People of the State of New York, Respondent,

v

Corry Moorhead, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
19-02151, 43
February 2, 2024

CITE TITLE AS: People v Moorhead

HEADNOTES

Crimes
Witnesses
Expert Witness—Child Sexual Abuse Accommodation Syndrome

Crimes
Indictment
Amendment of When Crime Occurred

Crimes
Rape
Sufficiency of Evidence

Julie Cianca, Public Defender, Rochester (Bradley E. Keem of counsel), for defendant-appellant.
Sandra Doorley, District Attorney, Rochester (Nancy Gilligan of counsel), for respondent.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered October 29, 2019. The judgment convicted defendant upon a jury verdict of rape in the first degree.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by reducing the conviction of rape in the first degree (Penal Law § 130.35 [3]) to attempted rape in the first degree (§§ 110.00, 130.35 [3]) and vacating the sentence imposed and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Monroe County, for sentencing on that conviction.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [3]). The charge arose from an allegation that defendant raped the seven-year-old victim when defendant was living with the victim's family. The victim did not disclose the abuse until a year later. Defendant contends that an expert was not needed to explain to the jury the idea of delayed disclosure and that permitting such testimony deprived him of his right to a fair trial. We reject that contention. Expert testimony on child sexual abuse accommodation syndrome is admissible "for the purpose of explaining behavior that might be puzzling to a jury" (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see* *People v Nicholson*, 26 NY3d 813, 828 [2016]). Supreme Court did not abuse its ***1226** discretion in determining that the expert testimony would assist the jury in understanding the issue of delayed disclosure (*see* *Nicholson*, 26 NY3d at 827-829; *People v Shane*, 187 AD3d 1219, 1220 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Bradberry*, 131 AD3d 800, 803 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015]; *see generally People v Austen*, 197 AD3d 861, 862 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]).

Contrary to defendant's contention, the court properly granted the People's request to amend the indictment. The original indictment alleged that defendant raped the victim "on or about and between September 1, 2017 and December 25, 2017," and the amended indictment alleged that defendant raped the victim "on or about and around December 25, 2017." The amendment did not change the theory of the prosecution or otherwise tend to prejudice defendant (*see* CPL 200.70 [1]; *People v Sharlow*, 217 AD3d 1120, 1123-1124 [3d Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Butler*, 300 AD2d 1103, 1103 [4th Dept 2002], *lv denied* 99 NY2d 613 [2003]).

Defendant next contends that the conviction is not supported by legally sufficient evidence that he was the perpetrator or that penetration occurred. A conviction is supported by legally sufficient evidence "when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a

reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). A defendant is guilty of rape in the **2 first degree under Penal Law § 130.35 (3) when the defendant "engages in sexual intercourse with another person . . . [w]ho is less than [11] years old." As relevant here, " '[s]exual intercourse' has its ordinary meaning and occurs upon any penetration, however slight" (§ 130.00 [1]).

Here, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish defendant's identity as the perpetrator. We agree with defendant, however, that the evidence is not legally sufficient to establish that penetration occurred (*see People v Carroll*, 95 NY2d 375, 382-384 [2000]). The victim testified that she awoke when defendant entered her bedroom wearing no clothes on the bottom part of his body. She testified that he got into her bed and that his penis touched her vagina. However, when asked whether defendant penetrated her, the victim testified either that she "forgot" or that she was "not sure" what happened. Additionally, *1227 the People did not establish the element of penetration through indirect or circumstantial evidence (*see id.* at 383-384; *People v Elioff*, 110 AD3d 1477, 1478 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013]; *People v Stebbins*, 280 AD2d 990, 990 [4th Dept 2001], *lv denied* 96 NY2d 925 [2001]). We therefore conclude that the evidence is legally insufficient to support the conviction, but we further conclude that the evidence is legally sufficient to support a conviction of the lesser included offense of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [3]; *see People v Porlier*, 55 AD3d 1059, 1061-1062 [3d Dept 2008]). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court for sentencing on that conviction.

Defendant also contends that the verdict is against the weight of the evidence on the issue of identity. Viewing the evidence in light of the elements of the lesser included offense of attempted rape in the first degree (*see Danielson*, 9 NY3d at 349), we conclude that a verdict convicting defendant of that crime would not be against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Santiago*, 195 AD3d 1460, 1461 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is, for the most part, unpreserved for our review inasmuch as defendant failed to object to many of the statements he now challenges on appeal (*see People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]; *see generally People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). In any event, to the extent the prosecutor's remarks were improper, they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; *see People v Palmer*, 204 AD3d 1512, 1514 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]) and did not shift the burden to defendant (*see People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]).

In light of our determination, we do not address defendant's contentions regarding the sentence and amendment of the presentence report. Present—Lindley, J.P., Montour, Ogden and Greenwood, JJ.

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BRONX COUNTY
FAMILY COURT

177 Misc.2d 414
Family Court, Bronx County, New York.

In the Matter of WINNER S., a Person Alleged to be a Juvenile Delinquent, Respondent.

May 26, 1998.

Synopsis

In juvenile delinquency proceeding, the Family Court, Bronx County, Hunt, J., held that juvenile subjected complainant to "sexual contact" when he touched her with a pencil in her vaginal area over her clothing for the purpose of gratifying his own sexual desire.

Adjudicated accordingly.

Attorneys and Law Firms

****784** ***414** Michael D. Hess, Corporation Counsel of New York City, New York City (Jennifer Abram, of counsel), for presentment agency.

Legal Aid Society, New York City (Monica Drinane and Vanessa Cherena, of counsel), Law Guardian.

Opinion

JOHN M. HUNT, Judge.

This Court must decide whether the Penal Code definition of "sexual contact" [Penal Law § 130.00(3)] includes an act whereby one gratifies sexual desire by using an inanimate object to touch the clothed "sexual or intimate parts" of another ***415** person without that person's consent. A review of relevant case law reveals no direct precedent on the pending issue.

The respondent in this case is charged with acts which if done by an adult would constitute the crimes of Sexual Abuse in the Second Degree [Penal Law § 130.60(2)] and Sexual Abuse in the Third Degree [Penal Law § 130.55]. At the fact-finding, the complainant, an eleven year old girl, testified that she knew the fifteen year old respondent as a fellow student in her junior high school and that he touched various parts of her body without her permission during English class on the morning of December 12, 1997. The complainant described an incident which began when the respondent placed his hand on her inner thigh and kept it there until she pushed it away. Although this initial unwanted touching might have been charged as an act of sexual abuse, see, *People v. Johnson,* 102 A.D.2d 895, 477 N.Y.S.2d 67 (2d Dept.1984), it is not. Instead, the petition alleges other acts which the complainant testified occurred immediately thereafter when the respondent touched her breast two to three times with his elbow and then touched her vaginal area with a pencil. Each of these latter touchings ostensibly occurred through or over the complainant's clothing.

"A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is ...(2) Less than fourteen years old." Penal Law § 130.60(2). A person is guilty of sexual abuse in the third degree "when he subjects another person to sexual contact without the

latter's consent...” Penal Law § 130.55. A required element in both of these provisions is that of “sexual contact,” which is defined in the Penal Law as “any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.” Penal Law, § 130.00(3).

This court finds the complainant to be credible, credits her version of the respondent's unwanted touching of her body and finds that the only logical inference that flows from all the evidence presented is that the respondent acted intentionally in each instance and did so for the purpose of gratifying his own sexual desire. With respect to respondent's purposeful repeated touching of the complainant's breast with his own elbow, the court finds that the presentment agency has proven beyond a reasonable doubt that the respondent thereby subjected the complainant to “sexual contact” as the term is defined in ***416** Penal Law § 130.00(3). What remains for the court to determine is whether or not the respondent's further act of using a pencil to touch the complainant's genital area above her clothing falls within that same Penal Law definition of “sexual contact.”

It is well settled that the Penal Law should not be strictly construed; instead, it should be interpreted “according to the fair import of [its] terms to promote justice and effect the objects of the law.” Penal Law § 5.00. This rule has been held to authorize a court to dispense with hypertechnical or strained interpretations of the statute. *People v. Ditta,* 52 N.Y.2d 657, 439 N.Y.S.2d 855, 422 N.E.2d 515 (1981). Thus, conduct that ****785** falls within the plain, natural meaning of a Penal Law provision may be punished as criminal. *Id.* at 660, 439 N.Y.S.2d at 857, 422 N.E.2d 515.

Cases interpreting the definition of “sexual contact” [Penal Law § 130.00(3)] involve varied scenarios. Nevertheless, these cases typically share the common factual component of actual physical contact between a part of the victim's body and a part of the perpetrator's body accomplished either directly or through clothing. [1] This court found only one reported case, *People v. Hairston,* 101 A.D.2d 912, 475 N.Y.S.2d 615 (3rd Dept.1984) which considered whether touching another's intimate parts with an inanimate object could form the basis of a sexual abuse charge. In *Hairston,* the defendant was accused of sexually abusing a semi-clad four year old by placing both his exposed penis and a vibrator next to a child's vagina. The Third Department found that under the facts of that case, either act was sufficient to constitute a violation of § 130.65 of the Penal Law (Sexual Abuse in the First Degree).

In the sexual abuse provisions of the Penal Law, the only reference to the use of the term “foreign object” is found in § 130.66 (Aggravated Sexual Abuse in the Third Degree) and 130.70 (Aggravated Sexual Abuse in the First Degree) both of which contemplate the use of an instrument or article which is capable of causing physical injury when inserted into intimate parts of the body, see, Penal Law, § 130.00(9). Because of different intent requirements, several courts have held that the crime of Sexual Abuse is not a lesser

included offense ***417** of Aggravated Sexual Abuse, see, *People v. Renna,* 132 A.D.2d 981, 518 N.Y.S.2d 511 (4th Dept.1987); *People v. Green,* 56 N.Y.2d 427, 452 N.Y.S.2d 389, 437 N.E.2d 1146 (1982), rearg. denied 57 N.Y.2d 775, 454 N.Y.S.2d 1033, 440 N.E.2d 1343; cf., *People v. Wheeler,* 67 N.Y.2d 960, 502 N.Y.S.2d 983, 494 N.E.2d 88 (1986). Nonetheless, it has been argued that prior to the addition of Aggravated Sexual Abuse in the Third Degree to the Penal Law (L.1996, Ch.181, effective Nov. 1, 1996), the same conduct that is now chargeable under that section could also have been punishable as Sexual Abuse in the First Degree, see, Donnino, Practice Commentary, McKinney's Cons.Laws of N.Y., Book 39, Penal Law, Art. 130, at p. 422.

From the foregoing, it is clear that the term "sexual contact" as referred to in the statute and as used in the Penal Law encompasses many and varied forms of proscribed sexual touching. Given the inclusive nature of the statute, this Court finds, after consideration of all of the evidence offered in support of the petition, that the respondent subjected the complainant to "sexual contact" when he touched her with a pencil in her vaginal area over her clothing for the purpose of gratifying his own sexual desire.

Accordingly, the Court finds that the petitioner has established beyond a reasonable doubt counts 1 and 2 of the petition, Sexual Abuse in the Second Degree, a violation of Penal Law § 130.60(2), an A Misdemeanor. The remaining counts, 3 and 4, are dismissed as lesser included offenses. The matter is adjourned to August 3, 1998 for disposition.

All Citations

177 Misc.2d 414, 676 N.Y.S.2d 783, 1998 N.Y. Slip Op. 98399

Footnotes

1 Intimate parts of the body have been held to include the buttocks, see, *Matter of David M.,* 93 Misc.2d 545, 403 N.Y.S.2d 178 (Fam.Ct., Bronx, 1978), the genital area, see, *People v. Estela,* 136 A.D.2d 728, 524 N.Y.S.2d 66 (2d Dept.1988), the navel, see, *People v. Belfrom,* 124 Misc.2d 185, 475 N.Y.S.2d 978 (Sup.Ct., Queens, 1984), the leg, see, *People v. Graydon,* 129 Misc.2d 265, 492 N.Y.S.2d 903 (Crim.Ct., N.Y.Co.1985), and the mouth, see *People v. Rondon,* 152 Misc.2d 1018, 579 N.Y.S.2d 319 (Crim.Ct., Queens, 1992); but see, *People v. Kittles,* 102 Misc.2d 224, 423 N.Y.S.2d 107 (Suffolk Co. Ct., 1979).

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STATUTES AND ADDITIONAL MATERIALS

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McKinney's Penal Law § 130.00

§ 130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:

1. "~~Sexual intercourse" has its ordinary meaning~~ **Vaginal sexual contact" means conduct between persons consisting of contact between the penis** and ~~occurs upon any penetration, however slight~~ **the vagina or vulva**.

2. (a) "Oral sexual ~~conduct~~ **contact**" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

(b) "Anal sexual ~~conduct~~ **contact**" means conduct between persons consisting of contact between the penis and anus.

3. "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

4. For the purposes of this article "married" means the existence of the relationship between the actor and the victim as spouses which is recognized by law at the time the actor commits an offense proscribed by this article against the victim.

5. "Mentally disabled" means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.

6. "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.

7. "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

8. "Forcible compulsion" means to compel by either:

a. use of physical force; or

b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.

9. "Foreign object" means any instrument or article which, when inserted in the vagina, urethra, penis, rectum or anus, is capable of causing physical injury.

10. "Sexual conduct" means **vaginal** sexual ~~intercourse~~ **contact**, oral sexual ~~conduct~~ **contact**, anal sexual ~~conduct~~ **contact**, aggravated sexual contact, or sexual contact.

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11. "Aggravated sexual contact" means inserting, other than for a valid medical purpose, a foreign object in the vagina, urethra, penis, rectum or anus of a child, thereby causing physical injury to such child.

12. "Health care provider" means any person who is, or is required to be, licensed or registered or holds himself or herself out to be licensed or registered, or provides services as if he or she were licensed or registered in the profession of medicine, chiropractic, dentistry or podiatry under any of the following: article one hundred thirty-one, one hundred thirty-two, one hundred thirty-three, or one hundred forty-one of the education law.

13. "Mental health care provider" shall mean a licensed physician, licensed psychologist, registered professional nurse, licensed clinical social worker or a licensed master social worker under the supervision of a physician, psychologist or licensed clinical social worker.

Credits

(L.1965, c. 1030. Amended L.1977, c. 692, § 2; L.1978, c. 723, § 1; L.1978, c. 735, § 1; L.1981, c. 696, § 1; L.1982, c. 560, § 1; L.1983, c. 449, § 1; L.1984, c. 650, § 1; L.1996, c. 122, § 5; L.2000, c. 1, §§ 1-a, 2, eff. Feb. 1, 2001; L.2003, c. 264, § 12, eff. Nov. 1, 2003; L.2004, c. 230, § 25, eff. July 27, 2004; L.2009, c. 485, §§ 1, 2, eff. Jan. 7, 2010; L.2010, c. 193, § 1, eff. Oct. 13, 2010 **; L.2023, c. 777, § 2, eff. Sept. 1, 2024; L.2024, c. 23, § 1, eff. Sept. 1, 2024** .)

McKinney's Penal Law § 130.00, NY PENAL § 130.00

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McKinney's Penal Law § 130.20

§ 130.20 Sexual misconduct

A person is guilty of sexual misconduct when:

1. He or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person without such person's consent; or

2. He or she engages in oral sexual contact with another person without such person's consent; or

~~2~~ **3**. He or she engages in ~~oral sexual conduct or~~ anal sexual ~~conduct~~ **contact** with another person without such person's consent; or

~~3~~ **4**. He or she engages in sexual conduct with an animal or a dead human body.

Sexual misconduct is a class A misdemeanor.

Credits
(L.1965, c. 1030. Amended L.2000, c. 1, § 31, eff. Feb. 1, 2001; L.2003, c. 264, § 17, eff. Nov. 1, 2003**; L.2023, c. 777, § 51, eff. Sept. 1, 2024**.)

McKinney's Penal Law § 130.20, NY PENAL § 130.20

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McKinney's Penal Law § 130.35

§ 130.35 Rape in the first degree

A person is guilty of rape in the first degree when ~~he or she engages in sexual intercourse with another person~~ :

1. he or she engages in vaginal sexual contact with another person:

(a) By forcible compulsion; or

(b) Who is incapable of consent by reason of being physically helpless; or

(c) Who is less than eleven years old; or

(d) Who is less than thirteen years old and the actor is eighteen years old or more;

2. he or she engages in oral sexual contact with another person:

~~1.~~ | **(a)** | By forcible compulsion; or

~~2.~~ | **(b)** | Who is incapable of consent by reason of being physically helpless; or

~~3.~~ | **(c)** | Who is less than eleven years old; or

(d) Who is less than thirteen years old and the actor is eighteen years old or more; or

3. he or she engages in anal sexual contact with another person:

(a) By forcible compulsion; or

(b) Who is incapable of consent by reason of being physically helpless; or

(c) Who is less than eleven years old; or

~~4.~~ | **(d)** | Who is less than thirteen years old and the actor is eighteen years old or more.

Rape in the first degree is a class B felony.

Credits

(L.1965, c. 1030. Amended L.2000, c. 1, § 34, eff. Feb. 1, 2001| **; L.2023, c. 777, § 5, eff. Sept. 1, 2024** |.)

McKinney's Penal Law § 130.35, NY PENAL § 130.35

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McKinney's Penal Law § 130.30

§ 130.30 Rape in the second degree

A person is guilty of rape in the second degree when:

1. being eighteen years old or more, he or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person less than fifteen years old;~~ or~~

2. being eighteen years old or more, he or she engages in oral sexual contact with another person less than fifteen years old;

3. being eighteen years old or more, he or she engages in anal sexual contact with another person less than fifteen years old;

~~2~~ **4**. he or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated~~.~~ **;**

5. he or she engages in oral sexual contact with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated; or

6. he or she engages in anal sexual contact with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

It shall be an affirmative defense to the crime of rape in the second degree as defined in ~~subdivision~~ **subdivisions** one**, two and three** of this section that the defendant was less than four years older than the victim at the time of the act.

Rape in the second degree is a class D felony.

Credits
(L.1965, c. 1030. Amended L.1987, c. 510, § 2; L.2000, c. 1, § 33, eff. Feb. 1, 2001**; L.2023, c. 777, § 4, eff. Sept. 1, 2024**.)

McKinney's Penal Law § 130.30, NY PENAL § 130.30

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Key: ~~deleted text~~ **added text**
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McKinney's Penal Law § 130.25

§ 130.25 Rape in the third degree

A person is guilty of rape in the third degree when:

1. He or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;

2. He or she engages in oral sexual contact with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;

3. He or she engages in anal sexual contact with another person who is incapable of consent by reason of some other factor other than being less than seventeen years old;

~~2~~ **4**. Being twenty-one years old or more, he or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person less than seventeen years old;~~ or~~

5. Being twenty-one years old or more, he or she engages in oral sexual contact with another person less than seventeen years old;

6. Being twenty-one years old or more, he or she engages in anal sexual contact with another person less than seventeen years old;

~~3~~ **7**. He or she engages in **vaginal** sexual ~~intercourse~~ **contact** with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent~~.~~ **;**

8. He or she engages in oral sexual contact with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent; or

9. He or she engages in anal sexual contact with another person without such person's consent where such lack of consent is by reason of some factor other than the incapacity to consent.

Rape in the third degree is a class E felony.

Credits

(L.1965, c. 1030. Amended L.1987, c. 510, § 1; L.2000, c. 1, § 32, eff. Feb. 1, 2001**; L.2023, c. 777, § 3, eff. Sept. 1, 2024**.)

McKinney's Penal Law § 130.25, NY PENAL § 130.25

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NY Spons. Memo., 2023 A.B. 3340

New York Sponsors Memorandum, 2023 A.B. 3340

February 9, 2023
New York Assembly
246th Legislature, 2023 Regular Session

NEW YORK STATE ASSEMBLY

MEMORANDUM IN SUPPORT OF LEGISLATION

submitted in accordance with Assembly Rule III, Sec 1(f)

SPONSOR: Cruz

TITLE OF BILL:

An act to amend the penal law, the criminal procedure law, the correction law, the social services law, the vehicle and traffic law, the family court act, the civil rights law, the civil practice law and rules, the agriculture and markets law, the judiciary law and the domestic relations law, in relation to sex offenses; and to repeal certain provisions of the penal law relating thereto

PURPOSE OR GENERAL IDEA OF BILL:

To amend the penal law to remove the penetration requirement from the rape statutes as well as to define rape as sexual intercourse, oral sexual conduct, or anal sexual conduct.

SUMMARY OF SPECIFIC PROVISIONS:

This bill removes the penetration requirement from the rape statutes, redefines rape to include oral and anal sexual conduct within the definition of rape and makes conforming changes throughout various areas of law.

JUSTIFICATION:

On March 28, 2012, a Justice of the New York State Supreme Court declared a mistrial on the rape charge against former New York City Police Officer Michael Pena. Pena was convicted of several other charges for holding the schoolteacher at gunpoint, threatening her life and forcibly sodomizing her. Pena was not convicted of rape despite overwhelming evidence of forcible, nonconsensual sexual conduct with a Bronx school teacher. It is galling that in the face of evidence

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of the defendant's semen in the victim's underwear, redness to her genitals, eyewitness testimony and the victim's own account of the pain of the attack; Pena was not convicted of the top count of rape. Common sense dictates that what happened to the victim in this case is rape.

This bill will redefine rape to include oral and anal sexual conduct, which are now referred to as "criminal sexual act," so that these other forms of sexual assault are recognized by the law as rape.

PRIOR LEGISLATIVE HISTORY:

A6319A of 2022

S.8279 of 2019-2020 (Hoylman): Died in Codes

A.0794 of 2019-2020 (Simotas): Died in Rules

A.4295-A of 2017-2018

A.4959B of 2015-2016

FISCAL IMPLICATIONS:

No

EFFECTIVE DATE: This act will take effect on January 1, 2024.

NY Spons. Memo., 2023 A.B. 3340

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McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 3. Juvenile Delinquency
Part 5. The Dispositional Hearing (Refs & Annos)

McKinney's Family Court Act § 351.1

§ 351.1. Probation, investigation and diagnostic assessment

Effective: April 10, 2017
Currentness

1. Following a determination that a respondent has committed a designated felony act and prior to the dispositional hearing, the judge shall order a probation investigation and a diagnostic assessment. For the purposes of this article, the probation investigation shall include, but not be limited to, the history of the juvenile including previous conduct, the family situation, any previous psychological and psychiatric reports, school adjustment, previous social assistance provided by voluntary or public agencies and the response of the juvenile to such assistance. For the purposes of this article, the diagnostic assessment shall include, but not be limited to, psychological tests and psychiatric interviews to determine mental capacity and achievement, emotional stability and mental disabilities. It shall include a clinical assessment of the situational factors that may have contributed to the act or acts. When feasible, expert opinion shall be rendered as to the risk presented by the juvenile to others or himself, with a recommendation as to the need for a restrictive placement.

2. Following a determination that a respondent committed a crime and prior to the dispositional hearing, the court shall order a probation investigation and may order a diagnostic assessment.

2-a. [Expires and deemed repealed March 31, 2028, pursuant to L.2012, c. 57, pt. G, subpt. A, § 11.] (a) In a social services district operating an approved juvenile justice services close to home initiative pursuant to section four hundred four of the social services law, the local probation department shall develop and submit to the office of children and family services for prior approval a validated pre-dispositional risk assessment instrument and any risk assessment process. The office shall share a copy of any such instrument and process with the office of probation and correctional alternatives and any expert consulting with the office pursuant to this section. Such department shall periodically revalidate any approved pre-dispositional risk assessment instrument. The department shall conspicuously post information about the instrument on its website, including but not limited to, the name of the instrument; the name and contact information of the person, institution or company that developed such instrument; what the instrument is intended to measure; the types of factors and information the instrument takes into consideration; the process by which the instrument is used in both the pre-disposition investigation and dispositional phase of a hearing; the purpose for the instrument and how the instrument informs the recommendation in the pre-dispositional investigation report; links to independent research and studies about the instrument as well as its own validation analysis relating to the instrument, when available; the most recent date the instrument was validated and the date the next re-validation process is anticipated to begin. The department shall confer with appropriate stakeholders, including but not limited to, attorneys for children, presentment agencies and the family court, prior to revising any validated pre-dispositional risk assessment instrument or process. Such department shall provide any approved pre-dispositional risk assessment instrument and process to the temporary president of the senate and the speaker of the assembly. Any revised pre-dispositional risk assessment instrument shall be subject to periodic empirical validation and to the approval of the office of children and family services. The office of children and family services shall consult with individuals with professional research experience and expertise in criminal justice; social work; juvenile justice; and applied mathematics, psychometrics and/or statistics to assist the office in determining the methods it will use to: approve the department's validated and revalidated pre-dispositional risk assessment instrument and

process; and analyze the effectiveness of the use of such instrument and process in accomplishing their intended goals; and analyze, to the greatest extent possible, any disparate impact on dispositional outcomes for juveniles based on race, sex, national origin, economic status, and any other constitutionally protected class, regarding the use of such instrument. The office shall consult with such individuals regarding whether it is appropriate to attempt to analyze whether there is any such disparate impact based on sexual orientation and, if so, the best methods to conduct such analysis. The office shall take into consideration any recommendations given by such individuals involving improvements that could be made to such instrument and process. The department shall provide training on the approved instrument and any approved process to the applicable family courts, presentment agency, and court appointed attorneys for respondents.

(b) Once an initial validated risk assessment instrument and any risk assessment process have been approved by the office of children and family services in consultation with the office of probation and correctional alternatives, the local probation department shall provide the applicable supervising family court judge with a copy of the validated risk assessment instrument and any such process along with the letter from the office of children and family services approving the instrument and process, if applicable, and indicating the date the instrument and any such process shall be effective, provided that such effective date shall be at least thirty days after such notification.

(c) Commencing on the effective date of a validated pre-dispositional risk assessment instrument and any approved process and thereafter, each probation investigation ordered under subdivision two of this section shall include the results of the validated risk assessment of the respondent and process, if any; and a respondent shall not be placed in accordance with section 353.3 or 353.5 of this part unless the court has received and given due consideration to the results of such validated risk assessment and any approved process and made the findings required pursuant to paragraph (f) of subdivision two of section 352.2 of this part.

(d) Notwithstanding any other provision of law to the contrary, data necessary for completion of a pre-dispositional risk assessment instrument may be shared among law enforcement, probation, courts, detention administrations, detention providers, presentment agencies, and the attorney for the child upon retention or appointment solely for the purpose of accurate completion of such risk assessment instrument. A copy of the completed pre-dispositional risk assessment instrument shall be made available to the attorney for the respondent and the applicable court.

(e) The local probation department shall provide the office of probation and correctional alternatives with information regarding the use of the pre-dispositional risk assessment instrument and any risk assessment process in the time and manner required by the office. The office may require that such data be submitted to the office electronically. The office shall not commingle any such information with any criminal history database. The office shall share such information with the office of children and family services. The office of children and family services shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(f) The family courts shall provide the office of children and family services with such information, in the time and manner required by the office, as is necessary for the office to determine the validity and efficacy of any pre-dispositional risk assessment instrument and process submitted to the office for approval under this subdivision and to analyze any disparate impact on dispositional outcomes for juveniles in accordance with paragraph (a) of this subdivision. The office shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(g) The office of probation and correctional alternatives shall promulgate regulations, in consultation with the office of children and family services, regarding the role of local probation departments in the completion and use of the pre-dispositional risk assessment instrument and in the risk assessment process.

2-b. [Expires and deemed repealed March 31, 2028, pursuant to L.2012, c. 57, pt. G, subpt. B, § 7.] The office of children and family services shall develop a validated pre-dispositional risk assessment instrument and any risk assessment process for juvenile delinquents. The office shall periodically revalidate any approved pre-dispositional risk assessment instrument. The office shall conspicuously post any approved pre-dispositional risk assessment instrument and any risk assessment process on its website and shall confer with appropriate stakeholders, including but not limited to, attorneys for children, presentment agencies and the family court, prior to revising any validated pre-dispositional risk assessment instrument or process. Any such revised pre-dispositional risk assessment instrument shall be subject to periodic empirical validation. The office of children and family services shall consult with individuals with professional research experience and expertise in criminal justice; social work; juvenile justice; and applied mathematics, psychometrics and/or statistics to assist the office in determining the method it will use to: develop, validate and revalidate such pre-dispositional risk assessment instrument; develop the risk assessment process; and analyze the effectiveness of the use of such pre-dispositional risk assessment instrument and process in accomplishing their intended goals; and analyze, to the greatest extent possible, any disparate impact on dispositional outcomes for juveniles based on race, sex, national origin, economic status, and any other constitutionally protected class, regarding the use of such instrument. The office shall consult with such individuals regarding whether it is appropriate to attempt to analyze whether there is any such disparate impact based on sexual orientation and, if so, the best methods to conduct such analysis. The office shall take into consideration any recommendations given by such individuals involving improvements that could be made to such instrument and process. The office also shall consult with local probation departments in the development of the validated pre-dispositional risk assessment instrument and the revalidation of such instrument. The office of children and family services shall provide training on the instrument and any process to the family courts, local probation departments, presentment agencies and court appointed attorneys for respondents. The office may determine that a pre-dispositional risk assessment instrument and any process in use pursuant to subdivision two-a of section 351.1 of this part may continue to be used pursuant to such subdivision instead of requiring the use of any instrument or process developed pursuant to this subdivision.

(a) Once an initial validated risk assessment instrument and risk assessment process have been developed, the office of children and family services shall provide the supervising family court judges and local probation departments with copies of the validated risk assessment instrument and process and notify them of the effective date of the instrument and process, which shall be at least six months after such notification.

(b) Commencing on the effective date of a validated risk assessment instrument and any risk assessment process and thereafter, each probation investigation ordered under subdivision two of this section shall include the results of the validated risk assessment of the respondent and process, if any; and a respondent shall not be placed in accordance with section 353.3 or 353.5 of this part unless the court has received and given due consideration to the results of such validated risk assessment and any process and made the findings required pursuant to paragraph (g) of subdivision two of section 352.2 of this part.

(c) Notwithstanding any other provision of law to the contrary, data necessary for completion of a pre-dispositional risk assessment instrument may be shared among law enforcement, probation, courts, detention administrations, detention providers, presentment agencies and the attorney for the child upon retention or appointment solely for the purpose of accurate completion of such risk assessment instrument, and a copy of the completed pre-dispositional risk assessment instrument shall be made available to the attorney for the respondent and applicable court.

(d) Local probation departments shall provide the office of probation and correctional alternatives with information regarding use of the pre-dispositional risk assessment instrument and any risk assessment process in the time and manner required by the office. The office may require that such data be submitted to the office electronically. The office shall not commingle any such information with any criminal history database. The office shall share such information with the office of children and family services. The office of children and family services shall use and share such information only for the purposes of this section and in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(e) Law enforcement and the family courts shall provide the office of children and family services with such information, in the time and manner required by the office, as is necessary for the office to develop, validate and revalidate any such pre-dispositional risk assessment instrument and process and to analyze any disparate impact on dispositional outcomes for juveniles in accordance with this section. The office shall use and share such information only for the purposes of this section and share it in accordance with this section. Such information shall be shared and received in a manner that protects the confidentiality of such information. The sharing, use, disclosure and redisclosure of such information to any person, office, or other entity not specifically authorized to receive it pursuant to this section or any other law is prohibited.

(f) The office of probation and correctional alternatives shall promulgate regulations, in consultation with the office of children and family services, regarding the role of local probation departments in the completion and use of the pre-dispositional risk assessment instrument and in the risk assessment process.

3. A child shall not be placed in accord with section 353.3 unless the court has ordered a probation investigation prior to the dispositional hearing; a child shall not be placed in accord with section 353.4 unless the court has ordered a diagnostic assessment prior to such hearing.

4. Each investigation report prepared pursuant to this section shall afford the victim the right to make a statement. Such victim impact statement shall include an analysis of the victim's version of the offense, the extent of injury or economic loss and the actual out-of-pocket loss or damage to the victim, including the amount of unreimbursed medical expenses, if any, and the views of the victim relating to disposition including the amount of restitution sought by the victim, subject to availability of such information. In the case where the victim is unable to assist in the preparation of the victim impact statement, the information may be acquired from the victim's family. Nothing contained in this section shall be interpreted to require that a victim or his or her family supply information for the preparation of an investigation report or that the dispositional hearing should be delayed in order to obtain such information.

5. (a) All diagnostic assessments and probation investigation reports shall be submitted to the court and made available by the court for inspection and copying by the presentment agency and the respondent at least five court days prior to the commencement of the dispositional hearing. All such reports shall be made available by the court for inspection and copying by the presentment agency and the respondent in connection with any appeal in the case.

(b) The victim impact statement shall be made available to the victim or the victim's family by the presentment agency prior to sentencing.

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6. All reports or memoranda prepared or obtained by the probation service for the purpose of a dispositional hearing shall be deemed confidential information furnished to the court and shall be subject to disclosure solely in accordance with this section or as otherwise provided for by law. Except as provided under section 320.5 such reports or memoranda shall not be furnished to the court prior to the entry of an order pursuant to section 345.1.

7. The probation services which prepare the investigation reports shall be responsible for the collection and transmission to the office of probation and correctional alternatives, of data on the number of victim impact statements prepared. Such information shall be transmitted annually to the office of victim services and included in the office's biennial report pursuant to subdivision twenty-one of section six hundred twenty-three of the executive law.

Credits

(Added L.1982, c. 920, § 1, eff. July 1, 1983. Amended L.1983, c. 398, § 35; L.1985, c. 585, § 1; L.1985, c. 880, § 3; L.1986, c. 418, §§ 1 to 3; L.2004, c. 317, § 1, eff. Nov. 8, 2004; L.2010, c. 56, pt. A, § 54, eff. June 22, 2010; L.2010, c. 56, pt. A-1, §§ 3, 30, eff. June 22, 2010; L.2012, c. 57, pt. G, subpt. A, § 2, eff. April 1, 2012; L.2012, c. 57, pt. G, subpt. B, § 2, eff. April 1, 2012; L.2014, c. 489, § 5, eff. Dec. 17, 2014; L.2017, c. 59, pt. WWW, § 70-c, eff. April 10, 2017.)

McKinney's Family Court Act § 351.1, NY FAM CT § 351.1
Current through L.2024, chapters 1 to 443. Some statute sections may be more current, see credits for details.

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