SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 99

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The People of the State of New York

against

Decision and Order
Ind. Nos. 2335/18
2673/19

Harvey Weinstein,

Defendant.

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James M. Burke, J.:

The defendant has been indicted for various felony sex offenses. Under Indictment 2335/2018, he is charged with two counts of Predatory Sexual Assault, one count of Criminal Sexual Act in the First Degree, and one count each of Rape in the First and Third Degrees. Under Indictment 2673/2019, he is charged with two counts of Predatory Sexual Assault. On the People's motion, the Court dismissed the two Predatory Sexual Assault charges from the 2018 indictment and consolidated the two indictments.[1]

The Court set a motion schedule for the defendant's omnibus motions to which the People responded. The defendant's motion is decided as follows:

1. Motion to dismiss Counts One and Two, charging Predatory Sexual Assault, as violating the ex post facto clause of the Constitution.

The crime of Predatory Sexual Assault, PL §130.95(2), requires that the defendant commit an "underlying crime" and that the defendant also engaged in conduct constituting an enumerated "aggravating crime" with one or more additional

[1]The consolidated indictment is now designated as follows: Counts One and Two, Predatory Sexual Assault; Count Three, Criminal Sexual Act in the First Degree; Count Four, Rape in the First Degree; and Count Five, Rape in the Third Degree.

persons.[2]

Specifically, Count One charges that the defendant committed the "underlying crime" of Criminal Sexual Act in the First Degree on July 10, 2006 against CW-2, and that he also committed the "aggravating crime" of Rape in the First Degree against a different complainant during the winter season of 1993-1994. Count Two charges that the defendant committed the "underlying crime" of Rape in the First Degree on March 18, 2013 against CW-1, and lists the same "aggravating crime" as described in Count One, that is, Rape in the First Degree, against that complainant during the winter of 1993-1994.[3]

The defendant contends that the "aggravating offense" for these two counts, Rape in the First Degree occurring in " the winter season of 1993-1994," violates the ex post facto clause of the Constitution because that crime occurred prior to the enactment of the Predatory Sexual Assault statute on June 23, 2006, and therefore those counts must be dismissed.

The Court finds that an "enumerated crime," including one which has occurred prior to the enactment of the PL §130.95(2), can be used as an "aggravating crime," and the inclusion of such pre-enactment crime does not violate the prohibition against ex post facto application of the law. See People v Weinberg, 83 NY2d 262 (1994).

In Weinberg, the defendant was charged with the repeated failure to file New York State income tax returns for the years 1983, 1984 and 1985, in violation of Tax Law §1802, which went into effect on November 1, 1985 and was made applicable to offenses committed on or after that date. Id. at 266. In rejecting the defendant's ex post facto claim, the Court observed that the defendant did not commit the repeated failure-to-file crime until he failed to file his 1985 tax return by April 1, 1986, "a point in time well after section 1802's effective date." As such, the Court concluded, "the Legislature has not punished defendant for acts previously committed that were innocent when performed, nor enhanced the punishment for a crime after

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[2]The enumerated crimes of PL §130.95(2) which enhance the penalties of that statute are: Rape in the First Degree, Criminal Sexual Act in the First Degree, Aggravated Sexual Abuse in the First Degree, and Course of Sexual Conduct against a Child in the First Degree.

[3]The specifics of the People's theory of the "aggravating crime" is found in the Voluntary Disclosure Form filed at defendant's arraignment on August 26, 2019.

its commission." Id.

The holding in Weinberg demonstrates that there is no ex post facto violation here because PL §130.95(2) punishes conduct that occurred after its effective date. As in Weinberg, the aggravating factors that enhance the punishment can occur before the effective date of the law. Here, the defendant did not commit the crime of Predatory Sexual Assault as charged in Count One until he committed the July 10, 2006 crime, and he did not commit the crime of Predatory Sexual Assault as charged in Count Two until he committed the March 18, 2013 crime. In both instances, he was on notice as of the enactment date of June 23, 2006, that if he committed those crimes as well as other enumerated crimes in PL §130.95(2), he would be subject to the enhanced penalties of that statute, precisely the legislature's intentions when it enacted that law. See also Gryger v Burke, 334 US 728, 732 (1948) (rejecting ex post facto challenge to state statute authorizing life imprisonment after the fourth felony offense where one of the aggravating convictions pre-dated the enactment of the statute; "[t]he sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because of a repetitive one"); People v Shulman, 172 Misc2d 535 (Co Ct., Suffolk County 1997)(rejecting ex post facto challenge to charge of Murder in the First Degree under PL §125.27(1(a)(xi) under which defendant causes death of another after causing death of two or more additional persons within 24 months in a similar fashion or pursuant to common scheme or plan, irrespective of whether the murders of the two additional persons pre-dated the enactment of the statute).

The defendant's reliance on People v Partridge, 173 AD3d 1769 (4th Dept. 2019) is misplaced. That case deals with a different statute, PL §130.96, Predatory Sexual Assault Against a Child, and the court's reversal of the defendant's conviction in that case was not on ex post facto grounds, but on the ground that the evidence of guilt was legally insufficient. That conviction was reversed because of the lack of evidence showing either that the defendant committed any part of the Course of Sexual Conduct crime after the effective date of that state, or that the victim was less than 13 years old, or that the three-month requirement for establishing a "course of sexual conduct" had been met.

The motion to dismiss Counts One and Two on these grounds is denied.

2. Motion to dismiss Counts One and Two, charging Predatory Sexual Assault, on grounds that the allegations regarding the 1994-1994 occurrence do not provide "fair notice" and therefore deprives the defendant of due process.

The People's Voluntary Disclosure Form (VDF), dated August 26, 2019, provides the following information regarding the 1993-1994 occurrence:

Approximate date: the winter season spanning 1993-1994.
Approximate time: nighttime.
Place: a location in New York City.[4]

The determination of whether the People have provided sufficiently specific information about an offense "must be made on an *ad hoc* basis by considering all the relevant circumstances," and by evaluating whether the People have made diligent efforts to narrow the time frame, and whether the designated period of time provided is "reasonable." People v Morris, 61 NY2d 290, 295-296 (1984).

The Court finds that the People have shown that they have made diligent efforts to narrow down the date that this complainant alleges she was sexually assaulted by the defendant. The complainant alleges she was assaulted by the defendant in an apartment she had sublet during the period spanning the winter of 1993-1994, and the People have indicated their efforts to narrow down this period, including contacting building management and attempting to locate former employees, seeking video recordings (which were no longer available), contacting people the complainant went to dinner with prior to the incident and other friends she spoke with after the incident, contacting the leaseholder of the apartment and searching for the sublease agreement, going to a New Jersey storage unit to look for the records and other items that had been in the complainant's apartment at the time, and having the complainant look through photographs and records of performances and trips she had taken during that time period, all in an effort to determine the specific date of the sexual assault.

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[4]The defendant has been provided with the specific address of this incident. Notably, the defendant was previously provided with notice of this occurrence on February 13, 2018, when it was part of an "Amended Bill of Particulars" relating to the 2018 indictment.

The People also point to the defendant's own actions which led to the delayed disclosure by the complainant, thereby making it difficult to pinpoint an exact date of the alleged assault. The People proffer that this complainant's fear of reprisal by the defendant caused her not to report it to law enforcement, and that the complainant was well aware of defendant's tactics of intimidating people, including the enlistment of employees of his company to call women to find out if they had been questioned by the media, and the hiring of an organization for the purpose of finding out the identities of women who were going to be the subject of articles in The New Yorker magazine and The New York Times.

The Court has considered the totality of the circumstances and finds that all factors point to the reasonableness of the notice provided to the defendant.

Therefore the motion to dismiss these counts on these grounds is denied.

3. Motion to dismiss Indictment 2673/2019 on the grounds that the Grand Jury presentation lacked proper authorization from the Court.

The defendant seeks dismissal of the Predatory Sexual Assault charges on the grounds that the presentation of these charges to the Grand Jury that returned Indictment No. 2673/2019 was impermissible because the Court had "effectively" dismissed the Predatory Sexual Assault charges in the 2018 indictment due to insufficient evidence. Therefore, the defendant argues, the People were required to obtain authorization from the Court before presenting evidence before another Grand Jury.

The defendant's argument is factually and legally flawed. The Court's decision of August 8, 2019 did not result in a dismissal of the Predatory Sexual Assault charges in the 2018 indictment. Rather, it granted the relief the defendant sought, namely, to strike the portion of the People's February 13, 2019 Amended Bill of Particulars which named a complainant to the "aggravating crimes" of Predatory Sexual Assault in the 2018 indictment. There is no reading of that decision which held that those counts were dismissed. Therefore, there was no legal bar to the re-presentation of the Predatory Sexual Assault charges to the Grand Jury that returned Indictment 2673/2019 and such presentation was entirely proper. See People v Cade, 74 NY2d 410 (1989).

The motion to dismiss the indictment on these grounds is denied.

4. Motion to suppress evidence obtained from a search warrant for three email accounts.

The defendant contends that the search warrant signed by the Court on February 23, 2018 is overly broad and lacks probable cause, and therefore any evidence seized pursuant to that warrant should be suppressed. This search warrant sought to search three email accounts, one of which appears to be the defendant's personal account and two of which appear to be those associated with the defendant's former entertainment company.

The defendant has failed to meet his burden of providing "sworn allegations of fact" to establish standing to contest the warrant for the two Weinstein Company email accounts. CPL §710.60(1). Although belatedly complied with the requirements of CPL §710.60(1), the sole support for the defendant's subjective belief in the expectation of privacy in the company email is contained in an attorney affirmation dated November 7, 2019, stating that the defendant "considered [the two company email accounts] private and over which he had exclusive control and authority."

To begin with, this self-serving statement is inadequate to meet his burden of showing that the defendant's subjective belief was "objectively reasonable under the circumstances." People v Ramirez-Portoreal, 8 NY2d 99, 109 (1996); People v Burton, 6 NY3d 584, 588 (2006); People v Leiva, 144 AD3d 599 (1st Dept. 2016).

Further, this statement is contradicted by the "Employee Handbook" of the Weinstein Company, which explicitly states that "computers are provided for use for business related to the Company only, and are not for private or personal use." The Handbook goes on to state not only that "employees should be aware that the information they enter into our computer systems may be accessible to others" and [e]mployees should have no expectation of privacy when using the Company's computer and/or telecommunications systems," but also that "all messages composed, sent or received on the electronic mail system are and remain the property of the Company. They are not the private property of any employee."

Notwithstanding the defendant's lack of standing for the two company

accounts and standing for the one personal email account, the defendant's motion to suppress evidence on the grounds that the warrant was "overly broad" and lacked probable cause is denied. The Court has examined the warrant and finds that the warrant sufficiently identified the specific offenses for which probable cause was established, that it specified the items to be seized, and that the time frame addressed in the warrant was appropriate and not overly broad.

Therefore, the motion to suppress evidence obtained from the February 23, 2018 search warrant is denied.

5. Motion for the NYPD personnel records of Detective DiGuadio.

The defendant requests the personnel file of Detective DiGuadio and for any information relating to the allegations of "Jane Does 1-4."

The defendant has failed to set forth a basis as to why such records are relevant to a motion to suppress, and, in any event, the People state they are not in possession of the NYPD personnel files.

The defendant has also failed to set forth sufficient allegations to support a Franks hearing, as he has failed establish that statements made by Detective DiGuadio in the warrant were perjurious on their face or made with reckless disregard for the truth. Franks v Delaware, 438 US 154 (1978); People v Tambe, 71 NY2d 492 (1988).

The motion is therefore denied.

5. Renewed motion to compel discovery.

The defendant moves this Court to issue an order requiring the People to disclose any previously undisclosed evidence. It is not necessary for the Court to issue an order since as of November 13, 2019, the People indicate that they have complied with all of the discovery demands. The People also indicate that the only remaining materials to be turned over are the minutes of the second grand jury proceeding and some "miscellaneous interview notes" for non-victim witnesses, all of which the People state they will provide in advance of January 1, 2020.

6. Motion to preclude or limit the testimony of Dr. Barbara Ziv.

On January 18, 2019, the People filed a "Notice of Expert Testimony on Sexual Assault," stating their intention to call Dr. Barbara Ziv as an expert in the field of sexual assault and rape trauma syndrome. On April 26, 2018, over the defendant's objection, this Court found Dr. Ziv's expert testimony in the area of sexual assault and rape trauma syndrome admissible.

The defendant again seeks an order precluding Dr. Barbara Ziv from testifying at trial, contending that the potential value of her testimony is substantially outweighed by the danger of unfair prejudice. Alternatively, the defendant requests a Frye hearing to determine the admissibility of her testimony.

The People have provided sufficient evidence to confirm that the principles expounded by this expert witness are generally accepted by the relevant scientific community and are not based on a novel scientific issue. People v. Taylor, 75 NY2d 277 (1990) In Taylor, the Court of Appeals ruled that expert testimony on rape trauma syndrome, "having been the subject of study and discussion for the past 16 years," was properly admitted. Since Taylor, expert testimony in this area has been accepted for more than thirty years, and is highly relevant to assist a lay jury in understanding this highly traumatic event and to dispel cultural myths and misconceptions surrounding rape and the identifiable symptoms. Id. at 286-287.

Moreover, as expert opinion regarding rape trauma syndrome has been generally accepted in the scientific community and has been admitted in all four departments of this state, no Frye hearing is required. Frye v United States, 293 F. 1013 (D.C.Cir. 1923); People v Hatcher, 130 AD3d 648 2d Dept 2015), lv. to app. den., 26 NY3d 968 (2015); People v Woodworth, 111 AD3d 1368 (4th Dept 2013); People v Brown, 7 AD3d 726 (2d Dept 2004); People v Green, 239 AD2d 248 (1st Dept 1997).

The Court maintains its previous decision of April 26, 2019 allowing the testimony of Dr. Ziv and denies the request for a Frye hearing for this witness.

The defendant also contends that he is entitled to disclosure of information about Dr. Ziv under the newly-enacted, but not yet effective, Article 245 of the

Criminal Procedure Law. The motion is denied as the People indicate that the defendant has received, and will receive by January 1, 2020, all materials to which he is entitled.

Lastly, the request for the Court to impose a sequence for the testimony of this witness is denied.

7. **Notice of defendant's intent to elicit expert testimony.**

The defendant has moved to elicit the testimony of Drs. Deborah Davis and Elizabeth Loftus as experts on the subject of human memory. The People oppose the testimony of these witnesses.

In order to determine whether the testimony of an expert is admissible at trial, the Court must determine whether the opinions and conclusions of the expert are based on theories and methods that are considered reliable. To determine reliability, New York courts continue to adhere to the Frye test, which requires that the expert's theories and methods be "generally accepted in the scientific community." Frye v US, Id. In order to reach that conclusion, the Court may review the submissions of the parties, as well as any previous rulings in other court proceedings in determining the admissibility of the proffered testimony. Cornell v 360 West 51st Street Realty, LLC, 22 NY3d 762, 780 (2014); People v Wesley, 83 NY2d 417 (1994).

Once the Court has determined that such expert opinion is generally accepted in the scientific community and is reliable, such testimony may be properly received if it will "help clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical jury." People v Lee, 96 NY2d 157 (2001); DeLong v County of Erie 60 NY2d 296, 307 (1983). The admissibility of expert testimony on a particular issue is within the discretion of the trial court, and such discretion depends upon whether the expert can tell the jury something significant that jurors would not ordinarily be expected to know already, or would aid a lay jury in reaching a verdict." People v Bedessie, 19 NY3d 147 (2012); People v Brown, 97 NY2d 500 (2002).

The Court must further determine whether the "potential value of the evidence is outweighed by the possibility of undue prejudice...or interfere with the province of

the jury." People v Bennet 79 NY2d 464 (1992). This inquiry is fact-specific, requiring the examination of the particular circumstances presented, and the degree of common experience that jurors would be likely to possess. If the subject is one about which jurors have some general understanding, expert testimony may nevertheless be properly received to dispel misconceptions or to explain unusual behavior. In such cases, the expert testimony does not usurp or preempt the function of the jury, but, rather, serves to elucidate phenomena not commonly known, and to enhance understanding of that which is known. People v Taylor, Id.

The Court therefore finds that the defendant has provided a sufficient foundation of general acceptance in the scientific community for a body of psychological research regarding the designation of the cognitive factors that pertain to memory. Accordingly, the Court will permit expert testimony on the following subjects: the general operation of human memory, including how memory works; the three phases of memory: acquisition, retention, and retrieval; factors that are understood to influence or distort memory, including post-event suggestion, acquisition errors, interpretation errors, retention time, auto-suggestion, and post-event suggestion; the nature of motivational and suggestive influences that can cause memory distortion; and on the subjects of whether memories of traumatic events are immune from factors that decay or distort memories, whether memories can be improved or enhanced over time, whether memories that conjure up emotions are more likely to be true, and whether there exists a correlation between how confident a person is in their memory and the accuracy of that memory.

On the other hand, the defendant has failed to substantiate or even make a preliminary showing that certain subjects and opinions that they proffer for expert testimony regarding memory are "generally accepted in the scientific community," or supported by admission in other courts. The only cases cited by the defendant in support of other areas regarding memory and perception are those that, in certain limited circumstances, have permitted expert opinion on the reliability of incriminating eyewitness identification. See People v Abney, 13 NY3d 251 (2009); People v. LeGrand, 8 NY3d 449(2007); People v. Drake, 7 NY3d 28 (2006). The defendant has failed to cite any authority or cases where an expert has been permitted to testify regarding memory in a sexual assault case and fails to provide a basis for the statement that such testimony is "routinely admitted in New York courts." The People have, in fact, cited a plethora of cases in which Dr. Davis was not permitted to testify in regards to her expertise on memory, usually on the

grounds that such testimony would either serve to confuse the jury or that its unfair prejudice outweighed any probative value.

Indeed, the two proffered defense experts have themselves cast into doubt many of the subjects about which the defendant proposes that they testify. In an article co-authorized by Drs. Davis and Loftus, they state that "little memory research has directly addressed memory for sexual interactions" and that "we hope to provide a call to arms for memory researchers to dive into this complicated, challenging, yet vitally important arena."[5]

Therefore the Court will not allow testimony on the following subjects: special issues of memory specifically for sexual or potentially sexual interactions, including sexual consent communications, causes of original misunderstandings of sexual intentions, and causes of distortion in sexual interactions; the phenomenon known as "voluntary unwanted sex"; responses to sexual assault, including discussion of statistics regarding the frequency of reactions such as the failure to report, delayed reporting, continuing contact with the alleged perpetrator, and the frequency of false reporting, and methods of studying such rates, and why many rates obtained through such methods are unreliable; and statistical analysis of the data upon which Dr. Ziv's testimony relies.

Of course, the defense will need to lay a proper foundation establishing the qualifications of the expert before any particular witness on the permitted subjects will be allowed to testify. Further the Court notes that should any of these expert witnesses be duplicative or beyond the areas which have been permitted, such witness's testimony will be restricted by the Court.

9. All Molineux matters will be addressed in a separate decision.

10. The motion to unseal the identities of two complaining witnesses is denied.

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[5]Deborah Davis & Elizabeth Loftus, Remembering Disputed Sexual Encounters: A New Frontier for Witness Memory Research, 105 J Crim. L. And Criminology 810, 816 (2016).

11. The motion to inspect the Grand Jury minutes is granted. The Court has reviewed the Grand Jury minutes and finds that they are legally sufficient to support the charges and that the proceedings were properly conducted.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
November 26, 2019

A.J.S.C. HON. JAMES M. BURKE

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