

I Object!

– James Eckert, Esq.

Molineux

If the ADA thinks that his proposed evidence fits into every category of *Molineux* exception, it's probably because the proof is merely evidence of propensity, and no, 'propensity' is not the catch-all *Molineux* category.

When the prosecution intends to elicit at trial proof that the defendant has previously committed similar crimes or bad acts, they are obligated to seek a prior ruling, and not simply introduce what they want, when they want to (*People v. Ventimiglia*, 52 NY2d 358 [1981]). Don't count on the failure to seek a ruling pretrial amounting to much, however. So long as the judge rules prior to the proof coming in, this tends to fall into *Molineux*'s "close enough" category.

The real test is whether the evidence ought to come in at all. Even under *Molineux* there is no exhaustive list, but the primary examples are intent/lack of mistake, common scheme or plan, and such a unique modus operandi as to represent independent proof that the defendant was the perpetrator (*People v. Molineux*, 168 NY 264, 313 [1901])(new categories can even be added, in *People v. Arafet*, 54 AD3d 517 the Third Department 3-2, upheld the introduction of prior crimes on the theory that they showed that the defendant possessed the expertise to steal a tractor-trailer full of copiers etc. At the time of this writing, leave to appeal to the Court of Appeals had been granted).

The test is whether the probative value greatly exceeds the prejudice of offering proof that the defendant has committed this crime before. There are two issues which trip up judges and prosecutors: propensity is not probative value, and the prejudice of having the ADA offer proof that the defendant has committed this crime before is, as the poet says: "yuge, Rochester, yuge".

If the proof is relevant because the defendant was in much the same situation as before, when we know he committed the crime, therefore he probably committed this crime, this is called propensity. Propensity is not a valid reason for admitting *Molineux*, and if the reason for admitting *Molineux* is something else, the extent to which the evidence shows propensity to commit this kind of crime does not add to the probative value.

Identity - the defendant's manner of committing a crime is so strange as to render the prior crime good evidence that the defendant committed this one - "sufficiently unique to be probative on the issue of identity" *People v. Pittman* (49 AD3d 1166 [4th Dept 2008]). Remember, just because the cops know from the nature of the crime which 6-10 people they'd like to talk to doesn't make it unique. Propensity is a good basis for investigation, but not for granting admissibility. Unique means unique.

Intent - "we know the defendant intended to commit this crime, because this is the kind of

crime this defendant commits" is propensity. In *Pittman*, the Fourth Department held "moreover, evidence of the 1998 incident should have been precluded insofar as it was used to prove intent because, assuming that the People established that defendant fired at the officer, 'intent may be easily inferred from the commission of the act itself'".

Motive - the motive to steal money is to gain the possession of money. The same can be said for the theft of anything of value. Showing that the defendant was a drug addict and really needed money is just propensity (*People v Balkum*, 149 AD2d 976 [4th Dept 1989]).

Common scheme or plan - this means a common scheme, like related victims or victims of the same scam, not just that the defendant has done this before. Going door to door within an office building may be a common scheme, grabbing many underage girls is not. A "common scheme or plan exception acknowledged in *Molineux* recognizes that evidence of uncharged crimes may be relevant 'to establish a scheme 'embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others'" *People v Buskey* (45 AD3d 1170 [3d Dept 2007]).

The key in *Molineux* is that the evidence has to be of something so odd, so unusual, that the commission of some unrelated crime actually represents solid evidence that the defendant committed this crime. This is rarely present. What is frequently present is propensity, the belief that people who did it once probably did it again. Even if the judge thinks it's true, it's not a valid *Molineux* category.

Try to discuss the limiting instruction before the proof comes in. If the Judge and ADA cannot decide what the purpose of the proof is so that it can be explained to the jury, it's propensity. If they think it fits every *Molineux* category, that's because it's propensity.