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2008 Cumulative Supplement

NEW YORK EVIDENCE HANDBOOK

Second Edition

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Rules, Theory, and Practice

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New York Evidence Handbook

Second Edition

by Michael M. Martin and Daniel J. Capra

Conveniently organized for use in the courtroom or the office, *New York Evidence Handbook* is your guide to the law of evidence in New York. The authors offer comprehensive analysis of the principles, the leading decisions, and the significant statutes, along with practical, expert guidance on commonly encountered but difficult evidentiary problems.

Highlights of the 2008 Cumulative Supplement

The 2008 Cumulative Supplement brings you up to date on the latest developments. Significant decisions and statutory changes are described and explained in annotation keyed to sections of the main volume; other decisions are cited with helpful parentheticals. The materials are arranged within each section so that statutes, if any, come first, followed by Court of Appeals decisions, and then decisions in each of the Appellate Divisions collected separately.

Noteworthy developments contained in the 2008 Cumulative Supplement include:

- **Insurance.** In *Latha Restaurant Corp. v. Tower Insurance Co.*, an action to recover insurance proceeds, the court held that the insured's overvaluation of insured property gave rise to a presumption of fraud, which becomes conclusive where, as here, the disparity between actual and claimed value is gross and without reasonable explanation (§3.2.5).
- **Real Evidence.** Affirming a murder conviction, the court in *People v. Pierre* held that an Internet instant message was properly admitted. "Although the witness did not save or print the message, and there was no Internet service provider evidence or other technical evidence in that regard," the witness testified to the defendant's screen name and that she sent an instant message to that same screen name and received a reply, the content of which made no sense unless it was sent by the defendant (§4.2).
- **Common Scheme or Plan.** In *People v. Athanasatos*, a prosecution for larceny from a Staples store, evidence was presented that the defendant committed a very similar larceny from a Staples store in Massachusetts the day before. The court held that the evidence was properly admitted "as proof of a preconcerted common scheme or plan, with adequate

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limiting instructions to that effect," because "the evidence established 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' " We question admission on that ground, since the existence of a general plan was not a material element of the charges, and especially since the court said it was error (but harmless) to admit the evidence "with respect to intent because that issue was not contested and the jury could infer intent from the facts" (§4.8.8).

- **Codification.** In *Hauzinger v. Hauzinger*, the parties in a divorce action had engaged in mediation pursuant to a confidentiality agreement. In reviewing whether the terms of a separation agreement were fair and reasonable, the court found no abuse of discretion when the judge refused to enforce the confidentiality agreement since it was necessary to consider the circumstances surrounding the execution of the separation agreement. The court rejected a suggestion that it apply the confidentiality provisions in the Uniform Mediation Act as a matter of public policy since New York has not adopted the Act (§5.1.2).

- **Specialists Versus Generalists.** In *Mustello v. Berg*, the plaintiff alleged that the defendant gastroenterologists failed to render proper treatment. In opposition to summary judgment, the plaintiff presented the affidavit of a general surgeon who opined that the treatment was improper. The affidavit of the plaintiff's expert did not mention whether he had any specific training or expertise in gastroenterology. Moreover, the affidavit did not indicate that he had familiarized himself with the relevant literature or otherwise set forth how he was, or became, familiar with the applicable standards of care in this specialized area of practice. The court found no error in the trial court's rejecting the affidavit and entering summary judgment for the defendants. It stated that "where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered. In the circumstances of this case, as the plaintiffs' expert failed to lay the requisite foundation for his asserted familiarity with the applicable standards of care, his affidavit was of no probative value" (§7.2.1.2).

- **Polygraph Results.** The court in *People v. DeLorenzo* affirmed convictions for rape and related crimes, finding that the trial court did not abuse discretion in excluding the results of a polygraph examination administered to the defendant. The court declared that "It is well established that 'the reliability of the polygraph has not been demonstrated with sufficient certainty' for the results of such tests to be admissible in evidence *(People v Shedrick*, 66 N.Y.2d 1015, 1018, 499 N.Y.S.2d 388).

Also contrary to defendant's contention, the court properly refused to conduct a *Frye* hearing before determining that the results of the polygraph test were inadmissible, inasmuch as defendant failed to show that the scientific consensus concerning polygraph tests had recently changed" (§7.2.3.8).

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§1.4 Preserving Evidentiary Rulings for Appeal

§1.4.1 Erroneous Ruling Admitting Evidence

People v. Bierenbaum, 301 A.D.2d 119, 151-152, 748 N.Y.S.2d 563, 588-589 (1st Dept. 2002), *app. denied*, 99 N.Y.2d 626 (2003): When the People turned over copies of a videotaped demonstration and indicated their intention to offer it into evidence, defense counsel said, "I suspect we'll object"; the judge immediately responded, "I suspect I'll allow it." The Appellate Division held that error was not preserved in this interchange, and that the defense had not preserved any issue for appeal, where no objection was made to the videotape at the time it was actually offered into evidence.

Hochhauser v. Electric Ins. Co., 46 A.D.3d 174, 177-178, 844 N.Y.S.2d 374, 376-377 (2d Dept. 2007) ("general objection based on hearsay" prior to witness' testimony was sufficient to preserve issue, even though no objection was made to specific testimony that constituted hearsay).

People v. Shook, 294 A.D.2d 710, 712-713, 743 N.Y.S.2d 573, 576 (3d Dept.), *app. denied*, 98 N.Y.2d 702 (2002): The defendant's contention that victim statements were improperly admitted under the prompt outcry exception was not preserved for appellate review, as he "failed to object to the admissibility of this testimony at trial, did not move to strike it or seek an appropriate limiting instruction."

Incorrect specific objection. *People v. Kello*, 96 N.Y.2d. 740, 743-744, 723 N.Y.S.2d 111, 113 (2001): The court's ruling that an objection on common-law hearsay grounds is insufficient to preserve a Confrontation Clause error has become especially significant since *Crawford v. Washington*, 541 U.S. 36 (2004) (discussed in §8.8, *infra*), substantially changed the constitutional analysis. Examples of decisions holding the Confrontation Clause error unpreserved include: *People v. Kimes*, 37 A.D.3d 1, 17-18, 831 N.Y.S.2d 1, 14 (1st Dept. 2006), *app. denied*, 8 N.Y.3d 881 (2007); *People v. Sykes*, 26 A.D.3d 203, 812 N.Y.S.2d 468 (1st Dept.), *app. denied*, 7 N.Y.3d 795 (2006); *People v. Lopez*, 25 A.D.3d 385, 808 N.Y.S.2d 648 (1st Dept.), *app. denied*, 7 N.Y.3d 758 (2006); *People v. Howell*, 44 A.D.3d 686, 843 N.Y.S.2d 169 (2d Dept. 2007), *app. denied*, 10 N.Y.3d 766 (2008); *People v. Mitchell*, 35 A.D.3d 507, 826 N.Y.S.2d 144 (2d Dept. 2006), *app. denied*, 8 N.Y.3d 883 (2007); *People v. F & S Auto Parts, Inc.*, 24 A.D.3d 795, 796, 809 N.Y.S.2d 93, 95 (2d Dept. 2005) (but issue reached in the interests of justice and convictions reversed because error was not harmless). *See People v. Grant*, 7 N.Y.3d 421, 424, 823 N.Y.S.2d 757, 759 (2006) (objection to *Sandoval* ruling did not preserve constitutional right-to-testify claim).

Andresen v. Kirschner, 297 A.D.2d 235, 746 N.Y.S.2d 258 (1st Dept. 2002): On cross-examination of the plaintiff, the defense elicited that the plaintiff had asserted a claim arising from the same accident and had settled that claim. The plaintiff's counsel objected to inquiry as to the amount of that settlement, but there was no objection to elicitation of the fact of the settlement. The court held it was error in these circumstances to grant a new trial for the admission of the settlement evidence, in violation of CPLR 4547. *See People v. White*, 27 A.D.3d 387, 811 N.Y.S.2d 660 (1st Dept.) (claim that evidence of uncharged crime violated constitutional rights was not preserved by objection resting solely on evidentiary rules), *app. denied*, 6 N.Y.3d 899 (2006); *People v. Harvey*, 309 A.D.2d 713, 766 N.Y.S.2d 194 (1st Dept.) (error in admitting as judicial admission false notice of alibi that defendant had withdrawn or disavowed was not preserved by objection that alibi was not inconsistent with defendant's position at trial), *app. denied*, 1 N.Y.3d 573 (2003); *People v. Reid*, 298 A.D.2d 191, 748 N.Y.S.2d 20 (1st Dept.) (where

objections were made on different grounds from those raised on appeal, error was unpreserved), *app. denied*, 99 N.Y.2d 563 (2002); *People v. Green*, 298 A.D.2d 209, 748 N.Y.S.2d 146 (1st Dept. 2002) (same), *app. denied*, 99 N.Y.2d 582 (2003).

People v. Bones, 17 A.D.3d 689, 793 N.Y.S.2d 545 (2d Dept.) ("personal knowledge" objection insufficient to preserve claim of Confrontation Clause violation), *app. denied*, 5 N.Y.3d 826 (2005).

People v. Young, 296 A.D.2d 588, 746 N.Y.S.2d 195 (3d Dept.) (Confrontation Clause error on appeal unpreserved by common-law hearsay objection at trial), *app. denied*, 99 N.Y.2d 536, 538, 541 (2002).

People v. Laracuente, 21 A.D.3d 1389, 801 N.Y.S.2d 676 (4th Dept. 2005) (objection to specificity of People's notice of intent to present other crimes evidence did not preserve objection to the admissibility of the evidence itself), *app. denied*, 6 N.Y.3d 777 (2006); *People v. Welch*, 307 A.D.2d 776, 763 N.Y.S.2d 701 (4th Dept.) (general objection based on illegal search and seizure to use of photographs to refresh witness's recollection did not preserve contention that prosecutor's use of photographs violated stipulation not to use on direct case), *app. denied*, 100 N.Y.2d 625 (2003).

General objection. *People v. Rivera*, 33 A.D.3d 450, 823 N.Y.S.2d 14 (1st Dept.) (hearsay, Confrontation Clause, and prejudicial objections not preserved by general objection), *app. denied*, 7 N.Y.3d 928 (2006); *People v. Freeman*, 305 A.D.2d 331, 760 N.Y.S.2d 470 (1st Dept.) (general objection did not preserve defendant's claim that a statement by the deceased was properly admitted), *app. denied*, 100 N.Y.2d 594 (2003); *People v. Palmer*, 299 A.D.2d 235, 750 N.Y.S.2d 275 (1st Dept. 2002) (general objection failed to preserve claim that People improperly introduced evidence of uncharged crimes), *app. denied*, 99 N.Y.2d 584 (2003).

People v. Jones, 25 A.D.3d 724, 811 N.Y.S.2d 702 (2d Dept.) (asserted error in People impeaching their own eyewitness with a prior inconsistent statement was unpreserved because the ground was not specifically raised in the objection made to the trial court), *app. denied*, 7 N.Y.3d 757 (2006).

People v. Everson, 303 A.D.2d 1027, 757 N.Y.S.2d 196 (4th Dept.), *aff'd*, 100 N.Y.2d 609 (2003): The court (3-2) reversed an order setting aside a guilty verdict, which had been granted on the ground that an expert was erroneously permitted to state an opinion that was based on double hearsay. The defendant's general objection did not preserve for appellate review the issue whether expert's opinion was impermissibly based on double hearsay, so setting aside the verdict was erroneous under Crim. Proc. Law §330.30(1). *See People v. Wright*,

34 A.D.3d 1274, 823 N.Y.S.2d 812 (4th Dept. 2006) (general objection failed to preserve error claim that other crimes evidence was prejudicial), *app. denied,* 8 N.Y.3d 886 (2007); *Carr v. Burnwell Gas of Newark, Inc.,* 23 A.D.3d 998, 998-999, 803 N.Y.S.2d 834, 836 (4th Dept. 2005) (general objection made to introduction of prior consistent statements failed to preserve contention that the testimony constituted improper bolstering); *People v. Parker,* 304 A.D.2d 146, 755 N.Y.S.2d 521 (4th Dept.) (general objection to question of witness whether anyone in courtroom resembled the person he saw running from the crime scene failed to preserve any error in admitting "resemblance testimony"), *app. denied,* 100 N.Y.2d 585 (2003).

§1.4.2 Erroneous Ruling Excluding Evidence

Madden v. Desmond, 39 A.D.3d 822, 835 N.Y.S.2d 337 (2d Dept. 2007) (where judge stated before trial, "I don't believe that you can go into that area," and plaintiffs did not raise the issue again during trial, exclusion of the evidence was not preserved for appellate review).

Offer of proof. *People v. Martich,* 30 A.D.3d 305, 818 N.Y.S.2d 48 (1st Dept.) (when defense counsel "simply moved on without making an offer of proof or other argument" each time an objection was sustained, defendant failed to preserve his argument), *app. denied,* 7 N.Y.3d 868 (2006).

People v. Ross, 43 A.D.3d 567, 569-570, 841 N.Y.S.2d 173, 177-178 (3d Dept.) (where defendant at trial argued only that accomplice's plea allocution was not hearsay, he did not preserve error based on claim that allocution was relevant to support defendant's account rather than victim's), *app. denied,* 9 N.Y.3d 964 (2007).

People v. Berry, 43 A.D.3d 1365, 842 N.Y.S.2d 822 (4th Dept. 2007), *app. denied,* 9 N.Y.3d 1031 (2008): The defendant in a sexual abuse prosecution asserted error in the exclusion of testimony regarding a statement made by one of the victims, which he claimed would have established that another person had subjected the victim to sexual abuse. However, at trial he contended that the statement was admissible because it was relevant in establishing whether there was a reason for the victim's delay in reporting abuse by the defendant. The court held that the offer of proof was insufficient to alert the judge to the relevance of the statement being claimed on appeal, so exclusion of the testimony was not reversible error.

§1.4.3 *Appellate Review of Errors in the Absence of Objections*

People v. Kelly, 5 N.Y.3d 116, 119-120, 799 N.Y.S.2d 763, 765-766 (2005), *aff'g* 11 A.D.3d 133, 781 N.Y.S.2d 75 (1st Dept. 2004): During deliberations in a murder trial, the jury asked to see a bayonet and sheath involved in the case. In the jury room the jury wanted to test for themselves how easy it was to withdraw the bayonet, but the court officer having custody refused and instead gave an unauthorized demonstration. Promptly afterward the officer reported the incident to the judge, who, after consulting with counsel and receiving no objection, gave the jury a curative instruction to disregard the demonstration. The Appellate Division held that the defendant had waived any error; the court officer's failure to give a ministerial direction to the jury to put their request for a demonstration in writing was not exempt from the requirement of preservation. Affirming, the Court of Appeals held there was no "mode of proceeding" error relieving the defendant of the obligation to object. The court also upheld the ruling below that by the prompt consultation with counsel and the giving of the curative instruction, the judge rather than the court officer had the "final say" on the jury's improper request, so there was no usurpation of the judge's obligation to decide whether and how the jury could examine the exhibit.

People v. Retamozzo, 25 A.D. 3d 73, 87-88, 802 N.Y.S.2d 426, 436 (1st Dept. 2005): The court reversed a conviction for drug possession because of the trial judge's misconduct in essentially testifying for the People on an essential issue, interrogating the defendant during his direct examination in such a way to indicate skepticism as to his credibility, interrupting defense cross-examination to ask questions that would only be proper as redirect examination by the prosecutor, and giving relatively free rein to the prosecutor during cross-examination of the defendant and his father. Although the defendant did not object to any of the judge's interventions, the court reviewed the claim of deprivation of a right to a fair trial in an exercise of its interest of justice jurisdiction. The only apparent strategic reasons not to object were to avoid antagonizing the judge and to avoid greater damage. The defendant "should never have been placed so persistently and pervasively in [the] position" of "declaring 'touche' before the jury" by voicing an immediate objection when the judge intervened to elicit damaging testimony. In *People v. Spruill*, 5 A.D.2d 318, 320, 775 N.Y.S.2d 249, 251 (1st Dept.), *app. denied*, 3 N.Y.3d 648 (2004), the court noted its power to reverse based on unpreserved issues as a matter of discretion in the interest of justice, but declined to do so where the trial judge had given a curative instruction sua sponte and the evidence against the defendant was "overwhelming."

§1.6 Limited Admissibility

People v. Montgomery, 22 A.D.3d 960, 963, 803 N.Y.S.2d 228, 230-231 (3d Dept. 2005): In a sexual abuse trial the prosecution introduced an inculpatory prior statement by a defense witness. Although the defense did not request an instruction limiting the evidence to impeachment use, the court reversed the conviction, holding that trial court's failure to give a cautionary instruction deprived the defendant of a fair trial. In *People v. Ward,* 10 A.D.3d 805, 807, 782 N.Y.S.2d 158, 160 (3d Dept. 2004), *app. denied,* 4 N.Y.3d 768 (2005), although it held any error in admitting evidence of uncharged crimes was harmless, the court commented: "Notably, no limiting instructions were given by County Court. While no such instructions were requested, our courts have repeatedly stressed the importance of cautionary instructions to reduce the chance that juries will improperly interpret such proof of uncharged crimes as evidence of defendants' propensity toward crime [citations]." In *People v. Greene,* 306 A.D.2d 639, 760 N.Y.S.2d 769 (3d Dept.), *app. denied,* 100 N.Y.2d 594 (2003), a prosecution for rape, incest, sexual abuse, and related offenses, the court held that evidence of the defendant's prior and concurrent threats and violence to the victim's family and uncharged sexual assaults and threats against the victim were properly admitted as proof of the element of forcible compulsion and to explain the victim's failure to reveal the ongoing sexual assaults. However, the court reversed the defendant's convictions because the judge failed to give cautionary instructions at the time each of the acts was received and during final instructions. Despite defense counsel's failure to request such instructions or to object to the failure to charge, the judge had an obligation to avoid the jury's using the evidence improperly as evidence of propensity to commit the crimes charged. *See People v. DeFayette,* 16 A.D.3d 708, 790 N.Y.S.2d 301 (3d Dept.) (noting failure to give limiting instruction regarding uncharged crimes, but finding issue unpreserved by defendant's failure to object and error harmless), *app. denied,* 4 N.Y.3d 885 (2005).

§1.7 Remainder of Completing and Explaining Acts, Conversations, Statements, and Writings

People v. Mateo, 2 N.Y.3d 383, 779 N.Y.S.2d 399, *cert. denied,* 124 S. Ct. 2929 (2004): A defendant charged with first-degree murder had, during an eight-hour interrogation, confessed not only to the charged crime but also to three other murders. The trial court made an *in limine* ruling barring reference to the other crimes on the People's

direct case, but preserving the prosecution's right to challenge the defense if it raised any issues as to the voluntariness of the confession. On direct examination, the police officer presenting the confession gave a truncated version consistent with the pretrial order, but the cross-examination highlighted the time gaps, the defendant's concerns for his family members (supporting his allegation that investigators overbore his will by leading him to believe that he was receiving lenient treatment for family members in exchange for his confession), and a gunshot injury in the leg the defendant had received in the incident leading to his arrest. Ultimately, the judge permitted the witness to testify concerning the defendant's full confession, and followed with jury instructions that the evidence of the other homicides was given for the "very limited purpose" of assessing the truthfulness of the defendant's statements concerning the charged crime. On appeal, the court affirmed admission of the full confession evidence. Without the officer's redirect, the jury received misleading impressions from counsel's argument and the cross-examination about why the interrogation lasted eight hours, that the defendant had refused medical treatment for his leg until he cleared up the four homicides, and that, despite his claim of covering for his wife, he had confessed to murders having nothing to do with her. In the majority's view, the problem of a distorted picture was compounded by the defense tactic of "claiming that it had no intention of opening the door, then persistently nudging it ajar."

People v. Hubrecht, 2 A.D.3d 289, 769 N.Y.S.2d 36 (1st Dept. 2003), *app. denied*, 2 N.Y.3d 741 (2004): The defendant in a murder case admitted the shooting, without any claim of self-defense, to an emergency medical technician who responded at the scene. When the People introduced that statement, the defense attempted to introduce a prior 911 call by the defendant, and his subsequent statement at the police station, in which he claimed self-defense. The court found no error in the exclusion of those two statements, since both were hearsay not subject to any exception and they were not admissible under the rule of completeness because the three statements were made "to different persons in different settings and could not be viewed as a single continuous narrative or process of interrogation," nor had the prosecution created a misleading impression that the defendant never told anyone that he acted in self-defense.

People v. Johnson, 296 A.D.2d 422, 745 N.Y.S.2d 51 (2d Dept.), *app. denied*, 99 N.Y.2d 537 (2002): The People were properly permitted to rehabilitate the credibility of an accomplice-witness on redirect by eliciting portions of a letter written by the witness, where the defendant had "opened the door" by eliciting other portions of the same letter