Louisiana Law Review

Volume 18 | Number 1
The Work of the Louisiana Supreme Court for the 1956-1957 Term
December 1957

Evidence

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As usual, a great many points of evidence were considered by the Supreme Court during the past term. Only the most interesting or significant will be discussed here.

RELEVANCY

Risk of Undue Prejudice — Gruesome Photographs

In *State v. Morgan*[1] the Supreme Court indicated that gruesome photographs of the deceased victim in a criminal case should be excluded if they have little or no probative value, and involve a substantial risk of undue prejudice. Although the writer feels that the approach taken in the *Morgan* case is sound,[2] it must be recognized that subsequent cases have whittled away its persuasiveness as authority.[3]

The recent case of *State v. Goins*[4] would seem to reflect a continued disinclination on the part of the court to invoke the rule of *State v. Morgan.* In the *Goins* case objection to the admissibility of certain photographs was made on the ground that they were "unnecessary" and "extremely prejudicial in view of their gruesome character."[5] The Supreme Court held that the trial judge was correct in overruling the objections of defense counsel, for it found that the photographs were admissible "for the purpose of identifying the deceased person as the one named in the indictment," and "to show the location of the bullet wounds in decedent's back."[6] The court did not cite *State v. Morgan* and did not discuss whether the photographs were in fact gruesome, or of such a nature as might reasonably be expected to inflame the passions of the jury.[7] The process suggested by the *Morgan*

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1. 211 La. 572, 30 So.2d 434 (1947).

2. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Evidence,* 14 LOUISIANA LAW REVIEW 220 (1953).

3. *Ibid.* See also Note, 14 LOUISIANA LAW REVIEW 421 (1954), discussing the line of cases culminating with State v. McMullan, 223 La. 629, 66 So.2d 574 (1953); and the subsequent case of State v. Palmer, 227 La. 691, 80 So.2d 374 (1955).

4. 232 La. 238, 94 So.2d 244 (1957).

5. *Id.* at 255, 94 So.2d at 250.

6. *Ibid.*

7. In another case decided during the past term, State v. Eubanks, 232 La. 289, 300, 94 So.2d 262, 266, 267 (1957), defense counsel had objected to the ad-

case of balancing the probative value of the photographs against the risk of undue prejudice seems to be an appropriate one, and it is hoped that the theory underlying the *Morgan* case will not be abandoned.

Risk of Undue Prejudice — Past Crimes To Show Knowledge, Intent, Plan

As a general rule, evidence of a defendant's prior criminal conduct is inadmissible. One of various exceptions to this well-recognized general rule arises where the evidence is relevant for the purpose of showing knowledge, intent, or plan.[8] In two cases decided during the past term[9] the court found that the offered testimony fell properly within this exception. In one,[10] defendant was charged with the possession of a hypodermic needle, and the Supreme Court found no error in the trial judge's admitting testimony "tending to show that the defendant was a drug addict in that he had recently taken a narcotic drug by way of a hypodermic needle."[11] In the other,[12] the defendant was charged with murder and the Supreme Court found that there was no error in the admission of testimony tending to show a series of other crimes, for the court found that this was proper "to show preparation for the commission of the crime charged, intent, motive and a consciousness of guilt."[13]

WITNESSES

Impeachment — Prior Inconsistent Statements by Defendant

Article 486 of the Code of Criminal Procedure[14] provides that each side has the right to impeach the testimony and credibility of witnesses called by the other side. One of the methods provided for the impeaching of a witness is a showing of a prior inconsistent statement.[15] The legal effect of impeaching a non-party witness is to tear down or neutralize the testimony he has

missibility of a photograph on the ground that it was "gruesome, inelegant and inflammatory." The trial judge overruled the objection, finding that the photograph was not gruesome or revolting, and the Supreme Court upheld the action of the trial judge, stating that "it was helpful to the State in presenting its evidence, and we do not find that it is of such a nature as to have prejudiced the jury."

8. LA. R.S. 15:445, 446 (1950).

9. State v. Goins, 232 La. 238, 94 So.2d 244 (1957); State v. Harris, 232 La. 911, 95 So.2d 496 (1957).

10. State v. Harris, 232 La. 911, 95 So.2d 496 (1957).

11. *Id.* at 913, 95 So.2d at 496.

12. State v. Goins, 232 La. 238, 94 So.2d 244 (1957).

13. *Id.* at 251, 94 So.2d at 249.

14. LA. R.S. 15:486 (1950).

15. LA. R.S. 15:493 (1950).

given on the stand, and, theoretically, the prior statement is not to be used as substantive proof of defendant's guilt.[16] Article 462 of the Code of Criminal Procedure[17] provides that when the accused takes the witness stand, he shall be subject to all the rules applicable to other witnesses. When the state introduces prior statements of a defendant witness, ostensibly for the sole purpose of impeaching the defendant as a witness, and such statements would be classified as confessions or admissions involving the existence of criminal intent or inculpatory facts[18] if offered by the state in its case in chief, a question quite naturally arises as to whether such statements are governed by the normal rules regulating the admissibility of confessions. In order for such "impeaching" statements to be admissible, need the state have mentioned them in its opening statement, and must it lay a prior foundation of voluntariness?[19]

In *State v. Palmer*[20] the trial judge, over defendant's objections, permitted the state, ostensibly for the purpose of impeaching defendant, to call a witness to testify as to certain statements containing inculpatory facts made by the defendant. No foundation had been laid to show that the statements in question had been freely and voluntarily made, and no mention of them had been made by the state in its opening statement. The court noted that it is well settled in the jurisprudence that admissions involving the existence of criminal intent or inculpatory facts are governed by the rules applicable to confessions, and, relying upon several prior cases,[21] held that the trial court had committed reversible error. The position taken seems eminently sound, for if the rule were otherwise, a means would be afforded the state to circumvent the regular rules relative to the admissibility of confessions and admissions involving the existence of criminal intent or inculpatory facts. In the *Palmer* case the court distinguished the recent case of *State v. Sheffield*,[22] which the state

16. See State v. Rocco, 222 La. 177, 62 So.2d 265 (1952); State v. Reed, 206 La. 143, 19 So.2d 28 (1944); State v. Paul, 203 La. 1033, 14 So.2d 826 (1943).

17. LA. R.S. 15:462 (1950).

18. For a discussion of whether the rules governing the admissibility of confessions also govern the admissibility of admissions involving the existence of criminal intent or inculpatory facts, see State v. Clark, 228 La. 899, 84 So.2d 452 (1955) and State v. Robinson, 215 La. 974, 41 So.2d 848 (1949), discussed briefly in *The Work of the Supreme Court for the 1955-1956 Term — Evidence*, 17 LOUISIANA LAW REVIEW 421, 424 (1957).

19. See LA. R.S. 15:333, 451 (1950).

20. 232 La. 468, 94 So.2d 439 (1957).

21. State v. Clark, 228 La. 899, 84 So.2d 452 (1955); State v. Ward, 187 La. 585, 175 So. 69 (1937); State v. Hayes, 162 La. 310, 110 So. 486 (1926).

22. 232 La. 53, 93 So.2d 691 (1957).

had urged as standing for a contrary principle. In the *Palmer* case it was noted that in the earlier *Sheffield* decision the court had been careful to point out that "the confession or statement there used had been covered by the opening statement."[23] The opinion in the *Palmer* case further distinguished the *Sheffield* case on the ground that no contention was there made that the statement in question was not freely and voluntarily given. Although the latter statement appears to the writer to be somewhat questionable,[24] it seems well that the court has made it abundantly clear[25] that the *Sheffield* case is not to be interpreted as a departure from prior jurisprudence on this point.

Judge as a Witness

In *State v. Eubanks*[26] the court stated that a judge "could not act both as a judge and as a witness."[27] The statement appears open to some question. Article 303 of the Code of Criminal Procedure[28] now provides[29] that one of the causes for which a judge in a criminal case shall be recused is "his being a material witness in the cause." On the other hand, Article 367 of the Code of Criminal Procedure[30] provides: "In any case in which the judge of the court may be a material witness, the oath shall be administered to him by any officer authorized by law to administer oaths," thus seemingly implying that a judge can serve both as a judge and as a witness.[31]

23. State v. Palmer, 232 La. 468, 485, 94 So.2d 439, 445 (1957).

24. In State v. Sheffield, 232 La. 53, 80, 93 So.2d 691, 700-01 (1957), in the per curiam opinion on the application for rehearing, the court stated: "The record further discloses that the said incriminating statements *alleged to have been made as not being freely and voluntarily given and not having the proper foundation laid therefor*, were clearly admissible being part of and included within the written and oral confessions of the defendant, which had been previously admitted by the court after the proper foundation therefor had been laid during the presentation of the State's case in chief in accordance with law." (Emphasis added.)

25. See also the per curiam opinion on the application for rehearing in State v. Sheffield, *id.* at 80, 93 So.2d at 700.

26. 232 La. 289, 94 So.2d 262 (1957).

27. *Id.* at 300, 94 So.2d at 266.

28. LA. R.S. 15:303 (1950).

29. Prior to the time that Article 303 was amended and incorporated into the Revised Statutes of 1950, the article contained no provision that a judge's being a material witness in the cause constituted a ground for recusation.

30. LA. R.S. 15:367 (1950).

31. For some of the other materials bearing upon the problem, see Ross v. Buhler, 2 Mart.(N.S.) 312 (La. 1824); La. Act of March 25, 1828; Babin v. Nolan, 10 Rob. 373 (La. 1845); LA. R.S. of 1870, § 3192; LA. CODE OF PRACTICE art. 337 (1870), as amended by La. Acts 1948, No. 336, p. 811; State v. DeBouchel, 173 La. 476, 137 So. 858 (1931).

DOCUMENTARY EVIDENCE

Production of Documents — Criminal Cases

To what extent may defense counsel, at the trial, successfully demand that the district attorney produce statements in his possession made to him by a prosecution witness prior to the trial? If such statements are produced and they reveal prior inconsistent statements by the witness as to non-collateral matter, they would normally be admissible for the purpose of impeaching or neutralizing the testimony given by the prosecution witness on the stand.[32]

In *State v. Weston*,[33] a rape case, the victim of the alleged rape was called to the stand by the district attorney. On cross examination by defense counsel, she admitted having made a written statement to police officers immediately after the alleged commission of the offense. Defense counsel then moved for the production of the statement, and the prosecution offered to comply with the request, but on the condition that the statement first be read to the jury. Not knowing what the statement contained, the defense counsel declined the conditional offer, and the trial judge thereupon refused to order the production by the state of the prior statement of the prosecuting witness. In discussing this interesting problem, the court stated that in *State v. Hodgeson*,[34] a case decided in 1912, "the court flatly held that a written statement made by the prosecuting witness should have been produced and made available to the defense for use for purposes of impeachment."[35] The court stated, however, that in the *Simon*[36] and *Bankston*[37] cases, it had been held that in order to have the right to production, defense counsel must lay a foundation showing that the prior statements are in fact contradictory to the statements given by the witness on the stand. The court found, however, that "the most recent authorities have declared, without qualification, that an accused is not entitled to production of any written statements of a state witness in the hands of a district attorney or the police department."[38] Although the

32. As to the procedure to be followed, and the foundation to be laid in order to impeach a witness by showing prior contradictory statements, see LA. R.S. 15:493 (1950).

33. 232 La. 766, 95 So.2d 305 (1957).

34. 130 La. 382, 58 So. 14 (1912).

35. 232 La. 766, 778, 95 So.2d 305, 309 (1957).

36. State v. Simon, 131 La. 520, 59 So. 975 (1912).

37. State v. Bankston, 165 La. 1082, 116 So. 565 (1928).

38. 232 La. 766, 778, 95 So.2d 305, 309 (1957). As authority for this statement the court cited State v. Labat, 226 La. 201, 75 So.2d 333 (1954); State v.

court was of the opinion that the *Hodgeson* case had been impliedly overruled by subsequent cases, it stated that the pronouncements in the more recent cases were too broad and that "it seems to us that the exception recognized in the Simon and Bankston cases should obtain in instances where a proper foundation for the impeachment of the witness has been laid — for example, when the witness admits on the stand that his prior statement is contrary to his testimony."[39] In this connection, the Supreme Court cited the comparatively recent United States Supreme Court case of *Gordon v. United States*[40] as recognizing such an exception.

The problem presented in the *Weston* case is an important one and is even more interesting because of the recent, and very controversial, *Jencks v. United States*,[41] a case decided subsequent to *Gordon v. United States*. Whether the view of the Louisiana Supreme Court will be affected by the position taken by the United States Supreme Court in the *Jencks* case, which took an even broader view relative to defendant's right to production, is a very interesting matter for speculation. Both the *Jencks* and *Weston* cases will receive more extensive discussion in a subsequent issue of this Review, but perhaps it should be noted in passing that the foundation required by the *Weston* case before defense counsel can successfully demand production may involve practical difficulties. It may frequently happen that defense counsel is unaware of the contents of the prior statement, and thus will have considerable difficulty in showing that the contents thereof are contradictory to the testimony given on the stand. Where defense counsel is ignorant of the contents of the prior statement, it will be especially difficult, as a practical matter, to lay the foundation suggested as an example by the court, i.e., the admission by the witness that his prior statement is contradictory to his testimony.

HEARSAY

Res Gestae

The term *res gestae* has been much criticized by the authorities. Dean Wigmore has stated: "This phrase, as conceded on all

Williams, 216 La. 419, 43 So.2d 780 (1950); and State v. Vallery, 214 La. 495, 38 So.2d 148 (1948); and made a footnote reference to State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945) relative to confessions and other statements in the hands of the district attorney.

39. 232 La. 766, 780, 95 So.2d 305, 310 (1957).

40. 344 U.S. 414 (1953).

41. 1 L.Ed.2d 1103 (U.S. 1957).

hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine."[42] Nevertheless the term is frequently used. Article 447 of the Code of Criminal Procedure[43] provides:

> "Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms any part of the res gestae is always admissible in evidence."

And Article 448[44] provides:

> "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

In the recent case of *State v. DiVicenti*[45] defendant appealed from a conviction of gambling. Over his objections, the state was permitted to introduce testimony relative to the tenor and substance of two telephone calls coming into the raided establishment after the arrest, and received by one of the arresting officers. The Supreme Court held that the testimony was admissible as part of the *res gestae*, rejecting as incorrect defendant's contention that the "test of admissibility of res gestae is the spontaneity of the utterance or occurrence."[46] The court did not mention Articles 447 or 448 of the Code of Criminal Procedure, but cited a discussion in Wharton's *Criminal Evidence*[47] as to the "broader" definition given to the term *res gestae* by some states, and indicated that this work classifies Louisiana as one of those states following the broader definition. In the opinion of the writer the term *res gestae* seldom, if ever, assists in analysis, and at times actually beclouds the true evidentiary problem. It is submitted that in the instant case the testimony concerning the telephone calls was admissible not to prove the truth of the statements, but merely to show the fact that such statements were made. The fact of the statements had a relevance

42. 6 WIGMORE, EVIDENCE 180, § 1767 (3d ed. 1940).
43. LA. R.S. 15:447 (1950).
44. *Id.* at 15:448.
45. 232 La. 13, 93 So.2d 676 (1957).
46. *Id.* at 21, 93 So.2d at 679.
47. WHARTON, CRIMINAL EVIDENCE 627 *et seq.*, § 279 (12th ed. 1955).

independent from the truth thereof. Thus the admission of the testimony involved no exception to the hearsay rule.[48]

In *State v. Defiore*[49] defendant appealed from a conviction of negligent homicide. Without objection, the court had permitted the state to introduce evidence that the defendant had drunk intoxicating liquor prior to the time that his automobile had run into a group of girls. Over the defendant's objection, the state was permitted to introduce testimony that defendant had engaged in a fist fight at the time he was partaking of intoxicating beverages, about two or two and a half hours prior to the commission of the crime charged. The Supreme Court was unwilling to hold testimony as to the fist fight admissible as part of the *res gestae*, but found that the action of the trial judge was harmless error.[50]

Reported Testimony

In *Louisiana State Bar Association v. Sackett*,[51] a disbarment case, the Supreme Court was requested by the Committee on Professional Ethics and Grievances of the Louisiana State Bar Association to rule on the question of whether testimony taken before that Committee in its investigation of complaints made against the defendant was admissible in the proceedings before the Commissioner appointed by the Supreme Court to take evidence in the case. The court stated that it knew of no Louisiana case on the point, but relying upon cases from other jurisdictions, ruled in favor of admissibility. The court relied heavily upon the fact that, pursuant to the Rules of the Supreme Court, the defendant was represented by counsel at the prior investigation, had the right of cross examination, the right to subpoena witnesses, and the right to object to any evidence offered. In addition, the court noted that in the proceedings before the Commissioner the defendant would have the right to produce additional testimony, further cross examine any witness who may have testified against him, and by compulsory process require the testimony of any additional witnesses who had not appeared in the case. In view of the rights afforded the defendant in the hearing before the Committee, and the substantial, if not com-

48. For a very able discussion of hearsay, see Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LOUISIANA LAW REVIEW 611 (1954).
49. 231 La. 769, 92 So.2d 717 (1957).
50. LA. R.S. 15:557 (1950).
51. 231 La. 655, 92 So.2d 571 (1957).

plete, identity of parties and issues, the ruling of the court appears sound.

Declarations by Persons Since Deceased — Admissions

In *Larocca v. Ofrias*[52] plaintiff brought suit on a promissory note, which she had acquired from the succession of her husband. The court found that plaintiff was not a holder in due course, and held that there was no error in the trial judge's admitting testimony offered by defendant, the maker of the notes, relative to statements made to the defendant by the plaintiff's deceased husband. Defendant contended that there was a lack of consideration, and the statements of the deceased husband were relevant on this issue. In this connection the court stated:

> "Although testimony respecting declarations of a person since deceased, even when against interest, is the weakest sort of evidence, nevertheless, such statements are legal evidence against his executor, administrator, heirs or other persons claiming under him."[53]

From a technical standpoint, the statements of the deceased under the circumstances of the instant case appear to be admissible as admissions.[54]

Confessions

In *State v. Goins*,[55] in order to traverse the testimony adduced by the state to show that an alleged confession was free and voluntary, defendant had exercised the privilege afforded him to take the stand out of the presence of the jury for the restricted purpose of testifying to the involuntary nature of the confession. After hearing the testimony adduced by both sides, the trial judge ruled the confession to be free and voluntary, and admissible. After the jury had returned, and the state had again presented its evidence as to the free and voluntary nature of the confession, defendant demanded the right to take the stand again for the restricted purpose "of traversing the testimony on such point."[56] This the trial judge refused to permit him to do, and

52. 231 La. 292, 91 So.2d 351 (1956).

53. *Id.* at 296, 91 So.2d at 352. In this connection the court cited Brown v. King, 7 La. App. 570 (1928); Succession of Crawford, 16 La. App. 326, 134 So. 269 (1931); Gaddis v. Brown, 1 So.2d 845 (La. App. 1941).

54. See 6 WIGMORE, EVIDENCE §§ 1081, 1084 (3d ed. 1940).

55. 232 La. 238, 94 So.2d 244 (1957). This case is also discussed at p. 139 *supra*.

56. *Id.* at 268, 94 So.2d at 255.

the action of the lower court was upheld on appeal. The court thus refused to extend the rule of *State v. Thomas*,[57] which had held that it was error for the trial judge to refuse to permit the defendant to take the stand out of the presence of the jury for the restricted purpose of traversing the testimony offered by the state as to the free and voluntary nature of the confession. Thus, it would appear that if the defendant wishes to take the stand in the presence of the jury to testify to the involuntary nature of the confession, he must do so when the defense presents its case in chief, and thereby subject himself to cross examination as to the entire case.

In *State v. Harris*[58] the court held that under the circumstances there presented it was not necessary for the state to call all the witnesses to the making of an alleged confession. Only one of eight witnesses was not called, and the seven who were called testified that the confession was free and voluntarily made and the defendant did not contend that it was made under duress, violence, threats, or intimidation. The court in the *Harris* case also indicated that it is unnecessary to lay a foundation of voluntariness relative to the admissibility of an acknowledgment by the defendant of the commission of another (and related) crime.[59]

57. 208 La. 548, 23 So.2d 212 (1945).

58. 232 La. 911, 95 So.2d 496 (1957). This case is also discussed at p. 140 *supra*.

59. As an additional reason for its holding in this regard the court, apparently feeling that the answer of the witness was unresponsive, stated that the state could not "be held responsible for an answer that is not responsive to the question." *Id.* at 915, 95 So.2d at 497.