Louisiana Law Review

Volume 32 | Number 2
The Work of the Louisiana Appellate Courts for the 1970-1971 Term: A Symposium
February 1972

Public Law: Criminal Law

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in all of its applications, and that today the fundamental issue is the reasonableness under the circumstances of permitting one to prosecute a suit against a non-domiciliary defendant, assuming adequate notice and perhaps the appointment of an attorney to represent the absentee. The writer believes it is eminently reasonable to allow alimony suits *in personam* against non-domiciliary defendants to be prosecuted in the plaintiff's state of domicile. Having a spouse or ex-spouse in possible need in a state is as much reason to consider the non-domiciliary subject to *in personam* suit there, for the purpose of ascertaining whether alimony is due, as is "doing business," "using the highways and causing injury or damage," or the host of other criteria used in other kinds of situations.[7]

On the other hand, the writer believes proceedings *quasi in rem* are intrinsically inappropriate to determine alimony liability for the future. A *quasi in rem* suit presupposes a claim resolvable in a money judgment, and a demand for alimony is certainly reducible to that; but to permit this procedure in instances in which the judgment cannot be executed completely as soon as rendered leads to difficulties. As Professor Woody of the Tulane Law School observed accurately in a note on *de Lavergne*,[8] for a *quasi in rem* judgment for future alimony to be truly effective the judgment debtor would have to be forbidden to regain control of the assets attached even if at the moment not a single alimony installment were due. Professor Woody apparently favors legislation adopting such a rule.[9] The writer politely dissents, believing that such a rule should be judged in unreasonable restraint of one's use of his assets before he has defaulted in his obligation.

CRIMINAL LAW

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Dangerous Weapon

In *State v. Levi*[1] the court held that an unloaded and in-

7. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 86-92 (for a summary treatment) and 93-139 (for greater detail) (1971). *See also* Anderson, *Using Long-Arm Jurisdiction to Enforce Marital Obligations*, 11 J. OF FAMILY L. 67 (1971).

8. Woody, *A New Alimony Remedy?*, 19 LA. B.J. 151 (1971).

9. *Id.* at 156.

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1. 259 La. 591, 250 So.2d 751 (1971). For a different view on this case,

operative gun employed in a robbery can be a "dangerous" weapon. A requested special instruction to the contrary was held to have been correctly denied. Another special instruction relating to the consideration of danger to persons other than the victim was sustained. The court followed *State v. Johnston*,[2] an assault case. Perspective of the victim was deemed important: Fear of the victim or bystanders would be likely to generate violent reaction, so the weapon was dangerous in the manner used; in addition, an unloaded gun could be used as a bludgeon.

Such reasoning is manifestly correct in the context of assault, because one form of assault involves the placing of the victim in apprehension of receiving a battery. Consequently, the victim's fear of an unloaded gun either as a firearm or bludgeon can quite reasonably be said to govern. The definitional context of the crime adds meaning to the general definition of "dangerous weapon." Robbery does not necessarily involve the use of actual force, but may exist by the presence of "intimidation." Thus, there exists a definitional context similar to assault. Both assault and robbery can involve fear on the part of the victim. So from purely exegetical reasoning, the court seems quite correct.

Justice Sanders, by excellent usage of "purpose" and "context" aspects of the genuine construction rule of article 3, reasoned further that punishment of armed robbery is designed to maintain peace, not only through the prevention of violence by the offender, but also by deterring the creation of situations which would provoke deadly violence by victims, or bystanders,

see Note, 32 LA. L. REV. 158 (1971). The major fallacy of the attack there made turns on the premise that article 2(3) requires *actual* danger *to the victim*. Such an assumption is unwarranted by the "manner of use" test and is contrary to the fact that a manner of use merely "calculated" to produce death or great bodily harm is sufficient for an instrumentality to be dangerous. There is no language in article 2(3) requiring that the danger be *to the victim*. Cases cited in the student Note involved crimes in which the victim's apprehension is not an element. Note, 32 LA. L. REV. 158, 159 n.7 (1971). Moreover, the cited opinions do *not* support a conclusion that actual danger to the victim is important. On the "actual" factor, State v. Reynolds, 209 La. 455, 24 So.2d 818 (1945) plainly held that a dangerous weapon "is not necessarily one that can or will produce death or great bodily harm." State v. Murff, 215 La. 40, 39 So.2d 817 (1949) held that lying in wait with devices which were dangerous to bus passengers and a driver, if used as intended, was lying in wait with a dangerous weapon. The intended "victim" of the attempt to commit aggravated criminal damage to the bus was the bus owner, a corporation with no corporeal body to be harmed. The passengers and driver were analogous to bystanders.

Perhaps, in the final analysis, differences of opinion about *Levi* really turn on one's judgment of whether an empty gun, used in a robbery, is likely to create danger to others. The shots fired by Levi's victim spoke loudly on this point.

2. 207 La. 161, 20 So.2d 741 (1944).

with resultant likelihood of danger to persons at the scene. Either a broken or unloaded gun may provoke violent defense as much as a loaded and directly dangerous real gun. Although a toy gun was not involved, it would seem that a toy or imitation gun could also be treated as a "dangerous weapon" under the reasoning of the court, provided it was used in the manner of a real loaded gun to intimidate.

Rape

In *State v. Bolden*,[3] the court has followed dual trends discernible in prior decisions by stretching the concept of relevance with respect to state of mind evidence in the prosecution context, and restricting it in the defense context. These trends have reached such extremes in dealing with evidence problems that it seems appropriate to question whether the evidence rulings have not *de facto* changed the substantive definitions of the Code. A review of two earlier decisions illustrates the prior development of these dual trends.

In a 1954 case, *State v. Michel*,[4] the supreme court upheld a prosecution objection to a remark by defense counsel related to drunkenness as a defense to a charge of aggravated rape. Its propriety depended on the theory that R.S. 14:15(2) provides that intoxication is a defense for crimes requiring specific criminal intent and that a prosecution for aggravated rape involves such a crime. The court held that specific criminal intent is not a necessary element of aggravated rape, distinguishing *State v. Ferrand*,[5] relied on by Michel's defense counsel, on the grounds that *Ferrand* involved attempted rape, and that all attempt crimes, under R.S. 14:27, require specific intent. Actually, the crime charged was not attempted aggravated rape, but simply aggravated rape, as in *Michel*. Attempted aggravated rape was the verdict returned by the jury. Noting that such a verdict was responsive to a charge of aggravated rape, the court in *Ferrand* found that the prosecution's evidence of a prior offense by the defendant was admissible to show intent. Of course, the very same reasoning would have called for an opposite holding on the intent problem in *Michel*, so the court's effort in *Michel* to distinguish *Ferrand* was rather unconvincing. The only truly

3. 257 La. 60, 241 So.2d 490 (1970).
4. 225 La. 1040, 74 So.2d 207 (1954).
5. 210 La. 394, 27 So.2d 174 (1946).

distinguishing feature of these two cases is that in *Michel* the evidence relating to subjective mental state would have benefitted the defense and was held irrelevant; in *Ferrand*, it benefitted the prosecution and was held relevant.

State v. Bolden combined the flexible judicial approach of both earlier cases, holding in effect that evidence which would logically tend to show the unquestionably relevant state of mind of the complaining witness (consent to sexual relations), because it would serve to impeach the complainant, is inadmissible, but evidence of an unrelated alleged rape by the defendant two years earlier is admissible. This writer's complaint with the *Bolden* decision is directed to the patent unfairness of excluding relevant evidence on the consent problem; it is not against showing subjective knowledge or specific criminal intent by use of evidence of prior similar criminal acts. Indeed, there is ample jurisprudence and statutory law supporting the use of prior similar criminal acts to show actual knowledge or specific intent. Whether or not rape requires any intent element at all is immaterial, since attempted rape is responsive and that crime certainly requires specific intent.

In a crime with so severe a penalty as aggravated rape,[6] it cannot be effectively urged that it does not require at least a general intent.[7] Consequently, the dissent of Justice Barham in the *Bolden* case, to the extent it relies on the theory that rape does not require intent, knowledge, or purpose, is less convincing than the major dissenting reasons given separately by him and Justice Tate, which also lack force.

The reasoning of the dissenting justices is that evidence of prior similar criminality is *too* relevant on the question of criminal intent and is therefore irrelevant—*i.e.*, it is prejudicially pursuasive and violates the "great principle that a party is not

6. *See* State v. Birdsell, 232 La. 725, 95 So.2d 290 (1957), *reaff'g* State v. Johnson, 228 La. 317, 82 So.2d 24, 30 (1955), which held "no crime can exist without the combination of a criminal act and a criminal intent, or an evil motive, or with a guilty knowledge of its consequences." This principle was stated in the context of a crime with a serious penalty (narcotics possession) and used in both cases to justify prosecution usage of evidence of prior criminality.

7. *See* Askew v. State, 118 So.2d 219 (Fla. 1960). The Florida Supreme Court held that the common law crime of rape, although no mention of intent occurs in its definition, involves a general intent, which can be inferred from the act itself. Such an intent approach would seem correct in Louisiana also. Of course, general intent usually involves a consideration of whether the act implies the intent, under the objective test of whether the offender doing an act "must have adverted" to the consequences.

to be convicted of one crime by proof that he is guilty of another." To this writer, the principle is *not* so "great" if it blocks consideration of overt acts which plainly and logically relate to the state of mind necessary to show guilt or innocence of the crime charged; but it is only a general principle, never intended as an all-embracing rule to exclude evidence of overt acts that reasonably tend to show actual knowledge or intent, or other relevant state of mind evidence.[8]

The dissenting justices did not concern themselves with the majority rejection or limitation of a defense right to attack the chastity of the victim, but the subject is worthy of comment. It is submitted that judicially created restrictions on the admissibility of evidence of a crime, especially when such restrictions effectively diminish a statutorily defined defense, is clearly violative of the "purely statutory"[9] scheme of substantive criminal law which Louisiana is supposed to have. It is against reason to be bound by old cases which recognize hearsay and reputation as relevant evidence of lack of chastity, but ignore direct evidence of actual acts of promiscuity as irrelevant to the issue of whether the female may have been a person who very likely consented. Under plain *statutory* policy, there should be no doubt of the absence of the female's consent in order for rape to be found. That policy is implicit in the requirement that there be resistance to the utmost unless such resistance would be futile, or incompentency prevents resistance.

Defense counsel in subsequent rape trials should make clear that any defense evidence concerning the victim's chastity is not offered to impugn her credibility; but independently of her credibility, it is offered to show probability of consent, or mistaken belief that consent was present. Cases cited by the court to support its exclusion of the evidence on an impeachment rationale actually sustain admission of such evidence as relevant if not used for impeachment.

Burglary

In *State v. Thompson*,[10] in passing upon the materiality and relevancy of evidence offered to corroborate testimony that a theft had taken place, the court approved per curiam remarks

8. *See* State v. Reeves, 193 La. 186, 190 So. 374 (1939).
9. *See* the Reporter's Comment to LA. R.S. 14:7 (1950).
10. 256 La. 1019, 240 So.2d 899 (1970).

of the trial judge which could be construed as stating that the fact of a theft having occurred is a necessary element for finding commission of a burglary. It seems correct to hold that testimony of the commission of the theft, after entering the premises, is quite relevant to prosecution for burglary because it is evidence of an intent to commit theft when entering. Such a holding should not be misconstrued as suggesting that it is necessary to show the actual commission of a theft. The plain language of both article 60 and article 62 evidences that it is sufficient, provided other requisites are present, to have an intent to commit a theft upon entering for the crime of burglary to be consummated.

Theft of Partnership Property

The much-criticized[11] opinion of *State v. Peterson*[12] was reversed in *State v. Morales*.[13] Noting that *Peterson* was rendered by less than a full court, and at that, a closely divided court, the supreme court correctly reviewed the law on partnership to conclude that the word "another," as used in article 67 of the theft article, did include a partnership. This was based upon the finding that a partnership constitutes a separate legal entity in Louisiana. It follows that it is a "person or legal entity" within the meaning of article 2(1). Consequently, a partner may in fact steal from a partnership in which he is a member. This decision seems correct as a matter of analysis of the letter of the law and the purpose behind article 67 of broadening theft to encompass *all* conceivable factual situations where there may be actual stealing by whatever name.

The technical correctness of the reversal of the *Peterson* decision does not necessarily mean that to permit indiscriminate prosecution for theft in partnership situations is wise law. The intimacy and informality of many partnership relations and the consent involved is analogous to a sort of business "marriage." Bitterness upon breaking up may lead to the misuse of the criminal process whenever one partner thinks he has been wronged by the other. Just as rape is impossible between marital partners, perhaps theft ought to be deemed impossible between

11. *See The Work of the Louisiana Supreme Court for the 1956-1957 Term—Criminal Law and Procedure*, 18 LA. L. REV. 120 (1957).
12. 232 La. 931, 95 So.2d 608 (1957).
13. 256 La. 940, 240 So.2d 714 (1970).

business partners. On the other hand, the existence of the partnership clearly should not be a license to steal. This is an important area where wise judgment of prosecutors—or control by the courts—will have to be exercised if the substantive law is not to be put in need of restrictive repair.

Robbery

In *State v. Montegut*,[14] the court clarified the definition of "armed robbery" noting that, although the definition contained in R.S. 14:64 did not itself employ the word "intent," an intentional element is present in the crime. Noting that armed robbery is defined as theft, plus the presence of other circumstances defined in R.S. 14:64, the court made reference to the definition of theft, which of course does require a specific criminal intent. By this reasoning it justified evidence of other similar acts of criminality as proof of the intent, under the much-used if not abused rule that evidence of similar acts may be used to prove intent.

Insanity

The particular facts of *State v. Edwards*[15] were that an eighteen-year-old boy who had about an eight-year-old mental age, with an IQ of 59, was held to be able to understand the nature of the charges against him and to assist counsel in his defense. The problem was not one of a substantive defense of insanity (although that defense was also unsuccessfully made), but rather the capacity of the boy to stand trial. But it is evident that the courts would not treat the substantive problem with any greater understanding of the capacity, or rather the incapacity, of marginal mental retardates.

Edwards may indeed be the law on insanity, as a special concurring opinion by Justice Tate noted pointing to established precedent. However, the shocking facts of the exceedingly limited mentality of a defendant who was forced to stand trial raise serious questions as to the sanity of a system of justice which in the twentieth century allows persons with seven to eight-year-old mental ages to stand trial, probably without the benefit of a substantive defense of insanity, and be fully criminally responsible under objective rules designed for the famous

14. 257 La. 665, 243 So.2d 791 (1971).
15. 257 La. 707, 243 So.2d 806 (1971).

"reasonable man" of the law. It is time for organizations like the Louisiana Association for Retarded Children, the Louisiana Mental Health Association, and others concerned with the welfare of the mentally disabled, mentally deficient, or the mentally ill to note the procedural and substantive nuances of criminal insanity problems and, as Justice Tate intimated ought to be done, to persuade the legislature to undertake serious reform of the whole field of insanity in criminal law.

In *State v. Square*[16] the court was faced with basically the same legal problem. The particular facts of the alleged incompetence of the defendant were not fully stated, but the case is interesting for the clarification of the point that low-grade or subnormal intelligence, although not determinative of the capacity to stand trial, is a factor to be considered and is relevant to an inquiry as to the competency to stand trial.

Concealed Weapons

In *In re Ogletree*,[17] a juvenile delinquency proceeding, the court considered whether the minor's act in carrying a pistol in his waistband constituted violation of the concealed weapon statute, R.S. 14:95(1). The only prior Louisiana judicial interpretations of the meaning of "concealment" indicated that the partial concealment would constitute concealment. An exactly opposite result was reached by the court of appeal holding that the object must be *fully* hidden from view in order to constitute concealment.

This writer is of the opinion that neither the old pre-Code jurisprudence, rejected in *Ogletree*, nor the *Ogletree* approach is sound. The problem is whether there has been an *intentional* concealment. If a part of the weapon is openly displayed, such open display is hardly consistent with an intent to conceal. If a part is subject to view, not through an intention for it to be openly displayed but merely by virtue of sloppy concealment, then it seems there may be intentional concealment even though there is not full concealment. These are *jury* questions and there ought not be any simplistic rule designed to govern both the rural outdoorsman and the city street roamer by so

16. 257 La. 743, 244 So.2d 200 (1971).
17. 244 So.2d 288 (La. App. 4th Cir. 1971).

mechanistic a standard as that of whether the weapon was partially or fully concealed.

Narcotics

In *State v. Barnes*,[18] Justice Barham rendered a dissent pointing out that all of the cases which had read in the requirement of guilty knowledge or intent in connection with narcotics statute violations "did so as a basis for allowing the State to introduce evidence of the defendant's prior or subsequent convictions or other similar acts or offenses from which could be inferred his guilty knowledge. . . ."[19] He then complained strongly about the refusal of the court to hold that a special instruction should have been given, as requested, to unequivocally inform the jury that guilty knowledge is an essential element for the crime of possession of narcotics. On rehearing, which again affirmed the conviction, Justice Tate dissented, strongly complaining about this failure to afford the defendant the benefit of state of mind rules.[20] This dissent reinforces the view that "evidence" decisions have unduly modified substantive criminal law and effectively caused the definitions of crimes and defenses to be different for the prosecution and defense.[21]

MODERN SOCIAL LEGISLATION

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UNEMPLOYMENT COMPENSATION

The Louisiana Employment Security Law is designed "to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance."[1] The provisions of the statute are liberally interpreted to give the greatest effect to the intent of this social legislation.[2]

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18. 257 La. 1017, 245 So.2d 159 (1971).
19. *Id.* at 1034, 245 So.2d at 165.
20. *Id.* at 1048, 245 So.2d at 171.
21. *See* text accompanying notes 3-11 *supra* for a discussion concerning the history of the jurisprudence, recently followed in *State v. Bolden*, showing that the Louisiana Supreme Court holdings on state of mind evidence must be taken in the context of whether this evidence benefits the prosecution or the defense. *State v. Barnes* also makes this point.

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1. LA. R.S. 23:1471 (1950).
2. Smith v. Brown, 147 So.2d 452 (La. App. 2d Cir. 1962).