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Evidence

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EVIDENCE

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RELEVANCY

Other Crime Evidence—Penalty Phase of Capital Case—Necessity of Prosecution's Giving Notice as to Intent to Offer Evidence of Other Crimes

In *State v. Hamilton*,[1] despite negative answers by the prosecution to defendant's discovery request about the prosecution's intent to introduce other crime evidence, the prosecution in the penalty phase was permitted to introduce very damaging evidence that several hours prior to the charged crime, the accused had committed another armed robbery (a crime for which he had not been convicted). In a forceful opinion authored by Justice Lemmon, the majority of the court held that under the circumstances the failure to give notice of the other crime evidence constituted reversible error necessitating retrial of the penalty issue. After noting that the Louisiana Constitution requires that an accused be notified of the nature and cause of the accusation against him, Justice Lemmon stated:

> The defendant's constitutional right to confront and cross-examine the witnesses against him *at trial* under La. Const. Art. I § 16 (1974) would be severely impaired if the defendant were not informed within a reasonable time *before trial* that he must be prepared to meet evidence relating to crimes other than the charged crime. Moreover, fundamental fairness dictates that an accused receive adequate prior notice that evidence of unrelated criminal activity may be offered by the prosecutor in an effort to punish him for the charged crime.[2]

The writers fully agree.

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1. 478 So. 2d 123 (La. 1985).
2. Id. at 132.

Other Crime Evidence—Specificity of Notice Required as to Other Crime Evidence in Penalty Phase of Capital Case

In *State v. Ward*,[3] the court held that in the penalty phase of a capital case, a defendant is entitled to less specific notice than in the guilt phase of the trial. Justice Lemmon in his concurring opinion took the position that statements in bills of information charging such other crimes are inadmissible evidence of the commission of those other crimes. Further, Justice Lemmon opined that for evidence as to those other crimes to be admissible, the evidence must be "clear and convincing." The writers agree.

WITNESSES

Attacking Credibility—Bias, Interest, or Corruption—Significance of Denial of Right of Confrontation

In *State v. Nash*,[4] the Louisiana Supreme Court re-emphasized the importance of the constitutional right of an accused to show the bias, interest or corruption of a prosecution witness, and used exceptionally strong language in announcing the relief to which an accused is entitled if denied this basic right. Although the accused in *Nash* had been permitted to show both the prior conviction of a critical prosecution witness, and the witness's willingness to participate in a drug transaction to which the accused was allegedly a party, the court held that it was reversible error for the trial court not to permit the defense to go further and show that at the time of the alleged crime, the witness, presumably because of his participation in the drug transaction in question, was subject to revocation of parole in another state and to criminal prosecution in Louisiana. Underlining the importance of the right, Justice Dennis, relying on United States Supreme Court authorities,[5] spoke for a majority of the court: "Defendant was thus denied the right of effective cross-examination, a constitutional error in the first magnitude which no amount of showing of want of prejudice would cure."[6] Perhaps because of non-acquiescence in the broad sweep of this language re reversible error on this issue, Justices Lemmon and Blanche, instead of joining in the opinion, concurred in the reversal.

It should be noted that subsequent to the Louisiana Supreme Court decision in *State v. Nash*, the United States Supreme Court in *Delaware*

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3. 483 So. 2d 578 (La. 1986).

4. 475 So. 2d 752 (La. 1985).

5. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974); Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245 (1966); Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748 (1968).

6. 475 So. 2d 752, 756 (La. 1985).

v. Van Arsdall,[7] under analogous circumstances, rejected an automatic reversal rule and instead applied a harmless error analysis. Whether a majority of the Louisiana Supreme Court will now retreat from the automatic reversal rule applied in this area in *Nash* remains to be seen.

Attacking Credibility—Bias, Interest, or Corruption

Another very interesting case in the area of bias, interest, or corruption is *State v. Trahan*.[8] Six members of the court, speaking through Chief Justice Dixon, found it reversible error for the trial court, in a prosecution for aggravated rape, to exclude from evidence a tape recording, made surreptitiously by the defendant's father, of a conversation between defendant's father and the husband of the alleged victim, during the course of which conversation the husband allegedly offered to "drop the charges" in exchange for the payment of $75,000. Interestingly, in *Trahan* the court did not advert to whether the reversal was necessarily required as a matter of constitutional law.[9] In advance of trial, the tape recording of the conversation had been furnished to the prosecution by the defense and had been played by the prosecutor before the alleged victim and her husband. The prosecution and the defense took very different postures with respect to the conversation. In its opening and closing statements to the jury and in its development of the testimony at trial, the prosecution took the position that the defendant's father had approached the husband and had made an effort to bribe him. On the other hand, the defense (whose attempt to offer the tape in evidence had been unsuccessful) argued in part that the tape was relevant as tending to impeach the testimony of the husband and alleged victim to show bias, interest or corruption.

At trial the husband had denied making an offer to the Trahans. Although denying any complicity in any such offer, the wife had admitted in her testimony that she and her husband had discussed dropping the charges in return for a payment of money, "but added that she never seriously considered accepting the money."[10] Although the defendant in his testimony at trial admitted that he had had sexual relations with the alleged victim, he claimed that she had consented to the act.

In the opinion of the writers, the supreme court was clearly correct in finding reversible error in the trial court's refusal to permit the jury to hear the tape recording; the tape recording was very relevant to the credibility of the husband and the alleged victim. If the husband and the alleged victim had in fact been willing to "drop" the criminal charges

7. 106 S. Ct. 1431 (1986).
8. 475 So. 2d 1060 (La. 1985).
9. See supra note 6 and accompanying text.
10. 475 So. 2d at 1062.

for such a payment, the believability of their trial testimony is substantially weakened. The tape recording was splendid evidence as to the exact nature of the conversation, and the writers agree that it should have been admitted.

PRIVILEGE

Instruction by Trial Court as to Existence of Testimonial Privilege

In *State v. Ward*,[11] a majority of the Louisiana Supreme Court held that the trial court did not commit error in refusing to instruct an accused's wife that she had a privilege not to testify against her husband. The supreme court stated that except as to the privilege against self-incrimination, no such instruction is required by Louisiana statute or jurisprudential rule. In a concurring opinion, Justice Lemmon took the position that at least when requested to do so, the trial court should instruct the accused's wife that she could not be compelled to testify against her husband.

In the opinion of the writers, the position taken by Justice Lemmon is eminently sound. Only a brief statement by the trial court would have been sufficient to clarify the matter and make clear to the witness what the law in fact is. Statements of the law by defense counsel to the witness wife might not have appeared to her authoritative, and it would have been a simple matter for the trial court to have informed the witness as to her legal rights. Although no positive pronouncement of Louisiana statute or jurisprudential rule so dictated, none then or now prohibits a trial court, when requested by defense counsel, to instruct a witness as to the existence of a privilege, and it is to be hoped that in the future, trial courts will follow the salutary procedure suggested by Justice Lemmon. The *Ward* case was not, however, an attractive case for the adoption of such a rule, and Justice Lemmon concluded that the refusal in that case to so instruct should be regarded as harmless error.[12]

Reporter Privilege—Scope of Privilege and Procedural Protections Available to Reporter

In re Burns[13] is one of the rare cases reaching the appellate courts of Louisiana relative to the reporter privilege.[14] Although the circum-

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11. 483 So. 2d 578 (La. 1986).

12. Justice Lemmon stated "the tenor of her testimony demonstrated that this error by the trial judge was also harmless." Id. at 592. The accused was on trial for killing the wife's stepfather, and according to the court, had sexually abused the witness wife and her children. The wife on the witness stand testified that she felt the accused, her husband, should be electrocuted because he "messed up a lot of lives." Id. at 585.

13. 484 So. 2d 658 (La. 1986).

14. La. R.S. 45:1452 (1982) provides: "Except as hereinafter provided, no reporter

stances surrounding the case are not altogether clear, it would seem that a newspaper carried certain information about an alleged confession by a person accused of murder. At the behest of the accused individual, the trial court held a hearing "for the purpose of revoking the reporter's privilege against compulsory identification of 'any informant or any source of information obtained by him from another person while acting as a reporter' contained in R.S. 45:1452."[15] At the hearing, counsel for the accused questioned the reporter as to whether the source for the newspaper story "was an individual employed by the clerk of court."[16] When the reporter, claiming privilege, refused to answer, the trial court held that the privilege was inapplicable because the question put to the reporter did not go to the "source" of the story as required by the statute, but only to "information on the source's employment."[17] The trial court found the reporter in contempt and sentenced him to jail. The Louisiana Court of Appeal denied writs and the Louisiana Supreme Court, granting writs, reversed the trial court. The supreme court held that the reporter privilege extends not merely to the actual name of the source of the reporter's story, but to "any disclosure of information, such as place of employment, that would tend to identify him."[18] Further, the court held that the procedural safeguards provided for reporters claiming the privilege[19] were applicable—i.e., the reporter was to have "the right to appeal the ruling of the trial court without fear of a contempt conviction or imprisonment"[20] pending the decision on appeal.[21]

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shall be compelled to disclose in any administrative, judicial or legislative proceedings or anywhere else the identity of any informant or any source of information obtained by him from another person while acting as a reporter." La. R.S. 45:1453 (1982) provides:

> In any case where the reporter claims the privilege conferred by this Part, the persons or parties seeking the information may apply to the district court of the parish in which the reporter resides for an order to revoke the privilege. In the event the reporter does not reside within the state, the application shall be made to the district court of the parish where the hearing, action or proceeding in which the information is sought is pending. The application for such an order shall set forth in writing the reason why the disclosure is essential to the protection of the public interest and service of such application shall be made upon the reporter. The order shall be granted only when the court, after hearing the parties, shall find that the disclosure is essential to the public interest. Any such order shall be appealable under Article 2083 of the Louisiana Code of Civil Procedure. In case of any such appeal, the privilege set forth in R.S. 45:1452 shall remain in full force and effect during pendency of such appeal.

15. 484 So. 2d at 658.
16. Id. at 659.
17. Id.
18. Id.
19. La. R.S. 45:1453 (1982).
20. 484 So. 2d at 659.
21. In so holding, the court apparently equated the appeal provided by La. Code Civ. P. art. 2083 with an application for writs.

Noting that since the trial court hearing, the informant had come forth and revealed his own identity, instead of remanding the case to the trial court for it to determine whether revelation of the source was "essential to the public interest," the supreme court itself reversed the reporter's contempt conviction.

An intriguing aspect of the case concerns the standing of the accused to invoke the trial court hearing in the first instance. Arguably the trial court, under its inherent power,[22] is authorized *sua sponte*, or on the suggestion of either the prosecutor or the accused, to order such a hearing.

HEARSAY

Business and Public Records—Need for Firsthand Knowledge

In *Griffin v. Succession of Branch*,[23] plaintiffs, claiming to be illegitimate children of the decedent, asserted an interest in the succession. To prove that they were children of the decedent, plaintiffs attempted to introduce in evidence records of the Department of Health and Human Resources containing an entry by an unavailable social worker that the decedent had affirmed, inter alia, that the claimants were his children.[24] Reversing the position taken by the trial court and the court of appeal, the Louisiana Supreme Court held that the records were admissible under either the business records or public documents exception to the hearsay rule. Under the circumstances, the writers agree. Although the supreme court does not discuss the fact that the person providing the information to the entrant was not himself an employee (and traditionally lack of firsthand knowledge of the entrant would be fatal to the availability of such an exception),[25] it appears that the circumstance that the out-of-court declaration to the employee itself also qualified for admissibility under an exception to the hearsay rule or as non-hearsay (as a declaration against interest or as an admission) resolves what otherwise may have been an insurmountable bar to admissibility.[26]

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22. La. Code Crim. P. art. 17 provides:

> A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

23. 479 So. 2d 324 (La. 1985).

24. Id. at 329; 452 So. 2d 344, 350 (La. App. 1st Cir. 1984) (Ponder, J., dissenting).

25. See McCormick on Evidence §§ 306, 315 (E. Cleary 3d ed. 1984) [hereinafter cited as McCormick on Evidence]; State v. Nicholas, 359 So. 2d 965, 969 n.2 (La. 1978).

26. See Fed. R. Evid. 805 relative to admissibility of double hearsay.

PRESUMPTIONS

Presumptions—Signification of Term in Criminal Statutes

One of the most amorphous terms in the law is "presumption." Rather than have a precise, well understood meaning, it connotes different things to different people, including lawyers and judges, even in the same context.[27] It is particularly disturbing when the user himself cannot with precision define the specific signification intended by him. Although in many legal contexts purposeful ambiguity may be very desirable, unintended ambiguity, as we all know, can be very dangerous indeed. When in a substantive criminal statute it is provided that fact "A" is an essential element of a stipulated crime, and it is then stipulated that proof of fact "B" creates a "presumption" of the existence of fact "A" (or similarly that fact "B" is prima facie evidence of fact "A"), what does such a formulation mean? Further, how does one resolve the problems created by such language?[28]

In *State v. Lindsey*,[29] the Louisiana Supreme Court, in a well-considered decision authored by Justice Dennis, wrestled mightily with the problem and reached a conclusion that will have reverberating significance as to a number of criminal statutes.[30] At issue in *Lindsey* was Louisiana Revised Statutes 14:71, the well-known "worthless check" statute, which makes it criminal to issue a check with intention to defraud,[31] and provides that the offender's failure to pay within ten days following actual or constructive notice "shall be presumptive evidence of his intent to defraud." What exactly is the meaning of the quoted phrase? In *Lindsey*, the court agreed with the trial court that if the provision in question established a "mandatory presumption," it would be unconstitutional.[32] The court noted that "failure to pay a

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27. "One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.' One author has listed no less than eight senses in which the term has been used by the courts." McCormick on Evidence § 342. For the latter proposition, the authors cite Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196-207 (1953).

28. See County Court of Ulster v. Allen, 442 U.S. 140, 99 S. Ct. 2213 (1979).

29. 491 So. 2d 371 (La. 1986).

30. The decision itself lists a number of criminal statutes containing such provisions.

31. La. R.S. 14:71 (1986).

32. The court stated:

> Mandatory presumptions are of two types: conclusive presumptions, which remove the presumed element from the case altogether if the state proves the basic predicate facts; and mandatory rebuttable presumptions, which relieve the state of the burden of persuasion on the presumed element unless the defendant persuades the finder of fact not to make such a finding.

491 So. 2d at 374.

worthless check within ten days of constructive notice of its nonpayment"[33] does not *necessarily* indicate that the instrument was originally issued with intent to defraud; there may be a number of other plausible explanations. Although frankly recognizing that what the legislature intended in using the formulation employed is doubtful, the supreme court, following a well-known guide to statutory interpretation designed to save statutes from constitutional attack, interpreted the act as creating a "permissive" rather than a "mandatory" presumption.[34] Thus interpreted, Louisiana Revised Statutes 14:71 authorizes, *but does not require*, the trier of fact to infer the intention to defraud from the fact of nonpayment within ten days under the circumstances. Of great significance, the court stressed that a similar interpretation is henceforth to be given to the use of the word "presumption" (and "prima facie evidence") in similar criminal statutes. The court notes that such an interpretation departs from prior rulings.[35] The decision is an important one and bears a careful reading by all concerned. Presumptions and burden of proof will be the subject of treatment in a forthcoming issue of this Review.

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33. Id. at 373.

34. For a lucid discussion of permissive and mandatory presumptions, see McCormick on Evidence §§ 342, 346, 347.

35. See, e.g., State v. Williams, 400 So. 2d 575 (La. 1981), and State v. McCoy, 395 So. 2d 319 (La. 1980).