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Vance R. Dittman Jr.

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ONE YEAR REVIEW OF EVIDENCE

BY VANCE R. DITTMAN, JR.*

During 1962 the Supreme Court of Colorado rendered decisions which involved several significant interpretations of the rules of evidence. This review will attempt an analysis of these cases in the respective categories involved. Consistent with the intent of this one year review, no reference will be made to cases applying rules of evidence in orthodox fashion to the frequently recurring situation presented by the ordinary trial. Rather, the cases selected for discussion are those which appear to decide a novel question before this court.

The use of demonstrative evidence came in for the usual objections that it is too inflammatory and prejudicial, but in each instance the supreme court found that the evidence served a legitimate purpose and that its use was proper.

In *Wooley v. People*,[1] objection was made to the admission of certain photographs of the body of Wooley's alleged victim, and also to a photograph of Wooley in the act of demonstrating to the police officers exactly how he had committed the crime. Wooley had made this demonstration following his confession, but at the trial he contended that the shooting was accidental. The photograph indicated that the shooting was intentional.

As to the admission of the photographs of the body, it showed two things which were essential to the prosecution's case. The first was the wound in the head, which was the handiwork of Wooley; the other, the state of decomposition which resulted from Wooley's attempt to conceal the body. The photographs corroborated both Wooley's confession and other testimony as to the nature of the wound and of the disposition of the body. Obviously the photographs brought vividly before the jury the details of the crime. But the court held that the photographs were admissible, being "competent evidence of anything which it is competent for a witness to describe in words,"[2] and that their shocking nature would not make necessary their exclusion, since they disclosed only conditions which were the direct result of Wooley's action and which were relevant to the issue in the case.

As to the photograph of Wooley's demonstration to the officers, the court pointed out that since there was no suggestion that an eye witness could not relate what he had seen Wooley do in the demonstration, the photograph not only corroborated what such eye witnesses had said, but also gave meaning to the demonstration. There was no error, therefore, in receiving the photograph in evidence. This was particularly true since the photograph indicated an intentional act, whereas the testimony offered on behalf of Wooley indicated that it was accidental.

This case clarifies considerably the role which demonstrative evidence may play in substantiating verbal testimony, even though

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* Professor of Law, University of Denver College of Law.
1 367 P.2d 903 (Colo. 1962).
2 *Id.* at 907.

such evidence may portray the facts much more vividly than might be necessary to establish the existence of such facts. The evidence is not to be excluded merely because the situation shown might be established by words alone.

This aspect of the law as to demonstrative evidence was developed still further by the supreme court in the case of *People v. Spinuzzi.*[3] This was a writ of error pursuant to Colo. Rev. Stat. § 39-7-27 (1953) on behalf of the people for a review of a decision of the trial court on questions of law. Testimony at the trial was to the effect that the deceased fell, with defendant on top of him; that defendant had a gun in his hand; that deceased was holding his hand in front of his face; that death was caused by a bullet in deceased's brain; that a shot was fired at that time and that there was no other shot fired on the occasion and, finally, that the bullet which lodged in deceased's brain and caused his death had passed through the palm of deceased's hand, and that this hand bore powder burns where the bullet entered. During the prosecution's case the district attorney offered in evidence a photograph of deceased's body to establish his identify and also to show the bullet hole in the hand and in the skull, as well as to illustrate the path which the bullet took, but the trial court restricted the use of the photograph to the question of identity. This was held to be error, since it has been consistently held, in Colorado, "that photographs are competent evidence of anything which it is competent for a witness to describe in words."[4] The court held that the prosecution was entitled to have the jury observe the picture as a portrayal of the bullet wounds, even though they had already been described by the testimony of witnesses.

The rule as to the use of demonstrative evidence was succinctly stated by the court in *Jensen v. South Adams County Water and San. Dist.*,[5] as follows: "Where the only purpose of a photograph is to inflame the jury, the pictures should be excluded. But where, as here, they portray the injury caused by the accident, they may not be excluded on the sole ground that they have 'emotional overtones' or will be embarrassing."[6]

A frequently recurring problem arises as to the admissibility of evidence of separate and distinct offenses of a similar nature to that of the offense which is involved in the trial, where such evidence is offered to prove the existence of an intent, plan, scheme, or to establish identity. In *Wooley v. People*,[7] a variation on this rather common situation arose. To prove a motive for the felonious killing, the prosecution offered evidence of another but completely *dissimilar* offense. This evidence related to Wooley's cashing of a number of checks payable to the victim of the homicide and delivered to his residence after his death. Wooley succeeded in cashing these checks by devious means, including forgery, and realized about $1400 from them. The court held that the usual rule as to the admissibility of evidence of other similar offenses did not apply to this situation, but that this evidence was admissible as an inte-

3 369 P.2d 427 (Colo. 1962).
4 *Id.* at 431.
5 368 P.2d 209 (Colo. 1962).
6 *Id.* at 212.
7 Note 1 *supra*.

gral part of the total picture surrounding the homicide, to establish the motive for the offense—to kill the victim for profit.

In connection with the use of evidence of separate offenses the court decided a question of first impression in this state in *Bizup v. People.*[8] Here the defendant contended that evidence of the separate but related offenses was inadmissible because he had confessed to them and that the only purpose of introducing the evidence was to prejudice the jury by making the killing appear more heinous. The court rejected this contention with the comment that "an admission by a defendant does not prevent the state from presenting separate and independent proof of the fact admitted."[9]

What appears to be a question of first impression in Colorado was involved in *Jordan v. People.*[10] Here a statement made by the defendant had been reduced to writing but the defendant had refused to either read it or sign it, so its admission as a confession was denied. After establishing its admissibility by showing the basic facts required to make the statement admissible as a past recollection recorded, however, the statement was read to the jury, in its entirety. To this procedure the defendant objected because, he insisted, the witness must first be shown the writing and must state that it does not revive his recollection, before the writing may be read to the jury. The witness was not asked, and he did not state, whether the document revived his present recollection.

The court disapproved any rule which requires that the absence of a present recollection must be shown as a preliminary to the introduction of past recollection recorded, and relied upon a statement by Professor Wigmore, which, in pertinent part, is as follows:

> Is the use of past recollection necessary (1) because in the case in hand there is not available a present actual recollection in the specific witness, or (2) because in the usual case a faithful record of past recollection, if it exists, is more trustworthy and desirable than a present recollection of greater or less vividness?
>
> The latter view, it would seem, is more in harmony with general experience, as well as with the attitude of the judges who early vindicated the use of past recollection. A faithful memorandum is acceptable, not conditionally on the total or partial absence of a present remnant of actual recollection in the particular witness, but unconditionally; because, for every moment of time which elapses between the act of recording and the occasion of testifying, the actual recollection must be inferior in vividness to the recollection perpetuated in the record.[11]

The court added that testimony of admissions of the accused should be accurate and that the exact words contained in the writing would obviously be more reliable. The court then enunciated the general rule applicable to such situations in the following words: "We are persuaded that the admissibility of a past recollection recorded does not depend upon the absence of

8 371 P.2d 786 (Colo. 1962).
9 *Id.* at 789.
10 376 P.2d 699 (Colo. 1962).
11 3 Wigmore, Evidence § 738 (3d ed. 1940).

a present recollection."[12] This rule makes admissible the authenticated writing, in the first instance, whether the situation is one in which the witness would be likely to have an independent recollection or not and this becomes a matter of irrelevant inquiry.

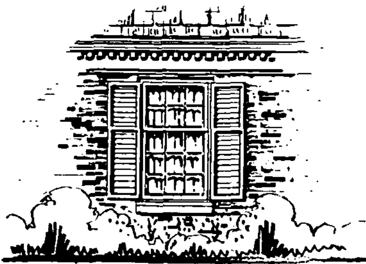
For the first time the supreme court had occasion to consider the reach of the extremely important decision of the United States Supreme Court in *Mapp v. Ohio*.[13] It was urged by the defendant, in *Peters v. People*,[14] that certain evidence admitted against the accused had been secured in violation of the safeguards set up in *Mapp*. A motion in the trial court that the accused be permitted to offer testimony to show the circumstances connected with the search and seizure was denied. The accused argued that this constituted reversible error.

Unfortunately for the enlightenment of the bar, the court determined that the evidence clearly indicated a permissive search and that there was nothing whatever in the record to indicate an unreasonable search and seizure, within the proscription of *Mapp*. The only indication of the attitude which may be adopted by the court as to a definition of "unreasonable" is to be found in certain language, which is clearly dictum, as follows:

> We conclude that the decision of the Supreme Court of the United States went no further than to exclude in the state courts the use of evidence obtained by way of an unreasonable search and seizure as forbidden by the Fourth Amendment to the United States Constitution. It does not exclude all evidence which might be obtained as an incident to a lawful arrest, nor does it preclude the admission of all evidence which may have been obtained without the sanction of a search warrant.[15]

The court was not required to answer the much debated question as to whether the state court may set up its own standards of reasonableness, or whether the state is bound to follow the same standards established by the federal courts in proceedings in those courts. This answer must be forthcoming in another case at another day and only the Supreme Court of the United States can finally resolve the question.

12 Note 10 *supra* at 703.
13 367 U.S. 643 (1961).
14 376 P.2d 170 (Colo. 1962).
15 *Id.* at 175.



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