Buffalo Law Review

Volume 11 | Number 1 Article 76

10-1-1961

Evidence—Conduct of Counsel Is Reversible Error

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credibility of his own witness by showing him to be unworthy of belief. However, *since counsel was taken by surprise,* he should be permitted to interrogate as to prior inconsistent statements to refresh recollection, to draw out an explanation, and to show the witness his error.

However, nowhere in this case does the Court make any mention of surprise and nowhere does the opinion indicate that the district attorney made any showing of surprise at the trial. The question was raised by counsel for defendant in his brief on appeal, but the Court, for some reason chose not to discuss it. Of course, a discussion of surprise was not absolutely necessary to the holding of the case as the Court held that the prior inconsistent statements were *not* used to refresh recollection, but it seems that some mention of surprise was in order since it has been held to be a necessary element of the doctrine.[19] Therefore, whether the Court will in the future require a showing of the "troublesome" requirement of surprise before permitting counsel to refresh the recollection of his witness appears to be somewhat in doubt.[20]

J. S. M.

CONDUCT OF COUNSEL IS REVERSIBLE ERROR

In *People v. Steinhardt,*[21] the defendant, convicted of a felony,[22] contended that he was deprived of a fair trial. Defendant's trial lasted fifty-three days during which time the district attorney insulted the defense counsel,[23] made improper remarks to the defendant on cross examination,[24] and introduced into the record evidence completely unrelated to the subject matter of the action.[25] The Appellate Division affirmed the conviction stating that the evidence clearly

19. People v. Purtell, 243 N.Y. 273, 153 N.E. 72 (1926). See Blum v. Munzesheimer, 66 Hun. 633, 21 N.Y. Supp. 498 (1892); and Colter v. American Merchant's Un. Ex. Co., 56 N.Y. 585 (1874), for dicta that limits the doctrine to instances in which the calling party is surprised by his witness' testimony.

20. McCormick, supra note 5 at 72, where the author recommends the abolition of a showing of hostility or surprise in line with his other argument that the trier of fact should be allowed to use prior inconsistent statements as affirmative evidence of a material fact.

21. 9 N.Y.2d 267, 213 N.Y.S.2d 434 (1961).

22. Defendant was convicted of criminally buying and receiving stolen property and of concealing and withholding stolen property under N.Y. Penal. Law § 1308.

23. Appellant's Brief, 7768 Cases & Points, Case 10, pp. 28-30:

"Now, your Honor, that stirring Sarah Bernhardt speech makes me want to puke. . . ."

"The air that . . . [defense counsel] gives stinks to high heaven."

"I have seen desperate men trying cases but never as desperate as this. . . . [Defense counsel] now is fishing off the bottom of the barrel."

"Some time subconsciously the truth seems to come out of . . . [defense counsel's] mouth."

24. Id. at 26:

"Well, sir, I am not allowed, due to the rules of evidence and due to the fact that I am a District Attorney, to state to you now what you are. . . ."

25. In cross examination of the defendant's witness, the district attorney asked if the witness had ever been convicted of a crime. In redirect examination, defense counsel established that the witness was a veteran of the Second World War, had fought and had been wounded at the Battle of Anzio. These answers prompted the prosecutor on recross examination to review his military history during the Second World War, and question the witness exhaustively on the commanders, the terrain, and the fighting at Anzio. "Your Honor, may the record show that I am a holder of the Purple Heart, and an Oak Leaf

established the guilt of the defendant as found by the jury.[26] The majority believed the conduct of the prosecutor was improper but did not affect the substantial rights of the defendant. The lone dissenter stated that the district attorney's actions were highly prejudicial to defendant's right to a fair trial and influenced the jury in their verdict. The Court of Appeals unanimously reversed the Appellate Division's decision and declared that the aforementioned conduct by the district attorney, plus the undue prolongation of the trial,[27] deprived defendant of a fair trial regardless of strong evidence of guilt.

Irrespective of a defendant's guilt or innocence, the New York courts have traditionally endeavored to safeguard the accused's fundamental right to a fair trial by jury.[28] The division between the Appellate Division and the Court of Appeals is indicative of the very essence of this difficult problem. The courts are confronted with this question: Whether or not the jury was influenced in their verdict by the prejudicial tactics utilized by counsel? Error is substantial and warrants a reversal of the conviction when the court finds that the jury has been influenced in reaching their verdict.[29] Mere errors in the technical aspects of a trial are unavoidable, and it is recognized that these are insufficient to constitute a reversal of conviction.[30] Although in the instant case the evidence of guilt warranted a conviction, the reprehensible conduct of the prosecutor turned the trial into a sham. Nevertheless, can it be stated that the Appellate Division was unreasonable in its opinion in affirming the conviction? The court has no standard whereby it can deduce the subjective intent of the jury in attempting to ascertain whether the conduct of the prosecutor did in fact influence the jury in their verdict. On the other hand, the Court of Appeals cannot be denied their opinion because the atmosphere of the trial was seemingly outrageous.

The instant case does not clearly define improper conduct on the part of counsel which may influence a jury in their verdict. The case indicates that the court will weigh the circumstances surrounding the trial in order to determine whether the defendant has been deprived of a fair trial and will reverse a

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Cluster to the Purple Heart, the holder of a Silver Star, the holder of the Bronze Star Medal; Your Honor, I want the record to show the decorations which I hold as a result of having served in the 3rd Infantry Division, 1st Battalion, 7th Infantry Regiment, I & R Platoon."

26. 11 A.D.2d 107, 201 N.Y.S.2d 564 (1st Dep't 1961).

27. An undue prolongation of a trial is not of itself a deprivation of due process so as to deprive defendant of a fair trial. People v. Clemente, 8 N.Y.2d 1, 200 N.Y.S.2d 625 (1960).

28. People v. Meleczko, 298 N.Y. 153, 81 N.E.2d 65 (1948) (The Court of Appeals reversed the conviction where District Attorney said in summation: "In my opinion the police used remarkable restraint in not giving him [the defendant] his just dues.") See also, People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885 (1956); People v. Tassiello, 300 N.Y. 425, 91 N.E.2d 872 (1950); People v. Jackson, 7 N.Y.2d 142, 196 N.Y.S.2d 79 (1959).

29. People v. Sobieskoda, 235 N.Y. 411, 139 N.E. 558 (1923).

30. N.Y. Code Crim. Proc. § 542 provides that after hearing the appeal, the court must give judgment, without regard to technical errors or defects as to exceptions which do not affect the substantial rights of the parties. Prejudicial statements may affect the substantial rights of parties if they affect the verdict.

conviction, even though the evidence supports the verdict, if the error committed was substantial. Apologies exchanged between counsel after stormy arguments and instructions by the court will not rectify the impression created in the minds of the jury from such abhorrent proceedings.

L. H. S.

CHARACTER EVIDENCE TO PROVE PARTICULAR RELEVANT TRAITS ADMISSIBLE

In *People v. McDowell*,[30a] the Court of Appeals reversed a conviction of second degree assault, affirmed by the Appellate Division,[30b] on the erroneous exclusion of evidence. The excluded evidence dealt with defendant's reputation for peacefulness in the community in which he resided and the alleged hostility of the complaining witness.

The exclusion of the evidence regarding the hostility of the witness was clearly error, the New York rule being ". . . that the hostility of a witness toward a party, against whom he is called, may be proved by any competent evidence."[30c]

The leading case in New York on the rules governing the admissibility of character evidence is *People v. Van Gaasbeck*,[31] in which the Court reached three conclusions. First, character evidence is admissible to prove only relevant traits, *i.e.*, in a murder charge, evidence as to peacefulness is competent but soberness would not be; second, the evidence as to the relevant traits is not admissible if it is based on the witness' personal knowledge rather than his knowledge of the defendant's reputation in the community; and third, negative testimony is competent, *i.e.*, having known him for thirty years and not having heard anything contrary to a good character about him is admissible to give rise to an inference of good reputation.

In *Van Gaasbeck*, two witnesses, who had known the defendant for twenty-five to thirty years, were called. The first was asked, "What do you say his reputation is?" The objection was that there was no foundation and that it was not the proper way to show character. The second was asked, "What do you say of it?" Both questions were excluded upon objection. On appeal, the Court of Appeals looked to the testimony immediately preceding the first question which had established that the witness knew defendant's reputation for peacefulness. This served to limit the question to a particular, relevant trait, in which case it was proper. In view of the testimony of the second witness that he knew defendant as being a peaceful, quiet man, the Court held the second question properly excluded as probing not reputation but personal knowledge.

In the instant case, it appears that two of the questions properly excluded were: "Are you familiar with his general reputation?" and "Do you know the general reputation of the defendant?" These questions are too broad to be

30a. 9 N.Y.2d 12, 210 N.Y.S.2d 514 (1961).
30b. 10 A.D.2d 900, 202 N.Y.S.2d 267 (4th Dep't 1960).
30c. People v. Lustig, 206 N.Y. 162, 99 N.E. 183 (1912).
31. 189 N.Y. 408, 82 N.E. 718 (1907).