68080

CRIMINAL DEFENSE NEWSLETTER

STATE APPELLATE DEFENDER OFFICE
LEGAL RESOURCES PROJECT

Volume 3, Number 2 **November-December 1979**

CROSS-EXAMINATION

In response to the many persons who have asked that trial tactics be discussed in the Newsletter, we offer the following article on cross-examination strategies. A short note on Michigan law concerning cross-examination follows the article.

THE PREPARATION AND CONDUCT OF THE INDIVIDUAL CROSS-EXAMINATION

A number of factors must be kept in mind to insure a planned, disciplined, safe and effective cross-examination.

1. Cross-Examine by Objective - Advance The Trial Plan

Management experts teach that "management by objective" is essential for achievement. The same applies to cross-examination. Many rambling and haphazard cross-examinations are so because the examiner is "just asking questions" without any apparent goal or objective in mind. If the examiner were stopped before the cross-examination and asked his goal or objective, he should have an immediate and clear answer. The overriding objective must be to advance the trial plan by getting favorable material to be used in the closing argument. If a proposed question does not advance the trial plan, it is unlikely to serve any useful purpose. Further, by knowing the objective of a particular cross-examination the specific questions to ask are apparent and it all falls into place.

2. Tailormake Each Cross-Examination

The natural tendency of the trial attorney is to use the same manner and same technique for every cross-examination he conducts. This is analogous to the surgeon who uses the saw for everything he does. The examiner must develop a repertoire of devices, techniques, etc., and choose the appropriate instrument for the specific situation. Having his objective firmly in mind the attorney chooses the proper tactic to elicit the testimony which satisfies that objective.

3. Make the Examination Psychologically Sound

The witness testifying is engaged in human behavior. Witnesses react differently. One witness if pushed may back down while another witness if pushed may remain firm and thus strengthen his testimony.

The examiner must choose the techniques to be used, the wording of the questions and the sequence of the questions which will cause the human behavior (the testimony) desired.

4. Get Favorable Facts

The term "favorable facts" refers to those facts which support the constructive position taken by the defense rather than those which go to impeachment. These are facts, for example,

which would support a conclusion of misidentification if that were the defense. Obtaining the favorable facts from the opposing witness is often ignored in the zeal to destroy him by impeachment. Instead, it should be the first priority.

5. Be Conservative

Cross-examination is dangerous. It often happens in our courts that the defendant is convicted by evidence elicited by the defense attorney - evidence which fills in the gaps of the prosecutor's case or is extremely prejudicial to the defense. The impact is several times as great when the harmful evidence comes in on cross-examination.

Several of the succeeding points are designed to reduce mistakes of commission in cross-examination to a minimum. Also the suggestions in the section of Preparation will make gambling in cross-examining far less necessary.

6. Consider No Cross-Examination

If there are no favorable facts to be elicited, the presumption should be in favor of no cross-examination. Saying "No cross-examination, your Honor" effectively communicates to the jury that the testimony was not important.

A second strategy consideration is important. If a witness is "solid," develop, if possible, a defense position that recognizes the testimony as true. Aim the defense attack against a weaker point of the prosecution so no cross-examination is needed on the "solid" point.

7. Don't Question Without Purpose

It seems the natural tendency is to feel that it doesn't hurt to ask and "something might turn up." Occasionally something does turn up but the percentages are substantially against the good outweighing the bad. The attorney should be in a really desperate situation before he resorts to an "all over the place," "vigorous" cross-examination.

8. Don't Permit Repetition of Direct Testimony

Once again the natural tendency results in emphasizing the prosecution's evidence. The attorney has just taken notes of the direct examination and uses those notes for cross-examination. He starts out by saying, "Mr. Witness, you just testified that _____, is that correct?" and proceeds through the entire direct testimony cementing that testimony in the minds of the jurors.

9. Don't Fight Losing Battles

For various reasons attorneys ask questions knowing full well that the answers are likely to be harmful to the case. Often he does this because he wishes the witness to make extensive admissions, but such a wish is rarely fulfilled. It is better to know what admissions are possible and get just those than to try for too much and elicit denials. Further, the attorney often feels that all testimony must be cross-examined or he is not doing his job. This results in emphasizing the damaging evidence and greatly increases the harmful effects from it.

It is essential to note here that the cross-examination that fails just accomplishes nothing. It is harmful. It has the effect of making the testimony like cold hard steel because "it stood up on cross-examination." Testimony not cross-examined may attract less attention, may not be believed or may be considered of lesser importance, thus having less negative impact.

10. Don't Question Witnout Knowing The Answer

This oft-repeated admonition is still violated in the vain hope that the answer will be something beneficial. It is a gamble which will likely produce results devastating to the examiner's case.

11. Don't Argue With the Witness

A large percentage of cross-examinations consist of an attorney arguing with the witness in an attempt to get the witness to agree with the attorney. Any dispassionate look convinces that this approach is based on wishful thinking. The witness sticks to his previous conclusion and the attorney has fought a losing battle.

12. Deal with Facts, Not Conclusions

A witness is highly unlikely to change his testimony and agree with the attorney on matters of conclusion. One can more easily get agreement with facts from which the attorney can reach his own conclusion on summation.

13. Don't Ask the One Question Too Many

The natural tendency when one has scored

a point is to attempt to emphasize it at that time. It is important in cross-examination to know whether the witness is objective or wants the defense to lose. If the witness wants the defense to lose, there is a great likelihood that the additional question will have given the witness time to recover and he will then explain or claim misunderstanding. The point is then lost. To avoid this difficulty with this type of witness, as soon as the witness has provided that which is needed for closing argument, the attorney should stop on that point and leave the emphasis for summation.

14. Control the Witness

The examiner needs to maintain control of the witness particularly when the witness has prejudicial information and has a tendency to volunteer or wishes the defense to lose. A number of methods of control are available:

a. Conduct a training session before reaching the critical point. Utilize any possible in camera hearing or the preliminary cross-examination to teach the witness not to volunteer.

b. Use short, plain, unambiguous questions so as to give the witness no reasonable excuse for volunteering.

c. Ask about only one new fact per question.

d. Use leading questions that legitimately call for only a "yes" or "no" answer.

e. Ask nothing that provides any excuse for explanation.

f. Utilize the aid of the court by requesting instruction to the witness to only answer the question.

g. Make a friend of the witness before the testimony. This makes him less likely to want to "get" the defense.

All of these methods must be used in a way that avoids the impression of withholding the truth from the jury.

15. Decide the Manner of Cross-Examination

Thought needs to be given to what manner will best serve the cross-examiner. One must avoid the attorney's natural tendency to conduct every cross-examination in the same manner.

While there are others, the two basic ways are the friendly approach and an adversary approach. A combination in which the examiner elicits what he can with a friendly manner and then suddenly shifts to a firmer manner to disconcert the witness may be effective.

Another is the fumbling approach which leads the witness to believe that the attorney does not know the critical information and to therefore decide that he, the witness, can get by with false statements.

16. Put the Cross-Examination in the Most Effective Sequence

There is a most effective sequence for each cross-examination. The first point should ordinarily be an effective one. One point may be used to "set up" another. If the witness is trying to outguess the examiner so the witness can answer the opposite of what the examiner wants, sequence may be changed to mislead the witness.

17. End on a High Note

Above all, the examination must end on a high note. The natural tendency is to cross-examine in the same order as the direct examination or to take up the strongest point first, the next strongest next and so on ending with the weakest point of all.

To be sure of ending on a high note select the ending point prior to examination and list it at the bottom of the cross-examination notes with space to fill in other notes above.

18. Word the Question to Achieve the Purpose

How one words questions will often determine what answers will be elicited. All witnesses wish their testimony to be reasonable. Therefore, if the question is worded with the implication that the only reasonable answer is the one the examiner expects, he will likely receive that answer. For example, if the question is worded, "Mrs. Jones, I suppose it's only natural then that you expected to see the robber among the pictures shown you?", one is likely to receive an affirmative response.

19. Maximize the Impact

Be brief. Emphasis is far greater if not too much is attempted. Favorable responses may be forgotten and the impact may be lessened.

Consider how to make your point or points most dramatically. Use demonstrative evidence.

Ask leading questions only and only those questions to which there will be favorable answers. This list of favorable answers has impact because it comes across as a "List of Admissions" - a useful concept.

Another effective impact device is "Stretching out a Point." Use several questions instead of one to make a favorable point.

20. Sustain the Momentum

A cross-examination must move and "live" if it is to be effective. Trial work must utilize the principles of show business in many respects. The examiner must know his subject so well that he does not have to study before each question and can "keep it moving."

Once again, short leading questions sustain momentum. Any response unfavorable to the examiner stops momentum and must be avoided. If however, such an answer is given, the examiner must minimize the damage by completely ignoring what has just been said and immediately proceeding to the next question as though the response were not significant.

TACTICS FOR CROSS-EXAMINATION

Planning and conducting the individual cross-examination also requires careful selection of tactics. The choice of tactic depends on the objective to be attained, the evidentiary situation and the personality of the witness. The choice of tactic may determine success or failure.

To be useful the tactic and its psychology must be well understood. It is hoped the following discussion will be helpful in this understanding.

1. Back Down

Witness situation: The witness is not confident of his testimony and his personality is such that if pushed he will back down.

Execution: "Set up" the witness by confronting him with facts as to which he is wrong (inconsistencies, etc.) then go to the crucial point and push hard for an admission that this fact was not as the witness has said; that the witness has only assumed, that the witness has only heard, that the witness does not remember, or that the witness does not really know.

It should be noted that this tactic is attempted too often. The mistake is that it is employed with the witness who does not have a personality such that if pushed he will back down.

2. Minimization

Witness situation: The heart of the testimony is true but part of it is exaggerated, inaccurate, or otherwise subject to attack.

Execution: Decrease the significance of the evidence and reduce its effect by procuring admissions as to the exaggerations and inaccuracies, rather than attacking the heart of the testimony.

3. Collateral Cross-Examination

Witness situation: A witness is expected to be prepared as to the central thrust of his testimony but not likely to be prepared as to matters on the fringes.

Execution: Ask questions as to the fringe matters developing contradictions and hazy recollection. This may work well on police officers who prepare by reading their offense reports just before testifying.

4. Wedge (No-Proof)

Witness situation: The witness probably has knowledge favorable to the defense but is reluctant and the examiner has little proof of the matter.

Execution: The little information available is stretched into several questions with a knowing attitude and the questions so worded as to lead the witness to believe the examiner knows all about the subject. A witness who believes the examiner already knows is likely to tell the whole story.

5. Wedge (With Proof)

Witness situation: The witness has know-

ledge favorable to the defense but is reluctant. The examiner has a document or other proof of the information desired.

Execution: Let the witness know about the proof and the witness will realize there is no point in withholding the information.

6. Trap

Witness situation: The witness is willing to lie or is lying and the examiner has the ammunition with which to demolish his testimony.

Execution: Get the witness thoroughly committed to the untruthful position and destroy him then or later with the evidence. To get the witness committed:

(a) Keep the objective hidden.

(b) Use the fumbling approach - pretend not to know.

(c) Get the witness to take the untruthful position several times in different ways.

(d) In general, go from the very general to the specific, camouflaging the objective by interspersing questions on other subjects.

7. Cross-Examine as to Probabilities

The witness is led into taking positions or making statements which the jury will regard as unreasonable or which can be demonstrated to be unreasonable.

8. Impression Cross-Examination

Witness situation: There is no particular point with which to destroy the witness but the total picture gives an impression favorable to the defense. Examples are that the witness does not remember, the witness is making up a story as he goes along, there was a frameup, etc.

Execution: There is no magic formula. Create the examination so that every question adds to the favorable impression.

9. Demeanor Cross-Examination

Witness situation: The witness is subject to showing characteristics which affect credibility.

Execution: Get into areas that will cause the witness to show hostility, overzealousness in convicting the defendant, prejudice, etc., to the point where it is clear to the jury.

10. Channeling

Witness situation: The witness is reluctant to testify favorably to the defense and the only thing the examiner has is reasonableness of the way he thinks the event occurred and the unreasonableness of the witness's story.

Execution: Ask each question in such a way that the only reasonable answer is the one desired and believed to be true. The witness does not want his testimony to appear unreasonable or illogical.

11. Shading

Witness situation: The witness testifies to a relative matter or any matter subject to interpretation.

Execution: Since no basis exists for the witness's interpretation as opposed to one more favorable to the defense, the witness may agree with the examiner, if pushed, i.e., the time involved could have been one minute rather than five.

12. Exposing Fallacies in Logic

No attempt can be made here to discuss all the possible fallacies and how to expose them. Suffice it to say that such knowledge is an important part of the cross-examiner's repertoire. A study of logic is most rewarding.

13. Dilemma

Look for situations in which the witness can take only those positions which are helpful to the defense.

14. Fake

Witness situation: The witness attempts to adapt his testimony so as to testify contrary to what he feels the examiner desires.

Execution: Keep the objective hidden and mislead the witness as to the facts wanted. This is often done by changing the sequence from that of normal conversation.

15. Undermining

Witness situation: The witness gives a firm opinion or conclusion, such as "That is the man."

Execution: Do not try to get the witness to change his opinion or conclusion if this is not likely (and it is seldom likely). Instead, bring out the underlying facts which show the lack of basis for the conclusion or that the conclusion is wrong. The opposite conclusion is then argued on summation, supported by the undermining facts.

The technique is highly useful in identification cases. Undermine by getting evidence of suggestiveness, description given to police differing from that of defendant, etc.

16. Forging "I Don't Knows"

Witness situation: Witnesses have a tendency to fill in details when they do not really remember and the proper answer would be "I don't know" or "I don't remember."

Execution: Give the witness tough questions and be firm. Then when the witness says "I don't know" let him off the hook. Be considerate and say "I understand, it was a long time ago" etc., to essentially teach the witness that the that the easy "out" is to say "I don't know."

CONCLUSION

The concepts and techniques of cross-examination discussed here are, it is hoped, enough to show how much is involved in this very challenging and useful skill. It is sincerely desired that it will interest the reader in attempting its mastery.

by Steven C. Rench

NOTES ON THE SCOPE OF CROSS-EXAMINATION

Most criminal defense attorneys have experienced the frustration of having a court impose limitations on their cross-examination of prosecution witnesses. When exposed to the scrutiny of appeal, however, many of those limitations are overturned. The following survey of appellate decisions is designed to give the trial attorney some ammunition to combat restrictions on the scope of cross-examination.

The scope of cross-examination is a matter generally left to the discretion of the trial judge, and an exercise of that discretion will not be disturbed unless a clear abuse of it is shown. People v Johnson, 382 Mich 632 (1969); People v Bouchee, 400 Mich 253 (1977). It must be exercised, however, with due regard for a defendant's constitutional rights of due process and confrontation. People v Bell, 88 Mich App 345 (1979). Michigan cases have upheld the right to cross-examine a witness on facts in issue or relevant facts, People v McKernan, 236 Mich 226 (1926); People v Fleish, 321 Mich 443 (1948), and the right "to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness." People v Dellabonda, 265 Mich 486, 499-500 (1933). Also included is the right to cross-examine on the theory of the defense. People v Gordon, 40 Mich 716 (1879); Moore v Lederle Laboratories, 392 Mich 289 (1974).

Recognizing the truth-finding function of cross-examination, courts have allowed defendants "broad" or "considerable" latitude in their questioning. In re Sparks Estate, 198 Mich 421 (1917); People v Sesson, 45 Mich App 288 (1973). Broad cross-examination has been deemed particularly important when questions concern a witness's bias or interest in testifying, People v Evans, 30 Mich App 361 (1971); People v Sesson, supra, at 301, when the witness is an accomplice or "star witness," People v Bell, supra, at 349, or when witnesses have offered conflicting testimony on a vital issue, People v Long, 50 Mich 249 (1883); People v Richmond, 35 Mich App 115 (1971).

Limitations on cross-examination are most likely to be upheld when questions are on a "collateral" matter. People v Welke, 342 Mich 164 (1955); People v Karmey, 86 Mich App 626 (1978). Witnesses have a right to be protected from gratuitous attacks on their character, People v Whalen, 390 Mich 672 (1973), from questions which endanger their personal safety, People v McIntosh, 62 Mich App 422 (1975) and from harrassing or humiliating questions, People v Paduchoski, 50 Mich App 434 (1973). Another limitation appears in MRE 611, which provides that "the judge may limit cross-examination with respect to matters not testified to on cross-examination." On this latter point there are few Michigan cases, and attorneys are referred to McCormick on Evidence, §27, p 51 (2nd ed. 1972).

by Dawn Van Hoek

Michigan Supreme Court Decisions

People v Chapa,
#62274
October 29, 1979

On defendant's application for leave, the Court unanimously reversed the Court of Appeals, setting aside defendant's sentence for heroin delivery and remanding for resentencing.

Defendant was improperly sentenced according to Bay County's sentencing policy for heroin dealers, where the sentencing court thought it "remove[d] much of the discretion that the court might otherwise have relative to sentences." That local sentencing policy of mandatory prison terms cannot replace the sentencing court's duty to individualize sentencing to the offender. Sentencing discretion can only be limited when the Legislature has established a mandatory term for an offense [felony firearm, for example] and delivery of heroin is not such an offense.

People v Formicola,
#60941
October 29, 197[illegible]

Acting on defendant's interlocutory appeal of a pre-trial order, the Court unanimously affirmed the denial of his motion to dismiss and remanded for trial on charges of inducing another to commit murder.

Justice Moody, for the Court, concluded that defendant would not be twice placed in jeopardy by state prosecution on inducing murder charges, where defendant has already pled guilty to federal charges arising from the same criminal act. The incident giving rise to both sets of charges was a meeting with an undercover State Police officer at which defendant allegedly arranged to have the officer kill four witnesses slated to testify against him in a federal food stamp fraud prosecution. Federal charges of impeding witnesses in a pending federal prosecution and obstructing a criminal investigation were instituted first, and defendant pled guilty as charged. The state charges were pending when he pled, and were not dismissed when defendant raised his double jeopardy claim.

Although the same criminal act provides the factual basis for both the federal and state charges, double jeopardy does not bar the pending state prosecution. The federal constitution imposes no bar on state prosecution after federal prosecution for the same act, and the state constitution only bars prosecution when the state's interests have already been satisfied by the federal prosecution. People v Cooper, 398 Mich 450 (1976). Interests being protected in this case are substantially different. First, a great disparity in maximum penalities exists: the federal charges carry a maximum term of five years and/or $5,000, while the state ones carry a maximum life term. Furthermore, the offenses differ in the type of conduct prohibited (impeding the federal judicial system vis-a-vis inciting a crime), the persons protected (participants in the judicial system vis-a-vis the general populace), and the proofs required to establish the offense (showing a relationship between defendant and a judicial proceeding vis-a-vis showing defendant induced a specified offense).

Leave had also been granted on the question of whether mandatory life imprisonment for inducing another to commit murder was intended by the Legislature or constitutional. Because defendant has not yet been tried or convicted, the issue was not properly presented and leave was improvidently granted.

People v Johnson and People v Ring, #58560, 60557
October 29, 1979

Reversed Johnson's felonious assault conviction and remanded for new trial. Affirmed, with modifications, the trial court's decision on requested felonious assault instructions in Ring's case.

Proofs at Johnson's trial and Ring's preliminary examination revealed that each defendant pointed a gun at a complainant, but did not fire a shot. Each defendant was charged with felonious assault and each requested the trial court to instruct jurors that an intent to injure was an element of the crime.

All Justices signed a memorandum opinion containing three holdings, with at least four Justices concurring in each holding:

> "1) a simple criminal assault 'is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery' [citation omitted],
>
> 2) the jury should be instructed that there must be either an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery,
>
> 3) the instruction in Johnson was deficient in two respects: it failed adequately to inform the jury of the intent requirement and it neglected to present the alternative 'reasonable apprehension of receiving an immediate battery' form of felonious assault; the jurors in Ring should be instructed that defendant can be convicted if he intended to injure the victim or put him in reasonable apprehension of receiving an immediate battery."

The Justices specifically declined to reach the question of whether assault or felonious assault are specific intent crimes for purposes of the voluntary intoxication defense.

Justice Williams wrote separately (with Justices Moody and Coleman signing) on the leave question of "whether felonious assault includes a specific intent as an element." He concluded that it does not, but instead, that felonious assault is but a simple assault aggravated by the use of a dangerous weapon.

Justice Ryan wrote separately in response to Justice Levin's dissent, with Justice Fitzgerald signing the opinion as well. He disagreed with Justice Levin's interpretation of People v Sanford, 402 Mich 460 (1978) and thought that Sanford sustained the principle that there are two kinds of criminal assault; attempted battery and putting in fear.

Justice Levin, dissenting with Justice Kavanagh, first agreed that the Legislature intended to make felonious assault a common-law assault committed with a dangerous weapon and that that intent was controlling. He disagreed on the definition of common law assault, however, writing that its intent element should be confined to "an intent to cause physical injury to the victim," rather than expanded to include putting in fear.

People v Sullivan, #63087
October 29, 1979

On defendant's application for leave, the Court unanimously reversed the Court of Appeals, thus reinstating the circuit court's dismissal of an assault with intent to do great bodily harm charge.

The trial court properly ruled that defendant should not have to

face a second trial for an offense that arose out of the same transaction as was involved in his first trial, where the prosecutor was untimely in moving to join the charges. Defendant was charged in separate informations with assault with intent to do great bodily harm and larceny over $100, and each was set for trial on a different date. On the date set for the larceny trial the prosecutor moved for consolidation, alleging that both charges involved a single transaction. Defense counsel objected to the motion as untimely and it was denied. After defendant was acquitted on the larceny charge, he moved for and obtained dismissal of the assault because it had not been joined and tried with the larceny charge.

The policy of the same transaction test of People v White, 390 Mich 245 (1973) was violated by the prosecutor's tardiness. He knew of both charges and their common factual basis well before he moved the court for consolidation. Furthermore, defendant did not expressly waive his double jeopardy claim when he objected to the consolidation on timeliness grounds.

People v Gornbein, #63540
November 14, 1979

On the prosecution's motion for clarification and reconsideration of the Court's previous order [People v Gornbein, 407 Mich 863 (1979)], the Court affirmed the portion reinstating defendant to bail but vacated the portion referring to the court rule on bail.

It was fundamentally unfair to apply the provisions of the amended constitutional bail provision to revoke this defendant's bail. Defendant was arraigned on criminal sexual conduct charges on December 10, 1978 and was released when he posted bail. Shortly thereafter, the prosecution sought and obtained revocation of that bail on the basis of the new criteria of the constitutional bail amendment. Only the bail criteria and not defendant's situation had changed in the time since he was admitted to bail. Since constitutional amendments affecting substantive rights generally operate prospectively and not retroactively, the trial court erred in revoking defendant's pre-trial bail.

Certain other language of the Court's original order was reexamined. The Court originally wrote:

> "The recent amendment of Const 1963, art 1, §15 does not alter GCR 1963, 790. That court rule continues to be controlling in pretrial release matters . . ."

On reconsideration, that language was deemed inappropriate and was vacated. The Court announced that it was considering and would publish for comment a proposed amendment to GCR 1963, 790 to bring the court rule into conformity with the constitutional amendment.

People v Hampton, #59843
November 26, 1979

On leave granted to the prosecution, the Court affirmed the trial court's decision to grant a new trial.

The key issue in the case revolved around the sufficiency of evidence showing defendant aided and abetted his co-defendant in a first degree murder. At the close of the prosecution's case defendant made a motion for directed verdict which the court denied because the prosecution had presented evidence on each element of the offense. The motion was later renewed at the close of all proofs, but the court decided to reserve its ruling until after the jury returned its

verdict. Jurors found defendant guilty of second degree murder. The court then set aside the verdict and ordered a new trial.

A majority of the Justices agreed with the conclusions reached by Chief Justice Coleman. First, the trial court's decision to set aside the verdict was more in the nature of ordering a new trial than of directing a verdict of acquittal. The court did not apply a directed verdict standard, but instead considered evidence presented by both the prosecution and defense. On the facts of the case, there was no abuse of discretion in granting a new trial.

Secondly, the recent United States Supreme Court case of Jackson v Virginia, __US__; 99 SCt 2781; 61 LEd2d 560 (1979) clarified that a court ruling on a motion for directed verdict must determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The "some evidence" on a material element standard was specifically disapproved.

Justice Levin, concurring separately with Justice Williams, agreed that the trial court did not abuse its discretion in granting a new trial. He disagreed, however, with the need to clarify the directed verdict standard, since no directed verdict was before the Court. He also saw no need to address the double jeopardy issue discussed by Justice Ryan, again because it was not raised.

Justice Ryan, joined by Justices Moody and Kavanagh, wrote that the trial court really directed a verdict of acquittal, although it denominated its order otherwise. Having found that the prosecution's evidence was not sufficient to convince a reasonable person beyond a reasonable doubt of defendant's guilt, the court erred in granting a new trial. Double jeopardy would bar the second trial. Burks v United States, 437 US 1; 98 SCt 2141; 57 LEd2d 1 (1978).

People v Major,
#62316
December 10, 1979

On defendant's request for review, the Court reversed his second degree criminal sexual conduct conviction and remanded for new trial.

Six Justices signed a per curiam opinion holding that certain "similar acts" evidence was erroneously admitted at defendant's trial. Defendant was on trial for the alleged act of putting his mouth on complainant's breast and the allegedly similar prior acts were incidents in which defendant had exposed himself to young girls. Defendant denied touching this complainant.

The prior similar acts may have been similar to the extent that they involved sexual improprieties with young girls, but they did not pass even threshold admissibility requirements in this case. The Court of Appeals opined that the evidence was admissible to show defendant's "motive and intent," two of the statutory purposes. Neither defendant's motive nor intent were material in this case, however, in the sense of being propositions in issue. Defendant did not claim that he acted unintentionally or with some innocent intent or with justifiable motive. Nor did the evidence meet the criterion of relevancy in proving defendant's intent or motive. The evidence simply tended to show that he had misbehaved sexually in the past. Since the case turned on an assessment of defendant's and the

complainant's relative credibility the Court could not conclude that the error was harmless.

Justice Williams, concurring separately, added that the prior acts were neither similar nor had a tendency to show defendant's scheme, plan, or system

People v Sain, #62984
December 10, 1979

On defendant's application for leave, the Court reversed his entering without breaking conviction and remanded for new trial.

Six Justices signed a per curiam opinion holding that defendant was denied a fair trial by prosecutorial comments on his exercise of the right to remain silent. The prosecutor did not err in asking the question which elicited a nonresponsive answer regarding the silence. The arresting police officer volunteered during direct examination that defendant did not respond to questioning when the officer came upon him at the scene of the break-in. However, the prosecutor's use of that testimony during his closing argument was another matter. He deliberately and repeatedly asked jurors to consider defendant's silence as a factor showing guilt.

Justice Williams concurred separately.

People v Stephens, #62133
December 10, 1979

On defendant's application for leave, the Court vacated his two armed robbery convictions and remanded for entry of convictions of larceny by conversion.

Defendant's request that the trial court instruct jurors on the lesser included offenses of larceny by trick and larceny by conversion should have been granted. The offenses were cognate included offenses and were supported by the evidence. Defendant took the stand and testified that he obtained money from complainants for the purchase of certain merchandise, and then drove off without delivering it. He denied having a gun. Since the defendant admitted criminal involvement, but not to the extent of the charged offense, the jury should have had the freedom to act according to the evidence.

Selected

Court of Appeals Opinions

DRUG SENTENCE MAY NOT BE DOUBLY ENHANCED

People v Edmonds, #78-605, October 16, 1979
BRENNAN, Bronson, Cynar

Affirmed delivery of heroin conviction and vacated habitual offender sentence augmentation.

Enhancement of defendant's sentence by both §48 of the controlled substances act and the habitual offender act was improper. The more specific terms of the controlled substance act should have been exclusively applied. Defendant's 53 to 80 year term was reduced to 26 to 40 years.

SAME DAY NOTICE INSUFFICIENT FOR PROBATION VIOLATION CHARGE

People v Ojaniemi, #78-4726, October 16, 1979
DANHOF, Brennan, Carroll

Set aside order revoking defendant's probation, without prejudice to prosecutor's right to

again seek revocation.

Defendant was not given timely and adequate notice of the probation violation charges against him. He was presented with notice of the charges the same morning he appeared in court for a violation hearing. He waived the assistance of counsel and stated that he understood the charges, but did not expressly waive the last-minute notice. He stated that all he wanted to do was plead guilty and after taking evidence, the court found him guilty.

This sequence of events did not afford time for substantial reflection or preparation by defendant. Furthermore, a "hurried and ill-conceived attempt to refute the accusations" is not a waiver of the notice defect, just as a guilty plea does not waive them.

Brennan, dissenting, wrote that a probation revocation hearing does not need the preparation time that a trial does.

SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE STANDARD CLARIFIED

People v Larry Walker, #78-4294
October 16, 1979, CYNAR, MacKenzie, Corkin

Affirmed jury-tried second degree murder conviction.

The Court rejected defendant's claim that there was insufficient evidence to establish beyond a reasonable doubt that he committed the offense. Evidence of guilt was entirely circumstantial and defendant claimed that the prosecution had not rebutted every reasonable theory consistent with his innocence, citing People v Davenport, 39 Mich App 252 (1972). The Court acknowledged the split of opinion on the standard to be applied in wholly circumstantial cases and opted for the rule of People v Edgar, 75 Mich App 467 (1977). Edgar held that the prosecution should not be required to specifically disprove all innocent theories and that circumstantial evidence should not be so distrusted. Instead, "it is sufficient for the prosecution to prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense produces." That burden was met here.

The Court found evidence of continuing acrimony between defendant and the decedent, of a fight which occurred in defendant's apartment some minutes before decedent was shot outside in the parking lot, and defendant was slow in answering the door to police and asked a friend to "take something from me." There was sufficient evidence of premeditation and deliberation to justify sending the first degree murder count to the jury.

COURT MAY INSTRUCT ON DISPOSITION OF GMI DEFENDANT IF NO DEFENSE OBJECTION

People v Brink, #78-727, November 5, 1979
HOLBROOK,JR., MacKenzie, Cynar

Affirmed jury conviction of guilty but mentally ill of first degree criminal sexual conduct.

The trial court did not err in sua sponte instructing jurors on the disposition of defendant if found not guilty by reason of insanity (NGRI) or guilty but mentally ill (GMI). People v Cole, 382 Mich 695 (1969) made instruction on NGRI disposition mandatory upon defense request. The charge may also be given sua sponte when, as was the case here, there is no defense objection.

Furthermore, the same reasons which led the Cole Court to approve a NGRI instruction apply equally to giving of a GMI disposition instruction. Jurors are just as unknowledgeable as to the consequences of a GMI verdict and they have the right to know the meaning of all possible verdicts.

Defendant's claim that the GMI law should not be applied to him because its treatment provisions are not being followed was rejected. The claim is appropriate to a complaint for mandamus rather than appeal of a conviction.

CITING DISSENTS, COURT UPHOLDS SEARCH INCIDENT TO MISDEMEANOR ARREST

People v LeBeuf, #78-3910, November 5, 1979
GILLIS, Beasley, Ransom

Reversed trial court's order quashing the information and remanded for trial on a possession of phencyclidine charge.

The trial court erred in deciding that the search of defendant and seizure of twenty phencyclidine tablets were unreasonable. Police officers observed a car with a cracked windshield and pulled it over for a traffic ordinance violation. Upon approaching the car they saw

two opened beer cans in front of defendant and his passenger. The cans were handed over upon request and found to contain beer, so the occupants were ordered out of the car and arrested for transporting open intoxicants.

While conducting a pat-down search for weapons, an officer felt an object in defendant's front pocket. He removed a plastic container labelled "Vanquish," opened it, and discovered capsules which he did not recognize as the product "Vanquish." Citing the dissents in People v Garcia, 81 Mich App 260 (1978) and People v Cavitt, 86 Mich App 59 (1978), the Court concluded that there had been a valid search incident to a full custodial arrest for a traffic offense.

Beasley, dissenting, and relying on the majority opinions in the above cases, would not find the trial court's decision to be clearly erroneous in this "close case."

OVERLY GENERAL WIRETAP WARRANT UNDOES CONVICTION

People v Taylor, #77-4518, November 5, 1979
MACKENZIE, T.M. Burns, Cavanagh

Reversed jury-tried conviction for inciting another to burn a dwelling, MCL 750.157b, 750.72; MSA 28.354(2), 28.267.

After reviewing search and seizure law in the area of electronic eavesdropping, the Court concluded that the warrant issued in this case could not pass constitutional muster. A friend of defendant told police of a conversation with defendant, in which defendant allegedly said that the house of an annoying neighbor could be easily burned. The police procured a warrant for a future conversation and the friend then telephoned defendant while an officer was present. They recorded the conversation, during which defendant told the friend "don't ever say nothing about me talking to you about. . ." Jurors were given a transcript of the conversation and were permitted to listen to the tape.

The problem in this participant recording situation was that the warrant did not adequately describe the conversations to be seized. It merely stated that the friend would call the defendant at a particular number and that the conversation to be seized was "evidence of a crime." Both Michigan Const 1963, art. 1, §11 and MCL 780.654; MSA 28.1259(4) require descriptions of the things to be seized and a statement of probable cause. Police in this case were given too much discretion as to what could be recorded, so defendant's motion to suppress the evidence should have been granted.

PROOF OF ARMED ELEMENT OF RA REQUIRES MORE THAN DEFENDANT'S ANNOUNCEMENT THAT HE HAD A GUN

People v Krist, #78-154, November 6, 1979
RILEY, Kaufman, Theiler

Vacated one armed robbery conviction and remanded for entry of unarmed robbery conviction and resentencing. Affirmed a second armed robbery conviction.

The trial court erred in refusing to dismiss Count I (one of two armed robberies charged) because insufficient evidence of one element of the crime was adduced at trial. A witness and a coparticipant testified that defendant announced that he had a gun, but neither person observed a gun during the robbery. Defendant's mere statement, without more, was insufficient to show that he had "a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to believe it to be a dangerous weapon." Accordingly, his conviction was reduced to one for unarmed robbery.

That element of armed robbery contains two elements of proof; first, subjective proof of the victim's fear and second, objective physical communication of the existence of a dangerous weapon. The second measure is made out when a defendant gestures with a covered hand or presses a hard object against someone, but not when he merely declares that he has a gun.

PREDELIBERATION REQUEST TO CHARGE ON FACTUALLY SUPPORTED COGNATE LESSER MUST BE HONORED

People v Vinson, #77-4692, November 6, 1979
PCJ: Danhof, Bronson, Beasley

Vacated assault with intent to do great bodily harm less than murder conviction and remanded for entry of a felonious assault conviction. Affirmed felony firearm conviction.

The trial court erred in refusing to instruct jurors, upon defense request, on the lesser included offense of felonious assault. Felonious assault was a cognate lesser offense of the charged assault with intent to murder since the

offenses share the element of assault. The cognate charge had to be given in this case because record evidence supported it. Defendant and the complainant each claimed that the other attacked him with a gun and knife.

A problem with defendant's claim arose, however, in the timeliness of the request to charge. Trial defense counsel requested the felonious assault instruction after the jury was instructed but before it began to deliberate. In denying a different request the court noted that it had set "the day before yesterday" as the deadline for instructional requests.

Although it was untimely, the request was made before the jury began deliberating, and was supported by the evidence. Furthermore, the felonious assault charge was not covered by the court's other instructions, it concerned a basic issue, and by returning a verdict on a charged lesser, the jury indicated its willingness to compromise. Under these special circumstances the court abused its discretion in refusing the charge.

TRIAL COURT'S ERRORS UNDO MURDER CONVICTION

People v Featherstone, #78-3129
November 6, 1979
PC: Kaufman, Maher, Riley

Reversed jury conviction for first degree murder.

The trial court erroneously decided that defendant's prior manslaughter conviction was admissible for impeachment purposes. First, the prior conviction was so similar to the charged offense that its prejudice outweighed its probative value. Defendant also had a more appropriate prior larceny conviction with which he could have been impeached. Second, defendant was released from prison on the manslaughter conviction in 1967 and his murder trial took place in 1978. The prior conviction thus was stale under the ten year guideline established in MRE 609(b). Since defendant chose not to testify at trial, the error was not harmless.

Further reversible error occurred when the trial court admitted a witness's preliminary examination testimony, after ruling that the prosecution had exercised due diligence in attempting to produce him. Due diligence was not made out where this endorsed witness was properly served with process on the second day of trial, and was seen by others the day police unsuccessfully sought him. Prejudice was shown by the fact that the witness's prior testimony was improperly admitted. The prosecution was directed to either produce the witness on retrial or demonstrate due diligence.

RES GESTAE EXCEPTION EXCUSES PRODUCTION

People v Gillam, #78-3423, November 6, 1979
PC: Kaufman, Maher, Riley

Affirmed delivery of heroin conviction.

The prosecutor's failure to produce res gestae witnesses was excused under an exception to the rule requiring production. The witnesses were persons allegedly present in defendant's apartment at the time of the heroin delivery. Defendant "presumably" knew their identities but he neither disclosed the information to the prosecution nor moved for their production during trial. Their production was therefore excused. People v Hernandez, 84 Mich App 1 (1978).

CHARACTER WITNESS MAY BE QUESTIONED ABOUT DEFENDANT'S PRIOR ARRESTS

People v Fields, #78-2159
November 19, 1979
ALLEN, Bashara, Beasley

Affirmed four convictions for assault with intent to commit murder and one felony firearm conviction.

Improper prosecutorial cross-examination of a defense character witness was the subject of a mistrial motion which was properly denied, according to the Court of Appeals. Defendant's mother was asked if she was aware of a prior felonious assault charge against her son. Defendant claimed on appeal that recent case law (Falkner/Rappuhn) overruled the prior rule allowing cross-examination of character witnesses regarding a defendant's arrest record. That rule has not been modified, but instead remains to permit questioning as to the grounds of knowledge upon which a witness's character testimony is based. Cross-examination with regard to a defendant's particular acts is not to establish such acts as fact. Rather, it is permissible to test the witness's credibility.

COMMENTS ON PRE-ARREST SILENCE ALSO IMPERMISSIBLE

People v Wade, #78-2429, November 17, 1979
RILEY, Danhof, Kaufman

Affirmed assault with intent to do great bodily harm less than murder and felony firearm convictions.

The rule of People v Bobo, 390 Mich 355 (1973) was extended to cover the pre-arrest situation in this case. Defendant testified that she did not intend to shoot the complainant, although she hid in her basement after the incident and did not come up until police arrived there for the second time. On cross-examination, the prosecutor asked the defendant why she had not come forward to explain that the shooting was accidential. Such questioning was an impermissible comment on defendant's exercise of her constitutional right to remain silent. That right is a constant, with no distinction between silence before or after arrest. The prosecutor "may not suggest a negative inference from a defendant's pre-arrest failure to either turn himself over or to explain defenses to police." Error in this case, however, was cured by the trial court's prompt cognizance of the error, order to strike the testimony, and curative instructions.

FELONY FIREARM TERMS ARISING FROM SAME PROCEEDING MAY BE "STACKED"

People v Barrett and Carr,
#78-5510, #78-5511, #78-5512
November 20, 1979
ALLEN, Bashara, Beasley

Affirmed Barrett's plea-based convictions for armed robbery (two counts), assault with intent to rob armed, and felony firearm (two counts). Affirmed Carr's plea-based convictions for armed robbery, assault with intent to rob armed, and felony firearm.

Defendant Barrett raised an issue of first impression. Since the pleas to two robberies were taken on the same day (the robberies occurred on different days), defendant alleged that the court could not "stack" the felony firearm sentences which were connected to them. Though he had been promised a combined two year term as part of his bargain, defendant received a five year term after the court identified certain "mandatory" language in the felony firearm statute. The court offered, but defendant refused, an opportunity to withdraw his plea to the underlying offense.

The Court rejected the habitual offender analogy, finding that the statutes differ in wording and purpose. The habitual offender statute exempts first-time offenders and gives courts the discretion to apply its terms. Conversely, the felony firearm statute lacks the timing requirements of the habitual offender statute and gives courts no discretion. Defendant's five year term was sustained, with the decision "strictly limited to the facts in the instant case." In footnotes, the Court observed that imposition of the ten year augmented felony firearm term would have to follow prior convictions (convictions could not be simultaneous). It would also be "questionable" whether the ten year term could be imposed where a defendant used a firearm in a robbery from three persons and then was found guilty, simultaneously, on all counts .

DUIL THIRD OFFENDER ENTITLED TO MISDEMEANOR CHARGE

People v Pipkin, #44673, November 20, 1979
MACKENZIE, Gillis, Brennan

On leave granted to defendant, reversed trial court's decision that a lesser included offense instruction would not be given in defendant's driving under the influence of intoxicating liquor (DUIL) trial.

Defendant was charged with DUIL third offender, an offense which augments a misdemeanor DUIL charge to a felony punishable by not less than 1 year nor more than 5 years imprisonment and/or a fine of not less than $500 nor more than $5,000. Before trial, defendant asked the court to decide whether it would instruct jurors on the lesser included offense of driving while visibly impaired (DWI), a misdemeanor. Citing People v Chamblis, 395 Mich 408 (1975), the court ruled that the charge would not be given.

The Court of Appeals decided that the Chamblis rule would not be strictly applied in these circumstances. Chamblis prohibits instruction on any lesser included offense with a maximum term of 1 year or less in any case where the maximum of the charged offense is more than 2 years. Strict application is not appropriate in this case because of the unique, bifurcated nature of a DUIL third offender prosecution. In the first phase of the trial the jury must determine guilt or innocence of DUIL. If guilt is found, the second phase involves a determination of whether a defendant has prior DUIL convictions. It is not until this second proceeding that the charge becomes a felony. Therefore, since only a less than 2 year offense is charged in the first phase, a lesser included instruction on a 1 year offense must be given.

STATUS REPORTS

CRIMINAL CODE REVISION

House Bill 4842, the bill to revise Michigan's criminal code, is presently before the House Judiciary Committee, but has not yet been placed on that Committee's agenda. Various state bar committees and the Incarceration and Alternatives to Incarceration Task Force of the Michigan Commission on Criminal Justice are also examining the bill. Defense attorneys should make it a point to familiarize themselves with this important proposed legislation and may obtain a copy of it from their state representative.

This project is supported by a grant awarded by the Michigan Office of Criminal Justice Programs under the Crime Control Act of 1976.

APPELLATE COUNSEL STANDARDS

On November 25, 1979 the Appellate Defender Commission submitted to the Michigan Supreme Court its design and standards for a statewide system of assigned appellate counsel. The product of an advisory committee's report and public hearings, the Commission's report was submitted within its statutory deadline. There is no timetable for Supreme Court approval of the standards. [A copy of the Commission's report may be obtained by writing to the Appellate Defender Commission, 1200 Sixth Avenue, Third Floor, North Tower, Detroit, Michigan 48226]

Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226
(313) 256-2814

CRIMINAL DEFENSE NEWSLETTER

Vol. 3, No. 2 **Nov.-Dec. 1979**

END