Missouri Law Review

Volume 23
Issue 4 *November 1958*

Article 3

1958

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CRIMINAL LAW IN MISSOURI–1957*

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The cases in the field of criminal law account for a large percentage of the work of the Supreme Court of Missouri. In 1957 there were seventy-three decisions in the appellate courts concerning this field of the law. The questions which were raised in the cases reviewed often have been passed upon several times before. There are several new and unique questions in the cases for the past year which are noted in the following Article. The treatment of settled principles is also presented as a reminder and review for attorneys engaged in trying criminal cases.

I. SPECIFIC OFFENSES

A. *Homicide*

State v. Stidham[1] was a prosecution for first degree murder arising out of the prison riots. The state's case was based on the theory of conspiracy and the evidence did not show any direct act of defendent as far as physical violence to deceased. The court sustained a conviction pointing out that mere encouragement is enough with respect to a principal in the second degree before the fact and that no particular acts are necessary.

Another first degree murder case[2] pointed out that demonstrative evidence, such as photographs, are admissible if such evidence tends to connect defendant with the crime, prove the deceased's identity, show the nature of the wound, or throw any relevant light on a material matter. Such evidence is admissible under this rule even if it is gruesome.

State v. Malone[3] was a prosecution for murder in which the principal defense was that the shooting was accidental. The trial court's refusal to instruct on self-defense was held to be proper since self-defense involves an intentional act, whereas accidental homicide, as was alleged here, is an

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*This Article contains a discussion of selected 1957 Missouri court decisions.

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1. 305 S.W.2d 7 (Mo. 1957).
2. State v. Moore, 303 S.W.2d 60 (Mo. 1957) (en banc).
3. 301 S.W.2d 750 (Mo. 1957).

unintentional act. In a second degree murder prosecution[4] it was held that evidence of drinking on the part of the defendant was admissible on the issue of motive, and it was further pointed out that the presence or absence of motive was to be given such weight as the jury considers it to be entitled to.

In a manslaughter prosecution,[5] defendant had come to a home where the deceased was visiting, had kicked out the storm door, had made belligerent remarks in the home, and thereafter, in front of the home, the deceased and the defendant engaged in a fight in which deceased was killed. It was held that defendant was guilty of manslaughter, even though the deceased attacked the defendant and it became necessary for defendant to take the life of the deceased in order to save his own. The evidence showed that defendant provoked the difficulty which led to the fight and there was no showing that defendant withdrew or attempted to withdraw after provoking such difficulty.

State v. Berry[6] presents an interesting question on double jeopardy. Defendant was prosecuted on a charge of murder and was convicted of manslaughter. In the original trial the jury was unable to agree and was discharged and the case was continued to another date later in the same term. In the next term the prosecuting attorney entered a nolle prosequi after a venire of prospective jurors had been assembled, sworn, and challenged, but the trial jury had not been sworn. In an excellent discussion on double jeopardy the court stated that these prior proceedings had not placed defendant in jeopardy.

B. *Robbery*

State v. Vandament[7] was a case of robbery in the first degree in which it was found that there was insufficient evidence of a robbery. The defendant went into a tavern while the proprietor was in the back room. He allegedly took money from the cash register and when the proprietor heard a noise and came to the door of the main room of the tavern, the defendant stuck a gun out at the proprietor and then ran out of the tavern. It was pointed out that where the defendant obtained physical possession of the property by stealth, and that force, violence, or putting in fear was used only for means of escape, or where the evidence

4. State v. Henderson, 301 S.W.2d 813 (Mo. 1957).
5. State v. Fuller, 302 S.W.2d 906 (Mo. 1957).
6. 298 S.W.2d 429 (Mo. 1957).
7. 299 S.W.2d 532 (Mo. 1957).

failed to show that possession of the property was obtained by force or violence or putting in fear, then the crime is not robbery.

State v. Tripp[8] was a charge of robbery in the first degree on the theory that defendant was an accessory and could therefore be charged, tried, and punished in the same manner as a principal in the first degree. The opinion stated that the distinction between principals and accessories has been virtually abrogated by statute[9] and that an accessory can be charged even though the principals have not been arrested, tried or punished.

In a first degree robbery prosecution[10] where an assault with intent to rape occurred immediately following the robbery, testimony concerning the assault was admissible as part of the res gestae and as an act which was inseparable from the robbery.

In *State v. Lora*[11] it was held that the defense of insanity and the defense of an alibi are not conflicting and the defendant may rely on both and introduce evidence as to both in a robbery prosecution.

C. *Burglary and Stealing*

In *State v. Zammer*[12] the court stated that it is only in first degree burglary indictments and not in second degree burglary indictments that the method of gaining entry by forcibly bursting or breaking must be alleged. The opinion further sets out an excellent dicussion on the requirements for the indictment or information in a burglary and stealing (larceny) case. It was indicated that pleading under consolidated stealing statutes, such as we now have in Missouri, was intended to be simplified, and that such consolidated statutes tended to eliminate confusion in the prosecution for any type of wrongful acquisition of property of another.

State v. Ewing[13] was a case in which the evidence indicated an entry of a service station but there was no evidence of a breaking upon entering. There was evidence of a later escape by breaking. It was held that there was no burglary where there was no evidence that entry was made by force.

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8. 303 S.W.2d 627 (Mo. 1957).
9. § 556.170, RSMo 1949.
10. State v. White, 301 S.W.2d 827 (Mo. 1957).
11. 305 S.W.2d 452 (Mo. 1957).
12. 305 S.W.2d 441 (Mo. 1957).
13. 298 S.W.2d 439 (Mo. 1957).

Burglary tools taken from the trunk of a vehicle by officers when they arrested defendant are admissible in a burglary prosecution.[14] In the same case it was pointed out that malicious destruction of property was not a lessor offense of the charge of burglary and therefore there was no need for the trial court to instruct on such an offense.

In a burglary prosecution, evidence that when the defendant was discovered in a service station, he left the service station and ran, was admissible to show consciousness of guilt and to show flight.[15]

D. *Rape*

In a statutory rape prosecution, penetration may be shown by circumstantial evidence and slight proof of actual penetration is sufficient.[16] Generally a prima facie case can be made in a statutory rape prosecution on the uncorroborated testimony of the prosecutrix unless such testimony is contradictory with physical facts and common experience, so as to be unconvincing.[17] In this type of case evidence of similar acts committed by defendant with prosecutrix prior to the date charged in the information is admissible.[18]

Where a defendant was charged in two counts of an information[19] with assault with intent to rape and molestation of a minor, and the two counts involved occurrences at one time and place and with reference to defendant's conduct toward the same child, then the state was not required to elect, prior to the close of its case, whether to proceed on the charge of assault with intent to rape or the charge of molestation of a minor.

E. *Driving Motor Vehicle While Intoxicated*

State v. Powell[20] is a novel case in that the defendant was convicted of operating a motor vehicle while intoxicated where the evidence showed that at the time of the offense he was driving a farm tractor.

F. *Forgery*

In a forgery prosecution, evidence of the utterance by defendant of another check on the same day he uttered the check mentioned in the

14. State v. Drake, 298 S.W.2d 374 (Mo. 1957).
15. State v. Peterson, 305 S.W.2d 695 (Mo. 1957).
16. State v. Ivey, 303 S.W.2d 585 (Mo. 1957).
17. State v. Palmer, 306 S.W.2d 441 (Mo. 1957).
18. State v. Tyler, 306 S.W.2d 452 (Mo. 1957).
19. State v. King, 303 S.W.2d 930 (Mo. 1957).
20. 306 S.W.2d 531 (Mo. 1957).

information was admissible to prove defendant attempted to defraud in the utterance of the check described in the information.[21] Also in a forgery prosecution, proof of prior taking of checks and check protecting machine was admissible even though such acts might have constituted another criminal offense. Such facts were held admissible as being relevant circumstances that would tend to establish the elements of the crime charged.[22]

G. *Misdemeanors*

Defendant was prosecuted on a charge of disturbing-the-peace after he had been involved in an altercation with a city marshall. After an acquittal on the disturbing-the-peace charge, defendant was then charged with common assault and convicted. The St. Louis Court of Appeals held that even though the disturbing-the-peace charge and common-assault charge grew out of the same transaction, proof essential for the common-assault charge would not necessarily convict defendant of disturbing the peace. Therefore prior acquittal on disturbing the peace did not bar prosecution for common assault.[23]

In a charge against parents for violation of compulsory school attendance law, it is necessary that the information negative the provision of the statute relating to home instruction.[24]

State v. La Driere[25] was a proceeding in prohibition to prevent a circuit judge from assuming jurisdiction of an appeal from a judgment entered in the magistrate court upon a plea of guilty by defendant to a misdemeanor charge. It was held that defendant had no right of appeal from a judgment entered in the magistrate court upon a plea of guilty. This is contrary to an earlier case decided by the St. Louis Court of Appeals.[26]

H. *Confidence Game*

State v. Webster[27] was a prosecution for a violation of the confidence game statute.[28] The defendant tricked prospective tenants into signing a lease agreement for an apartment owned by defendant and paying rent

21. State v. Garrison, 305 S.W.2d 447 (Mo. 1957).
22. State v. De Poortere, 303 S.W.2d 920 (Mo. 1957).
23. State v. Brooks, 298 S.W.2d 511 (St. L. Ct. App. 1957).
24. State v. Cheney, 305 S.W.2d 892 (K.C. Ct. App. 1957).
25. 299 S.W.2d 512 (Mo. 1957) (en banc).
26. State v. Akers, 287 S.W.2d 370 (St. L. Ct. App. 1956).
27. 298 S.W.2d 403 (Mo. 1957).
28. § 561.450, RSMo 1949.

in advance, when in fact defendant had no intention of abiding by the contract, and defendant then obtained cancallation of the lease by demanding additional payment for alternations. The court held that there was sufficient evidence to sustain a conviction under this statute and they further held that evidence of prior acts of the defendant was admissible to show the same thing had happened previously with other tenants. The court also indicated that in a prosecution under this statute the state can use evidence of future promises and performances since this statute is considered broader than that of obtaining money by false pretenses.[29]

I. *Habitual Criminal Act*

State v. Thompson[30] was a prosecution for first degree robbery under the Habitual Criminal Act. The defendant contended that there should be no evidence allowed of three prior convictions inasmuch as the same three prior convictions had been previously used against him in another prosecution under the Habitual Criminal Act. The court did not decide this question directly since the jury made no findings as to prior convictions. The court stated that the charge of prior convictions is not made as an independent charge of the commission of those offenses but merely as affecting punishment. By way of dicta, it was indicated that in the opinion in the earlier case of *State v. Collins*,[31] there seems to be a rather clear inference that the use of a prior conviction more than once is premissible. Several cases[32] indicate what is necessary proof under the Habitual Criminal Act and these cases repeat the established rule that the identity of names is prima facie sufficient to establish defendant's identity for the purpose of showing prior convictions within the Habitual Criminal Act.

II. Trial

A. *Evidence*

In a second degree murder prosecution it was prejudicial error for the trial court to deny the defendant the right to use a transcript of testimony of the first trial of the defendant to impeach testimony of a witness

29. § 561.370, RSMo 1949.
30. 299 S.W.2d 468 (Mo. 1957).
31. 266 Mo. 93, 180 S.W. 866 (1915).
32. State v. Reed, 298 S.W.2d 426 (Mo. 1957); State v. Garrison, 305 S.W.2d 447 (Mo. 1957); State v. Peterson, 305 S.W.2d 695 (Mo. 1957).

for the state in the instant trial.[33] Previously it had been held that the state could impeach testimony of the defendant at a second trial by use of testimony at the first trial,[34] and the court indicated they could conceive no reason why the rule should be different for a defendant who desires to impeach a witness for the state. In this same murder prosecution the defendant contended she had shot her husband in self-defense, and the trial court was found to be in error when it refused to permit defendant to present evidence of prior threats and acts of violence on the part of the deceased.

State v. Kollenborn[35] involved a charge of mistreatment of an infant in which the wife of the defendant and mother of the infant testified voluntarily against her husband. In a very interesting opinion the court found that the wife was a competent witness against her husband in a prosecution for acts of personal violence against her child. This extends the exception to the common law rule on testimony of one spouse against another. The court states that such an exception is desirable since it involves an offense against marital status, against public policy, and that there is a true necessity that the wife be permitted to testify in event of personal injury to her child, and that the exception which applies to personal injury to herself should equally apply in a case involving personal injury to her child. The opinion cautioned that this rule was not to be taken as controlling in civil cases.

B. *Confessions and Admissions*

State v. Chernick,[36] a first degree robbery case, indicated that the fact the defendant was under arrest at the time his statement was made and that his counsel representing him was not then present, would not render his statement involuntary as a matter of law.

State v. Scott,[37] another robbery prosecution, held that an admission made by defendant after defendant had been held more than twenty hours and no charge had been filed against him, would not alone, establish such admission as being made involuntarily.

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33. State v. Laspy, 298 S.W.2d 357 (Mo. 1957).
34. State v. Meyers, 189 S.W.2d 279 (Mo. 1945).
35. 304 S.W.2d 855 (Mo. 1957) (en banc).
36. 303 S.W.2d 595 (Mo. 1957).
37. 298 S.W.2d 435 (Mo. 1957).

C. *Instructions*

In a first degree murder case where the state had offered in evidence a voluntary statement of the defendant,[38] it was held that an instruction concerning the voluntary statement of defendant was erroneous. The instruction directed that what was said against defendant in the voluntary statement, the law presumed to be true. The instruction further directed that what was said in the voluntary statement that was favorable to defendant, the jury might believe or disbelieve, as may be shown to be true or false by the evidence. The court held that whether there are both favorable and unfavorable statements, or just unfavorable, such as instruction that gives a presumption is erroneous as being a comment on the evidence and actually goes beyond a comment on the evidence and amounts to a direction that the jury accept presumed facts to be true. This opinion would seem to settle the rule on such instructions, whether they involve just unfavorable statements or whether they involve favorable and unfavorable statements concerning the defendant.

D. *Argument of Counsel*

It would seem that there are always many questions raised as to the propriety of the arguments of state's counsel in criminal cases. As is indicated by the following discussion, there can be no set rule applied as to what can be argued and what cannot be argued, but the propriety of each argument must be determined on the facts of the particular case. *State v. Spencer*[39] contained an excellent discussion of the duties of the prosecuting attorney in representing the state in a criminal case and the bounds beyond which the attorney for the state should not go. This case involved a charge of assault with intent to kill. The prosecutor, in his cross-examination of defendant's character witness, made inquiry as to whether the witness realized that defendant's father had been disbarred from the practice of law. The court, in no uncertain terms, indicated that such cross-examination was highly improper and that the trial court committed error in not reprimanding counsel upon request of defendant's attorney. In a further example of stressing the bounds of propriety, the prosecutor, in his oral argument, indicated that defendant was a prominent man from a prominent family and called the jury's attention to newspaper articles. The prosecutor further argued that the defendant

38. State v. Phillips, 299 S.W.2d 431 (Mo. 1957).
39. 307 S.W.2d 440 (Mo. 1957).

could hire a good attorney who would browbeat witnesses. All of these remarks were held to be highly improper and prejudicial to defendant.

In *State v. Hite*[40] prosecutor, in his closing argument, made the following comments with regard to the defendant's side of the case: "And what's on his side of the scale—empty?" "When the State closed the evidence what did the defendant offer? They offered no evidence at all." It was held by the court that these remarks did not refer to the accused's failure to testify.

In a prosecution for murder, the prosecutor in his final argument called the defendant an adulterer. Such a remark was found to be objectionable because there was no evidence in the record that the defendant was guilty of adultery, as that crime is defined in the statute.[41]

State v. Daegele[42] involved a charge of molesting a female child. In the opening statement the prosecuting attorney indicated that three witnesses identified pictures of the defendant as taken from police files. The court found that such a comment was improper, but did not constitute grounds for discharge of the jury, in view of the fact that the trial court heard the comment, considered its probable effect, and determined it was not prejudicial.

E. *Trial Procedure*

In a case involving molesting a female child,[43] it was held that it was not prejudicial error for the trial court to permit the prosecutrix to be present in the courtroom when not testifying and in permitting her parents to be present during her testimony, as such matters are in the discretion of the trial court.

In a first degree robbery prosecution,[44] a witness for defendant was cross-examined as to marital and extramarital relations of witness' mother. Such an examination was held to be improper and prejudicial since the credibility of a witness for truthfulness may not be impeached by showing that his general moral character is bad.

Edwards v. Nash[45] was a habeas corpus action against the warden of

40. 298 S.W.2d 411 (Mo. 1957).
41. State v. Baber, 297 S.W.2d 439 (Mo. 1956).
42. 302 S.W.2d 20 (Mo. 1957).
43. State v. Daegele, *supra* note 42.
44. State v. Lora, 305 S.W.2d 452 (Mo. 1957).
45. 303 S.W.2d 211 (Mo. 1957).

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the state penitentiary on the basis that the accused had been convicted in a capital case without the appointment of counsel on his behalf. It was pointed out in the opinion that a state's policy in regard to the appointment of counsel in capital cases has no effect with regard to due process as required by the federal constitution. The court further pointed out that the accused in a capital case must be appointed counsel whether or not counsel is requested by accused. Such is held to be necessary by the United States Supreme Court[46] to satisfy the due process clause in the fourteenth amendment.

In an application for continuance in a criminal case, the trial court is not limited to consideration of facts stated in the affidavit of defendant, and the trial court may inquire into the truth of the statements contained in the application, either by hearing evidence or by applying its own knowledge of what has occurred in the case at the time application is made, especially where the court is led to question the good faith of the accused.[47]

F. *Appeal*

In at least half of the cases involving the field of criminal law which were reviewed by the Missouri supreme court during the year 1957, the court has refused to review allegations of error contained in the motion for new trial on the grounds that the allegations were too indefinite and did not comply with supreme court rule 27.20.[48] An assignment of error must set forth in detail and with particularity the specific grounds or causes for a new trial.[49]

There is no question from the cases reviewed that the supreme court requires that their rules as to appeal be followed. However, any doubt as to whether defendant's motion for a new trial sufficiently preserves for appellate review the question of sufficiency of the evidence to sustain the verdict, will be resolved in defendant's favor.[50] The court also demands that the motion for new trial be filed within the allowed time and has held that such a motion filed after the allowed time has elapsed is a nullity and preserves nothing for review.[51]

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46. Powell v. Alabama, 287 U.S. 45 (1932).
47. State v. Le Beau, 306 S.W.2d 482 (Mo. 1957).
48. RSMo 1957 Supp., at 1376.
49. State v. Reed, 298 S.W.2d 426 (Mo. 1957); State v. White, 301 S.W.2d 827 (Mo. 1957).
50. State v. Westberg, 307 S.W.2d 499 (Mo. 1957).
51 State v. Kenton, 298 S.W.2d 433 (Mo. 1957).

G. *Writs of Error Coram Nobis and Motions to Vacate Sentence and Judgment*

During the past year there were several interesting cases which were in the nature of a writ of error coram nobis. These writs were ordinarily brought to attack a judgment of conviction after the sentence had been served. The purpose of these writs generally was to attempt to invalidate previous convictions, so that the petitioner would not be liable for prosecution at the present time under the Habitual Criminal Act. The court generally held in these cases that such a writ is available to attack a judgment of conviction even after sentence has been served, provided that the motion is for a cause specified in the supreme court rules which provide for procedure for attack upon judgments. It has been held that habeas corpus would not be applicable in such cases because the attack was not on any sentence under which the petitioner was then in custody.[52] The opinions of the court involving such writs indicate that the trial court can speak only through its records and that a judgment cannot be impeached by oral testimony.[53]

In an attack upon a judgment for the reason that it did not show defendant waived his right to counsel, the court held that since there was not a positive showing defendant had not waived his right to counsel, the proceedings in the trial court would be presumed to be correct, and the failure to show the waiver of the right to counsel would not in itself invalidate a judgment against the defendant.[54]

In another hearing on a writ of error coram nobis, the court indicated that its review was based on the record as made in the lower court, as in suits of an equitable nature, and that such a proceeding was not a trial de novo, in that it was not a complete retrial in which new proofs might be made and the whole case opened up.[55]

In a motion to vacate a sentence and judgment the court held that any variance between the warrant, affidavit and complaint, with respect to the nature of the offense, did not affect the question of defendant's guilt or innocence, and if the warrant was defective such defect was waived by failure to make timely objections and by proceeding with the trial.[56]

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52. State v. Stodulski, 298 S.W.2d 420 (Mo. 1957).
53. *Ibid.*; State v. Harrison, 299 S.W.2d 479 (Mo. 1957).
54. State v. Stodulski, *supra* note 52.
55. State v. Eaton, 302 S.W.2d 866 (Mo. 1957).
56. State v. Ninemires, 306 S.W.2d 527 (Mo. 1957).

In another such motion brought under supreme court rule 27.26[57] the court indicated that such a motion may not be used as a substitute for a motion for new trial nor shall it function as an appeal,[58] and even though there was an admission of evidence by the trial court that could have been considered prejudicial on appeal, had it been properly raised and preserved, where the defendant did not raise the issue and his appeal was dismissed such an erroneous admission of evidence was not grounds for a collateral attack on the judgment.

57. RSMo 1957 Supp., at 1377.
58. State v. Hagedorn, 305 S.W.2d 700 (Mo. 1957).