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THE ADMISSIBILITY OF PHOTOGRAPHS OF THE CORPSE IN HOMICIDE CASES

ADMISSIBILITY IN GENERAL

Photographic evidence of persons, places and things is generally admissible in criminal prosecutions.¹ The fundamental reasoning underlying this rule is that photographic evidence is no more than a pictorial communication of a witness as opposed to or in conjunction with some other method of communication.² This general principle, with what approaches unanimity,³ has been specifically applied to admit photographs of the corpse in homicide prosecutions, in the discretion of the trial court,⁴ so long as basic requisites of identity⁵ and relevancy⁶ are

1. *Martin v. Commonwealth*, 184 Va. 1009, 31 S.E.2d 43 (1946); *State v. Myers*, 7 N.J. 465, 81 A.2d 710 (1951); *Commonwealth v. Boden*, 399 Pa. 298, 159 A.2d 894 (1960). See generally 20 AM. JUR. EVIDENCE § 728 (1939), Cf. *State v. Gardner*, 228 N.C. 567, 46 S.E.2d 824 (1948), holding that although photographs may not be used as substantive evidence, a witness may use them for the restricted purpose of explaining or illustrating relevant testimony.

2. *Smith v. State*, 27 N.J. 433, 142 A.2d 890 (1958). *Ligon v. Allen*, 157 Ky. 101, 162 S.W. 536 (1914). See also GREENLEAF, EVIDENCE, § 439(h), at 547 (1899).

3. See generally the cases collected in Annot., 73 A.L.R.2d 773, 775 (1960); also Annot., 159 A.L.R. 1443 (1945).

4. *People v. Schrader*, 44 Cal. Rep. 193, 401 P.2d 665 (1965); *People v. Jenko*, 410 Ill. 478, 102 N.E.2d 783 (1951); *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587 (1942). The ruling of the trial court will be overturned only when discretion is abused. *State v. Rainey*, 149 Me. 92, 99 A.2d 78 (1953). Some courts have held the lower court's action must be clearly abusive or patently erroneous under the circumstances, *Belger v. State*, 171 So.2d 574 (Fla. 1965). Others have indicated only flagrant abuse warrants reversal, *Commonwealth v. Boden*, 399 Pa. 298, 159 A.2d 894 (1960). Even if a ruling is found to be erroneous reversal is not necessarily warranted. *Wisniewski v. State*, 51 Del. 84, 138 A.2d 333 (1957).

5. *State v. Gardner*, 228 N.C. 567, 46 S.E.2d 824 (1948); *Wilson v. State*, 94 Ga. App. 588, 95 S.E.2d 733 (1956). In reference to the need to accurately identify photographs in general see Annot., 9 A.L.R.2d 899 (1950). Whether or not a photograph has been sufficiently verified is a preliminary question of fact for the trial court, *Commonwealth v. Noxon*, 319 Mass. 495, 66 N.E.2d 814 (1946). It does not seem necessary that the person who takes the photographs and the person who develops them be the same, *Black v. State*, 215 Ark. 618, 222 S.W.2d 816 (1949). Nor, is it necessary that the photograph be taken by a professional photographer, *State v. Jones*, 52 N.M. 118, 192 P.2d 559 (1948). In fact, so long as there are other competent witnesses available to testify that the photographs are a true representation it is not necessary that the photographer be identified, *People v. Cheary*, 48 Cal.2d 301, 309 P.2d 431 (1957). The condition of the camera is also immaterial if there is an accurate representation. *Jones v. State*, 228 Miss. 296, 87 So.2d 573 (1956).

6. See *Reddish v. State*, 167 So.2d 858 (Fla. 1964). Basic rules of relevance and materiality would seem to apply to photographic evidence of a corpse in a homicide prosecution as to photographic evidence generally, see Am. Jur. EVIDENCE § 729 (1939). See also *State v. Thorne*, 239 S.C. 164, 121 S.E.2d 623 (1961).

met. Some courts have taken the position that if such evidence is of probative value and may assist the witnesses in illustrating their testimony and the jury in ascertaining the truth of the matter and reaching a just conclusion there is no more reason to exclude photographs of the deceased than any other evidence.⁷ In *Martin v. Commonwealth*⁸ the Supreme Court of Appeals of Virginia adopted a slightly different approach yielding the same result. Treating the question of the admissibility of a photograph of the corpse in a criminal case as one of first impression, the Court found a photograph of a corpse showed no more than a view of the object itself and should tend to "excite no more sympathy or prejudice than the exhibition of a living person with a bruised, broken and torn body."⁹ In accordance with the general position of the courts photographs of the deceased have been held admissible to cast light on motive and intent,¹⁰ to show cause of death,¹¹ to show the atrociousness of the crime,¹² to establish the location and nature of the injury,¹³ to show the condition of the body¹⁴ and for various other purposes.¹⁵

LIMITATIONS UPON ADMISSIBILITY

The general rule as to the admissibility of photographs of the corpse in homicide prosecutions is subject to some limitation. Reference has

7. *Commonwealth v. Novak*, 395 Pa. 199, 150 A.2d 102 (1959); see also *Alcorta v. State*, 294 S.W.2d 112 (Tex. Crim. 1956). Rev'd on other grounds, 353 U.S. 28 (1956). Cf. *State v. Bischert*, 131 Mt. 152, 308 P.2d 969 (1957), and *Reddish v. State*, *supra* note 6, indicating if introduction of a photograph is not substantially necessary it should be excluded. See also *State v. Tyson*, 363 Mo. 1242, 258 S.W.2d 651 (1953).

8. 184 Va. 1009, 37 S.E.2d 43 (1946).

9. *Id.* at 1022, 37 S.E.2d at 49.

10. *People v. Craig*, 49 Cal.2d 313, 316 P.2d 947 (1957).

11. *Hollin v. Commonwealth*, 307 S.W.2d 910 (Ky. 1957).

12. *State v. Turmel*, 148 Me. 1, 88 A.2d 367 (1952); see also *Timmons v. Commonwealth* 204 Va. 205, 129 S.E.2d 697 (1963), recognizing the rule.

13. *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958). Photographs have been admitted to show the nature and location of a wound even after an operation attempting to save the victim's life, *Gaddes v. State*, 39 Ala. App. 630, 106 So.2d 268 (1958), and after autopsy, *McKeen v. State*, 253, 44 So.2d 781 (1949).

14. *State v. Smith*, 27 N.J. 433, 142 A.2d 890 (1958).

15. Photographs of the deceased have also been admitted to prove the corpus delicti, *State v. Gardner*, *supra* note 1, to identify the victim, *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950), to prove the character of weapons used, *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665 (1957), or the manner in which they were used, *People v. Jenko*, 410 Ill. 478, 102 N.E.2d 783 (1951). Also to refute defendant's plea of self-defense, *Darty v. State*, 161 So.2d 864 (Fla. 1964) and accident, *Commonwealth v. Davis*, 363 Pa. 91, 69 A.2d 123 (1949), as well as to corroborate state witnesses, *State v. Ernst*, 150 Me. 449, 114 A.2d 369 (1955).

already been made to the requisites of proper identification and relevancy.¹⁶ These basic requisites are seemingly adhered to in all jurisdictions,¹⁷ and although they may operate to restrict admissibility in any given case they warrant no further attention. The most significant restrictions, to the extent which they exist, relate to the necessity for admitting the photographs at all and the possibly prejudicial effect they will have upon the jury if admitted.

NECESSITY FOR ADMISSIBILITY

One of the most prominent objections to admissibility has been that under the particular circumstances of the case the introduction of photographs of the corpse is simply unnecessary and superfluous.¹⁸ More specifically it has been urged that when the defendant has admitted the facts to be shown by the photograph,¹⁹ or when the photographic evidence is of a cumulative nature²⁰ admissibility should be denied. These arguments rest upon the theory that as photographs of the body of the victim are of an inherently prejudicial nature the chance of depriving the defendant of a fair trial should not be taken unnecessarily, there being no necessity in the circumstances cited.²¹

There are some indications of variance in the manner in which the courts view objections based upon lack of necessity. In *Oxendine v. State*,²² a case in which the defendants made "full" and "complete" written confessions and admitted the crime in "intricate detail" the Court reversing the lower tribunal stated:

There was no issue nor controversy as to the cause of death. The defendants admitted the crime in intricate detail. The photos could not possibly lend assistance in the determination of the defendant's guilt. It was admitted . . . The whole procedure seems to have been so unnecessary and was highly prejudicial and forces a reversal.²³

Similarly, in *State v. Robinson*,²⁴ the Court determined that although the state would be entitled to introduce photographs if necessary to

16. See cases collected *supra* at notes 5 and 6.

17. 20 AM. JUR. *Evidence* § 728-729 (1939).

18. *Martin v. Commonwealth*, *supra* note 8.

19. *Oxendine v. State*, 335 P.2d 940 (Okla. Crim. 1958).

20. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1955).

21. *Reddish v. State*, 167 So.2d 858 (Fla. 1964).

22. 365 P.2d 940 (Okla. Crim. 1958).

23. *Id.* at 943.

24. 328 S.W.2d 66 (Mo. 1959). See also *Reddish v. State*, *supra* note 20.

prove facts in issue, the defendant had admitted all facts which may have been shown by the photographs and it was error to admit them under such circumstances. However, in *State v. Leland*,²⁵ even though there was a confession the Court maintained that so long as a plea of not guilty stands the State must be allowed to prove its case to the hilt, subject only to standards of fair play and the rules of evidence. Under a strict application of this reasoning it is immaterial whether or not the defendant admitted the facts to be proved by a photograph of the victim. Photographs of the corpse were also held admissible in *State v. Jones*.²⁶ In this case the defendant had made a confession and testified at the trial to substantially the same facts as contained in his confession. The Court overruled defense counsel's objection that introduction was unnecessary and found that photographic evidence is often better than words and served to corroborate state witnesses.

The latter cases could be taken as indicating that pictures of the corpse are admissible whether or not the defendant has admitted all of the facts which might be proved by their introduction.²⁷ Most cases concerning the defendant's admission of facts can be reconciled with *Oxendine* and *Robinson* however, and any differences of result rest not upon a divergence of rule, but upon factual distinctions. It is to be noted that in *Oxendine* "all" of the issues and facts upon which the photographs bore were admitted by the defendant, while in other cases only "some" of the facts were admitted and the photographs still had probative value with relation to facts or issues which had not been admitted.²⁸ Thus, in *Rivers v. U. S.*,²⁹ photographs of the dismembered body of the deceased were allowed over objection although the defendant admitted the killing, because the Court felt they had relevance as circumstantial evidence of the defendant's intent and purpose. In *People v. Laverne*³⁰ photographs of the deceased were admitted even though the defendant admitted hitting the deceased and that the deceased died from the injuries he had inflicted, as the pictures were relevant on the issue raised by the defendant's plea of self-defense. In fact,

25. 190 Ore. 598, 227 P.2d 785, aff'd, 343 U.S. 790 rehearing denied, 344 U.S. 848 (1951).

26. 52 N.M. 118, 192 P.2d 559 (1948).

27. Annot., 73 A.L.R.2d 769, § 10 at 809 (1960).

28. *State v. Upton*, *supra* note 20, it seems significant to note that in this case the Court said, "Appellant did not by this admission relieve the state of its entire burden of proof, for the appellant still stood on his plea of not guilty by reason of insanity." *Id.* at 442.

29. 270 F.2d 435 (9th Cir. 1959).

30. 148 Cal. App. 2d 605, 307 P.2d 31 (1957).

it is not at all certain that even *Leland* and *Jones* cannot be reconciled with the *Oxendine* approach. In *Powell v. State*³¹ it was decided that defendant's admissions were not broad enough to operate as a stipulation of all issues upon which photographs of the deceased bore. Although the breadth of the confessions in *Leland* and *Jones* is not clear, both cases could fall within the scope of the *Powell* decision.³² It is clear, however, that admissibility will not be denied in any case unless the defendant admits all issues and facts upon which a photograph of the deceased may bear.

It is generally held that the mere fact that a photograph of the body of the deceased is of a cumulative nature will not bar admissibility.³³ Thus, in *State v. Helm*,³⁴ the Court admitted photographic evidence of the deceased although a witness had testified to the facts to be proved by the photograph saying, ". . . there is no best evidence rule which excludes photographic evidence merely because some witness has testified concerning the conditions portrayed in the picture."³⁵ Often a photograph is clearer and more understandable than other evidence.³⁶ Even if cumulative a photograph may serve other legitimate purposes.³⁷ The test for determining admissibility is not necessity but whether or not the evidence is relevant.³⁸

In jurisdictions adhering to the "substantial necessity rule," it would seem a contrary view might obtain. Referring to this rule the Supreme Court of Louisiana³⁹ said:

. . . photographs which are calculated to arouse the sympathies or prejudices of the jury are properly excluded if they are entirely irrele-

31. 40 Ala. App. 148, 109 So.2d 525 (1959).

32. This seems particularly true in the case of *State v. Leland*, *supra* note 25, where the Court indicated that although there had been a confession the photograph still had probative value on the question of deliberation and premeditation. In *State v. Jones*, *supra* note 26, however, such a clear case cannot be made.

33. *State v. Myers*, 7 N.J. 465, 81 A.2d 71 (1961); *State v. Walkers*, 33 N.J. 580, 166 A.2d 567 (1960); *Commonwealth v. Buzard*, 365 Pa. 511, 76 A.2d 394 (1950); *People v. LaVerne*, *supra* note 30.

34. 66 Nev. 286, 209 P.2d 187 (1949) quoting *Godvig v. Lopez*, 185 Ore. 301, 202 P.2d 935 (1949).

35. *Id.* 209 P.2d at 197.

36. *Smith v. State*, 216 Ark. 1, 223 S.W.2d 1011 (1949).

37. *State v. Jones*, *supra* note 26.

38. *People v. Harrison*, 59 Cal.2d 622, 381 P.2d 665 (1963).

39. *State v. Morris*, 245 La. 175, 175 So.2d 728 (1963) [Court adopting the language of 23 C.J.S. *Criminal Law* § 852(1) c (1961)].

vant or not substantially necessary to show material facts and conditions.⁴⁰

It is at least questionable whether evidence which is cumulative is "substantially necessary" in given circumstances.⁴¹ In other jurisdictions the courts follow the rule that photographs should be excluded unless their probative value outweighs their prejudicial nature.⁴² Although the fact that a photograph is cumulative will not act as a bar to admissibility in these jurisdictions it could well operate as an obstacle, for the cumulative nature of a photograph could well reduce its probative value and result in exclusion. An examination of the cases, however, did not reveal any central tendency to exclude photographic evidence of a corpse on the basis that the evidence was cumulative in the absence of other factors. When the cumulative nature of a photograph has been mentioned as a ground of exclusion it has usually been in conjunction with other factors such as admissions by the defendant and the extremely prejudicial nature of the particular photograph.⁴³

PREJUDICIAL NATURE AS A BAR TO ADMISSIBILITY

The introduction of a photograph of the corpse is often strenuously challenged by attorneys for the defense on the basis that what it portrays,⁴⁴ the manner in which it portrays,⁴⁵ or the circumstances under which it was taken,⁴⁶ renders it so prejudicial that admission will inflame the jurors to such a degree that the defendant will be deprived of

40. *Id.*, 157 So.2d at 731.

41. *State v. Tyson*, 363 Mo. 1242, 258 S.W.2d 651 (1953), seems to indicate it may be, however.

42. *People v. Modesto*, 42 Cal. Rep. 417, 398 P.2d 753 (1965); *State v. DuQuay*, 158 Me. 61, 178 A.2d 129 (1962); *Born v. State*, 397 P.2d 924 (Okla. Crim. 1964).

43. *Keifer v. State*, 239 Ind. 103, 153 N.E.2d 899 (1958); *People v. Jackson*, 9 Ill.2d 484, 183 N.E.2d 528 (1956); *Dyken v. State*, 89 So.2d 866 (Fla. 1956).

44. Objections are often based upon the extremely gruesome or ghastly nature of photographs, *Rivers v. U.S.*, *supra* note 29; *State v. Beckwith* 243 Iowa 841, 53 N.W.2d 867 (1952).

45. Closely related to the subject of note 44 *supra*, are allegations that photographs are rendered prejudicial because enlarged or in color. Generally, the courts have taken the view that so long as the photograph is a true representation, the fact that it is in color or enlarged is inconsequential. See *State v. Sheppard*, 100 Ohio App. 345, 60 Ohio Ops. 298, 128 N.E.2d 504 (1955).

46. In *State v. De Zeler*, 230 Minn. 39, 41 N.W.2d 313 (1950), the Court, over an objection that three weeks' time had lapsed between death and the time the picture was taken, found that so long as the photographs were accurate and relevant they should not be excluded.

a fair trial.⁴⁷ If the photograph lacks probative value the courts have found no problem and there is general agreement that if the primary or sole purpose of a photograph is to prejudice the jury it should be excluded.⁴⁸ If the photograph possesses probative value, however, the courts have been forced to reconcile two conflicting principles. Evidence that has probative value and will be of assistance to the jury in reaching a just verdict should be admitted. It is also true that evidence of an inherently prejudicial nature should not be admitted. Obviously when the relevant evidence contains both characteristics a reasonable choice must be made.

It has been clearly established that photographs will not be refused admission merely because they have a tendency to inflame the jury,⁴⁹ or influence beyond the strict limits for which they are admissible.⁵⁰ Relevant evidence should not be excluded simply because it may arouse feelings of indignation.⁵¹ Any testimony involving the details of a violent crime could have this tendency, but this should not be allowed to render it incompetent.⁵² If the particular photograph serves to clarify or establish any material matter it is admissible even though it tends to agitate jurors.⁵³ In *State v. DuQuay*⁵⁴ the Court said:

Men and women of standing to be jurors and who have passed into the jury box are not so weak and untutored that they could be influenced to return a verdict of guilty by reason of the photographs. Surely the average man and woman is not so far removed from pain and sorrow, from gruesomeness, from scenes of death and violence and the like, that photographs such as these would turn the reasoning mind into dislike of or prejudice against a respondent defending himself in the halls of justice.⁵⁵

If the jury cannot perform its function without being improperly influenced the jury system is a failure.⁵⁶

In accordance with the views adhered to by most courts the prevail-

47. *Rivers v. U.S.*, *supra* note 29.

48. *People v. Cheary*, 48 Cal.2d 301, 309 P.2d 431 (1957); *Commonwealth v. Novak*, 395 Pa. 199, 150 A.2d 102 (1959).

49. *Carson v. Commonwealth*, 382 S.W.2d 85 (Ky. 1964).

50. *Oliver v. State*, 225 Ark. 809, 286 S.W.2d 17 (1956).

51. *People v. Jenko*, 410 Ill. 478, 102 N.E.2d 783 (1951).

52. *People v. Jenko*, *supra* note 51.

53. *State v. Perkins*, 382 S.W.2d 701 (Mo. 1964).

54. 158 Me. 61, 178 A.2d 129 (1962).

55. *Id.*, 178 A.2d at 131.

56. *State v. Long*, 195 Ore. 81, 244 P.2d 1033 (1952).

ing test with regard to prejudice is whether or not the probative value of the particular photograph outweighs its prejudicial nature.⁵⁷ Each conflicting principle is given force within defined limits. Theoretically if the prejudicial nature is at least equal to the probative value admissibility will be denied. Thus, while each of the necessary principles is allowed to function the defendant is given the benefit of the doubt in conformity with ideals of justice. Adoption of this rule seems the most practical and desirable method of providing protection for both defendants and the state.

To say that the rule is the most practical and desirable, however, is not to say that it is not susceptible of qualifications which call for cautious observation of its application. Whether or not probative value outweighs prejudicial nature rests within the discretion of the trial judge.⁵⁸ It is obvious that neither factor can be weighed with mathematical accuracy, and as they cannot, any determination of value or weight must rest upon the subjective evaluation of the individual judge. This situation is not conducive to uniform application and the courts must be watchful to insure that all men are equal before the law. A survey of the cases gives rise to an additional consideration; the operative value of the test as a restriction upon admissibility. Although the rule as stated promises adequate protection, the application of the rule is as important as the rule itself. It is, of course, impossible to determine with any certainty the manner in which a rule of this nature is being applied from printed records, but the small number of cases where the prejudicial nature of a photograph was considered sufficient to warrant exclusion, in proportion to the number of decided cases may well be a warning that the rule in application does not provide as much of a restraint upon the admissibility of highly prejudicial photographs as a reading of the rules themselves would indicate. In the interest of an equitable balance between the rights of the state and the rights of the accused the courts must attempt to insure a reasonable and practical consideration of highly prejudicial photographs and exercise caution lest minute probative factors are exploited and assigned undue importance. When society

57. See cases collected *supra* note 42; Cf. *State v. Sherrick*, 402 P.2d 1 (Ariz. 1965). Failure of the Court to indicate that probative value has been weighed against the prejudicial nature of a photograph may warrant reversal, *People v. Ford*, 60 Cal. 2d 772, 388 P.2d 892 (1964). Pennsylvania, while adhering to the general rule has adopted an additional safeguard and requires the Court to caution the jurors against allowing the photographs to prejudice them, *Commonwealth v. Capps*, 382 Pa. 72, 114 A.2d 338 (1955); *Commonwealth v. Dickerson*, 406 Pa. 102, 176 A.2d 421 (1962).

58. *People v. Schader*, 44 Cal. Rep. 193, 401 P.2d 665 (1965).

acts to assure reasonable freedom from prejudice it does not act to protect the guilty, but the innocent; and in protecting the innocent it protects itself.

CONCLUSION

It is clear that relevant and verified photographs of the corpse are generally admissible in homicide prosecutions for various purposes. Limitations upon admissibility vary as to their practical and operative value. The courts have not looked favorably upon objections based upon lack of necessity, but this is as it should be. Valuable evidence cannot be excluded simply because the defendant has admitted some facts or issues it will serve to prove. If this were the case any relevant photograph could be excluded in admitting all issues upon which the photograph had a bearing except those important to the defendant's case. This could hamstring the state and result in its case remaining unproved. Nor, is there any pressing need to exclude photographs merely because they are cumulative. Only when the photographs are cumulative and prejudicial is there any reason for concern, and in such cases sound application of the probative value test will provide adequate protection. It follows that the limitation upon admissibility of prejudicial photographs is the most substantial restriction. In this respect the weighing of probative value against prejudicial nature is the most equitable approach, and if soundly applied it should serve as a reasonable safeguard of the defendant's rights. As the rule is inherently susceptible of abuse, however, the courts must remain vigilant to assure just application.

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