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The Admissibility of Gruesome Photographs in a Criminal Trial Is Based on Their Competency, Materiality, and Relevancy to the Issue on Trial and Are Admissible If a Verbal Description of the Scene of the Crime Would Be Admissible, Unless the Photographs Are Offered Solely to Inflame the Minds of the Jury.

Steven M. Lee

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF GRUESOME PHOTOGRAPHS—THE ADMISSIBILITY OF GRUESOME PHOTOGRAPHS IN A CRIMINAL TRIAL IS BASED ON THEIR COMPETENCY, MATERIALITY, AND RELEVANCY TO THE ISSUE ON TRIAL AND ARE ADMISSIBLE IF A VERBAL DESCRIPTION OF THE SCENE OF THE CRIME WOULD BE ADMISSIBLE, UNLESS THE PHOTOGRAPHS ARE OFFERED SOLELY TO INFLAME THE MINDS OF THE JURY. *Martin v. State,* 475 S.W.2d 265 (TEX. CRIM. App. 1972).

The defendant in *Martin v. State*[1] pled not guilty by reason of insanity to a charge of shooting his former wife. He was, however, found guilty of murder with malice and assessed a sentence of life imprisonment. The defendant's objections to the introduction of four photographs taken of the deceased and of the scene of the crime shortly after the shooting were overruled. On appeal to the Texas Court of Criminal Appeals, the defendant contended that under Texas decisions the test for admissibility of gruesome photographs requires that there must be a disputed fact issue, effected by defendant through direct testimony, to which the photographs are legally relevant before the court may admit such photographs into evidence. Held—*Affirmed.* The admissibility of gruesome photographs in a criminal trial is based on their competency, materiality, and relevancy to the issue on trial, and such photographs are admissible if a verbal description of the body and scene of the crime would be admissible, unless they are offered solely to inflame the minds of the jury.[2]

The question of the admissibility of gruesome photographic evidence in the criminal trial has perplexed judges since the advent of photography. Courts throughout the country usually hold photographs admissible despite their gruesomeness in order to show the location and nature of injuries,[3] to refute pleas of self-defense,[4] and to show other facts such as the position of the parties prior to and during the crime.[5] The federal courts in treating gruesome photographs the same as other evidentiary matters have placed little control on the admissibility of photographic evidence. The United States Court of Appeals for the Fifth Circuit has held that ". . . so long as photographs accurately represent what they

1 475 S.W.2d 265 (Tex. Crim. App. 1972).

2 *Id.* at 267.

3 *See* McKee v. State, 31 So. 2d 656 (Ala. 1947) (photos of internal organs after dissection at autopsy); Oliver v. State, 286 S.W.2d 17 (Ark. 1956) (photos of bullet wounds); Monson v. State, 45 Tex. Crim. 426, 63 S.W. 647 (1901) (photos of deceased's brain).

4 *See* Jones v. State, 213 S.W.2d 974, 977 (Ark. 1948) (photos showing distance of bodies from each other to disprove defendant's plea of self-defense); State v. Gardner, 46 S.E.2d 824, 829 (N.C. 1948) (photos showing viciousness of attack to refute plea of self-defense).

5 *See* Smith v. State, 411 S.W.2d 548, 553 (Tex. Crim. App. 1967) (court admitted photos of body at scene to show respective position of parties at time of shooting in connection with defendant's plea of self-defense).

purport to depict and are logically relevant, their extreme gruesome and prejudicial character cannot make their admission in evidence amount to a denial of due process."[6]

There is a split of authority within American courts as to the test for admissibility of gruesome photographs in a criminal case.[7] One view is that if gruesome photographs are relevant to the issue on trial, then despite their extreme gruesome nature, the introduction would be upheld.[8] The problem facing the courts adopting this view is in deciding whether a particular photograph is relevant. There is a wide variation among the states as to the strictness of the relevancy test.[9] Other courts have instituted a balancing test which weighs the probative value of the offered photograph against the possible inflammatory effects the pictorial evidence may have on the jury.[10]

The Texas Court of Criminal Appeals, for a period of seventy years, limited the introduction of gruesome photographs to cases in which the pictures were legally relevant to the disputed fact issues.[11] Thus pictures that were introduced solely to inflame the minds of the jury and which were of no aid to the jury's solution of the case were excluded.[12] The only question facing the court in the pre-*Martin* days was whether or not the photographs were introduced to assist the jury in solving a material disputed fact. As early as 1901, in *Monson v. State*, the Texas court stressed the need for the photograph to be relevant to disputed issues before such evidence could be admitted.[13] Judge Davidson, writing for the court, affirmed the trial court's admission into evidence of pictures of the deceased's brain, where the defendant contended that the injuries to the deceased were brought about by an accidental fall.[14]

In *Willis v. State*, some four years after *Monson*, the court stated:

> [W]e believe it is conceded by all that where the photograph is not necessary to illustrate or make clear any question, but on the

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6 Burns v. Beto, 371 F.2d 598, 601 (5th Cir. 1966).

7 *See* 3 A. SCOTT, PHOTOGRAPHIC EVIDENCE § 1231 (2d ed. 1969).

8 State v. Eubanks, 124 So. 2d 543 (La. 1960); Seals v. State, 44 So. 2d 61 (Miss. 1950); Mott v. State, 232 P.2d 166 (Okla. 1951); State v. Garver, 225 P.2d 771 (Ore. 1950).

9 3 A. SCOTT, PHOTOGRAPHIC EVIDENCE § 1231 (2d ed. 1969).

10 People v. Sanchez, 423 P.2d 800 (Cal. 1967); State v. Wardwell, 183 A.2d 896 (Me. 1962); State v. Freemon, 374 P.2d 453 (Ore. 1962).

11 Burns v. State, 388 S.W.2d 690 (Tex. Crim. App. 1965) (photos admitted when defendant denied the number of wounds); Craig v. State, 171 Tex. Crim. 256, 347 S.W.2d 255 (1961) (photos were admitted to refute contention that death was due to fall); Bell v. State, 170 Tex. Crim. 308, 340 S.W.2d 294 (1961) (photos were admitted to refute defendant's plea of self-defense); Monson v. State, 45 Tex. Crim. 426, 63 S.W. 647 (1901) (photos of deceased's brain were admitted after issue of cause of death was raised).

12 Borroum v. State, 168 Tex. Crim. 552, 556, 331 S.W.2d 314, 316 (1960): "There existed no issue under the facts that would authorize the introduction of the pictures showing the bloody wound and the bloody clothing of the deceased." Wooley v. State, 162 Tex. Crim. 378, 285 S.W.2d 218 (1956); Shaver v. State, 162 Tex. Crim. 15, 280 S.W.2d 740 (1955).

13 45 Tex. Crim. 426, 63 S.W. 647 (1901).

14 *Id.*

other hand would be calculated to prejudice or inflame the minds of the jury, that such evidence is not admissible.[15]

In a line of cases beginning with *Gibson v. State*, the court of criminal appeals broadened its interpretation of what constituted a disputed fact and approved the admission of gruesome photographs to show malice and intent.[16] Thus, regardless of the defendant's stipulation that he committed the act, the prosecution was now able to introduce gory photographs of the body and scene to demonstrate to the jury the defendant's malice.[17] Thus, in permitting gory photographs whenever the question of malice was present, the court broadened the tests of admissibility.

Burns v. State, considered to be the leading case on the admissibility of gruesome photographs in Texas prior to the *Martin* decision, comprehensively reviewed and affirmed the "disputed fact test" for admissibility.[18] Presiding Judge McDonald, in overruling *Gibson*, stated that the rule allowing the admissibility of photographs to show intent and malice was too broad. The *Burns* decision narrowed the scope of the "disputed fact test" which the court was later to abrogate entirely in the *Martin* decision.[19]

Martin's plea of not guilty by reason of insanity presented no question of the defendant's responsibility for committing the crime. Martin contended that before photographs could properly be admitted, the defendant must place the particular fact to which the exhibit relates into issue.[20] The court in its consideration of Martin's appeal was faced with reconciling the disputed fact test with a situation in which no issue was before the court other than defendant's sanity. In its original opinion, the court refuted the defendant's allegation that there was no disputed fact by reasoning that the pictures were relevant to testimony that the defendant had waived off others as he was firing at the deceased. The court reasoned that the pictures were relevant in showing that the "appellant had understood the nature and quality of his act."[21] The court in its opinion on appellant's motion for rehearing, which withdrew the original opinion, expressly overruled the "disputed fact test"

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15 49 Tex. Crim. 139, 146, 90 S.W. 1100, 1104 (1905).

16 153 Tex. Crim. 582, 223 S.W.2d 625 (1949) (the court in overruling this rule, in Burns v. State refers to Gibson's discussion of intent and malice as dicta); Ray v. State, 160 Tex. Crim. 12, 266 S.W.2d 124 (1954); Cantrell v. State, 156 Tex. Crim. 329, 242 S.W.2d 387 (1951).

17 See note 16, *supra*.

18 388 S.W.2d 690, 697 (Tex. Crim. App. 1965).

19 *Id.*

20 Martin v. State, 475 S.W.2d 265 (Tex. Crim. App. 1972).

21 Martin v. State, No. 44185 (Tex. Crim. App., Nov. 23, 1971).

as was restated in *Burns* and announced new less rigid guidelines for the admissibility of photographs.[22]

In stating its new position concerning the introduction of photographs, the court incorporated into its decision several different approaches which have been adopted in other jurisdictions. The court stated that, ". . . if a photograph is competent, material, and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome. . . ."[23] The test of relevancy under the *Martin* case is much less limiting than the prior rule which required the picture to be legally relevant to a disputed issue. Other courts have found the admission of photographs of the body and scene in a homicide case to be relevant and admissible regardless of the defendant's admission that he perpetrated the act.[24] Some have found photographs to be admissible where the pictures are merely cumulative evidence of the *corpus delicti*.[25] The Supreme Court of Illinois in *State v. Jensen*, cited by *Martin* as authority for its newly stated relevancy test, stated: "[T]he prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove every essential element of the crime by the most convincing evidence it is able to produce."[26] The *Martin* decision, in expanding the court's relevancy test, "opens the door" to the trial court's admission of photographs which prior to this decision had been held not material to the case.

The court stated further that a gruesome photograph will not be held inadmissible merely because it tends to arouse the passions of the jury.[27] It has been the policy of the court to admit gruesome photographs, notwithstanding the arousal of the jury's passions, as long as the photographs offered otherwise qualified as competent.[28] In *State v. Long*, cited by Judge Odom in the *Martin* opinion, the Supreme Court of Oregon refuted the argument that photographs should be excluded which tend to arouse the passions of the jury.[29]

> If a jury is incapable of performing its function without being improperly influenced by evidence having probative force, then the jury system is a failure. . . . Long experience convinces us of the

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22 Martin v. State, 475 S.W.2d 265, 267 (Tex. Crim. App. 1972).

23 *Id.* at 267.

24 State v. Hagert, 58 N.E.2d 399 (Ohio 1944).

25 State v. Helm, 209 P.2d 187 (Nev. 1949), *cert. denied*, 339 U.S. 942, 70 S. Ct. 794, 94 L. Ed. 1358 (1950). Photos of bloody garment of the deceased admitted notwithstanding fact that witness had already described the contents of the picture.

26 296 P.2d 618, 635 (Ore. 1955).

27 Martin v. State, 475 S.W.2d 265, 267 (Tex. Crim. App. 1972).

28 Burns v. State, 388 S.W.2d 690 (Tex. Crim. App. 1965); Craig v. State, 171 Tex. Crim. 256, 347 S.W.2d 255 (1961); Monson v. State, 45 Tex. Crim. 426, 63 S.W. 647 (1901).

29 244 P.2d 1033 (Ore. 1952).

> ability and willingness of citizens called for jury duty to perform that duty with fidelity.[30]

The element of the *Martin* opinion which will have the most far-reaching effect on the criminal trial is the court's pronouncement that, "[i]f a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible."[31] If there is any doubt as to whether a photograph qualifies under the new relevancy test, the trial court can resolve this doubt by asking whether a verbal description of the scene or body would be admissible. The court here adopts the criterion which many courts have long used to test the admissibility of photographs in general.[32] The *Martin* decision again cites *State v. Jensen* in support of this newly established guideline for admissibility:

> No one would be heard to object to testimony which does no more than faithfully describe the wounds which were inflicted upon the victim of a homicide, no matter how horrifying the narration might be. But a photograph of the corpse may fortify the oral testimony. Should it be excluded because it is, perhaps, even more revolting? We think not, as long as the defendant stands upon his plea of not guilty and the burden remains with the state of proving that the victim met death by the criminal agency alleged in the indictment.[33]

In *Vaca v. State*, also cited by *Martin*, the Nebraska court viewed photographic evidence as silent witnesses which show at a glance the location of the wounds.[34]

The court in *Martin* gave little clue as to when it is permissible to describe verbally the scene and the wounds inflicted, thus laying the foundation for the admission of photographs. It seems, however, that a verbal description of the scene and body would always be permissible in a murder trial in the prosecution's burden of proving the *corpus delicti*.

However, the court did qualify this "broadened rule" by holding that photographs should be excluded if they are offered solely to inflame the minds of the jury.

> [W]e recognize there will be cases where the probative value of the photographs is very slight and the inflammatory aspects great; in such cases it would be an abuse of discretion to admit the same.[35]

The court found the disputed pictures of the scene and of the coagu-

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30 *Id.* at 1053.
31 Martin v. State, 475 S.W.2d 265, 267 (Tex. Crim. App. 1972).
32 29 AM. JUR. 2d *Evidence* § 785 (1967).
33 State v. Jensen, 296 P.2d 618, 635 (Ore. 1955).
34 34 N.W.2d 873 (Neb. 1948).
35 Martin v. State, 475 S.W.2d 265, 268 (Tex. Crim. App. 1972).