

Spring 3-1-1975

V. Evidence

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Recommended Citation

V. Evidence, 32 Wash. & Lee L. Rev. 540 (1975), <https://scholarlycommons.law.wlu.edu/wlulr/vol32/iss2/11>

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V. EVIDENCE

A. Admissibility of "Other Crimes" Evidence in a Criminal Prosecution—*United States v. DiZenzo*, 500 F.2d 263 (4th Cir. 1974).

The admissibility of evidence of criminal conduct other than that for which the accused is on trial is being interpreted in a new light in recent years. The opinion of the Fourth Circuit in *United States v. DiZenzo*¹ is indicative of this trend.

In *DiZenzo*, the defendant was charged with selling counterfeit obligations of the United States.² At trial, the government established its case mainly through the testimony of Eugene Powell, an accomplice, who confessed to purchasing counterfeit obligations from the defendant and to re-selling them to Peter Gorbea, an informant cooperating with the investigations. After presenting its proof of the transaction charged in the indictment, the government was permitted to introduce evidence of similar acts of the defendant. This evidence consisted of three conversations between DiZenzo and Gorbea, two of which were recorded, and a recorded telephone conversation between DiZenzo and Powell. The first two DiZenzo-Gorbea discussions occurred about six weeks after the alleged offense and concerned supplying Gorbea with counterfeit money. DiZenzo also discussed stolen credit cards, weapons, and wagering.³ In another conversation, the defendant once again spoke of stolen credit cards, the purchase of guns, illegitimate driver's licenses, and a stolen shipment of perfume to be purchased by DiZenzo. He elaborated on the availability of counterfeit currency, the difficulties in passing large counterfeits, the amount of currency he would furnish to Gorbea, the methods of making counterfeits appear legitimate, and a prior sale of counterfeit money from DiZenzo to Powell, the person to whom the defendant was charged with selling counterfeit money in the indictment.⁴ DiZenzo also showed Gorbea a counterfeit twenty dollar bill, which the latter described as being similar in both appearance and serial number to the currency he received from DiZenzo through Powell.

The recorded telephone conversation between the defendant and Powell took place about nine weeks after the offense charged in the indictment. In the conversation, DiZenzo indicated that he would

¹ 500 F.2d 263 (4th Cir. 1974).

² 18 U.S.C. § 473 (1970) provides in pertinent part:

Whoever . . . sells . . . any . . . counterfeited . . . obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be [punished].

³ Brief for Appellee at 3, *United States v. DiZenzo*, 500 F.2d at 263 (4th Cir. 1974).

⁴ *Id.* at 3-4.

supply Powell with more of "that stuff" at the right price.⁵ The conversation also included a reference to the kidnapping of Carlo Gambino's son in New York.⁶

The trial court allowed the recordings to be offered into evidence, but ordered those portions not relating to counterfeit currency deleted.⁷ DiZenko was convicted and appealed to the United States Court of Appeals for the Fourth Circuit. On appeal, the defendant contended that the trial court erred in allowing evidence of the other sales. The court of appeals, however, found that the probative value of the evidence outweighed the risk of undue prejudice to the accused, and affirmed the conviction.⁸

The court employed a two-step process in analyzing the admissibility of evidence relating to similar acts of the accused. Initially, it determined the relevance of the questioned evidence. The statute which DiZenko was charged with violating required that the defendant knowingly sold counterfeit currency with the intent that it be passed as genuine.⁹ The court reasoned that as a result of his denial of the charge, the defendant placed in issue every element of the alleged crime.¹⁰ Thus, the recordings were deemed relevant to show DiZenko's knowledge and intent.¹¹ The exhibition of the \$20 counterfeit bill served to link the defendant's words with his crime. Also, the fact that the conversations occurred after the alleged crime did not affect the relevancy of the recordings since criminal intent may be inferred from subsequent as well as prior acts.¹² Nor were the later conversations too remote in time to render the discussions irrelevant.¹³

The court pointed out, however, that merely because evidence of similar acts is relevant is not determinative of its admissibility. Once relevance has been established, the court must then decide "whether the probative value of the evidence 'is outweighed by the risk that its

⁵ *Id.* at 4.

⁶ *Id.*

⁷ 500 F.2d at 266.

⁸ *Id.* at 265-66.

⁹ See note 2 *supra*.

¹⁰ 500 F.2d at 265, citing *Flaherty v. United States*, 355 F.2d 924, 926 (1st Cir. 1966).

¹¹ The court of appeals found that:

[DiZenko's] subsequent conversations disclosed his cost for the counterfeits and the prices he charged, the quality of the bills, and his source of supply. All of this was relevant to his knowledge and intent.

500 F.2d at 265.

¹² *Id.*, citing *Wood v. United States*, 41 U.S. (16 Pet.) 332, 361 (1842).

¹³ *Id.*, citing *United States v. Corry*, 183 F.2d 155, 157 (2d Cir. 1950) (3 Year interval).

admission will create a substantial danger of undue prejudice to the accused.'"¹⁴ Important factors in assessing probative value not only include relevancy, but also the reliability and necessity of the evidence. The reliability requirement presented no difficulty in *DiZenzo*. The government established that the taped recordings were genuine through the testimony of those actually involved in the conversations. Moreover, the unrecorded conversation between the defendant and Gorbea was consistent with the recorded discussions. Thus, the accuracy of DiZenzo's words was sufficiently assured.

The court of appeals further found that the evidence of the similar acts was necessary to the government's case. The facts of the crime itself¹⁵ were such that the jury could have reasonably inferred that DiZenzo had no knowledge that the package he delivered to Powell contained counterfeit money that would be passed as genuine. Thus, the evidence of the recorded conversations was necessary to provide reliable proof of the defendant's knowledge and intent.

The second step of the court's process was to determine that the defendant had not been unduly prejudiced by the evidence. The court of appeals found that the trial judge reduced any threat of undue prejudice by taking three precautionary measures. First, only those parts of the recordings that related directly to counterfeiting were admitted. The extraneous references to credit cards, weapons, wagering and kidnapping were deleted. The trial judge also required excision of all derogatory ethnic comments. Finally, the trial court instructed the jury not to consider the evidence of similar acts unless and until it found by independent evidence that DiZenzo had sold counterfeit currency as charged in the indictment.¹⁶ As a result, the court of appeals found that the undoubted probative value of the evidence of similar acts outweighed the reduced risk of undue prejudice. Thus, the trial court had not abused its discretion in admitting the evidence.¹⁷

¹⁴ *Id.* at 265-66, quoting *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974).

¹⁵ The court of appeals found the following:

The facts of DiZenzo's sale of counterfeit bills were sparse. Powell testified that DiZenzo told him he had counterfeit money or access to it. Later in the same month or early in the next, DiZenzo delivered to him a wrapped package without saying anything about its contents that Powell could recall. There was no testimony that the package was opened in DiZenzo's presence. Three or four days later Powell paid DiZenzo \$250 for the counterfeits, which had a face value of \$1,000.

Id. at 266.

¹⁶ Brief for Appellee at 14, *United States v. DiZenzo*, 500 F.2d 263 (4th Cir. 1974).

¹⁷ 500 F.2d at 266.

The court's two-step analysis of the issue presented in *DiZenzo* provides a good example of the trend in several recent federal decisions.¹⁸ The established rule has been that evidence of other similar offenses was inadmissible in a criminal prosecution, subject to certain exceptions, such as those relating to the establishment of the defendant's intent, motive, handiwork, scheme or design.¹⁹ If the evidence could be classified as one of these traditional exceptions, only then was it admissible. This mechanistic approach has been subject to criticism,²⁰ and the rule of exclusion has become the exception rather than the standard. Consequently, evidence of similar acts was admitted if it was relevant to any particular issue before the court. The Fourth Circuit noted that:

. . . while the general rule excludes evidence of similar acts for the purpose of depicting the evil character of the accused, exceptions that are justified by relevance to pertinent issues permit its introduction in a variety of situations. Indeed, evidence of similar acts is relevant to so wide and unclassifiable a range of issues that the exclusionary rule has become one of qualified admissibility, aptly phrased: "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime. . . ."²¹

Despite the court's recognition of the liberal trend of admissibil-

¹⁸ See, e.g., *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974); *United States v. Hines*, 470 F.2d 225 (3d Cir. 1972), cert. denied, 410 U.S. 968 (1973); *Durring v. United States*, 328 F.2d 512 (1st Cir.), cert. denied, 377 U.S. 1003 (1964).

¹⁹ The reason for this rule was that, although this type of evidence was certainly probative to prove the criminal propensity of the defendant, especially when the criminal conduct was similar to the crime with which he was charged, it was also highly prejudicial. Its impact may cause a jury to find the accused guilty on the basis that he had been shown to have criminal inclinations generally, rather than on the basis of his culpability for the specific crime alleged. *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1959), rev'd on other grounds, 361 U.S. 212 (1960). See C. McCORMICK, LAW OF EVIDENCE, § 190 (2d ed. 1972).

²⁰ As Professor McCormick points out:

[H]ere there is danger that if judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.

C. McCORMICK, LAW OF EVIDENCE, § 190 at 453 (2d ed. 1972).

²¹ 500 F.2d at 265, quoting *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1959), rev'd on other grounds, 361 U.S. 212 (1960).

ity, the Fourth Circuit apparently chose to curtail the expansion of this rule. By requiring that the trial court weigh the probative value of the evidence against its possible prejudicial effect, the Fourth Circuit seems to have achieved its goal. The *DiZenzo* court stated that:

Evidence of similar acts . . . may not be admitted simply because the extraneous conduct is relevant *or* because it falls within one or more of the traditional exceptions to the exclusionary rule. The district judge, in the exercise of sound discretion, must also determine whether the probative value of the evidence "is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused."²²

This approach has the support of Professor McCormick, who has pointed out that:

[S]ome of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholding, but one of balancing, on the one side, the actual need for the other-crimes evidence in light of the issues and the other evidence available to the prosecution [this is the necessity requirement in *DiZenzo*], the convincingness of the evidence that the other crimes were committed and that the accused was the actor [the reliability requirement of *DiZenzo*], and the strength or weakness of the other-crimes evidence in supporting the issue [the relevance requirement in *DiZenzo*], and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.²³

The advantages of this balancing approach are readily obvious. Since the principle purpose behind the exclusionary rule is to protect the defendant against unfair prejudice,²⁴ the judge has the discretionary power to exclude the evidence, even though it may be substantially relevant. Thus, the defendant is assured, as far as possible, that he will receive a fair trial. No longer will evidence of similar acts be admitted merely because it fits into one of the established exceptions or because it is relevant. It must also meet the "probative value versus prejudicial effect" standard.

S.D.R.

²² 500 F.2d at 265-66, quoting *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974) (emphasis added).

²³ C. McCORMICK, *LAW OF EVIDENCE*, § 190 at 453 (2d ed. 1972).

²⁴ See note 20 *supra*.