

RECENT DECISIONS

PROSECUTORIAL MISCONDUCT AND JURY CHALLENGES - APPLICATION OF THE HARMLESS ERROR DOCTRINE - *State v. Hohman*, 138 Vt. 502, 420 A.2d 8521 (1980).

STATEMENT OF THE CASE

The defendant, George J. Hohman, was charged with first degree murder for the killing of a young girl in the Town of Shaftsbury on April 8, 1976. Due to pre-trial publicity, a change of venue from Bennington to Addison Superior Court was ordered. Subsequently, a jury found the defendant guilty of second degree murder. On appeal, the Vermont Supreme Court held that the superior court erred in allowing incriminating written materials used by the defendant's psychiatrist, and privileged by statute to be introduced as evidence.¹ The supreme court also held that certain statements elicited from the defendant were obtained in violation of *Miranda* Procedural safeguards.² The conviction was reversed and the case remanded for a new trial.³

After this remand, the State's Attorney for Bennington County, who prosecuted the case, ran for re-election. On November 6, 1978, he published a campaign advertisement in the *Bennington Banner* which included the following message:

In 1976 I prosecuted *State v. Hohman* and he was convicted of murder. The conviction was overturned because the judge allowed evidence to be improperly admitted, not because of prosecutorial misconduct. In 1978 I asked that the Court set bail at \$75,000 however bail was set at \$30,000.

I believe that the bail laws of the State should be changed to reflect a defendant's danger to the community. The Hohman case is the most important case pending. My opponent is disqualified from prosecuting George Hohman. If I am re-

1. *State v. Hohman*, 136 Vt. 341, 346, 392 A.2d 935, 938 (1978).

2. *Id.* at 352, 392 A.2d at 941-42.

3. *Id.* at 353, 392 A.2d at 942.

elected, I will vigorously prosecute Hohman and obtain a second conviction. Your support would be appreciated, Tuesday, November 7th.⁴

Upon remand, the defendant was charged with second degree murder. After another change of venue from Addison to Washington County Superior Court, the defendant promptly filed a motion to disqualify the State's Attorney on the ground that the advertisement evinced such personal bias as to require disqualification. The trial court denied this motion because it felt that no "credible evidence introduced to establish that [the State's Attorney was] biased or prejudicial to the point that defendant would be deprived of his constitutional right to a fair and impartial trial."⁵

During jury selection, the defendant also challenged for cause two jurors who had knowledge of the defendant's prior conviction. The defendant contended that knowledge of a prior conviction requires removal as a matter of law, regardless of a juror's assurances of impartiality. The trial court, in denying the defendant's challenges, accepted the state's argument that if the court could determine from its observations that the juror was fair, the challenge should be denied. The two jurors were allowed to serve on the panel.⁶ Although charged with second degree murder, the defendant was found guilty of the lesser included offense of manslaughter.⁷

On appeal from this conviction, the defendant raised two claims of error which are the subject of this Recent Decision. First, he claimed the trial court erred in failing to disqualify the State's Attorney for misconduct. Second, he claimed error in the trial court's denial of his challenges for cause of two jurors.⁸ The court

4. State v. Hohman, 138 Vt. 502, 505, 420 A.2d 852, 854 (1980).

5. *Id.*

6. *Id.* at 504, 420 A.2d at 854.

7. *Id.* at 508-10, 420 A.2d at 856-59.

8. The defendant also raised two claims of error which are not the subject of this recent decision. He claimed it was error not to allow him to absent himself from his trial. He also claimed error in the denial of his motion for a bifurcated trial of the separate issues of guilt and insanity. The supreme court denied both of these claims. State v. Hohman 138 Vt 502, 512-13, 420 A.2d 852, 858-59 (1980).

denied the claims and affirmed the judgment for conviction.

I. PROSECUTORIAL MISCONDUCT-HARMLESS OR PREJUDICIAL ERROR?

In *Chapman v. California*⁹ the United States Supreme Court established the standard for determining whether a violation of a criminal defendant's constitutional rights is harmless or reversible error. In *Chapman* the petitioners were convicted of murder after a jury trial in a California state court.¹⁰ During the trial the petitioners chose not to testify on their own behalf. The prosecutor took advantage of a California constitutional provision allowing counsel and the court to comment on the failure of criminal defendants to testify, and made numerous inferences of guilt from their silence. Similarly, the trial court charged the jury that it could draw adverse inferences from the defendants' silence. After the trial, but before petitioners' appeal, the United States Supreme Court in *Griffin v. California*¹¹ invalidated this state constitutional provision because it violated a defendant's fifth amendment right not to be compelled to be a witness against himself.

In *Chapman*, the California Supreme Court affirmed the conviction, and the United States Supreme Court granted certiorari to decide whether a violation of the principles of *Griffin* could be harmless error.¹² The petitioners urged the Court to hold that all violations of constitutional rights must be deemed reversible.¹³ In declining to accept this proposition, the Court pointed out that Congress had declared that "errors or defects which do not affect the substantial rights of the parties" shall not be reversible.¹⁴ The Court concluded "that there may be some constitutional errors which . . . are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not

9. 386 U.S. 18 (1967).

10. *Id.* at 19.

11. 380 U.S. 609 (1965).

12. 383 U.S. 956 (1966).

13. 386 U.S. 18, 20 (1967).

14. 386 U.S. at 22 (quoting 28 U.S.C. § 2111 (1976)).

requiring automatic reversal of the conviction."¹⁵

The Court then faced the issue of how a reviewing court is to determine whether a constitutional error is "so unimportant and insignificant" that it is harmless. First, the Court stated that, in accordance with the common law rule, the burden is on the beneficiary of the error to prove the error harmless.¹⁶ In order to meet this burden, the Court held "that before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt."¹⁷ In *Chapman*, the Court held that the comments by the prosecutor and trial judge regarding the petitioner's refusal to testify, made the petitioners "irrefutable witnesses against themselves,"¹⁸ in violation of their fifth amendment rights, and reversed their convictions and remanded.¹⁹

Prior to the *Hohman* case under review here, the last enunciation of a harmless error standard concerning prosecutorial misconduct was *State v. Lawrence*.²⁰ In *Lawrence* the defendant was convicted by a jury of attempted armed robbery. During his opening statement, the State's Attorney told the jury that he would call a witness who had heard the defendant talk about the crime while the two shared a prison cell. After the witness failed to testify on this matter, the defendant moved for a mistrial on the ground that the prosecutor's statements would have a prejudicial effect on the jury. The trial court denied the motion, but later carefully instructed the jury to disregard the prosecutor's statements concerning the testimony of the witness.

The defendant appealed this issue to the Vermont Supreme Court. Contrary to the rule in *Chapman*, where the United States Supreme Court placed the burden of proving that the error was

15. *Id.* at 22.

16. The Court said that "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it to show that it was harmless." *Chapman v. California*, 386 U.S. 18, 24 (1967).

17. *Id.* at 24.

18. *Id.* at 25.

19. *Id.* at 26.

20. 137 Vt. 597, 409 A.2d 997 (1979).

harmless on the beneficiary of such error, the court in *Lawrence* stressed that the defendant must make an affirmative showing of prejudice to overcome the trial court's discretion.²¹ The court held that the standard for review of the trial court's discretion was whether under all circumstances the statements were so prejudicial as to deny the defendant a fair and impartial trial.²²

The *Lawrence* court emphasized several factors which negated any prejudice to the defendant. First, it approved of the trial court's use of a cautionary instruction.²³ The Court further stressed that the prosecutor's statements were just one moment in an extended trial²⁴ and that it was highly speculative whether the jury would draw any adverse inferences from the prosecutor's statement.²⁵ In affirming the conviction, the court's reasoning was in accordance with legislative policy that "(a)ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."²⁶

A major factor in harmless error decisions is the degree of evidence establishing a defendant's guilt. In *Milton v. Wainright*²⁷ the petitioner brought a habeas corpus proceeding in federal court, contending that his murder conviction in a state court violated his fifth and sixth amendment rights. Prior to the trial the police obtained incriminating statements from him by placing an undercover agent as his cellmate. This evidence was introduced at trial along with other confessions that were knowingly made. The Supreme Court refused to overturn the conviction because there was "overwhelming evidence of guilt fairly established."²⁸

Similarly, in *State v. Rebideau*,²⁹ the petitioner claimed that

21. *Id.* at 601, 409 A.2d at 999 (citing *State v. Berard*, 132 Vt. 138, 145, 315 A.2d 501, 506 (1974)).

22. *Id.* at 601, 409 A.2d at 999 (citing *State v. Rebideau*, 132 Vt. 445, 448, 321 A.2d 58, 60 (1974)).

23. *Id.* at 601-02, 409 A.2d at 1000.

24. *Id.*

25. *Id.* at 602, 409 A.2d at 1000.

26. Vt. R. CR. P. 52 (1973).

27. 407 U.S. 371 (1972).

28. *Id.* at 377, *See also* *Harrington v. California*, 395 U.S. 250 (1969).

29. 132 Vt. 445, 321 A.2d 58 (1974).

the testimony of a state's witness who said that he knew the petitioner while in prison should have been excluded. The Vermont Supreme Court agreed that the evidence may have prejudicially colored the jury's presumption of innocence.³⁰ However, the court stressed that there was overwhelming evidence of guilt which "negated a reasonable possibility that the evidence complained of might have contributed to the conviction."³¹ In summary, courts often take a practical approach in deciding prejudicial error issues by examining the evidence of guilt to see if the error complained of is material to the conviction.

II. JUROR'S KNOWLEDGE OF A DEFENDANT'S PRIOR CONVICTION

As a general principle, if it is shown that the defendant was prejudiced by a juror's knowledge of the defendant's prior conviction, a new trial must be granted.³² There are, however, many exceptions to this rule which hinge largely upon the issue of whether the juror decided the case solely on the basis of evidence introduced at trial.

In *Murphy v. Florida*,³³ the petitioner, a notorious burglar who had a prior record of several convictions, was convicted in a Florida state court by a jury on various charges stemming from a burglary. His indictment received extensive media coverage, and at trial he unsuccessfully challenged all of the jurors on the basis of knowledge of his prior convictions. The United States Supreme Court held that it was permissible for a juror to have knowledge of a defendant's prior conviction "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."³⁴ The Court said that, while the juror's assurances of impartiality were not dispositive, the defendant must demonstrate the juror's prejudice in order to rebut a presumption of impartiality.³⁵ The *Murphy* Court stressed that none of the ju-

30. *Id.* at 447-48, 321 A.2d at 60.

31. *Id.* at 449, 321 A.2d at 61 (citing *Chapman v. California*, 395 U.S. 250 (1969)).

32. C. TORCIA, 4 WHARTON'S CRIMINAL PROCEDURE, § 607 (12th ed. 1976).

33. 421 U.S. 794 (1975).

34. *Id.* at 800 (quoting *Irwin v. Dowd*, 366 U.S. 717, 723 (1961)).

35. *Id.*

rors were prejudiced to the extent that they could not render an impartial verdict.³⁶ In reaching this conclusion, the court noted that four of the jurors had said that they believed the defendant's past to be irrelevant.³⁷ Also, the Court pointed out that the news accounts complained of were factual, and not opinionated,³⁸ and concluded that the defendant had not met his burden of rebutting the presumption of impartiality traditionally accorded to jurors.³⁹

Two other factors are often considered by courts in deciding issues of a juror's impartiality. First, reviewing courts allow a large degree of discretion to trial judges because they can observe the juror's demeanor during voir dire.⁴⁰ Second, courts will sometimes examine the facts surrounding jury deliberation to draw inferences of impartiality. In *State v. Bartlett*⁴¹ several jurors complained to an officer of the court that a fellow juror had a fixed bias concerning the defendant's guilt. Although the juror in question was removed on agreement of the parties, the defendant unsuccessfully moved for a mistrial on the grounds of misconduct by the juror and by the court officer. The Vermont Supreme Court disagreed with the petitioner's contention, and stated that the fact the jurors complained to the court, and later acquitted the defendant on one charge showed impartiality.⁴²

III. THE DECISION

On the issue of prosecutorial misconduct, the *Hohman* court based its decision on three considerations: an examination of the prejudice to the defendant in light of the circumstances, the fact that the jury cured any prejudicial error by rendering a verdict for the lesser offense of manslaughter, and the fact that there was overwhelming evidence of guilt fairly established at the trial.⁴³

36. *Id.*

37. *Id.* at 800-01.

38. *Id.* at 802.

39. *Id.* at 803.

40. *Irvin v. Dowd*, 366 U.S. 717, 723-24 (1961); *State v. Meyer*, 58 Vt. 457, 462 (1886); *State v. Meaker*, 54 Vt. 112, 124-25 (1881).

41. 137 Vt. 400, 407 A.2d 163 (1979).

42. *Id.* at 405-06, 407 A.2d at 166-67.

43. The court referred the matter to the Professional Responsibility Board on the basis

The court strongly disapproved of the prosecutor's conduct and said that it was error for the trial court to deny the motion to disqualify the State's Attorney.⁴⁴ The court declined however, to follow the lead of some states,⁴⁵ and rejected the notion that prosecutorial misconduct requires reversal as a matter of public policy.⁴⁶ Instead, they maintained their position that a claim of reversible error requires "a determination of the prejudice to the defendant under the particular circumstances of the case at hand."⁴⁷

Turning to the "circumstances at hand" the court found that the prosecutor's attitude was clearly prejudicial to the defendant at the plea bargaining stage.⁴⁸ The court said that if the defendant had been convicted of second degree murder, it would have reversed the conviction.⁴⁹ However, because the jury convicted the

of a potential violation of D.R. 7-107 of the PROFESSIONAL RESPONSIBILITY CODE (codified at VT. STAT. ANN. tit. 12, App. IX (Supp. 1980)). D.R. 7-107 (B) states that:

[a] lawyer . . . associated with the prosecution . . . of a criminal matter shall not . . . make or participate in the making of an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to: (1) The character, reputation or prior criminal record . . . of the accused . . . (6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

The ethical propriety of the prosecutor's conduct is beyond the scope of this Recent Decision, as is the propriety of the court's statement of its intention to refer the matter to the Professional Responsibility Board.

44. *State v. Hohman*, 138 Vt. at 506, 420 A.2d at 855 (1980).

45. See *State v. Sinclair*, 278 Md. 243, 363 A.2d 268 (1976), where the Maryland Court of Appeals reversed a conviction because the State's Attorney, who also represented a client in a civil action against the defendant, offered to drop or greatly reduce the criminal charges if the defendant abandoned his appeal in the civil action. The court said that the controlling principle was "if a prosecutor has . . . any pecuniary interest or significant personal interest in a civil matter which may impair his obligation in a criminal matter to act impartially toward both the State and the accused, then he is, on the basis of this state's public policy, disqualified from initiating or participating in the prosecution of that criminal cause." *Id.* at 254, 363 A.2d at 475. Later in the opinion the court expanded this principle by stating that a decision to prosecute must be "untainted by any contaminating influence." *Id.* at 260, 363 A.2d at 478. Although the facts in *Sinclair* differ from the instant case in that the Bennington County State's Attorney was not prejudiced because of any interest in a civil matter, the Maryland court might well have reversed the conviction in the instant case had it been before that court.

46. *State v. Hohman*, 138 Vt 502, 506 420 A.2d 852, 855 (1980).

47. *State v. Hohman*, 138 Vt. at 507, 420 A.2d at 855 (1980).

48. *Id.*, 420 A.2d at 855.

49. *Id.*

defendant of manslaughter, which is the lowest offense for which he could have plea bargained, the court felt that the jury's verdict cured any prejudicial error.⁵⁰ Beyond the pre-trial stage, the court found no instances where the bias of the prosecutor touched the trial, largely because none of the jurors were exposed to the campaign advertisement.⁵¹

The court also stressed the fact that there was overwhelming evidence of the defendant's guilt.⁵² The defendant had flagged down a police cruiser and told the officer he strangled a girl, left a note to his wife admitting the killing, and led the police to the body. All of these admissions were introduced without objection or contradiction.⁵³ Furthermore, "uncontradicted expert medical testimony attributed the death to strangulation."⁵⁴

The *Hohman* court discussed the constitutional standard governing reversible error established by the United States Supreme Court in *Chapman v. California*.⁵⁵ Because the defendant in *Hohman* made no constitutional claim, the court decided that *Chapman* need not apply.⁵⁶ Nevertheless, because the error was remedied by the jury verdict, and the fact of overwhelming evidence of guilt, the court found "beyond a reasonable doubt that disqualification of the prosecutor would have had no effect on the outcome of this trial."⁵⁷

On the issue of the juror challenges, the court held that only one of the denials was properly preserved for review,⁵⁸ and that

50. *Id.*, 420 A.2d at 856-57.

51. *Id.* at 508, 420 A.2d at 856.

52. *Id.*

53. *Id.*, 420 A.2d at 856.

54. *Id.*

55. 386 U.S. 18 (1967). See text accompanying notes 9-19 *supra*.

56. *State v. Hohman*, 138 Vt. at 508, 420 A.2d at 856 (1980).

57. *Id.*, 420 A.2d at 856.

58. The court held that the denial of the defendant's first challenge for cause was not preserved for review. *State v. Hohman*, 138 Vt. at 508-09, 420 A.2d at 850-57. Under *State v. Lawrence*, 137 Vt. 597, 409 A.2d 997 (1979), unless a party has exhausted all of its peremptory challenges at the time of the challenge for cause, a denial of the latter challenge is not preserved for appellate review. The court feels that this policy will insure that such challenges are serious, and not just tactical. It is also necessary to constitute the requisite prejudice, which is the expenditure of a peremptory challenge on a legally incompetent juror

this denial was not reversible error. The court decided not to upset the trial court's traditional discretion in this matter because the jury had asked that critical testimony be reread, and eventually rendered a verdict for the lesser offense of manslaughter.⁵⁹

The court pointed out that generally, a juror's knowledge of a defendant's prior conviction does not disqualify him as a matter of law.⁶⁰ Although here the juror asserted impartiality during voir dire, the court noted that such claims are not dispositive.⁶¹ The court took the middle ground by deciding that the defendant had not demonstrated partiality so as to warrant upsetting the trial court's discretion. The court reinforced this decision by pointing out the jury's thoughtful deliberation and rendering of a lesser verdict.⁶²

CONCLUSION

State v. Hohman demonstrates a practical approach to criminal procedure. Although the court found the prosecutor's conduct to be prejudicial to the defendant, it nonetheless found the error to be harmless as a practical matter because the jury verdict cured the error, and because there was overwhelming evidence of guilt. If the jury had rendered a verdict of second degree murder, it would have been interesting to see how the court would have dealt with its finding of prejudice in the face of overwhelming evidence of guilt. In any event, the court adopted the attitude that society as a whole should not be punished for the misdeeds of a state official.⁶³

Similarly, the court maintained a practical approach concerning the jury selection issue by reaffirming its policy of leaving dis-

so that it is not available to dismiss an objectionable but not incompetent juror. *Id.*, at 603, 409 A.2d at 1000.

59. 138 Vt. 502, 512, 420 A.2d 852, 858 (1980).

60. *State v. Hohman*, 138 Vt. at 511-12, 420 A.2d at 858.

61. *Id.* at 512, 420 A.2d at 858.

62. *Id.*

63. See, e.g., *United States v. Stanford*, 589 F.2d 285, 299 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

cretion to the trial court. To do otherwise, the court seemed to hint, would upset the difficult process of impaneling an impartial jury. This decision was made easier by the absence of any clear signs of impartiality, and by the fact that the jury, after long and thoughtful deliberations, rendered a verdict for a lesser charge.

Charles F. Storrow

ZONING-RIGHT OF TOWN TO DENY STATE AGENCY A ZONING PERMIT-
Vermont Division of State Buildings v. Town of Castleton Board of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980).

STATEMENT OF THE CASE

The appellee, Vermont Division of State Buildings, was granted a zoning permit by the Castleton administrative officer to convert a former college dormitory into a residence for eight or more juveniles who had been housed at the Weeks School.¹ Responding to neighborhood complaints, the Town of Castleton Board of Adjustment, appellants, rescinded the permit and ruled that the proposed use of the eight bedroom house on Seminary Street was non-residential.² As a result of the classification, the building could not be used for a group home³ since it could not

1. Until 1979, the Weeks School in Vergennes was the primary secure detention facility in the state for juveniles. Under authority of Vt. STAT. ANN. tit. 33, § 632(b) (1980), the Department of Corrections closed the Weeks School on April 1, 1979 and transferred the responsibility for the youths to the Department of Social and Rehabilitation Services (SRS). SRS then stepped up their efforts to deinstitutionalize as many of their charges as possible under a program entitled "Housing for Model Youth Service Program Including Instructional Facilities." See generally, Brief of Appellee at Statement of Facts; Brief of Appellants at 10, Vermont Div. of State Bldgs. v. Castleton Bd. of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980).

2. 138 Vt. 250, 253, 415 A.2d 188, 191 (1980).

3. The group home held not to qualify under Castleton's zoning regulations would have been "staffed by approximately ten persons . . . [and] . . . would provide housing and instructional areas for juvenile delinquents and serve as a screening and temporary detention center for other juveniles." *Id.* According to Deputy Commissioner of SRS Marian M. Cummings, the facts as argued were based on a preliminary plan not reflective of the final proposal for the Wright House in Castleton. The group home as finally proposed would have been