CHAPTER XI. - BASIC EVIDENCE

Judge Charles Billings

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CHAPTER XI
BASIC EVIDENCE

11.1 INTRODUCTION

In municipal divisions of the circuit courts, the general rules of evidence are applicable because Rule 37.61 states all trials shall be held in open court in an orderly manner according to law. Municipal judges are charged with the responsibility of conducting trials applying the general rules of evidence.

11.2 DEFINITION OF EVIDENCE

Evidence is defined as any species of proof legally presented at trial through witnesses, records, documents, exhibits or other physical objects by which any fact in dispute is established or disproved. The object of all evidence is to inform the trier of fact of the material, relevant facts in order that the truth may be elicited and a fair determination of the controversy be reached. Thus, courts are to decide a case only on the evidence introduced or presented during the trial.

The court must be mindful that its personal knowledge of facts regarding the case such as intersections of business or personal is not to be considered. The only facts that a court may consider are those elicited from the witness stand or though other evidentiary channels.

The party that seeks the admission of particular evidence whether through oral testimony or physical objects is responsible for securing its presence at trial. This can be done through subpoena to secure the attendance of a person or documents. In municipal trials, the city has the burden of presenting its evidence first. The defendant has the option to present evidence in his own defense. If the defendant does present evidence, the city may offer rebuttal testimony, generally aimed at refuting a particular piece of evidence introduced by the defendant. See Rule 37.62 on the order of trial.

11.3 COMPETENCY OF WITNESSES

A witness must be competent in order to testify. The traditional test to determine competency is whether the witness has sufficient intelligence to understand and relate facts and understand the obligation of the oath. Witnesses are presumed to be competent. The burden of showing incompetency is on the objecting party. The determination of competency is within the sound discretion of the judge. Thus, a witness who must communicate through sign language or an interpreter is competent, as long as the interpreter is sworn to attest to those facts as given by the witness, State v. Howard, 24 S.W. 41 (1893). A child is competent to testify as long as he or she testifies that he or she understands what is meant to be sworn as a witness and what the truth is, that it is wrong to tell a lie and that if the witness does tell a lie, he or she would be punished, State v. Patterson, 569 S.W. 2d 266 (Mo.App. E.D. 1978).

Generally, witnesses for the prosecution are excluded from the trial until they are called to testify. This is often called the “rule” and insures that witnesses will testify as to their own observations as opposed to simply reciting what a previous witness has testified. However, it has

been ruled that it is not an abuse of discretion to allow the city's witness to testify, despite the fact that the witness was present during testimony of other witnesses, State v. Gilmore, 797 S.W. 2d 802 (Mo.App. W.D. 1990). In fact, it has been held to be an abuse of discretion to exclude the testimony of a witness who violates "the rule", where the violation occurred ". . . without the consent, connivance, or procurement of the party or counsel calling him . . ." State v. Tracy, 918 S.W. 2d 847 (Mo.App. W.D. 1996). The trial court has the discretion to refuse a request for exclusion as you deem applicable, State v. Gamble, 649 S.W. 2d 573 (Mo.App. S.D. 1983).

A person who is an accomplice of a defendant is competent to testify and can present testimony against the person charged at trial, State v. Boliek, 706 S.W. 2d 847 (Mo.banc 1986).

If a particular defendant is disruptive to the trial, he can be excluded, where his behavior has been disruptive or is degrading to the judicial system, State v. Irvin, 628 S.W. 2d 957 (Mo.App. E.D. 1982), Illinois v. Allen, 90 S.Ct. 1057 (1970).

11.4 ROLE OF JUDGE

The judge may participate in the presentation of testimony, but should not engage in conduct which compromises his or her position of neutrality. The court can ask questions of a witness to clarify the evidence that has been presented, State v. Moseley, 705 S.W.2d 613 (Mo.App. E.D. 1986); see also State v. Farmer, 978 S.W.2d 68 (Mo.App. S.D. 1998) the judge can put additional questions to witness to elicit truth more fully. If the court does examine a witness, the then city, the defendant or defendant's counsel should be allowed further interrogation, Bova v. Bova, 135 S.W.2d 384 (Mo.App. E.D. 1940). The court should never, either in questioning or in response to objections by defense, or in determining what the facts are in the judge's position of finder of facts, give any indication of his position in a trial or make any remark on the testimony as presented. The judge should never indicate, or make any statement indicative of, any hostility or bias. The court should never make any comment, such as "That is a falsehood. Proceed." Duncan v. Pinkston, 340 S.W.2d 753 (Mo. 1960).

11.5 FORMS OF QUESTIONS (PRESENTATION OF EVIDENCE)

The initial examination of a witness is conducted by direct examination by the party calling the witness. The purpose of direct examination is to afford counsel or the party calling the witness a fair opportunity, subject to the rules of evidence, to examine the witness in his own way and bring out such material facts as he or she desires.

Counsel or the opposing party has the right to cross-examine witnesses as to the exact matters he or she testified to on direct examination and issues of credibility. Leading questions are permitted during cross-examination. Leading questions are defined as those which suggest the desired answer or contain a material fact and the answer requires a simple yes or no. The effect of leading questions is to put words in the witness' mouth so that the testimony is that of the questioner.

The party who presented the witness is entitled to redirect examination of the witness to clarify any matters that came up during the cross-examination. The trial judge may allow questions outside the scope of the cross-examinations if he or she deems it proper.

The trial judge has considerable discretion in regulating the manner of examination of witnesses. It is within the discretion of the trial judge to exclude questions which that are not material to the merits of the case, wholly irrelevant to the issues, repetitive questions or questions that are designed to embarrass or harass a witness.

11.6 LAY OPINION

It is a well-established rule that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and have actually observed the fact. This doctrine requires the witness give "facts" and not their inference, conclusion or opinion. The obvious exception to this rule is an expert but in the course of most municipal trials, the court will not have available expert witnesses. Cities may present testimony through police officers or other civilian witnesses who do not have particularized training or expertise in matters which they intend to testify. The court often must rely on lay opinions, where witnesses not testifying as an expert may offer testimony in the forms of opinions or inferences. Those opinions are limited to matters that are rationally based on the perception of the witness and are helpful to a clear understanding of the witnesses' testimony. Witnesses should be limited to observed facts and not be allowed to give conclusions as to what the accused did, State v. Boyd, 706 S.W.2d 461 (Mo.App. E.D. 1986). Lay opinion testimony is generally allowed in two circumstances: "1) to provide the jury with descriptive facts that otherwise could not be detailed or reproduced for the jury; and 2) to give a judgment on matters where witness is shown to have an opinion which would aid the jury." State v. Gardner, 955 SW2d 819, 823 (Mo.App. E.D. 1997). Section 490.640, RSMo (1994) provides "comparison of a disputed writing with any writing proved to the satisfaction of a judge to be genuine shall be permitted to be made by witnesses . . . " A witness testimony as to defendant's own incriminating statement was "something to the effect that" was admissible, notwithstanding the witnesses qualification of that answer. That testimony would go to the weight of the evidence, not the admissibility, State v. Stigall, 700 S.W.2d 851 (Mo.App. S.D. 1985). Persons who have previously observed intoxicated persons may state opinion of intoxication of Defendant, based upon driving observed and personal actions, State v. Palmer, 606 S.W.2D 207 (Mo.App. E.D. 1980.)

Witnesses are allowed to give an opinion as to value of their own property. Typically, a victim will be allowed to testify as to the value of his property, State v. Jenkins, 776 S.W.2D 59 (Mo.App. S.D. 1989), State v. Freeman, 667 S.W.2D 443 (Mo.App. S.D. 1984).

11.7 HEARSAY

Hearsay is evidence of an out of court statement made by someone other than the testifying witness and offered to prove the truth of the matter asserted. The statement can be oral or written. Although this definition seems simple, its application can be quite confusing. Hearsay evidence, if offered and there is no objection, can be admitted and is entitled to whatever appropriative value it may merit, Myer v. Christopher, 75 S.W. 750 (1903). The hearsay rule does not apply if the same statement is not offered for the truth of the matters contained therein, Bond v. R.R. Co., 363 S.W.2d 1 (Mo. 1962). Certain hearsay statements are customarily offered by the prosecution such as a police officer's conduct based on statements from an informant prior to arrest and search. If such statements amount to foundational matters or are not

prejudicial, they are usually admissible. State v. Howard, 913 S.W.2d (Mo.App. E.D. 1995.) When confronted with a question of admissibility, it helps to keep in mind the principal reason for exclusion, namely the lack of the normal safeguards of oath, confrontation and cross examination to determine the credibility of the out of court declarant.

The following are examples of hearsay. A police report constitutes hearsay and would be excludible if offered for the truth of the statements made by third parties in the report. Likewise, it would be error to permit an investigating officer to testify that witnesses at the scene told him the traffic lights were off or red, or yellow, as direct testimony would be necessary to prove these elements, Jefferson v. Biggar, 416 S.W.2D 933 (Mo. 1967). It is not proper for the prosecution to ask a witness questions which include reference to declarations of an unavailable person, State v. Callahan, 641 S.W.2D 186 (Mo.App. W. D. 1982). An undercover agent could not testify, for example, that an unidentified person went to a home and stated that he bought marijuana, because that would be an out of court declaration that is offered for the truth that marijuana was being sold in the residence, State v. Schuh, 497 S.W.2D 136 (Mo. 1973).

Be aware that an admission of a declaration of a co-actor or an accomplice admitting commission of a crime is not admissible as proof of the defendant's participation in that crime. This testimony would have a number of constitutional implications and generally deprives the person on trial the right to confront the witness. Thus a city attorney could not present evidence that the co-defendant entered a plea of guilty or confessed to the crime implicating the defendant, if that witness was not called *to* testify in the trial, State v. Sykes, 569 S.W.2d 258 (Mo.App. E.D. 1978), Bruton v. United States, 88 S.Ct. 1620 (1968).

Explanatory words which accompany and give character to the transaction are not hearsay. For example, discussions between a bar employee and an underage bar patron in a minor in possession charge would be admissible as the statements themselves would be non-hearsay as they are not offered for the truth of the statements but would constitute observable, verbal acts which actually are part of the transaction under investigation, State ex. rel. 807, Inc. v. Saitz, 425 S.W.2d 96 (Mo. 1968.)

When the state of mind of the declarant is at issue, statements indicating intent and offered for the purpose of showing conduct in conformity with the intent are admissible. For instance, a declarant states *to* the police officer that he bought marijuana at a specific house. This statement can be admitted to explain why the officer subsequently went to the house.

11.8 EXCEPTION TO THE HEARSAY RULE

For every rule there is an exception and there are plenty of exceptions to the Hearsay Rule. In an effort not to be too technical, a certain number of well-recognized exceptions are listed. This list is by no means exhaustive.

A. ADMISSIONS OF THE DEFENDANT

A statement of a defendant which is adverse to his or her interest is admissible as substantive evidence of the fact admitted. A statement need not be against the defendant's particular interest at the time it is stated, State v. Jones, 779 S.W.2D 668 (Mo.App. E.D. 1989). Should a defendant

make a statement that "I am willing to pay you for the damage done," such a statement would be admission of guilt and would be admissible as an exception to the hearsay rule, State v. Alexander, 499 S.W.2D 439 (Mo. 1973).

Declarations of a co-conspirator can be introduced against the defendant to show the participation in a conspiracy, State v. Jennings, 815 S.W.2d 434 (Mo.App. E.D. 1991).

B. SPONTANEOUS DECLARATIONS

A declaration made concerning an event is admissible when made contemporaneously with the event described. Thus, a declaration of a mental state, which manifests a present state of mind, knowledge or intent is admissible. It is proper to allow a city's evidence of prior declarations and actions manifesting a victim's fear of the defendant when defendant injected issues of self defense in his actions of attacking the victim, State v. Luster, 750 S.W.2d 474 (Mo.App. W.D. 1988); State v. Singh, 586 S.W.2d 410 (Mo.App. S.D. 1979). Statements may also be introduced to show the intent of a defendant, such as he was driving a car when he made a statement that he was going to "pick up Mike now," thus showing that he had a design or plan to drive a car, State Farm v. Foley, 624 S.W.2d 853 (Mo.App. W.D. 1981).

Spontaneous declarations are admissible when made contemporaneously with the event described. An officer's testimony that the incident leading police attention to defendant was hearing a lady's scream "help, he's going to kill me," was properly received, State v. Franklin, 755 S.W.2D 667 (Mo.App. E.D. 1988). Statements made of a victim of an assault within one hour of the event at the hospital describing her assailant were admissible, State v. White, 621 S.W. 2d 287 (Mo. 1981). Statements made by a defendant when being questioned prior to an arrest for driving under the influence are not admissible, since a statement would lose its spontaneity when made in response to an interrogation by an investigating police officer, State v. Stevens, 757 S.W.2d 229 (Mo.App. E.D. 1988). Declarations of an unidentified person in a citizen band radio transmission reporting a "car traveling southbound in northbound lanes," described as excited by law enforcement officers who heard the transmission held admissible to prove the act of driving by a DUI defendant, State v. Dunn, 821 S.W.2D 512 (Mo.App. W.D. 1991).

C. PAST RECOLLECTION RECORDED

There are two different situations which arise when a witness cannot immediately recall the facts, but is able to do so through the aid of a writing. The rules applying to them in trial are different. The first of these is known as present recollection refreshed and requires that the witness be able to testify independently without the writing, after refreshing his memory. However, when a witness is unable to testify from memory, the document may be admitted into evidence if the witness testifies as to its accuracy, Ferguson v. Overhead Door, 549 S.W.2d 356 (Mo.App. 1977). The witness must be able to testify either that he made the writing or that at some point in the past he knew it to be correct. This particular exception has little practical use because the writing itself would generally be admissible as a business record, or under some other hearsay exception. The observations made by a police officer in a police report, can be admissible if the officer is required to make the report such as an alcohol report which is sent to the Director of Revenue in DUI cases. Certain statements contained in the police report captured

by the investigating officer from witnesses at the scene, would still fall within the objection of hearsay.

D. BUSINESS RECORDS

Under §490.680, any portion of the books or records of a corporation or business may be used in evidence if the custodian of the records or other qualified witness testifies as to their identity and the mode of preparation and if it was made in the regular course of business, at or near the time of the act, and the source of information was clear to the preparer. Missouri rules also allow an affidavit to be prepared by the custodian, so the custodian would not have to appear personally, and the records that are produced ten days prior to the actual trial to the opponent. Likewise, hospital records are admissible as business records and generally fall within §490.680 RSMo. The courts have increasingly dealt with business records with great latitude. For examples see Director of Revenue cases beginning with Peace v. Director of Revenue, 765 S.W.2d 382 (Mo.App. W.D. 1989) and continuing, wherein essentially any witness who is familiar with the records or can testify as to the general preparation of the documents can provide the requisite affidavit for admission, see State v. Graham, 641 S.W.2D 102 (Mo. Banc 1982).

Business records are admissible for the city as well as the defense if the offering party provides an affidavit consistent with VAMS 490.692 providing notice and copies of the records to the other side at least seven (7) days prior to the date of trial.

11.9 DEMONSTRATIVE AND REAL EVIDENCE

Proof which is addressed directly to the senses of the court without interposing the testimony of witnesses is generally characterized as demonstrative evidence. Evidence of this character includes objects or articles brought into court and exhibited such as photographs, X-rays, diagrams, drawings or tests conducted either in or out of court. Such evidence is admissible if they supplement a witness's testimony, or clarify some issue in the case. The court has wide latitude in admitting this evidence. Officers are allowed to state that a knife "looked like" the one he removed from defendant's person or "would have been very similar" as ample identification for an admission for a particular weapon, State v. Hubbard, 659 S.W. 2d 551 (Mo.App. W.D. 1983).

Real evidence may consist of the actual object associated with a crime. When real evidence is purported to be the actual object, proof of accuracy has two elements: the city must establish (1) that the evidence is identical to that involved in the crime, and (2) that the evidence has not been tampered with. In chain of custody matters involving drugs and other matters before the courts, the chain of custody has been loosely construed. Where a police officer initials a bag of a substance taken from the accused, barring a showing as to the breaking of the chain, that evidence would be admitted, State v. Hurtt, 807 S.W.2D 185 (Mo.App. S.D. 1991); State v. Bishop, 781 S.W.2D 195 (Mo.App. S.D. 1989).

An article which relates to the crime in such a way as to be illustrative of the crime is also admissible. Thus, open beer cans found in the back seat of a car are admissible in a DUI prosecution.

11.10 RELEVANCY AND MATERIALITY

Evidence offered by either party in the trial, to be admissible must be relevant to the issues of the case and tend to establish or disprove them; matters that are wholly irrelevant and that are incapable of affording any legitimate proof, presumption, or inference regarding the fact or facts in issue must be excluded. Merely because a fact is remote in point of time or of significant value does not of itself, preclude its admissibility. Admissibility depends, to a large extent, on the nature and the circumstances of the case and rests largely in the discretion of the trial court. The real dangers of relevancy lie in the level of unfair prejudice, confusion, delay or needless presentation of cumulative evidence.

A brief checklist of relevant issues and supporting cases is stated below.

Relevant issues:

A. Identification of accused: State v. Taylor, 770 S.W.2d 531 (Mo.App. E.D. 1989), allowing the statement "I'm going to beat the hell out of someone," as identification factor of assailant;

B. Intent: State v. Brown, 624 S.W.2d 543 (Mo.App. 1981), allows pre-arrest conduct of screaming and cursing of police to show agitation and conscious disruption in a possession of marijuana case;

C. Conduct manifesting consciousness of guilt allows admission of evidence of flight to show consciousness of guilt: State v. Cone, 744 S.W.2d 860 (Mo.App. W.D. 1988).

Matters offered in evidence in a case must not only be relevant to the issues and tend to establish or disprove them, but they must also be "material" in that they must relate to the issues in the case. Evidence should be excluded if it is offered to prove or disprove a fact or proposition that is not at issue. The evidence must have some probative force over and above logical relevancy. Objections based on "immateriality" or "irrelevant" are used interchangeably.

11.11 IMPEACHMENT

Credibility of any witness who has given testimony on a material issue may be attacked by impeachment. Its purpose is to destroy credibility, not to prove the facts stated in the impeaching statement. Remember that impeachment comes from the opposing party and is generally not allowed by the party offering the particular witness unless the witness gives answers contrary to what the proponent believes the testimony to be. Thus, the oft cited cliche "you cannot impeach your own witness." The most common form of impeachment occurs when a witness testifies to facts material to the case and the opponent would have available proof that the witness has made previous statements that are inconsistent with his present testimony. The most obvious of these that are presented to us as municipal judges are police reports written by law enforcement officers at the time of a particular incident that are different from the testimony of the police officer in trial. In an impeachment scenario, hearsay statements are allowed and are admissible for the limited purpose of impeaching a witness. Thus, a conflicting statement from a witness

contained in a police report can be used to impeach the witness if he or she testifies in court. The reasoning is that the statement is not being offered for substantive evidence or for proof of the matter in the statement, but simply to show an inconsistency of a witness' statement at the time of trial. You, as the court, have a great deal of latitude in determining what is and what is not actually a contradiction or inconsistent statement.

The generally accepted view is that any material variance between the testimony and the previous statement will suffice to allow the impeachment to be presented, and then you as the fact finder will determine what significance to place on the inconsistency.

There are essentially five stages of impeachment or attacks that are made upon witnesses you observe in your court. The first, and probably the most effective, is that the witness, on a previous occasion, has made statements inconsistent or different from his present testimony. The second line of inquiry is to produce evidence that the witness is biased towards one party to the case or has an interest in the outcome of the matter. The third would be an attack on the character of the witness. The fourth is showing a defect in the capacity of the witness to remember or observe or to be able to recount the matters that were observed previously in the testimony before you. The final area of impeachment is that other witnesses have testified to material facts contrary to the testimony of this particular witness.

The character of the witness is most commonly impeached through the use of past convictions. A witness may only be impeached with felony or misdemeanor cases that have resulted in either a conviction, an SES or an SIS. Section 491.050, RSMo (1994). Municipal ordinance convictions may not be used to impeach pursuant to Commerford v. Kreitler, 462 S.W.2d 726, 733 (Mo. 1971). It is improper impeachment to examine a witness through use of prior arrests. Convictions of prior crimes can be introduced for the limited purpose either by the introduction of the record or by cross examination. If the witness fails to acknowledge the convictions, a certified copy of the arrest and conviction should be produced and may be admitted as evidence. Pursuant to §491.050, RSMo (1994), a plea of guilty or nolo contendere or a finding of guilty are admissible. It would be admissible even if they are "not final" because they are under appeal or if he had a suspended imposition of sentence, State v. Blaylock, 705 S.W.2d 30 (Mo.App. W.D. 1985). Under Missouri law, a conviction during the lifetime of a witness is admissible and the fact that the conviction is remote does not limit its use, State v. Askew, 822 S.W.2D 497 (Mo.App. 1991). When examining as to prior convictions, the testimony should be limited to "the nature of the crime, the date, the place of occurrence." A complete recitation of the facts and circumstances of the prior conviction are not admissible and is not allowed, State v. Hill, 823 S.W.2D 98 (Mo.App. 1991).

A witness can be impeached by proof of his or her general reputation, but the inquiry is usually confined to the reputation in the locality he or she resides. However, a defendant's character cannot be used as the basis for interring guilt. State v. Dudley, 912 S.W.2d 525 (Mo.App. W.D. 1996). To prove the bad character a proper foundation must be laid. The witness to the reputation must first know the reputation and explain how the witness came to this knowledge. Character or reputation cannot be proved by showing a witness has committed "bad acts." Thus a witness can testify about someone's reputation for honesty but cannot state he is a thief because he stole and give an example. The only bad acts that can be shown are convictions.

Once a witness has been impeached with a prior inconsistent statement, that witness may be rehabilitated through a prior consistent statement. You should exercise restraint to avoid the introduction of numerous consistent statements simply to counteract the inconsistency. The actual introduction of the evidence is within your discretion. State v. Mueller, 872 S.W.2d 559 (Mo.App. 1994.)

11.12 JUDICIAL NOTICE

Judicial notice is a substitute for formal proof of a matter by evidence. The phrase judicial notice refers to the method by which a court informs itself of a particular fact during the course of trial. This procedure dispenses with production of evidence and concedes that the proposition is true. There are three prerequisites (1) the matter must be one of common knowledge; (2) the matter must be settled beyond a reasonable doubt; and (3) the knowledge must exist within the jurisdiction of the court. If there is any uncertainty about a matter then evidence should be taken. Judicial notice should be used cautiously and only when the facts cannot reasonably be disputed. Francis v. Richardson, 978 S.W.2d 70 (Mo.App. 1998.)

Notice can be taken of a court's own files, Missouri statutes, matters of common knowledge, encyclopedias, textbooks, dictionaries, historical facts, geography, political subdivisions, common meaning of language or phrases, seasons, and scientific and mechanical facts. This is a partial list and far from exhaustive. The common knowledge element is difficult to apply. If, for instance, a fact is commonly accepted by scientist in a specific field, judicial notice can be taken of the fact. Remember, if there is some question about the fact, require the formal proof.

11.13 CONCLUSION

The purpose of this chapter is not to provide an exhaustive source book for all issues that will be presented to you in the court. Remember, the admissibility of evidence only becomes an issue if one of the parties objects. In considering the objection you will seldom be wrong if you review it from the standpoint of the witness. If a witness saw it, made it, smelt it or acted upon it, it will generally be admissible.

Studies show that the only contact most people have with the judicial system is through municipal courts. Treat the parties and their witnesses with respect.