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Federal Criminal Procedure - "Plain Error" in Instructions

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Jersey decision with its proper expert testimony and sufficient evidence properly submitted on the tests of the device is an indication that the courts are ready to accept it.[8]

There as yet has been no appeal taken to the Wisconsin Supreme Court on the use of a radar speedmeter in the case of a speeding violation on Wisconsin highways. One case at the trial court level has been decided in which the defendant was convicted as charged through use of the device in question.[9] In that case the State procured an expert witness who testified regarding the principle and accuracy of the radar device, and officers were permitted to testify regarding their testing of the device over the hearsay objection of the defendant. The court held that it was satisfied by the expert testimony that the radar speedmeter was a proper device to record speed, and that since both officers were present to testify to the test of the speedmeter and were subject to cross examination, their testimony was not hearsay. The officers in this case submitted in evidence the written records of the speeding violation made at the scene of the violation. At the present time the burden rests with the State, at each trial, to establish the acceptability of the radar speedmeter as a proper instrument to measure speed and its accuracy as of the time of the arrest.[10] This will continue to involve "lengthy litigation and appeals."[11]

Perhaps the legislature will come to the assistance of the prosecution in establishing the scientific worth of this device. As to the objection on the ground of hearsay evidence used to prove the State's case, it would appear that the New Jersey decision has pointed out the methods of its avoidance; this objection should present little difficulty where there is offered in evidence testimony by each officer as to his independant observations while testing the device and at the time of arrest, along with written records of the accuracy of the speedmeter at the time of test and arrest.

THOMAS A. SAVIGNAC

Federal Criminal Procedure—"Plain Error" in Instructions— Defendants were convicted of conspiring to defraud the United States by obstructing the Bureau of Internal Revenue in its assessment and collection of taxes. Defendant Benater assigned as error the refusal of the district court to give an instruction requested by defendants to the effect that the alleged conspiracy, so far as defendant Benater was con-

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[8] See Rooney, *Admissibility of Radar Speedmeter Readings,* 28 TUL. L.REV. 398-400 (1954).

[9] State v. Leuch, District Court of Milwaukee County, No. 50971, February 3, 1954, Judge Gregorski, presiding. However, this decision was reversed on the facts by a jury on appeal to the Circuit Court of Milwaukee County, No. 1763.

[10] *Supra,* note 5.

[11] *Supra,* note 4.

cerned, and his connection therewith, could not be established by any other alleged co-conspirator's acts and declarations. *Held*: that the Court of Appeals could not consider the error assigned because of the failure of defendant to state to the trial judge the ground of his objection, as required by Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A.[1] Denman, C. J., dissenting, contended that the refusal of the requested instruction was plain error affecting substantial rights, as contemplated by Rule 52(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.,[2] and that the Court of Appeals could, therefore, consider the error. *Benater v. United States, 209 F.2d 734 (9th Cir. 1954).*

Appellate Courts will not ordinarily recognize or determine errors not previously brought to the attention of the trial court; this rule is designed to effectuate the orderly administration of justice and is founded upon considerations of fairness to the court, to the parties and to the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact.[3] This doctrine is incorporated into the Federal Rules of Criminal Procedure, with respect to instructions, by Rule 30, which is a restatement of the decisional law.[4] But even under the decisional rule, where the error was such as to amount to a denial of fundamental rights, the court could notice it on its own motion.[5] This right to notice errors not objected to at the trial was preserved to the Federal appellate courts by Rule 52(b), which provides that plain error affecting substantial rights may be noticed though not called to the attention of the court. Rules 30 and 52(b) are *in pari materia* and should be construed together to continue the decisional rule.[6] By judicial interpretation, Rule 52(b) has been read to mean "not brought to the attention of the trial court,"[7] but it has been used in many cases to justify reversals for errors neither called to the attention of the trial court nor even raised in the briefs of counsel on appeal.[8]

[1] "Rule 30. Instructions.
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

[2] "Rule 52(b). Plain Error.
Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

[3] United States v. Jones, 204 F.2d 745 (7th Cir. 1953).

[4] Ryles v. United States, 172 F.2d 72 (10th Cir. 1948).

[5] *Ibid.*

[6] *Ibid.;* Apodaca v. United States, 188 F.2d 932 (10th Cir. 1951).

[7] United States v. Jones, *supra* note 3; United States v. Raub, 177 F.2d 312 (7th Cir. 1949).

[8] United States v. Kemble, 197 F.2d 316 (3rd Cir. 1952); Simmons v. United

The application of Rule 52(b) rests, in large measure, upon the exercise of the sound judicial discretion of the court.[9] But in order for the court, under this rule, to notice the errors assigned, it is said that such errors must be substantial and *capable* of resulting in a miscarriage of justice;[10] some courts have gone so far as to say that when the defendant has failed to object, only the strongest kind of showing that justice *has* miscarried will avail him on appeal.[11] Still others have required that there be readily apparent on the face of the record such a condition of unfairness and injustice as would appeal to the discretion of the court and prompt it to correct an obvious error in the administration of justice.[12] On the other hand, it has always been the custom of one court, in cases of serious criminal offenses, to check the record carefully for error prejudicial to the defendant which he did not urge.[13] When the error is thus tardily asserted, however, a judgment is to be exercised which does not turn in each instance upon treatment of the alleged error in isolation from other circumstances.[14]

Stringent though this requirement might be, defendants have not infrequently been able to have their convictions reversed because of errors committed upon trial, to which they failed to object. In the field of instructions, the cases generally fall into three classes: 1) those in which there is a failure to give a necessary instruction; 2) those in which an erroneous or misleading instruction has been given; and 3) those in which an instruction has been given which distorts the evidence to the prejudice of the defendant, or which assumes a fact which was not in evidence.

Failure of a trial court in a criminal case to instruct on all essential questions of law involved in the case, whether requested or not, clearly affects "substantial rights" within the meaning of Rule 52(b);[15] therefore, if the error is sufficiently "plain," as it nearly always is where the question of law is essential to the case, the appellate court may review and reverse even though no request was made nor objection taken to the omission at the trial. In one case,[16] defendant had been convicted of receiving stolen property. The applicable statute provided for varying

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States, 206 F.2d 427 (D.C. Cir. 1953); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); McGuinn v. United States, 191 F.2d 477 (D.C. Cir. 1947).

[9] United States v. Jones, *supra* note 3; United States v. Sferas, 210 F.2d 69 (7th Cir. 1954).

[10] United States v. Raub, *supra* note 7.

[11] Wagner v. United States, 171 F.2d 354 (5th Cir. 1948).

[12] United States v. Jonikas, 187 F.2d 240 (7th Cir. 1951); United States v. Powell, 155 F.2d 184 (7th Cir. 1946).

[13] Tatum v. United States, *supra* note 8.

[14] Crawford v. United States, 198 F.2d 976 (D.C. Cir. 1952); *cf.* United States v. Monroe, 164 F.2d 471 (2d Cir. 1947); Felton v. United States, 170 F.2d 153 (D.C. Cir. 1948).

[15] Tatum v. United States, *supra* note 8; Schino v. United States, 209 F.2d 67 (9th Cir. 1954).

[16] McQuaid v. United States, 193 F.2d 696 (D.C. Cir. 1951).

prison terms depending upon the value if the property involved. The trial court, however, failed to instruct the jury to find the value of the property. The appellate court held that this omission was error and could be noticed even though defendant had made no request for the instruction nor objection to its omission . The conviction was nevertheless affirmed ,the court pointing out that the sentence imposed by the trial court was not excessive even though the value of the property be considered as falling within the lowest class of offenses.

The rule is frequently stated that an instruction must discuss and define the offenses charged and must break them down into their constituent elements.[17] Failure to so instruct will constitute a plain error affecting substantial rights; and so, in *Morris v. United States,*[18] where the trial court in its instructions did not define the offense charged and gave the jury no opportunity to apply the law to the facts, merely telling them that if they found that certain facts were true, then they must return a verdict of guilty, it was held that such omission was plain error. The conviction was, therefore, reversed, even though no objection had been made at the trial. Likewise, a conviction for wilful evasion of taxes was reversed, even though no objection was made, when the instructions assumed that the only question for the jury was that of intent, which instructions amounted, in effect, to a directed verdict on the issues of falsity and fraudulence.[19]

Where some proof of insanity was adduced upon trial, it was held in one case that it was reversible error for the trial court to fail to instruct with respect to that defense, even though no request had been made.[20] On the other hand, it has been held that failure of the trial court to instruct on the presumption of innocence was not reversible error in the absence of a request for such instruction.[21]

If the trial court erroneously instructs the jury on the law, the appellate court may notice the error if it is plain and affects substantial rights. There appear to be no real standards on which to rely for the application of this rule, the decision resting in the discretion of the appellate court. However, as stated above,[22] it would seem that the erroneous instruction must have been at least capable of causing a miscarriage of justice. An instruction stating that the jury could consider the failure of the defendant to take the stand in his defense,[23] and an instruction that improperly stated the law with respect to entrapment[24] have been

[17] McGuinn v. United States, *supra* note 8; Williams v. United States, 131 F.2d 21 (D.C. Cir. 1942); Morris v. United States, 156 F.2d 525 (9th Cir. 1946).
[18] *Supra* note 17.
[19] United States v. Raub, *supra* note 7.
[20] Tatum v. United States, *supra* note 8.
[21] Spevak v. United States, 158 F.2d 594 (4th Cir. 1946).
[22] *Supra* note 10.
[23] United States v. Ward, 168 F.2d 226 (3rd Cir. 1948).
[24] United States v. Sherman, 200 F.2d 880 (2d Cir. 1952).

held to be reversible error though no objection was made. In *Jones v. United States,*[25] a prosecution for premeditated murder, the trial court instructed the jury that there need be no appreciable length of time between the formation of the intent to kill and the killing itself, that "it may be as instantaneous as successive thought." The appellate court held that this instruction was plainly erroneous, and reversed the conviction, even though no objection had been made.

The last class of cases includes those in which the judge, in his instructions, has distorted the evidence or assumed a fact which was not in evidence. This sort of error is clearly prejudicial when the distortion or assumption is at all detrimental to the defendant's case, and the cases generally hold that such error may be noticed on appeal though no objection is made. In *Austin v. United States,*[26] the trial court instructed that "defendants admitted that Austin shot and killed Gonzalez." Pointing out that neither defendant had admitted that the dead man was Gonzales, the appellate court reversed the conviction, stating that the error was plain and affected substantial rights and that, therefore, the error could be noticed though no objection had been made. Likewise, in *Robertson v. United States,*[27] a prosecution for forgery, the defendant failed to object to an instruction which stated that the jury might consider testimony of the storekeeper who cashed the check that he saw the defendants dividing the money. The actual testimony of the storekeeper had been merely that he saw one of the defendants pass money to the other and "thought they were arguing over the divvy of the money." The appellate court noticed the error and reversed. In *United States v. Balodimas,*[28] defendant was convicted of attempting to defeat income taxes. Upon the trial, defendant's employes testified that they had set aside a part of each day's receipts before they made entries in defendant's books of account; but there was no evidence that these employes were aware of the fact that such activity might be considered an attempt to defeat taxes. The trial judge instructed that these employes had openly admitted that they were law violators and that they had taken part in the commission of a crime. The defendant made no objection to this instruction; the appellate court reversed, nevertheless, because of the fact that the instruction of the trial judge had misstated the evidence.

On the one hand, it can be said that every defendant has a right to a fair trial free from prejudicial error, and that this right should not be made to depend so heavily upon the aptness of his counsel in perceiving every error as it occurs. But, on the other hand, if the rule were differ-

[25] 175 F.2d 544 (9th Cir. 1949).
[26] 208 F.2d 420 (5th Cir. 1953).
[27] 171 F.2d 345 (D.C. Cir. 1948).
[28] 177 F.2d 485 (7th Cir. 1949).

ent from what it is and required merely that the error be prejudicial instead of being capable of in a miscarriage of justice, objections at trials would be few and reversals of convictions many for errors which could have been prevented or corrected immediately at the trial. This being true, Rule 52(b) and the interpretations which have been given to it are sound in law and logic.

ROBERT H. GORSKE

BOOK REVIEW

LAW AND PRACTICE IN CHATTEL SECURED FARM CREDIT, by Glenn R. Coates, Madison: University of Wisconsin Press, 1954. Pp. xi, 105. $2.75.

The author of the volume under review has compiled an interesting analysis of how secured loans are made to Wisconsin farmers. Mr. Coates has interviewed many financial institutions and other lending agencies to determine the types of security devices actually in use. This survey revealed a number which have been accepted by the trade for many years although not all of them have been subjected to a court test. The instruments discussed include chattel mortgages, conditional sales contracts, milk check assignments, powers of attorney, and bank drafts incorporating a bill of sale. Less popular devices appear to be reservation of title to crops by landlord as security for rent payments, insurance policy assignments, and pledges.

The impact of Wisconsin law on loan procedures is particularly evident with respect to crop mortgages. Because of court decisions holding that a mortgage on property *to be acquired* is void, special devices have been developed where crops not yet in existence are intended as security. These include a promise by the farmer, with or without a power of attorney, to execute a mortgage when the crops later come into existence. In the potato growing regions the farmer is often made trustee of the crop until the mortgage is executed. The author doubts the validity of these devices if subjected to litigation, stating: "It is not likely that the court will permit form to triumph over substance." (p. 16)

Subsequent chapters deal with matters arising after the loan has been made, including the rights of third parties in the assets securing the loan and procedures for enforcement in the event of default. The survey found no instances where the debtor insisted on a statutory foreclosure. It appears that debtors, at least under the present economic conditions, are willing to cooperate with the lender in getting out of debt as painlessly as possible. One popular method of accomplishing