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Evidence - Presumption That Judge Disregarded Incompetent Evidence in Reaching His Verdict Does Not Obtain Where an Objection to the Evidence Has Been Overruled

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EVIDENCE—Presumption That Trial Judge Disregarded Incompetent Evidence In Reaching His Verdict Does Not Obtain Where An Objection to the Evidence Has Been Overruled.

Having waived his right to trial by jury, the defendant was tried in the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, on one count each of rape and aggravated kidnapping.[1]

The prosecuting witness testified that on December 20, 1968, at approximately 3:00 A.M., defendant entered a laundromat in the City of Elgin, Kane County, in which prosecutrix was doing her laundry, and forced her to go with him at knifepoint. He proceeded to drive to a nearby bar, which was just closing, and then to a cemetery in Cook County, holding the knife in his hand at all times. Upon reaching the cemetery, the defendant put the knife in his pocket, where it remained. After approximately one half hour of talking and petting, defendant said, "You know what we're here for," and prosecutrix shrugged and said "Well, let's do it." Prosecutrix testified that she was too scared to try to resist and that "during the whole course of the evening" she was "trying to make it appear that she was attracted to him," so that she might "live a little while longer."[2] After prosecutrix had helped defendant dress, he drove her back to her car, and prosecutrix returned to the laundromat to pick up her clothes. Defendant then returned to the laundromat and made a date to meet prosecutrix the next week. She then drove home, took her clothes out of the car, walked into her house, washed her hands and face, checked on her children, and then went down the block to her aunt's home. Upon being questioned by her aunt, prosecutrix complained that she had been raped. They called the police, and prosecutrix again related her story.

Defendant, on the stand, admitted the act of intercourse, but denied that a knife was produced and contended that prosecutrix went with him willingly and that the act of intercourse was consensual.

The balance of the substantive testimony came from the aunt and the police officer to whom prosecutrix had related her story. This testi-

1. Ill. Revised Statutes, ch. 38, sec. 10-2(a): "A kidnapper . . . is guilty of the offense of aggravated kidnapping when he (3) inflicts great bodily harm or commits another felony upon his victim. . . ."
2. Abstract at 28-30.

mony, objected to as hearsay, was admitted as an excited utterance. It was, in fact, a recital of what prosecutrix had told them, repeating in substance almost every detail of the incident as alleged by the prosecutrix.

At the conclusion of the evidence, defendant was found guilty of aggravated kidnapping, the rape charge was dismissed for lack of venue, and defendant was sentenced to from one to five years in the Illinois State Penitentiary.

On appeal, defendant contended that the court erred in allowing the prosecutrix's aunt and the police officer to testify as to the details of her complaint, such complaint being too far removed in time and opportunity from the act complained of to be an excited utterance.[3]

The State argued that the testimonies were admissible either as excited utterances, or to show the fact of complaint and thus corroborate prosecutrix's testimony.[4] HELD: Reversed and remanded.[5]

(1) The statements made by prosecutrix were too far removed in time from the occurrence to be admissible as excited utterances;

(2) The testimony was too extensive and detailed for the purpose of showing the fact of complaint; and

(3) The presumption that the trial judge in a bench trial considered only admissible evidence in reaching his decision does not apply when incompetent evidence was admitted over objection.

The charge of rape has traditionally raised many problems. By its very nature, rape is a crime which is likely to have few witnesses. It is also a charge which is thought to carry a great risk of falsehood, whether from delusion, spite, or shame after consensual intercourse.[6] Normally, even when a trial resolves itself into two witnesses, each telling conflicting stories under oath, the law leaves it to the trier of fact to

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3. Brief of the defendant, at 11.
4. Brief of the plaintiff at 7-10.
5. People v. Stewart, — Ill. App. 2d —, 264 N.E.2d 557 (1970).
6. 3A WIGMORE, EVIDENCE, sec. 924(a) (Chadbourn Rev. 1970); for a collection of examples from medical literature, see Wedmore v. State, 237 Ind. 212, 227-39, 143 N.E.2d 649, 656-62 (1957) (dissenting opinion); see also, Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 55, 68-70 (1952); But see Sheehy, *Nice Girls Don't Get Into Trouble*, New York Magazine 4.7 (Feb. 15, 1971) page 26, where the author argues that only one-third of rapes and rape attempts are reported because the "woman feels, or is made to feel, like a criminal." An examination of the accuracy of this argument is obviously beyond the scope of this comment. However, it is submitted that even if this "public rape psychology" does diminish the number of true complaints, these psychological pressures may have much less effect on the number of false accusations, for the need which gave rise to the fabrication in the first place might tend to overcome these pressures. But even granting the point, the cases contain a sufficient number of false accusations to support the court's concern.

distinguish truth from falsehood in deciding guilt or innocence, giving due weight of the demeanor of the witnesses and the presumption of innocence.

While the presumption of innocence in a rape case is an essential safeguard, there exists a large danger that this protection will be ignored. When the jury is presented with the opportunity to choose between the testimony of a woman who alleges she has been raped, and denial of the alleged rapist, the result may be that outrage at the attacker and sympathy for the victim will override the presumption of innocence.[7]

To compensate, in part, for this risk, the courts have generally require a greater degree of corroboration to support a charge of rape,[8] and have more closely scrutinized the evidence upon which a conviction for rape is based.[9]

A rape complaint has been held admissible, against an objection that it is hearsay, as an excited utterance or a corroborative statement. Generally, the details of a complaint are hearsay and must come within an exception to the rule to be admitted.

> Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[10]

Since the purpose of introducing the details of a rape complaint is, almost invariably, to prove the facts asserted in the complaint and thus substantiate the declarant's testimony, these details of the complaint are hearsay. In the past, Illinois courts have viewed the complaint, when it occurs in close time proximity to the alleged attack, as part of the act in question and have admitted the statements as "part of the res gestae". It is apparent, however, that the evidentiary value of the statements do not arise because the complaint is an essential part of the occurrence, or because it explains an ambiguous transaction, but rather because it tends to prove the fact of the occurrence itself. It is thus hearsay and must

7. See HALE, PLEAS OF THE CROWN *636.

8. People v. Carruthers, 379 Ill. 388, — N.E.2d 388 (1942); People v. O'Connor, 412 Ill. 304, 106 N.E.2d 176 (1952). In some cases, the legislatures have taken the lead. See, e.g., New York Penal Law, sec. 2013 (McKinney 1944); for listing, see 7 WIGMORE sec. 2061 (3rd).

9. People v. Kazmierczyk, 357 Ill. 592, 192 N.E. 657 (1934); People v. Mays, 23 Ill. 2d 520, 179 N.E.2d 654 (1962).

10. MCCORMICK, LAW OF EVIDENCE, sec. 225 (1954); compare with 6 WIGMORE, EVIDENCE, sec. 1746 (3rd 1940): "Whenever an utterance is used as testimony that the fact asserted in it did in fact occur as asserted . . . it is being used testimonially and is within the prohibition of the hearsay rule."

fall within some exception to the rule to be admissible. The res gestae exception has been repudiated by recent Illinois decisions and thus admission of the details of the complaint must depend upon other qualifications.

Hearsay declarations are generally excluded, not because they are inherently unreliable, but rather because there is no way to test their reliability at trial. Since the witness has no first-hand knowledge of the event in question, he is able to testify only to the fact of declarant's assertion, and not the truth of it. Thus, cross-examination, the "most efficacious test which the law has devised for the discovery of truth,"[11] is limited to whether or not the assertion was actually made, while the truth of the matter must rest on the credit of the absent declarant.[12]

But since the hearsay rule was developed to protect against the admission of statements whose reliability was not subject to test at trial, it was logical to except from its application statements whose reliability was likely to be high.[13] Thus, statements made in reaction to a startling experience without sufficient time for fabrication are admitted in the belief that they are likely to be reliable:

> There are many situations in which it can be easily seen that such a required test [cross-examination] would add little as a security, because its purpose had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance) in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.[14]

The "spontaneous declaration" exception for excited utterances,[15] then admits statements which, while hearsay, do not require cross-examination to test their reliability at trial.

The standards which determine whether a statement meets this test of reliability and thus comes under the excited utterance exception to the hearsay rule were enunciated in *People v. Poland* and reiterated in the instant case:

> (1) An occurrence sufficiently startling to produce a spontaneous and unreflected statement; (2) absence of time to fabricate; and

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11. McClesky v. Leadbetter, 1 Ga. 551, 555 (1846).
12. McCORMICK, LAW OF EVIDENCE, sec. 224 (1954); 5 WIGMORE, EVIDENCE, sec. 1362 (3rd, 1940).
13. 6 WIGMORE, *supra* at 1747; 29 Am. Jur. 2d, Evidence, sec. 708 (1967); People v. Poland, 22 Ill. 2d 175, 174 N.E.2d 804 (1962).
14. 5 WIGMORE, *supra* at sec. 1420.
15. "Spontaneous" should be read, not as connoting a time relationship but rather in its denotative sense of "coming freely and without premeditation or effort." 10 OXFORD ENGLISH DICTIONARY.

> (3) the statement must relate to the circumstances of the occurrence.[16]

The court in *Stewart* determined that too much time had elapsed between the occurrence and the statement to the aunt and the police officer and thus there was sufficient time to fabricate. The court concluded that the statements, therefore, were not admissible under the spontaneous declaration exceptions.

The court next considered whether the statements were admissible as corroborative complaints, a second independent ground for admission peculiar to rape cases.

> In rape cases, where the injured woman is a witness, it is proper for the woman to testify that she made prompt complaint concerning the outrage which had been perpetrated upon her, and it is proper to permit the person to whom she complained to give testimony that the complaint was made, but it is not proper to give any details of the complaint.[17]

The law allows such proof "upon the generous supposition that a woman wronged will be prompted to express her indignation at the injury inflicted upon her."[18]

Since such complaint would be a natural expression of outrage by one so wronged,

> It may therefore be shown in evidence as a circumstance which would usually and probably have occurred in case the offense had been committed. And further failure to complain . . . is looked upon as a suspicious circumstance; and, to repel the inference that the story may have been a mere fabrication, which otherwise might be drawn, such evidence is admitted as tending to confirm or corroborate the statements of the injured party.[19]

Such admission should not be considered an exception to the hearsay rule, as some courts have indicated,[20] for it admits only the fact that complaint was made—the truth of which is known to the witness—and not the details of the complaint—the truth of which is not known to the witness.[21] When so restricted the testimony is not given for the truth of the matter asserted but rather to prove that a complaint was in fact made and rebut the inference which might otherwise occur. Thus

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16. People v. Poland, 22 Ill. 2d 175, 181, 174 N.E.2d 804, 807 (1961).
17. People v. Romano, 306 Ill. 502, 503-504, 138 N.E. 169 (1923).
18. People v. DeFrates, 395 Ill. 439, 444, 70 N.E.2d 591 (1947).
19. 44 Am. Jur., Rape, sec. 83 (1942); see also, People v. Damen, 28 Ill. 2d 464, 193 N.E.2d 25 (1963).
20. People v. Furlong, 392 Ill. 247, 64 N.E.2d 460 (1946); People v. Davis, 10 Ill. 2d 430, 140 N.E.2d 675, *cert. den.* 355 U.S. 820, 78 S. Ct. 25, 2 L. Ed. 35.
21. People v. Damen, 28 Ill. 2d 464, 474, 193 N.E.2d 25 (1963).

it is not hearsay, but rather "original evidence of a fact which is important in rape cases and which cannot be ascertained in any other way."[22]

This testimony establishing the fact of complaint is admitted for a very narrow purpose:

> Admissibility is for the purpose of rebutting the presumption arising from the silence of the complainant, [and] it is unnecessary to show the details of the declaration, but only the fact of its making in order to negative the presumption arising from silence.[23]

To the extent that the presumption arising from silence is valid,[24] it is necessary to allow prosecutrix to rebut it. The question involved is not what prosecutrix said, which would involve a hearsay problem, but whether she said anything at all.

In those cases where the complaint was made under circumstances which do not raise the risk of fabrication, the admission of the details of the complaint under the spontaneous declaration exception to the hearsay rule would eliminate any question as to the fact of complaint, for inherent in the admission of the particulars is the fact of complaint. While the particulars could not be admitted without admission of the fact, it is impossible that the fact of complaint could be admitted without the particulars. This is so because they are admitted under two separate doctrines, and while the statements themselves may not be admissible as an exception to the hearsay rule, the fact of complaint may be admitted to rebut the presumption raised by silence. So limited, the testimony would not be offered for the truth of the matter asserted. However, the admission of the fact of complaint when the details of the complaint are excluded raises certain problems:

> The reason for the rule admitting the fact that complaint was made and excluding the complaint itself, is founded, aside from its being hearsay, by those courts which do not treat it as part of the res gestae, upon the danger of allowing a designing female to corroborate her testimony by statements made by herself to third persons, and the difficulty of disproving the principal fact by the accused.[25]

While it is true that closeness in time is relevant to the admission of the fact of complaint and that such evidence may be excluded if there was an "inconsistent or unexplained delay" in the making of the complaint,[26] it is also true that the testimony as to the fact is admissible even though "sufficient opportunity for reflection and invention"[27] had in-

22. People v. Romano, 306 Ill. 502, 504, 138 N.E. 169 (1923).
23. People v. Damen, 28 Ill. 2d 464, 473, 193 N.E.2d 25 (1963).
24. See note 6, *supra*.
25. 44 Am. Jur., Rape, sec. 84 (1942).
26. People v. Damen, 28 Ill. 2d 464, 473, 193 N.E.2d 25 (1963).
27. *Id.* at 472.

tervened. But whatever risk of fabrication attaches to the details of the complaint also attaches to the complaint itself, and the "lapse of time which disqualifies the statements as a spontaneous declaration also provides the complainant with an opportunity for reflection and invention."[28] In other words, if the particulars of the complaint may have been fabricated and are thus excluded, it follows that the complaint itself may have been fabricated. The result is that, where the particulars are not admissible as spontaneous declarations, the fact of complaint, which carries the same risk of fabrication, is admitted.

So long as the evidence is admitted solely to rebut the presumption raised by silence and the jury is clearly instructed in this regard, little prejudice is likely to result. However, prejudice does become more probable when too much is made of this evidence. As a general rule, where defendant denies the charge of rape, the testimony of prosecutrix, if not clear and convincing, must be corroborated by evidence of other facts and circumstances to justify a conviction.[29] The need for corroboration depends on the facts of the case,[30] but it is clear that where corroboration is necessary, evidence of the complaint has been admitted for this purpose.[31] The result has been that the use of the fact of complaint has been extended from negating the presumption raised by silence to corroborating the testimony of the prosecutrix. Thus, where prosecutrix does not testify, proof of the fact of complaint is inadmissible, for there is no testimony to corroborate.[32]

In other words, where the testimony is not convincing in the first place, the law allows the prosecutrix to corroborate herself by evidence of a complaint, the details of which were excluded as not being sufficiently free from the risk of fabrication. "It is an arbitrary rule which permits the corroboration of prosecutrix by her own complaint of the assault upon her."[33] But this is precisely what this doctrine allows, and it is especially important where her testimony is not sufficiently convincing on its own. Thus, while excluding the particulars of the complaint because of the "danger of allowing a designing female to corroborate her testimony by statements made by herself to third persons,"[34] the courts reach the same result by allowing the fact of the possibly fictitious complaint to corroborate prosectrix's testimony.

28. *Id.* at 474.
29. People v. Reaves, 24 Ill. 2d 380, 183 N.E.2d 176 (1967).
30. People v. Thompson, 91 Ill. App. 2d 34, 234 N.E.2d 5 (1968).
31. People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950); People v. Jenkins, 24 Ill. 2d 208, 181 N.E.2d 79 (1962).
32. People v. Furlong, 392 Ill. 247, 64 N.E.2d 469 (1946).
33. People v. Scattura, 238 Ill. 313, 316, 87 N.E. 332 (1909).
34. *Supra*, note 25.

> It is an immature jurisprudence that places reliance on corroboration, however unreliable the corroboration is, and rejects overwhelming [sic] reliable proof because it lacks corroboration, however slight and however technical to the point of token satisfaction of the rule. Quite often the corroboration supplied under the various rules of criminal law, and particularly in sex cases, is weak indeed and supplies only a formalistic bridge over a very profound discomfort in such cases because of the many motivational or quasi-pathological reasons for distortion of the facts.[35]

This is particularly true where the corroborative fact has already been determined to be susceptible to the risk of fabrication and the story to be corroborated contains deficiencies undermining its credibility.

This is not to say, however, that because of this danger, the fact of complaint must be excluded.[36] But what must be recognized is that the fact of complaint is admitted solely to rebut the presumption raised by failure to complain. It does not go to the proof of the rape, nor does it corroborate prosecutrix's testimony. If the testimony is not sufficiently clear and convincing to sustain a conviction, evidence as to the fact of complaint should not satisfy the requirement for corroboration where the particulars are not admissible as spontaneous declaration. On the other hand, where the testimony of prosecutrix is clear and convincing, failure to make prompt complaint should not of itself be sufficient to acquit.

It is difficult to determine how the *Stewart* court would have handled this problem had it been faced with this question. The court did recognize the classification of corroborative complaint, consisting of statements of the rape victim made "at a time too remote to qualify as a spontaneous declaration," and "limited to the fact that complaint was made." The court also stated that the complaints in question would have been allowable "as corroborative complaints had the testimony been limited to the fact of complaint."[37] However, it gives no indication as to the purpose for such admission.

What the court did make clear was that the prime factor for consideration in the admission of statements as spontaneous declarations is the

35. People v. Radunovic, 21 N.Y.2d 186, 191, 234 N.E.2d 212, 214, 287 N.Y.S.2d 33, 36-37 (1967) (Breitel, J., concurring); see also 7 WIGMORE, *supra* note 8.

36. Indeed, it would seem to be beneficial to remove all time restrictions and allow evidence as to the fact of complaint no matter how long after the occurrence the complaint was made (see 4 WIGMORE, EVIDENCE, sec. 1135 (3rd, 1940)), with the length of delay going only to the weight to be given the complaint. In fact, there would be cases in which the delay would be so great that the fact of complaint would become positive evidence for the defendant. The relevant questions would become: Given these circumstances, is it reasonable to believe that this complainant would have waited this long to complain, had the rape occurred as alleged?

37. People v. Stewart, — Ill. App. 2d —, 264 N.E.2d 557, 559 (1970).

presence or absence of time to fabricate and that, in this case, "prosecutrix did have time to fabricate."[38]

Finding error in the admission of details of the complaint, the court confronted the "presumption in Illinois law that if a trial court is the trier of the facts, it is presumed that the judge considered only admissible evidence, and that all incompetent evidence is disregarded in reaching his decision."[39]

The "premise seems to be that exclusion is only necessary to protect the defendant from an irrational jury and is not needed when the fact-finder is a judge who can coolly and professionally reach his decision without considering the improper evidence."[40] This presumption has led one court to say that "in the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not . . ."[41] This would seem to be a logical extension of the presumption, for if a judge considers only the competent evidence, it really makes no difference what is admitted. This presumption would only be rebutted when the judge states that he relied on evidence which is, in fact, incompetent.

Such a holding would, however, be contrary to Illinois decisions, and the Appellate Court will not go this far. The court begins by repeating the presumption,[42] but then recognizes a line of criminal cases qualifying the presumption, to the effect that even when there is no jury the trial court may not convict on incompetent evidence. In *People v. Grodkiewicz*, the Illinois Appellate Court said the presumption obtains "unless it affirmatively appears that the court was misled or improperly influenced by such remarks *and* [emphasis added] that they were productive of a judgment and sentence contrary to the law and the evidence."[43]

But it is not only by express statement that the trial court can show that it was misled: "Where an objection has been made to the evidence and overruled, it cannot be presumed that the evidence did not enter into the court's consideration. The ruling itself indicates that the court thought the evidence proper."[44]

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38. *Id.*
39. *Id.*
40. 79 Harv. L.R. 407 (1965).
41. Builders Steel Co. v. Commissioner, 179 F.2d 377, 379 (8th Cir. 1950).
42. 264 N.E.2d at 559.
43. *Id.* at 560, citing People v. Grodkiewicz, 16 Ill. 2d 192, 200, 157 N.E.2d 16 (1959).
44. People v. DeGroot, 108 Ill. App. 2d 1, 11, 247 N.E.2d 177 (1968); see also, People v. Smith, 55 Ill. App. 2d 480, 204 N.E.2d 577, (1965) where the court seems to find a similar showing of reliance in the trial court's refusal to strike incompetent testimony.

Thus, finding reliance in the trial court's overruling of the objection to the admission of the incompetent evidence, the *Stewart* court failed to examine its effect, leaving the rationale behind its decision unclear.

In citing *People v. Grodkiewicz*,[45] the court seems to be saying that the presumption controls unless the appellate court finds both reliance on the incompetent evidence by the trial judge and a verdict contrary to the weight of the evidence. However, the court will overturn any conviction which is contrary to the weight of the competent evidence, whether or not incompetent evidence was admitted. Thus, the reliance of the trial court on incompetent evidence would be immaterial, for as long as the verdict was against the weight of the competent evidence, the court would reverse whether or not there was reliance. This being so, the presumption against reliance would have no effect, for reliance would never be a question.

However, after citing *Grodkiewicz*, which said that for reversal a judgment must be contrary to the evidence, the *Stewart* court did not discuss the question of the sufficiency of the evidence and apparently overturned on the basis of the trial court's reliance on the incompetent evidence:

> From a review of the record, we are of the opinion that, in this instance, the trial judge did believe the testimony of the aunt and police officer to be admissible evidence under the spontaneous declaration rule and, further, that he did rely upon such evidence in arriving at his decision.[46]

But if this were the sole test for the reversal of a criminal verdict in a bench trial, it is a harsher rule than that for a jury verdict. Even if incompetent evidence is admitted in a jury trial, the verdict will not be overturned if the error was not prejudicial. It is thus apparent that the *Stewart* court did not make reliance the sole test for reversal.

If the second requirement is that the verdict is contrary to the competent evidence then the court's finding that the trial court relied on incompetent evidence would have been unnecessary, a presumption against reliance would be meaningless, and a discussion of the reasons for finding the verdict to be against the weight of the evidence would have been essential. On the other hand, the court may have considered the second requirement to be that the error was harmful, which could be assumed without discussion under the facts once reliance was found. An examination of the cases cited by the *Stewart* court in sup-

45. See n. 43, *supra.*
46. — Ill. App. 2d —, 264 N.E.2d at 560.

port of its formulation of the presumption sheds some light on the confusion.

People v. Grodkiewicz involved an appeal of a conviction for receiving stolen property on the grounds, inter alia, that remarks by the State's Attorney during trial and in the closing argument misstated the law and the evidence and were prejudicial.[47] The court found that the judgment was fully supported by the evidence,[48] and, after stating the presumption that the trial judge in the absence of the jury will "disregard all evidence heard except that which is competent and relevant"[49] held that the court will not reverse absent a showing of reliance and a verdict contrary to the evidence and affirmed the conviction, holding:

> If we assume the impropriety of the remarks of counsel, there is nothing in the record to suggest that the trial judge was misled thereby or that he lacked the legal discernment to render a judgment and sentence strictly in accord with the law and the evidence.[50]

Of the four cases cited by the *Stewart* court as following the reasoning of *Grodkiewicz*, only one affirmed the trial court, and it did not rely solely on the presumption. The court in *People v. Jackson*, in affirming the conviction for aggravated battery, found that, although the admission of the incompetent testimony was objected to, "the trial court made no ruling on the objection and defense counsel did not press for a ruling thereon." In addition, the incompetent testimony was excluded from "the trial court's extensive summary of the evidence" and the evidence was, therefore, not prejudicial to the defendant.[51] In effect, the court found an affirmative showing of no reliance on the incompetent evidence by the trial court.

In the other three cases cited by the *Stewart* court, the courts acknowledged the existence of the presumption, but reversed and remanded on the basis of a finding of reliance. The court in *People v. Moore*, after finding that "the evidence was adequate to sustain a finding of guilty beyond a reasonable doubt,"[52] reversed the conviction for attempted robbery, attempted murder, and aggravated battery. The court found that the admission of hearsay testimony to corroborate the one witness who had testified to the robbery was "clearly prejudicial"[53] and that the trial court's statement "that he would not 'deprive counsel of an oppor-

47. People v. Grodkiewicz, 16 Ill. 2d 192, 199, 157 N.E.2d 16 (1959).
48. *Id.* at 198, 200.
49. *Id.* at 199; see People v. Grabowski, 12 Ill. 2d 462, 467, 147 N.E.2d 49 (1957).
50. People v. Grodkiewicz, 16 Ill. 2d 192, 200, 157 N.E.2d 16 (1959).
51. People v. Jackson, 95 Ill. App. 2d 193, 199, 238 N.E.2d 196 (1968).
52. People v. Moore, 95 Ill. App. 2d 89, 94, 238 N.E.2d 67 (1968).
53. *Id.*

tunity to give the court some insight as to [the declarant]' "[54] was sufficient to show reliance on such testimony.

In *People v. Smith*, the court reversed and remanded a conviction for taking indecent liberties with a child after finding that fabrication on the part of the complaining witness was "highly improbable in the light of his clear and detailed description of the incident and its attendant circumstances,"[55] and that "the facts admitted by the defendant certainly give rise to the inference that his interest in these children was other than platonic"[56] and that the testimony was corroborated. The basis for the court's finding of reliance is unclear, but it apparently found that the trial court's refusal to strike the incompetent hearsay of a second complainant[57] indicated that the trial court gave some weight to it and "since we are unable to determine how much weight was given to this improper evidence, the conviction must be reversed and remanded."[58]

Finally, in *People v. DeGroot*, the court found that the competent evidence was sufficient to prove guilt beyond a reasonable doubt, but nevertheless held that the trial court's overruling of defendant's objection to the admission of evidence of prior convictions in a trial for drunken driving was sufficient to show reliance[59] and that such evidence was prejudicial to the defendant,[60] and therefore reversed the judgment.

Thus, in the three cases which reversed the trial court, the courts did not require the decision to be against the weight of the evidence and in fact found that the decision was supported by the evidence. In *Grodkiewicz* and *Jackson*, the courts found neither reliance nor insufficiency of evidence, thus did not have to consider whether both would be necessary in order to reverse. It therefore seems more probable that when reliance on incompetent evidence is demonstrated the question is not whether the judgment was contrary to the weight of the evidence, but rather whether the evidence admitted was prejudicial to the defendant. The concern, then, is the same whether the trial is held before a jury or not, for even a jury verdict will not be overturned if the error was harmless.

Under this interpretation there is still some question as to the validity of the presumption. If an objection to incompetent evidence is made

54. *Id.* at 95.
55. People v. Smith, 55 Ill. App. 2d 480, 486, 204 N.E.2d 579 (1965).
56. *Id.* at 487.
57. *Id.* at 485.
58. *Id.* at 488.
59. People v. DeGroot, 108 Ill. App. 2d 1, 11, 247 N.E.2d 177 (1968).
60. *Id.* at 10.

and sustained, then no presumption is necessary because it is manifest that the judge did not consider the evidence. If the objection is overruled then *DeGroot* and *Stewart* would suggest that the presumption is rebutted and therefore has no effect. If no objection is made and the evidence is admitted then the effect is the same in a bench trial as in a jury trial because the objection would be waived and a decision could be based upon the otherwise inadmissible evidence.[61] If the judge withholds ruling on the objection and the objecting party does not renew the objection and request a ruling at the close of the evidence then the presumption would have effect. However, this would only occur due to the failure to renew and would be similar to a waiver. Thus, the presumption would be very limited in scope.

Yet, it is apparent that the appellate court does consider the non-jury trial differently and is less likely to reverse a bench trial because of the admission of incompetent evidence. Thus, if the presumption is to have effect, it must be in the determination of harmless and prejudicial error.

The presumption that in a non-jury trial the judge will consider only the admissible evidence was first enunciated in a criminal trial in *People v. Reed.*[62] However, after stating the presumption, the court in *Reed* found it rebutted by the trial court's overruling of defendant's objection and while acknowledging "that the same harmful effect does not follow where a case is tried by a court without a jury,"[63] reversed because it could not say that the error did not affect the outcome.[64]

Among those courts which accept the presumption, its application has never been very well settled. While the majority may begin by recognizing the presumption, those which have refused to reverse the conviction challenged for the admission of incompetent evidence seem to have done so for reasons quite apart for the presumption.

For example, several courts have been moved to cite *People v. Cox* to uphold the proposition that there is a presumption, but fail to note the court's reason for sustaining:

> Furthermore, the trial judge in commenting on the evidence when

61. Under Supreme Court Rule 615 (Ill. Rev. Stat. ch. 110A, sec. 615 (1968)) consideration of errors not objected to is discretionary with the Appellate Court. "Briefly it may be said that the pivitol factors to be considered to determine whether or not an exercise of such discretion is warranted are: the closeness of the case, the conduct of the trial judge, the extent to which questionable evidence may have contributed to a guilty verdict, the fairness of the trial in general, and the magnitude of the error alleged." People v. Lagardo, 82 Ill. App. 2d 119, 124, 226 N.E.2d 492 (1967).
62. People v. Reed, 287 Ill. 606, 122 N.E. 806 (1919).
63. *Id.* at 611.
64. *Id.* at 612.

> he entered his judgment *clearly indicated that he gave little or no weight* [emphasis added] to the co-defendant's statements, but relied on the positive identification of the complaining witness.[65]

Other courts have cited the presumption while holding that the evidence was, in fact, admissible,[66] or that its effect was merely cumulative.[67] In a remarkable example of the effect of this presumption, the court in *People v. Alexander*[68] noted the presumption while making it clear that the evidence admitted was competent, the incompetent evidence was ordered striken by the judge, and the trial judge clearly indicated that he based his decision on the competent evidence which he had admitted and not on the incompetent evidence which he had excluded.

As pointed out in *People v. Smith*, despite the fact that the majority of Illinois Supreme Court decisions on the question of admissibility of evidence in a criminal bench trial since *People v. Reed* have recognized the presumption:

> Three cases exist, however, which have in no way been commented upon in any case in the Reed line and which hold directly contrary to the Reed line, namely, the trial judge in a bench trial of a criminal case is not accorded the same presumption which is accorded the chancellor in a chancery case that he will consider only competent evidence.[69]

After a survey of the cases in which the presumption was raised, the Illinois Supreme Court, in *People v. Nuccio*, said:

> While we could continue to distinguish the many other cases which contain statements of the presumption that judges consider only proper evidence, no useful purpose would be served by doing so. The rule as generally applied is a good one. But there are, it seems to us, limits to the immunity . . . which judges are presumed to possess.[70]

It is only where the facts are close and it cannot fairly be said that guilt or innocence was otherwise manifestly shown, that there appears to be a difference between a jury verdict and a bench verdict. The various

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65. People v. Cox, 22 Ill. 2d 534, 539, 177 N.E.2d 211, *cert. den.* in 374 U.S. 855 (1961); see also, People v. Alexander, 21 Ill. 2d 347, 172 N.E.2d 785, *cert. den.* in 368 U.S. 875 (1961); People v. Wallenberg, 24 Ill. 2d 350, 181 N.E.2d 143 (1962); People v. French, 33 Ill. 2d 146, 210 N.E.2d 540, *cert. den.* in 384 U.S. 1016 (1965).

66. People v. Popescue, 345 Ill. 142, 177 N.E. 753 (1931); People v. Grabowski, 12 Ill. 2d 462, 147 N.E.2d 49 (1958); People v. Lacey, 24 Ill. 2d 607, 182 N.E.2d 730 (1962); People v. Lewis, 30 Ill. 2d 617, 198 N.E.2d 812 (1964).

67. People v. Saisi, 24 Ill. 2d 274, 181 N.E.2d 68 (1962); People v. Palmer, 26 Ill. 2d 464, 187 N.E.2d 236, *cert. den.* in 373 U.S. 951 (1963).

68. People v. Armstrong, 80 Ill. App. 2d 77, 224 N.E.2d 675 (1967).

69. People v. Smith, 55 Ill. App. 2d 480, 488, 204 N.E.2d 577 (1965); See, People v. Reichart, 352 Ill. 358, 185 N.E. 585 (1933); People v. Arendarczyk, 367 Ill. 534, 12 N.E.2d 2 (1937); People v. Borrelli, 392 Ill. 481, 64 N.E.2d 719 (1946).

70. People v. Nuccio, 43 Ill. 2d 375, 395-96, 253 N.E.2d 353 (1969).

courts seem to suggest that they will more readily reverse a jury verdict, where it cannot be determined how much weight the jury gave the incompetent evidence.

What the presumption would mean, then, is that where there has been incompetent evidence introduced, the jury, not knowing the law, is likely to use it in reaching its verdict; whereas, the judge, knowing the law, is *likely* to disregard it. Since the jury is likely to use it, the defendant must be protected by an examination of the record to determine, not whether the evidence was in fact prejudicial, but only whether it might have been prejudicial; but since the judge is likely to consider only competent evidence in reaching his verdict, if the evidence amply supports his verdict, the court is less likely to overturn it, unless he indicates that he did rely on the incompetent evidence or there is a strong reason to believe it influenced his decision.

The court will carefully examine the record, especially in a rape case,[71] to determine whether to give credence to the verdict in light of all the attendant circumstances, and the presumption becomes no more than a circumstance to be considered[72]—along with the substance of the evidence, its relation to competent evidence, and other facts and circumstances peculiar to the individual case. This presumption, then, appears to be an artificial proposition, constructed to give support to the obvious—that the judge is likely to know the applicable law, and the jury is not.

Thus, by continuing the tradition of recognizing the presumption for cases other than the one under consideration, the court continues the theory without the application. A much more direct method of addressing this problem would be to recognize that, somewhere along the line, the courts have lost sight of the origins of this doctrine. In *People v. Reed,* where the presumption seems to have been first enunciated coherently, the court held:

> It is urged that inasmuch as the trial was before the court without a jury, the error, although serious and prejudicial, is not sufficient ground for reversing the judgment. The court, in the constant effort to sustain judgments *which appear to be right on the merits* [emphasis added] has frequently held in civil cases that if upon a review of the record the competent evidence sustans the judgment, it will not be reversed, and has said that the same harmful effect does not follow where a case is tried by a court without a jury as where trial is before a jury, [citations omitted]. *That rule is correct where upon review of the record the court can say the judg-*

71. People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211 (1962).
72. People v. Taylor, 410 Ill. 469, 102 N.E.2d 529 (1951).

> *ment is right regardless of the admission of incompetent evidence and erroneous rulings*, [emphasis added] but there is no course of sound reasoning justifying a conclusion that a court considering evidence competent and relevant as tending to prove the issue when ruling on the admission of testimony regards it as incompetent and not tending to prove the issue when finding the fact. The court ruled that the evidence of the former conviction for stealing an automobile was relevant to prove defendant guilty of the crime of pandering, with which he was charged, and the evidence was not afterward stricken out, nor is there anything in the record indicating it was disregarded. The evidence was directly and flatly contradictory, and *the court cannot say that the finding must necessarily have been that the defendant was guilty of the offense with which he was charged*, regardless of the incompetent evidence. [emphasis added] [73]

Instead of continuing this presumption in its present special form, it would be better to eliminate it, leaving only the general rule that, unless affirmative cause is shown, the verdict will not be disturbed. One such affirmative cause is insufficiency of the competent evidence; this is no different whether the trial is a bench trial or a jury trial. Another such affirmative cause is admission of incompetent evidence such as to prejudice the rights of the defendant. While the presumption that the trier of fact knows the law is an important circumstance to be considered, so too is the nature of the case, whether the evidence is merely cumulative, etc. Such a ruling would bring theory into line with what seems to be the practice, as stated in *People v. Vaughn*:

> The record here is not entirely free from error, but it is not the court's duty to review the record in a criminal case to determine whether or not it is free from error, and it is not the policy of the court to reverse a judgment of conviction merely because error has been committed, unless it appears that real justice has been denied or that the verdict of the jury and the judgment of the court may have resulted from such error.[74]

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73. People v. Reed, 287 Ill. 606, 611-12, 122 N.E. 806 (1919).
74. People v. Vaughn, 390 Ill. 360, 374, 61 N.E.2d 546 (1945).