

33 N.Y.2d 343

(Cite as: 33 N.Y.2d 343, 308 N.E.2d 435)

People v. Byrnes  
33 N.Y.2d 343, 352 N.Y.S.2d 913  
N.Y. 1974.

33 N.Y.2d 343308 N.E.2d 435, 352 N.Y.S.2d 913

The People of the State of New York, Respondent,  
v.  
Thomas Francis Byrnes, Appellant.  
Court of Appeals of New York

Argued January 7, 1974;  
decided February 14, 1974.

CITE TITLE AS: People v Byrnes

## HEADNOTES

Crimes--corroboration as to sex offenses--photographs, authenticated by independent testimony, sufficiently corroborated every material fact of rape, sodomy and incest; defendant was properly convicted--because of defendant's disruptive behavior, calculated to intimidate his daughter, who was 11 years old at trial, defendant was properly excluded from courtroom while she testified--before she testified, court conducted hearing to determine whether she could testify under oath and properly refused to permit defense to cross-examine her as to her capacity to understand nature of oath.

(1) Defendant was convicted of rape, sodomy and incest after a trial in which defendant's daughter -- the complainant -- who was 11 years old at the time of the trial, testified that on two occasions when she was 10 years old, she and her father went to the home of a man who photographed her and her father in the nude engaging in various sexual acts. A series of photographs, printed from negatives seized at that man's home pursuant to a warrant, were admitted into evidence over defendant's objection. There was unimpeached testimony by a photographic expert that the negatives and the prints had not been altered in any manner. The girl identified herself and her father in 10 photographs and testified that the photographs fairly represented what had occurred. Her mother -- defendant's wife -- likewise identified defendant and their daughter in six photographs and defendant or

their daughter in seven other photographs. Thus, independently of the daughter's testimony, the photographs were sufficiently authenticated, and so the corroborative value of the photographs was properly submitted to the jury.

(2) The Trial Judge acted within his discretion in excluding the defendant from the courtroom during the daughter's testimony, because of defendant's \*344 repeated disruptive behavior calculated to intimidate the girl. Careful provision was made to insure communication between the defendant and his attorney during the period of exclusion. Under the circumstances, defendant's own behavior lost him his constitutional right to be in the courtroom during her testimony.

(3) Preceding the appearance of the complainant as a sworn witness, the court conducted a hearing in the presence of prosecuting and defense counsel to determine whether she was eligible to testify under oath (CPL 60.20, subd. 2). The refusal of the court to permit the defense to cross-examine the girl as to her capacity to understand the nature of an oath did not constitute a denial of the defendant's constitutional right to confront the witnesses against him.

(4) Accordingly, defendant was properly convicted of the crimes charged.

People v. Byrnes, 40 A D 2d 951, affirmed.

## SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 27, 1972, which affirmed a judgment of the Nassau County Court (Frank X. Altimari, J.), rendered upon a verdict convicting defendant of rape in the first degree, sodomy in the first degree and incest.

## POINTS OF COUNSEL

*Matthew Muraskin* and *James J. McDonough* for appellant. I. Defendant was denied his right of con-

33 N.Y.2d 343

(Cite as: 33 N.Y.2d 343, 308 N.E.2d 435)

frontation by not being allowed to examine the complaining witness as to her competency to testify. (*People v. Klein*, 266 N. Y. 188; *People v. Tangalea*, 241 App. Div. 823; *People v. Perles*, 5 A D 2d 993; *Jackson v. Beto*, 388 F. 2d 409; *Pointer v. Texas*, 380 U. S. 400; *Jackson v. Denno*, 378 U. S. 368; *People v. Huntley*, 15 NY2d 72; *People v. Rensing*, 14 NY2d 210; *Aguilar v. State of New York*, 279 App. Div. 103.)II. Appellant was deprived of his right of confrontation by his exclusion from the courtroom. (*Lewis v. United States*, 146 U. S. 370; *Illinois v. Allen*, 397 U. S. 337; *People v. Bailey*, 21 NY2d 588; *Mayberry v. Pennsylvania*, 400 U. S. 455; *Johnson v. Mississippi*, 403 U. S. 212.)III. There was no corroboration for complainant's testimony. (*People v. Mleczo*, 298 N. Y. 153; *People v. Adams*, 21 NY2d 397; *People v. Perez*, 25 A D 2d 859; *People v. Linzy*, 31 NY2d 99; *People v. Marshall*, 5 A D 2d 352,6 NY2d 823; *People v. Hutchings*, 36 A D 2d 659; *People v. Terwilliger*, 74 Hun 310,142 N. Y. 629; *People v. Deitsch*, 237 N. Y. 300; *People v. Page*, 162 N. Y. 272; *People v. Downs*, 236 N. Y. 306; \*345 *People v. Anthony*, 293 N. Y. 649.)IV. It was error to admit into evidence prints of negatives seized by the police at the Abrams' house in Bellmore. Defendant was deprived of his right to cross-examination. V. The sentence was illegal. (*Green v. United States*, 365 U. S. 301; *Van Hook v. United States*, 365 U. S. 609; *Gordon v. United States*, 438 F. 2d 858; *United States v. Malcolm*, 432 F. 2d 809; *People ex rel. McCormick v. McMann*, 34 A D 2d 1035; *People ex rel. La Fay v. McMann*, 33 A D 2d 1102; *People v. Lynch*, 28 NY2d 524; *People v. Parsons*, 36 A D 2d 665.)

*William Cahn*, District Attorney (*Henry P. DeVine* of counsel), for respondent. I. Guilt was established beyond a reasonable doubt. (*People v. Lo Verde*, 7 NY2d 114; *People v. Plath*, 100 N. Y. 590; *People v. Masse*, 5 NY2d 217; *People v. Croes*, 285 N. Y. 279; *People v. Downs*, 236 N. Y. 306; *People v. Page*, 162 N. Y. 272; *People v. Terwilliger*, 74 Hun 310,142 N. Y. 629; *People v. Radumovic*, 21 NY2d 186; *People v. English*, 16 NY2d 719; *People v. Reynolds*, 25 N Y 2d 489.)II. Sixth Amendment right to cross-examine not denied appellant. (*Jackson v. Beto*, 388 F. 2d 409; *People v. Washor*, 196 N. Y. 104; *People v. Rensing*, 14 NY2d 210; *Barber v. Page*, 390 U. S. 719; *Smith v. Illinois*, 390 U. S. 129; *Douglas v. Alabama*, 380 U. S. 415; *Pointer v. Texas*, 380 U. S. 400; *People v. Ramistella*, 306 N. Y. 379; *Matter of Friedel v. Board of Regents of Univ. of State of N. Y.*, 296 N. Y. 347; *People v. Braun*, 158 N. Y.

558; *People v. Cole*, 43 N. Y. 508.)III. Appellant was not wrongfully excluded from trial. (*Illinois v. Allen*, 397 U. S. 337; *Lewis v. United States*, 146 U. S. 370; *Diaz v. United States*, 223 U. S. 442; *Johnson v. Mississippi*, 403 U. S. 212; *Mayberry v. Pennsylvania*, 400 U. S. 455.)IV. Prints are properly authenticated. (*People v. Poblner*, 32 NY2d 356; *People v. Perez*, 300 N. Y. 208; *People v. Webster*, 139 N. Y. 73; *People v. Buddensieck*, 103 N. Y. 487; *Ruloff v. People*, 45 N. Y. 213.)V. Sentence is lawful. (*People v. Poblner*, 32 NY2d 356; *People v. McCormick*, 31 NY2d 807; *People v. Berrios*, 28 NY2d 361; *People v. Reynolds*, 25 NY2d 489; *People v. McQueen*, 18 NY2d 337; *People v. Friola*, 11 NY2d 157; *People ex rel. La Fay v. McMann*, 33 A D 2d 1102,26 NY2d 613; *People ex rel. McCormick v. McMann*, 34 A D 2d 1035.)\*346

#### OPINION OF THE COURT

Jasen, J.

Following a jury trial in Nassau County Court, the defendant Thomas Brynes was convicted of rape, sodomy and incest. His conviction was unanimously affirmed by the Appellate Division and leave to appeal was granted by a Judge of this court.

At the trial, the complainant, defendant's daughter, then 11 years of age, testified that on two occasions, in November, 1970 and March, 1971, she and her father went to the home of one Gene Abrams, where Abrams photographed them in the nude engaging in various sexual acts. A series of photographs, produced from negatives seized at the Abrams home pursuant to a warrant and admitted into evidence over defendant's objection, variously depicted an adult male and a young female engaged in acts of intercourse and sodomy. There was unimpeached testimony by a photographic expert that neither the negatives nor the positive prints produced therefrom had been altered or "doctored" in any manner. Defense counsel also stipulated that the photographic prints accurately depicted the images on the negatives. The complainant identified herself and her father in 10 of the photographs. She further testified that the photographs fairly represented what occurred at the Abrams' home on these occasions, although she could not recall on which occasion, November, 1970 or March, 1971, each of the depicted acts occurred.

Marie Byrnes, complainant's mother and wife of the

33 N.Y.2d 343

(Cite as: 33 N.Y.2d 343, 308 N.E.2d 435)

defendant, testified that the individuals portrayed in six of the photographs were her daughter and her husband. In seven other photographs, she identified either her husband or her daughter. In several of the photographs in which she identified only her daughter, she testified that the male, whose facial features were not visible, wore a sleeveless knit shirt of the type in evidence and which she recognized as belonging to her husband.

It is urged that the objective evidence -- the photographs -- authenticated in part by the complainant, are insufficient corroboration in law for her testimony as to the occurrence of the acts of rape, sodomy and incest.

Section 130.15 of the Penal Law (L. 1965, ch. 1030), then in effect, provided: "A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged \*347 victim. This section shall not apply to the offense of sexual abuse in the third degree." Rape in the first degree (§ 130.35) and sodomy in the first degree (§ 130.50) both are offenses defined in article 130 and subject to the corroboration requirement.

Similarly, section 255.30 imposes a requirement of corroboration for conviction of incest: "A person shall not be convicted of adultery or incest or of an attempt to commit either such crime upon the uncorroborated testimony of the other party to the adulterous or incestuous act or attempted act." In a long line of cases, this court has held that the corroboration requirement extends to every material fact of the offense, including the identity of the defendant as the perpetrator. (E.g., People v. Linzy, 31 NY2d 99; People v. Masse, 5 NY2d 217; People v. Anthony, 293 N. Y. 649; People v. Downs, 236 N. Y. 306; People v. Page, 162 N. Y. 272; People v. Terwilliger, 74 Hun 310, affd. 142 N. Y. 629; People v. Plath, 100 N. Y. 590; see, also, People v. Radunovic, 21 NY2d 186; People v. English, 16 NY2d 719; People v. Colon, 16 NY2d 988.)

Preliminarily, it should be observed that the photographs were sufficiently authenticated and were properly admitted into evidence. The complainant, a competent witness possessing knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter

depicted. Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. (Stiasny v. Metropolitan St. Ry. Co., 58 App. Div. 172, affd. 172 N. Y. 656; McCormick, Evidence [2d ed.], § 214; Ann., Photographs -- Authentication, 9 ALR 2d 899, 910-915; 21 N. Y. Jur., Evidence, § 365.) Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify. (Alberti v. New York, Lake Erie & Western R. R. Co., 118 N. Y. 77; Fisch, New York Evidence, § 142, p. 76; Ann., Photographs -- Authentication, 9 ALR 2d 899, 912-913; 21 N. Y. Jur., Evidence, § 365.)

It is yet another question, however, whether corroborative evidence, the foundation for which was supplied in part, at least, by the complainant, is sufficient in law to sustain the conviction. Were the authenticating proof supplied solely by the \*348 complainant, the answer would have to be no. To hold otherwise would impermissibly allow the complainant to corroborate her own testimony (see People v. Linzy, 31 NY2d 99, 101, supra.; Peery v. State, 163 Neb. 628; Ann., Rape -- Corroboration of Prosecutrix, 60 A. L. R. 1124, 1151-1152) and, so to speak, the prosecution to lift itself up by its own bootstraps. (Cf. People v. Bowley, 59 Cal. 2d 855.)

It is clear, however, that these photographs were not admitted into evidence solely upon the complainant's foundation testimony. There was testimony that the negatives from which the positive prints were made had been seized at the Abrams' home. There was unimpeached testimony by a photographic expert that the negatives had not been altered in any manner and that the prints produced therefrom were accurate reproductions. And, finally, Marie Byrnes identified the subjects as her daughter, the complainant, and her husband, the defendant. Entirely lacking is any evidence or suggestion that the photographs do not depict what they purport to show. We conclude, therefore, that the source of the authentication was sufficiently independent of the complainant's testimony and that the corroborative value of the photographs was properly submitted to the jury. (Cf. People v. Bowley, 59 Cal. 2d 855, supra.; People v. Samuels, 250 Cal. App. 2d 501; People v. Doggett, 83 Cal. App. 2d 405; cf., also, People v. Mehaffey, 32 Cal. 2d 535, cert. den. 335 U. S. 900; People v. Mitman, 122

33 N.Y.2d 343

(Cite as: 33 N.Y.2d 343, 308 N.E.2d 435)

Cal. App. 2d, 490, 495, cert. den., 347 U.S. 991; *People v. Batsford*, 91 Cal. App. 2d 607.)

We would only add that, although the People did not proceed on this theory, no reason is discerned why, in a proper case, a photograph may not constitute independent probative evidence of what it shows. (See *People v. Perez*, 300 N. Y. 208, 216-217, cert. den. 338 U.S. 952 [photograph of accused taken by newspaper photographer immediately after he confessed held to be evidence, which, by itself, might have persuaded the jury that claimed assault and abuse were without substance]; *People v. Webster*, 139 N. Y. 73, 83 [photograph admitted to show physique of deceased where defendant pleaded self-defense]; *Maresca v. Lake Motors*, 32 A D 2d 533, 534, affd. 25 NY2d 716; *People v. Hausen*, 20 Misc 2d 113, 114; see, also, *People v. Bowley*, 59 Cal. 2d 855, supra.; *People v. Samuels*, 250 Cal. App. 2d 501, supra.; *People v. Doggett*, 83 Cal. App. 2d 405, \*349 supra.; *People v. Mitman*, 122 Cal. App. 2d 490, supra.; *People v. Withers*, 347 S. W. 2d 146, 149 [Mo.]; Gardner, *The Camera Goes to Court*, 24 North Carolina L. Rev. 233.) Authentication will always be required. But where no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera. (See *People v. Doggett*, supra.; *People v. Samuels*, supra.; see, also, *People v. Bowley*, supra.; *McCormick, Evidence* [2d ed.], § 214.) In the case before us, a fair conclusion is that the foundation testimony, even excluding that of the complainant, sufficiently authenticated the photographs by showing that they accurately depict what they purport to show, and that in themselves, the photographs were probative evidence of the crimes charged.

The Trial Judge excluded the defendant from the courtroom during the testimony of the complaining witness because of what he characterized as deliberate disruptive behavior by the defendant calculated to intimidate the witness. The defendant contends that the exclusion was an accommodation to the witness and an impermissible punishment for his prior disruptive behavior, all in violation of his right to confront the witnesses against him.

While the right of an accused to be present at every stage of a trial is guaranteed by Constitution (U. S. Const., 6th, 14th, Amdts.; see *Illinois v. Allen*, 397 U. S. 337, 338) and statute (CPL 260.20), the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom. (*Illinois v. Allen*, supra.; p. 343; CPL 260.20; see, also, *Snyder v. Massachusetts*, 291 U. S. 97, 106.)

On the record before us, we find that the Trial Judge acted well within his discretion in excluding the defendant from the courtroom during the testimony of the complaining witness. Four outbursts punctuated by profane and abusive language preceded defendant's removal. Each related in some way to the prospect of the complainant testifying in court. On one of these occasions, it was necessary for the defendant to be restrained by Sheriff's Deputies. The court was careful to \*350 admonish the defendant that further outbursts would be cause for removal. At one point the defendant promised that he would comport himself properly, only again to become disruptive. The last of the four outbursts occurred when the complainant was called as a witness. As she entered the courtroom and took her seat, the defendant "leaped on the counsel table and lunged in the direction of the witness chair in an assaultive manner." He was again restrained by Sheriff's Deputies and this time was shackled. The witness was excused, as was the jury. The court again admonished the defendant, who said in substance that he did not intend to listen. The trial was then recessed for the day. The following day, when trial resumed, the court announced its decision to exclude the defendant during the complainant's testimony. Careful provision was made to insure communication between the defendant and his attorney during this period. Under these circumstances, we conclude that the defendant lost his right to be present throughout his trial.

Preceding the complainant's appearance as a sworn witness, the court conducted a hearing to determine whether she was eligible to testify under oath. The examination of the prospective witness was conducted by the court, but in the presence of the District Attorney and defense counsel.

It is now contended that the defendant was denied his Sixth and Fourteenth Amendment right of confrontation by not being allowed to cross-examine the com-

33 N.Y.2d 343

(Cite as: 33 N.Y.2d 343, 308 N.E.2d 435)

plaining witness as to her capacity to understand the nature of an oath.

As previously noted, the complainant was 11 years of age when summoned to testify at the trial. CPL 60.20 (subd. 2) provides: "2. Every witness more than twelve years old may testify only under oath. A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath. If the court is not so satisfied, such child may nevertheless be permitted to give unsworn evidence if the court is satisfied that he possesses sufficient intelligence and capacity to justify the reception thereof."

It is the rule in this State that where a witness' mental capacity to testify is at issue, it is for the court, in the exercise of its discretion, to make that determination. (People v. Rensing, 14 NY2d 210, 213; People v. Washor, 196 N. Y. 104, 109-110.)\*351 And it is accepted practice here and elsewhere for the court to examine the prospective witness without the intervention of counsel. (Jackson v. Beto, 388 F. 2d 409, 411, n. 5 and cases cited therein.) While there is nothing to preclude the court from permitting defense counsel to participate in the examination of the prospective witness by submitting questions or, for that matter, by cross-examining, conduct of the *voir dire* by counsel for defendant is not a matter of constitutional right. (Jackson v. Beto, supra., p. 411.)

We have considered defendant's other points for reversal and have found them to be without merit.

For the reasons stated, the order of the Appellate Division should be affirmed.

Chief Judge Breitel and Judges Gabrielli, Jones, Wachtler, Rabin and Stevens concur.  
Order affirmed.

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N.Y. 1974.

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Thomas Francis Byrnes, Appellant.

33 N.Y.2d 343

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