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COMMENTS

ADMISSIBILITY OF EVIDENCE DISCLOSING OTHER CRIMES

By W. CLINTON SHIFFLET

The purpose of a criminal prosecution is to determine the guilt or innocence of the person charged with the crime set out in the information or indictment. To obtain a conviction, the state bears the burden of proving beyond a reasonable doubt to the jury that the accused committed the crime. This proof consists of direct evidence from eyewitnesses of the commission of the act itself or from circumstantial evidence tending to raise an inference of guilt. This evidence is collected and presented to the jury, from which they determine the guilt or innocence of the accused.

To satisfy this burden of proof prosecutors have attempted to show as evidence bearing on the crime charged, the guilt of the accused of crimes not mentioned in the indictment or information. Generally the courts refuse to allow the introduction of this evidence, saying either that evidence tending to prove the defendant guilty of crimes other than the one charged is inadmissible¹ or it is not competent to prove guilt of a crime charged by proving the commission of other crimes.²

Several reasons have been assigned by the courts for their application of this rule, but the one most often given is that the probative value of other crime evidence is slight as compared to its prejudicial effect on the jury.³ This fear of prejudice is not unfounded and is the basis of other rules governing criminal prosecutions.⁴ An illustration of this is the presumption of innocence which has its origin in the tendency of mankind to think that where there's smoke there's bound to be some fire.⁵ If the prosecution were allowed indiscriminately to introduce into evidence the guilt of the accused of other crimes, convictions would probably be based on criminal propensity rather than actual guilt.⁶

This rule of total exclusion prevailed for a long time, and evidence of other crimes was not admitted.⁷ The rule was enunciated as inflexible and

¹20 Am.Jur., Evidence, § 309, p. 287; 20 A.L.R.2d 1013.

²Hall v. United States, 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003 (1893); People v. King, 122 Cal. App. 50, 10 P.2d 89 (1932); People v. Sharp, 107 N.Y. 327, 14 N.E. 319 (1887); 22 C.J.S., Criminal Law, § 682, p. 1084.

³People v. Pollock, 31 Cal.App.2d 747, 89 P.2d 128 (1939); Missouri v. Hyde, 234 Mo. 200, 136 S.W. 316 (1910); 116 A.L.R. 554.

⁴First National Bank v. Ford, 30 Wyo. 110, 216 Pac. 691 (1923).

⁵Car v. State, 192 Miss. 152, 4 So.2d 887 (1941).

⁶State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939) (Pointing out the danger of admitting evidence of other crimes, the court said in effect that such evidence results in predisposing the minds of the jury to believing the defendant guilty, and thus to effectually strip him of all presumption of innocence.)

⁷MacLafferty v. United States, 77 F.2d 715 (9th Cir. 1935); Smith v. State, 195 Wis. 555, 218 N.W. 822 (1928).

universal in application. However, gradually exceptions were made in certain cases in the interest of justice or necessity.⁸ Thus, in 1874 a New York court allowed evidence of other crimes to prove the element of guilty knowledge where the defendant was charged with receiving stolen property. The court justified this exception on the ground that it was a necessary element of the prosecution's case, and while a court must do all in its power to prevent a jury from becoming prejudiced against the defendant, it must not favor him to the point of putting the prosecution at a disadvantage.⁹

It is difficult to quarrel with the reasoning that if justice is to be served the courts must not hamper the prosecution unduly. The prosecution is charged with the duty of public protection and must be allowed latitude in the performance of its duties. On the other hand, the courts are charged with the duty of limiting the admission of evidence so that convictions are based on facts rather than mere conjecture, grounded on the criminal propensity of the defendant.

Exceptions

The general rule of exclusion of evidence tending to prove the defendant guilty of crimes other than the one specified in the indictment has been modified by certain well defined exceptions.¹⁰ These exceptions fall into four main categories and, as one court put it, have so riddled the general rule of exclusion that the rule has become the exception and the exceptions the rule.¹¹ Thus evidence of other crimes may be introduced : (1) when it tends to prove an element necessary to the prosecution's case; (2) when it tends to prove motive or intent; (3) when it tends to identify the defendant; (4) when it tends to show a common plan or scheme of which this crime is one element.¹²

Motive and Intent

It is now well settled that to prove intent relevant evidence may be introduced even though it discloses other crimes committed by the defendant.¹³ In most cases where evidence is admitted to prove felonious intent the defendant admits the act but claims that it was an accident or a mistake.¹⁴ Here

⁸People v. Popescue, 345 Ill. 142, 177 N.E. 739 (1931); Fehlman v. State, 199 Ind. 746, 161 N.E. 8 (1928) (Burglary, absolute necessity for the admission of such evidence creates the exception); State v. Gregory, 191 S.C. 212, 4 S.E.2d 1 (1939).

⁹Copperman v. People, 56 N.Y. 591, 1 Hun. 15 (1874).

¹⁰People v. Sanders, 114 Cal. 216, 46 Pac. 153 (1896).

¹¹United States v. Sebo, 101 F.2d 889, 891 (7th Cir. 1939).

¹²People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 195 (1901).

¹³Langford v. United States, 178 F.2d 48 (9th Cir. 1949); People v. Craig, 111 Cal. 460, 44 Pac. 186 (1896).

¹⁴People v. Tibbitts, 35 Cal.App.2d 669, 96 P.2d 812 (1939); People v. Hall, 172 Misc. 930, 16 N.Y.S.2d 328 (1939).

evidence that the defendant made one or more unsuccessful prior attempts to commit the act charged is admitted to show intent and negate the claim of accident or mistake.¹⁵ The courts admit this evidence on the ground that its probative value outweighs the danger of its prejudicial effect.¹⁶ In similar cases where the defendant denies the act, courts also admit evidence showing other crimes to show motive or intent. However, in these cases the courts carefully instruct the jury to consider the evidence only in connection with intent and to ignore it in determining whether or not the defendant actually did the act.¹⁷

The element of motive is closely akin to that of intent. Since motive will often bear on intent the courts have generally held that evidence relevant to motive is admissible even though it tends to prove the defendant guilty of other crimes.¹⁸

Identity

Another exception to the general rule of exclusion is that evidence of other crimes is admissible to identify the defendant as the person who committed the crime.¹⁹ Thus if a witness is unable to identify a defendant on trial for robbery the prosecution can introduce evidence that the defendant robbed another person at or about the same place and time. This will tend to rebut a claim that some other person committed the crime. Although this evidence tends to prove the defendant guilty of another crime it also tends to identify him as the perpetrator of the crime charged, since the defendant was shown to have committed similar crimes in the vicinity. In order to introduce evidence of other crimes to prove identity there must be some logical connection between the other crimes and the crime charged.²⁰ In the illustration above, the connection was similar time and place. In other cases a unique habit or *modus operandi* have been held to be sufficient connection.²¹ However, mere similarity in method of operation or means would not be sufficient, because there is usually some similarity in all crimes of the same type.

When evidence of other crimes is admitted to prove intent the courts instruct the jury that it can be considered only for the limited purpose of

¹⁵State v. LaPage, 57 N.H. 245, 294 (1876) ; People v. Popescue, note 8 *supra*.

¹⁶Commonwealth v. Chalfa, 313 Pa. 175, 169 Atl. 564 (1933).

¹⁷People v. Folognos, 322 Ill. 304, 153 N.E. 373 (1926) (Evidence which shows the commission of other offenses should be received with care, and the trial court should make clear to the jury that the evidence is being received for the sole purpose of showing the intent with which the act charged was done.).

¹⁸State v. Gaule, 234 Minn. 186, 48 N.W.2d 44 (1951).

¹⁹People v. McMonigle, 29 Cal.2d 730, 177 P.2d 745 (1947).

²⁰Miller v. State, 13 Okl.Cr. 176, 163 Pac. 131 (1917) (The court held that mere similarity in method of operation or means would not serve to identify.).

²¹Thomas v. Commonwealth, 194 Ky. 491, 239 S.W. 776 (1922) ; UNDERHILL, CRIMINAL EVIDENCE 107.

showing intent. However, when identity is at issue evidence of other crimes may be considered to prove identity and to determine whether or not the defendant actually committed the crime. For this reason the courts admit this evidence for purposes of identity with more care and generally impose higher standards in ruling on the connection required than when it is admitted for other purposes.²²

Common Plan or Scheme

Evidence of other crimes is also admissible to prove a crime charged if it tends to show a common plan or scheme embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other.²³ The basis of this exception to the exclusion rule is that a plan or scheme, of which the crime committed is a part, is such a circumstance surrounding the crime that a jury would be warranted in finding from it, together with other evidence, that the accused committed the crime.²⁴ Again due to the prejudicial effect of other crime evidence the courts are strict in requiring a logical connection between the other crimes and the one charged in order to show a pre-existing plan.²⁵

A majority of the courts follow the rule of excluding evidence of other crimes unless the case falls within one of the recognized exceptions. A small minority holds that evidence showing other crimes may always be admitted where it is relevant, except to show criminal propensity.²⁶ It is suggested that it is more logical to admit other crime evidence where it has probative value which outweighs the possible prejudicial effects. However, this view has not been generally accepted and the great majority of cases have entirely excluded evidence of other crimes unless the case comes within the so-called exceptions.²⁷

Confusion

Although the exceptions to this general rule of exclusion are fairly well defined in most jurisdictions,²⁸ their application has resulted in conflict

²²WIGMORE, EVIDENCE § 304, pp. 202, 204.

²³*Giordano v. United States and Stern v. United States*, 185 F.2d 524 (6th Cir. 1950); *People v. Burns*, 109 Cal.App.2d 524, 241 P.2d 308 (1952); 20 A.L.R. 1001; 4 NICHOLLS, APPLIED EVIDENCE 3425.

²⁴See note 22 *supra*.

²⁵*State v. Sweeney*, 180 Minn. 450, 231 N.W. 225 (1930) (There must be some connection between the crimes to show that there existed in fact in the mind of the defendant a common purpose that included the commission of the crime charged.); 73 A.L.R. 380.

²⁶*State v. Scott*, 111 Utah 9, 175 P.2d 1016 (1947); MODEL CODE OF EVIDENCE, RULE 311 (1942).

²⁷51 HARV. L. REV. 988 (1937) (A good discussion on the soundness of judicial reasoning with particular reference to the alleged exceptions to the general rule excluding other crimes from evidence. The writer states that the exceptions are the result of not fully understanding the rule of relevancy.)

²⁸*Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928); 63 A.L.R. 595.

between jurisdictions and courts in the same jurisdiction. This is illustrated in two recent California cases, *People v. Coefield*²⁹ and *People v. Grimes*,³⁰ one in the District Court of Appeals and the other in the Supreme Court. Both of these cases deal with the California version of the common plan or scheme exception, and in both evidence of other crimes was admitted because of a novel application of this exception.

In the Supreme Court case, *People v. Coefield*, the defendant was on trial for murder, a homicide performed in the commission of a robbery. Evidence was introduced to show that the defendant and two others entered a liquor store armed and intending to commit robbery. The defendant ordered the clerk to "hand over all the money," and forced him into a back room, where he hit him on the head with the barrel of his gun. This blow did not render the clerk unconscious and when he started to get up the defendant hit him again, at which point the gun went off. The bullet pierced the clerk's head, killing him.

Purporting to show a common plan to rob liquor stores, the prosecution offered to show three other robberies committed by the defendant within a month of the robbery that resulted in the death of the clerk. In each of the other robberies, the defendant had followed the same procedure. He had forced the clerk into a back room where he hit him on the head with a gun. The prosecution contended that this similarity tended to prove a plan to rob liquor stores and to make an escape by hitting the clerk on the head. The trial court admitted the evidence, and on appeal the Supreme Court affirmed. The Supreme Court commented on the general rule, noted the exceptions and said that in view of the similarity in method of operation the evidence was admissible to prove a common plan and therefore intent despite the fact that it disclosed other crimes.

Here the defendant was indicted under section 189 of the California Penal Code, which provides that a homicide committed in the course of a robbery is murder in the first degree. Since intent was supplied by statute the prosecution was required to show only that the defendant committed robbery and that he committed the homicide. Instead, to show intent the court allowed prejudicial evidence to be admitted to supply a questionable common plan.

In *People v. Grimes*, decided in the District Court of Appeals, the defendant was charged with burglarizing a drugstore. There was a great deal of evidence, some of which placed the defendant in the area of the crime about the time of the burglary and some of which tended to show that the defendant had committed the crime. The prosecution introduced into evidence the fact that the defendant had previously committed several burg-

²⁹*People v. Coefield*, 37 Cal.2d 865, 236 P.2d 570 (1951).

³⁰*People v. Grimes*, 113 Cal.App.2d 401, 248 P.2d 130 (1950).

laries. It was shown that he had on these other occasions gained entrance to drugstores by kicking out a window, reaching through the glass and slipping the bolt on the door. The crime with which he was charged had been committed in the same way, the glass had been smashed out and the bolt had been turned by reaching through the hole. The trial court admitted the evidence of the other burglaries under a limited instruction that it could be considered only for the purpose of showing identity, intent or common plan or scheme. The appellate court affirmed the resulting conviction, saying that the method of operation was so similar that it tended to show a system, plan or design that the defendant had used before.

This decision seems to mark a point of departure from the previously accepted common plan exception. Heretofore evidence of other crimes was admitted to show a common plan or scheme only if the evidence tended to show a common plan embracing the commission of two or more crimes so related to each other that the proof of one tended to establish the other.³¹ This is not the case here. It is probable that the method of entrance used in this case was the best one and would have been used by anyone robbing a drugstore.

It seems obvious that the admission of the evidence on a showing of similarity in mode of operation was based on a departure from the accepted common-plan reasoning. Wigmore³² points out that in proving a common plan or scheme, there must be such a concurrence of common features that the various acts can be explained completely with reference to a common plan. He further points out that common features, when used in connection with common plan, are aspects that can only be explained by the existence of an overall plan. Each crime must point to the completion of a plan.³³ To illustrate, if a defendant charged with rape denies the charge, the prosecution will be allowed to prove that the defendant kidnapped the victim shortly before the alleged rape. This evidence would be allowed even though it disclosed another crime because the kidnapping would be explained by the overall plan to rape.³⁴

The common features required to show identity are to be distinguished from the common features required to show a common plan or scheme. Whereas in the latter mere similarity of operation is not sufficient, it is sufficient to introduce evidence of other crimes to show identity.

³¹See note 23 *supra*.

³²See note 22 *supra*.

³³*Vigil v. State*, 33 Ariz. 51, 262 Pac. 14 (1927); *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390 (1897) (Robbery, evidence of a conspiracy to kidnap admitted to show a common plan.); *People v. Kruvosky*, 53 Cal.App. 744, 200 Pac. 831 (1921).

³⁴*People v. Ciulla*, 44 Cal.App. 719, 187 Pac. 46 (1919).

Other Jurisdictions

This common plan or scheme exception is recognized in other jurisdictions and has been dealt with in varying ways. In Pennsylvania, evidence of other crimes will be admitted under the common plan exception if, as in California, the other crimes are traceable to a common plan. However, here if the similarity in the mode of operation is striking, the common plan exception will be extended to cover.³⁵ On the other hand, in a recent New York case the court refused to allow evidence of other crimes to be admitted even where there was similarity in the mode of operation. The court said that the defendant should not be connected with the crime charged merely because he had committed other crimes in that way, where that method was common to anyone who had the disposition to use it.³⁶ While rejecting the common plan theory altogether, Tennessee has recently held that other crimes may be shown to identify the defendant as the one who committed the crime charged.³⁷

Conclusion

In both the *Coeffield* and the *Grimes* cases the California courts allowed evidence of other crimes to be admitted to prove a common plan or scheme where the only common factor was similarity in the mode of operation. Since similarity alone is not sufficient to apply the common plan exclusion either historically or logically, the California courts have apparently enunciated a new rule. This fifth exception to the rule that evidence of other crimes is inadmissible to prove a crime applies the *common feature* requirement of the common scheme or plan exception to cases wherein the only similarity is a mode of operation available to anyone.

Since every action performed to accomplish an end has a certain similarity to every other action performed to accomplish a similar end, the hazards of this rule are obvious. Every robbery has features similar to every other robbery, every burglary features similar to every other burglary and every rape features in common with every other rape. How far the courts will go in allowing this exception only a well reasoned case can tell us. However, as it is, the situation is fraught with prejudicial possibilities.

³⁵Swan v. Commonwealth, 104 Pa. 218, 14 W.N.C. 67 (1883).

³⁶People v. Hassan, 196 App.Div. 89, 187 N.Y.Supp. 115 (1921).

³⁷Warren v. State, 178 Tenn. 157, 156 S.W.2d 416 (1951).

