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Admissibility In Criminal Cases Of Evidence Of Other Sex Offenses

CASE COMMENTS

ADMISSIBILITY IN CRIMINAL CASES OF EVIDENCE OF OTHER SEX OFFENSES

Evidence that tends to prove the proposition for which it is introduced is logically relevant.[1] Since trial is a means by which truth is sought, all evidence that facilitates the task of the triers of fact in arriving at the truth is logically relevant.[2] Nevertheless, some types of evidence may be excluded when it is thought that the harm or injustice that may result exceeds whatever probative value the evidence may have.[3] Such evidence is often said to be legally, as distinguished from logically, irrelevant.[4] Evidence of other acts or offenses of a defendant in a criminal case, when offered to prove the commission of the offense charged, traditionally comes within this category.[5]

In a recent Arizona case, *State v. Finley*,[6] a criminal prosecution for rape, the state offered evidence of another rape allegedly committed by the defendant five days prior to the one of which he was accused. The defendant's objection to admission of this evidence was overruled. On appeal, the majority of the Supreme Court of Arizona affirmed the ruling of the trial court. The court recognized the general rule that

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[1]Interstate Commerce Comm. v. Baird, 194 U.S. 25, 44 (1904); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941).

[2]James points out that the decisive inquiry is whether there is an apparently greater probability of the existence of the ultimate fact (the fact sought to be proved) after the admission of the evidence than existed before. Id. at 699.

Therefore, the issue of relevancy is primarily one for the jury. The judge should exclude evidence on the basis of its irrelevancy only if he feels that it is so lacking in probative value as not to deserve the jury's consideration. 1 Wigmore, Evidence § 29 (3d ed. 1940) [hereinafter cited as Wigmore].

[3]Id. at § 29(a).

"There is no constitutional right to introduce all evidence that may be logically relevant upon an issue raised. Consideration of social policy and practical expediency long ago produced a number of rules excluding from consideration facts which logically have some probative force." Commonwealth v. Di Stasio, 294 Mass. 273, 1 N.E.2d 189, 195 (1936).

[4]James, supra note 1; 1 Wigmore § 28(a).

"Legal relevancy requires a higher standard of evidentiary force.... The fact that [evidence] is logically relevant does not insure admissibility; it must also be legally relevant." Bouvier's Law Dictionary 1042 (1946).

[5]Capone v. United States, 51 F.2d 609, 619 (7th Cir. 1931), cert. denied, 284 U.S. 669 (1931); Keene v. Commonwealth, 307 Ky. 308, 210 S.W.2d 926 (1948); Commonwealth v. Boulden, 179 Pa. Super. 328, 116 A.2d 867 (1955); 1 Wharton, Criminal Evidence § 232 (12th ed. 1955).

[6]85 Ariz. 327, 338 P.2d 790 (1959).

proof of another offense cannot be put in evidence to prove the crime charged, but held that the evidence fell within a well recognized exception to this rule. The previous rape was found to be legally relevant "to show a system, plan or scheme embracing two or more crimes,"[7] the two occurrences showing the "same bent of mind and sinister design or practice."[8] The rationale was that the prior acts of rape showed the defendant's lustful propensity to commit such a crime.

The dissenting judge recognized that evidence of another offense is admissible if it tends to establish a scheme or plan. But he felt that the prior offense in this case, having occurred in another state some 500 miles distant,[9] was not relevant to show such a scheme or plan. The dissenting judge felt that the majority was disregarding a cardinal rule of evidence by allowing the evidence to be introduced on the basis of its relevance to show the *bad character* of the accused, although ostensibly basing its admissibility on its relevance to show a scheme or plan.

The broad statement is frequently made that evidence of the commission of one offense is irrelevant to prove the commission of another.[10] The fact that one has committed other offenses is of slight probative value to show that he committed the offense charged.[11] On the other hand, the evidence may be extremely relevant to prove some material element of the crime charged, such as motive, intent, absence of mistake, scheme or plan, or identity.[12] Then there is a double in-

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[7]338 P.2d at 794-95.

[8]Id. at 795.

[9]The fact that the other offense occurred in another jurisdiction does not of itself make the evidence inadmissible. However, remoteness in time or place will tend to negative the relevancy of the evidence to show a common scheme or plan. Harris v. State, 88 Okla. Crim. 422, 204 P.2d 305 (1949); State v. Buxton, 324 Mo. 78, 22 S.W.2d 635 (1929); Melville, Evidence as to Similar Offenses, Acts or Transactions in Criminal Cases, 29 Dicta 235 (1952); 22 C.J.S. Criminal Law § 638 (1940).

[10]Railton v. United States, 127 F.2d 691 (5th Cir. 1942); People v. Cione, 293 Ill. 321, 127 N.E. 646 (1920); State v. Rand, 238 Iowa 250, 25 N.W.2d 800 (1947); Sykes v. State, 112 Tenn. 572, 82 S.W. 185 (1904); I Wharton, op. cit. supra note 5, § 232. See also, Annot., 170 A.L.R. 306 (1947).

[11]"[I]t cannot be argued: 'Because A did an act X last year, therefore he probably did the act X as now charged.' Human action being infinitely varied, there is no adequate probative connection between the two." 1 Wigmore § 192.

A possible exception exists when two crimes are so inseparably intertwined that they may each be considered part of the same act. In such a case, evidence of one necessarily tends to prove the other—it is somewhat incorrectly said to be part of the res gestae and is admissible. People v. Scheck, 356 Ill. 56, 190 N.E. 108 (1934); People v. Thau, 219 N.Y. 39, 113 N.E. 556 (1916); Compton v. Commonwealth, 190 Va. 48, 55 S.E.2d 446 (1949); 1 Wharton, op. cit. supra note 5, § 234.

[12]People v. Zachowitz, 254 N.Y. 192, 172 N.E. 466 (1930); 1 Wigmore § 215-217; Hale, Some Comments on Character Evidence and Related Topics, 22 So. Cal. L. Rev. 341, 345 (1949).

ference. For example, when the accused is charged with killing *A* it may be inferred from the fact that *A* witnessed a crime committed by the accused that the accused had a motive for killing *A*, and from the fact the accused had a motive, it may be inferred that he did kill *A*.[13] In determining whether these inferences are valid, two questions of relevance are presented: first, whether the evidence of the other offense truly tends to establish some material element or factor, and secondly, whether this element or basis of relevance—as in the example, motive—has any probative value from which to infer that the accused committed the crime charged.[14]

The basic question involved when considering the admissibility of evidence of prior acts of misconduct is whether the accused's character —*i.e.*, his disposition to commit a crime like that charged—is a valid intermediate basis of relevance upon which to allow the admission of such evidence. While the character of the accused is always basically relevant,[15] the prosecution in most jurisdictions is not permitted to show the accused's bad character unless the defense has first produced evidence of his good character.[16]

However, assuming that the character of the accused is relevant, the question remains whether evidence of prior conduct or other offenses is admissible to show character. The universal rule is that it is not.[17] The reason for the inadmissibility of such evidence is not that it is logically irrelevant. On the contrary, it has always been recognized that evidence of other offenses is extremely cogent to show the character of the accused.[18] The evidence is excluded because of rea-

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[13]1 Wigmore § 192.

[14]Ibid.

[15]Id. at § 55.

[16]Railton v. United States, 127 F.2d 691 (5th Cir. 1942); People v. Goff, 100 Cal. App. 2d 166, 223 P.2d 27 (Dist. Ct. App. 1950); People v. Richardson, 222 N.Y. 103, 118 N.E. 514 (1917); Jones v. Town of LaCrosse, 180 Va. 406, 23 S.E.2d 142 (1942).

The reason for this rule is similar to reasons for the inadmissibility of evidence of other offenses or acts to prove character once it is in issue. See notes 19-20 infra and accompanying text. "[T]he result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity." Regina v. Rowton, Le & Ca. 520, 540-541, 169 Eng. Rep. 1497, 1506 (1856).

[17]Lovely v. United States, 169 F.2d 386 (4th Cir. 1948); State v. Lapage, 57 N.H. 245 (1876); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955); 1 Wharton, op. cit. supra note 5. § 232.

[18]"I shall not... deny this. [That evidence of a prior offense is logically relevant to show a propensity to commit a similar offense.] If I know a man has broken into my house... I am... more ready to believe him guilty of breaking into my neighbor's house.... This is human nature—the teaching of human experience." State v. Lapage, 57 N.H. 245, 300 (1876).

sons of collateral policy intended to prevent verdicts based on insufficient evidence.[19] These policy considerations are primarily two: (1) the principle of undue prejudice—the recognition of the tendency of juries to condemn on finding that the accused is of a character likely to commit such an act or merely that he is a reprehensible sort;[20] (2) the consideration of undue surprise—the basic injustice of introducing evidence against one who is unprepared to offer evidence of its untruth.[21]

Evidence of other offenses committed by the accused is always admissible to prove any other material proposition to which it is logically relevant other than the accused's propensity to commit the crime.[22] As is sometimes stated, the evidence is admissible if there is an *independent basis of relevance*.[23] These are limited only by the evidentiary issues presented by the trial, the most common being capacity, motive, intent, identity, absence of mistake, and design or plan.[24]

The court in the *Finley* case based the admissibility of evidence of a prior rape on its relevance to show a common scheme or plan embracing the two crimes—a well recognized independent basis of relevance.[25] However, in reaching this conclusion, the court used language that lends color to the contention in the dissent that the court was actually basing its decision on the relevance of the evidence to show the character of the accused. At one point in the decision the court emphasized its belief that "the two occurrences were characterized

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[19]1 Wigmore § 194.

[20]Commonwealth v. Boulden, 179 Pa. Super, 328, 116 A.2d 867 (1955); State v. Larsen, 42 Idaho 517, 246 Pac. 313 (1926); 1 Wigmore § 194.

[21]Commonwealth v. Boulden, supra note 20; Regina v. Rowton, Le. & Ca. 520, 541, 169 Eng. Rep. 1447, 1506 (1865); 1 Wigmore § 174.

Besides the two suggested bases for the rule, Wigmore suggests a possible third which is sometimes given by the courts, that of confusion of issues. However, as he states, this consideration plays but a small part. Ibid.

[22]See note 12 supra.

[23]Lectures by Professor Charles V. Laughlin, Washington & Lee Law School Evidence class, March 1959.

[24]Heglin v. United States, 27 F.2d 310 (8th Cir. 1928) (intent); Davis v. State, 213 Ala. 541, 105 So. 677 (1925) (motive); Commonwealth v. Ellis, 321 Mass. 669, 75 N.E.2d 241 (1947) (capacity) (dictum); State v. DePauw, 246 Minn. 91, 74 N.W.2d 297 (1955) (scheme or plan); State v. Harrison, 285 S.W. 83 (Mo. 1926) (identity).

These more common independent bases are frequency referred to as standard exceptions to the rule denying admission of evidence of other offenses. This is a misconception. Evidence of other acts or offenses is admissible if it is relevant on any issue in the case. The single exception to the general rule of admissibility is that it may not be used to show the character of the accused. This misconception has caused a great deal of the confusion which abounds in this field. Hale, supra note 12, at 345.

[25]1 Wharton, op. cit. supra note 5, § 240; 1 Wigmore § 217.

by the manifestation of the same *bent of mind* . . . ."[26] At another point, the court said that "the rationale underlying the admissibility of evidence of prior acts of rape is partially for the purpose of showing defendant's criminal desires and lustful propensity to commit such a crime."[27]

Even if it were admitted that evidence of the prior rape shows a common scheme or plan, the trial court's instruction went further and allowed the jury to consider the prior rape as bearing on the defendant's bad character. The trial court instructed that the evidence of the other offense was admitted "to prove his [defendant's] lustful and lascivious *disposition* and as having a tendency to render it more probable that the acts . . . charged . . . were committed"[28] by the accused. The failure to reverse, when considered in the light of these instructions, strongly supports a view that the majority was proceeding on the basis that evidence of other acts of misconduct is admissible to prove the bad character of the accused.

Modern American courts tend to admit evidence of similar offenses more freely when the accused is charged with a sex offense than with other crimes,[29] generally straining to find a recognized independent basis of relevance.[30] As in the principal case, the most common bases used are intent and scheme or plan.[31] In at least two jurisdictions the courts candidly state that evidence of other similar offenses is allowed for the purpose of showing the disposition of the accused[32] to commit a sex crime like the one charged. Justification for the relaxation of a long standing exclusionary rule is frequently dismissed with a statement that in this area of the law evidence of similar offenses

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[26]338 P.2d at 795. (Emphasis added.)

[27]Ibid.

[28]338 P.2d at 796. (Emphasis added.)

[29]Note, 40 Minn. L. Rev. 694 (1956); 9 Wash. & Lee L. Rev. 86 (1952); see also Commonwealth v. Boulden, 179 Pa. Super 328, 116 A.2d 867 (1955); Annot., 167 A.L.R. 565 (1941).

[30]Johnson v. State, 242 Ala. 278, 5 So. 2d 632 (1941), cert. denied, 316 U.S. 693 (1942); People v. Westek, 31 Cal. 2d 469, 190 P.2d 9 (1948); Barkley v. State, 190 Ga. 641, 10 S.E.2d 32 (1940); State v. DePauw, 246 Minn. 91, 74 N.W.2d 297 (1955); Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348 (1949).

[31]The intent basis is used by the courts irrespective of the fact that with most sex offenses intent may be inferred from the act. See Gerlach v. State, 217 Ark. 102, 229 S.W.2d 37 (1950).

The admission of evidence of another offense in order to show a scheme or plan would appear quite attenuated when it was admitted to "infer" a design or plan from two unrelated acts. See Commonwealth v. Kline, 361 Pa. 434, 65 A.2d 348 (1949).

[32]People v. Herman, 97 Cal. App. 2d 272, 217 P.2d 440 (Dist. Ct. App. 1950); State v. Whiting, 173 Kan. 711, 252 P.2d 884 (1953).

is relevant to show the character of the accused.[33] This reasoning seems to indicate a misunderstanding of the original basis for the rule limiting the admissibility of evidence of other acts or offenses. It has never been claimed that such evidence is not logically relevant to show the accused's propensity to commit the crime charged. The exclusionary rule is based on considerations of collateral policy.[34] These policy considerations, particularly that of undue prejudice, seem to require even greater precautions for sex offenses than for other crimes.[35]

Actually, the rationale behind the relaxation of the rules of admissibility in the field of sex crimes is the belief that there is a greater tendency on the part of the sex offender than the ordinary offender to repeat his crime.[36] And therefore the probative value of such evidence is thought to outweigh any policy considerations that would point to its exclusion.[37] The validity of this assumption, that sex offenders are more susceptible than other criminals to recidivism is open to question. There is some difference of opinion among the sociologists and criminologists who have studied the problem; but the majority seem of the opinion that recidivism is *considerably less* among sex offenders than among other types of criminals.[38]

Strong arguments have been made that evidence of other acts or offenses of an accused should always be admissible in any case to prove his character.[39] Such a contention is certainly not totally without merit. There is, however, no substantial basis for applying a different rule for sex crimes than for other types of criminal offenses.[40]

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[33]State v. Clough, 33 Del. 140, 132 Atl. 219 (1925); State v. Scheuller, 120 Minn. 26, 138 N.W. 937 (1912); Woodruff v. State, 72 Neb. 815, 101 N.W. 1114 (1904).

[34]See note 19 supra.

[35]Note, 37 Minn. L. Rev. 608, 614 (1953).

"I have no doubt that but for the abhorrence and deep-rooted contempt with which all sex crimes are viewed this additional exception to the general rule would never have found its way into the jurisprudence of the courts of the land." State v. Terrand, 210 La. 394, 27 So. 2d 174, 179 (1946) (disssent).

[36]39 Calif. L. Rev. 584, 587 (1951); Note, 40 Minn. L. Rev. 694, 701 (1951); see Commonwealth v. Boulden, 179 Pa. Super. 328, 116 A.2d 867, 873-74 (1955).

[37]Ibid.

[38]Barnes & Teeters, New Horizons in Criminology 102-07 (2d ed. 1951); Best, Crime and the Criminal Law in the United States 283-84 (1930); Commonwealth v. Boulden, 179 Pa. Super. 328, 116 A.2d, 867, 873 n.2 (1955). But see McDonald, Psychiatry and the Criminal 150 (1958). It has been argued that even if there is a greater propensity on the part of the sex criminal to repeat his crime, it is not sufficiently great or conclusive as to justify the change of a well established exclusionary rule. Note, 40 Minn. L. Rev. 694, 702 (1956).

[39]Stone, The Rule of Exclusion of Similar Fact Evidence, 51 Harv. L. Rev. 988 (1938).

[40]The courts of many states have relaxed the rules of admissibility of evidence of other acts of misconduct only when the offense charged is a so-called consensual