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PLEA OF SELF-DEFENSE: ADMISSIBILITY OF EVIDENCE OF DECEASED'S CHARACTER

It is well established that upon a plea of self-defense[1] in a homicide or assault prosecution, the defendant can offer evidence of the deceased's violent character.[2] However, the purpose for which the character evidence can be offered and the form in which it can be presented have been subject to various and sometimes conflicting qualifications.

State v. Johnson[3] is a recent example of the courts' treatment of these problems. On trial for murder in the lower court, the defendant, Fred Johnson, had entered a plea of self-defense. According to Johnson, the deceased, Travis Ray, had come to his home carrying a pistol. An argument ensued, and, when Ray reached for his pistol, Johnson shot him. A revolver was found in Ray's pocket. In support of his plea of self-defense, Johnson, out of the jury's hearing, related three specific instances in which Ray had been violent. Johnson had been present as a bystander on two of the occasions. The third instance involved an altercation between Ray and his wife, which had been related to Johnson by the wife. Each of the occurrences was known to Johnson prior to his encounter with Ray. The trial court excluded testimony on each instance and limited the defendant to testifying to violent acts of the deceased toward him personally. On appeal it was held that Johnson should have been allowed to introduce evidence of any specific violent acts of Ray that were known to him.

In allowing the defendant's character testimony, the court recognized the first of the following theories upon which such evidence is usually offered. When a defendant pleads self-defense, character evidence becomes relevant to show: (1) the apprehensive mind of the

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[1]Self-defense must be pleaded and sufficient evidence of it presented in order to render character evidence admissible. Farley v. State, 279 Ala. 98, 182 So. 2d 364 (1966); People v. Brophy, 122 Cal. App. 2d 638, 265 P.2d 593 (1954); State v. Gray, 179 Kan. 133, 292 P.2d 698 (1956); Pinter v. State, 203 Miss. 344, 34 So. 2d 723 (1948); Burford v. Commonwealth, 179 Va. 752, 767, 20 S.E.2d 509 (1942); Harrison v. Commonwealth, 79 Va. 374, 52 Am. R. 634 (1884).

[2]Homicide prosecutions: Evans v. United States, 108 App. D.C. 323, 277 F.2d 354 (1960); Brooks v. State, 263 Ala. 386, 82 So. 2d 553 (1955); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); People v. Yankouski, 143 N.Y.S.2d 737 (1955); Hubbard v. Commonwealth, 190 Va. 917, 59 S.E.2d 102 (1950); Lee v. Commonwealth, 188 Va. 360, 49 S.E.2d 608 (1948); 2 J. WIGMORE, EVIDENCE § 246 (3d ed. 1940). Assault prosecutions: People v. Brophy, 122 Cal. App. 2d 638, 265 P.2d 593 (1954); Wilcher v. State, 87 Ga. App. 93, 73 S.E.2d 57 (1962); State v. Engels, 2 N.J. Super. 126, 64 A.2d 897 (1949).

[3]270 N.C. 215, 154 S.E.2d 48 (1967).

defendant at the time of the affray,[4] or (2) who was the aggressor.[5] The purpose for which the evidence is admitted is usually dependent upon the factor of knowledge. If the deceased's violent character was known to the defendant, it is relevant to explain the accused's state of mind or apprehension at the time of the encounter.[6] Conversely, if the deceased's violent character was unknown to the defendant, it becomes relevant only on the question of who was the aggressor.[7]

The particular evidence offered to prove the deceased's character may be in one of two forms: (1) the deceased's general reputation for

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[4]Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1924); State v. Gordon, 37 Del. 219, 181 A. 361 (1935); Nance v. Fike, 244 N.C. 368, 93 S.E.2d 443 (1956); State v. Rawley, 237 N.C. 233, 74 S.E.2d 620 (1953); People v. Flournoy, 14 App. Div. 2d 854, 221 N.Y.S.2d 142 (1961); Burford v. Commonwealth, 179 Va. 752, 766, 20 S.E.2d 509 (1942); 2 J. WIGMORE, EVIDENCE §§ 246, 248 (3d ed. 1940).

[5]Mong Ming Club v. Tang, 77 Ariz. 63, 266 P.2d 1091 (1954); Miller v. State, 240 Ind. 398, 166 N.E.2d 338 (1960); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961); People v. Cellura, 288 Mich. 54, 284 N.W. 643 (1939); State v. Keaton, 258 Minn. 359, 104 N.W.2d 650 (1960); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954).

[6]People v. Jefferson, 34 Cal. App. 2d 278, 93 P.2d 230 (1939); Gunther v. State, 288 Md. 404, 179 A.2d 880 (1962); People v. Flournoy, 14 App. Div. 2d 854, 221 N.Y.S.2d 142 (1961); 2 J. WIGMORE, EVIDENCE § 246 (3d ed. 1940). Such known character evidence may also be used to show who was the aggressor, though it is more frequently used to show state of mind. Brooks v. State, 263 Ala. 386, 82 So. 2d 553 (1955); People v. Jefferson, 34 Cal. App. 2d 278, 93 P.2d 230 (1939); Gunther v. State, 288 Md. 404, 179 A.2d 880 (1962); People v. Stallworth, 364 Mich. 528, 111 N.W.2d 742 (1961).

[7]Evans v. United States, 108 App. D.C. 323, 277 F.2d 354 (1960); People v. Jefferson, 34 Cal. App. 2d 278, 93 P.2d 230 (1939); State v. Wilson, 236 Iowa 429, 19 N.W.2d 232, 239 (1945); State v. Keaton, 258 Minn. 359, 104 N.W.2d 650, 656 (1960); Rich v. Cooper, 234 Ore. 300, 380 P.2d 613 (1963); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); 1 J. WIGMORE, EVIDENCE § 63 (3d ed. 1940).

Under each theory, as a prerequisite to receiving character testimony, a foundation must be laid by the introduction of other evidence in order to bring self-defense into issue. State of mind theory: Farley v. State, 279 Ala. 98, 182 So. 2d 364 (1966); State v. Wallace, 83 Ariz. 220, 319 P.2d 529 (1957); People v. Yokum, 145 Cal. App. 2d 245, 302 P.2d 406 (1956); People v. Brophy, 122 Cal. App. 2d 638, 265 P.2d 593 (1954); People v. Yankouski, 143 N.Y.S.2d 737 (1955); Harris v. State, 400 P.2d 64 (Okla. Crim. App. 1965); Burford v. Commonwealth, 179 Va. 752, 767, 20 S.E. 509 (1942); 2 J. WIGMORE, EVIDENCE § 246 (3d ed. 1940). Aggressor theory: Mong Ming Club v. Tang, 77 Ariz. 63, 266 P.2d 1091 (1954); People v. Jefferson, 34 Cal. App. 2d 278, 93 P.2d 230 (1939); Smithwick v. State, 199 Ga. 292, 34 S.E. 28, 32 (1945); State v. Tobias, 218 La. 226, 48 So. 2d 905 (1950); Rich v. Cooper, 234 Ore. 300, 380 P.2d 613 (1963). It is immaterial whether the foundation was laid in the evidence of the state or in that of the defendant. State v. Wilson 236 Iowa 429, 19 N.W.2d 232 (1945); *accord* State v. Wallace, 83 Ariz. 220, 319 P.2d 529 (1957). Absent a foundation, character evidence will not be admitted. Mathis v. State, 210 Ga. 408, 80 S.E.2d 159 (1954); Nixon v. State, 204 Md. 475, 105 A.2d 243 (1954); State v. Helm, 66 Nev. 286, 209 P.2d 187 (1949).

violence, or (2) specific acts of violence by the deceased.[8] An overwhelming weight of authority allows evidence of general reputation in practically all instances.[9] Specific acts, however, have been subject to conflicting treatment by the courts. Their admissibility is dependent upon the purpose for which they are offered.

The use of specific acts to show the state of mind of the defendant was prohibited for a long time.[10] This can be attributed to the courts viewing the proffer of specific acts as an attempt to prove character. The courts are loathe to reason that because an individual acted violently on one occasion he also acted violently on another.[11] However, the objection presented by this rationale has been avoided by viewing the proffer of evidence as explanatory of the apprehensive mind of the defendant and not as an attempt to prove bad character.[12] Consequently, many jurisdictions now allow specific acts.[13] *Johnson* is in accord with the modern view. The rationale in permitting the introduction of specific acts is to afford the jury an opportunity

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[8]Marshall v. United States, 45 App. D.C. 373, 383 (Ct. App. 1916); People v. Casserio, 16 Cal. App. 2d 223, 60 P.2d 505 (1936); Jones v. State, 182 Md. 653, 35 A.2d 916 (1944); People v. Flournoy, 14 App. Div. 854, 221 N.Y.S.2d 142 (1961); Harris v. State, 400 P.2d 64 (Okla. Crim. App. 1965); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954) (dictum).

[9]State of mind theory: *e.g.*, Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1924); State v. Morgan, 245 N.C. 215, 95 S.E.2d 507 (1956); Mortimore v. State, 24 Wyo. 452, 161 P. 766 (1916); 2 J. WIGMORE, EVIDENCE § 246 (3d ed. 1940). Aggressor theory: *e.g.*, Evans v. United States, 108 App. D.C. 323, 277 F.2d 354 (1960); Marshall v. United States, 45 App. D.C. 373, 383 (Ct. App. 1916); Sullivan v. State, 47 Ariz. 224, 55 P.2d 312 (1936); Bridges v. State, 176 Ark. 756, 4 S.W.2d 12 (1928); People v. Soules, 41 Cal. App. 2d 298, 106 P.2d 639 (1940) (dictum); State v. Wilson, 236 Iowa 429, 19 N.W.2d 232 (1945); State v. Keaton, 258 Minn. 359, 104 N.W.2d 650 (1960); Rich v. Cooper, 234 Ore. 300, 380 P.2d 613 (1963) (dictum). *Contra,* State v. Padula, 106 Conn. 454, 138 A. 456 (1927); People v. Rodewald, 177 N.Y. 408, 70 N.E. 1 (1904).

[10]Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1924); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940).

[11]1 J. WIGMORE, EVIDENCE §§ 192, 193 (3d ed. 1940).

[12]*See* State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); Fields v. State, 85 Okla. Crim. 439, 188 P.2d 231 (1947); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Burford v. Commonwealth, 179 Va. 752, 767, 20 S.E.2d 509 (1942); Mortimore v. State, 24 Wyo. 452, 161 P. 772 (1916); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940).

[13]*E.g.*, McGuff v. State, 248 Ala. 259, 27 So. 2d 241 (1946); State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); State v. Wallace, 83 Ariz. 220, 319 P.2d 529 (1957); Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1924); Harris v. State, 400 P.2d 64 (Okla. Crim. App. 1965); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940). The number and type of specific acts to be admitted is within the discretion of the court. Rasnake v. Commonwealth, 135 Va. 677, 115 S.E. 543 (1923); 1 J. WIGMORE, EVIDENCE § 198 (3d ed. 1940).

to determine if the defendant acted in apprehension and if his plea of self-defense is well founded.[14]

Courts disagree as to the admissibility of specific acts of the deceased offered to show that he was the aggressor.[15] A majority of jurisdictions reject such evidence on the ground that it is collateral and necessitates proof of each previous affray to fairly determine whether the deceased was warranted in acting as he did.[16] As a result, the trial would be prolonged and the party against whom the evidence is offered would be greatly disadvantaged, since no one, without due notice, could explain all previous acts that might be presented.[17] A minority of jurisdictions, while recognizing that the admissibility of specific acts should be subject to sound discretion, allow them to be proven to show who was the aggressor.[18] In so doing, it would seem that the courts are deciding contrary to the firm rule of evidence that when character is used to prove an act, other specific acts cannot be used to prove violent character.[19] Based on this principle, the objection to using specific acts to show the defendant's apprehensive state of mind was reasoned away as such acts were not being used to prove character, but merely to show state of mind.[20] However, when specific acts are used to show who was the aggressor, they, in effect, *are* used to prove character. Nevertheless, a minority of jurisdictions allow character to be proven by specific acts when used to show who was the aggressor.

The minority rule allowing the introduction of specific acts to show who was the aggressor reveals a variance in the treatment given a defendant and that given the deceased in regard to character evidence. In homicide prosecutions where a plea of self-defense is en-

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[14]Evans v. United States, 108 App. D.C. 323, 277 F.2d 354 (1960); Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1924); Gunther v. State, 228 Md. 404, 179 A.2d 880 (1962); Jones v. State, 182 Md. 653, 35 A.2d 916, 919 (1944); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954).

[15]*See* Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226, 230 (1949).

[16]*E.g.*, Bridges v. State, 176 Ark. 756, 4 S.W.2d 12 (1928); People v. Soules, 41 Cal. App. 2d 298, 106 P.2d 639 (1940); McGill v. Commonwealth, 365 S.W.2d 470 (Ky. 1963); People v. Cellura, 288 Mich. 54, 284 N.W. 643 (1939); State v. Keaton, 258 Minn. 359, 104 N.W.2d 650 (1960).

[17]Richmond v. City of Norwich, 96 Conn. 582, 115 A. 11 (1921).

[18]*E.g.*, Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949); State v. Waldron, 71 W. Va. 1, 75 S.E. 558 (1912); 1 J. WIGMORE, EVIDENCE §§ 63, 198 (3d ed. 1940).

[19]1 J. WIGMORE, EVIDENCE §§ 192, 193 (3d ed. 1940).

[20]State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); Fields v. State, 85 Okla. Crim. 439, 188 P.2d 231 (1947); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Burford v. Commonwealth, 179 Va. 752, 767, 20 S.E.2d 509 (1942); Mortimore v. State, 24 Wyo. 452, 161 P. 772 (1916); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940).

tered it logically has been reasoned that the deceased becomes a quasi-defendant with the true defendant as his accuser.[21] If this analysis is accepted, the inconsistent treatment of the defendant and the deceased becomes apparent. The minority rule allows the introduction of specific, violent acts of the deceased to show who was the aggressor.[22] However, specific acts generally are not admissible when character is used to prove the act of which a defendant is accused.[23] Thus, if the deceased is viewed as a defendant being accused of the act of aggression, he is being denied the protection of this rule in those jurisdictions where specific acts may be used to prove the act of aggression.[24]

A further examination of the treatment specific acts have received by the courts reveals additional inconsistencies. When used to show the defendant's state of mind such evidence is generally admitted,[25] while when used to show who was the aggressor it usually is prohibited.[26] The question is thus raised whether allowing specific acts under the state-of-mind theory is consistent with excluding them on the question of who was the aggressor. The objection to their use under the former theory was reasoned away by the fact that specific acts are not being used to prove either character or an act, but only to show state of mind.[27] As a result, most jurisdictions allow them under the state-of-mind theory.[28] In so doing, the courts are apparently ignoring

[21]"On the same theory, when a prisoner sets up a defense, like the one at bar [self-defense]...he charges the deceased with an act of personal violence against him, and thereby becomes the accuser and makes the deceased the accused...." Commonwealth v. Castellana, 277 Pa. 117, 121 A. 50, 52 (1923).

[22]*E.g.*, Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949); State v. Waldron, 71 W. Va. 1, 75 S.E. 558 (1912).

[23]1 J. WIGMORE, EVIDENCE §§ 192, 193 (3d ed. 1940).

[24]*E.g.*, Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949); 1 J. WIGMORE, EVIDENCE §§ 63, 198 (3d ed. 1940).

[25]*E.g.*, McGuff v. State, 248 Ala. 259, 27 So. 2d 241 (1946); State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); State v. Wallace, 83 Ariz. 220, 319 P.2d 529 (1957); Mendez v. State, 27 Ariz. 82, 229 P. 1032 (1942); Harris v. State, 400 P.2d 64 (Okla. Crim. App. 1965); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940).

[26]*E.g.*, Bridges v. State, 176 Ark. 756, 4 S.W.2d 12 (1928); People v. Soules, 41 Cal. App. 2d 298, 106 P.2d 639 (1940); McGill v. Commonwealth, 365 S.W.2d 420 (Ky. 1963); State v. Keaton, 258 Minn. 359, 104 N.W.2d 650 (1960).

[27]State v. Jackson, 94 Ariz. 117, 382 P.2d 229 (1963); Fields v. State, 85 Okla. Crim. 439, 188 P.2d 231 (1947); Dempsey v. State, 159 Tex. Crim. 602, 266 S.W.2d 875 (1954); Burford v. Commonwealth, 179 Va. 752, 767, 20 S.E.2d 509 (1942); Mortimore v. State, 24 Wyo. 452, 161 P. 772 (1916); 2 J. WIGMORE, EVIDENCE § 248 (3d ed. 1940).

[28]Cases cited note 26 *supra*.