Marquette Law Review

Volume 35
Issue 1 *Summer 1951*

Article 8

1951

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Repository Citation
James J. Koenen, *Evidence - Admissibility of Evidence of Other Offenses*, 35 Marq. L. Rev. 55 (1951).
Available at: https://scholarship.law.marquette.edu/mulr/vol35/iss1/8

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EVIDENCE — ADMISSIBILITY OF EVIDENCE OF OTHER OFFENSES

One of the most important, and certainly one of the most controversial matters facing lawyers and courts alike in the field of criminal law, is the matter of introduction by the state of evidence of offenses other than that with which the defendant is charged. Since late in the Fifteenth Century (the days of the courts of the Inquisition in Spain), courts of England, and later the United States, have demonstrated an abhorrence for any trial procedure which tends to overlook the rights and privileges of the accused in an over-zealous attempt to give sanction to the laws that have been violated. It has long been felt that the introduction of evidence of separate and distinct offenses, apart from the one with which the defendant is charged, would be a practice which would do violence to the safeguards that have been established to insure to every defendant such a fair and impartial trial. It had long seemed that our common law courts were content to reject evidence of other crimes *ipso facto* but the first half of this century has witnessed a reversal of form, which to this writer seems to have reached its culmination in the case of the *People v. Sullivan*,[1] a California case decided in 1950. In that case, Sullivan, who was charged with forcible rape, was confronted by a witnes other than the prosecutrix who was allowed to testify to another alleged act of rape committed upon her by defendant at a date after the commission of the crime with which he was charged. Upon conviction Sullivan appealed, and the District Court of Appeals affirmed the conviction holding that testimony by a witness other than prosecutrix, that subsequent to the commission of the alleged offense the defendant committed the same offense upon that witness under similar circumstances, was properly admitted to show a plan, scheme, system or design into which fitted the commission of the offense for which the defendant was on trial. The long standing general rule regarding admission of evidence of other crimes was, that upon the prosecution for one offense, evidence of another distinct and separate offense is not admissible.[2] The basis for this rule has been that admission of such evidence would be prejudicial to the defendant because he would be forced to meet charges upon which the indictment or information is silent, his character would be put in issue by a showing of specific acts, and the evidence would tend to prejudice the defendant in the minds of the jury by causing them to believe that the defendant is guilty merely because such similar acts evince a disposition to commit crimes like the one of

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[1] People v. Sullivan, 215 P.(2d) 558 (Cal. 1950).

[2] State v. Henger, 220 Wis. 410, 246 N.W. 922 (1936); Fischer v. State, 226 Wis. 290, 276 N.W. 640 (1938); 22 C.J.S. §682, 691; 1 Jones, Evidence 255-256 (4th ed. 1938); 23 Marq. L. Rev. 41 (1938).

which he is accused. That such evidence is logically relevant, admits of little doubt, but nevertheless, for the above reasons our common law courts have always excluded it.[3]

Equally well recognized by now, however, is the exception to the general rule which holds that evidence of other offenses is always admissible to directly prove some material element of the crime charged.[4] Evidence of other crimes is admissible where it tends to establish: (1) motive;[5] (2) intent;[6] (3) absence of mistake or accident;[7] (4) the identity of the accused;[8] (5) a propensity toward sex crimes;[9] (6) a common scheme or plan involving the commission of similar crimes so related to each other that proof of one or more of them tends to establish the accusation.[10] These exceptions have in fact become so well recognized and generally accepted as to have attained the status of a rule themselves.[11]

The broad scope of the general rule, and the many qualifications of the exceptions to that rule would indicate wide latitude for conflicting opinion, and such indeed has been the case. An apparently irreconcilable conflict of opinion on the matter indicates that fine distinctions are made in the fact situations, since all of our common law courts give at

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[3] People v. Pollock, 31 Cal. App. (2d) 747, 89 P.(2d) 128 (1939); (Such evidence would be unduly prejudicial to the accused.); State v. Gregory, 191 S.C. 212, 4 S.E.(2d) 1 (1939), "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence."; Colvin v. Commonwealth, 147 Va. 663, 137 S.E. 476 (1927), ("Such testimony is not within the pleadings and would be an unfair surprise . . . to the accused.".

[4] People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901); Paulson v. State, 118 Wis. 89, 94 N.W. 771 (1903); Bradley v. State, 142 Wis. 137, 124 N.W. 1024 (1910); Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912); 22 C.J.S. §688; 2 Wigmore, Evidence §304 (3d ed. 1940).

[5] People v. Zabijak, 285 Mich. 164, 280 N.W. 144 (1938); State v. King, 342 Mo. 975, 119 S.W. (2d) 277 (1938).

[6] Paulson v. State, *supra*; Fenlon v. State, 195 Wis. 416, 217 N.W. 771 (1928); State v. Smith, 195 Wis. 555, 218 N.W. 822 (1928); Bartz v. State, 229 Wis. 552, 282 N.W. 562 (1939).

[7] People v. Williams, 6 Cal.(2d) 500, 58 P.(2d) 917 (1936); State v. Baugh, 200 Iowa 1225, 206 N.W. 250 (1925).

[8] People v. Filas, 396 Ill. 51, 15 N.E. (2d) 496 (1938); State v. Smook, 213 N.C. 79, 195 S.E. 72 (1938); State v. Jackson, 219 Wis. 13, 261 N.W. 732 (1935); Herde v. State, 236 Wis. 408, 295 N.W. 684 (1941); Bridges v. State, 247 Wis. 350, 19 N.W. (2d) 529 (1945).

[9] Commonwealth v. Piccerillo, 256 Mass. 487, 152 N.E. 746 (1926); Gundlach v. State, 184 Wis. 65, 198 N.W. 742 (1924).

[10] People v. Molineux, *supra*, Note 3, "To bring a case within this exception to the general rule. . .there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme or they must be so related to each other as to show a common motive or intent running through both." State v. Vincent, 202 Wis. 47, 231 N.W. 263 (1930).

[11] State v. Lord, 42 N.M. 638, 84 P.(2d) 80 (1938); State v. Vincent, *supra*, Note 9; State v. Jackson, *supra*, Note 7.

least lip service to the same general rule, with the same exceptions, and yet in almost identical fact situations arrive at contrary decisions.[12]

As the reader is no doubt well aware, the application of rules of evidence is greatly influenced by the nature of the crime with which the defendant is charged. Indeed, it would be beyond the designed scope of this type of comment to even attempt to survey the entire field of criminal offenses and examine the peculiarities of each, so of necessity this article will be confined to one type of offense only. The most widespread and marked deviation from the old rule has been apparent in the case of sex offenses and so the election was made to confine this article to that general field. Since this discussion concerns itself with sex crimes exclusively, it would be well to note at this point that most jurisdictions give considerably more weight to the exceptions to the general rule in the case of sex offenses,[13] and accordingly, many of the following holdings will be unique, and germane to that type of crime only.

The fact situations involving evidence of other sex offenses of the defendant fall broadly into four divisions: (1) a similar offense with the same person, prior to the commission of the crime for which the defendant is being tried; (2) with the same person, at a subsequent time; (3) same offense with a person other than the prosecutrix, at a prior time; (4) other person at a subsequent time.

Although regrettable for reasons of continuity, it perhaps will be expedient at this point to insert a brief note on the matter of presumptions arising from admitted evidence, before examining the attitude of our courts toward evidence of crimes in the four divisions given above. Obviously, any extensive examination of the rules governing presumptions is impossible, and not only would be be out of place, but unnecessary here. This discussion is concerned only with the running of presumptions, and for this purpose it will be sufficient merely to notice the general rule that presumptions run forward, but not backward. Although not expressly stated in the following decisions, unquestionably a make-weight argument for admission of evidence of prior crimes is the fact that generally a presumption will run forward, and apply to subsequent acts, while accordingly, since presumptions do not run backwards, evidence of a subsequent offense will raise no presumption of value in the prosecution of a prior offense, and consequently weigh against the admission of evidence of subsequent crimes. The courts have been quite uniform in their acceptance of evidence in the first division, when it has been properly qualified to show motive, intent, plan or the like.[14] The majority of our courts have quite consistently refused

[12] State v. Lord, *supra*, Note 10.
[13] People v. Schwartz, 79 Cal. App. 160, 248 P. 1043 (1926); People v. Place, 226 Mich. 212, 197 N.W. 513 (1924); State v. Oberg, 187 Wash. 429, 60 P.(2d) 66 (1936); Wharton, Criminal Evidence 170 §42 (11th ed.).
[14] 22 C.J.S. §691; 2 Wigmore, Evidence §357 (3d ed. 1940).

evidence in the second division,[15] but there seems to be a growing tendency, supported by good authority, to admit such evidence.[16] Division three is accepted but rarely, and then usually only in cases where both crimes happened at the same time or place, or in the case of crimes with infants where the evidence is admitted to show a mental twist or quirk.[17] The courts admitting evidence to show such mental twist proceed on the premise that while a forced sexual act with an adult female is a crime, it is not so unnatural as to show a defective mentality, while unnatural acts, or sex crimes against children evince a depravity of mind which is relevant to the issue and may be shown by other offenses of like nature. Until quite recently, evidence in the fourth class was uniformly held inadmissible for any purpose, but some recent decisions show that an attempt is being made to open the door to this type of evidence. There have been admissions to indicate intent,[18] and plan or scheme,[19] and while none are directly in point, they indicated the path which, correctly or not, one state at least, California, has decided to follow. Although several states have provisions for the admission of evidence which, on their face, would admit evidence in this last class,[20] these cases are the clearest admissions of such evidence that seem to have been made, and California, with the *Sullivan* case and the case of *People v. Ross*,[21] seems to have taken the most liberal stand on this matter.

There is a fifth division, really a combination of the first and second, which, although not a primary classification, is of enough importance to necessitate mention here. That class includes offenses with the same person both before and after the offense for which defendant is on trial. This class of evidence is logically admissible, if the prior acts are first established. Once the prior acts have been shown, the offense with which defendant is charged is shown, and then the matter of further

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[15] 22 C.J.S. §691.

[16] People v. Furhman, 130 Cal. App. 267, 19 P. (2d) 821 (1933); 2 Wigmore, Evidence §316 (3d ed. 1940).

[17] State v. Martinez, 65 Ariz. 389, 198 P.(2d) 115 (1948); People v. Cassandras, 83 Cal. App. (2d) 272, 188 P.(2d) 546 (1948); State v. Clough, 33 Del. 140, 132 A. 219 (1925); Bridges v. State, *supra*, Note 7.

[18] McKenzie v. State, 250 Ala. 178, 33 So.(2d) 488 (1948); Andrews v. State, 196 Ga. 84, 26 S.E.(2d) 263 (1943).

[19] Talley v. State, 36 So. (2d) 201 (Fla. 1948); Dorsey v. State, 49 S.E.(2d) 886 (Ga. 1948).

[20] Mich. 3 Comp. Laws 1929, sec. 17320, "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

[21] 221 P.(2d) 280 (Cal. 1950).

subsequent offenses is relevant as showing a continuing series of offenses, or one continuing crime as the case may be. The evidence, proceeding from prior to subsequent acts, through and including the crime charged, shows a continuing course of action, and in such case, all included acts will raise a presumption of guilt in regard to the offense charged.

To follow the logic of the California Court in admitting this evidence in the *Sullivan* case, it is necessary to point out that the defendant was charged with forcible rape, and the other offense testified to was also an act of forcible rape, in which the circumstances and the method of attack were almost identical with those of the first offense. The trial court qualified the admission thus: "This evidence was admitted in this case to show that there existed in the mind of the defendant a plan, scheme, system or design into which fitted the commission of the offense for which he is now on trial." The reason for the admission is relevant because the purpose or reason for the admission of evidence of another offense in each instance poses another test which the evidence must meet to qualify for admission for that purpose.[22] When the very doing of the act with which the defendant is charged is still to be proved, one of the evidential facts receivable is the person's plan or design to do it. However, to show evidence of other crimes to prove plan or design, there has to be more than merely the doing of similar acts. Wigmore points out that there must be shown, ". . . such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."[23] There is a very good discussion of the theory behind the rules on the admission of evidence of other crimes in the dissenting opinion of Justice Livingston in *McKenzie v. State*.[24]

It has been said that the general rule that a person who is on trial charged with a particular crime may not be shown to be guilty thereof by evidence showing that he has committed other crimes, is one of the distinguishing features of our common law jurisprudence,[25] and the writer feels that the decision of the California Court represents a decisive move towards the elimination of that distinction. It is inevitable that regardless of how many good and logical reasons may be presented for the unrestricted admission of relevant evidence, there eventually will be a point where the probable benefit to the prosecution will be so insignificant in the face of the dangers to the defendant's right of fair and impartial trial, that the preservation of our system of jurisprudence will demand that a final line be drawn and no further extension be

[22] 2 Wigmore, Evidence §300 (3d ed. 1940).
[23] 2Wigmore, Evidence §304 (3d ed. 1940).
[24] McKenzie v. State, *supra*, Note 16.
[25] People v. Grutz, 212 N.Y. 72, 105 N.E. 843 (1914).

made. It would seem that the California Court at least has gone beyond this line in the *Sullivan* case and indicated an inclination which may result in the abandonment of one of our fundamental rules of evidence. It is to be sincerely hoped that other jursidictions do not also fall into the error of confusing the means with the end, and protecting the former to the extent of harming the latter. It would be supremely ironic if we were to destroy and abandon our personal security in an endeavor to enforce laws designed to protect that same security.

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