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Evidence: Prior Crimes Used to Show Specific Intent and Identity

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CASE NOTE

EVIDENCE: PRIOR CRIMES USED TO SHOW SPECIFIC INTENT AND IDENTITY

I. Introduction

Although it is a general rule that prior crimes may not be introduced into evidence in criminal trials, the Wisconsin Supreme Court as well as most, if not all, of the state and federal courts in this country, recognizes certain exceptions to this rule. Prior offenses have, in the past, been introduced when a requisite element of proof for the defendant's conviction has not been sufficiently substantiated. Courts have allowed the introduction of these offenses into evidence either to infer the defendant's specific intent or to rebut doubts regarding the defendant's identity. However, before these offenses may be admitted into evidence, it must be shown that there is a rational connection between the prior offense and the offense with which the defendant is charged, and secondly, that the defendant was involved in the prior misconduct. It may be required that his involvement be shown in one of the following ways: 1) It may merely have to be proven that the defendant performed prior acts which are of a criminal nature; or 2) it may have to be shown that he was convicted of the prior offense.

II. The General Rule

As stated above, the general rule is that prior crimes may not be introduced into evidence.[1] The reasons for this general rule are expressed in the Wisconsin murder case of *Paulson v. State*:[2]

> In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect. In a case . . . where it is believed that so horrible a crime has been committed, and where naturally and properly there is great anxiety that such outrage do not go without retribution upon the perpetrator, as to whose identity the field of speculation is wide, the tendency to fasten suspicion upon some member of the community whose record is bad is very strong, and fraught with great danger to the unfortunate individual, however innocent.[3]

The defendant in this case was charged with murdering a teenage girl. The murder occurred while the defendant was stealing money from the girl's home. At the trial, the prosecution was permitted to show that the defendant was convicted of larceny on two prior occasions.

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[1] Underhill, Criminal Evidence §180 (4th ed. 1935).
[2] 118 Wis. 89, 94 N.W. 771 (1903).
[3] *Id.* at 99-100, 94 N.W. at 774.

III. Exceptions to the General Rule

There are two recognized exceptions to the general rule that evidence of prior offenses cannot be introduced at a subsequent criminal trial to prove an element of the crime charged.

A. Prior Offenses To Prove Specific Intent

When there is doubt as to whether the defendant had the specific intent at the time he performed the acts of the crime with which he is charged, courts have allowed introduction of prior similar criminal acts into evidence to infer this intent. If it can be shown that the defendant performed a criminal act (all the physical acts which are the essentials of the crime excluding specific intent, design and motive) two or more times, then in the words of Wigmore,

> ". . . the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i.e.,* criminal, intent accompanying such an act. . . ."[4]

B. Prior Offense To Prove Identity

If the defendant puts his identity in doubt through an alibi or by some other means, his prior offenses may be introduced to demonstrate that his *modus operandi* was the same in these prior offenses as in the crime charged. It is pointed out in *Corpus Juris Secundum* that

> ". . . where a crime has been committed by some novel or extraordinary means or in a peculiar or unusual manner, evidence of recent similar acts or crimes by accused committed by the same means or in the same manner are provable to identify accused as an inference from similarity of method."[5]

Possibly, in Wisconsin, prior offenses may be introduced *only* as probative of the defendant's identity. The Wisconsin Supreme Court in *State v. Stevens*[6] stated by way of dicta that:

> . . . it is settled that evidence of other crimes or of the similarity of schemes of one charged with theft by fraudulent means may be admitted for the limited purpose of identifying the defendant by means of the method of operation as the person who committed the particular crime charged.[7]

The question is whether the court in *Stevens* implied that other offenses could be admitted *only* to show the identity of the defendant. If such a negative inference can be drawn, it appears that the Wisconsin Supreme Court did not give recognition to this in the 1965 case of *State v. Reynolds.*[8] The purpose of introducing evidence of a prior burglary

[4] 1 Wigmore, Evidence §302 (2nd ed. 1923).
[5] 22A C.J.S. *Criminal Law* §684 (1961).
[6] 26 Wis. 2d 451, 132 N.W. 2d 502 (1965).
[7] *Id.* at 456, 132 N.W. 2d at 505.
[8] 28 Wis. 2d 350, 137 N.W. 2d 14 (1965).

in that case was to imply that Reynolds had the specific intent to steal when he and two associates broke into a school. The court did not expressly decide whether the prior offense could be introduced to show Reynolds' specific intent. The prior burglary was excluded because there was no connection established between the prior burglary and the burglary with which Reynolds was charged.[9] There is no statement in *Reynolds* indicating that prior offenses could not be introduced into evidence to prove specific intent. In fact, some of the cases cited[10] in *Reynolds* recognized that specific intent could be inferred by prior offenses. It appears, however, that if a case came before the Wisconsin Supreme Court on the sole issue of whether prior offenses could be introduced to infer specific intent, it would be difficult to predict how the court would decide this issue.

IV. Criteria for Introducing Prior Offenses

Two prerequisites appear to be needed before a prior criminal act may be admitted into evidence as probative of either the defendant's identity or his specific intent: 1) Some connection must be established between the two events or criminal acts. 2) It must be established that the defendant was involved in prior misconduct.

A. The Criterion of Connection

The basic question is: When should a court recognize that there is an adequate connection between the prior offense and the offense with which the defendant is charged? A standard for determining whether inferences set forth in federal statutes are constitutional has been enunciated by the United States Supreme Court in *Tot v. United States*.[11] The defendants in that case were convicted of violating the Federal Firearms Act.[12] This act made it unlawful for any person convicted of a crime of violence to receive firearms or ammunition which had been shipped or transported in interstate commerce. The act further stated that:

> . . . the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Chapter.[13]

The particular issue in the case was whether it would be a violation of due process to presume, from the defendant's possession of a firearm, that it was shipped in interstate commerce.[14] Ruling that the presumption was violative of due process, the Court stated that:

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[9] *Id.* at 359, 137 N.W. 2d at 18.
[10] Dietz v. State, 149 Wis. 462, 136 N.W. 166 (1912); Smith v. State, 195 Wis. 555, 218 N.W. 822 (1928).
[11] 319 U.S. 463 (1943).
[12] 15 U.S.C. §902(f) (1941).
[13] *Ibid.*
[14] 319 U.S. at 466.

> a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.[15]

This standard was again recognized by the United States Supreme Court in *United States v. Gainey*.[16] The statute in that case authorized the jury to infer from the defendant's unexplained presence at an illegal still and carrying on the business of distilling liquor without the required bond.[17] The Court ruled that according to the standard set forth in the *Tot* case the statutory inference was constitutional.[18] It was reasoned by the Court that:

> Congress was indoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade. Legislative recognition of the implication of seclusion only confirms what the folklore teaches —that strangers to the illegal business rarely penetrate the curtain of secrecy.[19]

From an analysis of these two United States Supreme Court cases the rule emerges that, in order to be constitutional, a presumption or an inference in a federal statute must be based on a rational connection between the two events involved. Wharton recognizes that the jury is permitted to deduce the existence of the essential facts in the controversy from the existence of another fact when in "the experience of mankind the existence of the one fact ordinarily and logically follows from the existence of the other."[20] Since the statutory presumptions and also the deductions of the jury must be grounded in experience, it would seem to follow that the inference between the prior criminal act and the ultimate crime to be proven must also be based on experience.

The Wisconsin Supreme Court in the *Reynolds* case, however, stated that evidence may be admitted "of other occurrences in which a defendant has participated, when such others are similar in facts and close to the time of the offenses for which a defendant is on trial."[21] In that case, the appellant Reynolds and two associates were apprehended near a public school in Burlington, Wisconsin, and subsequently were charged and convicted for burglarizing the school. There was evidence adduced at the trial establishing that Reynolds and his associates did break into the school—prior to their apprehension, they

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[15] *Id.* at 467-468.
[16] 380 U.S. 63 (1965).
[17] 26 U.S.C. §§5601(b)(1)-5601(b)(2) (1964).
[18] 380 U.S. at 68.
[19] *Id.* at 67-68.
[20] 1 WHARTON, CRIMINAL EVIDENCE §87 (12th ed. 1955).
[21] 28 Wis. 2d at 357, 137 N.W. 2d at 17.

were seen coming out of the school; one of the doors to the school had been forcibly opened; and a person other than Reynolds was carrying a bag of burglary tools. There was, however, no direct evidence that the breaking and entering was "with the intent to steal."[22] To infer this specific intent, the prosecutor tried to relate the burglary tools carried by one of the parties involved in the Burlington entry with a prior and different burglary of a school in Two Rivers, Wisconsin, which had occurred a week before. Two agents employed at an FBI laboratory were permitted to testify that bits of plaster found in the bag containing the burglary tools at the Burlington school were the same bits of plaster taken from the wall of the Two Rivers School.

Upon Reynolds' appeal, the state supreme court ruled that it was error to admit the testimony of the two FBI agents. The prosecutor, in the first instance, failed to establish either that Reynolds owned the bag containing the burglary tools or that he was in possession of them during the Burlington break-in. Secondly, it was not shown that Reynolds was actually involved in the Two Rivers burglary. It was conceivable, the court stated, that Reynolds could have joined up with his associates after the Two Rivers affair.[23]

It appears that the "similarity of fact and the closeness of time test" of the *Reynolds* case has a basis in experience. This test would be applicable where there have been two similar burglaries committed in the same city on two consecutive days and where the defendant is charged with the second burglary. If the prosecutor at the trial desires to prove either that the person who committed the second burglary was the defendant or that the defendant had specific intent to steal the prosecutor is permitted, according to the test in the *Reynolds* case, to introduce the first burglary into evidence. However, he must show that the defendant was actually involved in this prior burglary. If he fails to prove this, there is no basis for introducing the first burglary as evidence. If the defendant's involvement in the first burglary can be proven, it would appear that a rational connection could be established between it and the second burglary. When all the circumstances of the second burglary are considered in addition to the proven fact that he committed the first one, it appears very probable that the defendant did not commit the second break-in by accident, but that he had a "burglarious state of mind" when he committed it. On the other hand, although the defendant places his identification in doubt, the proof that he committed a prior similar burglary which involved similar techniques would be probative that he committed the crime charged.

In *Reynolds,* the fact that a door of the Burlington school was forcibly opened, that Reynolds and his associates were seen running

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[22] WIS. STAT. §943.10(1)(a) (1963).
[23] 28 Wis. 2d at 359, 137 N.W. 2d at 18.

out of the school, and that one of Reynolds' associates was carrying a bag of burglary tools would provide the arresting officers probable cause to believe that Reynolds and his associates intended to burglarize the Burlington school. Assuming that it was proven that Reynolds was actually involved in the Two Rivers burglary, the further fact that bits of plaster found in the bag containing burglarious tools were the same bits of plaster as were removed from the Two Rivers school would indicate that there was a rational connection between the two events.

B. Proof of Involvement In Prior Offenses

Once it has been established that there is a sufficient connection between the prior crime or criminal act and the crime with which the defendant is charged, the prosecutor's next obligation is to prove the defendant's involvement in these prior offenses. His involvement may be shown in one of the following ways: 1) Proof that he *committed* or *performed* certain acts which are of a *criminal nature.* 2) Proof that he was *convicted* of prior crimes.

1) *Proof of Prior Acts*

There appears to be two different views as to the nature and quality of evidence needed to establish prior criminal acts as a condition to their being considered by the jury. One view holds that it is sufficient to *substantially* establish that the defendant committed these offenses. The other view maintains that the commission of these offenses must be proven *beyond a reasonable doubt.*

Corpus Juris Secundum points out that

> ". . . evidence of other crimes committed by the accused should be admitted only where they are substantially established although proof beyond a reasonable doubt or proof of conviction is not generally required. . . ."[24]

The question is what is meant by the term "substantially established?"

The majority opinion in the *Reynolds* case adheres to a proposition similar to that stated in *Corpis Juris Secundum.* The state failed to establish, the court stated, that Reynolds "actually played a role in the Two Rivers Affair. . . ."[25] Justice Gordon, in his concurring opinion, pointed out that:

> . . . under the holding of the majority it is sufficient if the accused was personally involved in previous acts which were similar in facts and close in time to those acts for which he is presently being tried.[26]

When could it be substantially established that Reynolds played a role in the Two Rivers affair? If such prior involvement did not have to

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[24] 22A C.J.S. *Criminal Law* §690 (1961); People v. Rosota, 58 Cal. 2d 304, 373 P. 2d 867 (1962).
[25] 28 Wis. 2d at 359, 137 N.W. 2d at 18.
[26] 28 Wis. 2d 350, 361, 137 N.W. 2d 14, 19 (1965) (concurring opinion).

be proven beyond a reasonable doubt, how much doubt must be present in the trial judge's mind before this evidence will be excluded?

The better rule would seem to be that the defendant's commission of these prior acts must be proven beyond a reasonable doubt. *American Jurisprudence* supports this view:

> . . . [T]he courts generally require that evidence of the accused's guilt of another crime shall not be admitted unless the proof of the other crime is clear and sufficient to authorize a finding of the defendant's guilt of such other crime; in other words its commission must be shown beyond a reasonable doubt.[27]

The 1925 Wisconsin case of *Magnuson v. State*[28] may support the proposition that only the act itself must be proven beyond a reasonable doubt. The evidence of a prior criminal act in that case was not only admitted into evidence but it was also left to the jury rather than the judge, to determine whether such acts should be considered. Magnuson was convicted of first degree murder. The victim was the wife of one Chapman. Chapman's wife was killed by an explosion of a bomb, which was disguised as a package and sent by mail to Mr. Chapman. Mr. Chapman was a member of the county drainage board and had taken part in laying out certain drainage ditches. Evidence was introduced at the trial indicating that Magnuson was opposed to this project. There was also other evidence establishing that a dredge was blown up shortly prior to the time a ditch was to be dredged on Magnuson's property. The trial judge instructed the jury that the evidence concerning the blowing up of the dredge could be considered if they were convinced beyond a reasonable doubt that Magnuson destroyed the dredge. The Wisconsin Supreme Court approved this instruction.[29]

The *Magnuson* case has never been overruled, unless by the *Reynolds* case. There is no statement in the *Reynolds* case concerning the jury's right to determine whether Reynolds was involved in the Two Rivers affair. The Wisconsin Supreme Court, however, held that it was error for such evidence to be admitted.[30] It could be presumed from this ruling that it is not for the jury to determine whether the evidence of other criminal acts should have a bearing on the case at trial. An analysis of these two cases leaves two questions: 1) Should the trial judge or the jury determine whether prior offenses should be considered? 2) What quantum of proof is needed to establish that the defendant performed a previous act of a criminal nature?

A rule which permits the prosecution to introduce evidence of prior misconduct of the defendant raises serious questions under the

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[27] 20 AM. JUR. EVIDENCE §318 (1939); Haley v. State, 84 Tex Crim. 629, 209 S.W. 675, 3 A.L.R. 779 (1919).
[28] 187 Wis. 122, 203 N.W. 749 (1925).
[29] *Id.* at 134, 203 N.W. at 754.
[30] 28 Wis. 2d at 359, 137 N.W. 2d at 18.

fifth amendment.[31] At the outset it must be recognized that in most circumstances the defendant in a criminal case is under some compulsion to testify and to deny the offense. In many instances the decision not to place the defendant on the stand is prompted by considerations other than his ability to deny his participation in the crime.[32] When to this compulsion to testify is added the further compulsion to explain his alleged participation in other prior misconduct, his right to be free from compulsory self-incrimination may be violated. The defendant may be able to explain his apparent involvement in prior similar criminal acts, but unable to explain his involvement in the offense with which he stands charged. Should he take the witness stand to explain only these prior offenses, the jury is inescapably led to the conclusion that he could not explain the present offense. Should he be questioned concerning the present offense, he is forced either to commit perjury, to convict himself or to assert his privilege against self-incrimination before the jury. This dilemma is incapable of resolution: to this choice a defendant may not be placed.[33]

As the prosecutor may not comment on the defendant's failure to testify in his own behalf, it would appear reasonable that he may not attempt to force the defendant to the stand by the accumulation of alleged prior misconduct. *Griffin v. California*[34] ruled that it was a violation of the self-incrimination clause of the fifth amendment to permit a prosecutor in a state criminal proceeding to make comments concerning the defendant's failure to testify. The Court stated that "what the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."[35] It appears, analogously, that when prior criminal acts are introduced into evidence, the court is also solemnizing the defendant's silence into evidence against him.

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[31] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[32] Harris B. Steinberg made the following observations regarding placing a defendant on the witness stand:

> Generally speaking, a defendant doesn't do himself any good on the stand, except in rare instances. He can be cross-examined as to his criminal record if he has one. There may be very real doubt as to how he will stand up under any hostile cross-examination. Many accused persons make poor witnesses. Some of them may be unprepossessing in appearance. Their speech may be rough and untutored. Their earnest denials just do not carry much force, while the admission against interest made during cross-examination usually sticks out like a sore thumb.

Interview of Harris B. Steinberg of the New York Bar by Monrad G. Paulsen of the Columbuia University School of Law in JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, THE PROBLEM OF A CRIMINAL DEFENSE 17-18 (1961).

[33] *Cf.* De Luna v. United States, 308 F. 2d 140 (5th Cir. 1962).

[34] 380 U.S. 609 (1965).

[35] *Id.* at 614.

2) *Proof of Prior Convictions*

Justice Gordon in his concurring opinion in the *Reynolds* case took the position that ". . . it [is] essential to limit the prosecution to *prior convictions* in offering proof of previous, related conduct as a means of proving the accused's intent to commit the crime currently charged."[36] Among the cases he cited for authority, only one, *United States v. Haynes,*[37] specified (by way of dicta) that a prior conviction was necessary. The court in the *Haynes* case cited no direct authority for its position. Haynes and one Barnes, in that case, were arrested for the federal offense of illegally selling alcohol. Two cans of moonshine liquor were found in Haynes' truck. In cross-examining Haynes, the prosecutor asked him questions relating to the sale of moonshine liquor. The court felt that these questions were asked only to impeach the defendant's testimony and not to show his intent, motive or design. It was thus ruled that only a former conviction for a felony or a misdemeanor amounting to *crimen falsi* would be admissible to impeach Haynes' credibility.[38] The court then suggested that even if the question was proper to show intent, motive, identity, scheme or plan,

> ". . . it would have been necessary for the government to show the defendant had been convicted of selling moonshine liquor at a time that would have been material to the offenses laid in the indictment."[39]

If it must be shown that the defendant was guilty of the prior offenses rather than that he performed acts of a criminal nature, then proof of the prior conviction or convictions would be most desirable, if not necessary. The defendant, not being convicted of such offenses, may be said to be indirectly charged with a crime without the constitutional[40] or statutory[41] safeguards of being informed of the nature and cause of the offense.

V. Conclusion

The defense attorney in Wisconsin has available to him several means of attacking the introduction of prior misconduct into evidence. Proof that the defendant was convicted of these prior offenses would have to be introduced if the prosecutor not only attempted to prove that the defendant *committed* these offenses, but also that he was *guilty* of them. If it only has to be proven that the defendant *committed* prior criminal acts, his right against self-incrimination may be violated because of an undue compulsion to testify. When the *Reynolds* case is compared with the *Magnuson* case, it is questionable in Wisconsin

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[36] 28 Wis. 2d 350, 361, 137 N.W. 2d 14, 19 (1965) (concurring opinion).
[37] 81 F. Supp. 63 (W. D. Penn. 1948).
[38] *Id.* at 68.
[39] *Ibid.*
[40] U.S. Const. amend. VI Wis. Const. art. I, §7.
[41] Wis. Stat. §§955.05, 955.075, 954.02 and 960.36 (1963).

what quantum of proof of the defendant's involvement in these prior offenses is needed. The majority opinion of the *Reynolds* case indicated that it is sufficient to prove that the defendant was *involved* in these acts. Once it has been proven that the defendant has committed the prior criminal acts, it must be established that there is a rational connection in experience between the prior acts and the crime charged. If the two criminal acts are similar in fact and close in time, it appears that there is a rational connection between the two. In certain circumstances, it may be argued that a rational connection is not established just because the two events are similar in fact and close in time. If the prior crime is introduced into evidence to prove the defendant's specific intent in the crime charged, the defense attorney may attempt to persuade the Wisconsin Supreme Court that, on the authority of the *Stevens* case, prior crimes may be introduced only to rebut any doubt of the defendant's identity.

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