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Missouri's Law on Admissibility of Other Crimes Evidence: Increasing Inclusivity

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Missouri's Law on Admissibility of Other Crimes Evidence: Increasing Inclusivity?

State v. Skillicorn[1]

I. INTRODUCTION

Evidence of other crimes, or uncharged misconduct evidence as it is commonly called, has been important in many criminal trials, including such well-publicized trials as that of O.J. Simpson for murder and those of William Kennedy Smith and Mike Tyson for rape.[2] Furthermore, this type of evidence is important because studies have shown that admission of uncharged misconduct evidence greatly increases the likelihood that a jury will find the defendant guilty.[3]

State v. Skillicorn[4] presents a look at the current state of the law concerning admission of other crimes evidence in Missouri. The case illustrates the difficulty in applying current rules on the admission of such evidence and the need for more definite guidelines on admission of other crimes evidence.

II. FACTS AND HOLDING

In August 1994, Dennis Skillicorn, Allen Nicklasson, and Tim DeGraffenreid left Kansas City, Missouri and headed east on a trip to pick up illegal drugs.[5] During their return trip on August 23rd, their car broke down about twenty miles east of Kingdom City, Missouri on Interstate Highway 70.[6] A state trooper stopped to help, but the three men refused any assistance.[7] By the next day, they made it about seventeen miles to the JJ overpass, a few miles

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1. 944 S.W.2d 877 (Mo.), *cert. denied*, 118 S. Ct. 568 (1997).

2. For a comprehensive discussion of uncharged misconduct evidence, see EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1998). Professor Imwinkelried states that Judge Ito's ruling which limited the amount of uncharged misconduct evidence the prosecution could use was a factor in O.J. Simpson's acquittal. *Id.* § 1.01. The turning point which led to the acquittal of William Kennedy Smith came when the circuit judge "refused to allow the testimony of three women who claimed that Smith had also raped or assaulted them in the past." Mark Hanson, *Experts Expected Smith Verdict*, 78 A.B.A. J. 18 (1992). Mike Tyson's conviction was partially a result of uncharged misconduct evidence which was admitted under Indiana's rules of evidence. William Nack, *On Trial*, SPORTS ILLUSTRATED, Jan. 20, 1992, at 46, 49.

3. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160-61, 178-79 (1966). Nickolas J. Kyser, Note, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REFORM 535, 544 (1974).

4. 944 S.W.2d 877 (Mo.), *cert. denied*, 118 S. Ct. 568 (1997).

5. *Id.* at 882.

6. *Id.*

7. *Id.*

from Kingdom City, where they burglarized a home and stole some guns and money.[8] They then used the money to pay for a tow to Kingdom City.[9] The garage in Kingdom City could not repair all of the car problems, but the three men managed to drive back east toward the home they had recently robbed.[10] However, their car stalled again on the south outer road not far from Kingdom City.[11]

Soon after, Richard Drummond came upon the three men and offered to drive them to a phone.[12] Skillicorn and Nicklasson both had stolen guns from the previous burglary.[13] Nicklasson held a gun to Drummond's head while they loaded the other stolen items into Drummond's trunk.[14] As Drummond drove the car east on Interstate-70, accompanied by the three men, Skillicorn and Nicklasson discussed Drummond's fate quietly, not wanting him to panic.[15] They then instructed him to take an exit just east of Higginsville, Missouri and drove four miles to a secluded area.[16] At this juncture, Skillicorn demanded that Drummond relinquish his wallet, and then watched as Nicklasson led Drummond toward a wooded area and shot Drummond twice in the head.[17]

Following the shooting, the three men drove Drummond's car to a friend's house in Blue Springs, Missouri.[18] An argument ensued outside of the house in which Skillicorn and Nicklasson both held guns to the head of Keri McEntee, a friend of DeGraffenreid's who was present at the time. The owner of the house then came outside and Skillicorn and Nicklasson left.[19] The two men subsequently committed several burglaries and a robbery before they were caught by law enforcement officers.[20]

The Circuit Court of Lafayette County convicted Dennis Skillicorn of first degree murder and sentenced him to death.[21] The Missouri Supreme Court affirmed, holding that evidence of the uncharged assault against McEntee, committed by Skillicorn and Nicklasson following Drummond's murder, was relevant and admissible.[22] The court concluded the evidence was part of a sequence of events surrounding the murder and that it helped create a coherent

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 883.
17. *Id.*
18. *Id.* at 886.
19. *Id.*
20. *Id.* at 888.
21. *Id.* at 877.
22. *Id.* at 886-87.

picture for the jury, showing that Skillicorn aided or encouraged Nicklasson in the murder of Drummond.[23]

III. LEGAL BACKGROUND

A. Evidence of Other Crimes

The rule prohibiting the use of uncharged misconduct evidence to show the defendant's propensity to commit a particular crime traces back over three centuries to England.[24] Courts initially followed the view that any evidence relevant to the currently charged crime was admissible, even if only to prove the defendant's character,[25] which was in turn used to prove conduct.[26]

Then, in 1865, Parliament passed an Act leading to the rule forbidding the prosecution from attacking the defendant's character unless the defendant put her character in issue.[27] In the early twentieth century, this restriction led to many alternative theories of logical relevance for admitting uncharged misconduct evidence to prove a defendant's knowledge, intent, motive, and identity.[28] At this time in England, courts tended to view the uncharged misconduct evidence doctrine as inclusive, meaning they would allow such evidence under most any theory of logical relevance except to prove character.[29] Eventually, all of these theories became exceptions to the general rule prohibiting the use of uncharged misconduct evidence.[30] This led to some debate over whether English courts were actually following an exclusionary approach, with evidence admissible only if it fell into a recognized exception.[31] However, the inclusionary view, which held that evidence of uncharged misconduct was admissible unless the only theory of logical relevance was the use of the defendant's character as proof of his conduct, was eventually vindicated as the sounder approach.[32]

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23. *Id.*

24. IMWINKELRIED, *supra* note 2, § 2.25.

25. IMWINKELRIED, *supra* note 2, § 2.25.

26. IMWINKELRIED, *supra* note 2, § 2.25.

27. IMWINKELRIED, *supra* note 2, § 2.25. Parliament passed the Treason Act of 1695, which provided that a defendant could only be tried for the act specified in the pleading against him. IMWINKELRIED, *supra* note 2, § 2.25.

28. IMWINKELRIED, *supra* note 2, § 2.26.

29. IMWINKELRIED, *supra* note 2, § 2.26.

30. *See* IMWINKELRIED, *supra* note 2, § 2.26; *see also* Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 951 (1988).

31. IMWINKELRIED, *supra* note 2, § 2.26. For a discussion of the "inclusionary" versus "exclusionary" views, see Edward G. Mascolo, *Uncharged-Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 CONN. B.J. 281, 287-89 (1993).

32. IMWINKELRIED, *supra* note 2, § 2.26.

English rules regarding the admissibility of uncharged misconduct evidence influenced American courts.[33] In the early 1800s, American courts generally restricted the use of evidence of other crimes.[34] Toward the mid-1800s, however many American courts began to expand the number of exceptions for admitting such evidence.[35] Then came the landmark case of *People v. Molineux*[36] that discussed when evidence of uncharged misconduct was admissible. In general, the State could not offer evidence of other crimes to prove character, which was in turn used to show the defendant was guilty of the crime with which he was charged.[37] However, the court provided a list of logical relevance theories making uncharged misconduct evidence admissible for purposes other than to show character. These theories included using the evidence to show intent, motive, identity, absence of mistake, and common scheme or plan.[38]

The exceptions to admitting uncharged misconduct evidence further evolved after *Molineux*. Significantly, courts began to recognize what became known as *res gestae* evidence.[39] This evidence consisted of facts which surrounded the offense at issue. Courts generally admitted this evidence because the facts were so connected with the charged offense as to be inextricably intertwined, because they were components of the charged offense, or sometimes because they served to present a complete picture of the crime.[40] Some courts treated this type of evidence as evidence of other crimes which was admitted as

33. Schuster, *supra* note 30, at 953.

34. Schuster, *supra* note 30, at 953.

35. Schuster, *supra* note 30, at 953.

36. 61 N.E. 286 (N.Y. 1902).

37. *Id.* at 292-93.

38. *Id.* at 293.

39. Schuster, *supra* note 30, at 955-56.

40. Schuster, *supra* note 30, at 956. *See also* State v. Harris, 870 S.W.2d 798, 810 (Mo. 1994) (admitting evidence of "uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged"); State v. Jordan, 937 S.W.2d 262, 268 (Mo. Ct. App. 1996) (stating that evidence of separate offense is admissible if it tends to establish the res gestae of the charged offense). Courts have taken a variety of views on the admissibility of evidence under the res gestae theory. *See* IMWINKELRIED, *supra* note 2, § 6.28 (discussing the view permitting admission of uncharged misconduct evidence if the crime is committed simultaneously); IMWINKELRIED, *supra* note 2, § 6.29 (discussing the view that the uncharged misconduct evidence just needs to be in the same series of events in order to be admissible); IMWINKELRIED, *supra* note 2, § 6.30 (discussing the view that requires the evidence to be independently logically relevant in order to be admissible). *See also, e.g.*, United States v. Bettelyoun, 892 F.2d 744, 746-47 (8th Cir. 1989) (stating evidence of assault several hours before charged shooting was an "integral part of the operative facts of the crime charged"); Pickens v. Lockhart, 802 F. Supp. 208, 217 (E.D. Ark. 1992), *aff'd*, 4 F.3d 1446 (8th Cir. 1993) ("almost simultaneous").

an exception to the general prohibition,[41] while others got around the general rule altogether by characterizing it as evidence which was part of the crime charged.[42]

Inconsistent treatment by courts of the general rule prohibiting the admission of evidence of other crimes and of the *res gestae* exception eventually led to the adoption of Federal Rule of Evidence 404(b), based in large part on the *Molineux* decision.[43] Rule 404(b) has characteristics of both the inclusionary and exclusionary approaches that courts used in the past.[44] The first sentence of Rule 404(b) states the general rule that evidence of other crimes is not admissible to prove "the character of a person in order to show action in conformity therewith."[45] Such evidence, however, may be used for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."[46]

While this list of exceptions indicates that evidence of other crimes should not be admitted unless it falls under one of the listed categories, the "such as" language preceding the list of exceptions has led to the belief that the list is not

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41. Schuster, *supra* note 30, at 956 (citations omitted).

42. Schuster, *supra* note 30, at 957 (citations omitted).

43. Schuster, *supra* note 30, at 958. The federal rules of evidence were adopted in 1975. Rule 404(b) states in full:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

44. *See* Schuster, *supra* note 30, at 95; *see also* IMWINKELRIED, *supra* note 2, § 2.31 (stating that "[o]n its face, [404(b)] is 'vintage' inclusionary approach") (citing Michael S. Quinn, Comment, *The Jurisprudence of Similar Acts Evidence in the Eighth Circuit*, 48 UMKC L. REV. 342, 389 (1980)); Jason M. Brauser, Comment, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1597 (1994) (stating that 404(b) follows the inclusionary approach); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U.L. REV. 515, 521 (1995) (stating that the Federal Rules of Evidence essentially codify the "common-law exclusionary rule" but with a "slightly broader view of the traditional rule of exclusion") (citations omitted). Many scholars, including Professor Imwinkelried, also point out that the use of the words "such as" in both Rule 404(b) itself and in the Advisory Committee's Note is evidence of the drafters intent that the rule follow an inclusionary approach. IMWINKELRIED, *supra* note 2, § 2.31.

45. FED R. EVID. 404(b).

46. FED R. EVID. 404(b).

exhaustive.[47] Therefore, it is generally thought that the Federal Rules of Evidence follow an inclusionary approach, whereby such evidence can be admitted for any logically relevant purpose *other* than to show character.[48] Rule 404(b) was designed to bring about uniformity in the way federal courts treat the use of uncharged misconduct evidence. This goal has largely been successful, as every federal circuit court has now held that Rule 404(b) follows the inclusionary approach.[49]

B. Development of the Evidence of Other Crimes Doctrine in Missouri

Missouri's law of evidence, unlike the federal rules of evidence, has not been codified into a formal set of rules to which the courts can look. Instead, it has developed through case law and statutes.[50] The Missouri rules of evidence are summarized, however, in Missouri Evidence Restated.[51] Missouri's equivalent of Federal Rule of Evidence 404(b) is summarized as follows:

> Otherwise, evidence of other crimes, wrongs, or acts may be admissible when offered on proper lesser included issues, such as proof of motive, intent, preparation, common scheme or plan, knowledge, identity, opportunity or "means of committing" the charged crime, or absence of mistake or accident, and when offered for other purposes, including proof of the res gestae of the crime charged, and proof of later criminal conduct intended to intimidate a crime witness.[52]

Notable differences from the federal rules are the addition of the "common scheme" language instead of just using the "plan" exception, the language pertaining to the *res gestae* of a crime, and evidence of intimidation of witnesses.

Like the federal rules, the development of Missouri's common law regarding the admission of evidence of other crimes stemmed from *People v.*

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47. Brauser, *supra* note 44, at 1597.

48. Brauser, *supra* note 44, at 1597. *See also* IMWINKELRIED, *supra* note 2, § 2.31.

49. Professor Imwinkelried states that as of the mid-1980s, the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia circuits all follow an inclusionary approach to admitting evidence of other crimes. IMWINKELRIED, *supra* note 2, § 2.31. In the Third circuit, however, the law on this subject was unclear. By the mid-1990s, every circuit had held that 404(b) utilizes the inclusionary rule. IMWINKELRIED, *supra* note 2, § 2.31. *But see* IMWINKELRIED, *supra* note 2, § 2.30 (noting that while the inclusionary approach is now the majority view, some states still follow the exclusionary view).

50. MO. EVID. RESTATED at v (Mo. Bar 3d ed. 1996).

51. MO. EVID. RESTATED at v (Mo. Bar 3d ed. 1996).

52. MO. EVID. RESTATED § 404(b)(3) (Mo. Bar 3d ed. 1996).

Molineux.[53] Thus, the Missouri practice generally mirrors the federal rules, including the traditional exceptions outlined in Federal Rule 404(b). However, one significant difference between the two approaches is that while the federal rules are generally interpreted under an inclusive view, Missouri traditionally has not followed such an approach.[54] Missouri courts have instead tended to admit evidence of other crimes only if it is relevant to prove an established exception to the general rule against admitting such evidence. To determine these exceptions, one must examine the cases that have been instrumental in the development of Missouri's law in this area.

Molineux served as the basis for the current Missouri practice concerning admission of evidence of other crimes.[55] *Molineux* established that evidence of other crimes was admissible to prove the crime charged in five specific situations: to establish motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of the defendant.[56] Following *Molineux*, the Missouri Supreme Court, in *State v. Spray*,[57] announced the general rule that evidence of separate and distinct crimes is not admissible unless it has some legitimate tendency to directly establish the defendant's guilt for the charged offense.[58]

Following *Spray*, the court adopted several specific exceptions allowing for other crimes evidence. In 1905, in *State v. Bailey*,[59] the court adopted a common plan exception.[60] In *State v. Buxton*,[61] the Missouri Supreme Court reaffirmed the general rule stated in *Spray* and attempted to clarify the common plan exception, holding that a defendant did not fall under the common plan exception simply because had committed one or more similar crimes.[62]

In 1947, in *State v. Shilkett*,[63] the court admitted evidence of other crimes to establish the absence of mistake or accident on the part of the defendant.[64]

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53. *See* Bradley D. Kuhlman, Comment, *Prior Misconduct Evidence in Missouri*, 58 MO. L. REV. 907, 908 (1993).

54. IMWINKELRIED, *supra* note 2, § 2.28. At the height of the exclusionary approach around the time of *Molineux*, states that were traditionally considered as following the inclusionary view included California, Connecticut, Georgia, Idaho, Illinois, Indiana, Maine, Massachusetts, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and Wisconsin. IMWINKELRIED, *supra* note 2, § 2.28.

55. *See supra* note 53 and accompanying text.

56. People v. Molineux, 61 N.E. 286, 294 (N.Y. 1902).

57. 74 S.W. 846 (Mo. 1903).

58. *Id.* at 848-49.

59. 88 S.W. 733 (Mo. 1905).

60. *Id.* at 740-41.

61. State v. Buxton, 22 S.W.2d 635, 636-37 (Mo. 1929).

62. *Id.* at 636-37.

63. State v. Shilkett, 204 S.W.2d 920 (Mo. 1947).

64. *Id.* at 923.

Additionally, the court held that unless proof of a distinct crime had a legitimate tendency to directly establish the defendant's guilt for the charged offense, or showed an absence of mistake or accident, proof of such crime violated the defendant's right to be tried only for the offense for which he was on trial.[65]

In 1954, in *State v. Reese*,[66] the court again reaffirmed the general rule that other crimes evidence could only be admitted if it had some legitimate tendency to prove the crime charged.[67] Furthermore, the court cited *Molineux*, stating that its exceptions were well established,[68] and that the test for admission as an exception was as follows:

> The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence requires that its admission should be subjected by the courts to rigid scrutiny.[69]

The court also stated that whether logical relevancy existed was a question for the court to be resolved in light of the tendency that such evidence could prejudice the minds of the jurors.[70] If there was not a clear connection between the evidence at issue and the charged offense, the defendant should be given the benefit of the doubt[71] and the evidence should be rejected.

After many years of recognizing only the five *Molineux* exceptions, in 1985, the Missouri Supreme Court took a step toward adopting a new exception to the admission of other crimes evidence. In *State v. Kenley*,[72] the defendant was convicted of murder and sentenced to death.[73] The court admitted evidence of a shooting just prior to the robbery and murder for which the defendant was

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65. *Id.* at 923.

66. 274 S.W.2d 304 (Mo. 1954).

67. *Id.* at 307.

68. *Id.* For Missouri cases which have utilized various exceptions to admit or exclude evidence of other crimes, see State v. Weaver, 912 S.W.2d 499, 518 (Mo. 1995), *cert. denied*, 117 S. Ct. 153 (1996) (motive); State v. Neil, 869 S.W.2d 734, 736-37 (Mo. 1994) (common scheme or plan); State v. Shaw, 847 S.W.2d 768, 777-78 (Mo.), *cert. denied*, 510 U.S. 895 (1993) (intent); State v. Mitchell, 491 S.W.2d 292, 295 (Mo. 1973) (identity); State v. Crawford, 914 S.W.2d 390, 392-93 (Mo. Ct. App. 1996) (knowledge); State v. Kerr, 531 S.W.2d 536, 542 (Mo. Ct. App. 1975) (preparation).

69. *Reese*, 274 S.W.2d at 307.

70. *Id.*

71. *Id.*

72. 693 S.W.2d 79 (Mo. 1985).

73. *Id.* at 80.

on trial.[74] The court stated that "[c]onduct before and after the commission of the charged crime is relevant where it relates to the elements of the charged crime."[75] The court found the evidence was relevant to the defendant's state of mind during the course of the charged murder,[76] and admitted it under the theory that it also showed a common scheme or plan.[77]

Then in 1990, in *State v. Wacaser*,[78] the court admitted evidence of another alleged killing committed by the defendant even though charges relating to it had been dropped.[79] The defendant, however, was on trial for a murder that occurred contemporaneously with the other killing.[80] The court cited *Kenley* for the proposition that "[t]he state is entitled to introduce evidence of the circumstances surrounding the offense charged, and the relevant circumstances may include other crimes."[81] While neither *Kenley* nor *Wacaser* expressly so stated, it appears they may have utilized the *res gestae* concept to some extent, by admitting evidence so inextricably intertwined as to be part of the charged offense, a component of the charged offense, or necessary to "complete the picture."[82]

Although *Kenley* and *Wacaser* were somewhat unclear as to whether the court was establishing a new exception to the general rule on admissibility of other crimes evidence, in 1993 the Missouri Supreme Court clearly adopted a new exception in *State v. Bernard*.[83] The stage for this case was set one year

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74. *Id.* at 82.

75. *Id.*

76. *Id.* For a discussion of the use of other crimes evidence to prove the defendant's mental state, see Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41 (1990).

77. State v. Kenley, 693 S.W.2d 79, 82 (Mo. 1985).

78. 794 S.W.2d 190 (Mo. 1990).

79. *Id.* at 194

80. *Id.*

81. *Id.* (citing *Kenley*, 693 S.W.2d at 79).

82. *See supra* notes 39-42 and accompanying text; *see also* State v. Flenoid, 838 S.W.2d 462, 467 (Mo. Ct. App. 1992) (stating evidence that defendant charged with cocaine possession carried a beeper and cash at the same time as arrest for possession of drugs constituted "part of the res gestae of the charge being tried"); State v. Davis, 806 S.W.2d 441, 442-43 (Mo. Ct. App. 1991) (stating evidence that police officers saw defendant charged with possession of controlled substance exchange items with other persons prior to his arrest "established the res gestae of the crime with which defendant was charged"); *cf.* IMWINKELRIED, *supra* note 2, §§ 6.28-6.30 (discussing cases which admit evidence of other crimes committed simultaneously with the charged act, those which admit such evidence if it is committed in the same series of events as the charged act, and those which require an independent theory of relevance other than mere temporal connection to admit such evidence, with an exception for crimes which are inseparably connected).

83. 849 S.W.2d 10 (Mo. 1993).

earlier in *State v. Sladek*.[84] In *Sladek*, the defendant, a dentist, was charged with sexual assault for the rape of one of his patients who was also employed as an assistant in the same office.[85] The defendant raped the victim after sedating her to examine a chipped tooth.[86] The evidence at issue was testimony by three former patients that the defendant had touched their breasts (and one who testified that Sladek called her at home four times on a Sunday, asking her to call him at home).[87] The court held it inadmissible because the evidence did not tend to prove the defendant was guilty of sedating and raping the victim in the instant case.[88]

However, Justice Elwood Thomas wrote a concurring opinion in which he discussed the application of the rule regarding the admissibility of other crimes evidence[89] and the difficulty of applying the rule and its exceptions, particularly the common plan or scheme exception.[90] In the course of his opinion, he specifically referred to an exception called "signature modus operandi/corroboration," which he said was related to the identity exception.[91] He discussed a case that involved evidence of past similar misconduct by the defendant but where identity of the defendant was not an issue; the evidence only served to corroborate the victim's complaint.[92] Justice Thomas posited that the same probative value and prejudice were involved in a corroboration case as in an identity case, and thus, evidence that fell into the signature modus operandi/corroboration category was also a proper exception.[93]

Although the majority in *Sladek* did not adopt the views of Justice Thomas at that time, his position was adopted one year later in *State v. Bernard*.[94] *Bernard* involved a defendant who was charged with first degree sexual abuse and attempted forcible sodomy.[95] The evidence at issue was the testimony of

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84. 835 S.W.2d 308 (Mo. 1992).

85. *Id.* at 309.

86. *Id.*

87. *Id.* at 309-10.

88. *Id.* at 309-10, 312-13.

89. *Id.* at 313 (Thomas, J., concurring). In footnote one, Justice Thomas notes that the opinion uses the term "prior crimes" to refer to the type of evidence being considered under this issue, but that the same issues could arise with evidence of crimes subsequent to the one charged. *Id.* at 314.

90. *Id.* at 313-18.

91. *Id.* at 316.

92. *Id.* at 316-317 (citing State v. Dee, 752 S.W.2d 942 (Mo. Ct. App. 1988)).

93. *Id.* at 317. Justice Thomas also noted this exception involved reasoning based upon the defendant's propensity to commit the type of crime at issue. *Id.* Therefore, as this is inconsistent with the general rule, it is "particularly important that the requirement for a signature modus operandi be strictly enforced." *Id.*

94. 849 S.W.2d 10 (Mo. 1993).

95. *Id.* at 12.

four witnesses, all about the same age as the victim, concerning prior sexual abuse committed by the defendant for which he had never been charged.[96]

The court began by stating the general rule from *State v. Reese*[97] that although evidence of other crimes is not admissible to show the propensity of the defendant to commit a crime, it is admissible if it has some legitimate tendency to establish the defendant's guilt for the charged offense.[98] The court then noted that such legitimate tendency tends to exist when the evidence of other crimes establishes "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; [or] (5) the identity of the person charged with the commission of the crime on trial."[99] However, the court stated that even if evidence did not fall within one of the five listed exceptions, it could still be legally and logically relevant, and therefore admissible.[100] The court then formally adopted the signature modus operandi/corroboration exception raised by Justice Thomas in *Sladek*.[101]

As a result of the holding in *Bernard*, the Missouri Supreme Court formally recognized six exceptions to the general prohibition against the use of evidence of other crimes. Given Missouri's history of following an exclusionary approach to the doctrine of other crimes evidence, this raised the question of whether the court would thereafter follow only the six enumerated exceptions, or would instead embrace a more inclusionary approach by admitting any evidence of other crimes that could be shown as legally and logically relevant and which did not go to show the defendant's character.

IV. INSTANT DECISION

In *State v. Skillicorn*,[102] defendant Dennis Skillicorn was convicted of first degree murder and sentenced to death.[103] On his appeal to the Missouri Supreme Court, Skillicorn asserted, among twenty-one other points, that the trial court "erred in admitting evidence of subsequent offenses [by the defendant] because such evidence was not relevant to any material issue and its prejudicial impact

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96. *Id.*

97. 274 S.W.2d 304, 307 (Mo. 1954).

98. *Id.* at 13.

99. *Id.* (citing State v. Sladek, 835 S.W.2d 308, 311 (Mo. 1992) (quoting People v. Molineux, 61 N.E. 286, 294 (N.Y. 1902))).

100. *Id.* The court noted that in cases of sexual abuse against children, Missouri has been more liberal in admitting evidence of the defendant's past sexual misconduct. *Id.*

101. *Id.* at 17. The court stated "[i]n the context of corroboration, evidence of prior crimes is logically relevant in that it has a legitimate tendency to prove a material fact in the case by corroborating the testimony of the victim as to the sexual assault." *Id.*

102. 944 S.W.2d 877 (Mo.), *cert. denied*, 118 S. Ct. 568 (1997).

103. *Id.* at 882.

outweighed its probative value . . . ."[104] A divided court held that evidence of an uncharged assault occurring several hours after the murder, in which the defendant and his accomplices threatened another victim's life with the same guns used in the murder, was admissible to show that the defendant aided in or encouraged one of his accomplices in the murder of the victim and that he did so after due deliberation.[105] In so holding, the court admitted evidence of the assault because it presented a complete and coherent picture of the sequence of events surrounding the murder, thereby formally recognizing a seventh exception to the general rule against the admission of other crimes evidence.[106]

A. The Majority Opinion

The majority first noted the principle that defendants "have the right to be tried only for the offense for which they are charged."[107] The court then cited *Bernard* and *Buxton* for the proposition that evidence of other crimes is not admissible to show the propensity of the defendant to commit a crime, but may be admissible if it has a legitimate tendency to prove that the defendant is guilty of the crime with which he is charged.[108] The court further stated the evidence must also be legally relevant "in that its probative value outweighs its prejudicial effect."[109]

The majority highlighted the established exceptions for when evidence of other crimes has been admissible in previous cases.[110] The court noted the five "recognized exceptions" of using the evidence to show intent, motive, absence of mistake or accident, or a common scheme or plan.[111] Additionally, the court cited several cases where they also permitted evidence of other crimes in the past to show the circumstances or sequence of events surrounding the charged

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104. *Id.* at 883.

105. *Id.* at 887.

106. *Id.* at 886-87. While the court pointed to several cases as previously establishing the use of such evidence for this purpose, the Missouri Supreme Court had never explicitly recognized this exception and the previous cases are all factually distinguishable (in that each involved evidence of other crimes that occurred either before or contemporaneous with the charged offense, rather than after the charged offense). Furthermore, while the court again was not very clear that it was adopting a new exception, two months later in *State v. Roberts*, 948 S.W.2d 577, 591 (Mo. 1997), the Missouri Supreme Court made it clear that is what it indeed did in this case. *See infra* notes 131-32 and accompanying text.

107. State v. Skillicorn, 944 S.W.2d 877, 886 (Mo.) (quoting State v. Hornbuckle, 769 S.W.2d 89, 96 (Mo. 1986)), *cert. denied*, 118 S. Ct. 568 (1997).

108. *Id.*

109. *Id.* at 886 (citing State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993)).

110. *Id.* at 886-87.

111. *Id.* at 886. (citing State v. Garrison, 116 S.W.2d 23, 24 (Mo. 1938)).

offense[112] or to help present a complete and coherent picture.[113] The court then stated that the "recognized exceptions" were never meant to constitute an "exclusive list" of exceptions.[114] It pointed to the rule from *Buxton* that evidence must merely have a legitimate tendency to prove the defendant guilty of the charged offense and it must be "more probative than prejudicial."[115]

In the instant case, the majority stated the evidence regarding Skillicorn's assault was a "continuation of the sequence of events that presents a coherent picture of Skillicorn's crime."[116] The court held such evidence was particularly relevant because of its temporal closeness to the charged murder, because the same guns were used in Drummond's murder and in the assault on McEntee, and because the assault was committed to protect Drummond's car—the object for which they had killed him.[117]

B. The Dissent

Judge Covington specifically disagreed with the majority's admission of conduct by Skillicorn after the murder.[118] She stated that "[t]he law on admissibility of uncharged misconduct is well settled."[119] She then discussed the facts of *State v. Reese*, in which the Missouri Supreme Court stated the general rule that proof of other crimes is not admissible unless it has a legitimate tendency to directly prove the defendant's guilt of the offense for which he is charged.[120] Furthermore, Judge Covington stated that the use of evidence of other crimes could violate the defendant's right to be tried only for the charged offense if it is not "properly related" to the issue on trial.[121] She expressed concern that a jury could convict a defendant based on the "bad person" argument rather than because he is guilty of the offense for which he is on trial.[122]

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112. *Id.* (citing State v. Wacaser, 794 S.W.2d 190, 194 (Mo. 1990); State v. Flenoid, 838 S.W.2d 462, 467 (Mo. Ct. App. 1992); State v. Davis, 806 S.W.2d 441, 443 (Mo. Ct. App. 1991)).

113. *Id.* at 886-87 (citing *Flenoid*, 838 S.W.2d at 467).

114. *Id.* at 887 (citing State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993)).

115. *Id.* (citing State v. Buxton, 22 S.W.2d 635, 636 (Mo. 1929)).

116. *Id.* at 887.

117. *Id.* The court held that alternatively, the jury could infer "Skillicorn's murderous mental state" from the evidence of the events that surrounded the murder. *Id.*

118. *Id.* at 900 (Covington, J., dissenting).

119. *Id.*

120. *Id.* (citing State v. Reese, 274 S.W.2d 304, 307 (Mo. 1954)).

121. *Id.* (citing *Reese*, 274 S.W.2d at 307).

122. *Id.* (citing State v. Sladek, 835 S.W.2d 308, 314 (Mo. 1992) (Thomas, J., concurring)).

Judge Covington then addressed the exceptions to the general rule.[123] She noted that *Reese* set forth the "well settled exceptions" and that *Bernard* had stated that evidence of other crimes was admissible to prove the crime charged when it was used to establish motive, intent, absence of mistake or accident, common scheme or plan, identity of the person charged with the offense, or a signature modus operandi.[124] Whether the evidence was legally relevant enough to fall within one of the exceptions is a question for the court to decide "in light of the consideration that the inevitable tendency of such evidence is to raise a 'legally spurious presumption of guilt' in the minds of jurors."[125] Additionally, if the court did not clearly see the logical relevance between the evidence at issue and the charged offense, the defendant should be given the benefit of the doubt and the evidence should be held inadmissible.[126]

In the instant case, Judge Covington believed the majority disregarded the court's previous views in *Reese*, *Bernard*, and *Sladek*.[127] She stated the evidence of the assault on McEntee did not fall into any of the established exceptions.[128] She further believed that if it was admissible under the idea that it was part of the sequence of events surrounding the charged offense, this would only beg the question as to what evidence would *not* fall into this category.[129] Therefore, Judge Covington argued the evidence was not logically relevant, lacked any probative value, and that its admission was reversible error.[130]

V. COMMENT

The effect of the majority's holding in *Skillicorn* is to formally create a seventh exception to the general rule prohibiting the use of evidence of other crimes to prove the defendant guilty of the crime for which he is currently on trial. If there still was a question as to whether the court did indeed adopt the exception that such evidence may be used to present a complete and coherent picture of the sequence of events surrounding the charged offense, the court

123. *Id.*
124. *Id.* (citing State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993)).
125. *Id.* at 900-01 (quoting State v. Reese, 274 S.W.2d 304, 307 (Mo. 1954)).
126. *Id.* at 901 (citing *Reese*, 274 S.W.2d at 307).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* Judge Robertson wrote a separate concurrence in part and concurrence in the result with which Judge Benton concurred. He agreed completely with Judge Covington's analysis of admission of evidence of other crimes except that he did not believe that the erroneous admission of the evidence pertaining to the assault on McEntee required reversal. *Id.* at 899-900 (Robertson, J., concurring). Thus, while six of seven justices agreed on the conviction, the court was divided 4-3 as to the admissibility of the other crimes evidence.

answered that question two months later in *State v. Roberts*[131] when it stated, "*Skillicorn* notes a seventh category permitting evidence of a continuation of a sequence of events that assist in painting a coherent picture of the crime."[132] The court in *Roberts* also noted that prior to *Skillicorn*, *Bernard* recognized five categories of exceptions and added a sixth exception.[133]

Thus, the Missouri Supreme Court currently has recognized seven exceptions to the rule against admission of evidence of other crimes, two of which have been adopted since 1993. While Missouri traditionally has taken an exclusionary approach to the doctrine of other crimes evidence,[134] adoption of these new exceptions creates the appearance that the court may now be tending toward a more inclusionary approach, admitting evidence of other crimes so long as it is both logically and legally relevant and does not merely prove the character of the defendant and his propensity to commit the charged crime. Indeed, the *Bernard* court may have been essentially stating as much when it said "[e]vidence of prior misconduct that does not fall within one of the five enumerated exceptions may nevertheless be admissible if the evidence is legally and logically relevant."[135] While this was not the first time the Missouri Supreme Court had mentioned this general rule, *Bernard* and *Skillicorn* served as key cases in the court's evolving view on the admissibility of evidence of other crimes, as they represented situations where the court utilized an inclusionary view in order to admit evidence that did not fit within the traditionally established exceptions.

This trend toward the inclusionary approach, while clearly in line with the majority of jurisdictions (both state and federal), does raise some potential concerns. First, adoption of such an approach gives courts tremendous discretion over whether to admit evidence of other crimes. The inclusionary approach provides no clear guidelines on when to admit such evidence and puts the burden on the trial court to determine its logical and legal relevancy. Following an exclusionary form of the rule instead, in the words of the Court of Appeals of Maryland, would "clearly serve[] to remind the bench and bar that,

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131. 948 S.W.2d 577 (Mo. 1997). *Roberts* involved a defendant who was convicted of murder and sentenced to death for beating to death a 56 year-old woman. *Id.* at 585. In this case, there was evidence that the day after the murder, the defendant drove around town in the victim's car and at some point the car was stolen from him. *Id.* at 590-91. Prior to the trial, the defendant made a videotaped statement in which he said that he wanted to kill the people who stole the car from him. *Id.* at 590. The defense sought to have this evidence excluded, but the court admitted it under the theory that this was a continuation of the sequence of events that presented a clear and coherent picture of the crime, citing *Skillicorn* in support. *Id.* at 585, 591.

132. *Id.* at 591.

133. *Id.*

134. *See supra* note 54 and accompanying text.

135. State v. Bernard, 849 S.W.2d 10, 13 (Mo. 1993) (citing State v. Sladek, 835 S.W.2d 308, 311-12 (Mo. 1992)).

unlike most other evidence, this evidence carries with it heavy baggage that must be closely scrutinized before admissibility is warranted."[136] Granting courts the discretion that exists under the inclusionary view will also make it more difficult for defendants to have these evidentiary rulings overturned on appeal.

Second, the inclusionary approach gives the State an additional tool in criminal prosecutions, as it will be harder for defendants to argue against the admission of evidence of other crimes. Their only argument essentially will be the prejudicial effect of the evidence admitted against them. Furthermore, the United States Supreme Court, in a case involving admissibility of other crimes evidence under Federal Rule of Evidence 404(b), expressed that it shared the "petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b)."[137] Given the prominence of this concern, the Maryland Court of Appeals aptly stated the logic behind the exclusionary approach when it noted that "it will be the exceptional, and not the usual, case where the evidence of other bad acts is substantially relevant for reasons other than proof of criminal character. If that assumption is correct, and we believe it is, the exclusionary approach is certainly logical."[138]

In addition to the concerns raised by use of the inclusionary approach, the adoption of the particular exception used in *Skillicorn* presents particular problems of its own. As Judge Covington pointed out in her dissent, when evidence of other crimes is admitted but is not properly related to the cause of action on trial, it "violates the defendant's right to be tried for the offense for which he has been indicted."[139] There is a concern that the jury may otherwise convict the defendant for being a "bad person" instead of properly convicting him because he committed the crime for which he is on trial.[140] Judge Covington further stated the principle that if the court could not see a clear, logical connection between the evidence of the other crime and the crime with which the defendant is charged, then the court should give the benefit of the doubt to the defendant and not admit the evidence.[141]

In the instant case, the court admitted the evidence as part of the sequence of events surrounding the murder allegedly committed by the defendant. It is at least somewhat questionable whether evidence of actions by a defendant *subsequent* to the commission of a murder which are not in some way inseparable from the murder itself will always be probative of the fact that the defendant committed the murder. Indeed, Judge Covington pointed out that if the evidence at issue fit into the "sequence of events surrounding the [murder],"

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136. Harris v. Maryland, 597 A.2d 956, 962 (Md. 1991).

137. Huddleston v. United States, 485 U.S. 681, 691 (1991).

138. Harris v. Maryland, 597 A.2d 956, 961 (Md. 1991).

139. State v. Skillicorn, 944 S.W.2d 877, 900 (Mo.), *cert. denied*, 118 S. Ct. 568 (1997).

140. *Id.*

141. *Id.* at 901.

it would be difficult to determine what evidence would *not* fall into this category.[142] Therefore, by admitting evidence of other crimes under this theory, there is the potential problem that courts will face the difficulty of deciding at what point during the circumstances surrounding the charged crime does evidence of some other criminal act become no longer logically relevant. The result of adopting this exception will be that a court will have broad discretion in admitting evidence of surrounding circumstances that it views as logically relevant to establishing the defendant's guilt. This discretion will make the defense's job in criminal prosecutions much more difficult, as the only argument with respect to this type of evidence will be that its prejudice to the defendant outweighs its probative value.

In light of recent cases like *Skillicorn* and *Bernard*, Missouri's law on the use of other crimes evidence has become more inclusive. In prior cases, Missouri courts have primarily relied on the five traditional exceptions of intent, motive, identity, absence of mistake, or common scheme or plan. In *Bernard* and then in *Skillicorn*, the Missouri Supreme Court adopted two new exceptions to the general rule prohibiting the use of other crimes evidence. This raises the question whether Missouri is opting to follow the more inclusionary approach to admitting other crimes evidence, that evidence is admissible if it is logically relevant under any theory other than to prove the character of the defendant and action in conformity therewith. While the Missouri Supreme Court has not expressly stated that it has adopted the inclusionary view, *Bernard* and *Skillicorn* create the impression that the court is indeed shifting to such an approach. If this is in fact the case, this change will lead to greater discretion of trial courts in admitting evidence of other crimes and will limit criminal defendants' arguments against admission of such evidence and thereby increase the likelihood of conviction under the "bad person" theory.

VI. CONCLUSION

State v. Skillicorn presents a look at the current state of the law regarding admissibility of other crimes evidence. The Missouri Supreme Court expanded to seven its list of recognized exceptions to the general rule, admitting evidence of the sequence of events surrounding a crime which helps provide a clear and coherent picture of the crime. With this expansion, the court has indicated that it is becoming increasingly inclusive in its view of admissibility of evidence of other crimes.

JUSTIN M. DEAN

142. *Id.*