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Evidence - Other Offenses - Admissibility in a Rape Prosecution

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EVIDENCE — OTHER OFFENSES — ADMISSIBILITY IN A RAPE PROSECUTION— In a rape prosecution, the court admitted testimony of a girl that five days before the date of the crime charged, defendant had raped her. The Supreme Court of Arizona, two justices dissenting, *held*, that the evidence of this was admissable because it established a plan or sscheme, as in both instances, the victims had been lured into parked automobiles late at night, that the defendant had brutally attacked them after announcing his lustful intentions. *State v. Finely*, 388 P.2d 790 (Ariz. 1959).

The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant, any crime not alleged in the indictment, either as a foundation for a separate punishment, or in proving he is guilty of the crime charged.[1] But one of the well recognized exceptions to this rule is where evidence of the commission of a similar offense tends to show a system, plan, or scheme embracing two or more crimes so related to each other that proof of one tends to establish the other.[2] The test is not, then, a test of elements common to the crime charged, but rather, the establishment of a preconceived plan which resulted in the commission of the crime charged.[3] The rape of one woman does not negate the possibility that another woman may have consented.[4]

A plan of this nature can be clearly illustrated by a case such as *People v. Cosby*,[5] in which the defendant, through the use of an employment agency and under the pretext of being an employer, made appointments with women at his apartment on three different occasions for the sole purpose of assaulting them. The similarities relied upon by the court in the instant case for the purpose of establishing a plan seem hardly more than elements common to rape when compared to the facts in the above case. For example, the fact that both attacks occured late at night in automobiles is at most merely coincidental and common and can hardly be of any probative value.[6]

It has been stated in a number of cases that the admission of evidence of other offenses in a prosecution for a sexual offense is a matter of discretion for the court.[7] But care must be taken that the defendant is not forced by these admissions to meet charges of which he had no notice. Likewise, to allow evidence of this nature which shows a propensity to commit sexual crimes is to predispose the minds of the jury to convict in an area where prejudice already abounds.[8] It is also a well recognized rule that it is the defendant's perogative not to have his character attacked unless he himself puts it at issue.[9]

1. State v. Depauw, 246 Minn. 91, 74 N.W.2d 297 (1955); Harris v. State, 88 Okla. Crim. 422, 204 P.2d 305 (1949); See 1 Bishop Crim. Proc. § 1124 (3d ed. 1880).

2. Schwartz v. U.S., 160 F.2d 718 (1948); State v. Bock, 229 Minn. 449, 39 N.W.2d 887 (1949).

3. Lovely v. U.S., 169 F.2d 386 (1949); See State v. Depauw, 246 Minn. 91, 74 N.W.2d 297 (1955); State v. Lapage, 57 N.H. 245, 24 Am. Rep. 69 (1876).

4. See dissent in instant case, p 798.

5. 137 Cal. App. 332, 31 P.2d 218, (1954).

6. See State v. Sauter, 125 Mont. 109, 232 P.2d 731 (1951).

7. Bonnes v. U.S., 20 F.2d 754 (1927); Neff v. U.S., 105 F.2d 688 (1939); State v. Depauw, 246 Minn. 91, 74 N.W. 2d 297 (1955); Marlow v. State, 20 Okla. Rep. 326, 202 Pac. 1048 (1928).

8. People v. Westlek, 31 Cal. 2d 469, 190 P.2d 9 (1948); State v. Raether, 259 Minn 39, 48 N.W.2d 483 (1951); See Note 37 Minn. L. Rev. 608 (1953).

9. State v. Silvers, 230 Minn. 12, 40 N.W.2d 630 (1950); Jones v. Town of LaCrosse, 180 Va. 406, 23 S.E.2d 142 (1942); People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930). In the words of Justice Cardozo, "Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make

Most courts do not exclude logically relevant evidence of other transactions merely because it tends to show the defendant is guilty of another crime.[10] On the other hand, and of primary importance, despite a general relaxation of the rule, many courts still exclude this evidence where its probative value does not outweigh its prejudical effect.[11] From the decisions discussed it is possible to conclude that the court in the instant case may not have weighed this relationship properly.

Irrespective of this and taking into consideration the points thus far enumerated, it is clear that in an accusatorial system of justice, such as ours, the specific crime in issue must at all costs be the focal point about which proof is to be marshalled.[12]

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EVIDENCE — ADMISSION AGAINST INTEREST —USE OF PLEA OF GUILTY AGAINST DEFENDANT IN SUBSEQUENT CIVIL ACTION — Plaintiff brought an action to recover damages for personal injuries sustained in an upset of an automobile while riding as a guest of the defendant. The Trial Court granted a verdict for the defendant and the plaintiff appealed alleging that the court erred in giving instructions that defendant's admission of plea of guilty in a prior criminal action, arising out of the same accident, could only bear upon the defendant's credibility. The Supreme Court of North Dakota *held* that instructions limiting evidentiary effect of host's plea of guilty to his credibility was erroneous and prejudicial. *Borstad v. La Roque,* 98 N.W.2d 16 (N.D. 1959).

There is authority holding that a plea of guilty in a criminal case is an admission against the party thereto in a subsequent civil case when the civil action involves the same offense for which the criminal prosecution was instituted.[1] However, the plea of guilty is not conclusive and may be explained.[2] Some courts hold that defendant's plea of guilty is only an admission against his interest, and cannot be used as proof of the facts alleged in the civil action.[3] It has been held that defendant's plea of guilty is admissible against him in a subsequent civil action even though defendant withdrew his plea of guilty and pleaded not guilty,[4] because the admission tends to some extent to support the plaintiff's charges.[5] A plea of Nolo Contendere, however, which is generally defined as an implied confession (as distinguished from a

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it one — In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar."

10. People v. Carmelo, 94 Cal. App. 2d 301, 210 P.2d 538 (1949); Turner v. State, 187 Tenn. 309, 213 S.W.2d 281 (1948).

11. Harris v. State, 88 Okla. Crim. 422, 204 P.2d 305 (1949); Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955).

12. See People v. Molineaux, 168 N.Y. 264, 61 N.E. 286 (1901); State v. Emanuel, 42 Wash. 1, 253 P.2d 386 (1953).

1. Motley v. Page, 250 Ala. 265, 34 So.2d 201 (1948); Odian v. Habernicht, 133 Cal.2d 201, 283 P.2d 756 (1955); see Konshuk v. Hayes, 150 Wash. 565, 273 Pac. 957 (1929).

2. Moulin v. Bergeron, 135 Conn. 443, 65 A.2d 478 (1949); Utt v. Herold, 127 W. Va. 719, 34 S.E.2d 357 (1945).

3. Ralston v. Ralston, 45 Del. 305, 72 A.2d 441 (1950); see Rednall v. Thompson, 108 Cal.2d 662, 239 P.2d 693 (1952).

4. Morrissey v. Powell, 304 Mass. 268, 23 N.E.2d 411 (1939) (Withdrawal of plea of guilty does not amount to complete destruction of force and effect of prior plea of guilty).

5. Vaughn v. Jonas, 31 Cal.2d 586, 191 P.2d 432 (1948).