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the skepticism shown by the Florida courts. Hope for expedient handling of this long standing enigma rests in application of the principles announced by the United States Supreme Court, coupled with a sincere effort by the Florida Court to adhere to the spirit of due process as it protects individual liberty and dignity.

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ADMISSIBILITY OF EVIDENCE OF PRIOR CRIMINAL ACTS IN A CRIMINAL PROSECUTION

John Doe is on trial for murder. The homicide was committed during an armed robbery by two men alleged to be the defendant's accomplices. The accomplices have pleaded guilty and are going to testify for the state. The state admits that the defendant was not present when the homicide was committed, but contends that the two accomplices were robbing the store under the direction, guidance, and counsel of defendant Doe.

There were no eyewitnesses to the crime other than the accomplices. In an effort to solidify the state's case against Mr. Doe the prosecuting officer questions the two accomplices about previous crimes they allegedly committed while in the employ of the defendant. The defendant has not been formally charged with these crimes. The testimony relating to these prior indiscretions is lengthy and in fact constitutes the state's entire case against the defendant. Only the accomplices testify as to the circumstances surrounding the homicide. Other witnesses are called but they testify only as to circumstantial facts surrounding the prior crimes. Breaking and entering, burglary, grand larceny, and petty larceny allegedly constitute the previous offenses in question. None of these involved armed robbery or homicide.

The defendant's counsel repeatedly objects to the admission of such evidence, claiming that it is irrelevant and tends to try the defendant for crimes for which he has not been indicted or informed against. The state advocates admission, claiming that the evidence tends to show that John Doe directed and counseled the accomplices in the commission of the previous offenses and operated under that same scheme or plan in the offense with which he is presently charged. Upon this evidence the jury finds John Doe guilty of first degree murder.

Has John Doe had a fair trial? Or has he been denied due process because of the admission of evidence of prior crimes? It is submitted that the evidence was erroneously admitted and that John Doe has a right to a new trial. Some recent Florida cases support this contention.

DEVELOPMENT OF FLORIDA'S RULE OF ADMISSIBILITY

Until recently Florida was committed to the "rule of exclusion" with regard to the question of the admissibility of evidence of prior offenses in a criminal prosecution.[1] Such evidence was excluded unless it constituted an exception to the rule, such as evidence tending to show a common scheme or plan or to establish identity.[2]

This has not always been the Florida position. At one time Florida followed the English rule,[3] which permits admission of this evidence if relevant.[4] Later, however, the Florida Supreme Court began to apply this rule strictly. Evidence offered to show a common scheme or plan often was excluded as prejudicial, tending to try the defendant for an offense with which he was not charged, or as irrelevant.[5] *Nickels v. State*[6] owns the dubious distinction of starting the cyclical process of changing from a rule of admissibility to one of exclusion and back to a rule of admissibility.[7] A close reading of some of the cases preceding *Nickels* might lead to the conclusion that the process started much earlier.[8]

Under the rule of exclusion a pattern developed as to the admissibility of evidence of prior crimes. Such evidence was excluded unless the prior crimes were of a similar nature. If the evidence re-

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[1]See Williams v. State, 110 So. 2d 654 (Fla. 1959), for a discussion of the development of the Florida position on this rule.

[2]See Suarez v. State, 95 Fla. 42, 115 So. 519 (1928); Nickels v. State, 90 Fla. 659, 106 So. 479 (1925); Martin v. State, 86 Fla. 616, 98 So. 827 (1924).

[3]For a statement of the English rule see Regina v. Geering, [1849] 18 L.J.M.C. 215. The only exception to this rule is when evidence is offered to show bad character of the defendant. This is apparently the basic Florida position. See FLA. STAT. §§90.08-.09 (1959).

[4]See Roberson v. State, 40 Fla. 509, 24 So. 474 (1898); Mann v. State, 22 Fla. 600 (1886); Selph v. State, 22 Fla. 537 (1886).

[5]See cases cited notes 10-13 *infra*.

[6]90 Fla. 659, 106 So. 479 (1925).

[7]See Williams v. State, 110 So. 2d 654, 661 (Fla. 1959).

[8]See, *e.g.*, Martin v. State, 86 Fla. 616, 98 So. 827 (1924); Ryan v. State, 83 Fla. 610, 92 So. 571 (1922).

ferred to prior crimes involving similar circumstances, similar manner and method of execution, and similar offenses it was admitted.[9] Thus, when a defendant was charged with breaking and entering, evidence of the prior dissimilar crime of forgery was excluded.[10] A defendant charged with bigamy was not forced to refute evidence that he had previously threatened to kill his wife.[11]

In *Boyett v. State*[12] the defendant was charged with breaking and entering. His accomplice offered testimony as to burglaries and breakings he and the defendant had allegedly committed. The Court excluded most of this evidence, admitting only that portion pertaining to a previous breaking and entering of the *same* store. The admitted testimony disclosed that the witness and the defendant had entered the store on a previous occasion through a hole in the wall, and that they entered through the *same hole* while committing the crime for which they were then being tried. In *Gordon v. State*,[13] a perjury trial, evidence was offered of the defendant's alleged violation of election laws. The perjury charge had resulted from his testimony before the grand jury on the election law violation. The admission of this evidence was held to be error over the state's contention that it would show identity and common plan or scheme. The Florida Supreme Court was quite restrictive in its requirements. In *Talley v. State* it said: "*Like* crimes committed against the *same class of persons, at about the same time,* tend to show the same general design and evidence of the same as relevant and may lead to proof of identity."[14] Although this statement was made specifically applicable to the facts of that case, it illustrates the Court's attitude.

The Court continued to apply the exclusionary rule until 1959, when it decided *Williams v. State*.[15] In that case the Court readopted the rule of admissibility as to evidence of prior crimes; the circle was complete. The Court held that all relevant evidence is admissible and will not be excluded simply because it relates to prior crimes: "If found to be relevant for any purpose save that of showing bad character or propensity, then it should be admitted."[16] A hurried

[9]Talley v. State, 160 Fla. 593, 36 So. 2d 201 (1948); Stovall v. State, 156 Fla. 832, 24 So. 2d 582 (1946).

[10]Gafford v. State, 79 Fla. 581, 84 So. 602 (1920).

[11]West v. State, 140 Fla. 421, 191 So. 771 (1939).

[12]95 Fla. 597, 116 So. 476 (1928).

[13]104 So. 2d 524 (Fla. 1958).

[14]160 Fla. 593, 599, 36 So. 2d 201, 205 (1948). (Emphasis added.)

[15]110 So. 2d 654 (Fla. 1959).

[16]*Id.* at 662.

reading of the *Williams* opinion might lead one to believe that the Court merely clarified a position it had maintained for years. Frequent references were made to previous opinions rendered subsequent to the *Nickels* case that contained language pertaining to relevancy. However, the prior drift away from the original rule of admissibility was noted by Justice Thornal, who attempted to anchor the Court firmly to that rule:[17]

> "[W]e sense no guilt of ignoring the rule of stare decisis when we submit herewith a conclusion that we stand on the broad rule which admits this type of evidence subject to specific exclusions instead of contributing to a continuance of a confusing statement of the rule in terms of over-all exclusion subject to innumerable exceptions in favor of admissibility."

THE TEST OF RELEVANCY

On the basis of the *Williams* case it appears that defendant John Doe is destined to suffer the consequences of his past illegal activities. It should be kept in mind, however, that the test is now one of relevancy. Thus evidence offered as to past crimes of breaking and entering, burglary, grand larceny, and petty larceny will be admitted only if relevant to the offense charged. The present offense is murder committed while perpetrating an armed robbery.

It is submitted that the proffered evidence does not meet the test of relevancy. While many of the cases that held such evidence inadmissible were decided under the rule of exclusion, they do offer a guide as to what type of evidence will be considered relevant. The reference here is to those decisions that laid down the test of similar crimes, involving similar circumstances and similar manner and method of execution. Support for this contention is found in the *Williams* case itself, wherein the Court made several references to "similar fact situation," "similar method of operation," "similar fact evidence," and "similar offenses." In the *Williams* case the defendant was charged with rape. The victim had been assaulted by a person who had been hiding in the back seat of her automobile. The witness whose testimony was objected to testified that a few weeks before the crime she also had found the defendant hiding in the back seat of her automobile.

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[17] *Id.* at 661-62.

Proportion of Evidence of Prior Crime

There is yet another factor that should aid defendant Doe in his quest for a new trial. The facts as stated show that the *only* evidence against him was the testimony of his accomplices as to his part in the charged offense and the testimony of the accomplices and others as to the commission of prior offenses. Under the authority of a later case,[18] in which the major portion of the state's evidence consisted of another offense and the method of perpetration of that offense, a new trial is warranted. It was stated in that opinion:[19]

> "[W]e are convinced that the testimony about the subsequent crime was so disproportionate to the issues of sameness of perpetrator and weapon and of design that it may well have influenced the jury to find a verdict resulting in the death penalty while a restriction of that testimony might have resulted in a recommendation of mercy, a verdict of guilty of a lesser degree of murder or even a verdict of not guilty."

A new trial was ordered. Similarly, defendant Doe has been confronted with testimony concerning his past transgressions that is totally disproportionate to the testimony offered as to the charged offense.

Conclusion

A study of the cases in this area leads to the conclusion that the Supreme Court of Florida has readopted its original position. First its policy evolved from one of admissibility if relevant to one of exclusion with numerous exceptions. Evidence of previous criminal acts with which the defendant had not been charged was admitted only if it could be cast into one of the well-formed exceptions. One common exception concerned evidence tending to show a common scheme or plan or to establish identity when the alleged previous crimes involved similar facts, similar offenses, and the like. Then, evidently weary of the tail wagging the dog, the Court announced that thenceforth all evidence relating to prior crimes would be admissible if relevant. The test of relevancy remains, however, with many of the old exceptions to the exclusion rule meeting the test.

[18] Williams v. State, 117 So. 2d 473 (Fla. 1960).

[19] *Id.* at 476.