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EVIDENCE--HEARSAY AND CIRCUMSTANTIAL--INFANT AS WITNESS--INDECENT LIBERTIES

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EVIDENCE—HEARSAY AND CIRCUMSTANTIAL—INFANT AS WITNESS—INDECENT LIBERTIES—In the prosecution of the defendant for taking indecent liberties with a female under sixteen years of age, testimony respecting the features of the house and neighborhood where the offense occurred as narrated by the complaining witness to her mother was objected to as hearsay; and testimony of a second child as to advances made by the defendant in the same vicinity was objected to as putting in issue his character. *Held*, that the mother's

testimony as to the statements, made to her by the child soon after the offense, were competent to show that the child had knowledge; and that the testimony of the second child was admissible because it tended to identify the defendant as a person present in the neighborhood at the time of the offense. *Bridges v. State*, 247 Wis. 352, 19 N.W. (2d) 529 (1945).

Under the general rule extrajudicial statements of the complaining witness made at the time of the offense are not admissible to prove the offense but are deemed hearsay.[1] There is an exception made where such testimony is not admitted for its truth but to show knowledge in the complainant, where that is important.[2] It is so in cases of indecent liberties with minors because of the possibility of accusation of innocent persons on the basis of wrongs fabricated or imagined by children. Some courts hold that the testimony of the child when clear and convincing need not be corroborated.[3] Others, considering the quality of the child's testimony, hold that the uncorroborated statements, when denied, are not sufficient to sustain a conviction.[4] Therefore, statements of a person to whom the facts of the offense are related a short time after their occurrence are admitted.[5] These statements are usually limited to those that are necessary to make a complaint or to those that are stated in the complaint.[6] The testimony in this case showed the substantial correspondence between the place later identified by the seven-year-old complainant and her description of it to her mother and the police and thus showed her careful observation and memory of facts. The admission of this evidence for the limited purpose of showing the state of mind and the awareness of the child made more certain the other evidence of the child.

Perhaps more interesting is the question of the admission of the testimony of the second child, whom the defendant approached a short time before he met the complaining witness, and to whom he also offered money and an opportunity to read comics if she would accompany him. Testimony about the defendant's character or evidence of a separate and independent crime are inadmissible to prove guilt. As to character testimony an exception has been made in cases based on indecent liberties because, from the very nature of the crime, mental perversion of a definite nature must be present. In recognition of this it has been held that it is permissible to show lascivious character by testimony as to past events.[7] As to the admission of other events bearing no causal relationship to the offense charged, the courts have held the rule firmly established that such should be excluded as irrelevant and prejudicial especially where these events involve the commission of another crime.[8] It is, of course, arguable whether the defendant committed a crime against the second child on the facts

[1] Anthony v. State, 115 Tex. Cr. R. 191, 29 S.W. (2d) 784(1930).

[2] 6 WIGMORE, EVIDENCE, 3d ed., § 179 at p. 239(1940); H. & L. M. Warton Cotton Co. v. Southern Railway Co., 208 Ala. 417, 94 S. 726(1922).

[3] People v. Chaddock, 2 Cal. App. (2d) 643, 38 P. (2d) 473(1934); People v. Karpinski, 43 Cal. App. (2d) 545; 111 P. (2d) 393(1941).

[4] People v. Sharp, 384 Ill. 503, 51 N.E. (2d) 554(1943).

[5] Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928).

[6] State v. Rounds, 216 Iowa 131, 248 N.W. 500 (1933); State v. Hoffman, 240 Wis. 142, 2 N.W. (2d) 707(1942).

[7] People v. Owen, (Cal. App. 1945) 157 P. (2d) 432.

[8] Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292 (1892).

presented here. However, an earlier Wisconsin decision held that an action was maintainable under the statute for attempting to commit a felony in an attempt to take indecent liberties.[9] But even in the extreme case where a crime has been attempted or committed, it is held that there are exceptions to the rule forbidding such evidence, namely, where the evidence is introduced to show motive, intent or identity.[10] There must, however, be a close relationship between the instances and the offense charged. Testimony as to other events has been allowed where the same person is shown to have committed offenses in the same manner and in the same locality reasonably near the time when the offense charged was committed.[11] Interpreting what is meant by "reasonably near," it has been held that where three days [12] or two years [13] have separated the similar offenses the relationship is too remote. There must be such an intimate connection with the offense for which one is on trial that the testimony can be used as evidentiary. Here half an hour or less separated the conversation of defendant with the second child and that with complaining witness. There was such a close relationship in time that the second child's testimony, based on her absolute identification of defendant, was admissible to show his presence in the neighborhood. Granting admissibility, the next question is whether such testimony was prejudicial. Where identity has already been established by other evidence it is no longer in issue.[14] Applying this rule to the principal case it would seem that there was no need for the admission of such testimony because there was positive identification of the defendant by the complaining witness accompanied by a clear, accurate narration of events. However, proof of "identity" has been broadened to cover proof that the defendant was the person in the vicinity and that he was the kind of person likely to commit such a crime, on the ground that the relationship of these facts to the probabilities in issue renders them relevant unless there is an arbitrary rule, established by decision or by statute, to the contrary.[15] Even in this case where the jury was instructed that this circumstantial evidence was to be strictly limited to identification, such a distinction is too subtle for the ordinary mind and is unnecessary because of other evidence to the same effect. Its value in substantiating other evidence is outweighed by prejudice to the defendant. The nature of the offense and the age of the complaining witness no doubt make courts more liberal in allowing hearsay evidence in corroboration and circumstantial evidence, which although admitted to show identity, tended to show character.

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[9] Ambrose v. Reichenbach, 201 Wis. 17, 229 N.W. 35(1930).

[10] 3 A.L.R. 1540(1919); 22 A.L.R. 1016(1923); 27 A.L.R. 357(1923); 63 A.L.R. 602(1929).

[11] Whiteman v. State, 119 Ohio 285; 164 N.E. 51 (1928); State v. Spray, 174 Mo. 569, 74 S.W. 846(1903).

[12] State v. Greco, 7 Boyce (30 Del.) 140, 104 A. 637 (1918).

[13] Quen Guey v. State, 20 Ariz. 363, 181 P. 175 (1919).

[14] Kelley v. State, 80 Tex. Cr. R. 249, 185 S.W. 570(1916); Dabney v. State, 82 Miss. 252, 33 S. 973 (1903).

[15] Barnett v. State, 104 Ohio 298, 135 N.E. 647(1922).