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Chapter 11: Evidence

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CHAPTER 11

Evidence

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§11.1. Prior Consistent Statements: Fresh Complaint. Courts in most jurisdictions,[1] including Massachusetts,[2] hold that a witness's prior consistent statement is not admissible where it is offered to corroborate his testimony. The reason for this rule is that if offered to prove the truth of the matters asserted[3] the out-of-court statement is hearsay, and if the statement is offered merely to show the witness's consistency[4] it is not relevant until the witness has been impeached by evidence of recent fabrication or bias. However, in cases involving sexual assaults, courts routinely admit evidence that the victim had complained of the crime shortly after its commission even where the victim has not been expressly impeached.[5] This exception is generally known as the "fresh complaint" doctrine.[6] In two decisions during the *Survey* year, the Supreme Judicial Court reconsidered the rationale and scope of the fresh complaint exception as applied in Massachusetts.[7]

Historically, the fresh complaint doctrine represents "a perverted survival of the ancient requirement that [the victim] should make hue and cry" to arouse the neighborhood.[8] As a result, during the early development of the doctrine, proof of the victim's fresh complaint was a necessary element of the prosecution's case.[9] Although the notion of "hue and cry" has long since disappeared, the doctrine has neverthe-

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§11.1. [1] *See* 4 J. WIGMORE, EVIDENCE §1124, at 255 (Chadbourn rev. 1972) [hereinafter cited as WIGMORE].

[2] Commonwealth v. Zukoski, 1976 Mass. Adv. Sh. 846, 850, 345 N.E.2d 690, 693.

[3] MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251, at 604 (2d ed. 1972).

[4] See text and notes at 18-22 *infra.*

[5] *See* Commonwealth v. Hanger, 357 Mass. 464, 466, 258 N.E.2d 555, 557 (1970); Commonwealth v. Ellis, 319 Mass. 627, 629, 67 N.E.2d 234, 236 (1946).

[6] See text and notes at 13-17 and 23-28 *infra.*

[7] Commonwealth v. Blow, 1976 Mass. Adv. Sh. 1437, 348 N.E.2d 794; Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 348 N.E.2d 746.

[8] Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1427 n.7, 348 N.E.2d 746, 750 n.7; Commonwealth v. Cleary, 172 Mass. 175, 176, 51 N.E. 746, 746 (1898).

[9] Commonwealth v. Cleary, 172 Mass. 175, 176, 51 N.E. 746, 746 (1898).

less survived but in a permissive rather than a mandatory form.[10] Wigmore has identified three different rationales which have been advanced to explain the survival of this ancient doctrine. The different features of these separate theories, in turn, account for variations in the application of the fresh complaint exception among various jurisdictions.[11]

One approach adopted by only a few jurisdictions[12] is to admit evidence of a fresh complaint under the excited utterance exception to the hearsay rule.[13] To be admitted under this theory, the victim's complaint must have been virtually contemporaneous with the offense.[14] However, once the proponent has established that the complaint evinces the requisite spontaneity, "the hearsay is admitted for its own sake."[15] Accordingly, there is no further requirement that the victim also have appeared as a witness or, if a witness, that she have been impeached.[16] Furthermore, the details, as well as the fact that the complaint was made, are admitted into evidence and may be used testimonially.[17]

The second approach like the first also involves an application of a recognized hearsay exception. It admits the fresh complaint for the purpose of rehabilitating a witness who has been expressly impeached.[18] Several different consequences follow from the re-

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[10] *See* Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1427 n.7, 348 N.E.2d 746, 750 n.7.

[11] 4 WIGMORE, *supra* note 1, §§ 1134-1140, at 297-314.

[12] The Massachusetts courts have not chosen to rely on this approach. *See* Commonwealth v. Cleary, 172 Mass. 175, 176-77, 51 N.E. 746, 746-47 (1898).

[13] 4 WIGMORE, *supra* note 1, § 1139, at 313; 6 WIGMORE, *supra* note 1, § 1761, at 242-43. *See* Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1430 n.12, 348 N.E.2d 746, 751 n.12.

[14] *E.g.*, Cook v. Commonwealth, 351 S.W.2d 187, 189 (Ky. Ct. App. 1961) (victim's complaint made to husband within one hour of sexual assault admissible; complaint made to police officer six hours later was clearly not a part of the res gestae). The rationale for this requirement is the supposition that complaints made impulsively while still under the influence of a terrifying event are likely to be inherently truthful and will not reflect the influence of afterthought or deliberate design. *Id.*

[15] 4 WIGMORE, *supra* note 1, § 1139, at 314.

[16] *See, e.g.*, State v. Gorman, 229 Minn. 524, 526, 40 N.W.2d 347, 348 (1949); State v. Godwin, 51 N.M. 65, 71-72, 178 P.2d 584-88 (1947).

[17] *See, e.g.*, Hooks v. State, 215 Ga. 869, 872, 114 S.E.2d 6, 9 (1960); Commonwealth v. Cupps, 157 Pa. Super. 341, 342-44, 43 A.2d 545, 546-47 (1945).

The admission of such details as testimonial evidence highlights one central weakness of this approach which may have prevented it from gaining more widespread application. In situations where there is no other evidence of an assault, to accept the statement as substantive evidence commits "the error of accepting [the victim's] statement as itself evidence of the very facts which should first be otherwise shown in order to make the declarations spontaneous." 6 WIGMORE, *supra* note 1, § 1761, at 245-46. In most situations where the res gestae exception is the vehicle for the admission of evidence, there is some circumstantial evidence of the occurrence of the startling event. *Id.*, at 245. Circumstantial proof, however, may not be probative in the context of a sex crime as, for example, where there is evidence of intercourse, but no evidence bearing on the issue of the victim's consent. *Id.*, at 246.

[18] 4 WIGMORE, *supra* note 1, §§ 1137-38, at 311-12.

habilitative rationale of this approach. First, the victim must be in a position where evidence of the fresh complaint will rehabilitate her. Thus, the declarant actually must have been a witness,[19] and she must have been impeached.[20] Second, because the fresh complaint will rehabilitate an impeached witness only if the substance of her earlier version comports with that given on the stand, the details as well as the fact of the prior complaint must be admitted.[21] There is, however, no further requirement that the complaint must have been fresh, except that it must have preceded the asserted impeaching fabrication, bias, or inducement.[22]

In contrast to the first two theories, the third rationale for the admission of evidence of a fresh complaint is not so easily categorized as a recognized hearsay exception. This third approach, which is the one Massachusetts courts primarily adopt, begins with the assumption that a person victimized by a sexual assault would promptly complain.[23] In effect, therefore, the failure to make a fresh complaint is inconsistent with a subsequent willingness to bring charges and to testify in court, and thus allows the trier of fact to assume that no assault occurred. Accordingly, under this theory, the past complaint is admitted "as in a sense corroborating the testimony of the complainant, by showing that [the victim's] conduct immediately after the episode was consistent with her charge of rape."[24] The corroborative rationale resembles the rehabilitative one in that they apply only where the victim has taken the stand, both theories being premised on a notion of allowing the victim to rely on evidence of the fresh complaint to rebut an inconsistency arising as the result of her in-court testimony.[25] There are,

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[19] *Id.* § 1138, at 311.

[20] The exact nature of this further requirement may be differently conceived. In some jurisdictions, for example, courts will admit prior consistent statements simply to rebut evidence that an inconsistent statement was made. *See, e.g.*, Felice v. Long Island R.R., 426 F.2d 192, 197-98 (2d Cir.), *cert. denied*, 400 U.S. 820 (1970); 4 WIGMORE, *supra* note 1, § 1126, at 260-62. Massachusetts, on the other hand, limits the admissibility of prior consistent statements to cases involving claims that the witness's in-court testimony was the product of bias or inducement. *See* Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1423 n.3, 348 N.E.2d 746, 748 n.3; Commonwealth v. Zukoski, 1976 Mass. Adv. Sh. 846, 851-52, 345 N.E.2d 690, 693; Commonwealth v. Heffernan, 350 Mass. 48, 51-52, 213 N.E.2d 399, 402, *cert. denied*, 384 U.S. 960 (1966).

[21] 4 WIGMORE, *supra* note 1, § 1138, at 311.

[22] State v. Werner, 16 N.D. 83, 90, 112 N.W. 60, 62 (1907).

[23] *See* Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1425, 348 N.E.2d 746, 749; Commonwealth v. Spare, 353 Mass. 263, 265, 230 N.E.2d 798, 800 (1967); Commonwealth v. Cleary, 172 Mass. 175, 176-77, 51 N.E. 746, 746 (1898); 4 WIGMORE, *supra* note 1, § 1135, at 298. "This apparently irregular process of negativing evidence not yet formally introduced by the opponent" has been "fully sanctioned" by the courts. *Id.*, at 300. Similarly, even where the prosecution concedes the victim's failure to make a complaint, the delay may be explained away as the result of shame, fear, or want of opportunity. *Id.*, at 301.

[24] Commonwalth v. Spare, 353 Mass. 263, 265, 230 N.E.2d 798, 800 (1967).

[25] Commonwealth v. Cleary, 172 Mass. 175, 177, 51 N.E. 746, 746-47 (1898); 4 WIGMORE, *supra* note 1, § 1136, at 307-11.

however, differences in the applications of the corroborative and rehabilitative theories. Such differences stem from the fact that the corroborative rationale is aimed at rebutting an assumed inconsistency created by the victim's prior silence, whereas the rehabilitative approach is directed at rebutting an express inconsistency resulting from the victim's prior inconsistent statements. Thus, since the corroborative approach, unlike the rehabilitative one, is not conditioned on a showing of an actual inconsistency, it does not require that the witness have been expressly impeached.[26] Furthermore, whereas the entire statement is admitted under the rehabilitative rationale, most jurisdictions employing the corroborative theory will not admit the details of the complaint since the mere fact of a complaint is sufficient to rebut the implied inconsistency.[27] However, some jurisdictions employing the corroborative theory do not apply the rule in the same manner. Massachusetts, for example, adopts the minority rule and will admit the details as well as the fact of a complaint.[28]

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[26] 4 WIGMORE, *supra* note 1, § 1136, at 311.

[27] *Id.*, at 307. *See* Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 348 N.E.2d 746, where the Supreme Judicial Court recognized that "the so called 'majority' rule permits only the following: 'on the direct examination the practice has been merely to ask whether she made complaint . . . and to receive in answer only a simple yes or no.' " *Id.* at 1427, 348 N.E.2d at 750 (footnote omitted), *quoting* Woods v. State, 233 Ind. 320, 326, 119 N.E.2d 558, 562 (1954). There is, however, some conflict in the jurisdictions as to what "details" must be excluded under the "majority" rule. *Compare* People v. Burton, 55 Cal.2d 328, 351-52, 359 P.2d 433, 443-44, 11 Cal. Rptr. 65, 75-76 (1961) ("[A]lleged victim's statement of the nature of the offense and the identify of the asserted offender, without details, is proper.") *and* State v. Twyford, 85 S.D. 522, 527, 186 N.W.2d 545, 548 (1971) ("The name of complainant and the name of the alleged perpetrator, are not "details.") *with* People v. Fryman, 4 Ill.2d 224, 228, 122 N.E.2d 573, 576 (1954) (details and name of assailant excluded) *and* State v. McLemore, 99 Kan. 777, 779-80, 164 P.161, 162 (1917) (assailant's name must not be stated, but its admission is not prejudicial error where there is no question concerning the assailant's identity).

For cases admitting the details as well as the facts of the case, see State v. Purvis, 157 Conn. 198, 207-08, 251 A.2d 178, 182 (1968), *cert. denied*, 395 U.S. 928 (1969); State v. Crissman, 60 Ohio Op.2d 279, 281, 287 N.E.2d 642, 646 (County Ct. App. 1971). Wigmore does not indicate that any jurisdictions expressly adopt what would amount to a bona fide minority position in admitting the details of a fresh complaint under the corroborative rationale, but rather notes that "[a] few courts have erroneously allowed the detailed statement to be used even when proceeding upon the [corroborative] theory; but these rulings are probably due to a confusion of the [corroborative and rehabilitative] theor[ies]." 4 WIGMORE, *supra* note 1, § 1136, at 310 n.1. The Massachusetts Supreme Judicial Court's adherence to the "minority" rule would not appear to result from such a confusion. The Court appears explicitly to recognize the distinctions between the three different rationales that may be utilized to justify the admission of a fresh complaint. *See, e.g.*, Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1423 n.3, 1425, 1427 n.9, 1430, 348 N.E.2d 746, 748 n.3, 749, 750 n.9, 751. Furthermore, the Court's recognition that the "majority" rule would not admit the details indicates that its adoption of the alternative approach is not the product of inadvertence. *Id.* at 1424, 348 N.E.2d at 749.

[28] Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 1424, 348 N.E.2d 746, 749; Glover v. Callahan, 299 Mass. 55, 58, 12 N.E.2d 194, 196 (1937); *see* Commonwealth v. Hanger, 357 Mass. 464, 466, 258 N.E.2d 555, 555 (1970).

The development of the Massachusetts rule can be traced to a leading case where Justice Holmes recognized and adopted the common law practice of admitting the prior complaint, without there having been express impeachment, "for the . . . general purpose of confirming the testimony of the [victim]."[29] However, the Court in that case did not reach the issue of whether to admit the details as well as the facts of the complaint, for it did "not appear that more was admitted than the fact that the [victim] made complaint."[30] The question of the admissibility of the details was first addressed several years later in a civil case in which the Court stated, "[w]here, as in this Commonwealth, evidence as to such complaints is admitted for the purpose of corroborating the testimony of the complainant, the whole of the statement made by her, including the details, is admissible."[31] It is not clear from the opinion whether the parties had actually raised the admissibility of the details, or whether the quoted statement was mere dictum. In either event, the Court provided very little support for its statement. For authority, the Court relied mainly upon just one Massachusetts case[32] and a reference to Wigmore,[33] neither of which supported the Court's statement. Nevertheless, the Massachusetts rule has been regarded as established ever since.[34] During the *Survey* year, criminal defendants in two cases[35] attacked the Massachusetts adherence to the minority position and urged the Supreme Judicial Court to modify its rule by placing limitations on the admissibility of the details of the complaint.

In the first case, *Commonwealth v. Bailey,*[36] the defendant broke into the home of a retired school teacher and raped her. After the defendant left, the woman ran to a neighbor's house for help. She first described the incident to the neighbor and then repeated the story, on the morning after the incident, to the state policewoman who visited her in the hospital. At trial in the superior court, the victim described the attack, and then her neighbor and her sister testified without objection as to the victim's description of the attack shortly after it occurred.[37] When the trial court allowed the state policewoman to testify to the account that the victim had given at the hospital, the defendant objected and took exception.[38]

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[29] Commonwealth v. Cleary, 172 Mass. 175, 177, 51 N.E. 746, 746 (1898).

[30] *Id.* at 175, 51 N.E. at 746.

[31] Glover v. Callahan, 299 Mass. 55, 58, 12 N.E.2d 194, 196 (1937).

[32] Commonwealth v. Gangi, 243 Mass. 341, 137 N.E. 643 (1923).

[33] 299 Mass. at 58, 12 N.E.2d at 196, *citing* J. WIGMORE, EVIDENCE § 1138 (2d ed. 1923). For a discussion of Wigmore's stance on the admissibility of details under the corroborative approach, see text at note 27 *supra.*

[34] See cases cited at note 28 *supra.*

[35] Commonwealth v. Blow, 1976 Mass. Adv. Sh. 1437, 348 N.E.2d 794; Commonwealth v. Bailey, 1976 Mass. Adv. Sh. 1420, 348 N.E.2d 746.

[36] 1976 Mass. Adv. Sh. 1420, 348 N.E.2d 746. The facts of the case appear in 1976 Mass. Adv. Sh. at 1421-23, 348 N.E.2d at 747-48.

[37] *Id.* at 1425, 348 N.E.2d at 749.

[38] *Id.* at 1423, 348 N.E.2d at 748.

In appealing his conviction,[39] the defendant argued that the court should not have allowed the policewoman to testify as to the details of the victim's statement because the corroborative rationale, as applied by the majority of American jurisdictions, justifies the admission of only the fact of the complaint.[40] Nevertheless, the Supreme Judicial Court affirmed the judgment below.[41] Despite the facial logic and impressive scholarly support behind the defendant's position, the Court rejected it and chose to retain the established Massachusetts rule which admits the details of a fresh complaint as part of the prosecution's case-in-chief in order to corroborate the victim's court testimony.[42] The Court, however, did not rationalize its result merely on the grounds of *stare decisis*. Instead, after a careful analysis of the merits and justification of the rule, the Court determined that a more common sense approach warranted the retention of the Massachusetts rule.

The Supreme Judicial Court approached the issue by balancing the disadvantages of admitting the full details of the victim's statement against the benefits to be gained. On one hand, the Court found that the disadvantages were minimal, as several factors suggested that the Massachusetts rule "does not involve an unfair loading of the case against the defendant."[43] To the extent that the details of the prior statement were consistent with the victim's trial testimony, the Court concluded that their admission would be merely cumulative;[44] and to the extent that they were inconsistent, the admission of the prior statement actually might benefit a defendant who could use the discrepancy to discredit the victim.[45] Moreover, the Court emphasized that the details of the prior complaint may be admitted in any event on redirect examination if the defendant has impeached the victim by attributing an inconsistency to alleged bias or recent contrivance.[46] Suggesting that a complaint is most likely to have a significant bearing

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[39] The defendant subsequently was convicted in the superior court on indictments charging him with rape and assault to commit rape, G.L. c. 265, §§ 22, 24, and with breaking and entering a dwelling house at night with intent to commit a felony, G.L. c. 266, § 14.

[40] 1976 Mass. Adv. Sh. at 1425, 348 N.E.2d at 749. The defendant appealed his conviction under the provisions of G.L. c. 278, §§ 33A-33G. The Supreme Judicial Court granted direct review under G.L. c. 211A, § 10(a). 1976 Mass. Adv. Sh. at 1420, 348 N.E.2d at 747.

[41] 1976 Mass. Adv. Sh. 1423, 1436, 438 N.E.2d at 748, 754.

[42] *Id.* at 1426, 348 N.E.2d at 750. As an alternative ground for its holding, the Court noted "that, even if [it] accepted the defendant's argument, [it] would conclude that the admission of the policewoman's testimony, with its detail, was nonprejudicial and harmless in the present case." *Id.* at 1425, 348 N.E.2d at 749. Following as it did the testimony of the victim, the victim's neighbor, and the victim's sister, the policewoman's testimony was thought to constitute "a noncontroversial, largely inconspicuous and redundant segment of the trial." *Id.* at 1426, 348 N.E.2d at 749 (footnote omitted).

[43] *Id.* at 1429, 348 N.E.2d at 751.

[44] *See id.* at 1425-26, 1429, 348 N.E.2d at 749, 751. See note 33 *supra*.

[45] 1976 Mass. Adv. Sh. at 1430, 348 N.E.2d at 751.

[46] *Id.*

in the same cases which are likely to involve charges of impeachment on grounds of bias or recent contrivance,[47] the Court thus minimized the effect of its rule by describing its practical effect as being merely to shift the time of introduction of the evidence.[48] Furthermore, whether the fresh complaint was consistent or inconsistent with the victim's trial testimony, two additional factors limited any potential prejudice to the defendant that might result from the admission of the details of the complaint. First, the prosecution could make only limited use of the testimony because the complaint is admitted for corroborative purposes only and may not be used to fill gaps in the prosecution's case.[49] Second, where the jury might be influenced by "needless rehearsal of the particulars of a gruesome crime" or where the testimony might become unduly repetitious, the judge may limit the testimony in his discretion.[50] The combined effect of these factors, therefore, suggested that there was little practical disadvantage to admitting the victim's entire statement.

In contrast to these minimal disadvantages, however, the Court found that the benefits of admitting the details of the statement were substantial. Indeed, the Court determined that the mere fact of a complaint was too "perfunctory a reference . . . to achieve the intrinsic [corroborative] purpose of the [fresh complaint] doctrine."[51] To admit the details, the Court reasoned, was to admit "proof of [the victim's] condition, demeanor and verbal expressions," which evidence alone could enable the jury to form a reliable opinion with respect to whether in fact the woman's conduct was consistent with her testimony.[52] Furthermore, in a more general sense, the Court determined that adherence to its past practice would assist the rape victim who is often handicapped in prosecuting her complaint by humiliating in-court innuendos which abet the inordinate skepticism with which juries tend to approach such cases.[53] In essence, then, both the Court's approach—balancing the equities—as well as its result, follow the present trend[54] of modifying the rules of evidence in trials of sexual assault.

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[47] *Id.* ("cases where consent or the like is suggested").

[48] *Id.*

[49] *Id.* at 1429, 348 N.E.2d at 751.

[50] *Id.* at 1431, 348 N.E.2d at 752.

[51] *Id.* at 1428, 348 N.E.2d at 750.

[52] *Id.*, 348 N.E.2d at 750-51, *quoting* The Queen v. Lillyman, [1896] 2 Q.B. 167, 177-78. "To limit the evidence . . . to [the mere fact of the complaint] is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand and in the cognizance of the witness in the box." 1976 Mass. Adv. Sh. at 1429, 348 N.E.2d at 751, *quoting* The Queen v. Lillyman, [1896] 2 Q.B. 167, 177-78.

[53] 1976 Mass. Adv. Sh. at 1427 n.9, 1430-31, 348 N.E.2d at 750 n.9, 751-52 (noting discrepancy between judge and jury in rape cases).

[54] *See generally* Note, *Rape Reform Legislation: Is it the solution?* 24 CLEVE. ST. L. REV. 463 (1975); Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678,* 26 HASTINGS L.J. 1551 (1975).

The Supreme Judicial Court took a similar approach, elevating common sense considerations over legal niceties, in the related case of *Commonwealth v. Blow.*[55] Decided the same day as *Bailey, Blow* involved a defendant charged with other crimes in addition to rape, and a fresh complaint that encompassed all the alleged offenses.[56] In *Blow,* the complainant, the defendant, and a companion of the defendant met each other in a bar.[57] When the bar closed, the three of them left together, taking a taxi cab to a used car lot. There the two men took the complainant's pocketbook and the defendant engaged in intercourse with her. After the men had fled, the complainant went to a nearby phone both and telephoned the cab company. When a cab arrived, she went to the cab company office where she told the dispatcher that she had been raped and robbed. Taken to the police station, she there made a similar statement and then identified the defendant and his companion from a photographic line-up.

After the complainant had testified at the trial, the dispatcher took the stand and related the statements made by the complainant in the cab company's office.[58] The trial court admitted the entire statement over objection of defense counsel.[59] When acquitted of rape but convicted of unarmed robbery,[60] the defendant appealed to the Massachusetts Supreme Judicial Court.[61]

In challenging his conviction, defendant did not mount a frontal attack on the Massachusetts fresh complaint doctrine, as Bailey had done, rather he contended that the Massachusetts rule, admitting the details of a fresh complaint to corroborate a complainant's court tes-

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[55] 1976 Mass. Adv. Sh. 1437, 348 N.E. 2d 794.

[56] *Id* at 1437-39, 348 N.E.2d at 795. As the Court noted, this was also true in *Bailey*, but in that case the defendant made no special point of it. *Bailey*, 1976 Mass. Adv. Sh. at 1425 n.4, 348 N.E.2d at 749 n.4.

[57] The facts of the case appear in 1976 Mass. Adv. Sh. at 1437-39, 348 N.E.2d at 795-96. There was conflicting testimony as to the nature of this encounter. The complainant testified that she arrived at the bar shortly before closing time to buy beer and as she was leaving, the "two men rushed up behind her and jumped into the cab with her." *Id.* at 1438, 348 N.E.2d at 795. Other testimony introduced by defendant indicated that complainant arrived around midnight and had already been drinking very heavily. *Id.* at 1437, 348 N.E.2d at 795. According to this version, there was much "laughing and kidding," including an attempt by the complainant to entice the defendant's companion into the ladies' room, as well as a dispute over whether the companion's recollection of prior sexual encounter with the complainant was correct. *Id.*

[58] *Id.* at 1439-40, 348 N.E.2d at 796. This direct testimony was that "[s]he had said that she had been raped and robbed" and that she had said that the defendant and his companion " 'had taken her out into a car in this parking lot and taken her pocketbook away from her, [and] took the money out.' And she had said that the 'small guy [the defendant] had taken her clothes off and raped her.' " *Id., quoting* from the transcript of the trial.

[59] *Id.* at 1440, 348 N.E.2d at 796.

[60] *Id.* at 1437, 348 N.E.2d at 795. The rape indictment had been issued pursuant to G.L. c. 265, § 22; the unarmed robbery indictment pursuant to G.L. c. 265, § 19.

[61] Defendant appealed under the provisions of G.L. c. 278, §§ 33A-33G, and direct review was granted by the Supreme Judicial Court under G.L. c. 211A, § 10(a).

timony, should be qualified in the situation where a defendant is charged with a second crime in addition to rape, and the fresh complaint covers both offenses.[62] The Supreme Judicial Court, however, refused "thus to abandon or modify [its] basic rule in the particular situation,"[63] and affirmed the judgment below.[64]

In reaching its result, the Court, much as it had done in *Bailey*, focused on the practical implications of the defendant's suggested modification of the fresh complaint rule.[65] Initially, the court examined the possible alternatives for effectuating a modification of the rule in cases involving multiple offenses, finding substantial drawbacks in each. The defendant's proposed solution, for example, which was to admit the details concerning the rape and exclude those pertaining to the robbery, was unsatisfactory because it necessitated an impractical separation of the facts intrinsic to both offenses.[66] Furthermore, in situations where a victim would naturally mention both crimes in describing the incident, admission of only half of the statement might tend to discredit the victim's testimony since the jury might infer recent fabrication from the failure to mention both crimes.[67]

A second possible modification examined by the Court—limiting testimony to the fact that a complaint of sexual assault was made—posed the same problems as permitting only a restrictive corroboration.[68] Furthermore, that solution was indefensible for creating "the anomaly that the evidence that could be called in support of a prosecution for rape would be diminished when the circumstances were allegedly aggravated."[69] A third approach—having the prosecution forego admission of complaint evidence altogether when a defendant was charged with multiple crimes—was similarly flawed.[70] While a fourth alternative—severing the trials for the different offenses—might relieve some of these problems, the Court concluded that such an alternative generated still other unacceptable results.[71]

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[62] 1976 Mass. Adv. Sh. at 1440, 348 N.E.2d at 796. More particularly, defendant maintained that admission of the fresh complaint doctrine was "especially improper" in this case because, as it turned out, he had been acquitted of the rape charge. *Id.* at 1441, 348 N.E.2d at 796.

[63] *Id.* at 1442, 348 N.E.2d at 797 (footnote omitted).

[64] *Id.* at 1447, 348 N.E.2d at 799.

[65] In addition, as in *Bailey*, see note 42 *supra*, the Court also adduced an alternative ground for its opinion: even if the trial court had erred in admitting the testimony, it was not prejudicial error and "hardly ground for reversal." 1976 Mass. Adv. Sh. at 1441, 348 N.E.2d at 796. Not only were the dispatcher's statements merely cumulative of complainant's testimony, not unduly graphic or colorful, and appropriately subjected to a limiting instruction, but the jury in fact had "reached a conclusion contrary to that suggested by the testimony of fresh complaint." *Id.*

[66] 1976 Mass. Adv. Sh. at 1442, 348 N.E.2d at 797.

[67] *Id.*

[68] *Id.* at 1442-43, 348 N.E.2d at 797.

[69] *Id.* at 1443, 348 N.E.2d at 797.

[70] *Id.*

[71] *Id.*

In view of the substantial disadvantages inherent in any possible modification of the fresh complaint doctrine, the Court concluded that the benefits to be gained by any such modification paled in comparision with the very real benefit of "maintaining a uniform rule that applies as well in instances of multiple charges (which must represent a sizeable fraction of all cases in which rape is charged)."[72] Moreover, the costs of such a uniform rule in terms of any substantial likelihood of prejudice to the defendant were minimal.[73] Indeed, in a direct parallel to its analysis in *Bailey*, the Court reasoned that a fresh complaint encompassing related crimes was likely to be merely cumulative of the victim's trial testimony and, where it was not simply repetitive of such testimony, the discrepancy actually might work in the defendant's favor.[74] Furthermore, in the case of a particularly inflammatory complaint, the judge could exercise his discretion by adopting cautionary measures.[75] One such cautionary measure, which the Court explicitly approved, was the giving of an instruction, if the defendant so requests, that the complaint should be considered only in connection with the rape charge and, even then, should be used only for the purposes of corroboration.[76]

Thus, both *Bailey* and *Blow* afforded the Supreme Judicial Court an important opportunity to reaffirm and explain its continuing adherence to the minority rule which admits the details of a fresh complaint as part of the case-in-chief to corroborate the testimony of a rape victim. The significance of both opinions, however, lies not in legal niceties or in any rigid deference to past precedent. On the contrary, in each case the Court demonstrated its tendency to approach the evidentiary issues arising in rape cases from a practical perspective informed by judicial sensitivity to the special problems confronting the rape victim who prosecutes her assailant.

§11.2. Exceptions to the Hearsay Rule: Declarations of Co-Conspirators, Excited Utterances, and the Innominate Category: Nonhearsay Declarations. In contrast to its broad approach to the evidentiary problems of the fresh complaint doctrine in the *Bailey* and *Blow* cases,[1] a majority of the Supreme Judicial Court took a much narrower and more cautious approach in *Commonwealth v. White*,[2] with respect to three other exceptions to the hearsay rule.

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[72] *Id.*

[73] *Id.*

[74] *Id.* See text at notes 43-45 *supra*.

[75] 1976 Mass. Adv. Sh. at 1444, 348 N.E.2d at 797.

[76] As noted by the Court, this is the procedure adopted by Connecticut which, like Massachusetts, admits the details of the complaint to corroborate the victim's in-court testimony. *Id.* at 1443-44, 348 N.E.2d at 797, *citing* State v. Purvis, 157 Conn. 198, 207-08, 251 A.2d 178, 182 (1968), *cert. denied*, 395 U.S. 928 (1969).

§ 11.2. [1] *See* § 11.1 *supra*.

[2] 1976 Mass. Adv. Sh. 1921, 352 N.E.2d 904. Justice Braucher dissented. *Id.* at 1938, 352 N.E.2d at 912.

The *White* case arose out of a brief encounter between a white man, the complaining witness Thomas Slade, and two black youths in Roslindale.[3] According to Slade's testimony,[4] two youths accosted him and demanded money. The pair took five one-dollar bills from him and then fled.[5] Slade immediately enlisted the aid of some friends to search the neighborhood for the robbers. Soon they came upon the defendant and her companion Danny Gilbert,[6] who ran in opposite directions when Slade shouted at them. Although Slade stumbled and fell, certain of his friends chased the pair and quickly apprehended Gilbert, who surrendered without a struggle and handed over five one-dollar bills, saying "I didn't do it. She did it."[7] They then got into the car with Gilbert and returned to the parking lot where they had first seen the pair.[8] There they found Slade and the defendant who had been captured by some of the others. While the defendant consistently denied having done anything,[9] Gilbert turned to Slade and said "I'm sorry, man, I didn't mean it. I don't blame you for being mad."[10]

As the defendant continued to deny any part in the robbery, the central factual issue at her trial concerned the identity of the two robbers. In effect, the defense sought to suggest to the jury that the case was one of mistaken identity, arising when Slade and his friends simply seized upon the first black couple they saw after the robbery.[11] The Commonwealth, however, introduced Gilbert's statements as in-

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[3] The facts of the case appear in 1976 Mass. Adv. Sh. at 1922-26, 352 N.E.2d at 906-07.

[4] Compare the defendant's testimony as recounted at note 8 *infra*.

[5] Slade testified that Gilbert was brandishing a half-opened straight razor, while the defendant held a "shiny" object. One of them also apparently cut the victim's arm. 1976 Mass. Adv. Sh. at 1922, 352 N.E.2d at 906.

[6] Gilbert, a juvenile, was not tried with the defendant. *See id.*

[7] *Id.* at 1924, 352 N.E.2d at 907.

[8] Gilbert continued to make similar statements in the car, on the way back to the parking lot. *Id.*

[9] The defendant, however, did not deny her connection with Gilbert. On the contrary, when one of the men who had apprehended Gilbert exhibited the five one-dollar bills to Slade before giving them to one of the police officers who had arrived on the scene, she exclaimed, "That's his [Gilbert's] money [or ours]." *Id.* at 1925, 352 N.E.2d at 907.

[10] *Id.* at 1924, 352 N.E.2d at 907.

[11] *Id.* at 1926, 352 N.E.2d at 907-08. According to this theory, Slade's in-court identification of the defendant was actually based on seeing her at the time of the capture, not at the time of the robbery. *Id.*, 352 N.E.2d at 908. Because the original encounter was "very brief," it was reasonable to doubt Slade's ability to identify his assailants. *See id.* at 1922, 352 N.E.2d at 906.

To support the mistaken identity argument, the defendant took the stand and testifed that she and Gilbert had left her house on the day in question with nine dollars to go to a bowling alley. After stopping to buy wine, they paused briefly in the liquor store's parking lot to watch some children sledding. As they were standing there, a car bore down upon them with a man leaning out a window shouting profanities with the word "nigger." They were scared and ran. Furthermore, she contended that she had not been wearing clothes matching the description Thomas had given the police. *See id.* at 1925-26, 352 N.E.2d at 907.

culpating the defendant.[12] Over the defendant's objections and exceptions, the trial court admitted all of Gilbert's statements, relying on the co-conspirator exception to the hearsay rule.[13] Furthermore, in denying the defendant's motion for a mistrial, the trial court suggested that the statements also might be admissible as excited utterances.[14] On the defendant's appeal from her conviction,[15] the Supreme Judicial Court, over Justice Braucher's dissent, reversed and held that the admission of Gilbert's statements was prejudicial error requiring a new trial.[16]

Addressing first the trial court's reliance on the co-conspirator exception to the hearsay rule, the Court characterized that exception as follows: "[W]here there is proof . . . that two or more persons are engaged in a common criminal enterprise, the acts and declarations of one, during the enterprise and in furtherance of it, affect all."[17] Applying this rule, the Court had no doubt that there was sufficient evidence to indicate a joint venture to commit an assault and a robbery.[18] However, since the robbery itself was complete before Gilbert made his statement, the Court concentrated its inquiry on two other issues. First, the Court sought to determine whether the assailants' joint venture included the escape as well as the robbery, and second, if so, whether Gilbert's statements were made during the pendency and in furtherance of that joint venture.[19] Conceding the first issue for the sake of argument, the Court nevertheless concluded that Gilbert's statements failed the second test because the "escape" attempt ended in frustration with Gilbert's capture and surrender just before he made his statements.[20] Accordingly, the Court found that the prof-

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[12] *Id.* at 1926-27, 352 N.E.2d at 907-08. Neither side had called Gilbert as a witness. *Id.*

[13] *Id.* at 1927, 352 N.E.2d at 908. See text at note 17 *infra*. Defense counsel also moved for a mistrial and objected to the appropriate portion of the judge's charge to the jury. 1976 Mass. Adv. Sh. at 1927, 352 N.E.2d at 908.

[14] *See* 1976 Mass. Adv. Sh. at 1933, 352 N.E.2d at 910-11.

[15] Defendant was convicted on indictments for armed robbery, for assault and battery with a dangerous weapon, and for unlawful possession of marijuana found on her after her arrest. *Id.* at 1921, 352 N.E.2d at 905-06.

[16] *Id.* at 1927, 352 N.E.2d at 908. The order reversed only the first two of defendant's three convictions. See note 15 *supra*.

[17] 1976 Mass. Adv. Sh. at 1927-28, 352 N.E.2d at 908 (footnote omitted), *quoting* Commonwealth v. Pleasant, 1974 Mass. Adv. Sh. 1281, 1284-85, 315 N.E.2d 874, 876.

[18] 1976 Mass. Adv. Sh. at 1928, 352 N.E.2d at 908.

[19] *Id.* The Court also raised, but did not decide, the "question whether, for purposes of the hearsay exception, the trier is entitled to assume that a joint venture to commit a crime necessarily includes a common undertaking to effect an escape . . . ." *Id.* at 1929, 352 N.E.2d at 909. The Court suggested that the proponent of the out-of-court statement in fact may have to establish the existence of a joint venture to escape by proving two facts: (1) attempted escape by the participants in the crime; and (2) some element of collaboration between them. *Id.* Because both elements were present in *White*, there was no necessity for the Court to resolve the broader issue of the viability of the presumption. *Id.*

[20] The Commonwealth had argued that the "escape" continued because of the possibility that Gilbert might have anticipated being released on returning the money and

fered evidence failed to satisfy the conditions of the co-conspirator exception.[21]

In thus rejecting the trial court's reliance on the co-conspirator exception, the Court explained that it was not interpreting the rule with an "impractical strictness." On the contrary, exclusion of Gilbert's statements was necessary to further the "significant policy" behind the exception.[22] Only by insisting upon the continuation of a joint criminal enterprise could one be assured of the minimal degree of reliability necessary to justify imposing vicarious liability on a co-venturer.[23] The frustration of an enterprise reduces a declarant's reliability as his self-preservation interest tends to prevail over the interest of the common enterprise.[24]

Having thus disposed of the primary basis for the trial court's ruling, the Supreme Judicial Court similarly rejected the alternative contention that Gilbert's statements were properly admitted as excited utterances.[25] First, the Court noted that the exciting event was the apprehension of Gilbert, but the statements related not to that event, but to the earlier robbery.[26] Second, it determined that statements which exculpate the speaker and inculpate another appear more calculating than instinctive.[27] Thus, the Court concluded that Gilbert's declarations were "quite different from the statements usually accepted under the [excited utterance] rubric."[28]

Having thus found Gilbert's statements inadmissible under any previously recognized hearsay exception, the Court went on to consider the Commonwealth's suggestion that it should adopt a catchall "in-

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minimizing his guilt. *Id.* at 1930, 352 N.E.2d at 909. The Court dismissed the argument as not justified on the facts. Moreover, if Gilbert's statements were in fact designed to aid his escape by minimizing his own guilt, he did so on his own, at the defendant's expense, and in no sense as part of a "common" plan of escape. *Id.* at 1930-31, 352 N.E.2d at 909.

[21] *Id.*, 352 N.E.2d at 910.

[22] *Id.* at 1931-32, 352 N.E.2d at 910.

[23] *Id.* at 1932, 352 N.E.2d at 910. The Court noted that "[t]he mutual 'agency,' conceived to underlie a joint criminal venture, that justifies exposing one co-venturer to the risk of being incriminated by the utterances of another . . . loses all reality when the venture collapses, and the justification disappears with it." *Id.* (citation and footnote omitted). *See* Commonwealth v. Pleasant, 1974 Mass. Adv. Sh. 1281, 1284, 315 N.E.2d 874, 876.

[24] 1976 Mass. Adv. Sh. at 1932, 352 N.E.2d at 910.

[25] It was not at all clear whether the trial court had relied on the excited utterance exception to the hearsay rule. See text at note 14 *supra*.

[26] *Id.* at 1933-34, 352 N.E.2d at 911.

[27] *Id.* Since these two factors indicated that Gilbert's statements fell outside the excited utterance exception, the Court concluded that the customary deference to "the trier's discretion in deciding as to the closeness of the connection between the exciting event and the utterance [was] not pertinent." *Id.* The Court's refusal to affirm the trial court's ruling on this impliedly alternative ground prompted Justice Braucher to observe that: "So far as I can discover, this is the first time in our history that we have reversed a trial judge's ruling in a criminal case on the admissibility of evidence as a spontaneous utterance." *Id.* at 1940, 352 N.E.2d at 912 (Braucher, J., dissenting).

[28] *Id.* at 1934, 352 N.E.2d at 911.

nominate" hearsay exception under which Gilbert's statements would be admissible. The Court characterized the proposed "innominate" exception as encompassing hearsay statements whose "admission would be in a large sense compatible with sundry recognized hearsay exceptions, and would be otherwise fair."[29] The Court thus analogized it to the Federal Rules' catchall exception.[30] Having so described the proposed exception, however, the Court found it unnecessary to decide whether to adopt it;[31] for even under the Federal Rule, the Court found that Gilbert's statements would not be admissible.[32] Under the Federal Rule, the trial court would have had to exclude Gilbert's hearsay statements unless it was satisfied that more probative evidence, such as Gilbert's live testimony, was not available; and the Commonwealth gave no explanation for not having called Gilbert as a witness.[33] Additionally, the Federal Rule admits a hearsay declaration only if the trial court is reasonably satisfied as to its trustworthiness; and the majority was clearly suspicious of Gilbert's statements.[34]

Justice Braucher, in dissent, conceded the "impeccable logic" of the majority's opinion, but challenged the very premises on which its logic was based. Rather than according the numerous exceptions a certain "magical quality," Justice Braucher advocated the adoption of a far more sweeping approach that would begin with the proposition "that hearsay is admissible unless the trial judge in his or her sound discretion thinks it fair to exclude it."[35]

Applying his own formulation of the rule to the facts of the case, Justice Braucher also disagreed with the majority's characterization of the purpose for which the evidence was offered. Whereas the majority stated generally that the evidence was "offered to prove the truth of

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[29] *Id.*

[30] Rule 803(24) of the Federal Rules of Evidence reads in part:

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

[31] The Court, however, recognized the need for flexibility: "We agree that the hearsay rule and its stated exceptions should not be regarded as a closed system without room for variations on reasoned grounds." 1976 Mass. Adv. Sh. at 1934-35, 352 N.E.2d at 911.

[32] *Id.* at 1935-36, 352 N.E.2d at 911.

[33] *Id.* For the text of Rule 803(24), see note 30 *supra*.

[34] *See* 1976 Mass. Adv. Sh. at 1935, 352 N.E.2d at 911. Other factors militating against the application of the proposed innominate exception included the extension of the strong policy against admitting a co-venturer's statements after the frustration of the joint venture and the damaging nature of the statements which did not merely place defendant at the site of the crime, but put the knife in her hands. *Id.*

[35] *Id.* at 1939, 352 N.E.2d at 912 (Braucher, J., dissenting), *quoting* Younger, *In Praise of Simplicity*, 62 A.B.A.J. 632, 634 (1976).

Gilbert's statements,"[36] the dissent pointed out that they were "significant [only] as corroboration of the victim's identification of the defendant as one of those who robbed him. For any other purpose they were worthless, and their admission in evidence was harmless beyond a reasonable doubt."[37] Focusing on this narrower significance of Gilbert's statements, Justice Braucher concluded that those statements lacked the testimonial defects which generally require the exclusion of hearsay, namely, the potential for ambiguity, faulty perception, erroneous memory, and insincerity.[38]

In reaching this conclusion, Justice Braucher paid particular attention to the problem that had so obviously troubled the majority: the potential for insincerity in Gilbert's pushing blame away from himself and casting it on the defendant.[39] Justice Braucher determined, however, that when Gilbert's statements were restricted to the corroborative purpose, the risk of insincerity was minimized because the statement, especially when taken together with the surrender of the money, identified Gilbert as well as the defendant.[40] As such, Gilbert's statements were contrary to his own penal interest, and thus possessed sufficient "indicia of reliability" to allay the majority's suspicions.[41] Regarding the remaining requirements of the Federal Rule, Justice Braucher was not troubled by the Commonwealth's failure to call Gilbert as a witness or to explain its reasons for not doing so because if called as a witness Gilbert would undoubtedly have asserted his fifth amendment privilege not to testify.[42] Having thus negated the potential hearsay problems, Justice Braucher concluded that Gilbert's statements were properly admitted for the purpose of corroborating the eye-witness identification of the defendant.[43]

The *White* case is notable not only for the interplay between the majority and dissent approaches to the hearsay rule, but also for the failure of either opinion to consider a third approach that might have accommodated Justice Braucher's common sense result within the framework of existing hearsay rules. This third approach would avoid entirely the dispute over hearsay exceptions by recognizing that

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[36] 1976 Mass. Adv. Sh. at 1927, 352 N.E.2d at 908.

[37] *Id.* at 1940, 352 N.E.2d at 913 (Braucher, J., dissenting).

[38] *Id.* at 1942, 352 N.E.2d at 913 (Braucher, J., dissenting), *quoting* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

[39] 1976 Mass. Adv. Sh. at 1934, 352 N.E. 2d at 911. Justice Braucher discounted any problems conceivably posed by the first three testimonial defects. *Id.* at 1942-43, 352 N.E.2d at 914 (Braucher, J., dissenting).

[40] *Id.* at 1943, 352 N.E.2d at 914 (Braucher, J., dissenting).

[41] *Id.*, *quoting* Dutton v. Evans, 400 U.S. 74, 89 (1970).

[42] 1976 Mass. Adv. Sh. at 1940, 352 N.E.2d at 913; *see id.* at 1943, 352 N.E.2d at 914 (Braucher, J., dissenting), *quoting* Dutton v. Evans, 400 U.S. 74, 89 (1970).

[43] 1976 Mass. Adv. Sh. at 1943, 352 N.E.2d at 914 (Braucher, J., dissenting). Justice Braucher further noted that even if the trial court had given erroneous reasons for its correct ruling, that in itself was not grounds for reversal. *Id.* To the extent that the trial court had admitted evidence for other purposes, it had committed merely harmless error. *Id.*

Gilbert's statements were not hearsay at all because they had not been offered for the truth of the matters asserted.[44] Gilbert's statement that "she did it" was not introduced to prove that the defendant had done it. Similarly, his subsequent apology was not introduced to prove that Gilbert, in fact, was sorry. Instead, both statements were relevant only for the purpose of proving circumstantially that Gilbert had a guilty state of mind.[45] This, in turn, bore on the identity issue because the mere fact of his making the statements, irrespective of their truth, strongly suggested that he, and inferentially the defendant, his companion, were not the innocent bystanders that the defense sought to establish. Because the statements were not offered to evidence the fact asserted, the trial court might have admitted both statements without relying on any exception to the hearsay rule.[46]

There is no indication in either the majority opinion or the dissent as to why none of the judges considered a nonhearsay theory of admissiblity. This omission is especially surprising in view of the fact that both opinions indicated an awareness of the circumstantial nature of the evidence. The dissent, especially, came very close to reaching this result, when it premised its approach on a recognition of the nontestimonial nature of Gilbert's statements.[47] While it concluded that those statements did not present the normal hearsay dangers, it did not take the final step of declaring that the statements were not hearsay. The majority also seemed sensitive to the importance of circumstantial identity evidence, for they recognized the admissibility of "Gilbert's act of surrendering the five dollars as distinguished from his declarations."[48]

One possible factor in the Court's preoccupation with the hearsay aspect of Gilbert's statements, and concomitant failure on the part of both opinions to consider their admissibility as nonhearsay evidence, may be that the trial court admitted those statements without limitation, allowing the jury to consider their testimonial effect. However, the trial court would have been required to limit Gilbert's statements to their circumstantial value only if the defendant had requested a limiting instruction,[49] and it does not appear that she ever made such a request. Moreover, a concern with a limiting instruction would not account for the Court's failure to distinguish between the trial court's admission of both the statement—"I'm sorry, man, I didn't mean

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[44] The hearsay rule only forbids the use of an out-of-court statement "as an assertion to evidence the fact asserted . . . ." 6 J. WIGMORE, EVIDENCE § 1788, at 313 (Chadbourn rev. 1972).

[45] The hearsay rule does not apply when the utterance is introduced as circumstantial evidence. *Id. See generally id.* § 1790, at 320-26 (utterances as indicating circumstantially the speaker's own state of mind).

[46] See notes 44 and 45 *supra*.

[47] 1976 Mass. Adv. Sh. at 1940, 352 N.E.2d at 913.

[48] *Id.* at 1931 n.9, 352 N.E.2d at 910 n.9.

[49] Commonwealth v. Bailey, 1976 Mass. Adv. Sh. at 1429 n.11, 348 N.E.2d at 751 n.11.

it."—whose substance was innocuous and the statement—"she did it"—whose substance was far more damaging. Even as to this last statement, however, it is doubtful whether the defendant was in fact prejudiced by the absence of a limiting instruction. Once it was established that the defendant and Gilbert were the robbers, it was immaterial which one of them actually "did it," since the other one would be fully liable vicariously.[50]

In conclusion, then, the somewhat narrow approach of the *White* case contrasts sharply with the more flexible, policy-oriented results in the two "fresh complaint" cases, *Bailey* and *Blow,* discussed in the previous section.[51] In *White*, the Court adopted a more technical approach to hearsay exceptions which seems to have precluded consideration of the nonhearsay aspects of the declarations in question. Furthermore, while *Bailey* and *Blow* clarified an important issue, the *White* case may have raised more questions than it resolved.

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[50] *See, e.g.,* G.L. c. 274, §§ 1, 2.
[51] *See* § 11.1 *supra.*