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Evidence—Admissibility of Related Offenses

Dale Riveland

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not be found, it hardly seems that this should also be true if the change occurs after a dispute arises. If such were the case, an employer could terminate the basis of a labor dispute at his discretion, as the court intimates, without complying with any of the union's demands.

Although, after the dispute arises, the union employee fails to pay dues or actively participate through the union, according to the second *Ostroff* case he will still be considered a member of the union, so long as he has not attempted to withdraw from the union. There the union employee had discontinued any active employment through the union and had taken up employment in another field of work.

One final question is raised by the second *Ostroff* case with regard to the possible termination of a labor dispute. In that case, since the only union employee had left *P*'s employment, it seems that if the union had ended its controversy with *P*, it would not be able to resume picketing at a later date unless the basis for a labor dispute could be found, i.e., unless one of its members had been hired by *P* or unless one of *P*'s employees had joined the union. The question is then, how far may a union go in changing or altering its demands before the original controversy will be considered at an end? In the first *Ostroff* case, the court seemed to invite the change in demands and this was done all to the satisfaction of the court in the second *Ostroff* case. Assuming that the changes affected all of the union demands and all new demands were subsequently made, would not the time for determining the labor dispute then be at the time the new demands were made rather than at the time of the original demands? If the changes made in the demands did not completely replace the old demands, when will the court consider the time for determining the basis of a labor dispute to have shifted from the original time to the time the new demands are made?

As may be seen from the cases here presented, there are a number of questions that the court, or the legislature if it chooses, may answer for us at a future date. The rule that peaceful picketing will not be enjoined if a labor dispute exists and the objectives are not unlawful seems fairly stable and not likely to be changed except by statute. From the list of objectives that have been declared unlawful and the ones that have been held lawful, the union and the employer have a fair idea of how their relations should be guided. Similarly, there seems to be a fair criterion for establishing when a person is an employee. But much speculation begins to arise in the inception and termination of that status. Also, it is not clear how changes in demands will affect the existence of a labor dispute if all of the union employees had left their employment after the dispute arose. Clarification of these matters will probably await case-by-case determination in the courts, but a replacement or remodeling of the twenty-year-old labor disputes act, RCW 49.32.010 *et seq.* [RRS § 7612 *et seq.*], would be a great contribution to clarification of the labor picture in Washington.

ROBERT S. MUCKLESTONE

Evidence—Admissibility of Related Offenses. *D* was charged with sodomy and rape. A confession of a prior similar assault and attempted rape was admitted with the instruction that the confession should be used only for whatever bearing it might have upon common scheme or plan in connection with the rape charges. *D* was acquitted of rape and convicted of sodomy. Appeal. *Held:* Affirmed. Evidence of other crimes may not be admitted unless the evidence is relevant and necessary to prove an essential ingredient of the crime charged. This confession was not sufficiently related to show a common scheme or plan. However, *D* was not prejudiced as to the rape charges because he was acquitted of rape, nor did the evidence prejudice him on the sodomy counts because the confession could have been properly admitted to establish identity

and to prove that the acts charged could be committed in the cab of the truck. *State v. Goebel*, 40 Wn. 2d 18, 240 P. 2d 251 (1952).

In this case *D*'s method was to strike up a conversation by claiming to have seen the woman on his bus route. He would then offer to take her home in his truck, drive to a secluded spot and attempt rape. The general rule, and that of Washington, is that evidence of similar offenses is not admissible to show evil propensities or that the defendant has a tendency to commit the crime with which he is charged. *State v. Barton*, 198 Wash. 268, 88 P. 2d 385 (1939); *Neff v. United States*, 105 F. 2d 688 (C.A. 8th 1939); *State v. Lapage*, 57 N.H. 289 (1876). The similarities in the *Goebel* case go somewhat beyond showing a criminal disposition and tend to establish a general plan of operation on rapes of this sort even if they do not point to any particular act. However, in excluding the evidence from the common plan or scheme theory the court said the strict scope of that theory was limited to evidence which shows some causal connection between the offenses and which establishes a pre-existing design directed toward the doing of the *very act charged*. Actually, the value of the inference from the single prior act to the probability that *D* did the acts in the manner charged is rather insignificant if the improper consideration that *D* is an evil man could be completely isolated from it. This limited relevancy must be weighed against the great damage that the evidence did to *D*'s case by displaying his character. The opinion cites the rule established in an earlier appeal of the same case that evidence of other offenses even if relevant should not be admitted if its effect would be to "generate more heat than light." *State v. Goebel*, 36 Wn. 2d 367, 218 P. 2d 300 (1950).

Some cases declare that similar offense evidence is admissible if it is relevant to any necessary element of the crime. *People v. Williams*, 6 Cal. 2d 500, 58 P. 2d 917 (1936); *Farris v. People*, 129 Ill. 521, 21 N.E. 821 (1889); *State v. Simpson*, 50 N.W. 2d 601 (Iowa 1951). Others hold that only evidence offered to prove motive, intent, absence of mistake or accident, common plan or scheme, or identity is excepted from a general rule that evidence of crimes not charged is inadmissible. *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901); *Hancock v. State*, 123 Tex. Cr. 154, 58 S.W. 2d 129 (1933); *Parkinson v. People*, 135 Ill. 401, 25 N.E. 764 (1890); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Others add further exceptions. *Weldon v. State*, 84 Ga. App. 634, 66 S.E. 2d 920 (1951) (guilty knowledge); *Leezer v. State*, 121 Tex. Cr. 128, 51 S.W. 2d 606 (1932) (*res gestae*). Some further limit the exceptions. *Helton v. Commonwealth*, 244 S.W. 2d 762 (Ky. 1951); *People v. De Garmo*, 179 N.Y. 130, 71 N.E. 736 (1904). The creation of such a rule of general exclusion subject to limited exceptions has resulted in some confusion and perversion of justice because (1) overwhelmingly relevant evidence is rejected if not within one of the categories; (2) the attempts to force evidence of other offenses into the prescribed categories frequently result in distorting the exception so as to leave it very indefinite; (3) the true test of relevancy is obscured and sometimes ignored in the attempt to determine if one of the ready made exceptions is applicable. See Stone, *The Rule of Exclusion of Similar Fact Evidence; America*, 51 Harv. L. Rev. 988 (1938).

The Washington court has before avoided these difficulties by recognizing that the common exceptions to the rule that other offenses should be excluded are not the only ones. The real test is relevancy. *State v. Lew*, 26 Wn. 2d 394, 174 P. 2d 291 (1946); *State v. Davis*, 6 Wn. 2d 696, 108 P. 2d 641 (1940); *State v. O'Donnell*, 195 Wash. 471, 81 P. 2d 509 (1938). But intermingled among numerous decisions so stating are cases which tacitly imply that only evidence offered to prove identity, common plan or scheme, guilty knowledge, motive or intent will be admitted. *State v. Salle*, 34 Wn. 2d 183, 208 P. 2d 872 (1949); *State v. Kritzer*, 21 Wn. 2d 710, 152 P. 2d 967 (1944); *State v. Barton*, 198 Wash. 268, 88 P. 2d 385 (1939).

The net result in Washington is that a trial judge is not always sure what standard he must apply. The safest solution appears to be that this evasive class of evidence must be pigeon-holed in battered compartments if at all possible. Consequently, tortured instructions follow. For example, in *State v. Shay*, 186 Wash. 154, 57 P. 2d 401 (1936) the defendant was convicted of grafting by attempting to bribe jurors and prior similar acts were shown. The only instruction as to the use of the evidence was, "This evidence is admitted only to be considered by you insofar as it may throw light upon the transaction . . . alleged in the information, by showing scheme or system or guilty knowledge." (Brief for Appellant, p. 109). How far does such an instruction go in preventing improper use of the evidence? Scheme or system is an element of no crime but only a medium through which an inference may be made that a necessary element is present. Then the supreme court is forced to decide not only whether the evidence was relevant enough to be admitted but also whether the instructed use was proper. These problems will be less frequent if the Washington Supreme Court is taken at its word in the *Goebel* case when it says that the five common exceptions are not exhaustive, and that the true test is relevancy to the issues.

DALE RIVELAND

Guardian Ad Litem—Right of Alleged Incompetent to Contest Appointment. In an action brought by an ex-husband to enjoin an ex-wife's privilege of visiting their children, the trial court on the motion and evidence of incompetency offered by P appointed a guardian *ad litem* for D. The appointment was resisted by D. On application for a writ of prohibition to prevent appointment of guardian *ad litem*, *Held*: D is entitled to a full and fair hearing and an opportunity to defend against the appointment of a guardian *ad litem*. *Graham v. Graham*, 40 Wn. 2d 64, 240 P. 2d 564 (1952).

Although there have been seventeen reported cases concerning guardians *ad litem* in Washington, this is the first case involving an objection to the appointment. The point rarely arises because the normal situation concerns either a minor or a person admittedly insane or incompetent. It is the purpose of this note to analyze the Washington cases and show their relation to the principal case.

The first group of Washington cases poses the problem of when failure to appoint a guardian *ad litem* constitutes reversible error. The purposes of such guardian is to protect the interests of a party to an action when, in the opinion of the court, that party is incapable of so doing himself. A minor is legally presumed to lack the capacity to look after his own interests. Therefore the statutory provision for the appointment of a guardian *ad litem* is mandatory, and any adjudication adverse to the interests of such unrepresented minor is reversible error. *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108 (1912); *Mesere v. Flory*, 26 Wn. 2d 274, 173 P. 2d 776 (1946). The failure to appoint a guardian *ad litem* is not reversible error if the minor party was successful, and the adverse party did not object until after the pleading on the merits. *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844 (1901); see also *Hale v. Crown Columbia Pulp and Paper Co.*, 56 Wash. 236, 105 Pac. 480 (1909). Reversal will also result if an adjudication is obtained against one *non compos mentis* by default when such party is known to be incompetent and is not represented by a guardian *ad litem*. *Townsend v. Price*, 19 Wash. 415, 53 Pac. 668 (1898). However a failure to appoint a guardian *ad litem* where an insane person is represented by a general guardian who actively defends in the action will not affect the award. In re *DeNisson*, 197 Wash. 265, 84 P. 2d 1024 (1938).

A second group of cases involves the issue of the propriety of appointing a guardian *ad litem* when the party is already under the control of a general guardian. The prob-