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EVIDENCE OF DEFENDANT'S OTHER CRIMES: ADMISSIBILITY IN MINNESOTA

There are two ways of stating the rule concerning evidence of defendant's commission of other crimes.¹ The most frequent way of stating it is that it excludes any evidence which shows the defendant to be guilty of other crimes unless it is pertinent to the proof of defendant's commission of the crime charged.² The "unless" portion of this rule is usually stated in the form of exceptions.³ Stated another way, the rule will admit evidence of other crimes if it is relevant—unless its relevance is to show only a general disposition of the accused to commit the crime in question.⁴ Professor Stone has contended that the admission theory was the original rule, and the exclusion theory developed through misapplication of the former.⁵ Under either statement the result is to exclude such evidence if it has probative value only to show a disposition of the defendant to commit the crime charged.⁶ Under either, it is the doing of the act that is important. Conviction is not necessary before the evidence can be admitted,⁷ but mere arrest⁸ or punishment⁹ cannot be shown.

The correlative problem of the defendant wishing to present evidence of crimes by third persons also presents itself in some of these cases. Where such evidence has materiality in absolving the defendant from guilt, he should be allowed to present it.¹⁰

1. This Note concerns evidence of other crimes of the defendant as substantive evidence only. It does not cover the subject of impeachment of witnesses other than the defendant, which was covered in Note, 36 Minn. L. Rev. 724, 735-738 (1952), nor does it cover the subject of character evidence.

2. See 2 Jones, Commentaries on Evidence § 623 *et seq.* (2d ed. 1926).

3. *Ibid.*

4. See Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 993 (1938); 13 So. Calif. L. Rev. 511, 514 (1940).

5. Stone, *supra* note 4, at 993-1000.

6. See *St. Paul v. Greene*, 56 N. W. 2d 423, 426 (Minn. 1952). *But cf.* note 56 *infra* and text thereto.

7. See *State v. Anderson*, 155 Minn. 132, 192 N. W. 934 (1923) (evidence of a crime of which defendant had been acquitted held admissible). The problem of self-incrimination would appear to be the only other problem connected with presenting evidence of a mere commission, not a conviction, of a crime, and that problem could only appear in cases in which the prosecution seeks to elicit the evidence through cross-examination of the defendant.

8. *Cf. State v. Bryant*, 97 Minn. 8, 9, 105 N. W. 974 (1905); *State v. Renswick*, 85 Minn. 19, 22, 88 N. W. 22, 23 (1901); see 3 Wharton, *Criminal Evidence* § 1421 (11th ed. 1935).

9. *Cf. Harding v. Great N. Ry.*, 77 Minn. 417, 420, 80 N. W. 358, 359 (1899) (by implication).

10. The most common situation is in carnal knowledge cases. The rule is clear that ordinarily the defendant cannot show acts of the prosecutrix with other men as it has no bearing on the defendant's guilt of the crime charged. *State v. Kraus*, 175 Minn. 174, 220 N. W. 547 (1928); *State v. McPadden*, 150 Minn. 62, 184 N. W. 568 (1921). However, where the prosecution has alleged or attempted to prove that the prosecutrix has become preg-

REASONS FOR THE RULE

Various reasons have been advanced in support of the rule restricting admission of evidence of other crimes. Of these, the danger of prejudice to the defendant is the most substantial,¹¹ for there is merit to the contention that the complexities of human nature render inconclusive an assumption of guilt of the act presently charged because of other commissions of the same or similar acts.¹² Other reasons are the failure to inform the defendant that he must be prepared to meet extraneous charges,¹³ the danger that the jury may convict now because the defendant has escaped punishment in the past,¹⁴ and that the admission of such evidence unduly consumes trial time.¹⁵ Lastly, it is felt that since ours is an accusatorial rather than an inquisitorial system of justice, the prosecution must prove the defendant guilty of the specific crime charged by evidence relevant to the issues rather than by going into his past conduct.¹⁶

THE EXCLUSION THEORY IN PRACTICE

The Minnesota court purports to follow the exclusion theory of the rule.¹⁷ Under it, evidence is admissible if it comes under one of the exceptions to the general rule of inadmissibility. It is not enough to show that evidence tends to establish a certain exception to the exclusion rule. That exception must also constitute a material portion of the crime.¹⁸ Since production of the evidence is justified by necessity, if other evidence has substantially established this

nant or contracted venereal disease as a result of defendant's act, the evidence is admissible to show the falsity of such a claim. *See State v. Elijah*, 206 Minn. 619, 621, 289 N. W. 575, 577 (1940); *State v. Kraus*, *supra* at 179-180, 220, N. W. at 549. In forgery cases the defendant is allowed to introduce evidence of commission of forgeries similar to the one with which he is charged to negative an inference of his own guilt. *State v. Bock*, 229 Minn. 449, 39 N. W. 2d 887 (1949). Where the defendant seeks to introduce evidence of criminal acts of the decedent to show his quarrelsome nature, and thus aid defendant in establishing his plea of self-defense, it must be shown that the defendant knew of this characteristic for the evidence to be admissible. *State v. Ronk*, 91 Minn. 419, 431, 98 N. W. 334, 339 (1904).

11. *See State v. Eames*, 163 Minn. 249, 203 N. W. 769 (1925).

12. *See Wigmore, Evidence* § 192 (3d ed. 1940).

13. *Cf. State v. Haney*, 219 Minn. 518, 520, 18 N. W. 2d 315, 316 (1945); *see 1 Wharton, Criminal Evidence* § 344 (11th ed. 1935).

14. *See State v. Doty*, 167 Minn. 164, 166, 208 N. W. 760, 761 (1926).

15. *Cf. State v. Haney*, 219 Minn. 518, 520, 18 N. W. 2d 315, 316 (1945).

16. *See People v. Molineux*, 168 N. Y. 264, 292-293, 61 N. E. 286, 294 (1901). This case is perhaps the most famous, or infamous, of all cases concerning evidence of other crimes. Evidence concerning another poisoning by the defendant similar to the one charged was held to be inadmissible.

17. *See St. Paul v. Greene*, 56 N. W. 2d 423 (Minn. 1952).

18. *See 1 Wharton, Criminal Evidence* 485 (11th ed. 1935).

element, the proof of other crimes is inadmissible.¹⁹ Of course, where the crime shown is actually part of the same transaction as the crime charged, resort to an exception to bring the evidence in is unnecessary for no showing of other crimes is involved.²⁰ Conversely, when the prosecutor is permitted to present some evidence to show defendant guilty of other crimes under the promise of showing it to be under one of the exceptions and then fails to show the crime, it is reversible error not to strike such evidence with proper instructions.²¹

An early case²² cast doubt on the admissibility of subsequent acts. Later cases, however, admitted subsequent acts to show scheme or plan²³ and opportunity and inclination.²⁴ In several cases subsequent acts were held admissible, but no reason for their admission was given.²⁵ The major requirement is that such acts must not be too remote,²⁶ and they must, of course, satisfy the other requirements for admissibility of other crimes generally.²⁷ Some other jurisdictions have held inadmissible subsequent acts offered to show knowledge.²⁸ Whether Minnesota would reach the same result is questionable.²⁹ However, the fact that an act is subsequent may in itself render it incapable of showing the element for which it is presented. In such cases the act would be inadmissible purely because it would be irrelevant—not inadmissible per se because subsequent.

19. An example is that other crimes are inadmissible to show intent where the criminal intent is presumed from the act itself. *People v. Lonsdale*, 122 Mich. 388, 81 N. W. 277 (1899); see *Anderson v. United States*, 18 F. 2d 404, 405 (8th Cir. 1927); Wharton, *op. cit. supra* at 522-523.

20. *State v. Pugliese*, 149 Minn. 126, 182 N. W. 958 (1921); *State v. Mueller*, 38 Minn. 497, 38 N. W. 691 (1888) (alternative holding).

21. *State v. Johnson*, 173 Minn. 543, 217 N. W. 683 (1928) (by implication); see *State v. Gulbrandsen*, 57 N. W. 2d 419, 423-424 (Minn. 1953).

22. *State v. Schueller*, 120 Minn. 26, 30, 138 N. W. 937, 938 (1912).

23. *State v. Oelschlegel*, 173 Minn. 598, 218 N. W. 117 (1928).

24. *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915).

25. *State v. McPadden*, 150 Minn. 62, 184 N. W. 568 (1921); *State v. Rutledge*, 142 Minn. 117, 171 N. W. 275 (1919).

26. See *id.* at 119, 171 N. W. at 276; *State v. Roby*, 128 Minn. 187, 189, 150 N. W. 793, 794 (1915).

27. See *Witters v. United States*, 106 F. 2d 837 (D.C. Cir. 1939); *State v. Roby*, *supra* note 26; 25 Va. L. Rev. 234 (1938).

28. *Witters v. United States*, *supra* note 27; *Dampier v. State*, 191 Ind. 334, 132 N. E. 590 (1921); see *People v. Baskin*, 254 Ill. 509, 513, 98 N. E. 957, 959 (1912). The reasoning of these cases is that while the knowledge indicated by a prior act is presumed to continue to the act charged, knowledge found in a subsequent act cannot be imputed retroactively.

29. See *State v. Jansen*, 207 Minn. 250, 255, 290 N. W. 557, 560 (1940): "While one isolated act in investigating and reporting on a claim might be explained upon the ground that it was innocently committed through mistake or otherwise, other similar acts with respect to the same claim . . . have a reasonable and natural tendency to show that the specific act was knowingly committed with unlawful intent. . . . It makes no difference whether the acts came before or after the offense charged."

The exceptions most often relied on to admit evidence are those which establish capacity to do the act, scheme or plan, knowledge or belief, intent, motive, and identity.³⁰ Under this rule, however, the evidence has also been admitted to show malice,³¹ to complete the *res gestae*,³² to rebut inference of mistake,³³ to show readiness or unwillingness to commit the crimes charged,³⁴ to characterize the specific act charged,³⁵ and even to show an inclination of the defendant to commit the particular act charged.³⁶

Consideration should be given to some of the problems of interpretation and application of the various exceptions arising under the exclusion theory. At the outset one is faced with the difficulty of categorizing cases in terms of the various exceptions which have been offered to rationalize admissibility in spite of the fact that no reference is made to such a category in the opinions themselves. Numerous cases have held evidence of other crimes admissible to establish the defendant's possession of the gun involved in the crime charged,³⁷ or to show defendant's possession of liquor in prosecutions for illegal sales.³⁸ Decisions such as these conform to the traditional function of the capacity exception.³⁹

On the other hand, the Minnesota court has expressly justified its decision by reference to the capacity exception when the facts

30. *State v. Gifs*, 195 Minn. 276, 262 N. W. 637 (1935) (knowledge); *State v. Voss*, 192 Minn. 127, 255 N. W. 843 (1934) (intent); *State v. Nichols*, 179 Minn. 301, 229 N. W. 99 (1930) (capacity); *State v. Lindstrom*, 180 Minn. 435, 231 N. W. 12 (1930) (motive); *State v. Thornton*, 174 Minn. 323, 219 N. W. 176 (1928) (intent); *State v. Oelschlegel*, 173 Minn. 598, 218 N. W. 117 (1928) (scheme or plan); *State v. Hacker*, 153 Minn. 538, 191 N. W. 37 (1922) (scheme or plan); *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698 (1881) (motive); see *State v. Luckin*, 129 Minn. 402, 152 N. W. 698 (1915) (identity); 1 Wigmore, *Evidence* § 217 (3d ed. 1940).

31. 1 Wharton, *Criminal Evidence* § 245 (11th ed. 1935).

32. Underhill, *Criminal Evidence* 193 (3d ed. 1923); 1 Wharton, *Criminal Evidence* § 347 (11th ed. 1935); Note, 3 *Vand. L. Rev.* 779, 785-786 (1950).

33. See *State v. Sweeney*, 180 Minn. 450, 455, 231 N. W. 225, 227 (1930); see Underhill, *Criminal Evidence* 194 (3d ed. 1923); 1 Wharton, *Criminal Evidence* 490 (11th ed. 1935).

34. *State v. Doty*, 167 Minn. 164, 208 N. W. 760 (1926).

35. *State v. Priebe*, 221 Minn. 318, 22 N. W. 2d 1 (1946); see *State v. Voss*, 192 Minn. 127, 129, 255 N. W. 843, 844 (1934).

36. See, *e.g.*, *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915); *State v. Hartung*, 141 Minn. 207, 169 N. W. 712 (1918); *State v. Schueller*, 120 Minn. 26, 138 N. W. 937 (1912); see *State v. Whipple*, 143 Minn. 403, 407, 173 N. W. 801, 802 (1919).

37. See, *e.g.*, *State v. Hankins*, 193 Minn. 375, 258 N. W. 578 (1935); *State v. Nichols*, 179 Minn. 301, 229 N. W. 99 (1930); *State v. McClendon*, 172 Minn. 106, 214 N. W. 782 (1927); *State v. Barrett*, 40 Minn. 65, 41 N. W. 459 (1889).

38. See, *e.g.*, *State v. Upson*, 162 Minn. 9, 201 N. W. 913 (1925); *State v. Van Vleet*, 139 Minn. 144, 165 N. W. 962 (1918).

39. 1 Wigmore, *Evidence* § 88 (3d ed. 1940).

do not warrant its application. In *State v. Priebe*,⁴⁰ the court admitted evidence of shoplifting at other stores shortly before defendant's arrest for shoplifting, reasoning that the evidence was properly admitted to show defendant's capacity or skill to do the act charged, or because it "[c]haracterized her possession of the goods found in her possession."⁴¹ If other shoplifting shows capacity to shoplift, it would appear to follow that other robberies or murders or perjury would be perfectly relevant evidence to show capacity in a prosecution for such a crime. By such an application the rule could be completely circumvented. The decision can be explained, however, by an application of the scheme or plan exception. The logical consistency of the decision is saved by a last-minute reference to this exception.⁴²

The exception to show scheme or plan has been the most often used exception in Minnesota and has been used to admit evidence in prosecution for a great number of different crimes.⁴³ This exception proceeds upon an assumption that the showing of a series of closely-related crimes raises a probability that the defendant committed the one in the series for which he is under prosecution.⁴⁴ Therefore, the acts offered to show the scheme cannot be anonymous—their connection with the defendant is a necessary foundation for the admissibility of the evidence.⁴⁵ In prosecutions for arson, the court has admitted the evidence to show what in effect is a method of operation,⁴⁶ reasoning that the similarity between the crime shown to have been committed by the defendant and the one in issue tends to corroborate the proof of the crime charged.

While these cases are not inconsistent with the basic rationale of the scheme or plan exception, the court has not always kept that rationale in mind. In a prosecution for robbery where the only issue presented was whether the defendant conspired to commit the crime in question, prior crimes by the alleged co-conspirator were admitted to show the conspiracy although no connection be-

40. 221 Minn. 318, 22 N. W. 2d 1 (1946).

41. *Id.* at 322, 22 N. W. 2d at 3.

42. *Ibid.*

43. See, e.g., *State v. Yurkiewicz*, 212 Minn. 208, 3 N. W. 2d 775 (1942) (swindling); *State v. Sweeney*, 180 Minn. 450, 231 N. W. 225 (1930) (bribery); *State v. Clark*, 155 Minn. 117, 192 N. W. 737 (1923) (illegal sale of liquor); *State v. Hacker*, 153 Minn. 538, 191 N. W. 37 (1922) (larceny); *State v. Whipple*, 143 Minn. 403, 173 N. W. 801 (1919) (illegal sale of narcotics).

44. 2 Wigmore, Evidence § 304 (3d ed. 1940).

45. See *State v. Robbins*, 185 Minn. 202, 207-208, 240 N. W. 456, 459 (1932); *State v. Friedman*, 146 Minn. 373, 378, 178 N. W. 895, 897 (1920).

46. See *State v. Golden*, 173 Minn. 420, 217 N. W. 489 (1928); *State v. Ettenberg*, 145 Minn. 39, 176 N. W. 171 (1920).

tween the defendant and the prior crimes was shown.⁴⁷ Similarly, in a prosecution for car theft a prior car theft was shown although the defendant had been tried and acquitted of that crime.⁴⁸ Another robbery case admitted evidence of similar robberies in the vicinity although there was apparently no attempt to connect the defendant with those prior crimes.⁴⁹ Anonymous crimes can have no relevance in deciding whether the *defendant* committed the crime with which he is charged. Their admission under the guise of the scheme or plan rule can serve no useful purpose and cannot fail to make more difficult the jury's job of basing its decision on relevant evidence.

The distinction between showing knowledge and showing intent is a difficult one. While the abstract distinction is easy to state,⁵⁰ in most cases a showing that the defendant had knowledge of the wrongfulness of his act in turn goes to show that he had the necessary criminal intent, and evidence showing that the defendant intended a criminal act often shows he had knowledge of its wrongfulness. The Minnesota court has indicated difficulty in distinguishing between these two exceptions in several cases,⁵¹ stating that evidence was admissible either to show knowledge or intent. Where the question has been whether or not the defendant committed the act by mistake, such as where he has made incorrect entries in records, evidence admitted under another apparent exception, *i.e.*, to rebut the inference of such a mistake, also shows guilty knowledge and intent. At times, when faced with such a situation, the court has admitted the evidence on the basis of all three exceptions.⁵²

The term "res gestae" has been much criticized as being a catch-all, imprecise term.⁵³ While the mere fact that another crime was committed during a period of time known as the "res gestae" has little to do with the relevance of that crime in showing anything material to the proof of the crime charged, the motivation for this exception is legitimate. It seeks to prevent the exclusion of evidence which shows an independent crime in cases where that crime and the one relied on for prosecution are inseparable. Limited to that function, the results reached under it⁵⁴ are unobjectionable.

47. *State v. Briggs*, 122 Minn. 493, 142 N. W. 823 (1913).

48. *State v. Anderson*, 155 Minn. 132, 192 N. W. 934 (1923).

49. *See State v. Ryan*, 156 Minn. 186, 192, 194 N. W. 396, 399 (1923).

50. 2 Wigmore, Evidence § 300 (3d ed. 1940).

51. *See, c.g.*, *State v. Sabatini*, 171 Minn. 137, 213 N. W. 552 (1927); *State v. Rosenberg*, 155 Minn. 37, 192 N. W. 194 (1923); *State v. Southall*, 77 Minn. 296, 79 N. W. 1007 (1899).

52. *See State v. Jansen*, 207 Minn. 250, 290 N. W. 557 (1940); *State v. Bourne*, 86 Minn. 426, 90 N. W. 1105 (1902).

53. 1 Wigmore, Evidence § 218 (3d ed. 1940).

54. *State v. Bowers*, 178 Minn. 589, 228 N. W. 164 (1929).

The court has been most liberal in admitting evidence of other crimes in the sex crime cases,⁵⁵ and has even admitted it to show an inclination of the defendant to commit the crime charged.⁵⁶ The distinction between evidence showing an inclination, which can be shown in these cases, and a disposition, which is supposedly never admissible,⁵⁷ is dubious at best. The court has, however, limited this type of evidence to a showing of other similar acts with the prosecutrix.⁵⁸ The court's liberality in admitting evidence in this type of crime is somewhat illogical. Since natural prejudice against the sex offender is so great, it would seem that he should be afforded more, rather than less, protection. The reason for this liberal admissibility is not clear, but appears to rest on a belief that other acts with the prosecutrix show lust of the defendant for this particular girl rather than mere disposition to commit this type of crime. Thus, this evidence is used to show intent or design.⁵⁹ Such reasoning appears to be little more than rationalization to explain a complete departure from the exclusion rule which will not fit this situation.

In several of the carnal knowledge cases the prosecuting attorney has presented evidence of several acts of the defendant and the prosecutrix, and then after all evidence was in, has elected the specific act on which to base the prosecution. In an early case the conviction was reversed when, after electing to rely on one act, the prosecution offered evidence on another,⁶⁰ but later cases have allowed an election after evidence of several acts had been presented.⁶¹ It has been said to be a matter for the discretion of the trial judge.⁶² Allowing the prosecutor to proceed in this manner probably makes the defense more difficult, but in view of the court's liberal attitude in this type of case, it actually has little effect on whether the evidence of other acts of the accused will be admitted. This problem has only arisen in carnal knowledge cases, but there would appear to be no objection to the same procedure in other

55. See *State v. Schueller*, 120 Minn. 26, 29, 138 N. W. 937, 938 (1912).

56. See *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915); *State v. Schueller* *supra* note 53; see *State v. Elijah*, 206 Minn. 619, 621, 289 N. W. 575, 577 (1940).

57. See note 6 *supra* and text thereto. But see *State v. Shtemme*, 133 Minn. 184, 158 N. W. 48 (1916).

58. *State v. Hancy*, 219 Minn. 518, 18 N. W. 2d 315 (1945); *State v. Friend*, 151 Minn. 138, 186 N. W. 241 (1922); see 1 Wharton, *Criminal Evidence* 548-551 (11th ed. 1935). *But cf.* *State v. Shtemme*, 133 Minn. 184, 158 N. W. 48 (1916).

59. See 2 Wigmore, *Evidence* § 357 (3d ed. 1940).

60. *State v. Masteller*, 45 Minn. 128, 47 N. W. 541 (1890).

61. *State v. Roby*, 128 Minn. 187, 150 N. W. 793 (1915); *State v. Schueller*, 120 Minn. 26, 138 N. W. 937 (1912).

62. See *State v. Schueller*, 120 Minn. 26, 28, 138 N. W. 937, 938 (1912).

crimes, so long as the acts were so closely related as to require that they all be shown.⁶³

Where the court has deemed the evidence relevant and has been unable to squeeze it in under one of the known exceptions, it has invented new exceptions. Resorting to the so-called exceptions of showing willingness and readiness⁶⁴ and of characterizing the act charged,⁶⁵ points up the inadequacy of the exclusion theory to cover all situations.

EXCLUSION AND ADMISSION THEORIES COMPARED

Professor Stone believes that a return to the admission theory would eliminate many of the shortcomings that presently exist.⁶⁶ With proper application of the admission theory, Professor Stone's contention would probably be substantiated. The distinction between the admission and the exclusion theory is not so much a matter of words as it is a way of thinking. The admission theory admits relevant evidence so long as it shows more than disposition to commit the crime charged. However, to show that the evidence does indicate more than disposition, it must be pertinent to the proof of defendant's commission of the crime charged. As this is the exact purpose and scope of the exceptions to the exclusion theory,⁶⁷ the same result is reached in most cases by applying either theory. The two rules reach different results in the situations where the evidence in question is relevant but not clearly under any of the exceptions to the exclusion theory. A court strictly applying the exclusion theory would rule such evidence out. The same evidence would be admitted by a court applying the admission theory if it was relevant for any reason other than to show disposition. Because of the similarity of the two theories, it is not difficult to understand why the courts have been confused in their treatment of this type of evidence and why our court has not been consistent,⁶⁸ at

63. See *State v. Roby*, 128 Minn. 187, 189-190, 150 N. W. 793, 794 (1915). Referring to the problem of election the court said: "A different rule may obtain in cases of crimes so wholly unrelated that proof of other offenses is not properly in the case at all. We are not concerned with such cases here, and we make no decision in regard thereto."

64. See note 34 *supra*.

65. See note 35 *supra*.

66. See Stone, *supra* note 4, at 1033-1037.

67. See note 2 *supra* and text thereto.

68. See *State v. Clark*, 155 Minn. 117, 122, 192 N. W. 737, 739 (1923) (dissenting opinion).

times apparently applying the admission theory,⁶⁹ and at times the exclusion theory.⁷⁰

Proper application of the admission theory requires evidence to fill but one qualification—that it be relative to the proof of the crime charged.⁷¹ This rule is certainly not a panacea, for determination of what evidence is relevant will still be difficult in some cases. It would, however, tend to eliminate the problems involved in attempting to differentiate between the exceptions, trying to fit evidence under one of them, or in the invention of new exceptions to take care of relevant evidence that will not fit under any existing exception.

IMPEACHMENT OF THE DEFENDANT

The rule preventing a showing of defendant's other crimes is seriously altered when the defendant becomes a witness. Therefore, the problem of the impeachment of the defendant *as a witness* must necessarily be covered even though no consideration is given to the problem of impeachment of witnesses generally.

When he takes the stand, the defendant waives a large portion of his immunity from the showing of his other crimes. A Minnesota statute⁷² makes such evidence competent upon defendant's credibility as a witness.⁷³ The extent to which the prosecution may go into such facts is limited, however, and it is not proper to go into the details of the crimes to any great extent,⁷⁴ the question being

69. *E.g.*, *State v. McGraw*, 163 Minn. 154, 203 N. W. 771 (1925) ("proper to be considered" upon defendant's possession of the stolen goods); *State v. Hartung*, 141 Minn. 207, 169 N. W. 712 (1918) (admitted as being "germane to the issue"); *State v. Kaufman*, 125 Minn. 315, 146 N. W. 1115 (1914) (admitted as "relevant to the issue"); *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (1895) (admitted as "relevant to the issue").

70. *E.g.*, *St. Paul v. Greene*, 56 N. W. 2d 423 (Minn. 1952); *State v. Sweeney*, 180 Minn. 450, 231 N. W. 225 (1930); *State v. Fitchette*, 88 Minn. 145, 92 N. W. 527 (1902). The *Fitchette* case is one of the strongest Minnesota cases strictly applying the exclusion theory. The court has frequently been required to distinguish this case to admit evidence of other crimes. See, *e.g.*, *State v. Sweeney*, 180 Minn. 450, 456, 231 N. W. 225, 228 (1930); *State v. Ames*, 90 Minn. 183, 191-193, 96 N. W. 330, 333 (1903).

71. Model Code of Evidence, Rule 311 (1942), adopts the admission theory: "Subject to Rule 306, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally."

72. Minn. Stat. § 610.49 (1949).

73. *E.g.*, *State v. Quirk*, 101 Minn. 334, 112 N. W. 409 (1907); *State v. Curtis*, 39 Minn. 357, 40 N. W. 263 (1888). Of course, the prosecution may not introduce evidence merely to show defendant's bad *character* if he has not put his character in issue. *State v. Nelson*, 148 Minn. 285, 181 N. W. 850 (1921) (alternative holding).

74. *State v. Abdo*, 165 Minn. 440, 206 N. W. 933 (1926).

one for the discretion of the trial judge.⁷⁵ Even though objections to the questions of the overzealous prosecutor are sustained, the prejudice resulting in the minds of the jury from merely asking the questions may result in reversal.⁷⁶ However, if the abuse is not so flagrant that it cannot be overcome by proper instruction, a verdict for the state will in all probability be sustained.⁷⁷

The court's eagerness to admit this type of evidence, manifested by their squeezing in evidence under exceptions and by its inventing of new exceptions, has also shown itself in its seeming desire to admit evidence on the basis of defendant's trial tactics. It apparently takes little testimony on the defendant's behalf to pave the way for the prosecution to introduce evidence which may show other crimes to contradict the defendant's assertions. In *State v. McClendon*,⁷⁸ the state was allowed to introduce evidence which showed the defendant's perpetration of prior crimes in order to contradict his testimony even though it concerned a collateral matter. Where the defendant has introduced any evidence concerning alleged crimes by him, the state is free, within the discretion of the trial judge, to go into the details of these crimes.⁷⁹

If the reasons for holding evidence of other crimes inadmissible are deemed valid, it seems that allowing the evidence to be injected into the case just because the defendant takes the stand is contrary to our accusatorial system.⁸⁰ A more serious result is that it tends to discourage the defendant from taking the stand. While the argument that the defendant as a witness should be subject to the same impeachment as other witnesses is difficult to dispute, it should be remembered that other witnesses are not on trial. The Model Code would make evidence of the commission or conviction of the defendant of other crimes inadmissible to impair his *credibility* unless he first introduced evidence of good *character*.⁸¹ The rule recognizes the fact that all this type of evidence, whether admitted as substantive evidence, to impeach credibility, or to show bad character, has the same prejudicial effect.

75. See *State v. Bock*, 229 Minn. 449, 455, 39 N. W. 2d 887, 890 (1949); *State v. Quirk*, 101 Minn. 334, 338-339, 112 N. W. 409, 411 (1907).

76. *State v. Sanderson*, 179 Minn. 436, 229 N. W. 564 (1930); *State v. Glazer*, 176 Minn. 442, 223 N. W. 769 (1929); cf. *State v. Silvers*, 230 Minn. 12, 40 N. W. 2d 630 (1950).

77. *State v. Towers*, 106 Minn. 105, 118 N. W. 361 (1908).

78. 172 Minn. 106, 214 N. W. 782 (1927).

79. See *State v. Thornton*, 174 Minn. 323, 330, 219 N. W. 176, 179 (1928); *State v. Upson*, 162 Minn. 9, 13-14, 201 N. W. 913, 914 (1925).

80. See note 16 *supra* and text thereto.

81. Model Code of Evidence, Rule 106 (1942). The applicable sections of the rule read:

CONCLUSION

The exclusion theory is not necessarily bad because of the results to which it leads. In fact, as indicated earlier,⁸² application of either theory brings about the same result in most cases. The primary fault of the exclusion theory is the uncertainty it engenders. In a situation where the evidence in question does not clearly come under any of the exceptions it cannot be accurately determined whether the evidence will be admitted. If the court applies the rule strictly, some relevant evidence will not be admitted.⁸³ If, on the other hand, the court concentrates on whether the evidence comes within an exception, it may overlook the question of relevance and admit irrelevant evidence.⁸⁴

Even if the exclusion theory is followed this does not mean that the presently existing confusion cannot be largely eliminated. As the decision to a large measure rests within the discretion of the trial judge,⁸⁵ he should weigh the interests involved in making his decision. Merely going through the mechanical process of determining whether the evidence comes within one of the recognized exceptions will not adequately resolve the desires to admit all relevant evidence but to exclude evidence fraught with so many dangers to the accused except where absolutely necessary⁸⁶ for

"(1) Subject to Paragraphs (2) and (3), for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issue of his credibility as a witness, and need not, in examining him as to a statement made by him in writing inconsistent with any part of his testimony, show or read to him any part of the writing, except that extrinsic evidence shall be inadmissible.

" . . . (b) of his conviction of crime not involving dishonesty or false statements, or

" . . . (3) For the purpose of impairing the credibility of an accused in a criminal action who testifies at a trial therein the accused shall not at that trial be examined, nor shall any evidence be admitted, as to facts tending to prove his commission or conviction of another crime, unless he has first introduced evidence of his character to support his credibility."

The comment to the rule admits that most decisions are to the contrary. *Id.* at 54.

82. See note 66 *supra* and text thereto.

83. *E.g.*, *People v. Molineux*, 168 N. Y. 264, 292-293, 61 N. E. 286, 294 (1901). Evidence of another poisoning by defendant committed in almost identical manner to that charged was held inadmissible as the court did not find that it came under any of the exceptions. The dissent would have admitted it as relevant evidence.

84. *State v. Voss*, 192 Minn. 127, 255 N. W. 843 (1934). Evidence of the theft of some barley was admitted to show intent in the theft of the pigs for which defendant was being prosecuted.

85. See *State v. Bock*, 229 Minn. 449, 455, 39 N. W. 2d 887, 890 (1949); *State v. Voss*, 192 Minn. 127, 129, 255 N. W. 843, 844 (1934).

86. In certain types of prosecutions this kind of evidence is virtually essential for conviction, while in others there is little actual necessity for it.

conviction. If the relevance and necessity factors do outweigh the dangers, there should be little difficulty in fitting the evidence within one of the numerous exceptions.

While leaving the determinations of relevance, necessity and danger with the trial judge may lose any advantage that there might be in rigid rules, the greater advantage of reaching more equitable results through individual consideration of each case will be obtained.⁸⁷

Embezzlement cases, where one incorrect entry in the books could be a mistake is a good example of a case in which evidence of other "mistakes" is needed to rebut the inference of mistake.

87. The Legislature, by passing the Model Code, could eliminate many of the problems involved in evidence of other crimes. They have eliminated some of the problems with regard to embezzlement by passage of Minn. Stat. § 628.27 (1949) which allows the prosecutor to merely allege a larceny of a certain sum. He is then allowed to present evidence of the accused's larcenous activities within a six month period. He need not elect any one act or time. This has resulted in largely eliminating the necessity to resort to the scheme or plan exception to admit evidence of other crimes in these cases.