

Identity: A Non-Statutory Exception to Other Crimes Evidence

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show, just as in any other nuisance suit, that the defendant's activity was unreasonable *under the circumstances of the particular case*: he must prove a nuisance *in fact*. However, the regulatory standards should be given great weight by the Louisiana judiciary in determining liability in a nuisance case, because the weighing process used by the administrative agencies in developing these standards is very similar to the judiciary's nuisance test. Also, the judiciary, in their determination of the issues involved in a nuisance case, should allow private litigants to take full advantage of the emission data and the research data on the damages caused by pollutants compiled under the authority of the Clean Air Act.

Randall C. Songy

IDENTITY: A NON-STATUTORY EXCEPTION TO OTHER CRIMES EVIDENCE

Evidence that the accused committed crimes other than the one being prosecuted usually is inadmissible¹ because of the inherent danger that the factfinder will convict the accused of the crime charged because he has a propensity toward criminal conduct. However, the general prohibition is subject to recognized exceptions² based on the independent relevancy of other crimes evidence to material questions other than the defendant's character or propensity toward crime.³ Admissibility under these exceptions is predicated on a determination that the probative value of the evidence outweighs its inherently prejudicial effect on the accused.⁴

1. C. MCCORMICK, EVIDENCE §§ 184, 187 (Cleary ed. 1972) [hereinafter cited as MCCORMICK]; J. WIGMORE, EVIDENCE §§ 202, 216, 305 (3d ed. 1940) [hereinafter cited as WIGMORE]; see also Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) [hereinafter cited as Stone]; Comment, *Louisiana Evidence: Relevant and Material Aspects*, 21 LOYOLA L. REV. 476 (1975).

2. MCCORMICK §§ 43, 190, 288; WIGMORE §§ 218, 305, 980. See, e.g., *People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286 (1901) (listing the major common law exceptions: knowledge, intent, plan, design, system, motive, emotion, and identity). See also *People v. Johnson*, 228 N.Y. 332, 127 N.E. 186 (1920) (impeachment).

3. MCCORMICK §§ 184-85; Comment, *Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., In the Case in Chief*, 33 LA. L. REV. 614 (1973) [hereinafter cited as *Other Crimes—I*]; cf. FED. R. EVID. 402, 403.

4. WIGMORE §§ 216, 416; Trautman, *Logical or Legal Relevancy—A*

In Louisiana, statutory exceptions to the general rule excluding other crimes evidence⁵ include evidence used to impeach the credibility of witnesses,⁶ evidence of other crimes composing the *res gestae*,⁷ and evidence necessary to prove knowledge, intent, or system.⁸ The justifications for these exceptions vary. Evidence of a witness's prior conviction is admissible to test his credibility;⁹ the rule applies to defendants who take the stand in precisely the same manner that it applies to other witnesses.¹⁰ Evidence of uncharged crimes comprising part of the *res gestae* is received to inform the jury fully of the circumstances surrounding the particular crime charged,¹¹ including all acts, whether criminal or not, forming a concomitant part of the criminal episode. Because of its high probative value in establishing the defendant's guilt with respect to the crime charged, evidence of other criminal acts tending to establish the defendant's knowledge, intent, or system is allowed despite its inherent prejudice to

Conflict in Theory, 5 VAND. L. REV. 385 (1952) [hereinafter cited as Trautman].

5. *Other Crimes—I* at 621.

6. LA. R.S. 15:495 (1950), as amended by La. Acts 1952, No. 180 § 1 (authorizes use of evidence of prior convictions to impeach a witness's credibility); *State v. Prieur*, 277 So. 2d 134 (La. 1973) (strictly construing the statutory language to exclude all but evidence of convictions); Comment, *Other Crimes Evidence in Louisiana—To Attack the Credibility of the Defendant on Cross-Examination*, 33 LA. L. REV. 630 (1973) [hereinafter cited as *Other Crimes—II*].

7. LA. R.S. 15:447-48 (1950) (makes admissible evidence of circumstances incident to the criminal act as part of the *res gestae*); e.g., *State v. O'Connor*, 320 So. 2d 188 (La. 1975); *State v. Mays*, 315 So. 2d 766 (La. 1975); Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661 (1969).

8. LA. R.S. 15:445-46 (1950).

9. LA. R.S. 15:495 (1950), as amended by La. Acts 1952, No. 180 § 1. The original intent underlying this provision was to limit the inquiry to the fact of conviction. E.g., *State v. Perkins*, 248 La. 293, 178 So. 2d 255 (1965); but see *State v. Jackson*, 307 So. 2d 604 (La. 1975) (details of prior crimes offered to impeach may be inquired into for the purpose of establishing the true nature of the offense; three Justices dissented and one concurred in the decree); see generally Comment, *Federal Rules of Evidence: Article VI of the Federal Rules of Evidence: Witnesses*, 36 LA. L. REV. 99, 116-20 (1975).

10. *State v. Kelly*, 271 So. 2d 870 (La. 1973); MCCORMICK § 43 (The defendant with a prior record can avoid the effect of this rule by not taking the stand, but he is then denied the opportunity of personally presenting his side of the story.).

11. MCCORMICK § 288; WIGMORE § 218; e.g., *State v. O'Connor*, 320 So. 2d 188 (La. 1975).

the accused.¹² To minimize undue prejudice, introduction of other crimes evidence to establish knowledge, intent, or system has been prohibited judicially unless the prosecution complies with judicially imposed procedural prerequisites.¹³

The existence of additional exceptions to the ban on other crimes evidence is well documented at common law¹⁴ with at least one, identity, being judicially recognized in Louisiana.¹⁵ The traditional common law view of identity as an exception to the general rule excluding other crimes evidence is of a limited nature. Under this exception, the *modus operandi* of the crime charged and of the "other crime" sought to be introduced must be identical¹⁶ and must possess a certain uniqueness,¹⁷ so that the two crimes are conceived as the handiwork of one criminal—equivalent in effect to a fingerprint or signature. Proof that an accused has committed a "signature" crime identical with the crime under prosecution is logically relevant to the issue of identity but is admissible only when its probative value exceeds its prejudicial effect.¹⁸

12. Trautman at 387; *Other Crimes—I* at 615.

13. *State v. Prieur*, 277 So. 2d 126 (La. 1973). The supreme court established five procedural rules applicable when other crimes evidence is used to establish knowledge, intent, or system. These rules require the state to furnish notice before trial specifically stating the exception under which the evidence is offered, and to establish that the evidence is neither merely repetitive nor a subterfuge for attacking the defendant's character; they further provide that the jury be instructed that the evidence is admitted for limited purposes. The commitment of the court to these procedural rules appears firm. *State v. Brown*, 318 So. 2d 24 (La. 1975); *State v. Pearson*, 296 So. 2d 316 (La. 1974); *State v. Ghoram*, 290 So. 2d 850 (La. 1974). Nevertheless the court stated in *State v. Banks*, 307 So. 2d 594 (La. 1975), that *Prieur* was not to be applied in an overly technical manner and that good faith compliance with the guidelines was sufficient.

14. MCCORMICK § 190; e.g., *People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286 (1901).

15. See *State v. Banks*, 307 So. 2d 594 (La. 1975); *State v. Jordan*, 276 So. 2d 277 (La. 1973); *State v. Wideman*, 218 La. 860, 51 So. 2d 96 (1951); *State v. Fuselier*, 174 La. 319, 140 So. 490 (1932); *State v. Wales*, 168 La. 322, 122 So. 52 (1929).

16. MCCORMICK § 190; E. MARJORIBANKS, FOR THE DEFENCE: THE LIFE OF SIR EDWARD MARSHALL HALL at 312 (1929) (discussing the "bridges of the bath" case, *R. v. George Joseph Smith*, 11 Cr. App. R. 229 (1915)).

17. *People v. Haston*, 69 Cal. 2d 233, 444 P.2d 91 (1968) (admissibility depends on several factors considered alone or in combination: time of the offenses, method of entrance, *modus operandi*, and the defendant's actual presence at the scene of the crimes); WIGMORE § 411; cf. *Other Crimes—I* at 618 n.29.

18. See notes 4 & 12, *supra*.

The "signature crimes" identity exception has been recognized by Louisiana courts.¹⁹ For example, in *State v. Vince*,²⁰ the defendant was charged with rape; the Louisiana Supreme Court approved the admission of testimony by two prior rape victims showing that in each instance the defendant had lulled them into a false sense of security with a request for aid in finding his dog, led them to a clump of bushes, raped them, and then asked for their jewelry. Apparently the court was satisfied that the common *modus operandi* in each case was sufficient to make these signature crimes, since it sanctioned admission of the separate offenses under the identical crimes exception.²¹

Aside from cases involving "signature crimes," the identity exception has been construed by Louisiana courts to have a second meaning. In instances in which alibi, mistaken identity,²² or other defenses which draw into question the identity²³ of the perpetrator of the crime charged are raised or likely to be raised, Louisiana courts have allowed other crimes evidence to be introduced under a second so-called identity exception to the general exclusionary rule.²⁴ One means of establishing identity is through the introduction of evidence of similar crimes committed by the defendant which tend to

19. *State v. Vince*, 305 So. 2d 916 (La. 1974); *State v. Moore*, 278 So. 2d 781 (La. 1973); *State v. Jordan*, 276 So. 2d 277 (La. 1973); *State v. Modelist*, 260 La. 945, 257 So. 2d 669 (1972); *State v. Wideman*, 218 La. 860, 51 So. 2d 96 (1951); see also *State v. Dotson*, 260 La. 471, 256 So. 2d 594 (1971); *State v. Welch*, 250 La. 719, 198 So. 2d 902 (1967); cf. *Crook v. Henderson*, 310 F. Supp. 200 (E.D. La. 1970).

20. 305 So. 2d 916 (La. 1974).

21. *Id.* at 922. Cf. *Other Crimes—I* at 618 n.29. See also *State v. Moore*, 278 So. 2d 781 (La. 1973) (factual similarities in separate rapes were not sufficient to justify admission of evidence of one in prosecution for the other).

22. *State v. Banks*, 307 So. 2d 594 (La. 1975) (the state was permitted to show the familiarity of its witness with the defendant through evidence of past illegal drug transactions); *State v. Carter*, 301 So. 2d 612 (La. 1974) (identity proven through evidence of police officer's familiarity with the defendant gained by observing prior burglaries with binoculars).

23. *But see State v. Moore*, 278 So. 2d 781 (La. 1973) (not guilty plea does not of itself put identity at issue).

24. *State v. Banks*, 307 So. 2d 594 (La. 1975); *State v. Carter*, 301 So. 2d 612 (La. 1974); *State v. Hicks*, 301 So. 2d 357 (La. 1974); *State v. Kibby*, 294 So. 2d 196 (La. 1974); *State v. Harrison*, 291 So. 2d 782 (La. 1974); *State v. Reinhardt*, 229 La. 673, 86 So. 2d 530 (1956); *State v. Hicks*, 180 La. 281, 156 So. 353 (1934); *State v. Fuselier*, 174 La. 319, 140 So. 490 (1932); *State v. Wales*, 168 La. 322, 122 So. 52 (1929).

establish that he was the perpetrator of the crime charged.²⁵ Identity may also be the basis for admission of other crimes evidence when it is offered to establish the familiarity of the state's witness with the defendant. For example, in *State v. Banks*,²⁶ the accused, charged with a narcotics violation, attacked the ability of a state witness, an undercover police officer, to remember and identify him as the perpetrator of the crime under prosecution. On the basis of "identity" the Louisiana Supreme Court approved admission²⁷ of other narcotics violations to show the officer's familiarity with the particular accused and to rebut the defense of mistaken identity.²⁸ No requirement of similarity²⁹ between the offense charged and the other crime appears to exist, except that the other crime must be relevant to the issue of the defendant's identity as the perpetrator of the crime under prosecution.

Louisiana courts lack clear statutory authorization for their formulations of the identity exception.³⁰ Specific reference to an identity exception is not found in Louisiana cases until 1929, so despite the fact that the exception was already strongly established in the common law jurisprudence,³¹ its omission from the 1928 Louisiana Code of Criminal Procedure, wherein the knowledge, intent, and system exceptions were

25. *E.g.*, *State v. Hicks*, 180 La. 281, 156 So. 353 (1934); *State v. Wales*, 168 La. 322, 122 So. 52 (1929); WIGMORE § 306.

26. 307 So. 2d 594 (La. 1975).

27. *Id.* at 599.

28. *Id.* In a hypothetical case, the accused, charged with a narcotics violation, attacks the ability of a police undercover officer to remember and identify him as the perpetrator of the offense. It is suggested that the officer's testimony as to his familiarity with the accused gained through theft violations would be admitted under the analysis in *State v. Banks*, 307 So. 2d 594 (La. 1975).

29. *E.g.*, *State v. Reinhardt*, 229 La. 673, 86 So. 2d 530 (1956) (gambling and theft); *State v. Wales*, 168 La. 322, 122 So. 52 (1929) (bank robbery and auto theft).

30. *See State v. Banks*, 307 So. 2d 594, 603 (La. 1975) (Barham, J., dissenting) (questions the propriety of allowing identity to be used as an exception absent statutory authority). *See also State v. Prieur*, 277 So. 2d 126, 128 (La. 1973) (stating the only exceptions to the other crimes exclusionary rule are the statutory exceptions).

31. The first case in Louisiana recognizing an "identity exception" is *State v. Wales*, 168 La. 322, 122 So. 52 (1929), although the common law had recognized such an exception as early as 1901 in *People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286, 293 (1901). *See also Stone* at 1026.

first codified,³² is understandable. Why identity has not been added to the Louisiana statutes as a basis for admission of other crimes evidence is not determinable. Perhaps the apparent nexus between the "signature" identity exception and the system exception³³ was part of the reason for not codifying the former. However, this explanation³⁴ does not justify continued exclusion of the identity exception from the statutory scheme, since when properly understood, both the identity and system exceptions refer to crimes closely related in time, place, and manner³⁵ but systematic crimes make up part of a greater scheme,³⁶ while other crimes bearing on identity are not necessarily related to an overall plan. However, lack of statutory recognition has not diminished the viability of the identity exception.³⁷ The unavoidable conclusion follows that the identity exception as applied in Louisiana is an exception of equal stature with knowledge, intent, and system though not statutorily approved. Because both the statutory and the jurisprudential exceptions to the general exclusionary rule admit evidence inherently prejudicial to the accused,³⁸ evidence of other crimes offered to establish identity should be subject to the same procedural prerequisites to admissibility applicable to other crimes evidence offered to show knowledge, intent, and system.³⁹

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32. *State v. Hicks*, 180 La. 281, 156 So. 353 (1934); *State v. Fuselier*, 174 La. 319, 140 So. 490 (1932); *State v. Wales*, 168 La. 322, 122 So. 52 (1929).

33. LA. R.S. 15:445, 446; *State v. Spencer*, 257 La. 670, 243 So. 2d 793 (La. 1971); MCCORMICK § 190; WIGMORE § 304.

34. MCCORMICK § 190.

35. Compare *State v. Jordan*, 276 So. 2d 277 (La. 1973) (identity) with *State v. Spencer*, 243 So. 2d 793 (La. 1971) (system).

36. WIGMORE § 304; *Other Crimes—I* at 616.

37. *State v. Banks*, 307 So. 2d 594 (La. 1975); *State v. Vince*, 305 So. 2d 916 (La. 1974).

38. MCCORMICK § 190; *People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286 (1901). See also cases cited noted 24, *supra*.

39. See cases in note 13, *supra*.