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EVIDENCE OF OTHER CRIMES IN MONTANA

Evidence of other crimes is generally inadmissible to prove the crime for which the defendant is charged.¹ Such evidence is usually excluded because it will be given excessive consideration by the jury, not because it lacks probative value.² The exclusion of evidence of other crimes is a result of the court's recognition that a defendant should be convicted only of the specific crime charged, not because he has committed other crimes nor because he is possessed of a criminal propensity.³

The term "evidence of other crimes" is commonly used specifically to denote evidence offered during the prosecutor's case-in-chief.⁴ Evidence of other crimes may be admissible in Montana, despite the general rule of exclusion, for the purpose of proving motive, intent, identity, absence of mistake or inadvertance, or the existence of a common scheme or plan encompassing the commission of two or more offenses.⁵

THE ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES IN MONTANA

A body of case law, originating with *State v. Sauter*,⁶ has caused considerable confusion as to the admissibility of evidence of other crimes in Montana. Despite substantial contrary authority, these cases ultimately resulted in a holding that evidence of other crimes is never admissible.⁷ Analysis of the *Sauter* line of cases however indicates that this holding was not justified by the precedent relied on by the court. In the *Sauter* case, the defendant was charged with rape. Although admitting the act of intercourse, the defendant alleged that it was committed with consent. This rape allegedly occurred on a secluded road, after the defendant met and offered a ride to a woman in a tavern. The prosecution introduced evidence that the defendant had one month previously, committed rape

¹WHARTON'S CRIMINAL EVIDENCE, Section 232 (12th ed. 1955); JONES ON EVIDENCE, Section 162 (5th 1958).

²See JONES, *supra*, note 1.

³See *State v. Sauter*, 125 Mont. 109, 114, 232 P.2d 731 (1951); *State v. Nicks*, 134 Mont. 341, 332 P.2d 904 (1958); *State v. Ebel*, 92 Mont. 413, 423, 15 P.2d 223 (1932) in which the court quotes from *State v. Paulson*, 118 Wis. 89, 94 N.W. 771, 774 (1903): "From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged and that neither general bad character, and commission of other specific disconnected acts, whether criminal merely metricious could be proved against him, this was predicated on the fundamental principle of justice that the bad man no more than the good man ought to be convicted of a crime not committed by him."

⁴This paper will examine only evidence offered in this respect. Evidence of other crimes also enters into consideration as character evidence when it is an issue, to impeach the credibility of a defendant witness, or to increase the penalty for habitual criminals.

⁵*State v. Tully*, 148 Mont. 166 169, 418 P.2d 549 (1966); *State v. Simpson*, 109 Mont. 198, 208, 95 P.2d 761, 764 (1939); See Also *Spencer v. Texas*, 385 U.S. 554, 560 (1967) as to the Constitutionality of such evidence.

⁶*State v. Sauter*, 125 Mont. 109 (1951), 232 P.2d 731 (1951).

⁷*State v. Hale*, 126 Mont. 326, 249 P.2d 495 (1952).

on another woman under nearly identical circumstances. The Montana Supreme court vacated the conviction, holding that the prior act had no logical connection with the crime charged. In the words of the court:

"Sexual acts, whether rape or no rape, originating in barroom pickups, powered by the urge and consumated in automobiles, are entirely too common in this day and age to have much evidentiary value in showing a scheme or plan."⁸

Despite striking similarity, the evidence was thus excluded because the court held that there was no logical connection between the fact proposed to be proved and the fact in issue.

In *State v. Searle*,⁹ decided shortly after the *Sauter* decision, the charge was sodomy allegedly committed on a boy hired by the defendant to work in his place of business. The prosecution called other boys who had been employed by the defendant in an attempt to elicit evidence of other like offenses. This evidence was held incompetent and therefore inadmissible under the *Sauter* precedent. However, unlike the *Sauter* case, admissibility was not determined on the basis of the logical connection between the evidence and the act charged. As a result, the decision in *State v. Hale*¹⁰ was inevitable. In that case, a county surveyor was convicted of obtaining money under false pretenses. The prosecution introduced evidence that on another occasion, the defendant obtained money in the same manner as the act charged thereby indicating a scheme or plan. Citing the *Searle* precedent, the court held, without a determination of logical relevancy, that evidence of other crimes is never admissible. The *Hale* case thus does not stand on stable foundations and at the very most could only have been considered dubious authority.

Subsequent Montana decisions have affirmed this conclusion. In *State v. Merritt*,¹¹ the court noted that generally evidence of other crimes is not admissible. However, it was conceded that there existed exceptions and that evidence of other crimes was admissible in Montana to prove intent, motive, or the existence of a common scheme or plan. In the *Merritt* case, the *Sauter*, *Searle* and *Hale* cases were noted as following the general rule of exclusion not as authority for the complete exclusion of evidence of other crimes. In *State v. Tiedemann*,¹² the court did not allow the admission of evidence of other crimes, but also spoke of exceptions to the general rule and stated that their number and scope should not be increased. In *State v. Tully*,¹³ the Montana court quoted the general rule of exclusion and the five exceptions which are traditional in Montana law. In that case the court specifically affirmed the admissibility

⁸*State v. Sauter*, *supra*, note 6 at 112.

⁹125 Mont. 467, 239 P.2d 995 (1952).

¹⁰*Supra*, note 7.

¹¹*State v. Merritt*, 138 Mont. 546, 357 P.2d 683 (1960).

¹²*State v. Tiedemann*, 139 Mont. 237, 362 P.2d 529 (1961).

¹³*Supra*, note 9.

of evidence of other crimes to prove intent. Finally, in *State v. Jensen*¹⁴ the court specifically overruled authority that evidence of other crimes is always inadmissible. Thus it would seem clear that evidence of other crimes is not only admissible in Montana, but is admissible to the extent of the traditional five exceptions to the general rule of exclusion.

It would be erroneous to assume that the *Sauter and Searle* cases have not contributed some lasting effect. The policy of those cases continues to be manifested in that a similarity may be required to exist between the collateral act and the crime charged. Similarity between crimes is required in Montana when the evidence is offered to prove motive, intent, or the existence of a common scheme or plan.¹⁵ Since no cases have yet been decided which involve either the identity or the mistake or inadvertance exceptions, it cannot be said that evidence offered under these exceptions is also subject to the requirement of similarity. As a practical matter, similarity is a factor considered when determining the logical relevancy of evidence of other crimes. For this reason, the degree of required similarity is also unclear. Evidence of the same crime committed on a different person, at a different place and for a different motive has been held inadmissible even though it would have been highly relevant to a material issue.¹⁶ Evidence which was totally irrelevant and designed solely to prejudice the defendant has also been excluded.¹⁷ Between these two extremes lies a gray area in which the combination of the degree of prejudice and the degree of logical relevancy may vary widely.

Montana has a large body of case law concerning evidence of other crimes. It is the thesis of this paper that in determining the admissibility of such evidence, these cases must be viewed in their entirety. So viewed, they represent an unbroken development to the present day. Consequently, evidence of other crimes has been here treated in accordance with the foregoing thesis.

THE NATURE OF EVIDENCE OF OTHER CRIMES

The prosecution, as a general rule, may not offer to prove specific criminal acts other than the crime charged in the indictment. But what is evidence of other crimes? It is evidence of collateral criminal conduct which, because of some logical connection, is offered as proof of the crime charged. Evidence of specific acts of misconduct, which are not in themselves crimes, is not by definition within the rules governing evidence of other crimes. Logically then, such evidence should not be excluded if it

¹⁴*State v. Jensen*, 26 St. Rep. 348 (1969).

¹⁵*State v. Merritt*, *supra*, note 11 at 550 clarified this requirement.

¹⁶*State v. Crowl*, 135 Mont. 98, 337 P.2d 367 (1959). *But see State v. Jensen*, *supra*, note 14, in which similar acts, thought not proved as the same statutory crime, were held admissible.

¹⁷*State v. Tiedeman*, *supra*, note 12.

meets general evidentiary requirements of competency, relevancy, and materiality. However, such evidence has the same prejudicial effect as evidence which establishes commission of other criminal offenses. Such evidence should thus be subjected to the same general rule of exclusion, and should be admissible only for the purposes which justify admission of evidence of other crimes.¹⁸

Evidence of other crimes discloses the defendant's commission of a collateral criminal act. Evidence disclosing a prior conviction is the strongest proof which can be offered in this respect. However, evidence of other crimes is introduced to prove the offense for which the defendant is charged, not the other crime which is thereby disclosed. For this reason it is not necessary to prove commission of the other crime beyond a reasonable doubt.¹⁹ It is improper however, to offer mere accusation or innuendo as evidence under any of the exceptions to the general rule.²⁰ A prime facie case of the defendant's collateral guilt must be established before evidence of other crimes is admissible under any of the exceptions to the general rule.²¹

In itself, evidence of other crimes is not usually sufficient to convict. As circumstantial evidence, it can raise only an inference of the defendant's guilt of the crime charged. Such evidence must usually be accompanied by corroborating evidence. However, if the inference which is raised by the evidence is so strong, that it admits of no other reasonable hypothesis than the defendant's guilt, it is sufficient to sustain a conviction.²²

COMMON SCHEME OR PLAN

Evidence of other crimes which tends to establish the existence of a common scheme or plan, encompassing the commission of two or more offenses may be admissible in Montana.²³ Evidence of a common scheme or plan will be found in two distinguishable fact situations: (1) When the proffered evidence tends to prove a crime which is part of the *res gestae* of the offense charged, (2) When two or more acts are committed pursuant to a scheme or plan which evidences a common purpose.

An act is part of the *res gestae* when it is contemporaneous with or part of the charge, and when the circumstances surrounding the collateral crime are essential to prove or explain the act charged. For example, evidence was allowed to show that the defendant committed the crime of hiding stolen property which was not charged in the indictment. The admissibility of that evidence was held proper in a prosecution for the

¹⁸*State v. Tiedeman*, *supra*, note 12; See *JONES*, *supra*, note 1, Section 162.

¹⁹*State v. Ebel*, 92 Mont. 413, 424, 15 P.2d 233 (1932).

²⁰WHARTON'S CRIMINAL EVIDENCE, *supra*, note 1.

²¹*State v. Ebel*, *supra*, note 18.

²²See *State v. Ebel*, *supra*, note 18 at 421.

²³*State v. Merritt*, *supra*, note 11; *State v. Tully*, *supra*, note 5.

theft of the property.²⁴ In another case, the defendant was charged only with passing a forged state warrant. Evidence that the defendant had also committed the crime of presenting a false claim to the state was held admissible.²⁵

Evidence of a scheme or plan, which discloses a common purpose is subject to rather strict rules when it also discloses commission of other crimes. Such evidence is admissible in Montana only if the other crime is: (1) similar to the act charged, (2) closely connected, and (3) committed on or about the same time as the act charged.²⁶

The degree of required similarity has varied in Montana. Older cases held that exact similarity was not necessary and required only a more or less common purpose with relation to the act charged.²⁷ Recent decisions however have imposed very strict requirements of similarity. Not only must the other crime be similar, but the circumstances surrounding its commission must be nearly identical. For example, evidence which disclosed that the defendant had previously obtained money on a chattel mortgage through fraud, was held inadmissible in a trial for forgery of another chattel mortgage. The court determined that the obligor on the first chattel mortgage had actually signed it, while the obligor on the mortgage charged in the indictment did not sign it. The two transactions were held by the court to have differed in important particulars.²⁸ The fact of similarity must also be apparent from the facts alone. To permit a witness to testify that two criminal transactions are similar constitutes reversible error in Montana.²⁹

The requirement of close connection between the acts refers to the accused's state of mind. A scheme or plan to commit criminal acts must actually exist in the defendant's contemplation.³⁰ The fact that two or more offenses have been committed the same way does not in itself show the existence of a common scheme or plan.³¹ Evidence of other crimes has been held admissible to prove a common scheme or plan when it disclosed operation of a soft drink parlor to sell illegal liquor;³² the arrest confiscation of liquor and repeated failure to prosecute moonshiners;³³ or repeated use of a private winerom to rob.³⁴

²⁴State v. Rindall, 146 Mont. 64, 404 P.2d 327 (1965).

²⁵State v. Phillips, 127 Mont. 381, 264 P.2d 1009 (1953).

²⁶State v. Merritt, *supra*, note 11 at 549.

²⁷See State v. Lund, 93 Mont. 169, 18 P.2d 603 (1932).

²⁸State v. Merritt, *supra*, note 11.

²⁹State v. Merritt, *supra*, note 11; State v. Cassill, 71 Mont. 274, 229 Pac. 716 (1934).

³⁰See State v. Sauter, *supra*, note 3. See also State v. Jensen, *supra*, note 14, in which the chiropractor defendant's "continuous pattern of behavior" in molesting female patients was admissible as evidence of a common scheme or plan.

³¹State v. Sauter, *supra*, note 3.

³²State v. Cesar, 72 Mont. 252, 232 Pac. 1109 (1925).

³³State v. Hopkins, 68 Mont. 504, 219 Pac. 1106 (1923).

³⁴State v. McCarthy 36 Mont. 226, 92 Pac. 521 (1907); For other examples of a scheme or plan see State v. Groom, 89 Mont. 447, 300 Pac. 226 (1931); State v. Newman, 34 Mont. 434, 87 Pac. 462 (1906); State v. Mitton, 37 Mont. 366, 96 Pac. 926 (1908); State v. Jensen, *supra*, note 14.

Other crimes must have been committed "on or about the same time" to evidence the existence of a common scheme or plan. This time requirement has been variously construed by the Montana court. It is clear that evidence of other crimes committed on the same occasion is admissible to show a scheme.³⁵ It is also clear that evidence of subsequent acts offered for the same purpose, is not always admissible to ultimately prove a state of mind.³⁶ Evidence of prior acts should also be limited at some point in time. The opinions indicate that each case will be decided on its own facts.³⁷ However at some point in time, evidence of other crimes, which establishes a common scheme, is no more than proof that the defendant is possessed with a continuing criminal propensity. In Montana, evidence which is designed to show only a criminal propensity is never admissible.³⁸

MOTIVE

Motive is that state of the criminal mind which leads or tempts the mind to indulge in criminal acts; it is the moving power which impels the defendant to act for a definite result.³⁹ Motive is not an essential element of any crime, but evidence of other crimes may be admissible to prove a motive in Montana. Establishment of a motive may be highly relevant in determining the guilt of the crime charged. For example, evidence of other crimes has been held clearly relevant to prove that the defendant committed a subsequent crime to avoid prosecution. In a classical case,⁴⁰ the defendant admitted killing a deputy sheriff, but pleaded self defense. The Montana court affirmed the admission of evidence of two prior murders to establish a motive for killing with malice. In an analogous case,⁴¹ it was established that the collateral crime need not be similar to the act charged to logically prove a motive. Evidence of statutory rape and criminal abortion was held admissible in that case to infer the defendant's motive for committing murder. The court held that the evidence inferred that the defendant killed a young girl, not in self defense, but to remove her as a source of criminal liability. Although no Montana case has since been decided under the motive exception, a more recent case has announced that evidence of other crimes, offered to prove a motive, is subject to a requirement of similarity between the crimes.⁴²

³⁵State v. Pippi, 59 Mont. 116, 195 Pac. 556 (1921).

³⁶State v. Knox, 119 Mont. 449, 175 P.2d 774 (1946) which overruled as far as inconsistent State v. Simanton, 100 Mont. 292, 49 P.2d 981 (1935). See *State v. Jensen*, *supra*, note 14, where acts committed two years subsequent to the acts charged in the indictment were admitted.

³⁷See *State v. Searle*, *supra*, note 9—30 days too long; *State v. Tully*, *supra*, note 5—11 months held not too long. See *State v. Nicks*, *supra*, note 3.

³⁸State v. Tiedemann, *supra*, note 12.

³⁹WHARTON, *supra*, note 1, Section 85.

⁴⁰State v. Simpson, 109 Mont. 198, 95 P.2d 761 (1939).

⁴¹State v. Hallowell, 79 Mont. 343, 256 Pac. 380 (1927).

⁴²State v. Merritt, *supra*, note 11 at 550.

ABSENCE OF MISTAKE OR INADVERTANCE (HEREIN GUILTY KNOWLEDGE)

Evidence of other crimes may be admissible when it tends to prove lack of mistake or guilty knowledge. Such evidence is necessarily admissible only when relevant to the defendant's state of mind. Evidence admissible under this exception is especially relevant and important when the defendant's guilty knowledge is an essential element of the crime, i.e. receiving stolen property. The relevancy of evidence offered in this respect is normally tested by comparing the degree of similarity between the collateral act and the act for which the defendant is charged. In a Montana case,⁴³ the defendant was charged with receiving stolen livestock. Evidence that the defendant had on prior occasions received stolen livestock from the same thief, was received to show the defendant's guilty knowledge upon receipt of the animal charged in the indictment. Other Montana cases in this area suggest the usual limitations. Evidence of similar crimes will be admissible to show the lack of mistake or guilty knowledge if committed at a time not too remote,⁴⁴ if the same methods of commission are employed,⁴⁵ or if the acts are logically connected by a common scheme or plan.⁴⁶

IDENTITY

The identity of the accused as perpetrator of the crime is an essential element which must be established in every criminal case. Evidence of other crimes may be admissible, in exception to the general rule, to prove identity. The relevancy of such evidence commonly depends on the degree of similarity between the act charged and the collateral crime. For example, establishment of a highly characteristic method of committing crimes can be relevant in proving the wrongdoers identity as perpetrator of a crime committed in the same manner.⁴⁷ Such evidence will usually be most appropriately offered under the scheme or plan exception. In such a case, particular care must be taken to sufficiently identify the defendant with the collateral crime.⁴⁸ In Montana, sufficient identification is manifested only upon establishment of the defendant's prima facie guilt of the collateral crime.⁴⁹

Evidence of other crimes may also logically infer identity when the other crime is not similar to the act charged. Such inferences could logically be raised whenever the evidence establishes the existence of a motive.⁵⁰

⁴³*State v. Groom, supra*, note 33.

⁴⁴*State v. Tully, supra*, note 5; *State v. Moxley*, 41 Mont. 402, 110 Pac. 83 (1910).

⁴⁵*State v. Tully, supra*, note 5.

⁴⁶*State v. Groom, supra*, note 33.

⁴⁷See *People v. Pette*, 28 Cal.2d 306, 169 P.2d 924 (1946) *Cert. denied* 329 U.S. 790 (1946). Noted in 7 U.C.L.A. L. Rev. 463 475 (1960).

⁴⁸*State v. Ebel, supra*, note 18; *State v. Russell*, 93 Mont. 334, 18 P.2d 611 (1933).

⁴⁹*State v. Ebel, supra*, note 18.

⁵⁰See *State v. Simpson, supra*, note 40.

INTENT

A conviction for a criminal act is justified only if the prosecution proves that the act was committed pursuant to a criminal state of mind. Evidence which infers such a criminal state of mind may logically arise from the commission of other crimes. Such evidence may be admissible in exception to the general rule of exclusion in Montana. Evidence of other crimes may tend to directly infer the criminal state of mind. An illustrative case involved a prosecution for uttering a fraudulent check.⁵¹ The prosecution was allowed to introduce evidence that the defendant had also written other fraudulent checks under nearly identical circumstances. This evidence logically and directly inferred the defendant's intention to defraud. Evidence allowed under other exceptions however, may only infer a fact which in turn infers a criminal state of mind. For example, evidence of other crimes which establishes a compelling motive has been held relevant to infer malice.⁵²

Evidence of other crimes may logically infer a state of mind in several different ways. One such inference is raised by proof that the defendant committed another similar and closely related crime. Such evidence will logically indicate that both acts were committed with the same criminal state of mind. This inference most commonly arises when evidence is offered under the common scheme of plan exception.⁵³

Another logical inference arises from the repetitive nature of the act charged. The mechanics of this inference have been explained as a logical process of the mind which recognizes the possibility of an unusual or abnormal element occurring in one instance. But the more often a similar transaction occurs with similar results, the less likely is the abnormal element to be the actual cause of the acts.⁵⁴ This inference is particularly appropriate when the defendant pleads mistake or inadvertance. Proof of repetition of similar acts tends to logically reduce the probability that an abnormal cause such as mistake or inadvertance is the actual cause of the act.

Attempts to prove a criminal state of mind with evidence of other crimes may often amount to no more than a prejudicial proof of criminal propensity. In Montana, evidence of other crimes which offered to prove a criminal state of mind, is said to be subject to strict requirements of similarity and close time relation. However, evidence which is offered under the motive exception to ultimately prove a state of mind, is not logically subject to the requirements of close time relation. Commission of the second crime depends on the contingency of arrest and prosecution to supply the motive. It is obvious that the state will not in all cases discover the prior crime within a time closely related to the second offense.

⁵¹*State v. Tully*, *supra*, note 5.

⁵²*State v. Simpson*, *supra*, note 40; *State v. Hallowell*, *supra*, note 41.

⁵³*See State v. Phillips*, *supra*, note 24.

⁵⁴*State v. Hughes*, 76 Mont. 421, 427, 246 Pac. 959 (1926).

SEX OFFENSES

Evidence of other crimes may be excluded even when it would seem clearly admissible under an exception to the general rule of exclusion. The reason for such exclusion is the existence of policy considerations which recognize the prejudicial nature of such evidence.⁵⁵ Evidence of other sex offenses may be especially relevant in a prosecution for a like offense. However, the operation of policy considerations has usually resulted in the exclusion of evidence of other sex offenses in Montana.⁵⁶ However, a very recent case⁵⁷ seems to have completely disregarded these considerations. In that case, a chiropractor defendant was charged with a lewd act on a female patient who was under the age of sixteen years. Prior to proving the corpus delicti, the state was allowed to examine twelve witnesses who testified as to similar crimes committed upon them by the defendant.

In one factual situation, a large body of Montana case law indicates the court's willingness to consider evidence of prior sex crimes.⁵⁸ Those cases have all involved evidence which discloses commission of other sex offenses upon the prosecuting witness. Such evidence is allowed to corroborate the testimony of the prosecuting witness by establishing the intimate relationship.⁵⁹ In most cases, such evidence is highly relevant. But in many cases, the testimony of the prosecuting witness may be the sole basis for conviction. Allowance of such evidence, in default of any independent evidence, can be made to assume a weight far beyond its natural credibility.⁶⁰ Due to the emotional nature of sex crimes, when the state relies only upon the testimony of the prosecuting witness, the jury should be cautious of convicting upon such evidence.⁶¹

MATERIALITY AND RELEVANCY

Evidence of other crimes which may be justified under any of the exceptions to the general rule, is not automatically admitted into evidence. Admissible evidence must be both relevant and competent. Relevant evidence can be defined in the following manner:

⁵⁵See generally WHARTON, *supra*, note 1. Policy considerations exist when the jury will give excessive weight to the evidence, when the defendant would not be given notice by the indictment and would thus be surprised in making his defense or when the jury would be confused by the evidence as it relates to the crime charged.

⁵⁶*State v. Sauter*, *supra*, note 3; *State v. Searle*, *supra*, note 9; *State v. Tiedemann*, *supra*, note 12.

⁵⁷*State v. Jensen*, *supra*, note 14; but see generally WHARTON, *supra*, note 1; JONES, *supra*, note 1, Section 169; 41 Iowa L. Rev., 325, 333 (1956).

⁵⁸*State v. Tiedemann*, *supra*, note 12; *State v. Peterson*, 102 Mont. 495, 59 P.2d 61 (1936); *State v. Paddock*, 86 Mont. 569, 284 Pac. 549 (1930); *State v. Harris*, 51 Mont. 496, 154 Pac. 198 (1915); *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080 (1916); *State v. Gaimos*, 53 Mont. 118, 162 Pac. 596 (1916).

⁵⁹*State v. Tiedemann*, *supra*, note 12 at 241.

⁶⁰See *State v. Peterson*, *supra*, note 58.

⁶¹*State v. Gaimos*, *supra*, note 58.

Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence.⁶² (Emphasis supplied)

To justify a conviction the defendant must be proved to have committed a criminal act pursuant to a criminal state of mind. Evidence of other crimes may supply that proof, but the probable guilt of the defendant must be supported by an inference which is logical.⁶³ The probability of an inferred fact is normally measured in terms of common experience and varies inversely with the number of intervening inferences. For example, in a case in which the defendants were charged with assault, evidence of an assault committed twenty hours previously was held irrelevant to prove intent.⁶⁴ The facts indicate that the first assault was committed on a city street with an intent to rob, while the assault for which the defendants were charged, was committed in a hobo jungle for depraved reasons. Thus there was no logical connection between the two acts.

Evidence is also not relevant in the particular case, unless the logically inferred fact is in issue before the court. As a result, an especially difficult problem arises when the defendant admits either commission of the act or the criminal state of mind. Evidence of other crimes must be carefully scrutinized to determine whether it is actually relevant to an issue before the court.⁶⁵ For example, evidence of other crimes may be admissible to prove the identity of the defendant as perpetrator of the crime. But in many cases, the defendant will admit commission of the act. Admission of the fact does not preclude the state from offering proof of the same fact when it is necessary to the proof of the defendant's guilt.⁶⁶ Moreover, such evidence may also be admissible under other exceptions which logically infer a criminal state of mind. However, evidence which logically infers identity, does not in all cases logically infer intent. When a defendant admits a fact, evidence of other crimes which tends to prove the same fact is admissible only when such evidence also logically infers another fact actually in issue.⁶⁷ For example, in a rape case,⁶⁸ the defendant conceded the act of intercourse, but maintained that it was committed with consent. The prosecution introduced evidence of other crimes which arguably inferred identity and a criminal state of mind. When the Supreme Court determined that the evidence did not logically infer intent, it ruled that it should have been excluded from the trial completely. In a fraudulent check case,⁶⁹ the defendant ad-

⁶²WHARTON, *supra*, note 1, Section 148.

⁶³Wharton's Criminal Law and Procedure, Sections 60-64 (1957).

⁶⁴State v. Crowl, 135 Mont. 98, 102, 337 P.2d 367 (1959).

⁶⁵WHARTON, *supra*, note 57.

⁶⁶See *State v. Hollowell*, *supra*, note 41; *State v. Tully*, *supra*, note 5; 19 A.L.R. 1428.

⁶⁷*Id.*; See also WHARTON, *supra*, note 1, Section 235 at 513.

⁶⁸State v. Sauter, *supra*, note 3.

⁶⁹State v. Tully, *supra*, note 5.

mitted writing the check but pleaded no intention to defraud. The prosecution introduced evidence that the defendant had written several other checks under nearly identical circumstances. This evidence was held properly admissible because in addition to logically inferring identity of the writer, it also logically inferred the criminal state of mind. Thus evidence which logically infers a fact in issue, cannot be barred by the defendant's admission of another fact which is also logically inferrable from that evidence.

CONCLUSION

The Montana courts have maintained a strong concern for the rights of the defendant when determining the admissibility of evidence of other crimes. The exceptions to the general rule of exclusion of such evidence are not mutually exclusive and evidence can be admissible under more than one exception. For this reason, it is often difficult to determine the exception or exceptions which have justified admission of evidence of other crimes. Analysis suggests that several criteria may be used to determine admissibility. First, the courts may require that evidence meet standards particular to each exception.⁷⁰ Secondly, the courts will examine the evidence to see if it meets the general evidentiary requirements of competency, materiality and relevancy.⁷¹ Thirdly, the courts will determine whether there exists a substantial policy reason which requires the exclusion of otherwise admissible evidence.⁷² Since evidence of other crimes is admissible only as an exception to the general rule of exclusion, more than mere lip service has been given to the general rule to prevent prejudice. In view of this laudable recognition of the defendant's rights, it is clear that evidence of other crimes admissible only under the five exceptions to the general rule and when it will not prejudice the defendant to an extent violative of traditional justice and fair play in the courtroom.

WM. P. ROSCOE, III

⁷⁰The strict criteria under the scheme or plan or exception are the best example.

⁷¹See *State v. Knox, supra*, at note 35.

