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Evidence of an Extraneous Offense Offered to Rebut a Defensive Theory Urged by the Defendant Is Admissible Even Absent a Showing That the Defendant Was the Perpetrator of the Extraneous Offense.

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CASE NOTES

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF EXTRANEOUS OFFENSES—EVIDENCE OF AN EXTRANEOUS OFFENSE OFFERED TO REBUT A DEFENSIVE THEORY URGED BY THE DEFENDANT IS ADMISSIBLE EVEN ABSENT A SHOWING THAT THE DEFENDANT WAS THE PERPETRATOR OF THE EXTRANEOUS OFFENSE. *Williams v. State*, 481 S.W.2d 815 (Tex. Crim. App. 1972).

John Williams was convicted of knowingly and intentionally exposing, with lascivious intent, his private parts to a person under the age of sixteen years.[1] The defendant attempted to contest the charge by offering an alibi. As a rebuttal to this defensive theory, the trial court allowed the state to introduce evidence of an extraneous offense.[2] The state was unable, however, to prove that the defendant was the perpetrator of the other offense.

The defendant appealed to the court of criminal appeals urging that the evidence concerning the extraneous offense could not be brought within any of the recognized exceptions to the rule which prohibits the introduction of evidence of extraneous offenses, that the trial court erred in admitting evidence of the extraneous offense, and finally, that the state had not proved that the defendant perpetrated the extraneous offense. Held—*Affirmed.* Where evidence is offered to rebut the defensive issue there need not be proof that the defendant was the perpetrator of the extraneous offense which may incidentally have been proved.

It appears firmly established that the defendant in a criminal case can be convicted, "if at all, only by the evidence that shows he is guilty of the offense charged."[3] Evidence that the defendant has committed other crimes, remote and wholly disconnected from the offense for which he is being tried, is generally inadmissible.[4] The reason for this is the obvious prejudicial effect that such evidence would have in the outcome of his present trial.[5] Thus, it is reversible error to admit evidence which tends only to show that the defendant is a criminal gen-

1 TEX. PENAL CODE ANN. art. 535c, § 1 (1952) provides: "It shall be unlawful for any person with lascivious intent to knowingly and intentionally expose his or her private parts or genital organs to any other person, male or female, under the age of sixteen (16) years."

2 Williams v. State, 481 S.W.2d 815 (Tex. Crim. App. 1972).

3 *E.g.*, Blakenship v. State, 448 S.W.2d 476, 480 (Tex. Crim. App. 1969).

4 Franklin v. State, 163 Tex. Crim. 330, 291 S.W.2d 322 (1956).

5 Taylor v. State, 138 Tex. Crim. 161, 164, 134 S.W.2d 277, 279 (1939). The issues coming within the exceptions, such as intent and identity, must be controverted. If, for example, the state has sufficient proof of the defendant's intent, evidence of an extraneous offense which shows intent is inadmissible. The reason for this is that the evidence of the extraneous offense would serve no further purpose than to prejudice the accused, since his intent has already been established. *See, e.g.*, Gardner v. State, 55 Tex. Crim. 400, 117 S.W. 148 (1909).

erally.[6] There are, however, several well recognized exceptions. Evidence of extraneous offenses is admissible to show identity,[7] intent,[8] system,[9] scienter,[10] motive,[11] and malice.[12] It is also admissible to show the defendant's failure to have reformed,[13] to impeach his credibility,[14] and to controvert a defensive theory advanced by him.[15]

If the evidence of the other offense is admitted on the basis of being within one of the exceptions, the trial judge is required to limit the scope of the jury's consideration of the offense strictly to the purpose for which it was admitted.[16] Thus, if it was offered to prove the defendant's intent in committing the crime, the trial court must instruct the jury that they are not to consider the extraneous offense beyond its function of establishing intent.[17] Failure to include this instruction may constitute reversible error.[18]

It is generally held, however, that, even when coming within one of the well defined exceptions, evidence of an extraneous offense is only admissible if it is shown that the defendant was the perpetrator of the other offense.[19]

> It is axiomatic that when extraneous offenses are admitted, the jury must be told that they cannot consider them unless the State proves that the accused committed such collateral crimes. This being so, *no extraneous offense should be offered unless the State is prepared to prove that the accused committed the same.*[20]

This raises the question of the degree of proof necessary to establish the defendant as the perpetrator of the other offense. The degree of proof required varies in different jurisdictions,[21] but Texas has settled on

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6 Taylor v. State, 138 Tex. Crim. 161, 134 S.W.2d 277 (1939).
7 Wagner v. State, 463 S.W.2d 432 (Tex. Crim. App. 1971).
8 Gregory v. State, 449 S.W.2d 248 (Tex. Crim. App. 1970).
9 Garcia v. State, 455 S.W.2d 271 (Tex. Crim. App. 1970). Texas law on "system" is distinguished from that of other jurisdictions insofar as in Texas "system" cannot be shown by collateral crimes unless they develop the res gestae, show intent, or connect the defendant with the offense charged. This is based on the reasoning that similarity of acts the time do not ipso facto constitute "system." 1 H. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 212, at 507 (5th ed. 1956). The distinction between "system" and "systematic crimes" is discussed in Cone v. State, 86 Tex. Crim. 291, 293, 216 S.W. 190, 191 (1919).
10 *E.g.*, Lytton v. State, 131 TEX. CRIM. 654, 101 S.W.2d 564 (1936).
11 Watson v. State, 146 Tex. Crim. 425, 175 S.W.2d 423 (1943).
12 *E.g.*, Lytton v. State, 131 Tex. Crim. 654, 101 S.W.2d 564 (1936).
13 Castillo v. State, 411 S.W.2d 741 (Tex. Crim. App. 1967).
14 Giacona v. State, 124 Tex. Crim. 141, 62 S.W.2d 986 (1933).
15 Chambers v. State, 462 S.W.2d 313, 315 (Tex. Crim. App. 1970).
16 Harris v. State, 55 Tex. Crim. 469, 479, 117 S.W. 839, 844 (1909).
17 *Id.* at 478, 117 S.W. at 844.
18 Coker v. State, 35 Tex. Crim. 57, 31 S.W. 655 (1895).
19 Tomlinson v. State, 422 S.W.2d 474 (Tex. Crim. App. 1967).
20 *Id.* at 474 (emphasis added) (citations omitted).
21 For example, in Arizona the defendant must be shown to be the perpetrator of the extraneous offense with some certainty, but not beyond a reasonable doubt. State v. Waits,

the "beyond a reasonable doubt" criteria.[22] It is also necessary to prove that the extraneous offense did, in fact, occur.[23] This, too, must be shown beyond a reasonable doubt.[24]

The *Williams* decision defines, apparently for the first time, an exception to these prerequisites. If the evidence of the extraneous offense is admitted to rebut a defensive theory advanced by the defendant, it is no longer necessary to prove that the defendant perpetrated the other offense. In the opening paragraph of his vigorous dissent, Presiding Judge Onion delineates the import of the holding: "Today 'the majority' adopts a broad, new and dangerous rule—an exception to an exception which finds no support in the law or the particular facts of this case."[25]

The facts of the case are complex but the impact of the majority's decision can be fully appreciated only upon a careful review of the pertinent details. The two girl victims were on their way to a drugstore in San Antonio and claim the defendant drove up in his car and offered them a ride. One of the girls looked into the car and saw that he was nude from the waist down. The girls were able to get the license number of the car, GYW 916, and reported the incident to the police. A car bearing that license number was registered to the defendant's wife. The incident occurred at approximately 7:45 p.m. on June 13, 1969.

The defendant offered evidence showing that at 7:45 p.m. on June 13, 1969, he was in Aransas Pass with his wife and mother, 150 miles from San Antonio. A motel manager in Aransas Pass verified this, testifying that they arrived in a pickup and checked into her hotel. The defendant's father claimed that he left San Antonio for Aransas Pass at about 3:00 a.m. on June 14 in the car registered to the defendant's wife and reached his destination at about daybreak. He added that the car he arrived in, a cream colored, four door Buick, was the one customarily driven by the defendant but had been parked across the street from his house with the keys in the ignition. The defendant's mother corroborated this testimony, adding that she, the defendant and his wife left Aransas Pass in the car on June 15 for a visit with her mother in Brownsville, not returning to San Antonio until June 24, 1969. Her husband returned to San Antonio in the pickup.

The state was allowed to introduce evidence of an extraneous offense

404 P.2d 729 (Ariz. Ct. App. 1965). California requires some certainty also, mere suspicion is not enough. People v. McCullough, 322 P.2d 289 (Cal. Dist. Ct. App. 1962).

22 Lankford v. State, 93 Tex. Crim. 442, 248 S.W. 389 (1923). In the past, however, the court of criminal appeals has used such phrases as "evidence [which] strongly tend[s] to connect appellant" with the extraneous offense. Williams v. State, 38 Tex. Crim. 128, 137, 41 S.W. 645, 648 (1897); "reasonable certainty," Fountain v. State, 90 Tex. Crim. 474, 477, 241 S.W. 489, 491 (1921); "[s]atisfactorily shown to be a party to the commission of such offense," Shepherd v. State, 143 Tex. Crim. 387, 389, 158 S.W.2d 1010, 1011 (1942).

23 Pelton v. State, 60 Tex. Crim. 412, 132 S.W. 480 (1910).

24 *Id.* at 420, 132 S.W. at 484.

25 Williams v. State, 481 S.W.2d 815, 819 (Tex. Crim. App. 1972).

in rebuttal to this defensive theory. A fifteen-year-old girl testified that she and a girlfriend had been approached by a man in a white car bearing license number GYW 916. The man was completely nude. This incident occurred on June 18, 1969. The witness was unable to identify the defendant as having been the offender and, consequently, no charges were filed against him.

The majority emphasized that the main purpose of admitting the evidence was that it served to rebut the defensive theory of alibi, and that the evidence revealing an extraneous offense was only incidental to this main purpose. Judge Onion suggests in his dissent that the defense of alibi could have been rebutted without admitting the details of the extraneous offense.

> The fact that a witness or witnesses saw an automobile bearing license number GYW 916 in San Antonio on June 18, 1969, would have been admissible in light of appellant's alibi testimony, but to permit the State to go further and show an extraneous offense and the details thereof without showing that the appellant was the offender was error in my opinion . . . .[26]

Judge Onion seems to be suggesting that the main purpose in admitting the testimony could have been served without introducing the prejudicial effect of the details of the extraneous offense.[27]

As justification for affirming the trial court's decision to admit the evidence of the extraneous offense, the majority sought to establish a distinction between the exception of rebuttal of a defensive theory and all other exceptions allowing for the admission of this type of evidence. The distinction was essential to their holding since it has always been indispensable that the state show the defendant to be the perpetrator of the extraneous offense as a necessary prerequisite to its admissibility.[28] The court was faced with overruling the necessity of proving the defendant was the perpetrator for all exceptions, or finding some special basis for dispensing with the requirement for the excep-

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[26] *Id.* at 820.

[27] *Id.* at 820. Judge Odom, in a concurring opinion, also recognizes that the state had a right to show that the defendant's automobile was in San Antonio on June 18, 1969 for the purpose of impeaching the defendant's witnesses and rebutting the defensive issue. The details of the extraneous offense, according to Judge Odom, were also admissible but for a different reason than that of the majority: "A witness should be permitted to testify concerning collateral facts that serve to fix in his memory a material fact to which he has testified." *Id.* at 819 (concurring opinion). Judge Odom cites Wigmore in providing the reason for the rule.

> The party offering a witness may desire to make plain the strength of the witness' grounds of knowledge and the reasons for trusting his belief . . . the general rule is that a witness may on direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible . . . .

II J. WIGMORE, EVIDENCE § 655 (3d ed. 1940).

[28] Lankford v. State, 93 Tex. Crim. 442, 248 S.W. 389 (1923).

tion of rebuttal of a defensive theory only. The majority chose the latter and the result was, to repeat Judge Onion, "an exception to an exception." The holding was apparently without precedent, Judge Onion declaring:

> In support of such position the majority cites no authority but asks the reader to "compare" Chambers v. State, [and] Hart v. State, *both opinions by this writer.* Neither stands for the proposition that extraneous offenses or transactions may be offered without a showing that the accused is the perpetrator.[29]

In defining the distinction the majority concentrated on the fact that the state did not introduce the evidence complained of for the purpose of showing a separate offense, but for the purpose of rebutting the defensive theory. The showing of the extraneous offense was only incidental to the main purpose. While the truth of this cannot be disputed, it fails to establish a distinguishing feature of the rebuttal of a defensive theory exception. The showing of an extraneous offense is also often merely incidental to the resolution of the main issues of intent, identity, motive, and malice.

Certain issues are so vital to the determination of the guilt or innocence of the accused that even evidence which will have probable prejudicial effect is admitted. The rationale behind the exceptions seems to be that the necessity of resolving the issue outweighs the prejudicial effect.[30] Determination of the truth of a defensive theory is but one of these issues—identity, intent, etc. are also included. In resolving these issues the showing of an extraneous offense is often no more than a necessary vehicle of expediency, not meant to be an end in itself, but merely a means of resolving the issue. In discussing the defensive theory advanced by the defendant in *Williams*, the majority recognized this saying that "the State's evidence tended to show an extraneous offense was incidental to the purpose for which it was offered."[31] This, however, is not a feature peculiar to the exception of rebuttal of a defensive

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29 Williams v. State, 481 S.W.2d 815, 820 (Tex. Crim. App. 1972) (dissenting opinion) (emphasis added) (citations omitted). Judge Onion further stated that in Chambers v. State, 462 S.W.2d 313 (Tex. Crim. App. 1969), the witness did not testify that the defendant had been engaged in a criminal offense, but merely reported suspicious conduct of a group of men, one of whom was the defendant, to the police. In Hart v. State, 447 S.W.2d 944 (Tex. Crim. App. 1969), the defendant was clearly identified as being involved in the extraneous offense.

30 It is on this aspect that Judge Odom concentrates. Williams v. State, 481 S.W.2d 815, 819 (Tex. Crim. App. 1972) (concurring opinion). When the relevance of the evidence may outweigh its probable prejudicial effect, it is admissible. In such a case, the prejudicial effect should be alleviated as much as possible by a limiting instruction from the trial judge. Considerable discretion is allowed the trial judge in his determination of whether evidence is admissible. On appeal, reversal is granted only upon a showing of clear abuse of this discretion. Lanham v. State, 474 S.W.2d 197 (Tex. Crim. App. 1971).

31 Williams v. State, 481 S.W.2d 815, 822 (Tex. Crim. App. 1972).

theory, but has equal validity when applied to many cases where intent, identity, motive, etc. are in question.

The majority cites a passage from *Ivey v. State*[32] which purportedly recognized the distinction and treated defensive theory as being unique. In that case, the defendant urged a defensive theory saying that he was subject to epileptic seizures and was physically weak, therefore incapable of committing the crime of aggravated assault and battery. In rebuttal, the state offered evidence of another assault committed by the defendant. The court held it to be admissible.

> The state, for the purpose of showing the improbability of his defensive theory, introduced the evidence complained of. Under such a state of facts, the evidence became admissible notwithstanding it tended to show an extraneous offense. Of course, the evidence was not admissible for the purpose of impeachment, or showing intent, identity, etc. We did not base our opinion holding it admissible upon any such theory. One of the best known exceptions to the rule against proving extraneous crimes is that *any competent evidence* which tends to defeat the defense urged is admissible though it tends to show another offense.[33]

In the last sentence of this passage, the court is very specific in stating the rule as it applied to that case. A more general, all encompassing statement of the rule, however, is that any competent evidence is admissible though it tends to show another offense.[34] In this connection, "competent" evidence is evidence that comes within any of the exceptions.[35] Thus, in *Ivey*, the court was not so much defining a distinction as merely applying the rule for admissibility to one particular exception.

The language of the majority in detailing the peculiar characteristics of the rebuttal of a defensive theory exception has also been used by the court of criminal appeals in connection with other exceptions. The case of *Bruno v. State*[36] serves as an example. The defendant had been convicted of aggravated assault. The victim testified that he had first met the defendant while working as a guard in the Texas Prison System. Upon further questioning by the state, it developed that the defendant had been a prisoner at the time. The defendant objected on the grounds that the statement showed an extraneous offense. The objection was overruled. The court of criminal appeals affirmed holding that no motive for the assault could be established other than as a consequence of this prior relationship between the defendant and the prosecuting witness.

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32 152 Tex. Crim. 206, 212 S.W.2d 146 (1948).
33 *Id.* at 209, 212 S.W.2d at 148 (emphasis added).
34 Moore v. United States, 150 U.S. 57, 14 S. Ct. 26, 37 L. Ed. 996 (1893).
35 *Cf.* Moore v. United States, 150 U.S. 57, 14 S. Ct. 26, 37 L. Ed. 996 (1893).
36 163 Tex. Crim. 540, 295 S.W.2d 211 (1956).

> Evidence which is pertinent and tends to prove the offense alleged or motive is not rendered inadmissible because it *also shows or tends to show that the defendant had been convicted of a collateral crime.*[37]

Thus, the evidence showing motive was admissible, although it incidentally showed an extraneous offense. Evidence coming within other exceptions has also been admitted though the showing of an extraneous offense was only an incident to another purpose.[38]

In *Williams,* the court announced a holding unsupported by precedent. The question of whether the defendant perpetrated the extraneous offense is no longer relevant when the offense is introduced to rebut a defensive theory. The majority was understandably unwilling to extend this doctrine to the other exceptions. The attempt to set aside the rebuttal of a defensive theory exception, however, as deserving of special status, fails in the face of logic and precedent. While there are differences between the rebuttal exception and the exception of intent, malice, etc., the difference relied upon by the majority is questionable. Even conceding that the distinction as outlined by the majority is valid, it is difficult to see how it provides sound justification for the new rule. Drawing again on the words of Judge Onion:

> The rule forbidding the introduction of other crimes is one of evidence and arises out of a fundamental demand for justice and fairness. This general rule should be strictly enforced where applicable because of the prejudicial effect and injustice of such evidence and should not be departed from except under conditions which clearly justify such a departure and are necessary.
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> The action taken by "the majority" neither supported by the law or facts is totally unjustified.[39]

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37 *Id.* at 545, 295 S.W.2d at 213 (emphasis added).

38 *E.g.,* Knauf v. State, 108 Tex. Crim. 590, 2 S.W.2d 229 (1928)(identity); Meredith v. State, 115 Tex. Crim. 447, 27 S.W.2d 222 (1930)(knowledge).

39 Williams v. State, 481 S.W.2d 815, 822 (Tex. Crim. App. 1972) (dissenting opinion).