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OHIO'S "SIMILAR ACTS STATUTE": ITS USES AND ABUSES

DAVID L. HERBERT*

AND

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PREFACE

SINCE 1969, seven Ohio Supreme Court cases¹ have directly analyzed Ohio's "Similar Acts Statute."² The statute has been a source of major confusion to attorneys and judges alike—even the title itself being subject to some inherent misunderstanding.³ The judicial analysis of the Act was necessitated for the most part, by two primary factors: (1) prosecutorial misuse of the statute;⁴ and, (2) trial court misinterpretation of the breadth, scope and applicability of the statute in particular cases.⁵

This confusion has not been resolved despite the fact that the Ohio Supreme Court has most recently interpreted the Act once again in *State v. Curry*.⁶ Furthermore, no comprehensive analysis has been offered in the legal literature which could conceivably resolve the matter. The authors of this article itself were unable to agree upon the "correct" interpretation of the Act—perhaps due to the adversarial legal positions which each occupies.

Notwithstanding the lack of uniform analysis of the Act, this article should isolate the main areas of confusion and hopefully provide some "food for thought" which may in itself help to resolve the ambiguities of the statute. Moreover, the discussion offered herein may prompt the recently established Ohio Evidence Rules Committee to devote some time to the formulation of a clearer evidentiary statement on prosecutorial use of "other acts" testimony in criminal cases.

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¹ *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975); *State v. Burson*, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974); *State v. Flonnory*, 31 Ohio St. 2d 124, 285 N.E.2d 726 (1972); *State v. Carver*, 30 Ohio St. 2d 280, 285 N.E.2d 26 (1972); *State v. Carter*, 26 Ohio St. 2d 79, 269 N.E.2d 115 (1971); *State v. Moorehead*, 24 Ohio St. 2d 166, 265 N.E.2d 551 (1970); *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

² OHIO REV. CODE ANN. § 2945.59 (Page 1953).

³ *State v. Flonnory*, 31 Ohio St. 2d 124, 126, 285 N.E.2d 726, 729 (1972):

Much confusion about R.C. § 2945.59 might be avoided if it were observed that nowhere therein do the words "like" or "similar" appear. The statute permits the showing of "other acts" when such other acts "tend to show" certain things. If such other acts do in fact "tend to show" any of those things they are admissible notwithstanding they may not be "like" or "similar" to the crime charged.

⁴ See, e.g., *State v. Burson*, 38 Ohio St. 2d 167, 311 N.E.2d 526 (1974).

⁵ See, e.g., *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

⁶ 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

OHIO'S "SIMILAR ACTS STATUTE": A PROSECUTOR'S PERSPECTIVE

DAVID L. HERBERT

I. INTRODUCTION

PROSECUTORIAL TRIAL USE of Ohio's "similar acts" statute¹ has been somewhat limited in recent years because of seemingly contradictory court interpretations as to the proper application of the statute in particular cases.² As a result of these apparent contradictions, trial courts have been hesitant, perhaps understandably so, to allow the state the opportunity to introduce "other acts testimony"³ in criminal cases except where the use of such testimony has been indirectly approved by the Supreme Court of Ohio.

Ohio's similar acts statute, as discussed elsewhere,⁴ has its origins in the common law of Ohio,⁵ the United States⁶ and England.⁷ Legal historians have determined that in the beginning, the law made no provisions for the use of other acts evidence in criminal cases,⁸ the theory being that the accused should not have to answer for acts other than those charged in the indictment for which he was on trial.⁹ The rule through the decades, however, evolved to the point where certain testimony or evidence of prior criminal acts was

¹ OHIO REV. CODE ANN. § 2945.59 (Page 1953).

² Compare *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975) with *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

³ "Other acts testimony" may be defined as evidence of another act or acts, which a criminal defendant performed prior to, contemporaneous with or subsequent to the criminal act for which he must stand trial, where such other acts testimony is material to a matter in issue.

⁴ See Note, 5 O.S.L.J. 232, 233 (1939), where the author comments that: "It has frequently been held that the statute is simply a reiteration of the common law, and so its constitutionality is beyond question."

⁵ See *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928); *Barnett v. State*, 104 Ohio St. 298, 135 N.E. 647 (1922); *Patterson v. State*, 96 Ohio St. 90, 117 N.E. 233 (1917); *State v. Reineke*, 89 Ohio St. 390, 106 N.E. 52 (1914); *Boyd v. State*, 81 Ohio St. 239, 90 N.E. 355 (1909); *Jackson v. State*, 38 Ohio St. 585 (1883); *Tarbox v. State*, 38 Ohio St. 581 (1883); *Lindsey v. State*, 38 Ohio St. 507 (1882); *Coble v. State*, 31 Ohio St. 100 (1876); *Brown v. State*, 26 Ohio St. 176 (1875); *Shriedley v. State*, 23 Ohio St. 130 (1872); *Reed v. State*, 15 Ohio 217 (1846); *Hess v. State*, 5 Ohio 5 (1831); *Ohio v. Brooks*, 1 Ohio Dec. Reprint 407 (C.P. 1851).

⁶ See Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) [hereinafter cited as *Stone, America*].

⁷ See Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter cited as *Stone, England*].

⁸ Stone, *America*, *supra* note 6, at 989.

⁹ See, e.g., *Whiteman v. State*, 119 Ohio St. 285, 289-90, 164 N.E. 51, 52 (1928). See also JONES ON EVIDENCE § 162, at 290-91 (5th ed. 1958).

allowed to be used for limited purposes to prove such things as intent, motive, absence of mistake or accident, or identity.¹⁰

The common law of the United States, relying heavily in the beginning upon the common law of England, began in the 1800's to chip away at the original English Rule which excluded all other acts evidence in criminal cases.¹¹ Various state courts, including those in Ohio, began to vary their evidentiary rules to allow limited prosecutorial use of other acts testimony in criminal cases.¹² One of the first Ohio cases apparently dealing with other acts evidence arose in 1831.¹³ In this early Ohio prosecution, the Supreme Court of Ohio approved the use of other acts testimony to establish "the guilty knowledge of the defendant. . . ."¹⁴ The court in analyzing the prosecution's use of such evidence stated:

It can hardly be deemed necessary at this day to go into any course of reasoning to prove that circumstantial or presumptive evidence is allowed to prevail, even to the convicting of an offender . . . [because such evidence] is, in its own nature, capable of producing the highest degree of moral certainty.¹⁵

By 1928, the use of other acts testimony in criminal cases for limited evidentiary purposes gained a strong foothold in Ohio.¹⁶ The common law basis of the original rule and its exceptions was explained by the Ohio Supreme Court in *Whiteman v. State*¹⁷ in rather lengthy fashion:

The real meaning of this rule is that evidence of collateral offenses must never be received as substantive evidence of the offense on trial. While the rule itself is fundamental and well settled by a long line of adjudica-

¹⁰ See, e.g., *Whiteman v. State*, 119 Ohio St. 285, 289-90, 164 N.E. 51, 52 (1928). See also MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 190, at 447-54 (2d ed. 1972) [hereinafter cited as MCCORMICK]; Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325(1956) [hereinafter cited as Slough & Knightly].

When the terms "limited purpose" or "limited evidentiary purpose" are used herein, these terms mean that other acts evidence offered under Ohio's similar acts statute, is evidence received to prove one of those items mentioned in the statute either directly or inferentially. In this sense, therefore, other acts evidence is evidence used for the purpose of proving a limited evidentiary matter such as intent or identity. It should be considered by the jury in their fact finding function, to determine whether or not the state has proved beyond a reasonable doubt each element of the crime charged. This is a somewhat different definition than that offered in *State v. Flonnory*, 31 Ohio St. 2d 124, 285 N.E.2d 726 (1972); but, both definitions are in substantial accord as to the point that other acts testimony, received for one of the purposes mentioned in the statute can be used by the jury to determine if the state has proved each element of the crime charged.

¹¹ See Stone, *America*, supra note 6, at 989-93.

¹² See, e.g., *Hess v. State*, 5 Ohio 5 (1831).

¹³ *Id.*

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 10-11.

¹⁶ See *Whiteman v. State*, 119 Ohio St. 285, 291-93, 164 N.E. 51, 53 (1928).

¹⁷ 119 Ohio St. 285, 164 N.E. 51 (1928).

tion, it is equally fundamental and well settled that in certain classes of cases collateral offenses may be shown as reflecting upon the mental processes or mental attitude of the accused, where intent or guilty knowledge is an essential element of the crime for which the defendant is on trial, or as throwing light upon the motive inducing the commission of the crime, or to prove identity of the defendant, where identity is an issue, and more especially where such collateral offenses have been executed according to a plan or method, and it is shown that the accused persons committed such other offenses, and in so doing followed the same plan or method as is shown to have been followed in the commission of the crime charged in the indictment.¹⁸

This restatement of the Ohio common law rule was codified in 1929.¹⁹ This enactment, while being in conflict with the original English Rule, was in almost exact conformity with the common law existing in the State of Ohio,²⁰ the United States²¹ and England²² at the time of its passage, contrary to what some jurists later believed.²³ The 1929 enactment was amended in 1953²⁴ but remains to this date in substantially the common law form as expressed by the *Whiteman* court.

Through the years, Ohio's similar acts statute has been construed and reconstrued in a rather inconsistent fashion.²⁵ These contradictions appear to arise at least partially from a misinterpretation of the enactment's common law origins. For example, in 1963 the court of appeals for Stark County in the case of *State v. Strong*²⁶ stated: "[The similar acts statute] being in derogation of the common law rule of exclusion which did not permit other acts to be shown at all, must be construed strictly against the state."²⁷

As has been demonstrated however, the common law rule existing in Ohio in 1929 when the first act was promulgated did permit proof of other acts for limited evidentiary purposes.²⁸ This being the case, any interpretation of the statute should make reference to the common law for interpretative insight because "all legislation must be interpreted in the light of the common

¹⁸ *Id.* at 290, 164 N.E. at 52.

¹⁹ Act of April 1, 1929, ch. 23, § 13444-19 [1929] Ohio Laws 190 (repealed 1953).

²⁰ See *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928).

²¹ See *Stone, America*, *supra* note 6.

²² See *Stone, England*, *supra* note 7.

²³ See *State v. Strong*, 119 Ohio App. 31, 196 N.E.2d 801 (Ct. App. 1963).

²⁴ OHIO REV. CODE ANN. § 2945.59 (Page 1953).

²⁵ Compare *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975) with *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

²⁶ 119 Ohio App. 31, 196 N.E.2d 801 (1963).

²⁷ *Id.* at 36, 196 N.E.2d at 805.

²⁸ See *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928).

law and the scheme of jurisprudence *existing at the time of its enactment.*"²⁹

This ancient rule of statutory construction has, for the most part, been forgotten by Ohio courts interpreting the similar acts statute. If the courts had analyzed the enactment in light of *its* common law basis, some of the contradictions might have been avoided.

Inasmuch as the common law does provide a logical system of doctrines, principles, rules and practices which furnish one of the most reliable backgrounds upon which any statute can be studied,³⁰ this analysis of Ohio's similar acts statute will systematically refer to the law's origins for "valuable clues"³¹ as to the proper interpretation of the enactment. What follows then is an attempt to analyze the statute in light of its common law origins with the hope that this may lead to a better understanding of the breadth, scope and applicability of the statute in particular cases.

II. JUDICIAL CONSTRUCTION AND MISCONSTRUCTION OF OHIO'S SIMILAR ACTS STATUTE

Ohio's similar acts statute applies only to criminal cases where certain acts of the defendant are sought to be proved for some limited evidentiary purpose.³² The statute has no application to non-criminal cases or to acts of someone other than the defendant.³³ Furthermore, the statute cannot be used solely to prove a defendant's criminal disposition³⁴ or to attack his credibility,³⁵ although some other evidentiary rule may allow such use.

The statute may be used however, to enable the prosecution to inferentially prove certain limited evidentiary facts.³⁶ Thus, where a criminal defendant has committed some prior, contemporaneous or subsequent act,³⁷ which by **inference**, tends to prove a material fact in issue, the state may prove such facts to establish motive, intent, absence of mistake or accident, or the defendant's scheme, plan or system in doing an act³⁸ (which itself may be used to establish

²⁹ 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 50.01, at 268 (4th ed. 1973) (emphasis added).

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901).

³³ See OHIO REV. CODE ANN. § 2945.59 (Page 1953).

³⁴ See, e.g., *State v. Burson*, 38 Ohio St.2d 157, 311 N.E.2d 526 (1974).

³⁵ See Comment, *Evidence of Criminal History in Ohio Criminal Prosecutions*, 15 WEST. RES. L. REV. 772 (1964).

³⁶ See note 10, *supra*.

³⁷ See OHIO REV. CODE ANN. § 2945.59 (Page 1953).

³⁸ See *State v. Burson*, 38 Ohio St.2d 157, 159, 311 N.E.2d 526, 528 (1974).

identity³⁹). The proof of such matters is obviously for the limited purposes mentioned in the act and cannot properly be used for any other purpose.⁴⁰

At common law, other acts testimony could similarly be used for limited evidentiary purposes—not to prove criminal disposition but to prove intent,⁴¹ motive,⁴² absence of mistake or accident,⁴³ or identity.⁴⁴ Such evidence, then as today, was deemed to be circumstantial proof of a particular element of the crime charged,⁴⁵ or of a material fact or corroborative evidence of one or the other.⁴⁶ This form of testimony was admissible at common law where it was deemed competent and relevant to prove a matter in controversy.⁴⁷

Under Ohio's present similar acts statute, prosecutorial use of other acts of the defendant for limited evidentiary purposes may be made where such acts are *material* in proving an element of the crime charged that is in issue.⁴⁸ Although most Ohio courts have tended to use the words relevant and material almost interchangeably,⁴⁹ they have separate and distinct meaning.

Relevancy, as defined by one of the most respected authorities on evidence is: "[T]he tendency of evidence to establish a material proposition."⁵⁰ Materiality, on the other hand, is the tendency of evidence to prove an ultimate matter in issue.⁵¹ A matter is in issue when it must be proved by the initiator of the litigation in order for him to prevail.⁵² Relevant evidence then, is evidence that has some probative value in proving a material proposition or

³⁹ *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975); *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969). Some courts, *e.g.*, *State v. Brown*, 137 N.E.2d 609 (Ohio Ct. App. 1955) have taken the position that proof of identity is outside the scope of the statute, but inasmuch as the statute is merely declaratory of its common law existing at the time of the statute's initial enactment, identity should be construed to be within the law's framework. *See generally*, Comment, *Evidence of Criminal History in Ohio Criminal Prosecutions*, 15 WEST. RES. L. REV. 772, 777 (1964).

⁴⁰ *See, e.g.*, *State v. Hector*, 19 Ohio St. 2d 167, 174-78, 249 N.E.2d 912, 916-18 (1969).

⁴¹ *Cf. Shriedley v. State*, 23 Ohio St. 130 (1872).

⁴² *See, e.g.*, *Brown v. State*, 26 Ohio St. 176 (1875).

⁴³ *Cf., e.g.*, *Ohio v. Brooks*, 1 Ohio Dec. Reprint 407 (C.P. 1851).

⁴⁴ *See, e.g.*, *Barnett v. State*, 104 Ohio St. 298, 135 N.E. 647 (1922).

⁴⁵ *See, e.g.*, *Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928).

⁴⁶ *See Barnett v. State*, 104 Ohio St. 298, 135 N.E. 647 (1922).

⁴⁷ *See Whiteman v. State*, 119 Ohio St. 285, 164 N.E. 51 (1928).

⁴⁸ OHIO REV. CODE ANN. § 2945.59 (Page 1953).

⁴⁹ *See, e.g.*, *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

⁵⁰ MCCORMICK, *supra* note 10, § 185, at 435.

⁵¹ *Id.* § 185, at 434.

⁵² *Id.* *See also State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

fact. Material evidence consequently, is evidence that goes to establish the ultimate issues, those matters which must be proved to prevail. Evidence that is or is not material depends upon the particular pleadings or charge of the case in question. For example, if a criminal defendant admits the crime charged but attempts to negate liability therefore by putting forth a defense of entrapment, he would in effect, be admitting the elements of the crime;⁵³ consequently, evidence offered to prove the elements of the crime in question would be immaterial since these matters would not be in issue.

With this background in mind, it is important to note that other acts testimony or evidence, aside from other matters, could be used in every case where such evidence is of value in establishing ultimate issues in controversy,⁵⁴ *i.e.*, those issues which the charge requires to be proved.⁵⁵ Thus, for example, where a defendant is charged with murder, other acts of his which go to establishing an ultimate issue or element of the crime, could be used to establish, *e.g.*, intent, assuming the other evidentiary requirements could be met.⁵⁶

In every criminal case then, the prosecution should be free to use other acts testimony to establish one or more of the elements of the crime charged when such elements are in issue. When one or more of the elements have been admitted by the defense, proof of other acts to establish one of these elements would be immaterial and consequently inadmissible under the statute.⁵⁷

When the similar acts statute is used to allow prosecutorial presentation of other acts testimony or evidence to prove motive or intent, the state seeks to establish one of two differently defined terms, one an element of some crimes and the other merely inferential proof of the commission of a crime by a named defendant. Motive, as distinguished from intent, may be defined as the mental inducement which prompts the criminal act;⁵⁸ intent, on the other hand, may be defined as purpose.⁵⁹ To summarize then, "Intent spells purpose to use a

⁵³ See PERKINS ON CRIMINAL LAW 1031 (2d ed. 1969). Such an admission, in order to raise the defense of entrapment cannot be required however, *People v. Perez*, 62 Cal. 2d 769, 401 P.2d 934 (1965). Once a defense of entrapment is put forth, evidence of prior convictions of the same type of offense would be admissible to counter the claim, *United States v. Sherman*, 240 F.2d 949 (2d Cir. 1957).

⁵⁴ See *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

⁵⁵ See *Tarbox v. State*, 38 Ohio St. 581, 584 (1883). See also *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975); Comment, *Evidence of Criminal History in Ohio Criminal Prosecutions*, 15 WEST. RES. L. REV. 772, 776 (1964).

⁵⁶ See, *e.g.*, *Ohio v. Brooks*, 1 Ohio Dec. Reprint 407 (Com. P. 1851).

⁵⁷ See *Tarbox v. State*, 38 Ohio St. 581, 584 (1883). *Cf.* *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

⁵⁸ See *Shelton v. State*, 106 Ohio St. 243, 140 N.E. 153 (1922); *Brown v. State*, 26 Ohio St. 176, 181-82 (1875).

⁵⁹ See *Slough & Knightly*, *supra* note 10, at 328.

particular means to obtain a desired end, whereas motive supplies the reason that nudges the will and prods the mind to indulge the criminal intent.”⁶⁰

A different admissibility test applies to proof of either motive or intent by the use of other acts testimony than would be the case where other acts were used to show, *inter alia*, identity.⁶¹ When the prosecution attempts to establish either motive or intent by proof of similar acts, the evidence offered must show “acts so related to the offense for which the defendant is on trial that they have a logical connection therewith. . . .”⁶² It must be “clearly shown that a connection in *the mind of the defendant* must have existed between the offense charged in the indictment and others of a similar nature.”⁶³ Where such mental connection is shown, evidence of such related other acts is admissible to show either motive or intent.⁶⁴

Under this “logical connection test,” as some have labeled it,⁶⁵ the other acts evidence used must not be too remote in time or place and must be closely related factually to the crime for which the defendant stands trial.⁶⁶ Where the prosecution seeks to use other acts testimony to establish intent as opposed to motive, the crime charged must include the element of intent which must be in issue.⁶⁷

When the statute is used to allow prosecutorial presentation of similar acts testimony to show absence of mistake or accident on the defendant’s part, the statute seems to contemplate the use of other acts only after the defendant has claimed accident or mistake.⁶⁸ Therefore, to be admissible such other acts would have to be factually quite similar to have any probative value in negating the accident or mistake claim.⁶⁹

This admissibility requirement appears to be the only one necessary.

⁶⁰ *Id.*

⁶¹ *See* State v. Burson, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974).

⁶² State v. Moore, 149 Ohio St. 226, 229, 78 N.E.2d 365, 367 (1948).

⁶³ Brown v. State, 26 Ohio St. 176, 181 (1875) (emphasis added).

⁶⁴ *Id.* at 181-82. *Cf.* Lindsey v. State, 38 Ohio St. 507, 514 (1882). *See generally* State v. Moore, 149 Ohio St. 226, 78 N.E.2d 365 (1948).

⁶⁵ State v. Moore, 149 Ohio St. 226, 229, 78 N.E.2d 365, 367 (1948), in which the court held: “To be admissible, testimony offered under the statute must show acts so related to the offense for which a defendant is on trial that they have a logical connection therewith and may reasonably disclose a motive or purpose for the commission of such offense.”

⁶⁶ *See* State v. Carver, 30 Ohio St. 2d 280, 285 N.E.2d 26 (1972).

⁶⁷ State v. Curry, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

⁶⁸ *Cf.* United States v. Ross, 321 F.2d 61 (2d Cir. 1963), *cert. denied*, 375 U.S. 894 (1963); People v. Williams, 6 Cal. 2d 500, 58 P.2d 917 (1936). *See also* State v. Curry, 43 Ohio St. 2d 66, 72, 330 N.E.2d 720, 725 (1975).

⁶⁹ *See e.g.* State v. Lapaze, 57 N.H. 245, 294 (1876).

However, some Ohio courts, and at least one writer,⁷⁰ seem to have taken the position that in order for other acts testimony to be admissible to negate a claim of accident or mistake, the prosecution must show "that a connection, in the mind of the defendant must have existed between the offense in question and the other acts of a similar nature."⁷¹ This statement of the supreme court in *State v. Burson*⁷² was attributed to an earlier Ohio case, *State v. Moore*.⁷³ Ostensibly, this application of the "logical connection test" to absence of mistake or accident cases would require a proximity of time and place, as that test does in intent or motive cases. This would be sheer folly considering the wide range of possible cases covering a perhaps long period of time.

The above quoted statement of the *Burson* court cannot be attributed to the *Moore* decision inasmuch as *Moore* addressed a different question, *i.e.*, the standards for admissibility for other acts testimony in cases where the prosecution attempted to negate a claim of accident or mistake. This gross misinterpretation of the *Moore* opinion has led to substantial but needless confusion. Neither precedent nor logic dictate a different admissibility test than that offered herein where absence of mistake or accident issues are material.

In cases where the statute is used to prove the defendant's scheme, plan or system in doing an act, the reasons for allowing such evidence are different than when other uses of the statute are made. Proof of a defendant's scheme, plan or system may have one of two main uses under the law: to prove the existence of a conspiracy,⁷⁴ or to prove identity.⁷⁵ In order to use the statute to prove such limited evidentiary matters however, the existence of a conspiracy or the identity of the defendant must be in issue.⁷⁶

Some Ohio courts have taken the position that that portion of the similar acts statute relating to scheme, plan or system has relevance where the other acts testimony is part of the *res gestae* of the crime for which the defendant is on trial.⁷⁷ However, the statute has really no application in such situations because the facts are usually so interwoven as to be

⁷⁰ See Mount, *Ohio's "Similar Acts Statute": Another Interpretation, infra*.

⁷¹ *State v. Burson*, 38 Ohio St. 157, 160, 311 N.E.2d 526, 628-29 (1974).

⁷² *Id.*

⁷³ 149 Ohio St. 226, 78 N.E.2d 365 (1948).

⁷⁴ *Cf. McCORMICK, supra* note 10, § 190 at 448-49. See also *Patterson v. State*, 96 Ohio St. 90, 117 N.E. 223 (1917); *Jackson v. State*, 38 Ohio St. 585 (1883); *Tarbox v. State*, 38 Ohio St. 581 (1883).

⁷⁵ See, *e.g.*, *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975); *McCORMICK, supra* note 10, § 190 at 451. *But see State v. Flonnory*, 31 Ohio St. 2d 124, 285 N.E.2d 726 (1972); *Slough & Knightly, supra* note 11, at 330.

⁷⁶ See *State v. Curry*, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

inseparable.⁷⁸ In such cases, therefore, other acts testimony is allowed simply because there is no way to separate such facts from the alleged criminal act.⁷⁹ Consequently, the other acts testimony is not for a limited evidentiary purpose, but should be received without limitation as any other direct evidence.⁸⁰

The admissibility requirements for the use of other acts testimony in cases where identity is sought to be shown, were most recently examined by the supreme court in *State v. Curry*.⁸¹ In this case the defendant was charged with the crime of statutory rape. The prosecution introduced the testimony of the victim of this crime, the testimony of a witness to part of the facts thereof, and the testimony of a victim of another similar offense involving the defendant. As to the use of other acts testimony to establish identity, the supreme court held that the other acts evidence had been improperly admitted because the defendant acknowledged that he had been with the victim on the date in question and that therefore "identity was not a material issue."⁸² Consequently, the prosecution's attempt to prove the identity of the defendant as the perpetrator of the crime by the use of other acts testimony earmarking the scheme, plan or system as that of the defendant was held to be error.⁸³

The gravaman of the court's opinion rests upon the statement that "identity was not a material issue." However, the word identity as the court partially recognized, is not some abstract term. Identity in a criminal case is in issue and material when the state must prove that the defendant is the perpetrator of the crime.⁸⁴ The mere fact that a defendant admits that he was with the victim of the crime or that he was in the area of the occurrence does not relieve the prosecution of its burden to establish the identity of the perpetrator of the crime. Thus, in the *Curry* case, identity was a material issue because the prosecution was not relieved of its burden of establishing the identity of the perpetrator by the mere non-culpatory admissions of the defendant. While the identity element of any crime is material to the case, unless admitted, the probative value of other acts testimony to prove identity

⁷⁸ See Slough & Knightly, *supra* note 10, at 332:

Paging through the reports one frequently finds the principle of this exception to the rule of exclusion explained in terms of *res gestae*, thus it is common for courts to state that evidence of other crimes is admissible as part of the *res gestae*. Perhaps the exoticism of the Latin tongue appeals to the Anglo-Saxon mind; but aside from the fact that use of a foreign expression may serve as a convenient cliché or memory aid, there is little reason for resort to pseudo-intellectualism to demonstrate an idea which can be explained in simple English. In this instance, evidence of other crimes is receivable as a necessary and inseparable part of the transaction in issue.

⁷⁹ See 1 WIGMORE, EVIDENCE § 218, at 464-66 (2d ed. 1923).

⁸⁰ See note 78 *supra*.

⁸¹ 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975).

⁸² *Id.* at 73, 330 N.E.2d at 726.

⁸³ *Id.*

⁸⁴ Cf. PERKINS ON CRIMINAL LAW 645 (2d ed. 1969).

may decrease with the availability of other direct evidence.⁸⁵ However, in such a prosecution as statutory rape, where the victim is often a young child, such other acts testimony often has great probative value in establishing identity and in corroborating the victim's recount of the facts.⁸⁶

If the *Curry* rationale was carried to its extremes, everytime a victim or a witness identifies a defendant as the perpetrator of the crime charged, other acts testimony designed to prove identity by comparison of the scheme, plan or system of the other act with the criminal act in question, would be deemed to be immaterial. This result is not supported by earlier Ohio cases or by the definition of materiality offered earlier.⁸⁷

In an earlier Ohio prosecution, *State v. Hector*,⁸⁸ the supreme court stated: The legal determination, by comparison of the plan, system or method employed in a prior crime with the plan, system or method employed in the crime in question, of whether the former is relevant to the issue of *identity of the perpetrator of the latter, must be made without consideration of the fact that eye witnesses have identified the same person as the perpetrator of both crimes.* (emphasis added)

....

There must be some similarity of methodology employed which *itself* would constitute probative evidence of the probability that the same person (whoever he might be) committed both crimes. In such event, eye-witness proof of the identity of the perpetrator of the prior offense is relevant proof on the issue of the identity of the perpetrator of the offense in question. Absent such proof, it has no relevancy, and such omission is not supplied by the fact that eye witnesses at the scene of the offense in question identified the same person as the perpetrator of that offense.

....

For such evidence to be admissible, there must be such a logical connection between the crimes that proof of the one will naturally tend to show that the accused is the person who committed the other.⁸⁹

If these admission prerequisites as laid down in *Hector*, are met and if the defendant has not admitted that he is the perpetrator of the crime, identity is material and should be admitted. The *Hector* case, as the above quote presupposes, involved two separate identifications: one by the victim of the crime for which the defendant was then standing trial, and one by the victim

⁸⁵ See FED. R. EVID. 400(b), Advisory Committee Notes. Compare *People v. Buskiewicz*, 330 Ill. 532, 162 N.E. 196 (1928) with *Kirby v. Commonwealth*, 206 Ky. 535, 267 S.W. 1094 (Ct. App. 1925).

⁸⁶ See *Boyd v. State*, 81 Ohio St. 239, 90 N.E. 355 (1909).

⁸⁷ See text accompanying notes 50-57 *supra*.

⁸⁸ 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

⁸⁹ *Id.* at 177, 249 N.E.2d at 918, (emphasis added).

of a "similar act," such act being used to earmark the criminal acts as the handiwork of the defendant, thereby identifying him as the perpetrator of the criminal act in question.

Cases arising prior and subsequent to *Hector* further support this theory. For example, in an early Ohio prosecution, *Boyd v. State*,⁹⁰ the state was allowed to introduce other acts testimony in a statutory rape case to show two things: (1) the relations between the parties; and (2) to provide corroborative evidence of the testimony of the prosecutrix, including her identification of the defendant.⁹¹ A similar result was reached in another early prosecution, *Whiteman v. State*.⁹² In a later Ohio prosecution, *State v. Carter*,⁹³ the supreme court approved the use of similar acts testimony in an armed robbery case to help establish identity, even though two victims of the crime for which the defendant was on trial made positive identifications.⁹⁴ A comparable result was reached in *Barnett v. State*⁹⁵ arising in 1922.

As has been demonstrated, judicial construction or misconstruction, as the case may be, of Ohio's similar acts statute has been somewhat confusing to say the least. The exceptions to the very early common law rule originating in England, are perhaps now broader than the "rule" itself.⁹⁶ It may well be as Dean Wigmore suggested in 1940, that the precedents cannot be reconciled with any degree of certainty or with any expectation of reward.⁹⁷ However, the sometimes important and significant role which the statute can play, demand that some analysis be made of the "proper" uses of the law.

III. A RECONCILIATION—SOME THOUGHTS ON A RECONSTRUCTION OF OHIO'S SIMILAR ACTS STATUTE

Aside from some of the confusing court interpretations of the statute already discussed, some cases do supply valuable insights as to the proper uses of the statute. First, and without much question, the statute should only be used where the prosecution seeks to prove a material fact in issue.⁹⁸ Any other use would violate the wording of the statute by merely showing the criminal disposition of the defendant.⁹⁹ Secondly, the statute should only be used to

⁹⁰ 81 Ohio St. 239, 90 N.E. 355 (1909).

⁹¹ *Id.*

⁹² 119 Ohio St. 285, 164 N.E. 51 (1928).

⁹³ 26 Ohio St. 2d 79, 269 N.E.2d 115 (1971).

⁹⁴ *Id.*

⁹⁵ 104 Ohio St. 298, 135 N.E. 647 (1922).

⁹⁶ *Trogdon v. Commonwealth*, 31 Gratt. 862, 870 (Va. 1878).

⁹⁷ 2 WIGMORE, EVIDENCE § 302 (3d ed. 1940).

⁹⁸ OHIO REV. CODE ANN. § 2945.59 (Page 1953).

⁹⁹ See *State v. Burson*, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974).

prove those limited things provided for in the statute, *i.e.*, motive, intent, absence of mistake or accident, or the plan, system or scheme used in doing an act. Moreover, when the statute is used to prove absence of mistake or accident, such usage should only be allowed where a claim of mistake or accident is presented. Thirdly, it should be remembered that the portion of the statute allowing proof of plan, system or scheme, may be used to establish two ultimate facts: conspiracy or identity. Where the prosecution introduces similar acts testimony as to these two items such evidence is for a limited purpose; but, where the prosecution introduces other acts testimony as to acts so related to the crime charged as to be inseparable from it, that evidence is not limited purpose evidence but direct testimony about the crime charged.¹⁰⁰

When the statute is used to prove motive or intent, the logical connection test as laid down in *State v. Moore*¹⁰¹ should serve as the standard for admission. However, when the statute is used to prove absence of mistake or accident, the use of a logical connection admissibility test appears to be misplaced. The only requirement for admission should be similarity of methodology employed as was partially discussed in *Moore*.¹⁰² When the statute permits proof of prior "similar acts" to establish identity, such proof should be admitted based upon the test as laid down in *Hector*¹⁰³ and applied in *Burson*.¹⁰⁴

The legal determination, by comparison of the plan, system, or method employed in a prior crime with the plan, system or method employed in the crime in question, of whether the former is relevant to the issue of identity of the perpetrator of the latter, must be made without consideration of the fact that eyewitnesses have identified the same person as the perpetrator of both crimes.

....

There must be some similarity of methodology employed which *itself* would constitute probative evidence of the probability that the same person (whoever he might be) committed both crimes. In such event eye-witness proof of the identity of the perpetrator of the prior offense is relevant proof on the issue of the identity of the perpetrator of the offense in question.¹⁰⁵

Moreover, there is no valid reason to exclude the presentation of evidence to prove identity in a case where there is some evidence of such, unless the probative value of such other acts testimony, when compared to

¹⁰⁰ See note 78 *supra*.

¹⁰¹ 149 Ohio St. 226, 78 N.E.2d 365 (1948).

¹⁰² *Id.*

¹⁰³ 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

¹⁰⁴ 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974).

¹⁰⁵ *State v. Hector*, 19 Ohio St. 2d 167, 177, 249 N.E.2d 912, 918 (1969).

other evidence is almost nil. Furthermore, in a case where the defendant admits being with the victim of the crime or in the area of the occurrence, other acts evidence offered to prove identity should be admitted. When we consider that the prosecution must establish that the defendant is the perpetrator of the crime, *beyond a reasonable doubt*, it is fairly easy to understand that a contrary rule, as hinted to in *Curry*, is not justified in logic or on the basis of past precedent.

IV. A LIGHT OF HOPE: OHIO'S EVIDENCE RULES COMMITTEE—SOME THOUGHTS ON THE FUTURE OF OTHER ACTS TESTIMONY IN OHIO

Inasmuch as Ohio is presently considering a revision of its common law and statutory rules of evidence,¹⁰⁶ some thought should be given to the future of similar acts testimony in Ohio. An examination of other codified rules of evidence may be of some benefit to this discussion. The recently adopted Federal Rules of Evidence,¹⁰⁷ permit the use of other acts testimony or evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.¹⁰⁸ The accompanying Committee Notes to the Federal Rules indicate:

The determination must be made [under the Rules] whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403.¹⁰⁹

Similarly, the Uniform Rules of Evidence,¹¹⁰ permit the use of other acts testimony to prove limited material facts,¹¹¹ if the probative value of such evidence is not outweighed by the risk of prejudice to the defendant.¹¹²

Both the Federal Rules and the Uniform Rules place significant emphasis on the possible prejudice which other acts evidence may play in criminal cases. The possibility of such prejudice cannot be discounted. However, the relevancy of such evidence in proper cases cannot be forgotten. Consequently, any new Ohio rule should seek to balance these two possibly conflicting philosophies.

Because of conflicting case interpretations, some thought should be given

¹⁰⁶ The Ohio Evidence Rules Committee was established in 1975 by the Supreme Court of Ohio to consider a codification of the rules of evidence existing in Ohio.

¹⁰⁷ The Federal Rules of Evidence were enacted into law on January 2, 1975, to take effect 180 days from the date of enactment. See Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

¹⁰⁸ FED. R. EVID. 404(b).

¹⁰⁹ FED. R. EVID. 404(b) Advisory Committee Notes.

¹¹⁰ The Uniform Rules of Evidence were drafted by the National Conference of Commissioners on Uniform State Laws and approved at its annual conference in 1953.

¹¹¹ UNIFORM R. EVID. 55.

¹¹² UNIFORM R. EVID. 45.

to including within such a rule, admissibility standards for the introduction of different kinds of other acts evidence. In this manner, past misinterpretations of such standards could ostensibly be avoided. Explicit guidelines should be promulgated which could serve as definitive standards for trial judges to follow when they attempt to determine whether or not to admit other acts testimony. Perhaps the standards in Rule 45 of the Uniform Rules of Evidence could serve as a viable starting point for such a purpose.¹¹³

In any case, because of the confusing interpretations of other acts cases in Ohio, some careful planning should go into any revision of Ohio's similar acts statute. Anything less may further complicate the admissibility standards for other acts testimony in this state.

¹¹³ UNIFORM R. EVID. 45:

Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.