Missouri Law Review

Volume 27
Issue 4 *November 1962*

Article 2

1962

Criminal Law in Missouri-Evidence of Other Crimes

Edward H. Hunvald Jr.

CRIMINAL LAW IN MISSOURI—EVIDENCE OF OTHER CRIMES*

EDWARD H. HUNVALD, JR.**

Those who bewail the passing of great (though sometimes non-existent) traditions in the law will moan after reading *State v. Stacey*.[1] In that case the defendant was found guilty of "wilfully and maliciously killing a dumb animal, Janie, a Seeing-Eye dog . . ."[2] The conviction was reversed because of the actions of the prosecuting attorney, who, in his closing argument, "went outside the record and quoted portions of the now historic 'Eulogy to a Dog' by Senator George Graham Vest,"[3] and then urged the jury to "judge this matter with your *hearts* as well as your heads."[4] The court concluded that this was designed to lead the jury to decide the case on the basis of emotion instead of reason—"a course at war with unbiased justice."[5]

Despite this and other advances in the methods and rules of criminal trial practice, there are still areas where an eager prosecutor can follow a course of conduct designed to lead the jury to decide cases on the basis of emotion rather than reason. One such area is the use of evidence which shows that the defendant has committed other crimes in addition to the one for which he is being tried. There is a grave danger that such evidence will lead the jury to convict the defendant simply because he is a "bad man," and to ignore the shortcomings of the other evidence offered against him. Unfortunately, the obvious course of excluding all evidence of the de-

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*This article contains a discussion of selected 1961 and 1962 Missouri court decisions reported in volumes 346-356, inclusive, Southwestern Reporter, Second Series.

** Associate Professor of Law, University of Missouri; A.B., Princeton, 1950; LL.B., Harvard, 1953.

1. 355 S.W.2d 377 (St. L. Ct. App. 1962).
2. *Id.* at 378.
3. *Id.* at 380. The court paid due homage to Senator Vest by quoting his famous speech in a footnote. 355 S.W.2d at 380. There was no evidence in the record that Janie possessed the attributes of Old Drum. The court did not ponder the question of whether or not Old Drum actually resembled the "noble dog" described by Senator Vest, but merely pointed out that an appellate court never ruled on the propriety of the eulogy in the case wherein it was delivered. See Burden v. Hornsby, 50 Mo. 238 (1872).
4. *Supra* note 1, at 381.
5. *Ibid.*

fendant's criminal past is not a satisfactory solution, for often the evidence of other crimes has a legitimate use as well as an illegitimate and prejudicial effect. The rules of admissibility of evidence of other crimes are the results of an effort to compromise, to balance, the risk of undue prejudice and the legitimate probative value of such evidence. This effort has naturally resulted in inconsistencies and, in some cases, outright confusion.

It is an accepted rule that in a criminal trial, the state may not introduce evidence of the bad character of the defendant unless and until the defendant attempts to show the existence of his good character.[6] The reason for this rule is not that the defendant's character is irrelevant in a criminal prosecution, for the opposite is most certainly true. The defendant is allowed to introduce evidence of his good character as circumstantial evidence of his innocence.[7] For example, he may show his character for honesty in a stealing case, or for peaceableness in an assault case. By the same token, his character for dishonesty or for violence would also be relevant. But such evidence of bad character is excluded because "the danger of prejudice outweighs the probative value."[8] However, once the defendant has offered evidence of his good character, the prosecution can rebut this with evidence of the defendant's bad character and can show his prior convictions and iniquities.[9]

There are, of course, instances where the evidence of other offenses is relevant for other purposes than as illustrations of the defendant's character. In such situations the evidence is usually admissible.[10] In *State v. Johnson,*[11] the defendant was charged with having robbed *A.* Evidence

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6. State v. Hayes, 356 Mo. 1033, 204 S.W.2d 723 (1947). See generally 1 WIGMORE, EVIDENCE § 57 (3d ed. 1940).

7. MCCORMICK, EVIDENCE 333 (1954); 1 WIGMORE, *op. cit. supra* note 6, §§ 55, 56.

8. MCCORMICK, *op. cit. supra* note 7, at 327. There are also the dangers of confusion of issues and undue consumption of time and surprise. *Id.* at 325.

"The policy precluding the state from initially attacking the appellant's character is the avoidance of 'uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce.'" State v. Hayes, *supra* note 6, at 1036, 204 S.W.2d at 725, quoting from 1 WIGMORE, *op. cit. supra* note 6, § 57.

9. For a recent example, see State v. Withers, 347 S.W.2d 146, 150 (Mo. 1961). Defendant was charged with immoral molestation of a female minor. On direct examination the defendant testified that apart from the present incident he had not been arrested or in any kind of trouble. This was sufficient to allow the prosecution to question the defendant about prior charges, arrests and misconduct.

10. "The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." MCCORMICK, *op. cit. supra* note 7, at 327.

11. 347 S.W.2d 220 (Mo. 1961).

was received that the defendant and three confederates interrupted a poker game and robbed *A* and five other persons. The evidence of the robbery of the five other persons was admissible to show the defendant's guilt of robbing *A*. It would have been almost impossible to give the jury an accurate impression of the robbery of *A* without also showing the other robberies.[12] A similar result was reached in *State v. Adamson*.[13] The defendant there was convicted of forgery of a check. Evidence of his and his confederates' activities prior to the passing of the check in question was received. This evidence indicated the commission of other offenses which, unlike those in *Johnson*,[14] did not occur at the same time as the offense charged. No error was committed in receiving this evidence, the appellate court stating that it would have been impossible to show the "printing, preparation, and writing" of the check in question without showing the prior events. "The State is not to be penalized if the parties so entangle their illegal affairs that one offense cannot be proved without also proving others."[15]

Evidence of the defendant's other crimes may be relevant to show motive, intent, identity, knowledge and any number of other facts which indicate guilt of the offense charged.[16] However, the courts usually require that the other crime be closely related in some manner to the offense charged. In *State v. Stegall*,[17] for instance, it was held that error was committed in the reception of other crime evidence.[18] The defendant was charged with obtaining money by means of false pretenses.[19] Evidence was admit-

12. Charges of these five "other" robberies were pending against the defendant. See also the related case of State v. Ashe, 350 S.W.2d 768 (Mo. 1961), affirming the conviction of a confederate involved in the same robberies. Ashe had been tried and acquitted of the robbery of another of the poker players. The court stated that the defendant's protection against harassment by multiple trials when double jeopardy does not apply rests with the discretion of the prosecutor. Unfortunately, the court did not give any indication of the factors that the prosecutor should use in exercising this discretion.

13. 346 S.W.2d 85 (Mo. 1961). See also State v. Moore, 353 S.W.2d 712 (Mo. 1962).

14. *Supra* note 11.

15. State v. Adamson, *supra* note 13, at 87.

16. For a partial listing of such factors, see McCORMICK, *op. cit. supra* note 7, at 328-33. *Cf.* UNIFORM RULE OF EVIDENCE 55: "[S]uch evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity."

17. 353 S.W.2d 656 (Mo. 1962).

18. The conviction was reversed because of a defective information, which failed to allege that the party supposed to have been defrauded relied upon the misrepresentations or believed them and was thus induced by them to part with the money.

19. The case is also interesting for its discussion of the relationship between the Missouri stealing statute, § 560.156, RSMo 1959, and the confidence game statute, § 561.450, RSMo 1959. The language of both statutes is broad enough

ted that the defendant had obtained automobile junk motors by false pretenses some 14 months after the occurrence of the crime charged, and that defendant had evidently cheated his partner by withholding the profits received in an enterprise some 10 months prior to the commission of the crime charged. The court ruled that this was error. After stating that in prosecutions for obtaining property by means of false pretenses, evidence of similar offenses is admissible to prove criminal intent, the court pointed out that these offenses were too removed in time from the offense charged, and, in addition, that one of the situations was materially different in that it did not involve the use of any false pretenses.

With character evidence inadmissible until the defendant opens up the area, and the limitations of relevancy and remoteness on evidence of prior misconduct to show some element of the crime charged,[20] it would seem that the problems of the admissibility of evidence of other crimes would not arise too often, and, that when they did, the rules would provide a fairly adequate solution in avoiding the dangers of prejudice as much as is reasonably possible without prohibiting the use of such evidence altogether.

Unfortunately, the problem is not that easily solved, for evidence of other crimes is admissible for purposes other than showing the guilt of the defendant. One standard use of such evidence and one that presents great opportunities for abuse is the use of evidence of other crimes to impeach the defendant after he has taken the stand and testified in his own behalf.[21]

State v. Hunt[22] illustrates a number of problems involved in impeaching the defendant-witness. The defendant had been charged and convicted of speeding. That conviction was reversed and the case remanded for a

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to cover the crime of obtaining property by means of false pretenses. The court indicated that the stealing statute should be used for the ordinary type of false pretenses, while the confidence game statute should be used for those swindles that involve gaining the victim's confidence. This distinction is somewhat tenuous, but it may be the only one possible, since the legislature when enacting the stealing statute for some reason did not repeal the confidence game statute, although it did repeal the statutes on larceny, embezzlement and false pretenses. For an example of the stealing statute covering a "con" game, see State v. Murphy, 347 S.W.2d 230 (Mo. 1961).

20. Even where the evidence of other offense is relevant for some purpose, it may still be error to admit it if it is cumulative or if the fact it shows is not particularly important. *Cf.* State v. Griffin, 336 S.W.2d 364 (Mo. 1960).

21. On the areas covered by this article, see generally Bishop, *Impeachment and Rehabilitation of Witness By Character Evidence in Missouri*, 20 Mo. L. REV. 142, 273 (1955).

22. 352 S.W.2d 57 (K.C. Ct. App. 1961).

new trial.[23] At the second trial, the defendant took the stand and testified in his own behalf. The prosecution then asked the defendant if he had not been convicted of driving ninety-five miles per hour in a sixty mile zone and paid a fine of fifty dollars.[24] After objection by the defense was overruled, the witness admitted that he had been so convicted. This conviction had occurred after the first trial on the present charge of speeding, but, of course, prior to the second trial.

As indicated above, the other conviction for speeding was not admissible to show the defendant's character, as the defendant had not offered evidence to show his good character. Nor would the other instance of speeding seem to be relevant in any way to the guilt of the offense charged. Evidence of conduct on one occasion is not usually admissible to prove conduct on another occasion.[25] However, the evidence was ruled proper in this case as a means of impeaching the defendant-witness.

When the defendant takes the stand and testifies in his own behalf, he is subject, in Missouri, to impeachment in the same fashion as any other witness.[26] The fact that he is the defendant and that there is grave danger of prejudice from the showing of prior crimes, does not, in Missouri, prevent the showing of prior crimes to impeach him. In some states, the defendant-witness is accorded protections that the ordinary witness does not have,[27] and there are good reasons for according him these protections.[28] If the defendant does not take the stand, he runs the risk of the jury using his silence as evidence of his guilt (despite the supposed impropriety of such a conclusion). If he has a defense, but by taking the stand is forced to concede the existence of a prior "record," there is a grave danger that the jury will use this prior record, particularly if it includes crimes that are

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23. State v. Hunt, 335 S.W.2d 506 (K.C. Ct. App. 1960).
24. Brief for Respondent, p. 10, State v. Hunt, *supra* note 22.
25. Thus, in State v. Hyde, 234 Mo. 200, 224, 136 S.W. 316, 322 (1910), it was stated:

> One who commits one crime may be more likely to commit another; yet, logically, one crime does not prove another, nor tend to prove another, unless there is such a relation between them that proof of one tends to prove the other. . . .
>
> The rule [of exclusion of other crime evidence], therefore, rests upon two grounds: First, the impropriety of inferring from the commission of one crime that the defendant is guilty of another, and, second, the constitutional objection to compelling a defendant to meet charges of which the indictment gives no information.

26. "[A]nd may be contradicted and impeached as any other witness in the case; . . ." § 546.260, RSMo 1959.
27. See Annot., 161 A.L.R. 233 (1946).
28. See McCormick, *op. cit. supra* note 7, at 93-94.

similar to the one charged, as evidence of his guilt, despite any limiting instructions that may be given.[29] On the other hand, if this type of impeachment is foreclosed as to a defendant-witness, then it does allow the defendant to appear as a blameless person. This consideration has led most courts to allow some kind of impeachment by showing prior crimes of the defendant-witness.

However, in the *Hunt* case, the prior offense was that of speeding, and it is difficult to see any relation between this conviction and the defendant-witness' credibility. A Missouri statute provides that a person who has been convicted of a criminal offense is a competent witness "but the conviction may be proved to affect his credibility."[30] While this statute allows impeachment by showing prior convictions, it does not follow that a conviction for speeding is relevant to credibility, nor that such a conviction should be used to impeach. The Missouri courts have reached this illogical result by reasoning that:

> section 491.050 expressly permits proof of a prior conviction of a witness of a criminal offense to affect his credibility, . . . Section 556.010 defines a "criminal offense" to mean any offense, misdemeanor or felony, for which any imprisonment or fine, or both, may by law be inflicted. By virtue of the foergoing statutes, the right of the State to cross-examine defendant with reference to a prior conviction for operating a motor vehicle without a driver's license was clearly lawful.[31]

The difficulty with this theory is that it assumes that the legislature, in enacting these statutes, meant to allow evidence of all convictions to impeach even though there was no relevant connection between the conviction and the integrity of the witness. However, such an approach does have the merit of ease of administration, and when there is a doubtful relationship between prior crimes and the defendant's integrity, it is arguable

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29. On the duty of the court to give a limiting instruction, see State v. Chaney, 349 S.W.2d 238 (Mo. 1961) (en banc), where a majority of the court held that where an incorrect limiting instruction is requested, the trial court is under a duty to give a correct limiting instruction. See also State v. Baldwin, 349 S.W.2d 212 (Mo. 1961), where the lower court committed reversible error by giving a "character" instruction after other prosecution evidence had been introduced only for impeachment purposes.

30. § 491.050, RSMo 1959.

31. State v. Cox, 333 S.W.2d 25, 29 (Mo. 1960). The defendant had been convicted of manslaughter arising out of an automobile accident.

that the jury should decide how much, if any, weight to give to such evidence.[32]

While in any other case the jury would have little difficulty in seeing the lack of relationship between speeding and reliability as a witness, and also would not be unduly prejudiced against a person because he has been convicted of speeding, yet there does seem to be a very real danger that when the defendant is charged with speeding, the jury is apt to use this evidence to infer his guilt of the present charge. Certainly, in cases like the *Hunt* case, it seems clear that the danger of misuse of the evidence of conviction of speeding far outweighs its questionable value as an attack upon the credibility of the witness.

Limitations upon the type of prior offenses that can be used to impeach are difficult to apply. Allowing the use of only those crimes that are felonies or that involve "moral turpitude," or which are "infamous" crimes, may result in inconsistencies and the necessity of highly refined rules of classification. However, it does not seem to be too difficult to have a rule that will exclude the use of violations of traffic regulations.[33]

If the use of the prior conviction to impeach were all that was involved in *State v. Hunt*, the case would be little more than an example of the wide-open Missouri approach in this area. However, the defense was not content to let the matter drop with the admission on cross-examination by the

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32. State v. Ransom, 340 Mo. 165, 174, 100 S.W.2d 294, 298 (1936):
> The jury must determine the creditability of witnesses. It needs no argument to demonstrate that conviction of an offense of one kind, say a trivial misdemeanor, would not affect the creditability of a witness to the same extent as would conviction of some heinous offense involving moral turpitude.

33. Prior to the enactment of the present impeachment statute, the rule in Missouri was that only convictions of felonies or of petit larceny could be used to impeach a witness. The present statute was not too kindly received by the Missouri Supreme Court:
> While we doubt very seriously the wisdom of this sudden and apparently unnecessary change of the long-established rules of evidence, which have been uniformly followed for so many years, doubtless on account of their being based upon that most appropriate foundation of reason and justice, yet, if this change is unwise and was ill-considered, the more strictly it is enforced the sooner its defects will appear, and the sooner will the power that created it bring about its destruction.

State v. Blitz, 171 Mo. 530, 542, 71 S.W. 1027, 1030 (1903). In its zeal for strict enforcement, the court overlooked the possibility of interpreting the statute to exclude the use of convictions which bore no necessary relation to integrity. The result is that now, use of any criminal conviction is the rule that has been "uniformly followed for so many years," and will probably be considered by those who are familiar with it as "based upon the most appropriate foundation of reason and justice."

defendant of his prior conviction. The defendant was then asked on redirect if he had pleaded guilty to the prior offense. After an affirmative reply, the defendant was asked why he had pleaded guilty to the other offense. The defendant answered that he had pleaded guilty "because I was guilty."[34] The implication of this testimony is, of course, that when the defendant had been speeding, he admitted it (and presumably took his punishment like a man) and, obversely, when he had not been speeding, he would deny any such charge made against him.

The only difficulty with this apparent attempt at rehabilitation of the defendant-witness is that it is irrelevant to the impeaching qualities of the prior conviction.[35] If it is improper for the state to try to show the defendant's guilt of the charge of speeding by showing another instance of speeding, it would seem equally inappropriate for the defense to try to show the truthfulness of his plea of "not guilty" by showing a prior truthful plea of "guilty."

Moreover, the inference which is supposed to be drawn from the prior conviction is that because of the conduct which led to the conviction, the defendant-witness possesses some type of moral defect which affects his credibility. It is the crime for which the defendant was convicted that supposedly illustrates this moral defect, not whether he pleaded guilty to the charge. It might be argued that the defendant-witness' plea of guilty to the other charge of speeding is an indication of his remorse about the prior event and shows some degree of reformation of the moral defect that the other conviction is supposed to reveal. However, it seems doubtful that this was the inference that the defense was seeking to have the jury draw from the defendant's testimony.

Perhaps such rehabilitation should be allowed because it gives the

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34. State v. Hunt, *supra* note 22, at 59.

35. On the right to explain the former conviction, see Annot., 166 A.L.R. 211 (1947). *Cf.* State v. Kimmell, 156 Mo. App. 461, 471, 137 S.W. 329, 332 (Spr. Ct. App. 1911):

> The fact that defendant had been convicted was the only fact that was admissible . . . . To permit the defendant to explain the circumstances of the conviction for the purpose of destroying or weakening the effect of the conviction would have been to open up a reinvestigation of the former case; for, if the defendant were permitted to explain, the state should also be permitted to rebut that explanation, and, if this course were adopted, it would result in a retrial of the former case, and the effect of the record of the result of that trial would be disputed by the oral testimony of witnesses, and thus a judgment of a court of record would be contradicted by oral testimony, and this cannot be done.

See also State v. Jones, 249 Mo. 80, 155 S.W. 33 (1913).

defendant an opportunity to offset the improper inferences that the jury might draw from the prior conviction. In the *Hunt* case the jury might well reason (improperly, of course) that a man convicted of speeding once is apt to speed again.[36] It is also not beyond belief that the prosecutor was aware of this improper inference when he brought up the matter of the prior conviction. So perhaps it is only fair to allow the defendant an opportunity to rebut this evidence, not only as it bears upon his credibility but also as it bears upon his guilt. In any event, in the *Hunt* case, there was no objection to the defendant's testimony as to why he pleaded guilty.

This was not, however, the end of the affair, for after the defendant testified that he pleaded guilty because he "was guilty," the prosecutor asked him: "[D]on't you think the fact that you had this young lady in the car with you had anything to do with your entering a plea of guilty?"[37]

The defendant's motion for a mistrial was overruled, and on the appeal the court ruled that there was no error in denying this motion. The appellate court, in fact, indicated that there is nothing wrong with this question, as the defendant had opened up the area by testifying as to why he had pleaded guilty.[38]

Without regard to the correctness of the appellate court's decision, it seems clear that this trial on a charge of speeding moved quite a way from the issues relevant to that charge. The impeachment process was carried to its illogical extreme—to the exploration of the possibility of (and the inference of) some type of immoral behavior on the part of the defendant by being in the company of an unmarried woman on a night approximately two years after the incident which was supposed to be subject of the trial.[39] Yet, since this evidence grew out of an attempt to impeach the witness, it was somehow not an inquiry into character, evidence of which, of course, is not admissible. It would have been better if the evidence of the other offense could have been excluded altogether.

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36. Since the speeding which led to the prior conviction occurred after the events leading to the charge for which the defendant was on trial, the inference might even be stronger, since one might reason that a person who has been arrested and charged with the offense of speeding would be exceptionally careful thereafter.

37. Brief for Appellant, pp. 17-18, State v. Hunt, *supra* note 22.

38. The court relied upon § 546.260, RSMo 1959, which permits the cross-examination of a defendant in a criminal case "as to any matter referred to in his examination in chief. . . ."

39. The offense charged allegedly occurred on January 19, 1958. The conviction of speeding used to impeach occurred on May 19, 1960. Brief for the Appellant, p. 17, State v. Hunt, *supra* note 22.

Prior misconduct need not have resulted in a conviction in order for it to be admissible to impeach a witness. There are, however, some distinctions between using prior convictions to impeach and using prior misconduct as to which there has been no conviction.[40]

In *State v. Foster*,[41] the defendant was charged with robbery in the first degree. A defense witness testified to facts which, if believed, would show alibi; that the defendant was somewhere other than the scene of the crime. On cross examination the prosecutor asked the witness[42] if he had not admitted to the police that he, the witness, had planned and attempted to rob the Fort Wood Theatre. Before there was a ruling on the defense counsel's objection, the witness stated, "I'll answer the question for you . . . No, sir, it is not true, I haven't admitted to trying to rob anything." The question was repeated in substance and the witness answered, "Not no Fort Wood Theatre; no, sir."[43] When asked if he had not admitted to the police that he had planned and attempted to rob the Fort Wood Drive-in Theatre, the witness became hesitant, and after objections by counsel had been overruled, the witness stated that he had made such a statement to the police but only after being beaten.[44]

On appeal it was argued that the trial court erred in allowing this cross-examination. The appellate court rejected this contention, stating first that the witness had waived his privilege against self-incrimination by volunteering his answer.[45] The court then went on to say:

> While it is error to ask a witness if he has been arrested for or charged with a crime, there is an obvious distinction if he is asked if he committed the crime, and we conclude this distinction extends to asking him if he has admitted committing an offense.[46]

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40. See McCormick, *op. cit. supra* note 7, at 87-97. The two basic distinctions are that allowing such impeachment by use of offenses which have not resulted in convictions is within the discretion of the court and, that in such impeachment, the examiner must "take the answer" of the witness; that is, he cannot introduce extrinsic evidence of the misconduct.

41. 349 S.W.2d 922 (Mo. 1961).

42. Although the witness here was not the defendant, and therefore there is not the same problem of prejudice, the rules of cross-examination are supposed to be the same. See § 546.260, RSMo 1959.

43. *Supra* note 41, at 924.

44. *Ibid.*

45. If the witness was also the defendant, there would have been a waiver, when he took the stand, of his privilege against self-incrimination as to his testimony on direct and as to matters of impeachment.

46. State v. Foster, *supra* note 41, at 925. Citations omitted without indication.

It is hoped that this little bit of illogic will not be enshrined as the "law" in Missouri. The law on impeachment by showing other offenses is much too confused as it is. It is proper, although controlled by the discretion of the court, to inquire into the commission of other crimes for purposes of impeachment, even though there has been no conviction.[47] It is also true that inquiries into mere arrests or charges are not permitted for the purpose of impeachment. But to conclude that there is no difference between asking about the commission of a prior offense and asking about a statement admitting the commission of a prior offense is to ignore an important distinction.

If a person has committed a crime and the commission of this crime is relevant to showing his unreliability as a witness, then it is an accepted and proper method of impeachment to show the existence of the crime. If there is no conviction, then the manner of showing the commission of the crime is to get the witness to admit on the witness stand that he has committed the offense. The fact that a witness has made an out-of-court statement admitting the commission of a crime is not relevant to his impeachment unless the out-of-court statement is true and can be considered as evidence of the commission of the crime.[48] If the out-of-court statement is false, then it is no evidence of the commission of the crime.[49] So, in order for the jury to use this evidence, they must first determine whether or not it is true.

Evidence of arrests and charges is not admissible to impeach for several reasons. First, prior arrests and charges are not very reliable indicators of misconduct. There are too many times when innocent persons have been arrested for or charged with the commission of crimes. In order for a jury to decide what weight to give to evidence of an arrest or charge, it would be necessary to go into the details of the incident. To do so would involve the exploration of side issues with resultant expense in time and

47. *Cf.* State v. Cox, 352 S.W.2d 665 (Mo. 1961), holding that the trial court did not err in its refusal to allow the defense to inquire of a prosecution witness whether she was a prostitute and earned her living by immoral means, and whether she was a dope addict or was under the influence of drugs on the night of the crime and at trial.

48. This, of course, raises the problem of hearsay. Statements admitting criminal liability are in some jurisdictions considered to fall within the hearsay exception of declarations against interest. *Cf.* Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945). See also Annot., 162 A.L.R. 446 (1946). Of course, before the declaration against interest exception will apply, the declarant must be unavailable as a witness.

49. It would, however, show the existence of an untrue statement made by the witness, but this would clearly be a statement as to a collateral matter.

the confusion of the issues. Because arrests and charges are not reliable indicators of moral deficiency, they can not be used to impeach a witness.[50] It is submitted that the same reasoning applies to out-of-court statements which admit the commission of other crimes. A person's out-of-court admission of criminal conduct may be more reliable than a person's arrest as an indication of moral deficiency, but it still has elements of unreliability and it will involve time and confusion to go into the details of the admission. Perhaps the best reason for refusing to allow an inquiry into out-of-court admissions is that it is not the least bit necessary. The prosecuting attorney could simply have asked whether the witness had committed the crime.[51] It is the commission of the crime, not the confession of it, that is relevant to the impeachment of the witness.[52]

A defendant who has a record of convictions may be able to prevent the prosecution from introducing this record into evidence. If the defendant does not offer evidence of his good character, the state cannot show his prior criminal record as evidence of his bad character; if the defendant does not take the stand and testify, the state cannot show the prior record as a means of impeachment. Thus, unless some particular misconduct is relevant to the present charge, the prior record of the defendant should not be introduced into evidence. Until recently, however, the defendant's prior record could be introduced into evidence, not because it was relevant to guilt, not to show bad character, not to impeach the defendant, but for the jury to use in adjudging the sentence to be imposed should they find the defendant guilty.[53] By some feat of mental magic, the jury was supposed to

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50. *Cf.* 3 WIGMORE, EVIDENCE § 980a (3d ed. 1940). There is also, of course, the problem of hearsay involved in the accusation.

51. *Cf.* State v. Gridley, 353 S.W.2d 705 (Mo. 1962), where the court ruled that no error had been committed by the trial court's censoring an attorney for asking, "I saw in the paper where you and two other fellows were charged with a strong armed robbery . . . ." *Id.* at 707.

52. Perhaps the objection to this case is somewhat academic. If the witness had been asked if he had committed the crime of attempted robbery of the theatre and had denied it, the court might then allow the prosecutor to inquire into the admission of the crime, not for the purpose of using the admission as evidence of character and thus to impeach, but as an effort to get the witness to retract his original denial.

53. § 556.280, RSMo 1949. "Prior to the 1959 amendment the provisions of Section 556.280 required that evidence of the prior conviction, imprisonment and discharge of a defendant be presented to the jury as a part of the State's case, and the jury was instructed, upon a finding of those facts, together with a finding of guilt as to the subsequent offense, to fix the punishment at the longest term of imprisonment prescribed therefor." State v. Morton, 338 S.W.2d 858, 861 (Mo. 1960). For a continuation of this case see State v. Morton, 349 S.W.2d 914 (Mo. 1961).

ignore the prior record when it was introduced for sentencing purposes until they found the defendant guilty.

Fortunately, under the new habitual criminal statute,[54] this practice of letting the jury hear evidence of prior convictions for sentencing purposes has been done away with. Now the existence of the prior record is determined by the judge out of the hearing of the jury. If he finds the necessary record to exist, then, if the jury finds the defendant guilty, the judge decides what the sentence is to be.[55]

The advantages of this new practice are obvious. The prior record can be considered as a factor in determining what sentence is appropriate, but the danger of prejudice is removed, provided, of course, that the prior record is not admissible for some other purpose. Despite the fact that this new procedure is, by and large, more beneficial to a defendant with a past record than was the old procedure, it still was attacked in a number of cases by defendants who were sentenced in accordance with it. The attacks were based primarily upon claims that the application of the new procedure was ex post facto and that it violated defendant's right to trial by jury. These claims, and others, were rejected by the court.[56]

Thus, in the area of sentencing, the problem of achieving a proper balance between the usefulness of evidence of other offenses and the danger of prejudice from such evidence has been solved by removing the issue (and the evidence) from the jury.[57] It is unlikely that Missouri will adopt a rule preventing the use of evidence of other offenses to impeach a defendant-witness, but perhaps a better balance than we now have may someday be achieved in that area.

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54. § 556.280, RSMo 1959. For a case in which the court considered, for sentencing purposes, evidence of offenses which had not resulted in convictions, see State v. Zavalcofski, 349 S.W.2d 942 (Mo. 1961).

55. Another improvement made by the new statute is that the court is not required to impose the most severe sentence allowed for the subsequent offense.

56. State v. Donnell, 351 S.W.2d 775 (Mo. 1961); State v. Colbert, 344 S.W.2d 115 (Mo. 1961); State v. Chamineak, 343 S.W.2d 153 (Mo. 1961); State v. Williams, 343 S.W.2d 58 (Mo. 1961); State v. Wolfe, 343 S.W.2d 10 (Mo.), *cert. denied,* 366 U.S. 953, 368 U.S. 907 (1961), *petition for habeaus corpus denied,* Wolfe v. Nash, 205 F. Supp. 219 (W.D. Mo. 1962); State v. Payne, 342 S.W.2d 950 (Mo. 1961); State v. Griffin, 339 S.W.2d 803 (Mo. 1961); State v. Morton, 338 S.W.2d 858 (Mo. 1960).

57. *But see* State v. Colbert, *supra* note 56, where defendant argued that when the judge did not instruct the jury as to the sentence, the jury would realize that the defendant had a record of convictions and would wonder how many and for what crimes.