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# Criminal Law—Excluding Evidence of Prior Crimes When Trial Resulted in Acquittal—State v. Wakefield, 278 N.W.2d 307 (Minn. 1979)

**Criminal Law**—EXCLUDING EVIDENCE OF PRIOR CRIMES WHEN TRIAL RESULTED IN ACQUITTAL—*State v. Wakefield*, 278 N.W.2d 307 (Minn. 1979).

> "In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar."
>
> Mr. Chief Judge Cardozo, for the court, in *People v. Zackowitz*, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1930).

At common law, evidence of an accused's prior criminal conduct was excluded from trial.[1] Because of the potential probative value of prior criminal conduct evidence, several exceptions to the general exclusionary rule developed.[2] Although courts have often applied a number of procedural safeguards to protect defendants from the possible prejudicial effect of such evidence,[3] the exceptions have been broadly construed.[4] In fact, courts seldom have differentiated between two types of prior conduct that appear intrinsically dissimilar—prior acquittal evidence and prior conviction evidence[5]—when determining the admissibility of evidence of prior conduct. In *State v. Wakefield*,[6] the Minnesota Supreme Court recognized this important distinction and ruled that prior acquittal evidence is inadmissible in a subsequent criminal trial.[7]

In *Wakefield*, defendant was convicted of first degree criminal sexual conduct.[8] At trial, one of the witnesses for the state was a victim of an alleged earlier rape.[9] The supreme court ruled that admitting this testimony was reversible error because defendant had been acquitted of that crime.[10] The court held that "under no circumstances is evidence of a crime other than that for which a defendant is on trial admissible when the defendant has been acquitted of that other offense."[11]

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1. *See* 1 J. WIGMORE, EVIDENCE §§ 192, 194 (3d ed. 1940).
2. The leading case is People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901), which established the major exceptions: to show motive; to show intent; to negative mistake; to show a common plan or scheme; and to establish identity. *Id.* at 293, 61 N.E. at 294. Minnesota recognized these exceptions in State v. Fitchette, 88 Minn. 145, 148, 92 N.W. 527, 528 (1902). In State v. Schueller, 120 Minn. 26, 29, 138 N.W. 937, 938 (1912), these exceptions were applied specifically to sex crimes. MINN. R. EVID. 404(b)-(c) has codified these exceptions.
3. *See* notes 32-40 *infra* and accompanying text.
4. *See* United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967) ("Because the exceptions are so numerous, it is difficult to determine whether the doctrine or the acknowledged exceptions are the more extensive.").
5. *See* notes 14-15 *infra* and accompanying text.
6. 278 N.W.2d 307 (Minn. 1979).
7. *See id.* at 308-09.
8. *Id.* at 307.
9. *Id.* at 308.
10. *See id.* at 307.
11. *Id.* at 309.

The Minnesota court's holding in *Wakefield* adopts the minority position regarding the admission of prior acquittal evidence.[12] The general rule is that prior acquittal evidence may be admitted if it falls within an exception to the exclusionary rule.[13] Most jurisdictions make no distinctions between cases in which the defendant was convicted and those in which the defendant was acquitted,[14] or even released after arrest,[15] when determining the admissibility of the evidence. These jurisdictions, however, do require prior criminal conduct evidence to satisfy a certain standard of proof.[16] If this threshold degree of proof is met, the court must independently determine whether the prejudicial impact[17] of the evidence is outweighed by its probative value.[18] If this test is not met,

12. *See id.* at 309. Other jurisdictions have held evidence of a crime for which the defendant was previously acquitted to be inadmissible. *See, e.g.*, Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972); State v. Little, 87 Ariz. 295, 307, 350 P.2d 756, 764 (1960); State v. Perkins, 349 So. 2d 161, 163-64 (Fla. 1977); People v. Ulrich, 30 Ill. 2d 94, 101, 195 N.E.2d 180, 183-84 (1963); Asher v. Commonwealth, 324 S.W.2d 824, 826 (Ky. 1959); Ladnier v. State, 254 Miss. 469, 475, 182 So. 2d 389, 391-92 (1966); State v. Kerwin, 133 Vt. 391, 395, 340 A.2d 45, 47-48 (1975); *cf.* State v. Tindal, 5 Del. (5 Harr.) 488, 490 (1854) (weight of evidence destroyed if defendant proves previous trial resulted in acquittal).

13. *See, e.g.*, Robinson v. State, 40 Ala. App. 101, 104, 108 So. 2d 188, 191 (1959); People v. Frank, 28 Cal. 507, 515 (1865); Bell v. State, 57 Md. 108, 118-19 (1881); People v. Johnston, 328 Mich. 213, 227, 43 N.W.2d 334, 340 (1950); State v. Millard, 242 S.W. 923, 926 (Mo. 1922); Koenigstein v. State, 101 Neb. 229, 238, 162 N.W. 879, 882 (1917); State v. Heaton, 56 N.D. 357, 369-70, 217 N.W. 531, 536 (1927).

14. *See, e.g.*, Ladd v. State, 568 P.2d 960, 968 (Alaska 1977), *cert. denied*, 435 U.S. 928 (1978); Dandridge v. State, 109 Ga. App. 33, 33-34, 134 S.E.2d 814, 815 (1964); State v. Darling, 197 Kan. 471, 479-80, 419 P.2d 836, 844 (1966); State v. Schlue, 129 N.J. Super. 351, 355-56, 323 A.2d 549, 552 (App. Div. 1974).

15. *See, e.g.*, People v. Fox, 126 Cal. App. 2d 560, 569, 272 P.2d 832, 838 (1954) (testimony of prior arrest admissible to show common plan or design despite release after dismissal of charge).

16. The standard of proof necessary varies from jurisdiction to jurisdiction. *Compare, e.g.*, People v. McClellan, 71 Cal. 2d 793, 806, 457 P.2d 871, 879-80, 80 Cal. Rptr. 31, 39-40 (1969) (accomplice's testimony of prior crimes must be proved beyond a reasonable doubt before it is admissible at penalty trial) *with, e.g.*, Tucker v. State, 82 Nev. 127, 131, 412 P.2d 970, 972 (1966) (plain, clear, and convincing evidence that accused committed prior offense necessary before evidence of prior offense can be admitted at trial).

17. According to Professor Wigmore:

> The reasons [for prejudice] thus marshalled in various forms are reducible to three: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses; . . . (3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated . . . .

1 J. WIGMORE, *supra* note 1, § 194.

18. The Minnesota rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MINN. R. EVID. 403.

the evidence is inadmissible.[19] Since evidence of either proven or alleged prior criminal conduct often has substantial probative value,[20] the evidence generally is admitted.[21] The Alabama Court of Appeals in *Robinson v. State*[22] expressed the majority view: "[W]e are clearly of [the] opinion the general rule is that the fact that a defendant in a criminal prosecution has been acquitted of another offense does not render evidence of such prior offense inadmissible, if such evidence is otherwise competent."[23]

The *Wakefield* decision makes the use of the majority rule's balancing test unnecessary when evidence of a prior acquittal is involved. *Wakefield's* adoption of the minority rule establishes an absolute bar to the use of such evidence in Minnesota.[24] Therefore, no case-by-case judicial evaluation is necessary. Other courts that follow the minority position have placed emphasis upon collateral estoppel,[25] general unfairness,[26] and jury prejudice[27] as the foundation for their decisions. The *Wakefield* court's basic rationale, however, was that introduction of evidence of a prior acquittal contravened a fundamental principle of our system of justice—that the state be allowed to try and convict the accused only once.[28] The court stated:

> [I]t is a basic tenet of our jurisprudence that once the state has mustered its evidence against a defendant and failed, the matter is done. In the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime.[29]

Although this language seems to resemble that used in discussions of collateral estoppel and double jeopardy,[30] the Minnesota court did not rely

19. *See, e.g.*, People v. Corbeil, 77 Mich. App. 691, 696, 259 N.W.2d 193, 195 (1977) (per curiam) (evidence inadmissible if probative value outweighed by prejudicial impact); Nester v. State, 75 Nev. 41, 54, 334 P.2d 524, 531 (1959) (prejudicial evidence inadmissible even though otherwise relevant).

20. *See* 1 J. WIGMORE, *supra* note 1, § 194 ("[Prior criminal conduct evidence] is objectionable, not because it has no appreciative probative value, but because it has too much.").

21. *See, e.g.*, Robinson v. State, 40 Ala. App. 101, 104, 108 So. 2d 188, 191 (1959). *But see* State v. Wakefield, 278 N.W.2d at 309.

22. 40 Ala. App. 101, 108 So. 2d 188 (1959).

23. *Id.* at 104, 108 So. 2d at 191.

24. *See* State v. Wakefield, 278 N.W.2d at 309.

25. *See, e.g.*, Wingate v. Wainwright, 464 F.2d 209, 212-13 (5th Cir. 1972).

26. *See, e.g.*, State v. Little, 87 Ariz. 295, 307, 350 P.2d 756, 764 (1960) (verdict of acquittal should relieve defendant from again having to answer evidence of prior crime).

27. *See, e.g.*, State v. Kerwin, 133 Vt. 391, 395, 340 A.2d 45, 48 (1975).

28. *See* 278 N.W.2d at 308.

29. *Id.*

30. Under a double jeopardy analysis, the accused cannot be put on trial twice for the same crime. When evidence of a prior acquittal for a different crime is used, however, the defendant is not being tried for the the previous offense. Previous conduct is only being used as evidence to gain a conviction for the present charge. *But cf.* Ashe v. Swenson, 397

upon either of these principles in reaching its decision. The court's approach was made necessary by the fact that neither the principle of collateral estoppel nor those of double jeopardy were applicable to the facts in *Wakefield*.[31]

The Minnesota court often has expressed concern over the use of prior criminal conduct evidence because of the accompanying negative aspects of such evidence.[32] The court has not limited itself to precautionary rhetoric but has developed procedural safeguards to lessen the prejudicial impact of prior criminal conduct evidence. In *State v. Spreigl*,[33] the court held that the prosecution must, within a reasonable time before trial, give the defendant a written statement of the offenses that it intends to show were committed.[34] The purpose of this notice requirement is to insure that the defendant has the opportunity to prepare a defense to the evidence.[35]

*Spreigl* was followed by the development of further safeguards against the potential misuse of evidence of prior conduct in *State v. Billstrom*.[36]

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U.S. 436, 446 (1970) (reversing conviction for robbery of card game participant after defendant had previously been acquitted of robbing another of the players in the same game; determination that defendant was not one of the robbers was a necessary finding made by the jury in the first prosecution).

While collateral estoppel initially appears to be a means of preventing the use of prior acquittal evidence, one flaw in the argument exists. When a general verdict of not guilty is given, it is nearly impossible to be certain which facts were necessary for the jury's decision. Therefore, it cannot be determined which issues were actually litigated, and such a determination is the key element of any collateral estoppel argument. *Cf.* Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("[W]hen an issue of ultimate fact has once been determined by a valid and final judgement, that issue cannot again be litigated between the same parties in any future lawsuit.").

31. In *Wakefield*, the prior acquittal was the result of a charge of rape against defendant perpetrated against a different victim at a different time. *See* 278 N.W.2d at 308. Double jeopardy analysis was inapplicable because the second charge involved an entirely different crime. Collateral estoppel also was inapplicable because the verdict in the prior acquittal made it impossible to ascertain which factual determinations were necessary to the result.

32. *See, e.g.*, State v. Gress, 250 Minn. 337, 343, 84 N.W.2d 616, 621 (1957) (admissible evidence should not be prejudicial and remote); State v. Gavle, 234 Minn. 186, 208, 48 N.W.2d 44, 56 (1951) ("It is sometimes a close question whether the probative value of such evidence is outweighed by the risk that its admission will necessitate undue consumption of time, confuse the issues, surprise the defendant, or mislead and unduly prejudice the jury . . . ."); State v. Friend, 151 Minn. 138, 140, 186 N.W. 241, 242 (1922) (quoting jurists critical of the practice of admitting evidence of prior criminal conduct); State v. Nelson, 148 Minn. 285, 300, 181 N.W. 850, 856 (1921) (evidence of independent crimes generally incompetent).

33. 272 Minn. 488, 139 N.W.2d 167 (1965).

34. *Id.* at 496-97, 139 N.W.2d at 173.

35. *See id.* at 493-94, 139 N.W.2d at 171. Professor Wigmore argues that unfair surprise is one of the dangers of using evidence of prior conduct. *See* 1 J. WIGMORE, *supra* note 1, § 194.

36. 276 Minn. 174, 149 N.W.2d 281 (1967).

*Billstrom* established that evidence of prior conduct must be clear and convincing,[37] that when the prosecution gives the defendant *Spreigl* notice of its intent to introduce evidence of prior conduct, the prosecution must specify the exception to the exclusionary rule under which the evidence is admissible,[38] and that the court must admonish the jury that the evidence was received for limited purposes, both when the evidence is introduced and in the final charge.[39] These procedures prevent the prosecution from using evidence of the defendant's prior criminal conduct that does not fall within an exception to the general exclusionary rule.[40]

The *Spreigl* and *Billstrom* rules have been codified in the Minnesota Rules of Criminal Procedure.[41] Since prior acquittal evidence remains admissible under the Minnesota Rules of Criminal Procedure and the Minnesota Rules of Evidence,[42] however, *Wakefield's* implied amendment of the procedural and evidentiary rules represents a further extension of the protection afforded criminal defendants by the Minnesota court.

Recently, the *Wakefield* standard was reconsidered in *State v. Burton*.[43] In *Burton* defendant was convicted of simple robbery and theft.[44] At trial evidence of an alleged prior offense of which defendant had been acquit-

37. According to the court: "The evidence of defendant's participation in other crimes need not be proved beyond a reasonable doubt but must be clear and convincing." *Id.* at 179, 149 N.W.2d at 285 (footnote omitted), *quoted in* State v. Link, 289 N.W.2d 102, 105 (Minn. 1979).

38. *See* State v. Billstrom, 276 Minn. 174, 178, 149 N.W.2d 281, 284 (1967).

39. *See id.* at 179, 149 N.W.2d at 285. In State v. Forsman, 260 N.W.2d 160 (Minn. 1977), the jury admonition and the prosecution's explanation of which exclusionary exception makes the evidence admissible were held to be mandatory only if the defendant requested them. *See id.* at 169.

40. The Louisiana Supreme Court recognized this consideration when adopting the *Spreigl-Billstrom* procedure. *See* State v. Prieur, 277 So. 2d 126, 130 (La. 1973).

41. MINN. R. CRIM. P. 7.02. The rule provides that the prosecution must give the defendant notice of any intended use of prior crimes, wrongs, or acts unless: (1) the defendant previously has been prosecuted for the offense; (2) the prior conduct is introduced to rebut the defendant's good character; or (3) the conduct arises out of the same episode or occurrence as the offense charged. *See id.*

42. The use of prior acquittal evidence is not specifically excluded by the Minnesota Rules of Evidence or the Minnesota Rules of Criminal Procedure. For example, if evidence from a prior acquittal referred to a defendant's motive or opportunity, then, under MINN. R. EVID. 404(b), that evidence may be admissible. *See id.* (evidence of other crimes, wrongs, or acts may be admissible for purposes other than character, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). If the probative value of this evidence were found to substantially outweigh its prejudicial impact, the evidence can be admitted under MINN. R. EVID. 403. Finally, if the defendant had been previously prosecuted for the alleged act, he would not qualify for *Spreigl* notice under MINN. R. CRIM. P. 7.02.

43. 281 N.W.2d 195 (Minn. 1979).

44. *Id.* at 196.

ted was admitted.[45] The court reversed the conviction on the strength of its *Wakefield* decision.[46] Although *Burton* appears to be in complete harmony with the holding in *Wakefield*, the last paragraph of *Burton* could represent a slight retreat from the strict exclusionary standard. The court concluded that "[b]ecause we hold that Olson's testimony cannot be received, there is no occasion to rule on the contention that evidence of prior criminal conduct may not be received until the trial court has determined that the evidence of such conduct is clear and convincing."[47] The court's statement could be viewed as recognizing a circumstance in which the court would allow evidence from a prior acquittal, if the evidence were clear and convincing. It is more likely, however, that the last paragraph in *Burton* means that any potential application of the *Billstrom* clear and convincing test in the *Burton* case was foreclosed by the *Wakefield* decision. The forcefulness of the *Wakefield* opinion and the fact that the *Wakefield* court found the *Billstrom* standard inadequate to protect acquitted defendants support this conclusion.[48]

Because of its great probative value,[49] the use of prior criminal conduct evidence necessarily has a place in our judicial system. Due to its prejudicial tendencies, however, such evidence should be used cautiously. Evidence from a defendant's prior acquittal is distinct from evidence relating to an actual conviction.[50] The use of such evidence has been properly abandoned because of the lesser probative value,[51] the unfairness, and the prejudice resulting from its admission. Undoubtedly, there will be instances in which the *Wakefield* standard will exclude evidence that would be crucial to the conviction of a criminal.[52] Even in these in-

45. *Id.*

46. *See id.* at 197.

47. *Id.* at 198.

48. *See* 278 N.W.2d at 308. The *Wakefield* court stated: "Restricted categories and procedural safeguards, however, do not eliminate prejudice to the defendant nor free him from the necessity to defend against such evidence." *Id.*

49. *See* note 20 *supra* and accompanying text.

50. *See, e.g.*, Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 451 (1964); Comment, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight,"* 21 U.C.L.A. L. REV. 892, 897 (1974); Note, *Use of Prior Crimes to Affect Credibility and Penalty in Pennyslvania*, 113 U. PA. L. REV. 382, 383-84 (1965).

51. *See, e.g.*, State v. Little, 87 Ariz. 295, 307, 350 P.2d 756, 764 (1960) (evidence of prior criminal act offered to show plan, and that plan was probable part of act for which defendant is presently being prosecuted; probative value of evidence weakened when jury must make two inferences from the evidence).

52. An unfortunate example is People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976). In *Oliphant*, the defendant had allegely raped three women prior to the trial for a fourth rape. *See id.* at 482, 250 N.W.2d at 446. Of the three previous women, two had brought charges against defendant and he was acquitted in both instances. *See id.* at 484-86, 250 N.W.2d at 447-48. Defendant had developed a scheme for raping the women in which it proved to be extremely difficult to show that the victims had not consented to the

stances, the overall effect of *Wakefield* is beneficial. Allowing the state repeatedly to introduce evidence that the defendant was found not guilty in previous prosecutions contravenes basic notions of fairness. The Minnesota court has decided this result would be too high a price to pay for the additional convictions that prior acquittal evidence might secure.

**Family Law**—CHILD STEALING—*State v. McCormick*, 273 N.W.2d 624 (Minn. 1978).

The growing rate of marriage dissolutions in the United States has precipitated a deluge of family-related litigation in the courts.[1] Among the most ardently contested issues in dissolution actions is the right to custody of children.[2] Although the overriding consideration is the best interests of the child, courts must also decide the individual rights of both parents.[3] An unfortunate consequence of many custody decrees is the

intercourse. *See id.* at 488, 250 N.W.2d at 449. When the identical method used by defendant was described by all four victims, however, it became readily apparent that defendant was guilty. *See id.* The *Wakefield* standard applied to this case would have resulted in a remand since prior acquittal evidence had been introduced. *Compare* State v. Wakefield, 278 N.W.2d at 309 (prior acquittal evidence inadmissible) *with* People v. Oliphant, 399 Mich. 472, 498-500, 250 N.W.2d 443, 454 (1976) (prior acquittal evidence admissible absent collateral estoppel or double jeopardy). While the testimony of the woman who had not pressed charges against defendant may have been used in the second trial, it is possible that a dangerous rapist would have been acquitted for a third time.

1. The marriage dissolution rate has increased drastically in the last decade. An estimated 1,122,000 divorces were granted in 1978, nearly double the number in 1968. *See* 27 U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, MONTHLY VITAL STATISTICS REPORT NO. 12, at 2 (1979). In Minnesota, there was almost one marriage dissolution for every two marriages in 1978, with over fourteen thousand divorces being granted. *See id.* at 5, 7.

2. *See* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modificiations*, 65 CALIF. L. REV. 978, 979 (1979); Hudak, *Seize, Run and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 521 (1974); Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641, 641 (1978). It is estimated that each year some 900,000 children are affected by the divorce of their parents and become a potential issue in the dissolution litigation. *See* 123 CONG. REC. S2982 (daily ed. Feb. 24, 1977) (remarks of Sen. McGovern).

3. *See* Fisher v. Devins, 294 Minn. 496, 498, 200 N.W.2d 28, 30 (1972) (duty of the court is to determine best interest and welfare of child); Wallin v. Wallin, 290 Minn. 261, 265, 187 N.W.2d 627, 630 (1971) (overriding consideration is child's welfare). *See generally* Comment, *Protecting the Interests of Children in Custody Proceedings: A Perspective on Twenty Years of Theory and Practice in the Appointment of Guardians Ad Litem*, 12 CREIGHTON L. REV. 234 (1978); Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733 (1976-1977).

The parental rights doctrine, requiring that a parent be awarded custody unless proven unfit, is based on the assumption that the interests of the child are best served by preserving the parents' right to custody. *See* McCough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent—Third Party Custody Disputes*, 27 EMORY L.J. 209, 212