

Further discussion of the example on page 188.

The example in the book is misleading. As the example is written, evidence of prior rapes by Connor is just propensity evidence proving he has tendencies both to commit rape and also to lie about the circumstances. It does not illustrate the “objective chances” doctrine and, in my opinion, reaches the wrong result.

As the book points out at the top of page 189, the doctrine of chances expresses the idea that if unusual events happen several times, it tends to suggest that the events were the result of intentional human behavior rather than by chance or accident. The classic example is known as the “Brides in the Bath” case. A defendant was charged with murdering his wife by drowning her in the bathtub. He claimed the drowning was accidental, a perfectly plausible explanation. The state proved that his two previous wives also drowned in the bathtub, which evidence was admissible because it rebutted the defense claim of accident.

The problem with the rape example in the book, is that the defense does not claim he had intercourse with the victim “by accident.” The doctrine of chances cannot therefore be invoked as statistical evidence that this could not have been a random accident, since no such issue is before the jury.

The defendant claims he thought the victim was consenting and therefore did not know that he was committing a crime. This is just a claim of lack of mens rea, which does not place into issue any specific mental state such as intent or knowledge. In most states, before the intent or knowledge exception of 404(b) may be invoked, the defendant must clearly deny a specific intent element (e.g., intent to kill) or a specific knowledge element that is part of the definition of the crime. E.g., the Huddleston case on p. 189 where the defendant denies knowing that the goods he sold were stolen and the statute makes knowledge an element of the offense.

In a rape case, knowledge that the victim is refusing consent is not an element of the crime. Rape is generally defined as forcible sexual intercourse. The defendant is not claiming that he did not know he was engaging in forcible sex. He claimed he did not know he was engaging in nonconsensual sex, but the statute does not make this a material element. Consent is a defense, of course, but that is a question of actual consent (the victim's state of mind) and it also does not make the defendant's knowledge material.

However, the example makes sense if we change the facts slightly, so that the defendant is charged with assault with intent to commit rape, and the allegation is that he started to attack the victim under the good faith belief that she was consenting, breaking off the attack only after she screamed and sprayed him with pepper spray. Now we have a crime that has a specific intent element (intent to rape) in addition to mens rea, and the defendant's past instances of similar behavior are admissible to refute his claim that he was intending to have consensual sex and not intending to commit rape.