

## 7. THINGS THAT LOOK LIKE CHARACTER EVIDENCE BUT AREN'T

### A. Rule 404(b) -- Crimes and other isolated acts of bad behavior (not done frequently enough to be a pattern)

1. Prosecutors love to prove that a defendant has a prior criminal record because it effectively negates the presumption of innocence. Empirical studies show that jurors are willing to give an accused the benefit of the presumption of innocence only if this is the accused's first offense. Once he has proved himself to be "a criminal," the jury assumes he is guilty. However, proving that the defendant has criminal tendencies would seem to be prohibited as character evidence.

2. Rule 404(b) gives prosecutors a big loophole -- it allows evidence of a person's past criminal/immoral conduct if it helps prove an issue other than the defendant's tendency to behave like a criminal. They can be divided into five groups

- Identity
- Motive
- Intent, knowledge, absence of mistake or accident
- Preparation or plan
- Opportunity

This is going to require some mental gymnastics.

Prior acts of criminality are not admissible to prove that the person committed a similar crime, i.e., if Bill Cosby is on trial for sexually assaulting Andrea Constand in Philadelphia in 2004, the prosecutor cannot call Beth Ferrier as a witness to testify that Cosby gave her drugs and sexually assaulted her in 1986. Nor can he call 50 women to testify Cosby drugged and assaulted them. The only reason it would be relevant is prove that he has a pattern of criminal behavior, which is also known as character evidence.

The prosecutor needs to come up with a relevant reason why the jury should hear about Cosby's past acts. It must be a genuine disputed issue of real consequence or Rule 403 will exclude it. The prejudicial effect is obvious -- the whole world has made up its mind that Cosby is guilty based solely on the number of claims. The jury will too if it hears about them, so prejudicial effect will substantially outweigh probative value unless the issue is genuine. That means the prosecutor cannot just say that evidence tends to show his identity, intent, motive, which are always relevant issues. This is just propensity/character evidence. The prosecutor's argument is going to have to be narrow and more specific, arguing one of the reasons set out below.

However, even if the prosecutor convinces the judge that the evidence is genuinely relevant to prove something like intent, that does not make it admissible. It merely removes the evidence

from automatic exclusion as character evidence under Rule 404, because it is relevant for a purpose other than to show criminal tendencies. As with any relevant evidence, its admissibility will therefore be determined by Rule 403.

There are two intertwined Rule 403 dangers. First, evidence that the defendant committed crimes other than and in addition to the one for which he is on trial has obvious prejudicial effect. It arouses the emotions of the jury. Second, it may tend to confuse the issues, especially if some of the people involved are the same, and the defendant must now defend himself against more than one charge. This is weighed against the generally low probative value of an old crime being evidence of anything recent. Therefore, even evidence of a prior crime that has some probative value on one of the Rule 404(b) exceptions is usually not admissible.

3. Notice and Hearing Requirement. If requested by the defendant, the state must provide reasonable notice of its intent to use evidence of other crimes. In most cases, the notice must be given pre-trial, although the judge may permit notice during trial if the prosecutor shows good cause for the late notification. A hearing must be held, but no specific formality or procedure is required.

4. Foundation.

- a) The court must determine that the evidence of other criminal acts is genuinely relevant to a contested matter other than the defendant's criminal propensity. Care should be taken to make sure that the supposed purpose is legitimate and not just a pretext for placing the defendant's criminal record before the jury.
- b) There must be sufficient proof that the defendant is the perpetrator of the prior act. Evidence that the defendant was accused or arrested is not sufficient.

5. Rule 403 balancing. The court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. Balancing is left to the trial judge's discretion, but the following considerations are relevant:

- 1) Similarity. The more similar the prior crime is to the crime charged, the more likely the jury will use the prior crime as propensity evidence, so the higher the prejudice.
- 2) Recency. Recent past acts have higher probative value than old ones, because people change.
- 3) Cumulative evidence. At some point, cumulative testimony about lots of prior incidents becomes prejudicial because it shifts the jury's attention away from the crime charged. No piling on. *See Williams v. State*, 677 N.E.2d 1077 (Ind. Ct. App. 1997) (prior crime admissible but Rule 403 was violated by admitting four redundant documents detailing the prior criminal charges).

6. No requirement that other crime pre-date crime charged. Evidence that falls into the definition of "other crimes" is not limited to prior criminal behavior. The other crimes may have been committed before or after the crime charged.

7. Conviction Irrelevant. When evidence of another crime is admissible, what matters is whether the defendant committed it, not whether the defendant was convicted for it. Therefore, evidence of criminal activity is admissible even if the defendant was never formally charged. Indeed, it usually is unduly prejudicial to inform the jury that the accused was convicted of the other crime. However, if the defendant has been acquitted of the prior crime, collateral estoppel will generally prevent the state from using it.

8. 404(b) evidence is typically admissible only in rebuttal. In order to balance probative value against the inherently prejudicial effect of evidence of prior criminality, the judge must know the degree to which a technically material issue is really being contested. In many cases, the judge will not know this until after the defense presents its case. Is he denying mens rea, claiming accident, or saying he was in Cleveland at the time? In some cases it will be obvious from the defendant's opening statement or cross-examination that he is contesting an issue on which prior crimes evidence is admissible, but in most cases, the prosecution will have to wait until rebuttal.

9. Admonition to Jury. If the court admits evidence of other criminal activity, Rule 105 provides that the court must admonish the jury about the limited relevance of the evidence if requested to do so by the defense. However, because such an admonition can backfire and emphasize the prior criminal behavior of the defendant, the court should not give such an admonition without a request by the defendant.

10. The Exceptions, in order of importance

There are really only five: 1) identity, 2) motive, 3) state of mind such as intent, knowledge and absence of mistake or accident, 4) preparation and plan, and 5) opportunity.

(A). Identity

(1) *Signature crimes*. If the identity of the perpetrator in the present case is disputed, evidence strongly connecting the defendant to a similar crime may be admissible if the crimes are sufficiently distinctive to qualify as "signature crimes." The other crimes must be both similar to the present crime and also have been committed in a unique manner akin to a criminal signature. The following foundation is required:

(a) The present crime and the other crime must be substantially similar in their details. Crimes that are only generally similar do not qualify. A robbery committed with a .38 revolver is not similar to a robbery using a 9mm automatic even though they are both handguns.

(b) Both crimes must have been committed in so distinctive and unusual a manner as to be like a signature, so that the court can be certain that the same person must have committed both. A robber wearing a ski mask is not unusual; a robber wearing a Batman mask is.

(c) The evidence must strongly suggest that the defendant in fact committed the prior crime. Eyewitness identification, a confession, fingerprints, or some other positive evidence is required.

(2) *Crimes connecting defendant to present charge.* If identity is disputed, evidence that the defendant was involved in another crime may be relevant if it connects the defendant to the current crime scene. For example:

- The gun used by the perpetrator in the current crime had been stolen by the defendant in a prior crime.
- Witness did not know perpetrator's name, but recognized him as a person arrested during a fraternity party on Little 500 weekend and was able to identify the defendant's photo from among those of people arrested that night.
- Evidence that the defendant had killed his mother admissible because the masked perpetrator told the victim he had nothing to lose because he killed his mother.

(3) *Evidence that someone other than the defendant committed prior crimes.* The identity exception to Rule 404(b) applies to acts by third persons as well as the defendant. The defendant may offer evidence of other crimes committed by a third person to prove that person is the true perpetrator, but only if he can lay the foundation for the identity exception set forth above.

#### (B) Motive

For a prior crime to be admissible to show motive, something that happened during that event must be the specific motive for the current crime. For example:

- The defendant's motive to kill victim arose during past drug deal when he found out victim was an informant.
- The defendant's motive to kill a store manager arose when the manager fired him and testified against him for a prior theft crime.
- The defendant's motive for revenge against a rival gang member arose from his criminal gang involvement.

Prior criminal activity is not admissible as circumstantial evidence of a common motive, i.e., that a defendant who has committed several similar crimes must have a common motive to commit that type of crime.

#### (C) Intent, knowledge and absence of mistake or accident

(1) *General rule.* As a general rule, the state may *not* use a defendant's prior crimes to prove mens rea, specific criminal intent, or any other mental state. A plea of "not guilty" is not enough to put a state of mind in issue. Only if a relevant mental state -- usually intent -- is genuinely contested may the prosecution use this exception. A defendant must go beyond denying culpability and affirmatively present a claim of particular contrary intent, lack of knowledge, or accident. As a general rule, the defendant must admit the act but deny the mental state necessary for it to be a crime.

(2) *Examples:* In the following situations, the courts have held that a defendant has placed a mental state at issue.

- The defendant denied intentionally killing his wife and claimed it was accidental; evidence of prior batteries against wife was admissible.
- The defendant claimed she killed victim in sudden heat of passion during an argument;

evidence of a prior event where defendant chased the victim with a baseball bat was admissible.

- The defendant, a state official, claimed he violated ghost employment law by mistake and not intentionally; evidence of prior assigning of state employees for personal purposes admissible.
- The defendant claimed someone hacked his computer and used it to send pornographic pictures over the Internet without his knowledge; state could rebut by proving that the defendant later solicited the person to whom the photos were sent.
- If a courier charged with drug possession who claims that he reasonably believed the package he was delivering contained an innocuous substance, the state may prove his knowing involvement in other similar crimes to rebut this defense.
- If a defendant claims that a wreck which caused a death was an accident caused by a momentary lapse of judgment, the state could prove other past situations in which the defendant drove erratically because of texting.

(3) *Time limit.* To be relevant, the prior incidents must have been close in time to the criminal act.

#### (D) Preparation or Plan

Preparation and planning are rarely disputed issues. Few crimes include preparation and planning as an element other than conspiracy and premeditated murder, so there are few situations in which this exception can legitimately be invoked. There are fewer still where the evidence proving preparation would be the commission of a separate crime. I suppose that if a defendant is charged with premeditated murder and defends that he is guilty only of manslaughter for killing in the heat of passion, evidence that he stole a gun a week before the killing would be admissible if it could be connected to the premeditation, e.g., by statements he made when he stole the gun that he was going to use it to get rid of his wife.

#### (E) Opportunity

I have never actually seen a case where “opportunity” because a contested issue. Hypothetically, if a defendant claimed he could not have committed the crime because he was in Boston that day, the prosecution could produce evidence that he was in fact in town that day, even if it showed that he was committing a crime, e.g., a time-stamped ATM photo showing him trying to use a stolen credit card 15 minutes after the attack.

#### 11. Prior crimes to impeach.

Though not listed among the exceptions in 404(b), prior criminal activity that resulted in a conviction is admissible to impeach a defendant who testifies, if it complies with the requirements of Evidence Rule 609, and prior acts of dishonesty may be admissible under Rule 608. These will be covered when we discuss impeachment.

## 12. Victim/Witness's State of Mind

(1) *Victim's fear of defendant.* The state of mind of a victim or witness is rarely a material issue. Thus, evidence of prior crimes and threats by the defendant toward the victim are not admissible to show the victim's state of mind. Unless the defendant has opened the door by claiming a good relationship with the victim, the victim's fear of the defendant is irrelevant and past crimes or threats against the victim are not admissible unless directly connected to the present crime.

(2) *Witness intimidation.* If a witness claims not to remember events, evidence that the witness was threatened by the defendant is admissible to explain the sudden loss of memory. This works the other way, too, and if a witness initially denied knowledge but later testifies against the defendant, the witness may explain her initial refusal was a result of threatening acts by the defendant that intimidated her.

## 13. Civil Cases

(A) *In general.* Rule 404(b) is rarely applied in civil cases because issues like motive, intent, and identity are not typically elements of civil claims and defenses. The admissibility of evidence that a party to a civil case engaged in other acts of criminality and wrongdoing is more often determined under Rule 403's general balancing test. However, nothing in Rule 404(b) suggests that it is may not be invoked in civil cases, especially intentional torts.

(B) Evidence of other events in civil cases are likely to be relevant for different reasons than those in criminal cases -- to show dangerousness, notice, value, feasibility, or ownership, or to rebut a defense of impossibility, but only if a foundation of substantial similarity of conditions is laid. For example, evidence of prior shootings outside a strip club would be admissible to show the owners' knowledge of a dangerous condition, but only if a foundation were laid that the essential conditions of the prior crimes and current one are substantially similar and close in time).

(C) *Similar Accidents.* Similar accidents (whether or not they amount to crimes) are not admissible to show that a party has a tendency to be careless. However, if the accidents are both recent and similar, they may be relevant for the more limited purpose of showing the existence of a dangerous condition or notice to the defendant of a potential hazard, if either issue is genuinely disputed. All essential conditions at the time of the prior accident must be shown to be substantially similar to the conditions surrounding the event being litigated.

## **B. HABIT AND ROUTINE PRACTICE**

### 1. Rule

Rule 406 provides that evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion, the person or organization acted accordingly. To qualify as a habit, rather than a character trait, the behavior must be an invariable response to a specific situation that occurs often enough that someone can develop a particular response. Habit and routine practice are normally proved by opinion testimony and not by evidence of specific illustrative acts.

The simple distinction: if a person always behaves in a certain way, it's probably a habit, but if they usually behave in a certain way, it's character..

## 2. Foundation

To meet the definition of habit, a person must *always* behave in a certain way. Office practice is a common use -- testimony by the office manager that departmental practice was always to take outgoing mail to the post office at the end of each day and keep a record if anything was returned undeliverable. If a person only tends to behave in a certain way *most* of the time, such tendency is a character trait and not admissible.

- (1) The witness must have personal knowledge of the person or organization whose conduct is being described, usually because the witness is the person whose behavior is at issue or works for the organization.
- (2) The conduct at issue must be engaged in so often and routinely that it is done automatically, without thinking.
- (3) The witness has personally observed a large number of incidents of this conduct, although the witness need not have seen all such incidents.
- (4) The person or organization *always* responds to the situation in a particular way. It is not enough that the person or organization *usually* acts in a certain way, although occasional inconsistent behavior will not defeat the foundation, if the evidence establishes that the conduct is consistent, automatic and reflexive under normal circumstances.

The foundation is usually laid by opinion testimony. Describing a series of specific instances of conduct would be a waste of time and precluded by Rule 403.

## 3. Usage of Trade and Industry Practices

Evidence of customary practices within an industry or trade is admissible to construe terms of art or ambiguous provisions in contracts. UCC 1-205.