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Admitting Evidence of Other Bad Acts[1] in Cold Case Sexual Assaults

In a cold case sexual assault trial, introducing evidence to show that the defendant has previously been accused of some other crime or "bad act" is often helpful, even crucial, to the prosecution's case. The "other act" may have been an uncharged act (e.g., a burglary or threat) in connection with the current sexual assault charge; perhaps the related act would have been charged if not for the statute of limitations expiring for that crime. Or the related act might be a similar assault (actual or attempted) against a different victim, which proves the defendant's identity, motive, intent, preparation, scheme, or plan in the present case.

With the testing of previously unsubmitted sexual assault kits (SAKs), Combined DNA Index System (CODIS) hits may help to identify other assaults (or attempted assaults) by the same perpetrator. Evidence of these other assaults may be relevant and admissible in the present case; this evidence may also prove the defendant's identity, motive, intent, preparation, scheme, or plan in the present case. Moreover, those other offenses may provide leads to additional evidence supporting the charges in the present case. This resource provides an overview of (1) the Evidence Rule* to admit evidence of other crimes, wrongs, or acts and (2) the unique considerations for the rule in cold case sexual assaults.

The Evidence Rule: Other Crimes, Wrongs, or Acts

"Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules. In many jurisdictions, the admissibility of uncharged-misconduct evidence is not only the most frequently litigated issue on appeal, but also the most common ground for reversal."[2]

Federal Rule of Evidence 404(b) and equivalent state or tribal evidence rules or statutes[3] prohibit introducing evidence of a crime, wrong, or other act to prove a person's character as a way to show that the individual acted in conformity with that character trait on a particular occasion. In the criminal context, this translates to prohibiting the introduction of evidence to show that the defendant has a propensity to commit a particular crime. Most jurisdictions do not allow evidence of propensity.[4] However, the rule is typically considered to be one of *inclusion* rather than exclusion; it explicitly *permits* evidence of other bad acts for purposes other than propensity—such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The proper purposes for which such evidence may be admitted are generally not limited to those explicitly listed in the rule. In most jurisdictions, any legitimate issue relevant to proof of the crime or of the defendant's guilt (e.g., consciousness of guilt) can be grounds for admitting such evidence. Such evidence can consist of uncharged or unreported acts, prior convictions, possible prior acts for which the defendant was acquitted of any crime,[5] and noncriminal behavior that reflects poorly on the defendant's character (e.g., acts of marital infidelity, acts of emotional abuse). Evidence of an act for which the defendant has been previously acquitted at trial may be admissible; however, this varies by jurisdiction.[6]

The extent to which evidence of other crimes, wrongs, or acts is admissible—and the purposes for which the jury may consider it—will depend upon the

- law in the particular jurisdiction,
- evidence rules or other statutory provisions governing the admissibility of evidence, and
- case law interpreting it.

Most jurisdictions prohibit admission of other acts to prove propensity or character, which requires that another specific purpose or purposes be identified and that the jury's consideration of the other acts' evidence be limited to those specific, permissible purposes.[7] Each jurisdiction's laws establish the following:

- Purposes for which the evidence can be admitted
- Conditions or tests for admissibility
- Limitations on admissibility (e.g., excluding evidence of acts considered too remote to be relevant)
- Procedural requirements (e.g., notice to the defense within a specific timeframe; mandatory limiting instructions)

Evidence of some other acts may be admissible on multiple grounds, or admissible on only one or two of several possible grounds.[8]

*This refers to the relevant rule of evidence. Many, though not all, state rules are 404(b); with that in mind, "rule" is sometimes used to refer to the appropriate evidence rule.

With careful preparation and presentation, prosecutors can confidently seek to admit such evidence for a proper purpose. Even if the court does not permit introducing the evidence as part of the prosecution's case-in-chief, the defense may open the door during cross-examination or the defense case, allowing previously barred evidence to be admitted as relevant.

Res Gestae or Acts "Inextricably Intertwined" with the Charged Crime[9]

Some courts refer to bad acts as *res gestae* acts or acts "inextricably intertwined" with, or "intrinsic to," the criminal act when the acts are (a) part and parcel of the events surrounding the charged crime or (b) ones that cannot be excluded without compromising the jury's ability to understand what occurred. This theory may be considered a proper purpose under Rule 404(b) and analyzed according to precedent on that rule; in other cases, it is considered an independent ground for admission and not subject to the same requirements.

An abuser's threat to kill the victim's pet during events that culminate in an assault is an example of *res gestae*. Such an act committed months before might be analyzed under Rule 404(b), though an act committed during events immediately surrounding the crime might be admitted on a *res gestae* theory.[10]

Identifying Other Crimes, Wrongs, or Acts

The testing of previously unsubmitted rape kits throughout the country confirms a significant incidence of serial offenders in both stranger and non-stranger categories.[11] Additionally, offenders' DNA profiles have been discovered in other crimes—such as murder, robbery, burglary, and theft. Discovering offender DNA profiles in sexual assaults as well as at least one other type of crime is known as *crossover offending*. When individuals commit crossover crimes, this challenges traditional stereotypes about the nature of offenders; additionally, crossover offending highlights the risk that serial offenders pose.[12]

Offenders Known and Unknown

In cases in which the victim knows the assailant, evidence of other acts can be helpful in overcoming the consent defense by (a) establishing the perpetrator's intentional plan or preparation for the assault or (b) providing support for a finding of constructive force.[13] Such evidence may also establish the defendant's knowledge of the effects of drugs and/or alcohol as tools of victimization, illuminate a basis for victim selection, or demonstrate a plan to create or exploit vulnerabilities.

If the victim and defendant were in an intimate relationship, then establishing the defendant's history of abusive behavior, dominance, and control that led to the criminal act is often beneficial to the prosecution's case.[14] Introducing "other acts" evidence may provide necessary context for the crime as part of a pattern of abuse or provide evidence of the perpetrator's intent and planning. This evidence not only helps to illuminate the full extent of victimization but also helps jury members to understand how the crime could have occurred. Additionally, the evidence may be relevant to explain why the victim perceived resisting to be futile or dangerous, or why the victim did not immediately report the sexual assault.

If a victim did not know the offender, then evidence of other acts may help to establish the perpetrator's identity. The perpetrator's use of a uniquely identifiable weapon or possession of stolen property may connect multiple offenses. Perpetrator identity can sometimes be established on the theory that both are "signature crimes"—crimes with sufficiently unusual similarities as to "earmark a crime as the defendant's handiwork."[15]

Co-occurring Crimes

Prosecutors should also remember to look for evidence of co-occurring crimes that the offender committed against the victim. When the statute of limitations has expired for the offenses other than the sexual assault, Rule 404(b) may nevertheless allow evidence of those criminal acts to explain the crime—including the knowledge, beliefs, and actions of both the offender and the victim. Examples of such co-occurring crimes include intimate partner violence, stalking, and human trafficking (both sex and labor trafficking).

Introducing the Evidence

Prosecutors should file pretrial motions *in limine* any time they anticipate introducing evidence of a defendant's other crimes or bad acts, regardless of whether the law requires such a motion. By carefully briefing the issue for the trial court, the prosecutor will focus attention on a thorough analysis of the evidence and will clearly articulate the basis (or bases) for admitting the evidence. The court will have time to research the issue, if necessary, and to carefully consider the arguments before deciding. Presenting such evidence without a preliminary ruling from the court increases the risk of mistrial or reversal on appeal.

The motion should assert all potentially applicable grounds for admission, including as many of the "purposes" under

the Evidence Rule that may apply; additionally, the motion should seek from the court a ruling on each of the grounds. By requesting a ruling on each of the grounds for admission, an appellate court will have a complete record of the court's rulings and reasoning as to each of the proffered arguments.[16]

The defense may raise several objections to the admission of "other acts" evidence, including

- the differences in conduct;
- the remoteness in time;
- the fact that
  - the other act does not support a purpose authorized by the rule,
  - the issue is not seriously in dispute, or
  - the probative value is outweighed by the danger of prejudice.

The prosecutor's motion brief should anticipate and address these arguments.

Each jurisdiction will have its own standards or tests for the admissibility of "other acts" evidence; these standards or tests may vary based on factors such as the specific purpose for which the evidence is to be offered.[17] The U.S. Supreme Court has held that evidence offered under Rule 404(b) does not need to meet even the "preponderance" standard to be admissible.[18] In *Huddleston v. United States*,[19] the Supreme Court established the analysis *federal* courts must undertake in determining the admissibility of evidence under Rule 404(b):

- The "bad act" evidence must be admitted for a *proper purpose* under the rule,[20] and not to demonstrate the offender's propensity towards the charged criminal act.
- The "bad act" evidence must be *relevant* to the charged crime.
- The *probative value of the proffered evidence must not be substantially outweighed by the danger of unfair prejudice.* The court must weigh these competing interests, as required under Rule 403.
- The defense may request that *the court give a limiting instruction*, as outlined in Rule 105 to protect against jury misuse of the 404(b) evidence.

The *Huddleston* analysis is simply an interpretation of the federal rule. Admissibility in a particular jurisdiction will be determined by that jurisdiction's laws. However, the requirements set forth in *Huddleston* are typical in most jurisdictions. In addition to the specific requirements pertaining to evidence of other bad acts, any such evidence must also satisfy the general rules pertaining to evidence, including requirements that the evidence be relevant[21] and that the danger of unfair prejudice not substantially outweigh the probative value of evidence.[22]

In addition to relevance, there may be another requirement of materiality; this requirement focuses on whether the issue on which the evidence is offered is actually or seriously in dispute.[23] For example, when the consent defense is used in a sexual assault case involving acquaintances, evidence of a prior or subsequent crime offered solely to prove identity might not be considered material; however, the same crime might be admissible for some other purpose on a matter that *is* at issue, such as proof of a common scheme or plan to render the victim incapable of consent through use of alcohol and/or drugs.[24]

Courts sometimes consider the probative value versus the prejudicial effect of the proffered evidence as part of the overall analysis of admissibility under Rule 404(b); other times, they conduct a separate balancing analysis under Rule 403.[25] The temporal proximity of the prior act may be considered as part of this weighing process. Generally speaking, acts that are very remote in time from the charged crime are likely to be less probative and more likely to be unfairly prejudicial than acts committed closer in time.[26] Some courts have taken the position that the remoteness of the prior act, rather than the act's admissibility, affects only the weight that should be accorded such evidence.[27] Nexus between the proffered evidence and the current case is a critical feature.

When evidence of other bad acts is admissible for a limited purpose, it is important to present the specific purpose for which a jury *can* consider the evidence (i.e., limiting instruction), so the jury does not consider the evidence to be impermissible (such as propensity, where evidence showing propensity is not permitted). Even if the defense fails to request a limiting instruction, the prosecutor should make such a request, wording the instruction in sufficiently strong terms that there will be little possibility of the jury's failing to understand the limited purpose for which the evidence is being admitted. Doing so may prevent reversal of a conviction on appeal. Such an instruction is appropriate at the time the evidence is admitted and should, generally, be repeated at the end of the trial.[28]

Whether the court holds an evidentiary hearing with witness testimony on a motion to admit evidence under Rule 404(b) varies according to local practice. Usually an offer of proof will be sufficient[29] and, where permissible, such practice will spare the victim from testifying at an additional hearing.

Prosecutors should urge the court to make findings as to each of the proffered grounds for admissibility, including *res gestae* where applicable. This may prevent a reversal

and remand for consideration of a different grounds for admission if an appellate court disagrees with the trial court's reasoning on one of the grounds. Depending on local practice, drafting the findings of fact and conclusions of law to support each of the grounds for admission urged may be desirable.

If the court rules the "other acts" evidence inadmissible, keep in mind that this evidence may become admissible during trial if the defense opens the door during cross-examination or during its own case. In that event, a hearing should occur without the jury to renew the motion and obtain the court's ruling.

A successful motion to admit "other acts" evidence requires carefully presenting the evidence at trial to avoid any suggestion that the jury should consider the evidence for an improper purpose. Testimony should be presented in a way that will allow the jury to draw the permitted inferences in support of the charged crime. In summation, the prosecutor should take care to argue the appropriate purpose(s) for which the evidence was admitted under the Evidence Rule.

References:

1. The evidence rules of most United States jurisdictions have a provision equivalent to Federal Rule of Evidence 404(b), which states:
(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose—such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must

   (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial and

   (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

2. Imwinkelreid, E. (2010). The second coming of res gestae: A procedural approach to untangling the "inextricably intertwined" theory for admitting evidence of an accused's uncharged misconduct. *Catholic University Law Review, 59*, 719. Available at http://scholarship.law.edu/lawreview/vol59/iss3/3.

3. Prosecutors should check their jurisdiction's law to determine the categories of other acts evidence provided in the rules of evidence (or other statutory provisions) and how those categories, and the permissible purposes for which the evidence may be used, have been analyzed by the courts. For the purposes of this article, the authors have referenced "other crimes, wrongs, or acts" and also, generally, Rule 404(b).

4. Most jurisdictions never permit evidence to show that a defendant has a "propensity" for committing a particular kind of crime. However, some jurisdictions permit evidence to show propensity, at least for certain types of crimes—typically, in cases involving sexual violence, sexual abuse of children, or (more rarely) domestic violence. The evidence rules or statutes may not explicitly state that the evidence is admissible to show "propensity," but rather may state in general terms that evidence of prior acts may be admitted to prove any issue for which it is relevant. Jurisdictions with broad rules of admissibility for certain crimes may require less-painstaking analysis for the evidence of other acts to be admissible; nevertheless, a motion should always be filed to seek a ruling in advance before attempting to introduce such evidence, and a limiting instruction cautioning the jury about the manner in which they consider and weigh such evidence may still be necessary. Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Nebraska, Oklahoma, and Wisconsin generally allow propensity evidence in sexual violence cases. The federal rules of evidence permit propensity evidence in cases of sexual assault (Rule 413) and child molestation (Rule 414). Colorado has adopted a relaxed standard for admission of evidence of other sex crimes for purposes other than propensity. Michigan, Missouri, Texas, Utah, and Virginia allow evidence of propensity only in cases of child sexual abuse. Alaska, California, Illinois, Louisiana, Michigan, and Wisconsin allow propensity evidence in domestic violence cases. For example, Rule 413(a).

5. *See* notes 2 and 3, *supra*.

6. The United States Supreme Court has held that the Fifth Amendment's protection against double jeopardy does not prohibit the prosecution from introducing evidence of a crime for which the defendant was acquitted. Dowling v. United States, 493 U.S. 342 (1990); *see also* United States. v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (holding that evidence of prior drug acquittal is admissible to prove knowledge and intent in subsequent prosecution). Many jurisdictions bar such evidence of acquittals, however. *See* State v. J.M., Jr., 137 A.3d 490 (N.J. 2016) (holding that evidence of crime for which defendant was acquitted may not be admitted at trial for subsequent crime). Even if evidence of an act for which the defendant is acquitted is admissible, it may be necessary for the court to permit the defendant to introduce evidence that the charge resulted in an acquittal. *See*, for example, Ex parte Bayne, 375 So.2d 1239 (Ala. 1979), *overruled on other grounds*, Ex parte Burgess, 827 So.2d 193 (Ala. 2000). For research support on jurisdiction-specific law, please contact AEquitas at ta@aequitasresource.org or at 202.558.0040.

7. *Supra* note 4.

8. For research support on jurisdiction-specific law, please contact AEquitas at ta@aequitasresource.org or at 202.558.0040.

9. For a thoughtful discussion of the intricacies of the doctrine of *res gestae* and its relationship to Rule 404(b), see Imwinkelreid, *supra* note 2.

10. Some courts have explicitly rejected the utility of *res gestae* as a basis for admitting such evidence. In jurisdictions that have disapproved the use of the term or related terms, prosecutors should avoid arguing it as a basis for admitting the evidence and rely instead upon ordinary Rule 404(b) analysis. (In the example about a threat to kill a pet, in a jurisdiction that does not recognize *res gestae* as an independent basis for admission, such evidence might be admissible under Rule 404(b) as proof of the defendant's motive to put the victim in fear or to control the victim.) In jurisdictions that recognize the concept, the prosecutor might argue it as a "purpose" under Rule 404(b) and/or as an independent ground for admission, depending upon the available precedent. (For a thoughtful, comprehensive discussion of the various approaches to, and criticisms of, the concepts of *res gestae* or "intrinsic" evidence, *see* United States v. Green, 617 F.3d 233 (3d Cir. 2010), and sources cited therein.)

11. Campbell, R., Feeney, H., Pierce, S. J., Sharma, D. B., & Fehler-Cabral, G. (2016, March 27). Tested at last: How DNA evidence in untested rape kits can identify offenders and serial sexual assaults, *Journal of Interpersonal Violence*, pii: 0886260516639585. [Epub ahead of print]. doi: 10.1177/0886260516639585

12. Simons, D. A. (2014). *Chapter 3: Sex Offender Typologies*. In National Criminal Justice Association, *Sex Offender Management Assessment and Planning Initiative Report, Adult Section*. (internal citations omitted). Retrieved June 9, 2017, from https://www.smart.gov/SOMAPI/sec1/ch3_typology.html

13. Threats and intimidation to gain control or prevent resistance; esp., threatening words or gestures directed against a robbery victim." *Constructive Force*, Black's Law Dictionary (10th ed. 2014)

14. *See* Hartley, C. C., & Ryan, R. (2002). *Prosecution strategies in domestic violence felonies: Telling the story of domestic violence, executive summary*. Retrieved from https://www.ncjrs.gov/pdffiles1/nij/grants/194074.pdf; Vartabedian, P. (2007). The need to hold batterers accountable: Admitting prior acts of abuse in domestic violence cases. *Santa Clara University Law Review, 47*, 157. Retrieved from http://digitalcommons.law.scu.edu/lawreview/vol47/iss1/5

15. "A distinctive crime so similar in pattern, scheme, or modus operandi to previous crimes that it identifies a particular defendant as the perpetrator." *Signature Crime*, Black's Law Dictionary (10th ed. 2014). "Signature crime" as a basis for admitting evidence of another crime is probably the most difficult to establish and the most vulnerable to attack on appeal because of the common requirement that the similarities be sufficiently unusual to amount to a "signature," making it unlikely that anyone other than the defendant was the perpetrator. *See, for example,* State v. Jones, 450 S.W.3d 866, 898-99 (Tenn.

2014) (discussing the distinction between crimes with similar characteristics and "signature" crimes); *compare* State v. Sempsey, 358 A.2d 212 (N.J. Super. App. Div. 1977) (allowing evidence of other rape where in both cases the attack occurred at night; the defendant had previously worked in the victim's apartment; the victim's eyes were covered with tape; the assailant wore peculiar head gear, a dark jacket and pants; the assailant possessed a gun; the assailant instructed the victims to count when he left or he would shoot; the assailant smelled of grease, was unable to obtain an erection and forced the victims to perform oral sex) *with* State v. Thang, 41 P.3d 1159 (Wash. 2002) (holding that numerous similarities between crimes were insufficiently distinctive to admit evidence on issue of identity).

16. For theories and examples for each typical "purpose," *see* AEquitas. (2017, May). Other acts: Purpose, theory, and examples (p. 5). In Evidence of other "bad acts" in intimate partner violence, sexual violence, stalking, and human trafficking prosecutions. *Strategies in Brief, 31*. Retrieved from http://www.aequitasresource.org/Evidence-of-Other-Bad-Acts--In-Intimate-Partner-Violence-Sexual-Violence-Stalking-and-Human-Trafficking-Prosecutions-SIB31v2.pdf

17. For example, in Minnesota, evidence of other bad acts under Rule 404(b) must be "clear and convincing"; however, evidence offered under the statute permitting evidence of prior acts of domestic violence (a "propensity" statute) has no such requirement. *See* State v. McCoy, 682 N.W.2d 153 (Minn. 2004) (explaining the distinction between the standard for admissibility under Minn. R. Evid. 404(b) and Minn. Stat. § 634.20).

18. *See* Huddleston v. United States, 485 U.S. 681 (1988) (holding that court need not find, by a preponderance of the evidence, that the prior act occurred; there must be merely sufficient evidence to support a jury's finding that the defendant committed the act).

19. *Id*.

20. *See Other Acts: Purpose, Theory, and Examples (Aequitas, 2017)* chart below. Most jurisdictions permit purposes other than those explicitly set forth in the rule. The Federal Rule, for example, states that such evidence is "admissible for another purpose, *such as* proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Federal Rule of Evidence 404(b)(2) (emphasis added).

21. *See* Federal Rule of Evidence 401, 402.

22. See Federal Rule of Evidence 403.

23. In some jurisdictions, materiality may be explicitly required in the Rule. *See, e.g.,* N.J. R. Evid. 404(b) (Evidence of other crimes, wrongs, or acts admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident *when such matters are relevant to a material issue in dispute*.") (Emphasis added.) In some, the materiality requirement may be imposed by case law. *See*, *for example*, State v. Hardy, 154 So.3d 537, 538 (La. 2014).

24. See, for example, State v. Williams, 983 N.E.2d 1278 (Ohio 2012) (agreeing with Court of Appeals that identity was not at issue but admitting evidence to show how defendant selected vulnerable minor victims and groomed them for assault).

25. *See* United States v. Maxwell, 643 F.3d 1096, 1102 (8th Cir. 2011). The federal rule provides that evidence may be excluded "if its probative value is *substantially outweighed* by a danger of one or more of the following: *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Federal Rule of Evidence 403 (emphasis added).

26. *See*, for example, State v. Jones, 369 S.E.2d 822 (N.C. 1988) (holding that sexual assaults committed 7 years before the charged assaults were too remote to be sufficiently probative on the issue of common scheme or plan to commit similar crimes); *cf*. State v. Martin, 796 P.2d 1007 (Idaho 1990) (prior sexual assaults not too remote where defendant spent most of the intervening years in prison).

27. *See, for example*, Hart v. State, 57 P.3d 348 (Wyo. 2002) (holding that a 20-year gap between assaults on young female relatives was not too remote, given the generational opportunity to commit such crimes, and citing prior cases holding that remoteness will bar admission of evidence only if the other act is so remote as to make it irrelevant to the purpose for which it is offered); *cf*. State v. Beckelheimer, 726 S.E.2d 156 (N.C. 2012) (holding that proximity in time is less significant when evidence of prior acts is highly similar to facts of charged case).

28. If the defense feels that a limiting instruction will call undue attention to the evidence, the waiver and the strategic reason for waiver should be placed on the record, so the defense cannot later complain about failure to give the instruction.

29. In many jurisdictions, the rules of evidence do not apply at preliminary hearings on the admissibility of evidence. See Federal Rule of Evidence 104(a).

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