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Tenn. R. Evid. 404(b)
Other Crimes, Wrongs or Acts

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Why study 404(b)?

As pointed out by one prominent commentator, the admissibility of uncharged misconduct evidence:

(1) is the single most important issue in contemporary criminal evidence law,

(2) has generated more published appellate opinions than any other evidentiary issue,

(3) is the most common ground for appeal of criminal cases, and

(4) in some jurisdictions, is the most frequent basis of reversal in criminal cases.

See Edward J. Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea; The Doctrines which Threaten to Engulf the Character Evidence Prohibition, 51 Ohio St. L.J. 575, 576-577 (1990).

The Current Wording of Rule 404(b)

With regard to the admission of evidence that a defendant has committed a crime or crimes other than the one for which he or she is on trial, the Tennessee Rules of Evidence, Rule 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing;

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

For a general discussion of the law applicable to this Rule 404(b), See Cohen, Sheppeard, & Paine, Tennessee Law of Evidence, § 4.04(7) et seq. (6th ed. 2011); and W. Mark Ward, Tennessee Criminal Trial Practice, § 22:24 (West 2021-2022).

The Standard of Review on Appeal

The decision as to whether to admit evidence of other crimes is a matter within the trial judge's discretion and, if the procedures directed by Rule 404(b) are substantially followed, the trial court's decision to admit evidence of other crimes may only be reversed for an abuse of discretion. On the other hand, the decision of the trial judge will be given no deference on appeal if the trial judge fails to substantially follow the procedure outlined in the rule. State v. DuBose, 953 S.W.2d 649, 653 (Tenn. 1997). See also State v. Berkley, 2016 WL 3006941 (Tenn. Crim. App. 2016) (appellate court considers matter *de novo* when trial court fails to substantially comply with procedures).

Historical Perspective: Proof of other Crimes in Tennessee

The general rule of law which prohibits the State from introducing proof that a defendant has committed a crime other than the crime for which he is on trial dates back hundreds of years. Ninety-five years ago, in Mays v. State, 145 Tenn. 118, 238

S.W. 1096 (1921), the Tennessee Supreme Court said that '[t]he general rule has been well established that on a prosecution for a particular crime evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same character, is irrelevant and inadmissible. But to this rule there are several exceptions." In Mays, the Court cited Tennessee cases in support of this general rule dating back to 1840 and referred to People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901) for a "full discussion of the general rule and its exceptions...."

The Molineux court stated:

> The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto.... "The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded." ... "The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it is known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one." ..."The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence....By [the common law] the criminal is presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In

order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."...The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crimes charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, (5) the identity of the person charged with the commission of the crime on trial.

People v. Molineux, 168 N.Y. 264, 61 N.E. 286, 291-293 (1901) (citations omitted).

Thus, the long-standing rule in Tennessee "prohibits propensity evidence to establish guilt, i.e. that the accused has committed bad acts in the past, from which the trier of fact may conclude that he or she is the kind of 'bad person' likely to commit the crime charged, While it is conceded that such evidence has logical relevance, (citations omitted) it has generally been felt that the danger of prejudice involved in such an inquiry outweighs the probative value to be gained from it." Shockley v. State, 585 S.W.2d 645, 653 (Tenn. Crim. App. 1978).

This long-standing common law position was reaffirmed by the Tennessee Supreme Court in Bunch v. State, 605 S.W.2d 227 (Tenn. 1980) and again in State v. Parton, 694 S.W.2d 299 (Tenn. 1985). When the Tennessee Rules of Evidence were adopted in 1990, the current rule, Tenn. R. Evid 404(b) incorporated this common law perspective, with a disdain for "propensity" evidence.

Significantly, in 1994 the federal courts adopted Fed R. Evid 413 (Similar Crimes in Sexual Assault Cases and Fed. R. Evid. 414 (Similar Crimes in Child-Molestation Cases) which allows "propensity" evidence in federal courts. Likewise some states have, either by court rule, legislation or judicial decisions, opted to create a "sex crimes exception" to the general rule prohibiting propensity evidence. Despite these recent

developments on the national level, the majority of States retain the common law rule prohibiting propensity evidence in sexual assault prosecutions. It should also be noted that some of the legislative attempts to create a "sex crimes exception" have been declared unconstitutional as either violating the due process rights of the defendant or as being contrary to the separation of powers doctrine.

Likewise in 1994, after the federal sex crimes exception became effective, in State v. Rickman, 876 S.W.2d 824 (Tenn. 1994), the Tennessee Supreme Court considered and rejected a general sex crimes exception to Rule 404(b) which would allow propensity evidence to corroborate the victim and to show the lustful disposition of the defendant. Since then, the appellate courts of this State have repeatedly held that Tennessee has no "sex crimes exception" to the rule prohibiting evidence of other crimes to show a defendant's propensity to commit criminal conduct.

The history of Tenn. R. Evid. 404(b) would not be complete without a discussion of State v. Mallard, 40 S.W.3d 473 (Tenn. 2001). In Mallard, the Tennessee Supreme Court was called upon to decide whether T.C.A. § 39-17-424 (which allowed proof of a defendant's prior convictions for violation of any state or federal drug laws in a prosecution for possession of drug paraphernalia) conflicted with Tenn. R. Evid. 404(b), and if so, whether the legislature intended it to override the Tennessee Rules of Evidence. In addressing this issue, the Tennessee Supreme Court noted that the ultimate power to decide what is "relevant" in a criminal prosecution rests with the Tennessee Supreme Court, and not the legislature; and that "...any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical and legal relevancy impairs the independent operation of the

judicial branch of government, and no measure can be permitted to stand." Mallard, at 483. The Supreme Court found that a strict interpretation of the statute would put it in conflict with Tenn. R. Evid. 404(b) and would make it unconstitutional. In order to save its constitutionality, the Supreme Court chose to interpret the statute as merely supplementing the rules of evidence. It held that courts could only admit evidence under T.C.A. § 39-17-424 when it also met all the other requirements of the Tennessee Rules of Evidence, including Rule 404(b). Thus, the Tennessee Supreme Court reiterated its disdain for "propensity" evidence in Mallard.

Meanwhile, in 2004, the Tennessee Legislature enacted a limited sex crimes exception in cases involving child victims. See T,C.A. § 40-17-124. No Tennessee appellate court has addressed the validity of this statute. However, the statute itself provides that it shall not be construed "to limit the admissibility or consideration of evidence under any other rule or statute." It is very likely that it would be interpreted the same way the Tennessee Supreme Court did in Mallard as not "trumping" Rule 404(b).

Finally, in 2014, the Tennessee Legislature enacted Tenn. Code Ann. § 24-7-125 (effective July 1, 2014) which attempts in criminal cases to expand the protection against proof of other crimes, wrongs or acts by providing that they cannot be used "to prove the character of any individual, including a deceased victim, the defendant, a witness, or any other third party to show action in conformity with the character trait."

The Philosophical Purpose of Rule 404(b)

As a general proposition, evidence of a defendant's other crimes, wrongs, or acts are not admissible to prove the defendant by propensity is the probable perpetrator of

the crime in question. Although such evidence is "relevant" and may constitute "strongly persuasive proof" it is generally rejected because "the risk that a jury will convict for crimes other than those charged – or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment – creates a prejudicial effect that outweighs ordinary relevance." Old Chief v. United States, 519 U.S. 172, 181, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Stated otherwise, "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Michelson v. United States, 335 U.S. 469, 475-76, 69 S.Ct. 213, 93 L.Ed. 168 (1948). Furthermore, the danger of a jury improperly convicting a defendant for his or her propensity or disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial is particularly strong when the other crime, wrong or act is similar to the crime on trial. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994).

Crimes, Wrongs or Acts

Although Rule 404(b) is often referred to as generally prohibiting proof of "other crimes," it should be noted that the rule applies to any "wrong" or "bad act" that is being offered to show conformity with a particular character trait, i.e. propensity evidence. Clearly, the rule is applicable to any criminal offense, whether or not the defendant has been formally charged with or convicted of the criminal offense. In addition, inclusion of the words "wrongs" and "acts" indicates that the rule also applies to non-criminal

behavior that is being used as propensity evidence. See State v. Clark, 452 S.W.3d 268 (Tenn. 2014) (although using adult pornography is not a crime many people consider it a moral wrong such that Rule 404(b) is applicable); But see State v. Reid, 213 S.W.3d 792, 813-14 (Tenn. 2006) (possession of gun and knife after the crime was committed not controlled by 404(b) as the same is not a "bad act"). Consider State v. Carmody, 2020 WL 2931947 (Tenn. Crim. App. 2020) (trial judge properly considered possession of a gun under 404(b) where defendant was convicted felon at the time he possessed the gun, and if he chose to testify, the jury would learn of his prior conviction for being a convicted felon in possession of a handgun). See State v. Robinson, 2017 WL 4693999 (Tenn. Crim. App. 2017) (testimony about behavior which is relevant and which does not constitute a crime or bad act is not analyzed under Rule 404(b)). But see State v. Hall, 2016 WL 1222755 (Tenn. Crim. App. 2016) (collecting cases reflecting that "gang affiliation" is governed by 404(b)).

Prior or Subsequent Crimes, Wrongs or Acts

Although 404(b) usually applies to "prior" crimes, wrongs or acts, it should be noted that the word "prior" is not contained in the rule. Accordingly, the rule is equally applicable to "subsequent" matters. See State v. Elkins, 102 S.W.3d 578 (Tenn. 2003) ("Tennessee courts, as well as a large number of state and federal courts, have allowed the admission of evidence of subsequent crimes, wrongs or acts when they bear on the issues of identity, intent, continuing scheme or plan, or rebuttal of accident, mistake, or entrapment.").

Ordinarily Applies to Defendants

The text of Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a ***person***….. Traditionally, Rule 404(b) has been applied to prevent proof of other crimes, wrongs or bad acts committed by the ***defendant*** on trial. In fact, the Tennessee Supreme Court has specifically found that the rule only applies to criminal defendants. State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002); State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997) (evidence of other crimes, wrongs or acts, if relevant, are not excluded by Rule 404(b) if the crime, wrong or act was committed by a person other than the accused).

But see Tenn. Code Ann. § 24-7-125 (effective July 1, 2014) which attempts in criminal cases to expand the protection against proof of other crimes, wrongs or acts by providing that they cannot be used "to prove the character of any individual, including a deceased victim, the defendant, a witness, or any other third party to show action in conformity with the character trait."

The preamble of the applicable public act, 2014 Tenn. Pub. Acts ch. 713, provides that its purpose is to reverse the holding in State v. Stevens, 78 S.W.3d 817 (Tenn. 2002), and to prevent defendant's from introducing into evidence a victim's other acts that are "totally irrelevant to the instant offense." It should be noted that despite the urging of commentators, See THE TIME IS RIGHT TO AMEND RULE 404(b), 45 U. Mem. L. Rev. 149 (2014), the text of the Rule has never been amended to include the expanded language of the statute. Likewise, the Advisory Commission Comments to the Rule still contain a reference to Stevens and a statement that the Rule only applies to defendants.

The question arises: ***Did the Tennessee Legislature effectively reverse the Tennessee Supreme Court's holding in State v. Stevens?***

The Court of Criminal Appeals has, in at least three opinions, taken for granted that Rule 404(b) now applies to persons other than criminal defendants. See State v. Moon, 2021 WL 531308 (Tenn. Crim. App, 2021) (permission to appeal granted May 13, 2021); State v. Blackwell, 2019 WL 2486228 (Tenn. Crim. App. 2019); State v. Buckingham, 2018 WL 4003572 (Tenn. Crim. App. 2018). However, it does not appear that in any of these cases an issue was made as to the constitutionality of Tenn. Code Ann. § 24-7-125. On the other hand, in State v. Snipes, 2021 WL 4523074 (Tenn. Crim. App. 2021), another panel of the Court of Criminal Appeals summarily rejected an allegation that the trial court had committed a 404(b) error by noting that 404(b) was not applicable as it only applies to defendants. Accord State v. Williams, 2022 WL 152516 (Tenn. Crim. App. 2022) (only applies to criminal accused).

The Tennessee Supreme Court granted permission to appeal in State v. Moon but again no argument was made in the briefs or at oral argument as to whether the legislature had effectively overruled Stevens. Accordingly, this matter will likely remain undecided and, at best, we may get a footnote that addresses the matter. Most recently, in State v. Reynolds, 2021 WL 5563741 (Tenn. 2021) the Tennessee Supreme Court considered the propriety of allowing proof of the gang membership of the defendant and two other persons in order to show an association between the three people as that "association" helped to identify the defendant as the culprit. In footnote 23 it is noted that (1) the State had argued and the defendant never contested that the admissibility of the gang membership of the other two persons was governed by Rule

403, not 404(b); (2) the legislature had passed a statute extending the prohibition against other crimes evidence to persons other than a defendant; (3) the "principle substantive difference in the approaches is that under Rule 403, the danger of unfair prejudice associated with the evidence must 'substantially' outweigh probative value for the evidence to be excluded."; (4) exclusion is more difficult under 403; and (5) "[f]or the sake of simplicity, we will address the admissibility of evidence of Duncan's and Jackson's gang membership as part of our examination of the admissibility of the evidence of the Defendant's gang membership."

Whether the Legislature's enactment of Tenn. Code Ann. § 24-7-125 effectively reverses Stevens remains unanswered. It should be noted that under the Stevens approach the only evidence to be excluded is that which would hurt a defendant. If the legislative approach is adopted, evidence that favors a defendant may be excluded under 404(b) when it would have been admitted under 403.

Requirements for Admission

(1) Jury-Out Hearing

The first condition which must be satisfied before allowing Rule 404(b) evidence is that "[t]he court upon request must hold a hearing outside the jury's presence."

The burden is on the defense to object to 404(b) evidence and ask for a jury-out hearing on the matter or the issue is normally deemed waived. State v. Jones, 15 S.W.3d 880 (Tenn. Crim. App. 1999). But see State v. Thacker, 164 S.W.3d 208, 239-243 (Tenn. 2005) (in context of death penalty case 404(b) issue was considered on its merits despite the general rule of waiver).

The burden of persuasion with regard to the admissibility of evidence under 404(b) is on the proponent of the evidence. State v. Sexton, 368 S.W.3d 371, 404 (Tenn. 2012). The admissibility of other crimes evidence is a preliminary question which is determined by the trial judge under Tenn. R. Evid. 104(a) such that "[i]n making its determination the court is not bound by the rules of evidence except those with respect to privileges." ***But see "clear and convincing" evidence requirements discussed later.***

Although the admissibility of the evidence may be tentatively determined pre-trial, the final decision whether to allow proof of other crimes should be made after considering the evidence presented at trial. If the trial court makes pre-trial rulings they may have to be reconsidered based in the actual proof in the case. State v. Gilley,173 S.W.3d 1, 6 (Tenn. 2005).

(2)Material Issue other than Propensity

The second condition which must be satisfied is that "[t]he court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence."

To ensure that a defendant receives a fair trial, Rule 404(b) excludes proof of other crimes unless material to some purpose other than propensity or character of the defendant. According to the Advisory Commission Comments, other relevant purposes may include "issues such as identity (including motive and common scheme or plan), intent, or rebuttal of a claim of accident or mistake." This list should not be considered exclusive, but merely as exemplifying some of the more commonly used non-propensity

purposes. Tennessee case law has recognized at least seven limited purposes for which proof of other crimes may be considered: (1) where the other crime is part of the *same transaction* and logically related to the one for which the defendant is on trial so that proof of the other crime is necessary to prove the one charged; (2) where the other crime and the crime for which the defendant is on trial reveal a distinctive design or are so similar as to constitute *signature crimes* so that the evidence tends to establish the identity of the culprit who committed the offense for which the defendant is on trial; (3) where the other crime is part of a larger, *continuing plan or conspiracy*; (4) where the other crime shows a *motive* for commission of the present crime; (5) where the other crime tends to establish the defendant's *intent* to commit the charged offense or *to rebut an allegation of accident or mistake*, (6) to show *guilty knowledge*; and (7) to provide contextual background for the case.

As mentioned, this list should not be considered exhaustive. Other "purposes" may also include (8) to show opportunity or capacity; (9) to show consciousness of guilt; (10) to rebut a claim of entrapment; and (11) to rebut a duress defense.

The trial judge must not only determine that the evidence is relevant to a non-propensity material issue, but must also "upon request" identify the specific "material issue." Obviously, the "opponent" of the 404(b) evidence should "request" the trial judge to state on the record the material issue for which the judge is admitting the evidence. Further, when arguing about the admissibility of the evidence the "proponent" should be able to articulate the "specific" non-propensity material issue for which the evidence is being offered and the "opponent" should point out any inability of the "proponent" to be specific. The Tennessee Supreme Court has stated that when a party offers 404(b)

evidence without connecting the evidence with one of the recognized exception, courts should be highly skeptical. State v. Clark, 452 S.W.3d 268, 291-92 (Tenn. 2014). Likewise, courts should be skeptical when the "proponent" can provide nothing more than a "laundry list" of reasons without any specificity.

Common plan or scheme

There are three types of common plan or scheme evidence recognized in Tennessee law: (a) offenses that are part of the **same transaction**; (b) offenses that reveal a distinctive design or are so similar as to constitute **"signature" crimes**; and (c) offenses that are part of a larger, **continuing plan** or conspiracy. Each of these will be considered more fully below, but it must be recognized that common plan or scheme evidence does not constitute a separate rationale for admitting other crimes evidence unless that evidence is also relevant to some non-propensity material issue in the case. In other words, a prosecutor cannot merely "mouth" the words "same transaction, signature crimes, or continuing plan" without also showing the evidence would be relevant to a non-propensity purpose. As the Tennessee Supreme Court has indicated:

> the mere existence of a common scheme or plan is not proper justification for admitting evidence of other crimes. Rather, admission of evidence of other crimes which tends to show a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue. Unless expressly tied to a relevant issue, evidence of common scheme or plan can only serve to encourage the jury to conclude that since the defendant committed the other crime, he also committed the crime charged.

State v. Moore, 6 S.W.3d 235, 239, n.5 (Tenn. 1999).

(1) Same transaction

With regard to the "same transaction" category, the general rule excluding proof of other crimes only applies when the other crimes are "wholly independent of that for which the defendant is charged." State v. Howell, 868 S.W.2d 238, 254 (Tenn. 1993). To qualify within the "same transaction" category, the crimes must occur within a single criminal episode. State v. Hoyt, 928 S.W.2d 935, 943-44 (Tenn. Crim. App. 1995). To constitute the "same criminal episode" the acts of the defendant must occur simultaneously or in close sequence and must occur in the same place or in closely situated places. A break in the action may be sufficient to interrupt the temporal proximity required for a single criminal episode to exist. In addition, in order for a single criminal episode to exist the proof of the one offense necessarily involves proof of the others. This means the proof of the one offense must be "inextricably connected" with the proof of the other; or that proof of the one offense forms a "substantial portion of the proof" of the other offense. State v. Johnson, 342 S.W.3d 468 (Tenn. 2011).

(2) Signature crimes

The "signature crimes" category has given the Courts the most difficulty in application and has resulted in many convictions being overturned. The theory behind this category is that the crimes are so similar with respect to their *modus operandi* that they provide an inference that the defendant committed the crime on trial, i.e proof that he committed the one crime establishes his "identity" as committing the crime on trial. In order for this category to apply the modus operandi must be both (1) substantially identical and (2) must be so unique that proof that the defendant committed the other offense fairly tends to establish his identity as committing the offense on trial. State v. Moore, 6 S.W.3d 235 (Tenn. 1999). For this category to apply there must not only be

substantial similarity between the crimes, those similarities must also be sufficiently non-generic, i.e. unique.

It should be noted that there is a common misconception that 404(b) evidence is only admissible on the issue of "identity" if the other crime constitutes a "signature crime." The "signature crimes" category is not the only way in which the "identity" of the defendant can be proven by other crimes. The commission of other dissimilar crimes, wrongs or bad acts may link the defendant to the crime on trial so as to establish the defendant's identity as the culprit for the case on trial. See e.g. State v. Reynolds, 2021 WL 5563744 (Tenn. 2021) (evidence of gang membership showing association of defendant with person found in possession of murder weapon helped to establish defendant's identity as the culprit). Along these lines, identity can often be proven by interlocking physical evidence. See e.g. State v. Howell, 868 S.W.2d 238 (Tenn. 1993) (murder by defendant in Oklahoma with same weapon used in Tennessee homicide); State v. Taylor, 669 S.W.2s 694 (Tenn. Crim. App. 1983) (bullets taken from victim's body linked to gun used by defendant in another crime); State v. Churchman, 2014 WL 12651043 (Tenn. Crim. App. 2014) (defendant's identity proven by linking him to stolen vehicle and weapon used in another crime).

(3) Continuing plan or conspiracy

In this category there is no requirement that the offenses be similar. The only requirement is that the offenses be related to each other so that one tends to establish the other. It "encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose." State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993). This category "contemplates crimes committed in furtherance

of a plan that has a readily distinguishable goal, not simply a string of similar offenses." Id. Thus, the charged offense and the extrinsic offense must both constitute steps toward the same final goal.

(4) Motive

Establishing that a defendant had a "motive" to commit the present offense because of some prior offense may be relevant to prove identity, intent, or lack of accident or mistake and often this category overlaps with these other categories. McLean v. State, 527 S.W.2d 76 (Tenn. 1975). "Motive is the reason why someone did a particular act…. Since motivation for human behavior is almost infinitely diverse, the general inquiry is whether the circumstances evidenced by the other crime would tend to prompt the criminal act for which the defendant is being tried." TENNESSEE LAW OF EVIDENCE § 4.04(9) (6TH ED. 2011). Whether or not the circumstances of a particular case tend to establish motive must be determined by logic and general experience. Claiborne v. State, 555 S.W.2d 414 (Tenn. Crim. App. 1977). In order for evidence to be admissible under the motive category, the court must be able to articulate how the other crimes evidence fits into a "chain of logical inferences" that would support a motive. 22 Fed. Prac. & Proc. Evid. § 5240.

(5) Intent

There is very little law in Tennessee on the issue of proof of another crime to show "intent" and no appellate court has attempted to explain this category in a comprehensive manner. As a result, the appellate opinions are all over the place. The bad news is that without any comprehensive explanation as to how to apply this category, the likelihood of a reversal when a trial judge articulates "intent" as the reason

for allowing the other crimes evidence is increased. If this category is interpreted too broadly by a trial judge the result is the allowance of evidence solely for establishing the defendant's propensity to commit the crime on trial.

Most courts would agree that evidence of other crimes should not be admitted on the issue of "intent" unless intent is a "material" issue in the case. On the other hand, absent guidance from the appellate courts there seems to be a divergence of opinions as to when "intent" becomes a material issue. Some judges believe that "intent" only becomes a material issue when the defendant presents evidence of a lack of intent. These judges believe that "intent" becomes material only to rebut the defense claim of a lack of intent. Clearly, this is not what was contemplated by the rules commission because by the plain wording of the comments to Rule 404(b), evidence to show "intent" is not limited to rebuttal proof. See also United States v. Johnson, 27 Fed.3d 1186, 1191-92 (6th Cir. 1994) (under the "intent" exception evidence of similar crimes may be introduced either when the crime on trial requires the state to prove a "specific intent" or when the defendant raises a claim of lack of intent).

Some commentators have suggested that, as a general, rule "intent" should be deemed a material issue with regard to "specific intent" crimes, but not to general intent crimes unless the defendant makes it an issue. THE NEW WIGMORE: A TREATISE ON EVIDENCE, § 7.2.1 (2016). If this is the correct analysis, "intent" should never be deemed a "material" issue in a "general intent" crime unless the defendant makes it an issue. See State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) (intent is not a material issue in any sex offense); Brenner v. State, 217 Tenn. 427, 398 S.W.2d 252, 258 (1965) (when intent cannot be inferred from the act itself, other similar crimes may be

admissible to show intent). The rationale for not allowing proof of other crimes in prosecuting for "general intent" crimes is that the defendant's general intent can easily be inferred from his or her actions. As a result, the prosecution does not "need" the evidence to establish the applicable *mens rea* and this "absence of need" weighs against the State when considering the probative value of the evidence. **Note:** Under current Tennessee law "intentional" corresponds loosely with the common law concept of specific intent, while "knowingly" corresponds loosely with the concept of general intent. State v. Dison, 1997 WL 36844 (Tenn. Crim. App. 1997).

It has also been suggested that proof of other crimes should only be allowed when there is some *connection* between the crimes such that the evidence is relevant to something more than general propensity. Among possible considerations in assessing whether the crimes are connected is whether the offenses involved the same victim, the same location, the time lapse between the offenses, and whether they involved a unique modus operandi. Admission of evidence of *unconnected* other crimes on the issue of "intent" amounts to nothing more than propensity evidence. See State v. Huse, 2021 WL 1100758 (Tenn. Crim. App. 2021) (specifically adopting the above referenced *connection* analysis and finding an abuse of discretion when the State was allowed in a child abuse case to introduce evidence that the defendant had abused a different child in the past; the State failed to show a logical connection between the prior bad act evidence and the charged offense). See also State v. Logan, 2015 WL 5883187 (Tenn. Crim. App. 2015) (applying connection analysis).

Example: State v. Smith, 868 S.W.2d 561, 574 (Tenn. 1993) (evidence of prior acts of violence against the *same victim* are relevant to show the defendant's hostility toward

the victim, malice, intent, and a settled purpose to harm the victim); But see State v. Gilley, 173 S.W.3d 1 (Tenn. 2005) (however prior acts of violence against the same victim are not automatically admissible, court must conduct full 404(b) analysis to determine admissibility).

(6) Rebuttal of a claim of accident or mistake

The categories allowing proof of other crimes to rebut a claim of accident or mistake and the category to show defendant's "intent" are similar in that they all address the defendant's intent at the time of the crime, but by the plain wording of the advisory commission comments the former is limited to rebuttal proof. As such, poof of other crimes should never be allowed to rebut a claim of accident or mistake unless the defendant has put one of these matters in issue. See e.g. State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) ("Finally, because the appellant did not assert accident or mistake as a defense, there was nothing to rebut."). ***Important:*** How does the defendant put one of these matters in issue? Obviously if he testifies or presents any evidence on one of these matters, the matter is in issue. Is the matter in issue simply because the defense attorney raises it in opening or closing arguments? Cf. State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995) (self-defense cannot be raised merely from arguments of counsel).

The word "accident" is self-explanatory, meaning that the act was unintentional. "Mistake" refers to a claim that the defendant lacked the intent to commit the crime because he or she labored under a mistake of fact and did not know that the act was criminal.

(7) Guilty knowledge

The guilty knowledge category applies when "knowledge is an essential element of the crime charged and evidence of other offenses tends to establish that the defendant possesses this knowledge at the time of the commission of the crime presently charged" Tennessee Practice Series, Tennessee Pattern Jury Instructions—Criminal No. 42.10. This exception is frequently applied in drug cases where the defendant claims not to have known that drugs were present, in possession of stolen goods cases where the defendant claims not to have known the goods were stolen, and in counterfeiting cases where the prosecution must prove the defendant knew the money was counterfeit.

This category sometimes overlaps with the "intent" category, but is distinct. For a detailed discussion of this category See THE NEW WIGMORE: A TREATISE OF EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 6.1 et seq. (Aspen Publishing 2018); David P. Leonard, The Use of Uncharged Misconduct Evidence to Prove Knowledge, 81 Neb. L. Rev. 115 (2002).

(8) Contextual background

This category is distinct from the "same transaction" category and the offenses do not need to arise from the same criminal episode. Because the offenses involved in this category do not necessarily derive from the same criminal episode, the Tennessee Supreme Court has indicated that this category is only applicable when the State can prove and the trial court finds that (a) exclusion of the evidence would create a chronological or conceptual void in the presentation of the case; (b) the void would likely result in confusion concerning the material issues or evidence and (c) the probative value of the evidence is not outweighed by the danger of unfair prejudice. State v.

Gilliland, 22 S.W.3d 266 (Tenn. 2000). But see State v. Berkley, 2016 WL 3006941 (Tenn. Crim. App. 2016) (this restrictive test applies when evidence is *only* admitted for contextual background).

(9) Other purposes

The text of Tenn. R. Evid. 404(b) does not contain a list of "other purposes" for which proof of other crimes is permissible. As such, no list should be considered exclusive. So long as the "other purpose" is material to some purpose other than propensity, it may be admissible. Other non-propensity purposes could include: (a) to show opportunity or capacity; (b) to show consciousness of guilt; (c) to rebut a claim of entrapment; (d) to rebut a duress defense; etc.

(3) Clear and Convincing Evidence

The third condition which must be satisfied is that "[t]he court must find proof of the other crime, wrong, or act to be clear and convincing."

With regard to Fed. R. Evid. 404(b), the United States Supreme Court in Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988) resolved a split of authority in the Circuit Courts of Appeal as to whether the trial judge must find the evidence of the other crime by a preponderance of the evidence or by clear and convincing evidence. The United States Supreme Court went with the preponderance of the evidence standard, but noted that the trial judge only had to find that there was sufficient evidence for the jury to conclude that the other crime had been committed by a preponderance of the evidence. As the Court put it:

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor

> makes a finding that the Government proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact – here, that the television was stolen – by a preponderance of the evidence.

Although Fed. R. Evid. 404(b) only requires a finding that there is sufficient evidence for a jury to conclude that the Defendant committed the other crime by a preponderance of the evidence, the Tennessee Supreme Court has long held that proof (1) that the other crime was actually committed and (2) committed by the defendant on trial must be clear and convincing. Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854, 858 (1943). In 2003, this "clear and convincing" requirement was added to the actual text of Tenn. R. Evid. 404(b). The text clearly makes it the responsibility of the trial judge to make the determination.

Clear and convincing evidence is that which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. State v. Sexton, 368 S.W.3d 371, 404 (Tenn. 2012). T.P.I. – Civ. 2.41 provides that: "Clear and convincing evidence is a different and higher standard than preponderance of the evidence. To prove an issue by clear and convincing evidence, the party having the burden of proof must show that the proposed conclusion is highly probable and that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence."

The clear and convincing standard cannot be met solely from hearsay evidence, State v. Sexton, 368 S.W.3d 371 (Tenn. 2012) (unless the hearsay satisfies an exception to the hearsay rule), but the uncorroborated testimony of an accomplice may

satisfy the standard. State v. Little, 2012 WL 8718 (Tenn. Crim. App. 2012). Likewise, the mere fact that the witnesses present conflicting testimony as to the other crime will not necessarily prevent a finding of clear and convincing evidence. State v. Woods, 2018 WL 1674210 (Tenn. Crim. App. 2018).

Although the Tennessee Supreme Court held in State v. Holman, 611 S.W.2d 411 (Tenn. 1981) that any crime for which the Defendant has been acquitted can never be used under 404(b) as the proof cannot be clear and convincing, the Court modified this rule in State v. Jarman, 604 S.W.3d 24 (Tenn. 2020) finding that such evidence may be used if it passes the stringent requirements of 404(b) including a showing of clear and convincing evidence. However, the Court noted that the fact that the defendant was acquitted will often weigh heavily against a finding of clear and convincing evidence.

(4) Probative Value vs. Unfair Prejudice

The fourth condition which must be satisfied is that "[t]he court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice."

In addition to a finding of relevance, the trial judge must also weigh the probative value of the evidence against its unfair prejudicial effect. A finding that the other crimes evidence has "probative value" does not end the inquiry. As the Advisory Commission Comments state, "[i]f the danger of unfair prejudice outweighs the probative value, the court should exclude the evidence *even though it bears on a material issue aside from character.*"

In weighing the probative value against the danger of unfair prejudice it is important to recognize that Tennessee has adopted a more stringent test than the federal courts and most of the other States. Federal Rules of Evidence 404(b) and the equivalent rules of most States are deemed to be "rules of inclusion" as they apply the equivalent of Rule 403 and only exclude relevant evidence if the unfair prejudice "substantially outweighs" the probative value. Tennessee is one of the few jurisdictions that excludes the evidence if the unfair prejudice merely "outweighs" the probative value. Because of this significant difference, Tennessee courts have labeled Tenn. R. Evid. 404(b) as a "rule of exclusion." State v. James, 81 S.W.3d 751, 758 (Tenn. 2002). As one court has said, "if the unfair prejudice outweighs the probative value ***or is even dangerously close to tipping the scales***," the judge must exclude it despite its relevance. State v. Gilliland, 22 S.W.3d 266, 272 (Tenn. 2000). See also State v. Jones, 15 S.W.3d 880 (Tenn. Crim. App. 1999) (courts should take restrictive approach).

Against this backdrop, in weighing probative value against unfair prejudice, one Tennessee commentator has suggested consideration of the following factors: (1) the likelihood that the accused actually committed the other crime; (2) the need of the State to use the evidence to prove its case; (3) the strength of the relevance of the evidence on the issue it is intended to prove; (4) whether limiting instructions will reduce the prejudicial impact; and (5) the similarity between the prior crime and the crime on trial. Cohen, Paine, & Sheppeard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (6th ed. 2011). In an earlier edition, Paine et al. stated: "In assessing probative value of other crimes evidence, it is important to recognize that such crimes have varying degrees of probative value depending on the particular facts and circumstances of each offense

and the strength of their tendency to establish a non-propensity purpose for which they are being offered. In addition, the court should look at whether the State legitimately "needs" the evidence to establish its case." Cohen, Paine, & Sheppeard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (4th ed. 2000).

One national commentator has suggested consideration of the following factors: (1) need to prove the contested issue; (2) sufficiency of other evidence on the contested issue; (3) availability of other proof on the contested issue; (4) strength of the proof that the other crime was committed by the defendant; (5) comparison of the prior crime with the charged crime and whether the prior crime is more heinous than the charged crime; (6) time required to prove the other crime; (7) nature of the proof of the other crime; (8) motivation of the offeror; and (9) other factors, such as, the adequacy of limiting instructions. 22 Fed. Prac. & Proc. Evid. § 5250 (1st ed.).

Need to prove contested issue. In assessing the "probative value" of 404(b) evidence, one important factor is the State's legitimate "need" to prove the non-propensity matter for which it is offering the evidence. Where the issue for which the other crime evidence is sought to be introduced is not contested or placed in issue by the evidence …, the probative value of the other evidence becomes slight." Cohen, Paine, & Sheppeard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (4th ed. 2000). For example, if "identity" is not contested or placed in issue in the case, there is no "need" for the State to prove "other crimes" as relevant to establish the defendant's identity as the culprit, i.e admission of other sex crimes to show Bill Cosby's identity would not be "needed." Also, if defendant has not claimed accident or mistake of fact, there is no "need" to present proof of other crimes on these matters. Finally, if the defendant is

charged with a general intent crime, his or her intent is deemed self-evident from his or her actions alone such that there is no "need" to establish the defendant's intent unless the defendant puts his or her intent in issue. Rodriguez, The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice, 48 U. Miami L. Rev. 451, 462 (1993).

Sufficiency of other evidence on contested issue. This factor is closely related to the "need" factor but is somewhat distinguishable. Suppose the State really "needs" to establish a material issue in the case, but it has ample evidence to do so that does not require the introduction of other crimes. Where there is ample other non-prejudicial evidence available to the prosecution to prove the material issue, the probative value of the other evidence becomes slight." Cohen, Paine, & Sheppeard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (4th ed. 2000).

Strength of the relevance of the evidence on the issue it is intended to prove. "In assessing probative value of other crimes evidence, it is important to recognize that such crimes have varying degrees of probative value depending on the particular facts and circumstances of each offense and the strength of their tendency to establish a non-propensity purpose for which they are being offered." Cohen, Paine, & Sheppeard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (4th ed. 2000). This simply asks the question as to how "strong" is the other crimes evidence in establishing the non-propensity purpose.

Similarity. Comparison of the other crime with the crime for which the defendant is on trial relates both to "probative value" and to "prejudicial effect." The more similar

the other crimes, the more likely the jury will consider them for propensity purposes. The more dissimilar the other crimes, the less likely they will be used by the jury for propensity purposes. For example, in a murder case proof of other financial crimes in order to establish a "motive" for the murder involves a dissimilar crime and less potential for unfair prejudice. On the other hand, if the "other crime" is similar to the one on trial or even more egregious, the greater likelihood of unfair prejudice.

On the other hand, the "probative value" of other crimes evidence introduced for some non-propensity purposes is increased by the similarity of the crimes. For instance, "signature crimes" by their definition require a unique modus operandi in order to establish the "identity" of the culprit. Likewise, with regard to admission of other crimes to show "intent" the more similar the crimes the greater the probative value.

Time to prove other crime and nature of proof. As already mentioned, the State must establish that the defendant committed the "other crimes" by clear and convincing evidence. This is relatively easy to do if the defendant has already been convicted of those "other crimes." If not, then the State must produce witnesses to establish the other crimes who must testify in a jury-out hearing and at trial. The result is an marked increase in the time it takes to try the case and more time might be devoted to proving criminal offenses for which the defendant is not on trial than devoted to proving the case that is on trial.

Instructions. See Tennessee Practice Series, Tennessee Pattern Jury Instructions—Criminal No. 42.10. Consider State v. Huse, 2021 WL 1100758 (Tenn. Crim. App. 2021) (we will not consider on appeal any non-propensity reason for admitting the bad act evidence if the trial judge did not instruct the jury on that reason).

By it's plain wording, Tenn. R. Evid. 404(b) only applies when the evidence is being offered "to prove the character of a person in order to show action in conformity with the character trait."

Character of defendant: Tenn. R. Evid. 404(a)(1) (evidence of *pertinent* character trait of the accused offered by the accused or by the prosecution to rebut the same; **or** if defendant introduces evidence of a victim's character trait under 404(a)(2), the State may offer evidence of the same character trait of the defendant)

Character of victim: Tenn. R. Evid. 404(a)(2) (evidence of a *pertinent* character trait of the victim offered by the accused or by the prosecution to rebut the same; **or** evidence of a character trait for peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor).

Tenn. R. Evid. 405 (when character evidence is introduced under 404(a) (1) or (2) the proof is limited to reputation or opinion evidence. Specific instances of conduct cannot be brought out on direct examination but may be inquired about on cross-examination to challenge the opinion of the witness. However, before allowing such inquiry on cross-examination the trial court must (a) upon request hold a jury-out hearing; (b) determine that a reasonable factual basis exists for the inquiry and (c) must determine that the probative value of the specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on the substantive issues.

Tenn. R. Evid. 412 (character of sexual assault victim)

Tenn. R. Evid. 608 (impeachment of witness by other bad act involving dishonesty; this reflects on the witness' character for truthfulness)

Tenn. R. Evid. 609 (impeachment of witness by conviction for crime; this reflects on the witness' character for truthfulness)

Tenn. R. Evid. 613 (allowing witness to explain inconsistent statement; this relates to the witness' state of mind, not the character of the defendant)

Self-defense exception: If a defendant *raises the issue of self-defense*, the defendant may attack the character of the victim with either (1) opinion or reputation evidence pertaining to the victim's propensity for violence or (2) evidence of other specific violent acts committed by the victim.

Opinion or reputation evidence would be admissible under Tenn. R. Evid. 404(a)(2) and 405.

Specific violent acts in self-defense context are not controlled by Tenn. R. Evid. 404(a)(2) and 405.

Evidence of other specific violent acts of the victim which are known to the defendant at the time of the offense are admissible as *substantive* evidence of the defendant's *state of mind*. State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995).

If the defendant was unaware of the other specific violent acts at the time of the offense, evidence of those specific acts is admissible for the limited purpose of *corroborating* a self-defense claim that the victim was the first aggressor. This evidence is being offered solely as corroborative, not substantive evidence such that it is not controlled by Tenn. R. Evid. 404(a)(2) or 405. State v. Joslin, 1997 WL 583071 (Tenn. Crim. App. 1997). However, before witnesses other than the defendant are allowed to

testify as specific instances of the victim's violent behavior to corroborate a claim that the victim was the first aggressor, the following prerequisites are required: (1) self-defense must be raised by the proof and not the words and statements of counsel; (2) the trial judge must determine whether there is a factual basis underlying the allegations; (3) the trial judge must determine whether the probative value is outweighed by the potential for unfair prejudice. State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995).

Mere "threats" made by the victim against the defendant are admissible when the issue of "first aggressor" has been raised. These "threats" are an exception to the hearsay rule showing the victim's state of mind and are relevant to the victim's status as first aggressor. State v. Saylor, 117 S.W.3d 239 (Tenn. 2003).

Child sex crimes exception: As mentioned previously, the Tennessee Supreme Court has rejected any notion that there should be general sex crimes exception to Rule 404(b). However, the Court has recognized a "narrow, special rule" in child sex cases in which the child is unable to pinpoint exactly when the offense was committed. In such cases the prosecution may allege that the sex crimes occurred over a span of time and the State may introduce evidence of all the acts that occurred during the time span listed in the indictment, but then must make an election as to the specific incident for which a conviction is sought. State v. Rickman, 876 S.W.2d 824, 829 (Tenn. 1994). Evidence of sexual offenses alleged to have occurred outside the time span listed in the indictment is governed by Tenn. R. Evid. 404(b) and generally inadmissible. State v. Hoyt, 928 S.W.2d 935, 947 (Tenn. Crim. App. 1995).