

**Tenn. R. Evid. 404(b)**

**Other Crimes, Wrongs or Acts**

# ***Why study 404(b)?***

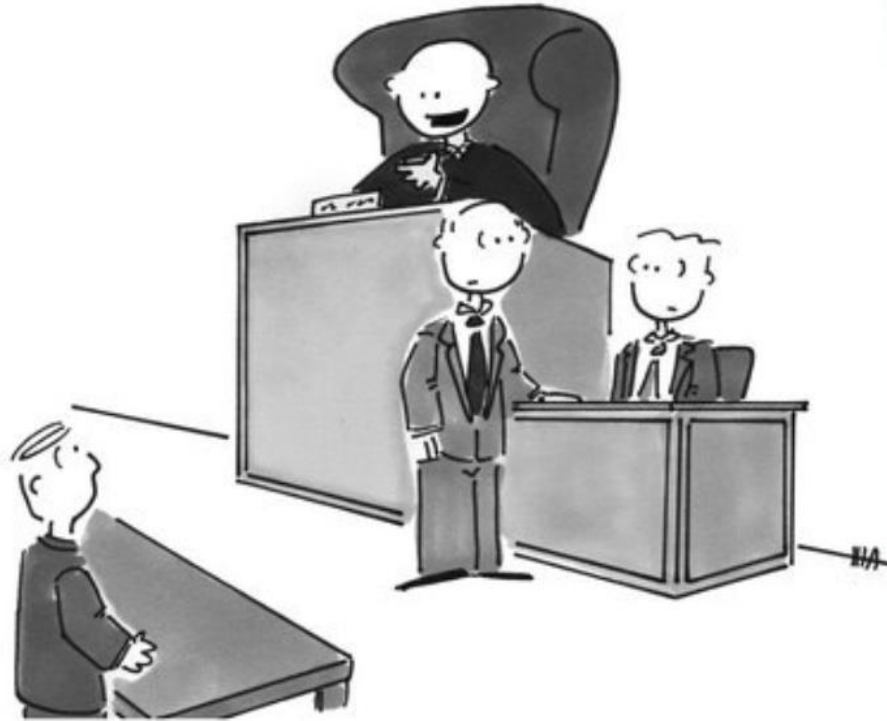
- the single most important issue in contemporary criminal evidence law
- generated more published appellate opinions
- most common ground for appeal
- most frequent basis of reversal

# ***The Current Wording of Rule 404(b)***

(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.

# *The Standard of Review on Appeal*



"Ok, heads, it's sustained. Tails, overruled."



**"THE DEMEANOR OF THIS JUDICIAL PANEL DOESN'T BODE WELL FOR YOUR 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.

State v. DuBose, 953 S.W.2d 649, 653 (Tenn. 1997).

# ***Historical Perspective: Proof of other Crimes in Tennessee***

- Common Law – Mays v. State, 145 Tenn. 118, 238 S.W. 1096 (1921)
- 1990 – Tennessee Rules of Evidence
- 1994 – State v. Rickman, 876 S.W.2d 824 (Tenn. 1994)
- 2001 – State v. Mallard, 40 S.W.3d 473 (Tenn. 2001)
- 2004 – T.C.A. § 40-17-124
- 2014 – T.C.A. § 24-7-125

# ***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).



# ***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.

See State v. Clark, 452 S.W.3d 268 (Tenn. 2014)

# ***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)

# ***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***.....
- State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002)
- Tenn. Code Ann. § 24-7-125 (effective July 1, 2014)
- Recall State v. Mallard, 40 S.W.3d 473 (Tenn. 2001)
- State v. Lowe, 552 S.W.3d 842 (Tenn. 2018)
- State v. Buckingham, 2018 WL 4003572 (Tenn. Crim. App. 2018)

# ***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).
- 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).
- Preliminary question – Tenn. R. Evid. 104(a).
- 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).

# ***Requirements for Admission***

## ***(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.”**

# ***Requirements for Admission***

## ***(2) Material Issue other than Propensity***

1. Same Transaction
2. Signature Crimes
3. Continuing Plan or Conspiracy
4. Motive
5. Intent
6. Guilty Knowledge
7. Contextual Background
8. Opportunity or Capacity
9. Consciousness of Guilt
10. Rebut Claim of Entrapment
11. Rebut Duress

# Common Plan or Scheme

- Same Transaction, Signature Crimes, Continuing Plan or Conspiracy

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

- 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

- 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).

# 3. Continuing Plan or Conspiracy

- This category “contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses.” State v. Hallock, 875 S.W.2d 285, 290 (Tenn. Crim. App. 1993).

# 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).
- 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). 76 (Tenn. 1975).

# 5. Intent



*“Don’t spread it around, but on the really tough ones,  
I just go with ‘eenie, meenie, minie, moe.’”*

## 5. Intent, cont'd.

- 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.
- United States v. Johnson, 27 Fed.3d 1186, 1191-92 (6<sup>th</sup> 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).

## 5. Intent, cont'd.

- I submit 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).
- State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) (intent is not a material issue in any sex offense).
- With regard to “specific intent” crimes, I believe 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.
- 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).

## 6. Rebuttal of a Claim of Accident or Mistake

- Proof 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).
- ***Important:*** How does the defendant put one of these matters in issue?
- State v. Ruane, 912 S.W.2d 766 (Tenn. Crim. App. 1995) (self-defense cannot be raised merely from arguments of counsel).

# 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.



# 8. Contextual Background

- 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).

# ***Requirements for Admission***

## ***(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.”**
- Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854, 858 (1943).
- 2003 – Tennessee Rules of Evidence
- The clear and convincing standard cannot be met solely from hearsay evidence. State v. Sexton, 368 S.W.3d 371 (Tenn. 2012).
- Uncorroborated testimony of an accomplice may satisfy the standard. State v. Little, 2012 WL 8718 (Tenn. Crim. App. 2012).
- State v. Jarman, 2020 WL 3638015 (Tenn. 2020) – “Aquitted-act evidence”

# ***Requirements for Admission***

## ***(4) Probative Value v. 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.”
- State v. James, 81 S.W.3d 751, 758 (Tenn. 2002) – Rule of Exclusion
- “[I]f 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).

# ***Requirements for Admission***

## ***(4) Probative Value v. Unfair Prejudice, cont'd.***

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, & Sheppard, TENNESSEE LAW OF EVIDENCE, 4.04(8)(e) (6<sup>th</sup> ed. 2011).

# ***Requirements for Admission***

## ***(4) Probative Value v. Unfair Prejudice, cont'd.***

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 (1<sup>st</sup> ed.).



*"And don't go whining to some higher court."*