

Wayne County Criminal Advocacy Program

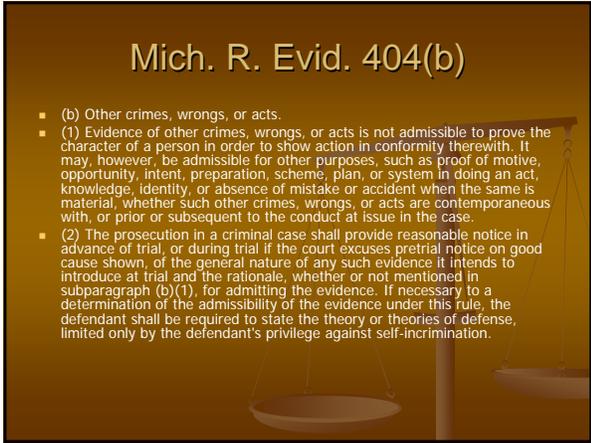
October 10, 2008 meeting
Detroit Michigan



BAD ACTS:

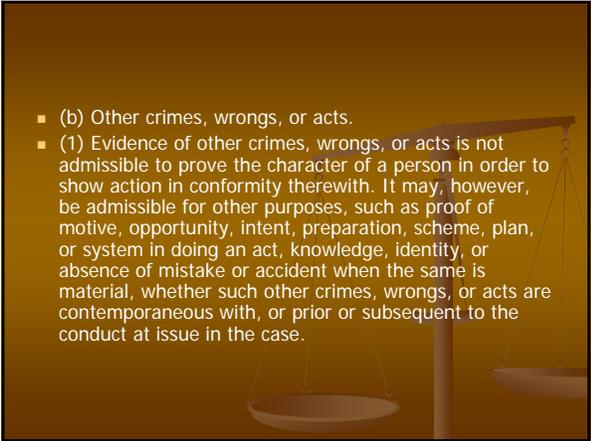
The Recent Interpretation of Rule 404(b) by the Michigan Courts

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Mich. R. Evid. 404(b)

- (b) Other crimes, wrongs, or acts.
- (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
- (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.



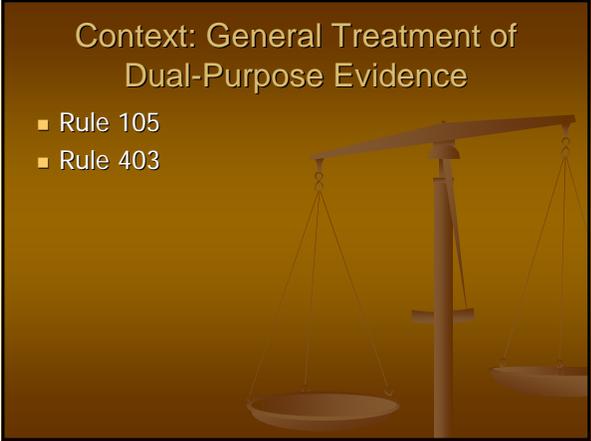
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Why is the rule problematic?



- Context
- Powerful evidence; potential for prejudice
- Frequently misunderstood and abused by advocates
- Imprecision by advocates
- Discordant appellate decisions

Context: General Treatment of Dual-Purpose Evidence



- Rule 105
- Rule 403

Rule 105: Limited Admissibility

- When evidence **which is admissible** as to one party or **for one purpose but not admissible** as to another party or **for another purpose** is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Safety valve: Rule 403

- Although relevant, evidence may be excluded if its probative value is **substantially outweighed** by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence

Analytical steps

- a. The evidence must be offered for a proper purpose, that is, other than proving a trait of character
- b. The proper purpose must be relevant (under Rule 104(b))
- c. The court must balance probative value against unfair prejudice (Rule 403)
- d. The court should limit the use of the evidence to its proper scope (Rule 105)
- *People v. VanderVliet*, 444 Mich. 52, 508 N.W.2d 114 (1993)

General purposes:

- Proof of the other crimes may be offered to prove that the allegedly criminal act took place (*actus reus*)
- The evidence may be tendered to show that the accused was the actor (identity)
- Other crimes evidence may be introduced to show that the accused had the requisite mental state (intent, absence of mistake, etc.)
- -- See *People v. Engelman*, 434 Mich. 204, 453 N.W.2d 646 (1990)

Rule 104(b)

- "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."
- Evidence must be sufficient to convince rational fact finder that the act occurred

Application of Rule 403 (the safety valve)

- Must assess both sides of the scale: probative value and unfair prejudice
- There is a judicial thumb on the scale
- Bad act evidence ALWAYS tends to prove bad character
- Timing of the balancing process can be critical

Probative Value

- Court must consider the legitimate strength of the evidence in light of its proper purpose.
- Factors:
 - Is this the only way the proponent can prove the proposition?
 - Is the matter genuinely in issue? (what stage of the trial is the evidence offered?)
 - How strong is the evidence that the prior act actually occurred?
 - Does the evidence tend to prove directly an essential element of a claim of defense, or merely an intermediate fact?
 - If the proper purpose is identity or intent, how similar is the prior act to the charged act?
 - How close in time (or remote) is the prior act to the charged crime?

What constitutes “prejudice”?

- Unfair prejudice does not mean simply damaging
- “Rather, the concept of ‘unfair prejudice’ embraces two distinct notions. First, when the evidence may tend to prove more than one proposition and thus could be considered for both a proper and an improper purpose, unfair prejudice can result when the improper purpose overwhelms or substantially overshadows any legitimate basis for receiving the evidence. . . . Second, unfair prejudice can result when evidence that is only marginally probative tends to be given preemptive weight by the jury substantially out of proportion to its logical force.” – *Dresser v. Cradle of Hope Adoption Center, Inc.*, 421 F. Supp. 2d 1024, 1030 (E.D. Mich. 2006).

Illustrative and troublesome cases

- *People v. Yost*, 278 Mich. App. 341, 749 N.W.2d 753 (2008)
- *People v. Watkins*, 277 Mich. App. 358, 745 N.W.2d 149 (2008)
- *People v. Dobek*, 274 Mich. 58, 732 N.W.2d 546 (2007)
- *Wlosinski v. Cohn*, 269 Mich. App. 303, 713 N.W.2d 16 (2005)

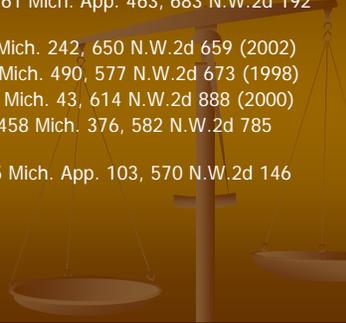
More cases

- *People v. Knox*, 469 Mich. 502, 674 N.W.2d 366 (2004)
- *People v. McGhee*, 268 Mich. App. 600, 709 N.W.2d 595 (2005)
- *People v. Johnigan*, 265 Mich. App. 463, 696 N.W.2d 724 (2005)
- *People v. Drohan*, 264 Mich. App. 77, 689 N.W.2d 750 (2004)



More cases

- *People v. Houston*, 261 Mich. App. 463, 683 N.W.2d 192 (2004)
- *People v. Hine*, 467 Mich. 242, 650 N.W.2d 659 (2002)
- *People v. Starr*, 457 Mich. 490, 577 N.W.2d 673 (1998)
- *People v. Sabin*, 463 Mich. 43, 614 N.W.2d 888 (2000)
- *People v. Crawford*, 458 Mich. 376, 582 N.W.2d 785 (1998)
- *People v. Hoffman*, 225 Mich. App. 103, 570 N.W.2d 146 (1997)



And Some Chestnuts

- *People v. Engelman*, 434 Mich. 204, 453 N.W.2d 656 (1990)
- *People v. Lee*, 434 Mich. 59, 450 N.W.2d 883 (1990)
- *People v. Major*, 407 Mich. 394, 285 N.W.2d 660 (1979)
- *People v. Oliphant*, 399 Mich. 472, 250 N.W.2d 443 (1976)