Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)

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The presumption of innocence is a fundamental characteristic of American criminal justice. Admitting evidence of previous crimes, wrongs, or acts committed by a defendant taints that presumption because it shows the defendant to be a "bad person." Jurors no longer view the defendant in a neutral way. They assume that a defendant who has been in trouble with the law before is more likely to be guilty now.

To ensure that a jury convicts a defendant only on evidence proving the commission of the crime charged, Washington Rule of Evidence 404(b) (ER 404(b)) limits the admission of evidence of other misconduct. It reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

1. Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

Although not expressly articulated in the Constitution, the presumption of innocence is a basic component of a fair trial. See, e.g., Taylor v. Kentucky, 436 U.S. 478 (1978); E. Cleary, McCormick on Evidence § 342, at 967–68 (3d ed. 1984) [hereinafter cited as McCormick].


3. Studies by the London School of Economics and the Chicago Jury Project show that jurors take the beyond a reasonable doubt standard seriously only until they find out the defendant is a bad person. These studies conclude that the presumption of innocence only operates for defendants without prior criminal records. See generally H. Kalven & H. Zeisel, The American Jury (1966).

4. ER 404 is in accord with previous Washington case law. See Adoption of Rules of Evidence, 91 Wn. 2d 1117, 1133 (1979); e.g., State v. Saltarelli, 98 Wn. 2d 358, 362, 655 P.2d 697, 699 (1982). The Washington Supreme Court has stated the purpose for prohibiting evidence of other misconduct is that a defendant must be tried for the offenses charged in the indictment or information, and thus introducing evidence of unrelated crimes is "grossly and erroneously prejudicial." State v. Goebel, 36 Wn. 2d 367, 368, 218 P.2d 300, 301 (1950).

The phrase "other crimes, wrongs, or acts," properly restated, means "acts, other than those charged in the indictment or information, including crimes and civil wrongs." The acts need not occur prior to the crime charged. State v. Laureano, 101 Wn. 2d 745, 764, 682 P.2d 889, 901 (1984). Accordingly, this Comment will use the term "other misconduct" to denote "other crimes, wrongs, or acts."

5. Wash. R. Evd. 494(b). The admissible purposes are not all on the same "plane." Some, such as motive and plan, function as intermediate inferences, thus serving as indirect proof of the elements of the charged crime. Others, such as intent, relate to the ultimate elements, thus serving as direct proof. See Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 1025–26
Application of this rule has resulted in much litigation and confusion.\(^6\)

In Washington, the introduction of evidence of other misconduct to show intent or absence of mistake or accident has proven particularly troublesome.\(^7\) Washington courts have made no attempt to delineate the differences between proof of intent and proof of absence of mistake or accident.\(^8\) Nor have they satisfactorily distinguished either of the proofs from a mere showing of propensity to commit crime. By failing to make these distinctions, the courts undermine the letter and spirit of ER 404(b).

The lack of clear standards to guide application of the intent and absence of mistake or accident aspects of ER 404(b) leaves trial and appellate courts on their own in making and reviewing admission determinations. Rather than struggle with the complexities of ER 404(b), these courts often mechanically admit other misconduct evidence whenever the state offers it with the announced intention of proving intent or absence of mistake or accident.\(^9\) This "magic password" approach results in a curious mix of contradictory holdings which do no more than pay lip service to the plain language of ER 404(b), while ignoring the policies underlying the rule.\(^10\)

Careful analysis of ER 404(b) can provide both attorneys and judges guidance in determining when evidence of misconduct other than the crime charged may be properly admitted to show intent or absence of mistake or accident.\(^11\) The logical theory underlying proper admission for both pur-

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\(^6\) Proof of confusion over ER 404(b) is apparent from the sheer number of cases on the matter. The various forms of ER 404(b) around the country have generated more reported decisions than any other rule. 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239, at 427 (1978). See also J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[08] (1985). Yet despite the recurrence of this issue, determining when other misconduct may be admitted is "so perplexing that the cases . . . often cannot be reconciled." Id. ¶ 404[08], at 404–53.

\(^7\) See generally 5 K. Tegland, Washington Practice § 119 (2d ed. 1982) and list of cited cases. This Comment will focus on the law in Washington, although the concepts and problems are similar in state and federal courts throughout the United States. See J. Weinstein & M. Berger, supra note 6, ¶ 404[12], at 404–94.

\(^8\) See infra note 63 and accompanying text.

\(^9\) When the state offers evidence of other misconduct to prove intent or absence of mistake or accident, many Washington courts seem to apply the following reasoning process: the other misconduct evidence has been offered to show intent or absence of mistake or accident; ER 404(b) allows evidence of other misconduct to be admitted to show intent or absence of mistake or accident; therefore the evidence is admissible. See cases cited infra note 10.


\(^11\) This Comment addresses only offers of other misconduct evidence by the state against a defendant in criminal cases. While ER 404(b) is not limited to criminal cases, most proof problems regarding intent arise in the criminal context. K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 136, 151 (3d ed. 1982). For examples of the application of ER 404(b) in non-criminal areas, see Calbom v. Knudtzon, 65 Wn. 2d 157, 168, 396 P.2d 148, 154 (1964) (action alleging
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poses must be explored and necessary distinctions between the two types of proof highlighted. General guidelines reflecting the true purposes and proper application of ER 404(b) with respect to intent and absence of mistake or accident may then be formulated.12

I. ER 404(b): AN OVERVIEW

In general, a court will admit all relevant evidence unless a specific rule of policy forbids its use.13 Evidence that increases or decreases the likelihood of the existence of an offered fact is deemed relevant.14 Human experience teaches that a person who has committed a bad act in the past may be more likely to commit another bad act. Accordingly, evidence of other misconduct is admissible under the normal standards of relevancy unless it has been specifically forbidden.

ER 404(b) provides one such specific ban on relevant evidence. The rule prohibits the use of evidence of other misconduct where it enables the jury to make a subjective determination of the defendant’s character in order to infer an element of the present crime.15


Other misconduct evidence may also be admitted under Washington Rule of Evidence 609 to impeach the credibility of defendants who take the stand in their own defense. See Wash. R. Evid. 609. The application of ER 404(b) is potentially much broader in terms of the variety of material that may be offered because the only other misconduct evidence that may be introduced under Washington Rule of Evidence 609 is recent convictions for crimes involving dishonesty or crimes carrying a prison sentence of over one year. Id.

12. Some commentators have simply thrown up their hands claiming that it is impossible to verbalize a formula to reconcile the cases which can be applied with any precision. J. WeINsEIN & M. BERGER, supra note 6, ¶ 404[08], at 404–53.

If precision is the goal, Weinstein and Berger are correct. However, by encapsulating the purposes of ER 404(b) in general guidelines, it is possible to take a large step toward uniformity and consistency by requiring that judges make their decisions using similar reasoning processes.

13. “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.” Wash. R. Evid. 402.

14. Evidence is relevant if it has the tendency to make the existence of the fact to be proved more probable or less probable than it would be without the evidence. Accordingly, the basic definition of relevance in ER 401 requires only a minimal relationship between the item of evidence and the proposition that it is offered to prove. R. LeMPeRT & S. SaLTZBUrg, A Modern Approach To Evidence 140–50 (2d ed. 1982).

15. ER 404(b) requires that the evidence of other misconduct must be relevant on some theory other than the general proposition that one who commits a crime is likely to commit another.

An example of the use of the prohibited theory is as follows. If a man were charged with shoplifting, evidence that he had shoplifted on other occasions would establish that he possessed a propensity for theft. From this supposed propensity for theft, a further inference could be drawn that the man would act in conformity with this propensity and steal on other occasions, such as at the time of the charged theft. Roth, Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach, 9 Pepperdine L. Rev. 297, 300 n.9 (1982). ER 404(b) does not exclude evidence that tends to show the guilt of another
The ER 404(b) prohibition arises because the use of other misconduct to prove general character implicates two unacceptable inferences. First, the state offers evidence of the defendant's prior general misconduct, or evidence of the defendant's tendency to commit a particular type of misconduct, as proof from which the jury can infer the defendant's criminal character. The rule prohibits this inference because in using it, the state forces the jury to focus on the defendant's character. The jury is then tempted to decide the case on the basis of defendant's general propensity for criminality rather than the merits of the case. Such a shift in focus often leads to a presumption of guilt rather than innocence.

From this "proof" of criminal character, the state then asks the jury to infer the defendant's conduct or mental state on a specific occasion. The rule forbids this inference because, in making the required inference, the offense on the basis of irrelevancy. Indeed, such evidence is highly relevant to prove bad character. The admission of such evidence is limited for policy reasons due to its highly prejudicial impact:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice 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.


16. The jury tends to believe the defendant is guilty of the charge merely because the defendant's previous readiness to do evil shows that he or she is a person likely to commit a crime. See IA J. Wigmore, Evidence § 582 (R. Tillers rev. 1983); State v. Burton, 101 Wn. 2d 1, 9, 676 P.2d 975, 981 (1984) (evidence of other misconduct by its very nature is highly prejudicial because of its inherent implication that "once a criminal, always a criminal").

The natural tendency of the human mind is to form a lasting impression of a person on the basis of fragmentary data. E. Imwinkelried, Uncharged Misconduct Evidence § 2:18, at 49 (1984). Ironically, studies show very little consistency between a person's subjective disposition and conduct at a specific time. Lawson, Credibility and Character: A Different Look at an Interminable Problem, 50 Notre Dame Law. 758, 777–79 (1975).

17. Juries are tempted to convict, not because they find defendants guilty of the present charge, but because they feel defendants have escaped punishment for the other crimes. Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 763 (1961).

18. The defendant is viewed as a "bad person;" thus jurors assume the defendant must be guilty of the crime charged unless proven otherwise:

Federal courts have consistently recognized that prior conviction evidence is inherently prejudicial. Statistical studies have shown that even with limiting instructions, a jury is more likely to convict a defendant with a criminal record. It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. . . . The danger of prior conviction evidence is its tendency to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Jones, 101 Wn. 2d 113, 120, 677 P.2d 131, 136 (1984) (citations omitted).

Further, defendants will be forced to defend every alleged misdoing in their lives, even though they may be unprepared to demonstrate that the attacking evidence is fabricated.
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jury may overestimate the value of such evidence.\textsuperscript{19} Hence, the case may be
decided on an improper basis—the defendant’s character—rather than the
proper basis—the merits of the case. In order to protect the accused from
prejudice, courts should not admit evidence when its relevancy depends on
these two inferences.\textsuperscript{20}

Although ER 404(b) disallows evidence of other misconduct when its
relevancy depends on character inferences, the rule does indicate the most
common purposes for which evidence of other misconduct can be intro-
duced.\textsuperscript{21} Such purposes, including motive, plan, identity, opportunity,
preparation, knowledge, intent or absence of mistake or accident, are based
upon theories of relevance that do not rely upon the prohibited inferences.\textsuperscript{22}

The Washington Supreme Court has developed specific standards for
guiding the application of many of the frequently employed purposes for
admitting evidence under ER 404(b).\textsuperscript{23} Intent and absence of mistake or
accident, however, still lack clear guidelines for their use. The developed
standards can be circumvented, therefore, if courts merely cite several
purposes, including the two that have no specified guidelines, with no
explanation of the basis of the relevance of the evidence. Intent and absence

that a man once convicted of a particular crime might be prone to commit a similar offense).

\textsuperscript{20} The inference of a criminal disposition may not be used to establish any link in the chain of
logic connecting the uncharged offense with the material fact [in this case, the intent to steal]. If no
theory of relevancy can be established without this pitfall, the evidence of the uncharged offense is
simply inadmissible.

omitted).

\textsuperscript{21} ER 404(b) is not a rule of exclusion with certain listed exceptions. Rather, the rule stands for the
general proposition that evidence of other misconduct is never admissible when based on a subjective
character inference, but is admissible when based on any other relevance theory. The result would be the
same if the courts simply applied ER 404(a), although the presence of ER 404(b) certainly alerts the
readers to the important distinction. J. \textsc{Weinstei}n & M. \textsc{Berger}, \textit{supra} note 6, § 404[08], at 404–53.

\textsuperscript{22} The plain language employed by both the federal and Washington rules ("such as") makes it
clear that the listed categories are only for purposes of illustration and are not intended to be absolute.
State v. Goebel, 40 Wn. 2d 18, 21, 240 P.2d 251, 253 (1952); \textsc{McCormick}, \textit{supra} note 1, § 190, at 558.
Additionally, during its debate on the federal rule, the House Judiciary Committee specifically rejected
an amendment that would have modified the rule to limit admissibility to the stated categories. \textsc{White},
\textit{Evidence of Other Crimes, Wrongs, or Acts Under Federal Rule of Evidence 404(b): Some Unanswered
Questions}, 1 AM. \textsc{TriAL} \textsc{Law} \textsc{A. Crim. Rep.} 13, 14 (1978).

Nevertheless, some jurisdictions have interpreted similar evidence rule language to create an
exclusionary rule, barring other misconduct evidence not offered to prove one of the listed purposes.
For a discussion on the status of the current inclusionary versus exclusionary debate, see generally
\textsc{Reed}, \textit{Part Three: Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of

251, 253–54 (1952) (plan).
of mistake or accident are consistently included in such laundry lists.\textsuperscript{24} The reviewing courts are left to determine the actual purpose for which the evidence was admitted.

Because evidence of other misconduct can be admitted under ER 404(b) for more than one purpose, the Washington Supreme Court has held that courts must identify the specific purpose or purposes for which the evidence is to be admitted whenever a timely objection is made to the introduction of evidence of other misconduct under ER 404(b).\textsuperscript{25} It is not enough for courts to simply list several of the recognized purposes and assume that at least one will apply.\textsuperscript{26} Such hit-or-miss lists emasculate the rule. Unless the trial court identifies the specific purpose, a reviewing court cannot determine whether ER 404(b) has been properly applied.\textsuperscript{27} Moreover, judges who carefully record their reasons for admitting evidence of other misconduct are less likely to err because the process of weighing the evidence and stating specific reasons for their decision ensures a thoughtful consideration of the issue.\textsuperscript{28}

Once the court identifies the specific purpose for which the evidence is relevant, under Washington case law it must then state on the record the reason underlying the relevancy.\textsuperscript{29} It must, therefore, identify why a

\begin{itemize}
\item \textsuperscript{24} See, e.g., State v. Fitzgerald, 39 Wn. App. 652, 662, 694 P.2d 1117, 1124 (1985) (trial court admitted other misconduct evidence to prove motive, intent, preparation, plan, knowledge, identity, opportunity, or absence of mistake); State v. Hieb, 39 Wn. App 273, 282, 693 P.2d 145, 152 (1984) (trial court admitted other misconduct for the purpose of proving motive, common scheme or plan, identity, and intent, thereby forcing the appellate court to provide the missing rationale).
\item The prevailing view in other jurisdictions is that the judge need not make express findings on the record. E. IMWINKELRIED, supra note 16, at § 9:50. Nevertheless, in order to ensure that evidence is not admitted solely on the basis of relevance generated by defendant’s propensity to commit crimes, several states require the prosecutor to provide notice of their intent to introduce other misconduct as evidence. See, e.g., FLA. STAT. § 90.404(2)(b1) (1979); MNN. STAT. § 7.02 (1979). See generally C. WRIGHT & K. GRAHAM, supra note 6, § 5249, at 525; E. IMWINKELRIED, supra note 16, at § 9:27. Washington does not procedurally require the prosecutor to specify the applicable purpose. However, since the trial court must state the appropriate purpose, as well as the reason why the evidence is relevant, on the record, the prosecutor should provide the court with such information to ensure that the record is complete whenever an objection to admission is made.
\item A pre-trial notice requirement is extremely desirable for Washington. This procedure forces prosecutors to think through their theory of independent relevance before offering the evidence at trial and leads to more informed decision-making by the trial judge.
\item \textsuperscript{26} Fitzgerald, 39 Wn. App. at 663, 694 P.2d at 1124 (a general statement including all permissible purposes without explanation is improper).
\item \textsuperscript{27} Jackson, 102 Wn. 2d at 694, 689 P.2d at 79. The laundry lists force courts to provide the missing rationale based on the textual record.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. (trial judges err when they do not enunciate the reasons for their decision). See also Saltarelli, 98 Wn. 2d at 362–63, 655 P 2d at 699.
\end{itemize}
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particular "magic password" applies to the instant case. Unless the evidence is found to be relevant without relying on the defendant's propensity to commit crimes, it cannot be admitted regardless of its probative value.\textsuperscript{30} Once again, it is essential that judges set out their reasoning to ensure thoughtful consideration and to provide a record for effective appellate review.\textsuperscript{31} Despite these requirements, lower courts persist in including the two vaguely articulated purposes, which reviewing courts, absent guidelines, are hardpressed to challenge.

Without discernible guidelines for admitting evidence of other misconduct to show intent or absence of mistake or accident, the terms "intent" and "absence of mistake or accident" may continue to be used solely as labels to justify predetermined admission decisions.\textsuperscript{32} Individual judges will remain free to restrict or expand ER 404(b) using a simple labeling process.\textsuperscript{33} To maintain the integrity of the rule, purposes such as intent and absence of mistake or accident, which are frequently employed and often abused, must have cohesive standards which guide their proper and fair application.\textsuperscript{34}

II. GUIDELINES FOR ADMITTING EVIDENCE OF OTHER MISCONDUCT TO SHOW INTENT OR ABSENCE OF MISTAKE OR ACCIDENT UNDER ER 404(b)

In \textit{State v. Robtoy},\textsuperscript{35} the Washington Supreme Court set forth general guidelines for dealing with the admissibility of evidence of misconduct other than the crime charged. These guidelines were designed to prevent

\textsuperscript{30} Saltarelli, 98 Wn. 2d at 366–67, 655 P.2d at 701 (regardless of the similarity between the other misconduct and the charged crime, such evidence is not admissible if its relevance is based solely on propensity).

\textsuperscript{31} Jackson, 102 Wn. 2d at 694, 689 P.2d at 79.


\textsuperscript{33} See \textit{State v. Maesse}, 29 Wn. App. 642, 629 P.2d 1349 (1981), for an example of this type of circumvention. There, the identity of the arsonist was in issue because the defendant apparently denied performing the act. By admitting evidence of other fires started by the defendant to prove state of mind, the court avoided the strong requirements of distinctiveness and similarity necessary for the admission of evidence of other misconduct to prove identity. \textit{See infra} notes 95–100 and accompanying text. Accordingly, evidence of other misconduct reached the jury, which undoubtedly used it to find defendant started the fire. A careful analysis of the intent exception might have led to a ruling of inadmissibility. \textit{See id.; see also} \textit{State v. Hieb}, 39 Wn. App. 273, 282–84, 693 P.2d 145, 152–53 (1984) (evidence found not admissible to prove identity admitted to show intent).

\textsuperscript{34} Without standards, the legitimate theory of admissibility can be misconstrued, as in \textit{Maesse}, 29 Wn. App. at 648–49, 629 P.2d at 1352–53, where the trial court labeled a tenuous modus operandi situation as one involving intent. \textit{Cf.} \textit{State v. Kidd}, 36 Wn. App. 503, 505–07, 674 P.2d 674, 676–77 (1983). In \textit{Kidd}, the appellate court properly rejected the intent argument, holding that other misconduct was not admissible to prove identity because the prosecution made no showing of "marked similarities." Thus, the court did not allow the evidence in the back door by admitting it to prove intent.

\textsuperscript{35} 98 Wn. 2d 30, 653 P.2d 284 (1982).
prejudice and lessen the chance of overestimation of the evidence. According to Robtoy, before evidence of other misconduct can be admitted, it must be shown to be “logically relevant.” To be logically relevant, the evidence must be “relevant and necessary to prove an essential ingredient of the crime charged.” Two elements emerge from this test: (1) the evidence must be necessary to prove a “material issue,” and (2) the evidence must be relevant without relying on the forbidden propensity inferences, as required by ER 404(b).

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36. The guidelines set forth in the Robtoy opinion merely reiterate the showing required by the rules of evidence concerning relevancy. See Wash. R. Evid. 401-411.

37. The concept of logical relevance underlies every discussion of the admissibility of circumstantial evidence. In order for Fact A to be admitted in evidence for the purpose of proving the existence of Fact B, a logical relation must exist between Fact A and Fact B. In contrast, “legal relevance” is the concept of balancing the probative value of the evidence against the prejudice it will cause. Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Vand. L. Rev. 385 (1952).

38. Robtoy, 98 Wn. 2d at 42, 653 P.2d at 292 (quoting State v. Goebel, 40 Wn. 2d 18, 21, 240 P.2d 251, 253 (1952)).

39. Robtoy, 98 Wn. 2d at 42, 653 P.2d at 292.

40. In addition to satisfying the test for logical relevance, in order for evidence of other misconduct to be admissible, it must also meet the requirements of legal relevance: its probative value must be shown to outweigh its potential for prejudice. Id. See generally Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 Notre Dame L. Rev. 556 (1984). See also Wash. R. Evid. 403. This balancing process must be performed on the record. State v. Tharp, 96 Wn. 2d 591, 597, 637 P.2d 961, 964 (1981); State v. Jackson, 102 Wn. 2d 689, 693, 689 P.2d 76, 78 (1984).

The admission and exclusion of evidence found to be logically relevant is within the sound discretion of the trial court. The court’s discretion will not be reversed absent manifest abuse. State v. Woolworth, 30 Wn. App. 901, 906-07, 639 P.2d 216, 219 (1981). Such abuse “occurs only if no reasonable person would take the view adopted by the trial court.” Id. at 906, 639 P.2d at 219 (citing State v. Huelett, 92 Wn. 2d 967, 969, 603 P.2d 1258, 1259 (1979)).

Because of this extremely deferential standard of review, abuse of discretion is rarely, but occasionally, found. See Robtoy, 98 Wn. 2d at 44, 653 P.2d at 293; State v. Descoteaux, 94 Wn. 2d 31, 39, 614 P.2d 179, 184 (1980). This Comment focuses solely on the logical relevance aspect of admitting evidence of other misconduct. Unless the evidence is found to be logically relevant, “balancing probativeness against potential prejudice is an empty gesture.” State v. Saltarelli, 98 Wn. 2d 358, 366, 655 P.2d 697, 701 (1982). Under ER 404(b), the trial judge’s discretion does not arise unless the evidence is logically relevant apart from relevance generated by defendant’s propensity to commit crimes. C. Wright & K. Graham, supra note 6, § 5249, at 540. The extent and scrutiny of review of a logical relevancy determination is the same as for any legal ruling. Id.

Where the reviewing court finds an erroneous admission of other misconduct evidence, the mistake is not of constitutional magnitude. Robtoy, 98 Wn. 2d at 44, 653 P.2d at 293. Such error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Id. Interestingly, erroneous admission of the same evidence under ER 609(a)(1) (impeachment by evidence of past convictions) does constitute an error of constitutional magnitude. State v. Jones, 101 Wn. 2d 113, 124-25, 677 P.2d 131, 138-39 (1984). The court distinguishes the two situations by explaining, “unlike ER 404(b), ER 609(a)(1) has a direct effect on a defendant’s constitutional right to testify in his own defense.” Id. at 124, 677 P.2d at 138.
A. Materiality Under ER 404(b)

To sustain a finding of logical relevance, the state must first show that evidence of defendant's other misconduct is necessary to prove a material issue before the jury. 41

1. Intent

Intent is an element in almost every crime; 42 thus it has been argued that any evidence proving intent is material. 43 Under ER 404(b), however, Washington admits evidence of other misconduct to prove intent only where it is more than a "formal issue." 44

41. Robtoy, 98 Wn. 2d at 42, 653 P.2d at 292.

Use of the term "material" has fallen into disfavor in jurisdictions around the country because it lacks a useful definition. C. Wright & K. Graham, supra note 6, § 5164, at 39. Accordingly, the drafters of Washington Rule of Evidence 401 (ER 401) abandoned the traditional terminology, substituting "fact that is of consequence to the determination of the action" in its place. Wash. R. Evid. 401. Additionally, the drafters expressly stated that ER 401 does not require an issue to be in dispute in order to be relevant. Fed. R. Evid. 401 advisory committee note, 51 F.R.D. 315, 343 (1971). Evidence admitted under ER 404(b), however, must also meet the additional requirement of being necessary to prove an element of the charge or to rebut a defense before it is deemed logically relevant.

42. A showing of general or specific intent is required for nearly every crime. See generally W. LA FAIVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, at 201 (1972). General intent is that state of mind which negates accident, inadvertence, or mistake. By comparison, specific intent is the purpose with which the defendant acted to use a particular means to obtain the desired result. Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions, 36 TENN. L. REV. 515, 518 (1969). This Comment makes no attempt to delineate the differences in the two types of intents; rather, it considers general principles applicable to both types.

43. See C. Wright & K. Graham, supra note 6, § 5242.

44. State v. Smith, 103 Wash. 267, 268, 174 P. 9, 9 (1918) (where the act charged against the defendant itself characterizes the offense, the guilty intent is proven by proving the act). See also Saltarelli, 98 Wn. 2d at 366, 655 P.2d at 701 (citing People v. Kelley, 66 Cal. 2d 232, 424 P.2d 947, 57 Cal. Rptr. 363 (1967) (in some cases, if the act is proven, no real question as to intent arises, thus the intent principle has no necessary application); II J. Wigmore, EVIDENCE § 357 (Chadbourn rev. 1979).

The court's discussion in Saltarelli, 98 Wn. 2d at 366, 655 P.2d at 701, arose in the context of a general intent case. Nevertheless, as evidenced by the holding in Smith and the court's approval of the holding in Kelley, both specific intent cases, the reasoning is equally applicable in all cases.

Most jurisdictions are in accord with Washington on this issue. See, e.g., United States v. Miller, 508 F.2d 444, 450 (7th Cir. 1974); People v. Golochowicz, 413 Mich. 298, 319 N.W.2d 518, 524 (1982) (such evidentiary matters must be in issue, not in the sense that criminal intent is nearly always in issue to some greater or lesser degree, but in the sense that they are genuinely controverted matters); Judicial Council Committee's Note, Wis. STAT. § 904.04 (1975) (evidence of other misconduct should be excluded if the issue upon which it is offered is not substantially disputed). See generally C. Wright & K. Graham, supra note 6, § 5242; E. Imwinkelried, supra note 16, § 8:10.

This is the prevailing view in England as well. Thompson v. The King, 1918 A.C. 221, 232 (before an issue can be said to be raised, it must have been raised in substance; the theory that a plea of not guilty places everything in issue is not enough for this purpose).

A minority of jurisdictions, emphasizing that ER 401 does not require an issue to be in dispute in order to be relevant, hold evidence of other misconduct to be material whenever intent is an element of the charged crime. C. Wright & K. Graham, supra note 6, § 5242.
When the mere doing of the act demonstrates criminal intent, evidence of other misconduct offered to prove general or specific intent is immaterial. For example, if a defendant is charged with armed robbery, and if the act is proven, it follows that the actor intended the consequences of the act. In such a case, evidence of other misconduct cannot be admitted unless the defendant specifically raises the issue of intent. Defendants who deny participation in the act do not raise the issue of intent, thereby exposing themselves to evidence of other misconduct, where the performance of the act would indisputably show criminal intent.

In other cases, where performance of the act itself does not conclusively demonstrate the accompanying intent, intent remains a material issue even if the defendant denies the act. For example, a woman may be arrested while walking down the street. If she intended to walk to a bus stop, she has committed no crime. Yet if she intended to solicit for prostitution, a crime has been committed by the act of walking down the street. In such a case, evidence of other misconduct meets the materiality test. However, the defendant may remove intent as a material issue by stipulation.

Accordingly, if the defendant has not specifically raised the issue of intent in a pre-trial conference or previous proceeding, the state should bring a motion in limine whenever it desires to show intent with proof of other misconduct. Without such a ruling, the state risks reversal by introducing evidence of other misconduct during its case in chief. Error occurs where the court finds that the act itself evidences criminal intent. However, if the defendant later contests the issue of intent, the premature admission is harmless error. E. IMWINKELRIED, supra note 16, § 8:10, at 23. But see United States v. Webb, 625 F.2d 709, 710 (5th Cir. 1980) (unless the defendant gives enforceable pre-trial assurances that the issue of intent will not be disputed, the state’s case in chief may include such evidence of other misconduct as would be admissible if intent were contested); State v. Hieb, 39 Wn. App. 273, 284, 693 P.2d 145, 153 (1984) (intent is a material issue whenever it is included in the jury instruction as an issue to be decided, even if performance of the act conclusively establishes intent).

For a general discussion on the proper timing of admissibility of evidence of other misconduct, see J. WEINSTEIN & M. BERGER, supra note 6, ¶ 404[09], at 404–62. Several states require their prosecutors to give pre-trial notice of their intention to use other misconduct evidence. See Fla. STAT. § 90.404(2)(b) (1979); State v. Spreigl, 139 N.W.2d 167, 173 (Minn. 1965). See generally E. IMWINKELRIED, supra note 16, at § 9:09.

46. J. WIGMORE, supra note 44, § 357; Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 20 Kan. L. Rev. 411, 418 (1972) ("[W]here intent is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses to cast light upon intent, even though similar in nature, should not be permitted under any circumstance.").

47. See State v. Brown, 30 Wn. App. 344, 633 P.2d 1351 (1981). When conduct resembles a crime, the act may be criminal or innocent depending on the intent with which it was done.

48. Because evidence of other misconduct must be necessary to be admissible under ER 404(b).
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erly presented stipulation, conclusively establishing intent if the act is
proven, will make any evidence of other misconduct unnecessary, and
hence immaterial.49

2. Absence of Mistake or Accident

To meet the Robtoy requirement that evidence of other misconduct must
be "necessary to prove a material issue," evidence the state offers that
proves absence of mistake or accident must directly negate such a defense.
Unlike intent, mistake or accident is not an element of the crime. It is never
a material issue unless first raised by the defendant.50 The state may not

such evidence is inadmissible if a proper stipulation has been entered into. State v. Irving, 24 Wn. App.
370, 374, 601 P.2d 954, 956 (1979) (where identity is conclusively established by stipulation, the state
has no need to prove that element). See United States v. DeVaughn, 601 F.2d 42, 46 (2d Cir. 1979)
(where stipulation offered by defendant would have removed an issue, it is reversible error to introduce
evidence to prove that issue).

Weinstein acknowledges that a majority of jurisdictions allow stipulations to bar admission of
evidence of other misconduct, but cautions that tactical problems, such as the need of the state to
corroborate the testimony of a sole eyewitness, may demand a different result. J. Weinstein & M.
Berger, supra note 6, § 404[09], at 404-61.

49. Defense counsel can properly remove intent as a material issue by offering to stipulate at a pre-
trial conference. The stipulation must unequivocally concede intent if the jury finds beyond a reason-
able doubt that the defendant committed the act. When the evidence of other misconduct is relevant to
several material issues, the stipulation must concede all of them to be effective. See State v. Hames, 74
Wn. 2d 721, 724, 446 P.2d 344, 346 (1968) (defendant offered to stipulate that witness knew him but
not that he was the drug seller; thus, state allowed to introduce witness' testimony to prove identity of
seller).

Unlike the civil defendant, a criminal defendant cannot eliminate issues at the pleading stage by
selective admissions. C. Wright & K. Graham, supra note 6, § 5194. Thus it seems just to allow the
defendant to remove specific factual issues by way of stipulation. See generally United States v. Mohel,
604 F.2d 748 (2d Cir. 1979).

Nevertheless, some jurisdictions have held that the state has no obligation to enter into such a
stipulation, arguing that a stipulation is a voluntary agreement and that the state has a right to offer and
to have received evidence which is relevant and material. State v. Clemons, 643 S.W.2d 803, 805 (Mo.
1983). See also State v. Smith, 644 S.W.2d 700 (Tenn. Crim. App. 1983). In Washington, however, an
unequivocal stipulation makes the evidence immaterial and therefore irrelevant. State v. Irving, 24 Wn.

Other courts hold that whether the state must accept a stipulation is a matter of trial court discretion.
See, e.g., United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985); United States v. Pedroza, 750
F.2d 187, 201 (2d Cir. 1984). Assuming that evidence of other misconduct offered to prove intent is
automatically relevant, these courts immediately go to the balancing process called for by Federal Rule
of Evidence 403. However, if the stipulation removes intent as an issue, such evidence is no longer
relevant and no need exists for the balancing test. See supra note 48 and accompanying text.

claimed a mistake or accident as a defense, thus the state's argument bordered on the "frivolous"). But
find the act was not committed by accident in order to convict, other misconduct evidence was properly
admitted to show absence of accident even though the defendant made no express claim of accident);
"rebutted any defense of mistake or accident" even though none was claimed).

Defense counsel may sufficiently raise such a defense at a pre-trial conference, at prior proceedings,
merely impute the accused with these defenses in order to rebut them at the outset. Additionally, to be material, the evidence offered must go to the basis of the charge, rather than to a collateral issue.

Defendants raise accident as a defense when they admit that they performed the act but ask to be excused because they performed it inadvertently. For example, defendants charged with arson may claim that they accidentally let a hand-warming fire get out of control. Defendants claim mistake, on the other hand, when they admit performing the act, but claim that they believed the circumstances to be such that the acts, as intended, were legal. For example, defendants charged with cutting down a neighbor’s tree may claim that they thought it was on their own property.

The state may introduce evidence of other misconduct after it has made an affirmative showing of the necessity of the rebuttal evidence. A showing that the defendant has raised a defense of mistake or accident will normally suffice. However, proof of intent necessarily negates accident or mistake, thereby obviating the need for evidence of other misconduct to rebut the mistake or accident defense. Because of the necessity requirement, the trial judge must be wary of admitting evidence of other misconduct to prove absence of mistake or accident when the state has made a prima facie showing of intent with other, less prejudicial, evidence.

In the final analysis, use of ER 404(b) to admit evidence of other misconduct to prove intent or absence of mistake or accident has a much narrower application than is immediately obvious. Such evidence is admissible to prove intent only when the court finds that the doing of the act does not conclusively establish criminal intent and when the defendant does not stipulate to intent if the act is proven. Admissibility to prove

or in an opening statement. E. IMWINKELRIED, supra note 16, at § 8:15.
51. See Robtoy, 98 Wn. 2d at 42, 693 P.2d at 292 (evidence must be relevant and necessary to prove an element of the crime): Thompson v. The King, 1918 A.C. 221, 232.
52. For example, in State v. Jackson, 102 Wn. 2d 689, 694–95, 689 P.2d 76, 78–79 (1984), defendant was charged with taking indecent liberties by touching a girl’s abdomen and rubbing his hips against her buttocks. Defendant denied these acts, claiming instead that he only touched the girl’s mouth while reaching for her shoulder. The trial court admitted evidence of an earlier assault on another victim to, among other things, negate the defendant’s claim of accident. Id. The supreme court reversed, noting that defendant’s only claim of “accident” was that he touched the victim’s mouth instead of her shoulder. The court held that because the touching of the victim’s mouth was not the basis of the indecent liberties charge, the evidence would negate no relevant claim of accident. Id.
53. See id. at 694–95, 689 P.2d at 79.
54. See infra note 88 and accompanying text.
56. This same result would be reached by applying the balancing test called for by Washington Rule of Evidence 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.” WASH. R. EVID. 403.
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absence of mistake or accident, on the other hand, is dependent on proof of a genuine claim of mistake or accident and a showing that such a claim must be negated.

B. Relevancy of Evidence of Other Misconduct Under ER 404(b)

After determining that intent or absence of mistake or accident is a material issue, the trial court must then determine whether the evidence of other misconduct is relevant under the restricted definition of relevancy provided by ER 404(b). The court must determine whether the sole basis of relevance is the forbidden character inferences. The only theory of logic under which evidence of other misconduct is directly relevant to prove intent or absence of mistake or accident, without relying on character inferences, is the doctrine of chances. The doctrine of chances is based entirely on probabilities. Its foundation is the instinctive recognition that the odds against an innocent person being repeatedly involved in similar suspicious circumstances increase with each incident. At some point of recurrence, the similar repeated acts can no longer be viewed as coincidental. When the evidence reaches such a point, the recurrence of a similar unlawful act tends to negate accident, inadvertence, good faith, or other

57. See supra notes 15–20 and accompanying text.
58. See id.
59. To augment direct proof of intent, ER 404(b) allows many ways to prove intent indirectly. See generally McCormick, supra note 1, § 190, at 558. Evidence that defendant possessed a motive or engaged in a common plan would provide a solid base from which to infer criminal intent. Additionally, evidence negating defendant’s claim of insanity would negatively help to prove criminal intent by eliminating a non-criminal mens rea. However, in each of these situations, the evidence of other misconduct is offered to show motive, plan, or absence of insanity, all of which are valid purposes under ER 404(b). This Comment addresses only situations where the state offers evidence of other misconduct to prove intent directly.

Much of the confusion in dealing with ER 404(b) stems from the tendency to lump all the purposes together while discussing them. The logical theories underlying the relevance of each purpose are distinct and must be discussed separately. See Stone, supra note 5, at 1026.

60. As proof of intent necessarily negates mistake or accident, evidence of motive or plan may prove absence of mistake or accident by indirectly proving intent. See supra notes 55–56 and accompanying text. Additionally, proof of knowledge of a material fact will often prove absence of a mistake. J. WIGMORE, supra note 44, § 301. However, when the issue is knowledge, the proper inquiry is whether the defendant had prior notice. Such a discussion is beyond the scope of this Comment.

61. See United States v. Danzey, 594 F.2d 905, 912 (2d Cir. 1979). Evidence offered to prove other proper purposes under ER 404(b) may ultimately prove intent or absence of mistake or accident. For example, the state can rebut a defense of mistake by showing a previous crime put the defendant on notice, but that shows knowledge. The state could show intent by proving the victim testified against the defendant at a prior trial, but that shows motive. This Comment is limited to situations where evidence of other misconduct is offered to directly prove intent or absence of mistake or accident, with no other purposes serving as stepping stones.
innocent mental states, and tends to establish by negative inference the presence of criminal intent.\textsuperscript{62}

Most courts have failed to separate intent from absence of mistake or accident when applying the doctrine of chances.\textsuperscript{63} Three reasons emerge for distinguishing the proofs. First, in the rule itself the rulemakers chose to separate the concepts. Second, the two proofs achieve different results. Proof of absence of mistake or accident can accomplish only one thing: eliminating one possible defense of non-criminal intent, thereby serving as support for criminal intent via a negative inference.\textsuperscript{64} Proof of intent, on the other hand, includes evidence intended to affirmatively prove defendant’s mental state while performing the act.\textsuperscript{65}

Third, and most importantly, the standard of proof required will vary dramatically with the purpose for which the evidence of other misconduct is offered. As an element of the crime, intent must be proven beyond a reasonable doubt.\textsuperscript{66} A simple defense, such as mistake or accident, can be negated by a preponderance of the evidence.\textsuperscript{67} Only by applying the doctrine of chances separately to each proof can the appropriate distinctions be maintained.

1. Absence of Mistake or Accident

The doctrine of chances may be used to negate a claim of accident by showing the improbability that the act was inadvertent. It may be used to negate a claim of mistake by showing the improbability that the defendant

\textsuperscript{62} J. Wigmore, supra note 44, § 302. The doctrine of chances only applies when the act itself is assumed to have been performed by the defendant. Id.

\textsuperscript{63} See State v. Jackson, 102 Wn. 2d 689, 692–93, 689 P.2d 76, 78 (1984) (trial court admitted evidence of other misconduct to prove intent or absence of mistake or accident); State v. Fitzgerald, 39 Wn. App. 652, 662, 694 P.2d 1117, 1124 (1985) (trial court admitted evidence to prove, among other purposes, intent or absence of mistake); State v. Maesse, 29 Wn. App. 642, 649, 629 P.2d 1349, 1353 (1981) (appellate court affirmed trial court admission of evidence of other misconduct because the evidence was "probative of [the defendant's] state of mind, and [it] rebutted any defense of mistake or accident").

\textsuperscript{64} Courts recognize many other possible non-criminal intents including entrapment, insanity, and self defense. See generally W. LaFave & A. Scott, Handbook on Criminal Law, §§ 28, 36, 48 (1972).

\textsuperscript{65} A simple example may be helpful. Suppose the identity of a piece of fruit is in question. Evidence offered to prove that the object is not an orange may be quite different than evidence offered to prove that the object is an apple.

An example in the criminal context is as follows. A defendant charged with larceny may claim as defenses, in the alternative, mistake and insanity. Evidence proving absence of mistake will not directly prove the required criminal intent, but it will prove intent indirectly by eliminating one possible lawful intent.

\textsuperscript{66} In re Winship, 397 U.S. 358, 364 (1970).

\textsuperscript{67} Id.
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acted under a mistaken belief. Under the doctrine, recurrence or repetition of the act decreases the likelihood that the act was an accident or the result of a mistaken belief. As the recurrence of an act becomes too objectively improbable to be a coincidence, the lack of coincidence itself becomes evidence of absence of mistake or accident.

Using evidence of other misconduct to prove absence of mistake or accident under this theory of logical relevance does not depend on the forbidden propensity inferences. The state does not ask the jury to make a subjective determination of the defendant's character. Instead, the state asks the jury to infer absence of mistake or accident from statistical or objective unlikelihood that the crime could have been committed accidentally or inadvertently. Thus, the rule reduces the dangers of prejudice and overestimation that ER 404(b) was designed to prevent.

To be objectively improbable, the evidence of other misconduct must combine with the present charge to create the improbability of coincidence. The doctrine of chances, however, does not involve incremental progression, where every additional aspect of similarity and additional performance of the act increases the probative value by an incremental amount. Rather, evidence of other misconduct remains logically irrelevant and inadmissible until the incidents reach a theoretical improbability threshold. The judge must decide whether sufficient similarity exists to justify a reasonable finding by a rational jury of noncoincidental acts.

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68. A claim of mistake can be indirectly negated by proof that the defendant had prior notice of the claimed mistaken fact. Such evidence should appropriately be admitted to prove knowledge after meeting the showing required for knowledge. See E. Imwinkelried, supra note 16, § 5:21 to 5:25, for a discussion of the required showing. This Comment, however, is limited to situations where evidence of other misconduct is offered directly to negate a claim of mistake by proof of similar acts.

For example, defendants charged with burglary may claim they believed it was their own house. Evidence that they broke into two other houses on the same street in exactly the same way would directly negate this claim of mistake. A showing that the defendants had prior notice that the house was not their own would be proof of knowledge that would serve as indirect proof negating mistake.


70. See supra note 4 and accompanying text.

By using objective improbability as an intermediate inference, the state's use of the doctrine of chances reduces the danger of prejudice by directing the jury away from the defendant's propensity for general misconduct or a specific type of misconduct. Instead, the state directs the jury to focus on the acts themselves. Further, the danger of the jury overestimating the value of such evidence is reduced. The required limiting instruction and the specificity of the proof combine to narrow the jury's focus.

71. When some similarity exists between the acts, some probative value based on probabilities will always arise. Under ER 401 such evidence would be properly admissible. However, under ER 404(b), the determinative issue is whether this probative value, properly premised upon similarity, will be substantial enough to be noncoincidental.

72. See Wash. R. Evid. 104(b).

If the evidence of other misconduct is not sufficiently similar to be more then coincidental, its admission into evidence is simply a "piece of damning prejudice." State v. Kidd, 36 Wn. App. 503,
In making the threshold determination, judges must focus on the factors that make the coincidence objectively or statistically improbable: repetition of and similarity between the acts. No single factor will be determinative. Each factor must be viewed in context with the others. Furthermore, every judge should articulate these factors on the record to ensure a thoughtful consideration of the whole issue and to provide the reviewing court with a reviewable record. Although no bright line rule is available, a judge can ensure a reasoned, uniform, and reviewable decision by considering the following questions:

a. How Often Has the Act Been Repeated?

The objective improbability of coincidence increases with each recurrence of an act. Yet courts often assume that a single previous occurrence suffices to show an improbability of coincidence. Since the evidence must reach a threshold level of noncoincidence, unless the act occurred a sufficient number of times to be noncoincidental, the evidence of other misconduct remains inadmissible under ER 404(b) as nothing more than character evidence.

For example, if the IRS found a relatively minor, though favorable error in addition in an income tax return in two succeeding years, most courts would consider it a case of casual mistake. If, however, a similar error was found in each of the preceding five years, the possibility of casual mistake would be greatly diminished.

b. How Complex Is the Repeated Act?

If the charged crime requires several separate steps for completion, such as forgery, the defendant's performance of a similar complex act increases the improbability of coincidence more than if the charged act is simply a spontaneous response to external stimuli. The repetition of each separate

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507, 674 P.2d 674, 677 (1983) (citing State v. Goebel, 36 Wn. 2d 367, 368, 218 P.2d 300, 301 (1950)).
73. See supra note 12.
74. The goal, as stated in State v. Goebel, 36 Wn. 2d 367, 368, 218 P.2d 300, 301 (1950), is to protect the presumption of innocence by ensuring that the purposes of ER 404(b) are met. See supra note 4 and accompanying text.
76. See Roth, supra note 15, at 302.
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step of the complex act increases the objective improbability of coincidence.

c. How Much Time Has Passed Between the Commission of the Acts?

The closer in time the performance of the acts, the less likely the separate acts merely coincide. Thus, a bookkeeper’s erroneous entry ten years ago would have little significance in a probability determination as to whether the present erroneous addition was inadvertent. The evidence would fall short of the threshold. However, several erroneous additions in the bookkeeper’s own favor in the same year would exclude casual error.78

d. How Clearly Has It Been Proven That Defendant Was the Perpetrator of the Other Misconduct?

The stronger the proof that defendant in fact engaged in the other misconduct, the greater the objective improbability of coincidence. At one extreme, even anonymous instances of similar conduct can be probative to negate accident or mistake.79 Evidence that a child has repeatedly been brought in for medical treatment may contribute, in terms of probabilities, to negating defendant’s claim of accident in a charge of the infant’s murder.80 At the other extreme, actual proof that defendant was with the child during each of the previous incidents would weigh more heavily on the probability scale.81

79. J. Wigmore, supra note 44, § 303.
81. Under Washington Rule of Evidence 104, the trial judge may consider otherwise irrelevant evidence in determining the admissibility of offered evidence. However, under State v. Tharp, 96 Wn. 2d 591, 593–94, 637 P.2d 961, 962 (1981), only evidence connected to defendant by a preponderance of the evidence can be admitted for jury consideration as proof of facts in the case. Accordingly, even though anonymous instances may be considered by the judge, along with other evidence, in determining the threshold likelihood of coincidence, only those instances connected to the defendant by a preponderance of the evidence can actually be admitted.

Other jurisdictions require a significantly lesser showing of proof in order to admit evidence of other misconduct. See, e.g., United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978) (under a Federal Rule of Evidence 104(b) standard, other misconduct is admissible if it supports a rational jury finding that the defendant performed the other misconduct).

Because the strength of the doctrine of chances rests on the probability of similar bad acts being committed by the same person, admitting evidence of other misconduct under a relaxed standard of proof undermines the theory.
e. Was the Victim of the Other Misconduct Similar to the Victim of the Charged Crime?

The value of evidence of other misconduct in determining whether separate acts are coincidental varies with the similarity between the victims. Because similarity is the key, other instances involving dissimilar victims should have negligible effect on the probability threshold determination. For example, evidence of a prior rape against a victim aged twenty-five, standing alone, will have very little probative value regarding a charge involving the defendants two-year-old step-daughter, except the value of allowing the jury to subjectively conclude “once a sexual offender, always a sexual offender.”

In a recent case, evidence of sexual abuse of defendant’s twelve-year-old son was offered to negate defendant’s claim of accident with respect to taking indecent liberties with his three-year-old granddaughter.82 The court appears to have assumed the evidence was automatically relevant under ER 404(b). However, the proper reasoning would have been first to determine whether these acts reasonably could follow each other coincidentally. It is essential to recognize that the relevancy of the evidence is dependent on the degree of similarity between the events. Therefore, no evidence of other misconduct is automatically admissible merely because the acts themselves bore some similarity. The degree of similarity between the victims should have been factored into the determination of whether the acts could have been coincidental.83

f. Were the Physical Elements of the Other Misconduct Similar to Those of the Charged Crime?

The objective improbability of coincidence between the other misconduct evidence and the alleged crime increases with the degree of similarity in the physical elements of the acts. In terms of objective probability, this catchall factor ensures that the offered evidence actually negates the claim of mistake or accident under the doctrine of chances.

The closer the physical similarities in the acts, the less likely the acts were a coincidence. For example, a pair of accused car thieves may claim to have had a good faith belief that they had permission to take an automobile.

83. It is possible that a rational jury could find that the acts in Bouchard were indeed noncoincidental. The key is not allowing such evidence to be admitted solely on assumptions, but only after a thoughtful consideration of the likelihood of coincidence.

Evidence showing that certain types of sex offenders, of a class to which the defendant belongs, make no distinction between the gender of their victims would certainly provide support for a finding of noncoincidence.
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Evidence showing that they had previously stolen a stereo would have very little inferential value in proving or disproving coincidence. However, evidence showing that defendants had made a similar “mistake” with other cars would strongly indicate a lack of coincidence.

The doctrine of chances, which underlies proper admission of evidence of other misconduct to rebut a defense of mistake or accident, is based on the objective improbability caused by the repetition of similar acts. Therefore, to prove absence of mistake or accident under the doctrine of chances, the state must not merely offer evidence of other misconduct to show an alternative explanation for defendant’s acts; the other misconduct must negate the claimed mistake or accident through probabilities based on the similarity.

2. Intent

Courts may admit evidence of misconduct other than the crime charged under the doctrine of chances to prove intent affirmatively. Defendants may deny the requisite criminal intent, but admit performance of the act while offering no affirmative defense. In such a case, the defendants may claim that they intended, with no mistaken belief, to do the very act performed, but that the act, without criminal intent, was legal. The state, therefore, asks the jury to make the inference that the intent was criminal.

84. Some jurisdictions would admit such evidence under the reasoning that proof of the earlier stolen stereo would show that defendant had previously taken an object without returning it, and is thus more likely to do it again. See generally Beechum, 582 F.2d at 911. The use of such a relaxed standard undermines the doctrine of chances. See supra note 81.

85. United States v. Dudley, 562 F.2d 965 (5th Cir. 1977).

86. Many of the permissible purposes for admitting evidence of other misconduct under ER 404(b) are relevant regardless of the physical similarities between the acts. For example, motive is proved by showing “[a]n inducement, or that which leads or tempts the mind to indulge [in] a criminal act.” State v. Tharp, 96 Wn. 2d 591, 597, 637 P.2d 961, 964 (1981) (citing BLACK’S LAW DICTIONARY (definition of motive). See also State v. Hubbard, 37 Wn. App. 137, 146, 679 P.2d 391, 397, rev. on other grounds, 103 Wn. 2d 570, 579 P.2d 718 (1984) (evidence that the defendant had burglarized the murder victim’s home six months earlier was admissible to prove motive for victim’s beating of the defendant, which in turn showed the defendant’s motive for murder).

Knowledge requires a showing of prior notice, not similarity between the acts. J. WIGMORE, supra note 44, § 301. For example, defendants charged with knowingly attacking a police officer may claim they did not know it was a police officer. Proof that on another occasion the defendants escaped from the custody of that same officer would prove the required knowledge. See People v. Morales, 143 Cal. 550, 77 P. 470 (1904).

87. In State v. Gatalski, 40 Wn. App. 601, 609, 699 P.2d 804, 809 (1985), the court admitted evidence of a prior assault to rebut defendant’s claim that he mistakenly missed an exit while taking a woman home, reasoning “[t]he evidence supplies an explanation for [defendant’s act] that is completely inconsistent with [defendant’s] explanation.” The only basis from which to infer this other “explanation,” however, is defendant’s criminal propensity.

88. For example, defendants who had previously been convicted of arson, now arrested in the
State v. Brown illustrates the current application in Washington of the doctrine of chances to prove intent through evidence of other misconduct. In Brown, the state charged a young woman with prostitution loitering. To establish the requisite criminal intent, the court allowed the state to introduce into evidence two prior prostitution convictions. The appellate court failed to provide the reasoning it employed in upholding admission of the evidence of other misconduct. Such a result, however, can be explained only by the rationale set forth by many courts in justifying admission of such evidence:

Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.

This reasoning fails to comport with the plain language of ER 404(b). Evidence of unlawful intent in a prior offense is directly relevant to unlawful intent in the present offense only on the assumption that once a person has shown an ability to harbor an evil intent, that person is more likely to entertain that same evil intent on another occasion. The court in Brown seemed to hold that the defendant possessed the same state of mind in all of the instances. Thus, defendant's state of mind at the time of the latest offense was proven by showing a state of mind on a previous occasion. The court thereby concluded that such a state of mind arose on separate occasions. However, courts generally call a state of mind that governs otherwise unconnected acts a person's character trait or propensity.

parking lot of a warehouse with matches in their pocket, might defend on the ground that they were taking a short-cut home. The state could offer the prior convictions to prove affirmatively that the defendants intended to commit arson again. Without a claim of mistake or accident to negate, the evidence is offered as affirmative proof of criminal intent. This proof would only be probative as propensity evidence. Yet many Washington courts admit such evidence under ER 404(b). See State v. Brown, 30 Wn. App. 344, 347, 633 P.2d 1351, 1353 (1981). 89. 30 Wn. App. 344, 633 P.2d 1351 (1981).

90. The court simply stated that evidence of a prior prostitution conviction is a "circumstance" which may tend to prove intent in a prostitution loitering case. Brown, 30 Wn. App. at 347, 633 P.2d at 1353.


92. See, e.g., State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1324, 1329 (1981). In Turner, the defendant was accused of firing a rifle at a passing car. Even though the defendant denied the act, the appellate court upheld the admission of evidence of prior firing of warning shots in defense of defendant's property because it indicated a frame of mind relevant to prove intent in the present case. Id.

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The commission of another criminal act will always tend to show present criminal intent via a propensity inference. ER 404(b) was designed to avoid exactly such general character inferences. By admitting other misconduct to show intent directly under such a relaxed standard, courts circumvent the protections provided by the requirements for proving the other available purposes under ER 404(b), many of which prove intent indirectly.

To maintain the integrity of the rule, courts could eliminate intent from the rule altogether. Although removal would erase all possibility of erroneous court application, this approach is unsatisfactory because rule changes are cumbersome. A second approach would be simply to recognize that at some point society is willing to admit evidence of misconduct other than the crime charged to prove propensity. The intermediate inference would no longer be objective improbability. Instead, the court would allow the jury to use the forbidden subjective character inference to infer present criminal intent from past criminal acts. This approach is unsatisfactory as well, due to the absolute ban on admission of evidence to prove a defendant's propensity to commit crime in ER 404(b).

A third approach is to require courts to focus on the doctrine of chances. The rationale for such an approach is already employed in admitting evidence of other misconduct to prove identity under ER 404(b). Courts admit evidence of other misconduct to prove identity when such evidence is highly distinctive and highly similar to the crime charged. The underlying rationale utilized by the Washington Supreme Court to admit evidence of other misconduct to prove identity is equally applicable when such evidence is offered to prove intent.

94. See generally Stone, The Rule of Exclusion of Similar Fact Evidence: England, 46 HARV. L. REV. 954, 983-84 (1933) ("There is a point in the ascending scale of probability [of guilt arising from propensity] when it is so near to certainty, that it is absurd to shy at the admission of the prejudicial evidence.").

95. The method employed in committing the act "must be so unusual and distinctive as to be like a signature." State v. Coe, 101 Wn. 2d 772, 777, 684 P.2d 668, 672 (1984) (quoting MCCORMICK, supra note 1, § 190, at 560). In proving intent, on the other hand, the acts need not be distinctive, only repetitious.

96. "A prior or subsequent crime or other incident is not admissible [to prove identity] merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused." Coe, 101 Wn. 2d at 777, 684 P.2d at 672 (quoting United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir. 1974)).

97. Both distinctiveness and extreme similarity must be shown. For example, proof that defendant has robbed five banks while wearing gloves and a stocking mask, even though the acts are extremely similar, will not be admissible to prove identity in a case for armed robbery, because the act itself is not distinctive. United States v. Myers, 550 F.2d 1036 (5th Cir. 1977). Alternatively, if the defendant is currently charged with the murder of a victim found with a bloody cross carved in his forehead, evidence of three other murders committed by the defendant where he left the victim tied up in the hollow of a tree would not be admissible, even though both acts are distinctive.
When the state offers evidence of other misconduct to prove identity, that evidence may be the strongest connection between the defendant and the charged crime. Because of the highly prejudicial impact of such evidence on the jury, strict standards are enforced to prevent innocent persons from being convicted merely because they once performed another bad act somewhat similar to the crime charged. In much the same way, when other misconduct evidence is offered to prove intent, that evidence may be the strongest connection between the defendant and the required criminal intent. Because this issue only arises when the act itself is innocent unless performed with a criminal intent, a danger exists that innocent persons may be convicted merely because they once performed another bad act somewhat similar to the crime charged. In both situations, admitting the evidence is highly prejudicial because the jury could infer present guilt via a propensity inference. Here, the focus on probabilities comes very close to the focus on character. Thus, the admissibility of such evidence must be limited to those cases in which the evidence is “highly relevant.”

When proving identity, relevancy is proportional to the degree of similarity between the charged crime and the other misconduct, and the degree of distinctiveness of the repeated act. Thus, to be “highly relevant,” a high degree of similarity and a strong showing of distinctiveness must be set forth. Likewise, when proving intent, relevancy is proportional to the degree of similarity between the charged crime and the other misconduct, and the frequency of repetition of the similar act. Thus, to be “highly relevant” in this instance, a high degree of similarity and a strong showing of repetition must again be set forth. The specificity of proof

98. See supra notes 42–49 and accompanying text.
99. See Coe, 101 Wn. 2d at 778, 684 P.2d at 672.
This “highly relevant” standard can easily be avoided by courts that require a lesser showing of similarity for intent than for identity. When the identity of the perpetrator is in issue, these courts can circumvent ER 404(b) by admitting evidence of other misconduct under the lesser showing of similarity required to prove the intent of the defendant. See Heib, 39 Wn. App. at 282–84, 693 P.2d at 153–55.
100. See Coe, 101 Wn. 2d at 777, 684 P.2d at 672.
101. See supra notes 82–87 and accompanying text.
102. See supra notes 75–76 and accompanying text.
103. To prove intent, rather than absence of mistake or accident, the proof of the listed factors must be significantly greater. See generally State v. McDonald, 712 P.2d 163, 166 n.4 (Or. App. 1986) (quoting C. TORCIA, 1 WHARTON’S CRIMINAL EVIDENCE § 245 (13th ed. 1972)) (other crimes must be “so related to the crime charged in point of time or circumstances that evidence thereof is significantly useful in showing the defendant’s intent in connection with the crime charged”).

Some courts insist that when the state introduces evidence of other crimes to prove identity rather than state of mind, a much greater degree of similarity between the charged crime and the uncharged crime is required. United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977). However, proof of identity requires two separate showings, extreme similarity and extreme distinctiveness. It is true that proving intent requires no showing of distinctiveness in the charged or uncharged crimes. The need for extreme similarity, however, remains the same. In both situations, the entire case may turn on whether the evidence of other misconduct should be admitted due to the highly prejudicial nature of such
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required in both instances satisfies the policy justifications underlying ER 404(b).\textsuperscript{104}

Applying this rationale to Brown, the court, on a mere showing that the defendant had previously been convicted for prostitution loitering, should not have deemed the evidence "highly relevant" to the case at hand. For the past convictions to be admissible under ER 404(b) to prove intent, the court should have required a showing that the facts and circumstances surrounding each episode were highly similar.\textsuperscript{105} No such showing was required by the court in Brown.

The application of this solution would not affect the amount of evidence of other misconduct admitted to prove other permissible purposes under ER 404(b), many of which prove intent indirectly.\textsuperscript{106} It may, however, significantly decrease the amount of other misconduct admitted to prove intent directly. Prosecutors would be forced to provide an applicable theory of relevance rather than simply to offer the evidence to prove intent and assume it will be admissible. Accordingly, admission decisions in this state would become more consistent, better reasoned, and easier to review.

Undoubtedly, proving a person's state of mind is one of the most difficult proofs that can be attempted. Given the tremendous prejudice that occurs every time evidence of other misconduct is admitted, however, the requirements for admitting such evidence cannot be lowered simply because of the difficulty. ER 404(b) serves a purpose—to preserve the presumption of innocence. Judges must not allow the presumption to be reversed without a thorough consideration of the logical theory employed.

III. CONCLUSION

In order for judges to properly admit evidence of other misconduct to prove intent, they must consider each of the following questions on the record:

\begin{itemize}
  \item Limiting the evidence to specific repeated situations reduces the danger of prejudice. No longer do defendants have to account for all misconduct ever done. They must simply explain the specifically targeted repeated situation. Furthermore, the jury does not then focus on the nature of the defendant. Rather, it focuses on the specific repeated act.
  \item Moreover, the specificity of proof required substantially reduces the dangers of overestimation by precluding the jury from easily drawing any general inferences. Once the protective policy justifications underlying ER 404(b) are satisfied, the court should not bar admission under the rule.
  \item For example, evidence showing that each event occurred in the same area of town, at approximately the same time of day, and with the defendant wearing the same type of clothing exhibits a high degree of similarity.
\end{itemize}

\textsuperscript{104} Limiting the evidence to specific repeated situations reduces the danger of prejudice. No longer do defendants have to account for all misconduct ever done. They must simply explain the specifically targeted repeated situation. Furthermore, the jury does not then focus on the nature of the defendant. Rather, it focuses on the specific repeated act.

\textsuperscript{105} For example, evidence showing that each event occurred in the same area of town, at approximately the same time of day, and with the defendant wearing the same type of clothing exhibits a high degree of similarity.

\textsuperscript{106} See supra notes 5 and 59.
(1) Is intent a material issue?
   a. Does the defendant deny the act?
   b. Does performance of the act conclusively show an accompanying criminal intent?
   c. Does the defendant stipulate to intent?

(2) Under what logical theory is the evidence of other misconduct offered?
   a. Is the evidence offered to prove intent directly?
   b. Is the evidence highly relevant?
   (i) Has there been a strong showing of repetition?
   (ii) Has there been a showing of a high degree of similarity?

Alternatively, for judges to properly admit evidence of other misconduct to prove absence of mistake or accident, they must consider each of the following questions on the record:

(1) Is absence of mistake or accident a material issue?
   a. Has the defendant made a claim of mistake or accident?
   b. Does the evidence offered to rebut the defense go to the basis of the charge?
   c. Does the defense of mistake or accident need to be rebutted; is the evidence of other misconduct necessary?

(2) Has the doctrine of chances been triggered?
   a. How often has the act been repeated?
   b. How complex is the repeated act?
   c. How much time has passed between the commission of the acts?
   d. How clearly has it been proven that the defendant was the perpetrator of the other misconduct?
   e. Was the victim of the other misconduct similar to the victim of the charged crime?
   f. Were the physical elements of the other misconduct similar to those of the charged crime?

Courts in Washington currently produce confusing and inconsistent decisions admitting and excluding evidence of other misconduct to prove intent or absence of mistake or accident under ER 404(b). Application of the above guidelines will preserve the policy underlying the rule by forcing judges and attorneys to work through, on the record, whether the relevance of the offered evidence is inadmissibly dependent on propensity inferences drawn from the defendant's other misconduct. Without these protections, the presumption of innocence becomes nothing more than an idealistic desire.

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