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WASHINGTON'S EXPANSION OF THE "PLAN" EXCEPTION AFTER STATE V. LOUGH

Jeannie Mayre Mar

Abstract: In State v. Lough, the Washington Supreme Court ignored strong case law limiting the admission of an accused's prior misconduct under the plan exception to evidence rule 404(b) and upheld the admission of unproved wrongs against the accused. The plan exception to Washington Rule of Evidence 404(b) prohibits using misconduct evidence to show propensity, but admits such evidence if used to establish a defendant's overall design or plan to commit the charged offense. This Note analyzes the Washington Supreme Court decision to uphold admission of a defendant's uncharged misconduct under the plan exception. Moreover, this Note argues that the court improperly broadened the plan exception and should not have applied the exception because the evidence's prejudicial impact outweighed its probative value.

One of the most important premises of the American judicial system is that no person shall be convicted by his past. Evidence of an accused's past wrongs creates a prejudice that is extremely difficult to overcome. To protect the right to a fair trial, Washington Rule of Evidence 404(b) prohibits the use of such evidence for the purpose of showing that a defendant has a criminal propensity. Such evidence, however, may be used for special purposes other than establishing criminal character. One such purpose is to show a defendant's overall design or plan to commit the prior and charged offenses.

In 1995, the Washington Supreme Court reviewed a case involving a trial court's admission of highly prejudicial testimony under the plan exception. In State v. Lough, a prosecution for attempted rape, the

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 the author recognizes that both male and female defendants are affected by this rule, male pronouns will be used because many of the cases discussed involve male defendants.


3. See infra note 11 and accompanying text.

4. Wash. R. Evid. 404(b). The common scheme or plan is one of the exceptions which permit admission of a defendant's prior misconduct. This Note will refer to this exception as the "plan exception." See infra notes 19–22 and accompanying text.

victim claimed Lough drugged and raped her while she was unconscious.\(^6\) Lough appealed the trial court's admission of testimony from four women who claimed that Lough also had raped them.\(^7\) Although the alleged prior misconduct had occurred years before and was not connected to the present criminal charges, the supreme court upheld admission of the evidence under the plan exception, reasoning that the testimony assisted in showing the defendant's "plan" to drug and rape women.\(^8\)

This Note analyzes the application of the plan exception in *Lough*. Part I briefly summarizes the plan exception and examines its past application by Washington courts. Part II reviews the facts, holding, and rationale of *Lough*. Part III argues that the *Lough* court misapplied the plan exception and succumbed to the idea that cases involving sexual misconduct should be treated differently under the law.\(^9\) Finally, part IV recommends two approaches Washington courts should follow to guide future application of the plan exception.

I. THE EXCEPTION

A. Rule 404(b)

Generally, courts admit relevant evidence unless a specific rule prohibits admission.\(^10\) One such prohibition is Rule 404(b).\(^11\) Under this rule, the prosecution may not use evidence of a defendant's "other

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6. *Id.* at 849–50, 889 P.2d at 488–89.
7. *Id.* at 849–52, 889 P.2d at 488–90.
8. *Id.* at 861, 889 P.2d at 494–95.
9. This Note only addresses the offer of prior misconduct evidence in criminal cases. Although Wash. R. Evid. 404(b) is not limited to criminal cases, most problems regarding the plan exception arise in the criminal context.
11. "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, plan, knowledge, identity, or absence of mistake or accident." Wash. R. Evid. 404(b) (emphasis added). This rule is the same as Federal Rule 404(b) and conforms substantially to previous Washington law. See *State v. Whalon*, 1 Wash. App. 785, 464 P.2d 730 (1970).
crimes, wrongs, or acts” to prove that he acted in conformity with a “criminal” character.\(^\text{12}\)

The rule prohibits the general use of evidence of other misconduct for two reasons. First, evidence of other misconduct may influence the jury to decide a defendant’s guilt based on character rather than the facts of the case.\(^\text{13}\) Jurors may be prejudiced against a defendant upon hearing that he has a criminal record or has committed past wrongful acts.\(^\text{14}\) Second, there is the danger that jurors would tend to grant undue weight to evidence of a defendant’s criminal history. Jurors are more likely to convict a defendant with a criminal record.\(^\text{15}\) Thus, the jury may decide the case on an improper basis—the defendant’s character—rather than on the merits of the case. To protect against this prejudice, the rule requires suppression of evidence when the only relevancy is to establish a defendant’s criminal propensity.

Although Rule 404(b) prohibits the use of evidence of other misconduct to show criminal character, it admits such evidence for non-character purposes.\(^\text{16}\) Such other purposes include motive, opportunity,

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\(^\text{12}\) Wash. R. Evid. 404(b). It should be noted that “ER 404(b) applies to evidence of other crimes or acts regardless of whether they occurred before or after the conduct for which the defendant was actually charged.” State v. Laureano, 101 Wash. 2d 745, 764, 682 P.2d 889, 901 (1984), overruled in part by State v. Brown, 111 Wash. 2d 124, 132, 761 P.2d 588, 593 (1988).

\(^\text{13}\) Wash. R. Evid. 404(b) does not exclude such evidence based on irrelevancy. In fact, the evidence of other misconduct is prohibited because it may be too relevant. Its admission is limited for policy reasons due to its highly prejudicial impact. See Michelson v. United States, 335 U.S. 469, 475–76 (1948), quoted with approval in State v. Kelly, 102 Wash. 2d 188, 199, 685 P.2d 564, 572 (1984).

\(^\text{14}\) The Washington Supreme Court stated that the introduction of evidence of other unrelated misconduct is “grossly and erroneously prejudicial.” State v. Goebel, 36 Wash. 2d 367, 368, 218 P.2d 300, 301 (1950).


intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The application of this rule and its exceptions has engendered much litigation and confusion.

B. The Plan Exception

The common scheme or plan exception is one of seven special exceptions which admit evidence of uncharged offenses. The plan exception, like all Rule 404(b) exceptions, was meant to be a narrow conduit for the admission of prejudicial evidence against a defendant. The plan exception was meant to be limited to circumstances where the state sought to admit evidence of a defendant's other misconduct in order to show that the defendant had an overall mental plan to commit the crime for which he had been charged.

Courts admit uncharged misconduct evidence under the plan theory for the narrow purpose of enabling the jury to hear the whole story or get a complete picture of what occurred during the alleged crime. Activities such as stealing a gun and getaway car for a bank robbery satisfy this purpose, and evidence of such activities is therefore admissible under the exception, even if the only charge is for the bank robbery. The goal is

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17. Supra note 11.
18. Proof of the confusion presiding over Wash. R. Evid. 404(b) is apparent from the enormous number of cases involving the issue. 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence 404-08, at 46-47 (1992); see also, Byron N. Miller, Note, Admissibility of Other Offenses After State v. Houghton, 25 S.D. L. Rev. 166, 167 (1980).
19. Wash. R. Evid. 404(b).
20. Imwinkelried writes that the plan exception cases fall into two categories. The first category is what is called the "true plan," in which the courts can permissively infer the existence of a true plan in the defendant's mind. The test for the true plan is whether or not the uncharged misconduct is logically relevant to show the defendant's mental plan. The second category of plan exception cases are disparagingly called "spurious plan" cases. These are situations in which the courts have admitted misconduct evidence under the plan exception even when the prosecutor failed to show a plan in the defendant's mind or when the degree of similarity was insufficient to satisfy the modus operandi theory. Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:20–3:23, at 50–53 (1995).
22. Aronson, supra note 16, at 404-16 ("Activities such as stealing the getaway car, assaulting a customer outside the bank, or raping another victim, in the same vicinity, rear the time of the charged crime, all fall within this category.").

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to provide a full picture for the jury by admitting evidence of connected incidents leading up to the charged crime.23

C. Admitting Misconduct Evidence Under the Plan Exception

1. The Criteria for Admission

To avoid improper admission of misconduct evidence, Washington courts have developed a standard for applying the plan exception.24 Before admitting prior misconduct evidence, the court must: (1) identify the purpose for which the State seeks admission of the evidence; (2) decide if the evidence is relevant to prove an element of the crime charged; and (3) weigh the probative value of the evidence against its prejudicial effect.25 In addition, the prosecution must prove by a preponderance of the evidence that the misconduct actually occurred.26 Such steps are necessary to protect the defendant’s right to a fair trial.

2. Application of the Plan Exception

Although the plan exception’s admission standard seems straightforward, past application has generated confusion and controversy. The plan exception has proved to be a popular theory for introducing evidence of a defendant’s other misconduct.27 Prosecutors frequently rely on the plan exception because of its flexible application and courts’ liberal admission under the plan paradigm.28 However, this exception has recently come under attack,29 with the heart of the controversy revolving around the meaning of “plan.”

23. State v. Tharp, 96 Wash. 2d 591, 594, 637 P.2d 961, 962 (1981) (“Each offense was a piece in the mosaic necessarily admitted in order that a complete picture be depicted.”).
29. Imwinkelried, supra note 27, at 1011; MaeEndez & Imwinkelried, supra note 27, at 478–79.
There are three different interpretations of “plan.” The “unlinked plan” requires only that the prosecution show similarities between the charged crime and the other offenses, and that the acts were temporally proximate. A second, more demanding definition is the “linked methodology” theory. Here, “plan” connotes a mental condition and the prosecutor must show that the accused planned the methods of all the crimes in his mind. This theory demands evidence that the accused used the same technique and that he employed the same methodology by a conscious choice. The final definition, the “linked acts” theory, is even more restrictive. Here, the prosecution must show that the accused had an overall design or grand scheme encompassing the charged and uncharged crimes. Under this definition, all the crimes are related: Each criminal act is a stage or a step in the overarching plan.

Some commentators and courts condemn the use of the plan theory when the prosecutor has shown only that the defendant has committed parallel offenses. Other commentators and courts defend the broader application of the plan theory.

3. Washington Courts Are Split

Washington state courts also have experienced difficulty defining “plan” and applying the exception. In fact, Washington courts have split over the issue. Some courts have held that mere similarities between the uncharged and charged offenses are insufficient to establish a “plan” under Rule 404(b). Other courts have broadened the plan exception,
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holding that commission of a crime similar to the one charged is admissible under the plan theory, even though the evidence does not address a specific element of the crime to be proven. It is against this backdrop that the Washington Supreme Court reviewed *State v. Lough*.

II. REVIEW OF *STATE V. LOUGH*

Although Washington courts have reached different results regarding the plan exception, the policy behind Rule 404(b) in protecting the accused person’s right to a fair trial has remained the same. The Washington Supreme Court’s decision in *State v. Lough*, however, ignores that purpose and expands the plan exception beyond its intended scope.

A. Facts of the Case

   Lynn Roderick Lough, a paramedic with King County Emergency Services, met P.A. through an emergency medical training class Lough taught at P.A.’s workplace. On July 22, 1988, Lough and P.A. met at her home to watch a video. P.A. stated that Lough mixed her a drink that made her feel dizzy and disoriented. Her memory then became confused. She recalled her pants being pulled down and Lough’s genitals in her hands and face. She fell asleep. P.A. said that when she awoke, she was unclothed from the waist down and Lough was gone. She found her clothes folded on the arm of a chair.

   Lough denied that he drugged or assaulted P.A. He testified that, after several drinks, they started kissing and that they had consensual intercourse. P.A. testified that at eight o’clock the following morning, Lough called her and asked how she was feeling. She stated that after she told Lough she was confused about what had happened, he assured

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37. See, e.g., *State v. York*, 50 Wash. App. 446, 454–58, 749 P.2d 683, 688–90 (1987) (holding that separate incidents of sexual crimes against students at defendant’s beauty school were admissible to show plan); *State v. Bennett*, 36 Wash. App. 176, 180, 672 P.2d 772, 775 (1983) (holding that prior incidents where defendant assisted runaway teenagers for sexual favors was admissible to show “plan” of providing food and shelter to runaway teenagers for sex).


39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 849–50, 889 P.2d at 488.
her that nothing had happened. At trial, Lough denied making such a statement.

P.A. never officially reported the incident, although she spoke to a friend who was a police officer. In 1990, after reading about an investigation of a King County paramedic who had allegedly drugged and raped women, she finally went to the police. P.A.’s allegations prompted the county prosecutor to file charges of indecent liberties, attempted rape, and burglary against Lough.

B. The State’s Evidence of “Other Misconduct”

At trial, the state introduced testimony from four other women who claimed Lough also drugged and raped them between 1978 to 1988. Before trial, Lough sought to exclude this testimony. The trial court ruled that the evidence was admissible to show a common scheme or plan to drug and rape women, despite the fact that none of the women knew each other or P.A. The jury convicted Lough of all charges in connection with the incident involving P.A. and Lough was given an exceptionally long sentence of sixty months.

Lough appealed, claiming that the trial court erred when it admitted testimony from the four women. On appeal, he argued that the plan exception should apply only if the state can show that a causal connection exists between the uncharged and charged offenses — that is, that the prior act of misconduct was done in preparation for the crime charged. The Washington Supreme Court rejected Lough’s argument, reasoning that such a limitation would provide no real benefit and would bar relevant and reliable evidence.

43. Id.
44. Id.
45. Id.
46. Id. at 850, 889 P.2d at 488–89.
47. Id. at 850, 889 P.2d at 489.
48. Id. at 850–51, 889 P.2d at 489.
49. Id. at 850, 889 P.2d at 489.
50. Id.
51. Id.
52. Id. at 851–52, 889 P.2d at 489.
53. Id. at 855, 889 P.2d at 491.
54. Id.
C. The Court's Holding and Rationale

The Washington Supreme Court held that the prior misconduct evidence was admissible under the plan exception for two reasons. First, finding a split in Washington state authority, the court relied on other cases which applied the plan exception based only on similarities between the uncharged and charged offenses. The court essentially tailored its decision after the California case, People v. Ewoldt, and applied the unlinked acts theory of the plan exception. This theory only requires a showing of similarities among the uncharged and charged offenses to establish a plan exception. Second, the court stated that the manner in which Lough committed the assault on P.A. made the evidence of prior acts necessary. Because Lough "deprived the State of significant evidence of the victim's testimony by the way he committed the crime," the evidence of the defendant's prior misconduct was relevant to show that the misconduct had occurred again in the instant case.

III. EVIDENCE OF LOUGH'S PRIOR CONDUCT SHOULD NOT HAVE BEEN ADMITTED

The Lough court erred in admitting evidence of the prior alleged assaults in what was essentially a credibility battle between the accused and the victim. First, the plan exception was the only exception available to the state. Although the identity exception, established through modus operandi, would have been more appropriate, the state could not meet its high foundational requirements. Second, the Lough court misapplied the plan exception because of its reliance upon inappropriate cases, insufficient proof, and its special treatment of sex cases. Finally, a higher standard of foundational evidence should have been applied to the plan exception in Lough.

55. Id. at 855–56, 889 P.2d at 491–92 (citing People v. Ewoldt, 867 P.2d 757, 767 (Cal. 1994)).
56. 867 P.2d 757 (Cal. 1994).
57. Lough, 125 Wash. 2d at 859, 889 P.2d at 894.
58. Modus operandi applies only when the methods employed in committing the prior crimes and the charged crime are so unique as to identify the defendant as the perpetrator of both crimes. See infra notes 75–80 and accompanying text.
59. See infra notes 112–134 and accompanying text.
A. The Common Scheme or Plan Exception Was the Only Option

In upholding the admission of other misconduct evidence, the supreme court relied only on the plan exception. The state argued that the evidence should be admitted based on the plan exception and an "other purpose" exception—that is, to establish an element of the crime charged. It is apparent, however, that the state's other purposes argument was an artful attempt to circumvent Rule 404(b). The only exception that the state could have plausibly asserted was the identity exception. Identity was not an issue in the case, however, and thus, the state's only recourse was the plan exception.

1. The State's "Other Purpose" Was Criminal Propensity

The state asserted two exceptions to justify the trial court's admission of the 404(b) evidence: the plan exception, and the "other purpose" exception. The list of "other purposes" for which evidence of other bad acts may be admitted under evidence rule 404(b) is not exhaustive. Such evidence may be admitted if it is relevant to any purpose other than criminal propensity and if its probative value is not outweighed by its prejudicial impact.

The state argued that the 404(b) evidence was needed to "corroborate [P.A.'s] testimony and to refute Lough's defense that [P.A.] was a conscious and active participant in the sexual activity." Lough testified that he and P.A. had consensual intercourse. The burden then fell upon the State to prove that some crime had occurred. However, P.A., the State's only witness, was unable to positively state that anything occurred against her will. To strengthen her testimony and credibility, the State sought admission of the 404(b) evidence. The State argued that the fact that its sole witness could not state with any certainty that a

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60. Lough, 125 Wash. 2d at 861, 889 P.2d at 494–95.
61. Respondent's Brief at 21, Lough (No. 28281-6-I).
62. Id. at 33.
63. See Respondent's Brief at 21–33.
64. Id. at 21–32. The State argued that the evidence of other misconduct was necessary to show that P.A. was not a willing participant in the sexual activity. Id. at 32.
65. Supra note 16.
66. Supra note 16.
67. Respondent's Brief at 32.
68. See Lough, 125 Wash. 2d at 849–50, 889 P.2d at 488–89; Appellant's Brief at 10–11, Lough (No. 28281-6-I).

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crime had even occurred warranted application of the other purposes exception. 69

These relevancy arguments do not satisfy the two-prong test for the "other purposes" exception under 404(b). The State must specify a specific purpose and show that the evidence's prejudicial effect will not outweigh its probative value. 70 Corroboration usually involves testimony by a witness who can directly verify the statement of another witness. 71 A proper example would be a witness who could testify that she heard struggles between Lough and P.A. that night or that she saw Lough drug P.A.'s drink. Past allegations against Lough are not corroborating evidence because they shed no light on whether Lough committed the charged crime. The prior misconduct showed nothing more than criminal propensity.

Moreover, the victims of the alleged prior crimes were unable to state with certainty that a crime occurred in each of their cases. Each witness only claimed that she believed she was drugged and raped by Lough. 72 Only one witness claimed that she awoke during intercourse. 73 Even if the testimony by the other witnesses was corroborative, its probative value was minimal and was clearly outweighed by its prejudicial impact. 74

69. Respondent's Brief at 32.
71. Corroborating evidence means "[e]vidence supplementary to that already given and tending to strengthen and confirm it. Additional evidence of a different character to the same point." Black's Law Dictionary 344-45 (6th ed. 1990). The indefinite testimony from the other witnesses against Lough did not confirm or strengthen P.A.'s claim that she had been raped. Lough, 125 Wash. 2d at 850-51, 889 P.2d at 489-90.

It should also be noted that all evidence of prior misconduct may be construed to corroborate the claim that a defendant has committed the charged offense. The very nature of prior offenses carries the propensity factor that always lends itself to "corroboration" of the victim's claim or that the defendant may acted in the same manner again. The issue is not whether the misconduct evidence corroborates, but whether the evidence is sufficiently valuable that it merits admission. 72. Lough, 125 Wash. 2d at 850-51, 889 P.2d at 489-90.
73. Id. at 850, 889 P.2d at 489.

74. Although the statute of limitations likely would have kept Lough from being charged for the prior crimes, the jury might convict because it believed Lough had gotten away with the other crimes.
2. The Identity Exception Was Unavailable and Avoided

The most plausible exception for admitting the 404(b) evidence was to prove the defendant's identity by showing a modus operandi. Under this theory, such evidence would be admissible if unique or distinctive methods could identify the perpetrator. Modus operandi is a "signature mark" or a calling card of the perpetrator that reveals his identity. Neither the State nor the court relied on the exception, however, because it did not apply in Lough. The exception applies only when identity is an issue. In this case, Lough's identity was not an issue. Moreover, there was nothing sufficiently unique about the crime, and the foundational requirements necessary to establish modus operandi could not be met.

Even if identity was an issue, the State could not have met the high standard of foundational evidence required to establish modus operandi. Although the claimed sexual assaults by the past victims appear similar to the charged crime, mere similarity is insufficient to admit evidence under modus operandi. The facts of the prior misconduct and the charged offense must share common features that are so remarkably similar that they point to the same person committing both acts. State v. Bowen illustrates that the similarity standard requires a lesser degree of foundational evidence which would be insufficient to satisfy modus operandi.

77. The State's briefs to both the court of appeals and the supreme court did not contain arguments for admission of 404(b) evidence based upon modus operandi.
78. Cohen, 101 Wash. 2d at 777, 684 P.2d at 672 ("Where prior acts are sought to be admitted to show modus operandi, 'the primary purpose... is to corroborate the identity of the accused as the person who likely committed the offense charged.'" (citing State v. Irving, 24 Wash. App. 370, 374, 601 P.2d 954, 956 (1979) (emphasis added)); see also State v. Bowen, 48 Wash. App. 187, 193, 738 P.2d 316, 320 (1987) ("[T]he primary purpose of the modus operandi principle is to corroborate the identity of the accused as the person who likely committed the offense charged.") (citing State v. Whalon, 1 Wash. App. 785, 464 P.2d 730 (1970))).
79. Lough admitted to visiting P.A. that night. Lough, 125 Wash. 2d at 849, 889 P.2d at 488.
80. People v. Ewoldt, 867 P.2d 757, 770 (Cal. 1994) ("The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity."); McCormick on Evidence, supra note 16, at 346 ("The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."); Tegland, supra note 16, at 175 (more similarity between prior misconduct and crime charged is insufficient to justify admitting prior misconduct; proponent must point to something distinctive or unusual—a characteristic 'signature'—that links defendant to crime charged).
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operandi. In Bowen, the State argued that two prior allegations of indecent touching were admissible under the plan exception because of their similarities to the charged offense.\(^2\) The court of appeals rejected the State's argument of the plan theory and further held that modus operandi did not apply because identity was not an issue in the case and because the similarities between the uncharged and charged offenses were not distinctive enough.\(^3\)

Thus, the identity exception was not available because the State could not meet the foundational requirements necessary to establish modus operandi. The State could not prove that Lough drugged P.A. because there was no physical evidence, and P.A. did not see Lough put drugs in her drink. There was also no direct proof that Lough drugged the other alleged victims.

**B. The Lough Court Misapplied the Plan Exception**

In Lough, the supreme court applied the "unlinked acts" theory of the plan exception.\(^4\) Thus, the State only was required to show that the prior misconduct bore a similarity to the charged crime. But the plan exception, like the identity exception, was meant to require a high level of foundational evidence.

Because the purpose of the identity exception is to show the identity of the perpetrator, unrelated prior offenses are only admissible when the facts show that the commission of each prior offense was nearly identical, thus satisfying a high foundational requirement. Likewise, the plan exception only applies to admit unrelated prior offenses when the evidence meets a high evidentiary foundation because the purpose is to show a preconceived "plan" by the defendant to commit all the crimes. The high foundation of evidence is meant to show the jury how the crimes are connected. The Lough court's application of the lower standard within the "unlinked acts" theory undercut the intent of the plan exception and the protections of Rule 404(b).

To preserve the protections of Rule 404(b), the court should have applied the higher foundational standard of the linked acts theory, similar to that used for modus operandi. Traditionally, the linked acts theory has required a showing that the uncharged and charged offenses were steps

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82. All three victims were patients of Bowen who had told him that they were separated from their husbands. *Id.* at 192, 738 P.2d at 320.
83. *Id.*
84. *Lough*, 125 Wash. 2d at 861, 889 P.2d at 494-95; *supra* notes 30, 36 and accompanying text.
taken by the accused toward a singular goal.\textsuperscript{85} This showing requires a higher degree of foundational evidence and protects the accused from the admission of highly prejudicial evidence. In addition, the linked acts theory protects the accused from purely opportunistic actions, which is inadmissible as plan evidence.\textsuperscript{86}

1. \textit{The Court Relied on Inappropriate Cases}

Recognizing the split in Washington regarding to the plan exception, the court followed three cases that misapplied the exception. In each case, the court either unnecessarily applied the plan exception or drastically lowered the foundational evidence required. By following these cases, the \textit{Lough} court improperly broadened the plan exception.

The first case on which the \textit{Lough} court relied was \textit{State v. Bennett},\textsuperscript{87} a prosecution for third-degree statutory rape. The State introduced testimony from other female victims in order to prove that Bennett had a plan for luring teenage girls to his apartment with promises of food, shelter, and money.\textsuperscript{88} The Washington Court of Appeals upheld the admission of the testimony based on a similarity standard, stating that the plan exception was established through “features common to all four girls and their relationships to Bennett.”\textsuperscript{89} The court stated that the “similar acts evidence” from two of the witnesses showed a plan to lure teenage runaways to his apartment with promises of assistance.\textsuperscript{90}

\textsuperscript{85} Imwinkelried, \textit{supra} note 20, § 3:21–22.

\textsuperscript{86} The “unlinked acts” theory entirely fails to recognize the issue of purely opportunistic behavior. Opportunistic behavior is any spontaneous action committed by the accused when a window of opportunity suddenly becomes available. “Conduct is ‘purely opportunistic’ only if it is spur of the moment conduct, intended to take advantage of a sudden opportunity.” United State v. Ivery, 999 F.2d 1043, 1046, n.5 (6th Cir. 1993) (quoting United State v. Rust, 976 F.2d 55, 57 (1st Cir. 1992)). Such conduct, if purely spur of the moment, cannot be deemed part of a plan. Even under the unlinked acts theory of \textit{Ewoldt}, a “plan does not encompass unrelated crimes committed against random ‘targets of opportunity.’” MaeEndez & Imwinkelried, \textit{supra} note 27, at 491–92 (citing People v. Williams, 751 P.2d 395, 412 (Cal. 1988).


\textsuperscript{88} The State added that the testimony was probative on the issue of whether or not sexual intercourse occurred between the Bennett and the victim in the present case. \textit{Id.} at 179–80, 672 P.2d at 775.

\textsuperscript{89} All the victims were female, teenage runaways brought to the accused’s apartment. \textit{Id.} at 179–80, 672 P.2d at 775.

\textsuperscript{90} \textit{Id.} at 179–80, 672 P.2d at 775.
Another case cited by the *Lough* court was *State v. Roth*. In Roth, the State sought to prove that the defendant’s fourth wife, Cynthia, did not die of an accidental drowning, but was murdered by her husband for her life insurance policy. The State introduced evidence of the accidental death of Roth’s second wife, Janis, and his collection on her insurance policy, alleging that Roth had murdered her as well. The Washington Court of Appeals upheld the admission of the prior act based on the motive and plan exceptions, and to rebut the defendant’s accident claim. The court admitted the evidence based on the similarities between the uncharged and charged offenses, stating that each act showed a high degree of planning, and that the planning for the first alleged crime would have been useful in committing the murder in the charged offense.

The *Lough* court ultimately relied upon the California decision of *People v. Ewoldt*. In Ewoldt, the accused was convicted of committing lewd acts and molesting his step-daughter. The California Supreme Court upheld the trial court’s admission of prior misconduct evidence that the accused had allegedly molested his other step-daughter. The court did not require that the other misconduct be part of a single plan. Instead, it held that a plan could be shown through prior misconduct with a marked similarity to the charged crime.

In each of the three cases relied upon by the *Lough* court, the courts mistakenly applied the plan exception. None of the cases involved prior misconduct that was part of a common goal or a criminal plan. The

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92. *Id.* at 811–12, 881 P.2d at 272.
93. *Id.* at 812–13, 881 P.2d at 272. Janis Roth died in a mountain climbing accident prior to Cynthia’s death.
94. State argued that this evidence was relevant for other purposes, including plan, motive, modus operandi, and rebuttal of a claim of accident. *Id.* at 812–13, 881 P.2d at 272–74.
95. *Id.*
96. It should be noted that the court recognized that the plan exception should be limited to situations where each act is an “integral part of an over-arching plan explicitly conceived and executed by the defendant . . . .” *Id.* at 820, 881 P.2d at 276 (citing *State v. Bowen*, 48 Wash. App. 187, 192, 738 P.2d 316, 320 (1987)).
98. 867 P.2d 757 (Cal. 1994).
99. *Id.* at 759, 763.
100. *Id.* at 767.
similarities noted by each court were really methods of committing a crime that were more suited to modus operandi analysis. However, as in Lough, modus operandi was unavailable because identity was not an issue in each of these cases.

Furthermore, each court substituted the plan exception for what should have been another 404(b) exception. In Bennett, the most applicable exception was modus operandi; however, this exception was unavailable because nothing distinctively identified one perpetrator, and identity was not an issue. In Roth, the most applicable exceptions were motive and the rebuttal of the defendant’s claim of accidental death. In Ewoldt, the court substituted the plan exception for what would have been recognized in Washington as the 404(b) “other purpose” of “lustful disposition.”

By following the reasoning of these cases, the Lough court improperly broadened the plan exception. The plan exception was designed to admit evidence of prior misconduct only if the facts of the case showed that the uncharged and charged offenses were part of a common goal. Broadening the plan exception to situations containing only “similarities” among the offenses defeats the purpose of the plan exception and its protections for the accused.

2. Ewoldt and the Unlinked Acts Theory Are Flawed

Ewoldt applied the unlinked acts theory of the plan exception. The California court, however, failed to establish the level of foundational

102. The only similarity between the charged and uncharged offenses in Roth was that the defendant collected on insurance policies. A similarity in results, however, is not enough to satisfy the plan exception. See Ewoldt, 867 P.2d at 770; MaeEndez & Imwinkelried, supra note 27, at 497.
103. The “lustful disposition” exception is the most commonly cited of the “other purposes” and is used to show the defendant’s particular fascination toward a particular victim. Although a general propensity to commit sex crimes is prohibited by Wash. R. Evid. 404(a) and (b), this “lustful disposition” is recognized by Washington courts to be sufficiently probative to overcome the prejudice in such cases. Aronson, supra note 16, at 404-20.

Although “lustful disposition” is usually limited to evidence of the accused’s prior sexual advances upon the victim, see State v. Bemson, 40 Wash. App. 729, 737-38, 700 P.2d 758, 765 (1985), some courts have admitted evidence of sexual attacks on other victims if the victims are limited to a particular class. See Soper v. State, 731 P.2d 587, 589 (Alaska Ct. App. 1987) (extending lustful disposition exception where complainant was member of limited class of individuals, dependent daughters, having highly relevant common characteristics and where testimony gave jury necessary background to explain relationship between defendant and victim). In Ewoldt, the victim’s sister probably would be considered a member of a limited class of dependent step-daughters of the accused.
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evidence necessary for the plan exception under this theory. This approach fails to protect against admission of purely opportunistic acts, which are inadmissible under the plan exception. In adopting the Ewoldt approach, the Lough Court also failed to address opportunistic behavior that does not constitute a plan.

Ewoldt states that to show a plan, the evidence "must demonstrate 'not merely a similarity in results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'"\textsuperscript{104} The Ewoldt court reasoned that a marked similarity in the commission of the prior acts and the charged offense was sufficient to show a "plan."\textsuperscript{105} But the court failed to explicitly lay out a standard or the level of foundational evidence necessary to satisfy this "similarities" test.

Ewoldt attempts to compromise between the restrictive standard of the linked acts theory and the need for probative evidence in special circumstances. The court's error is that it compromised too much. As Judge Mosk noted in his dissent to the Ewoldt opinion, the court essentially traded a restrictive standard for no standard at all.\textsuperscript{106} This result defeats the purpose of Rule 404(b) and improperly admits prior misconduct evidence.

The similarity standard of the unlinked acts theory provides no set criteria to protect against purely opportunistic actions. In Ewoldt, the California Supreme Court held that in order to demonstrate a plan, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts."\textsuperscript{107} The court's reference to "spontaneous acts" is significant.\textsuperscript{108} If the uncharged and charged offenses are truly "spontaneous," then they cannot be considered connected and, therefore, cannot be a part of a "plan."

By adopting Ewoldt without considering its nuances, the Lough court also adopted its errors. The low standard created by the Ewoldt court and adopted by the Lough court fails to address opportunistic behavior and thus, fails to adequately balance the evidence's probative value against its prejudicial impact. The prior acts alleged against Lough all qualify as

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\textsuperscript{104} Ewoldt, 867 P.2d at 770 (emphasis omitted) (quoting John Henry Wigmore, Evidence in Trials at Common Law § 304, at 249 (James A. Chadbourn ed., 4th ed. 1979)).

\textsuperscript{105} Id. at 769.

\textsuperscript{106} 867 P.2d at 776 (Mosk, J., dissenting) (stressing lack of any required foundational evidence from which overarching plan could be inferred).

\textsuperscript{107} Id. at 770.

\textsuperscript{108} See MaeEndez & Imwinkelried, supra note 27, at 493.
opportunistische actions. Even if the prosecution could have proved that the prior misconduct actually occurred, each act could be considered a purely spontaneous act. In other words, the accused simply saw a window of opportunity and decided to act upon it. Such spontaneous action is not a pre-arranged "design" and therefore would not fall under the plan exception.

3. The Lough Court Accepted Insufficient Proof of Prior Acts

The lower foundational standard adopted by the Lough court has resulted in a lower standard of required proof that the alleged prior acts actually occurred. It is well settled that prior acts must be proved by a preponderance of the evidence.\(^{109}\) Even in the cases cited by the Lough court, there was no question that the acts occurred in the manner to which the victims and witnesses testified. In Lough, however, the prior acts and the charged crime could not be established from the testimony of the alleged victims. Each witness stated that her memory of the incident was unclear.\(^{110}\) Despite this lack of proof, the court upheld the admission of the uncharged misconduct.\(^{111}\)

4. The Court May Be Treating Sex Cases Differently

The Lough court seems to have fallen into the trap of treating cases involving sex crimes differently from cases involving other offenses. Before Lough, courts in other jurisdictions also applied a lower foundational standard under the plan exception for sex crimes because the nature of sex crimes merits additional information concerning the acts of the defendant.\(^{112}\) Similarly, many of the Washington cases

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111. Id. at 865, 889 P.2d at 497.
112. See, e.g., People v. Balcom, 867 P.2d 777, 781 (Cal. 1994) (finding two rapes committed in same manner admissible to show plan by defendant and that he employed same plan to rape victim); State v. Morowitz, 512 A.2d 175, 179 (Conn. 1986) (holding that similar sexual assault on female patient three years before charged incidents were admissible to show plan in rape case); State v. Grant, 33 Conn. App. 133, 138 (1993) (allowing admission of evidence that defendant engaged in sexual activity with one daughter in trial involving other daughter under common scheme or plan); Sheppard v. State, 659 So.2d 457, 458 (Fla. 1995) (holding that testimony of defendant's daughter that she had been sexually assaulted in past by defendant was admissible in prosecution of rape); State v. Rawls, 649 So.2d 1350, 1353–54 (Fla. 1995) (holding testimony of three other boys who testified that defendant had raped them admissible in case of sexual battery of person of less than 12 years, based on argument that defendant's conduct was "strikingly similar"); People v. Oliphant, 250 N.W.2d 443 (Mich. 1976) (holding that testimony of three witnesses that they had been raped by
applying the similarities standard are sex cases. The only two cases since Lough, State v. Pirtle and Keene v. Edie illustrate the emerging double standard between sex crimes and other crimes.

In Pirtle, the accused was convicted of two counts of aggravated first-degree murder. The defendant subdued two fast food employees, stole $4200, and then beat and killed the employees. The State argued that one of the aggravating circumstances was that the murders were committed as a part of a common scheme or plan.

Although Pirtle concerns aggravating factors in a murder and does not address evidentiary issues, the court’s discussion of the plan exception in relation to the common plan aggravator is illuminating. In refuting the defendant’s argument that the common scheme or plan aggravator is unconstitutionally vague, the court defined the aggravator between murders as requiring a “nexus between the killings.” The court further held that this interpretation of the common scheme or plan aggravator is consistent with the “traditional understanding of common scheme or plan within the rules of evidence.” Citing Lough, the Pirtle court held that a common scheme or plan under the rules of evidence may be established where “several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan.”

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113. See, e.g., State v. Bacotgarcia, 59 Wash. App. 815, 801 P.2d 993 (1990) (holding prior misconduct involving prostitution admissible in prostitution and rape case, even though appellate court had noted that such admission of prior misconduct was questionable under plan exception or any exception), review denied, 116 Wash. 2d 1020, 811 P.2d 219 (1991); State v. York, 50 Wash. App. 446, 749 P.2d 683 (1987) (stating that separate incidents of sexual assaults upon young students near defendant’s beauty school were admissible in separate trials to show common scheme or plan by defendant), review denied, 110 Wash. 2d 1009 (1988); State v. Bennett, 36 Wash. App. 176, 672 P.2d 772 (1983).


117. Id. at 638–39, 904 P.2d at 252–53.

118. Id. at 638, 904 P.2d at 252.

119. Id. at 661–62, 904 P.2d at 264 (citing State v. Dictado, 102 Wash. 2d 277, 285, 687 P.2d 172, 178 (1984)).

120. Id. at 662, 904 P.2d at 264.

have applied the lower similarity standard found in *Lough*, it followed the more stringent requirement set out in *Bowen*. 122

In *Keene v. Edie*, an adult victim brought a tort action for damages against her friend's father for childhood sexual abuse. 123 In the tort action, Keene introduced evidence of similar sexual abuse by the defendant upon another childhood friend and his two daughters. 124 Although each witness claimed that the defendant touched her breasts and fondled them in exchange for gifts or special treatment, 125 none of the alleged misconduct involved a similar method. 126 Despite differences in the alleged offenses, 127 the appellate court applied the unlinked acts theory, holding that similarities between the prior misconduct and the subject of the tort action were sufficient to establish the common scheme or plan exception. 128 Thus, the appellate court upheld the trial court's decision to admit the prior misconduct. 129

Commentators have noted a growing number of state laws granting more liberal admission of prior acts evidence in cases involving sex crimes. 130 Sexual crimes, such as rape, lewd conduct, and child molestation, shock the public conscience. The anger and horror from such heinous crimes can lead to condemnation of the accused and a public crusade against every sexual offender. 131

Although commentators claim that evidence of a defendant's prior offenses is necessary to inform the jury, 132 the fact remains that the

122. *Id.* at 661, 904 P.2d at 264.
124. *Id.* at 1316–17.
125. *Id.*
126. The court noted that the evidence showed a method that was "almost a modus operandi." *Id.* at 1314 n.2. The court was incorrect. The results were the same, but not the methods.
127. *Id.* at 1316–17.
128. *Id.* at 1316–18.
129. *Id.* at 1318.
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probability of predicting the reoccurrence of rape is no better than predicting the reoccurrence of murder. Prosecutors very likely seek such sexual evidence not for the purpose of predicting behavior, however, but for the purpose of providing an inflammatory suggestion to the jury. Because the prejudice generated from such evidence can overwhelm its probative value, it should not be admitted.

C. The Lough Court Should Have Applied a Higher Standard

The Washington Supreme Court should have required the prosecution to show that the prior misconduct in Lough was part of a larger criminal design—individual steps toward a common goal by the accused—to meet the plan exception. Washington precedent correctly limits the common scheme or plan exception to this interpretation.

1. The Court Should Have Followed State v. Bowen

In State v. Bowen, a patient claimed that her physician fondled her breasts. Under the plan exception, the prosecution introduced testimony of two other patients, both of whom claimed that the doctor had also sexually assaulted them. The State asserted that, because all


134. Commentators have supported legislation to amend the rules of evidence in order to admit prior misconduct evidence based on arguments that sexual offenders are a danger to society because rapists are particularly likely to repeat their crimes. Karp, supra note 132, at 20. Supporters of the recently passed Federal Rules of Evidence 412–413 have implied that the rules’ special exception for admission of sexual prior misconduct was necessary based on repeated offenses by rapists and child molesters. See 140 Cong. Rec. S 12990–01; see also supra notes 81–83 and accompanying text.

In fact, recent data suggest that rapists are no more likely to re-offend that other classes of criminals. A Bureau of Justice Statistics recidivism study released in 1989 found that only 7.7% of rapists were re-arrested for rape within the last three years. In contrast, 19.6% of released robbers were re-arrested for robbery, 21.9% of defendants convicted for assault were re-arrested for assault, 31.9% of released burglars were re-arrested for burglary and 33.5% of released larcenists were re-arrested for larceny. Allen J. Beck, Recidivism of Prisoners Released in 1983, in Bureau of Justice Statistics 6 (1989). Only released murderers had a lower recidivism rate at 6.6%. Id. Such statistics do not support the argument that the crime of rape should be treated differently because of high recidivism among sex offenders.


136. One witness testified that she was fondled two months before the charged incident. The second witness testified that she was fondled during a medical visit to her home about a year before the charged incident. Id. at 189; see also supra notes 81–83 and accompanying text.
three crimes were substantially similar, the uncharged offenses should be admitted to show Bowen’s “plan” to assault female patients separated from their husbands. The court of appeals held the testimony from the two witnesses inadmissible under the plan theory and reversed the trial court decision. The court concluded that the State failed to satisfy the plan exception because it did not show specific connections between the uncharged and charged offenses. In the absence of such connections, the court noted that admitting such evidence only would serve to unduly prejudice the jury, and, thus, constituted prejudicial error.

In Lough, each victim also made similar claims of sexual assault. Although the State argued that the accused used the same method of incapacitating each woman before intercourse, none of the claimed similarities showed any connection between the uncharged and charged offenses in a manner that suggested a larger criminal design. Furthermore, the facts in Lough are less reliable than those in Bowen. In Bowen, the victims were able to recount the sexual touching incidents. In Lough, however, none of the victims could give reliable and detailed testimony as to what had occurred.

2. A Higher Standard Is Appropriate

Bowen illustrates that both the plan and identity exceptions should have similarly high foundational requirements. The unlinked acts theory fails to establish this high standard and compromises the protections of Rule 404(b). The only interpretation of the plan exception that sets a proper level of foundational evidence is the linked acts theory.

In cases applying the linked acts theory, Washington courts seek to uphold the intent behind Rule 404(b). The linked acts theory protects the accused from the prejudicial impact of prior crimes or alleged illegal acts. In demanding proof of an overall design connecting the prior misconduct and the charged offense, the linked acts standard correctly requires that the prosecution meet a high foundational requirement.
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The linked acts standard also rejects the notion that a few similarities between the prior misconduct and the charged crime are enough to show a plan. Courts applying the linked acts theory have consistently stated that such similarities are not of sufficient probative value to overcome their prejudicial effect. These courts recognize that, although there may be some minimal value in establishing a "plan," the true power behind such evidence lies in its prejudicial impact upon the jury. The linked acts standard protects against such danger by requiring a level of relevant evidence that logically supports application of the plan exception.

IV. RECOMMENDATIONS FOR FUTURE APPLICATION OF THE PLAN EXCEPTION IN WASHINGTON COURTS

Washington courts should consider two options when the prosecution seeks to admit evidence under the plan exception. First, courts should admit evidence of prior sexual offenses under the lustful disposition exception when appropriate. Second, courts should apply two versions of the linked acts theory of the plan exception.

Washington courts already admit evidence of prior sexual misconduct under the lustful disposition exception. The courts can use the lustful disposition exception to absorb many of the misapplied plan cases by identifying classes of victims. Certainly lustful disposition would apply to most rape cases involving the defendant’s daughter, as in Ewoldt. The exception could also be expanded to admit evidence of other victims. Although the lustful disposition exception is usually limited to admitting evidence of prior sexual misconduct by the defendant on the same victim, the courts could identify other classes of victims that would

142. Bowen, 48 Wash. App. at 191–92, 738 P.2d at 320 (stating that points of similarity were insufficient to satisfy plan exception and demonstrated "little more than general propensity to commit indecent liberties, precisely the purpose forbidden under ER 404(b)"); State v. Hieb, 39 Wash. App. 273, 693 P.2d 145 (1984) (holding evidence that accused had injured child on other occasions was inadmissible to show common plan or scheme in prosecution for murder of child), reversed on other grounds, 107 Wash. 2d 97, 727 P.2d 239 (1986); State v. Harris, 36 Wash. App. 746, 677 P.2d 202 (1984) (holding that evidence of two alleged rapes, two and a half weeks apart, did not constitute common scheme or plan to commit crime charged and did not qualify as links in chain forming common design, scheme, or plan).

143. "Prosecutors relish proffering uncharged misconduct evidence because they realize that it is so devastating to the defense." MaeEndez & Imwinkelried, supra note 27, at 474. "Prosecutors favor uncharged misconduct evidence precisely because they know that it is one of "the most prejudicial [types of] evidence imaginable."" Id. (citing People v. Smallwood, 722 P.2d 197, 205 (Cal. 1986) (alteration in original)).

144. See supra note 103.

145. See supra note 103 and accompanying text.
qualify under the lustful disposition exception. The courts could set a criteria of characteristics for identifying victims limited to a particular class. If tailored properly to avoid prejudicial impact outweighing the probative value, classes of victims could include patients of doctors, children in restricted areas, and close relatives. If Washington courts decide to expand the classes of victims, similarities and relationships among the defendant to the victims could be explored without the need to resort to expansion of the more general plan exception.

Second, courts should apply one of two versions of the linked acts plan exception. The first linked acts theory was enumerated by the court in Bowen. This theory requires that the prosecution show a connection between the prior offenses and the charged crime. The second theory is the linked methodology theory. Under this theory, the prosecutor must establish that the common methodology used in the prior offenses and the charged offense was in fact planned by the accused. Under this interpretation, the plan exception applies when the prosecutor shows that the accused developed a preconceived modus operandi that he “planned” to use whenever the opportunity presented itself.

V. CONCLUSION

The Washington Supreme Court improperly broadened the common scheme or plan exception to Evidence Rule 404(b) in State v. Lough. In an attempt to respond aggressively to a difficult case that did not meet the high requirements of modus operandi, the court lowered the foundational requirements to the point that any evidence which does not meet the requirements for modus operandi can be readily admitted under the plan exception. Although Washington courts thus far have limited the application to sexual crimes, the low standard established in Lough sets a dangerous precedent for all future criminal cases. The courts ought to

146. See supra note 103.
148. See Imwinkelried, supra note 27, at 1013; MaeEndez & Imwinkelried, supra note 27, at 483–84.
149. See Imwinkelried, supra note 27, at 1013; MaeEndez & Imwinkelried, supra note 27, at 483–84.
150. See Imwinkelried, supra note 27, at 1013. This theory, however, requires proof that the accused actually formulated a plan or modus operandi. This requirement is not satisfied by mere repetition of results and a few similar facts. Instead, this standard require nearly the same modus operandi in each case and evidence of a plan by the accused. See People v. Corona, 145 Cal. Rptr. 894 (App. 1978) (holding that ledger containing names of victims tends to show how defendant selected victims).
apply the more stringent linked acts standard and consider all the exceptions before admitting prior misconduct evidence. This approach properly balances the probative value of the evidence against its prejudicial effect and upholds Rule 404(b)’s purpose of protecting the accused’s right to an impartial trial.