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No. 22-51163
(5th Cir. Mar. 19, 2023) (per curiam)

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-51163
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
May 19, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

WALTER RAUL MAGUINA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:19-CR-2607-1

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:[*]

Walter Raul Maguina appeals his convictions for conspiracy to transport aliens and transportation of aliens. He argues that the district court abused its discretion by admitting evidence of his 2018 conviction for transportation of aliens. He also asserts that a limited remand is required because the district court did not properly articulate its findings on the

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

applicable balancing test for the admission of such evidence. We disagree and AFFIRM.

* * *

Under the Federal Rules of Evidence, extrinsic evidence of other crimes, wrongs, or acts is inadmissible as proof of character but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2); *see* FED. R. EVID. 404(b)(1); *United States v. Cockrell*, 587 F.3d 674, 678 (5th Cir. 2009). We determine whether evidence was properly admitted under Rule 404(b) by applying the two-prong test provided in *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc). *See United States v. Juarez*, 866 F.3d 622, 627 (5th Cir. 2017). Under prong one, the extrinsic evidence of a past offense must be "relevant to an issue other than the defendant's character." *Beechum*, 582 F.2d at 911. Under prong two, "the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [Federal Rule of Evidence] 403." *Id.* Where, as here, a defendant timely objects to a district court's ruling to admit evidence under Rule 404(b), we review for abuse of discretion. *See United States v. Hays*, 872 F.2d 582, 587 (5th Cir. 1989).

Maguina does not challenge the relevance of the evidence of his prior conviction. We thus turn to the second prong of the *Beechum* test, which requires us to assess several factors, including: "(1) the government's need for the extrinsic evidence, (2) the similarity between the extrinsic and charged offenses, (3) the amount of time separating the two offenses, and (4) the court's limiting instructions." *Juarez*, 866 F.3d at 627 (internal quotation marks and citation omitted). Because we must make a "commonsense assessment of all the circumstances surrounding the extrinsic offense," no

one factor is dispositive. *Beechum*, 582 F.2d at 914. Additionally, the overall prejudicial effect of the extrinsic evidence is considered. *See Juarez*, 866 F.3d at 629–30. We look to whether the prior conviction was "of a heinous nature," and whether the evidence of such conviction was "likely to incite the jury to an irrational decision," "cumulative," or "tend[ed] to confuse the issues, mislead the jury or cause undue delay." *United States v. McMahon*, 592 F.2d 871, 876 (5th Cir. 1979); *see also* FED. R. EVID. 403.

Maguina is unable to establish that evidence of his 2018 conviction for transportation of aliens was inadmissible under prong two of the *Beechum* test. First, the Government had a need for extrinsic evidence to prove intent, knowledge, motive, and absence of mistake because Maguina asserted lack of knowledge in his defense, claiming he was a taxi driver merely helping a member of the clergy who worked with refugees. Second, the 2018 case was similar to this case, and the dissimilar facts that Maguina points to are directly connected to Maguina's involvement in alien smuggling in 2018 and therefore "significant . . . [to] the purpose of the inquiry at hand." *United States v. Valenzuela*, 57 F.4th 518, 522 (5th Cir. 2023) (holding no abuse of discretion to admit Rule 404(b) evidence in trial for drug smuggling, even where there were some different aspects in prior drug smuggling conviction). Third, Maguina concedes that the amount of time separating the offenses does not weigh in favor of a finding of undue prejudice. Finally, the limiting instructions given by the court were sufficient as we have held that even less extensive limiting instructions are sufficient to mitigate a jury's improper use of Rule 404(b) evidence. *See Valenzuela*, 57 F.4th at 523. Moreover, there are no aspects of the evidence, nor the presentation of it, that could have misled or incited the jury. *See McMahon*, 592 F.2d at 876. Therefore, the risk of unfair prejudice did not substantially outweigh the probative value of the

evidence of the 2018 conviction. The district court did not abuse its discretion in admitting such evidence. *See Beechum*, 582 F.2d at 911.

Finally, Maguina says this case must be remanded because the district court failed to address the prejudicial nature of the extrinsic evidence. In assessing this argument, we must confirm that the district court "engage[d] in the proper *Beechum* analysis and that this analysis is sufficiently apparent for purposes of appellate review." *United States v. Osum*, 943 F.2d 1394, 1401 (5th Cir. 1991). The district court "must articulate on the record its findings as to the *Beechum* probative value/prejudice evaluation" when formally requested by a party. *Id.* A mere objection to the admission of Rule 404(b) evidence—even with an argument addressing the prejudice prong—does not rise to the level of a formal request. *Id.* at 1402–03. If the district court fails to respond to this request and make the proper record, we must order a limited remand for the district court to properly and explicitly engage in the *Beechum* probative value/prejudice evaluation. *Id.* at 1402. However, this remand requirement does not apply if "the factors upon which the probative value/prejudice evaluation were [sic] made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983).

Here, Maguina's invocations and objections concerning the prejudice prong were not formal requests for a *Beechum* finding. *See Osum*, 943 F.2d at 1402–03. Moreover, "there is no substantial uncertainty about the correctness of the ruling." *Robinson*, 700 F.2d at 213. The district court was presented with the parties' arguments on this issue, the court understood the requirements of Rule 404(b), and the "factors contributing to the probative value/prejudice determination are . . . evident from the record." *Osum*, 943 F.2d at 1403. Accordingly, no remand is required.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	§	**CRIMINAL NO. EP-19-CR-**
	§	
Plaintiff,	§	**INDICTMENT**
	§	
v.	§	**CT 1: 8:1324(a)(1)(A)(v)(I), (a)(1)(A)(ii) and (a)(1)(B) (i)- Conspiracy to Transport Aliens;**
	§	
WALTER RAUL MAGUINA,	§	
	§	**CT 2: 8:1324(a)(1)(A)(ii)& (a)(1)(B)(ii) - Transporting Aliens.**
Defendant.	§	
	§	
	§	

THE GRAND JURY CHARGES:

EP 19CR2607

COUNT ONE
(8 U.S.C. §§ 1324(a)(1)(A)(v)(I), (a)(1)(A)(ii) and (a)(1)(B)(i))

On or about July 12, 2019, in the Western District of Texas, Defendant,

WALTER RAUL MAGUINA,

knowingly, intentionally, and unlawfully conspired, combined, and confederated, and agreed with others known and unknown to the Grand Jury, to commit offenses against the United States, namely: to transport and move and attempt to transport and move aliens within the United States knowing and in reckless disregard of the fact that said aliens had come to, entered, and remained in the United States in violation of law, said transportation being in furtherance of said violation of law, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(v)(I), (a)(1)(A)(ii) and (a)(1)(B)(i).

COUNT TWO
(8 U.S.C. §§ 1324(a)(1)(A)(ii) & (a)(1)(B)(ii))

On or about July 12, 2019, in the Western District of Texas, Defendant,

WALTER RAUL MAGUINA,

knowing and in reckless disregard of the fact that certain aliens had come to, entered and remained in the United States in violation of law, transported and moved, and attempted to transport and move such aliens within the United States, in furtherance of said violation of law, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(ii) and (a)(1)(B)(ii).

A TRUE BILL.

ORIGINAL SIGNATURE
REDACTED PURSUANT TO
E-GOVERNMENT ACT OF 2002

FOREPERSON OF THE GRAND JURY

JOHN F. BASH
UNITED STATES ATTORNEY

BY: _____
Assistant U.S. Attorney

APPENDIX C

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Federal Rules of Evidence Rule 404, 28 U.S.C.A.

Rule 404. Character Evidence; Other Crimes, Wrongs or Acts

Currentness

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 27, 2020, eff. Dec. 1, 2020.)

ADVISORY COMMITTEE NOTES

1972 Proposed Rules

Note to Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal.Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.,* 615:

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder,* 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Note to Subdivision (b). Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

1974 Enactment

Note to Subdivision (b). The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version. House Report No. 93-650.

Note to Subdivision (b). This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time. Senate Report No. 93-1277.

1987 Amendments

The amendments are technical. No substantive change is intended.

1991 Amendments

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g., United States v. McClure,* 546 F.2d 670 (5th Cir.1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g.,* Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. *Compare* Fla.Stat.Ann. § 90.404(2)(b) (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf.* Fla.Stat.Ann. § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine,* the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, *see United States v. Williams,* 900 F.2d 823 (5th Cir.1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston,* 485 U.S. 681, 108 S.Ct. 1496 (1988).

2000 Amendments

Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985) (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks*, 470 F.2d 432, 434-5 (D.C.Cir. 1972) (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

GAP Report--Proposed Amendment to Rule 404(a)

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 404(a):

1. The term "a pertinent trait of character" was changed to "the same trait of character," in order to limit the scope of the government's rebuttal. The Committee Note was revised to accord with this change in the text.

2. The word "alleged" was added before each reference in the Rule to a "victim" in order to provide consistency with Evidence Rule 412. The Committee Note was amended to accord with this change in the text.

3. The Committee Note was amended to clarify that rebuttal is not permitted under this Rule if the accused proffers evidence of the alleged victim's character for a purpose other than to prove the alleged victim's propensity to act in a certain manner.

2006 Amendments

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the

exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("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."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

2011 Amendments

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2020 Amendments

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

• The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

• The pretrial notice must be in writing--which requirement is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

• Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied--even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See*, e.g., *United States v. Lopez-Gutierrez,* 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta,* 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

• The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

• Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Notes of Decisions (3452)

Fed. Rules Evid. Rule 404, 28 U.S.C.A., FRE Rule 404
Including Amendments Received Through 8-1-23

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