(MUJI 2d) CR411 404(b) Instruction

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. You may consider this evidence, if at all, for the limited purpose of [tailor to proper non-character purpose such as motive, intent, etc.]. This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict a person simply because you believe (he) (she) may have committed some other act(s) at another time.

References
Utah R. Evid. 105.
Utah R. Evid. 404(b).
Huddleston v. United States, 485 U.S. 681, 691-92 (1988).
State v. Forsyth, 641 P.2d 1172, 1175-76 (Utah 1982).
29 Am. Jur.2d Evidence § 461.

Committee Notes
This instruction, if given, should be given at the time the 404(b) evidence is presented to the jury and, upon request, again in the closing instructions. Under Rule 105, the court must give a limiting instruction upon request of the defendant.

The committee recognizes, however, that there may be times when a defendant, for strategic purposes, does not want a 404(b) instruction to be given. In those instances, a record should be made outside the presence of the jury that the defendant affirmatively waives the giving of a limiting instruction.

404(b) allows evidence when relevant to prove any material fact, except criminal disposition as the basis for an inference that the defendant committed the crime charged. State v. Forsyth, 641 P.2d 1172 (Utah 1982). In the rare instance where, after the jury has been instructed, a party identifies another proper non-character purpose, the court may give additional instruction.

If the 404(b) evidence was a prior conviction admitted also to impeach under Rule 609, see instruction CR409.

If the instruction relates to a witness other than a defendant, it should be modified.

Ohio v. Roberts, 448 US 56 (1980) – Indicia of Reliability Test
Police arrested defendant for forgery of check. State sought to introduce the transcript of witness preliminary hearing testimony at trial. *Former testimony* under the *unavailability* (i.e., not firmly rooted) rule of hearsay. Two-prong test to determine whether such hearsay violates the right of confrontation: (1) State must produce witness or demonstrate that the witness is unavailable and (2) the hearsay must demonstrate "adequate indicia of reliability." To meet that test, the evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."

White v. Illinois, 502 U.S. 346 (1992)
Court retreated from the strict *Roberts* unavailability requirement, holding that firmly rooted excited utterance and medical statement hearsay of child who was abused do not require a showing of unavailability because of "substantial guarantees" of trustworthiness.

Crawford v. Washington, 541 US 36 (2004) – New Standard: Testimonial Statements
Crawford stabbed man for allegedly raping his wife. Wife gave prior statements that rebut defendant's theory of defense of others. She invoked her spousal privilege and prosecution used hearsay exception which was not firmly rooted of *against interest statement*. Court rejects *Roberts* test and create new standard. Testimonial hearsay statements by a person who does not testify at trial is inadmissible unless there was a prior opportunity to cross-examine.

Davis v. Washington, Hammon v. Indiana, 547 US 813 (2006) – Primary Purpose distinction
Davis used of 911 recording of domestic violence call where victim and told the operator that defendant had beaten her with his fists and then left. Hammon was domestic violence call where police arrive on scene and got excited utterances and witness statement from victim. Neither victim testified in court. Court developed a primary purpose test. Davis was not testimonial because "circumstances objectively indicating that the primary purpose of the interrogation is to enable police to meet an ongoing emergency." Hammon was testimonial because there was no "ongoing emergency" and "the primary purpose … is to establish or prove past events potentially relevant to later criminal prosecution."

Giles v. California, 554 U.S. 353 (2008) – Forfeiture by Wrongdoing
Giles was charged with murdering his girlfriend. During the trial, prosecutors used former statement of the deceased to police about a domestic violence and threats to kill her. Court upheld forfeiture by wrongdoing doctrine but stated that this hearsay testimony would not be admitted without a showing that the defendant had specific intent to prevent the witness from testifying.

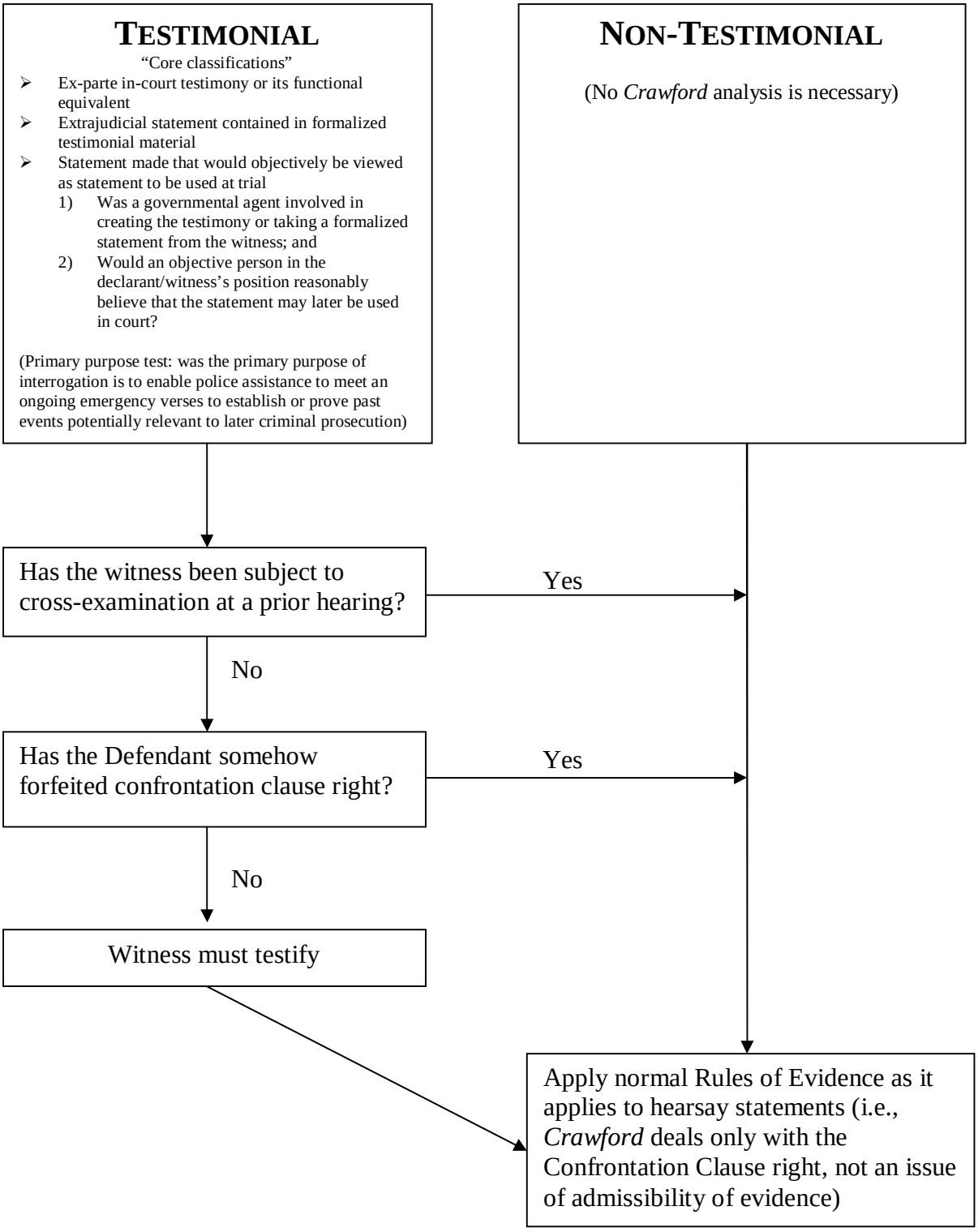
Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) – Affidavits
State admitted chemical drug test report stating that the substance was cocaine, without the testimony of the person who performed the test. Confrontation Clause aimed at addressing two abuses: (1) out-of-court statements that have a primary purpose of accusing a targeted individual of criminal conduct and (2) formalized statements, such as affidavits. This affidavit was the "core class of testimonial statements" which sole purpose was to provide "prima facie evidence" for trial.

Michigan v. Bryant, 562 U.S. ___ (2011) – Dying Declarations
Victim shot outside his house and then drove himself to a gas station and called police, as he was dying in the parking lot, he identified the shooter in response to police questions. Court held the statements were non-testimonial. Court held that it must make an objective determination whether the "primary purpose" of the interrogation was to meet an ongoing emergency or to prove past events. Court placed great weight on fact that place was in an informal setting (i.e., not police station), shooter was still at large, and victim continued to ask about when emergency medical services would arrive. (Justice Scalia wrote a bitter dissent claiming this was return to *Roberts*.)

Bullcoming v. New Mexico, 564 U.S. ___ (2011) – Surrogate Testimony
Analyst did not testify because on unpaid leave for undisclosed reasons. Supervisor for analyst was called to testify to non-testifying analyst's records. Court held that "surrogate" analyst could not testify about the testimonial statements in the forensic report of the certifying analyst under the Confrontation Clause.

Williams v. Illinois, 567 U.S. ___ (2012) - Experts
Rape case where defendant's DNA profile generated by non-testifying analyst. The DNA expert relied upon this profile to determine profile matched rape kit evidence. Fractured plurality decided that there was no Confrontation Clause violation because (1) the report was not used for the truth of the matter asserted (i.e., that the report contained an accurate profile of the defendant's DNA, rather that the report contained a DNA profile that matched the DNA profile deduced from the defendant's blood) and (2) it was non-testimonial (DNA profiles have the ability to incriminate and exonerate and the analysts preparing them "generally have no way of knowing whether it will turn out to be incriminating or exonerating—or both."

CRAWFORD ANALYSIS



Evidence Primer

404(b), Hearsay, Demonstrative, Crawford, … and the Kitchen Sink in 1 Hour

UPC Conference
August 1, 2013

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Three Types of Evidence

- Real Evidence
  - It is the original evidence which played a role in the case (e.g., weapon, paraphernalia, bloody shirt, forged check).
  - Real evidence is separate, distinct, and doesn't rely upon a witness' testimony.

- Illustrative Evidence
  - The "illustrative aid" may be used to assist a witness in explaining testimony but cannot be given to the jury as evidence (e.g., chalkboard drawings, courtroom demonstrations).
  - Such an exhibit is not sufficiently accurate or probative to be admitted into evidence for the jury to have when they deliberate.

Three Types of Evidence – continued

- Demonstrative Evidence
  - Demonstrative evidence played no part in the crime. The distinguishing feature of demonstrative evidence is that it is witness or lawyer-generated.
  - For example, a photograph of a broken tool is demonstrative evidence, and the actual broken tool is real evidence. (Both the photograph and the actual tool are usually admissible.)
  - Examples
    - Maps, photographs, drawings
    - Plaster casts, molds, or scale models
    - Charts, diagrams, summaries, chronologies
    - Police composites, mug shots, sketches, jail recordings
    - Videotapes, computer reconstruction or animation
    - Scientific tests or experiments
    - White board & markers (high tech Powerpoint)
    - Many more

Types of Evidence – continued

- Demonstrative Evidence – continued
  - Visual aids of this type are tied to the credibility of the witness and although they are not "real evidence," a jury can usually view them again while it deliberates.
  - Admissibility depends upon the accuracy and probative nature of the evidence to assist the jury.
  - Establish a foundation
    - Will the evidence assist the jury in making a determination of the existence of a relevant fact?
    - Does it accurately depict or reproduce the act, event, or condition under consideration?
    - Can you articulate the relevancy?
  - May have to establish the "chain of custody" with some demonstrative evidence.

- Your ability to persuade is directly related to your ability to communicate clearly to the jury

- Studies show that we learn through our 5 senses at different levels:
  - Taste (1%)
  - Touch (1.5%)
  - Smell (3.5%)
  - Hearing (11%)
  - Sight (83%)

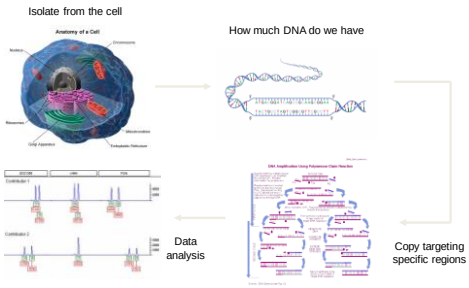
Your goal as a prosecutor is to make the jurors visualize the facts as much as possible ("I see your point").

How do I make your evidence come alive?

- What demonstrative evidence can I create to help simplify or clarify the theory of my case and the points I want to make?
- Do I have witness or witnesses who can lay the foundation; but more important, can use the evidence effectively to advance the theory of the case and make the points?
- What will it cost me to prepare and use the demonstrative evidence? Is my case worth it?
- Is the courtroom equipped to allow me to use the evidence effectively?

Make the judge and jury become "eyewitnesses" to your case.

Explaining complicated testimony



Name	Value in Numbers	Scientific Notation
One	1	10^0
Hundred	100	10^2
Thousand	1,000	10^3
Million	1,000,000	10^6
Billion	1,000,000,000	10^9
Trillion	1,000,000,000,000	10^{12}
Quadrillion	1,000,000,000,000,000	10^{15}
Quintillion	1,000,000,000,000,000,000	10^{18}
Sextillion	1,000,000,000,000,000,000,000	10^{21}
Septillion	1,000,000,000,000,000,000,000,000	10^{24}

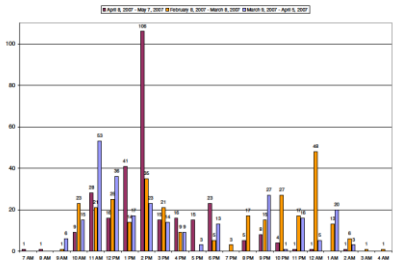
7 Billion is approx. the total present world population[1]

106 Billion is approx. the total population ever living on the earth[2]

280 Billion is approx. 1,000 times U.S. population[3]

1. The United States Census Bureau estimates that the world population exceeded 7 billion on March 12, 2012. (U.S. Census Bureau – World POPClock Projection).
2. Carl Haub of the nonprofit Population Reference Bureau estimates the total number of humans who have ever lived on the earth as of 2002 was approximately 106 billion. (Haub, Carl, "How Many People Have Ever Lived on Earth ?" Population Today, Population Reference Bureau, 30 (8): pp. 3–4, November/December 2002)
3. Source attribution conclusions.

Doing the math (visually) for the jury



Knife found in left front pant pocket of defendant

Result Conclusions and Opinions

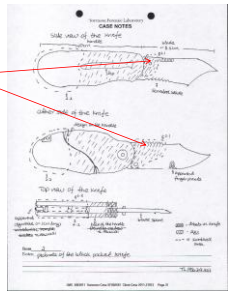
Item 2.1 (RBS on blade of knife):

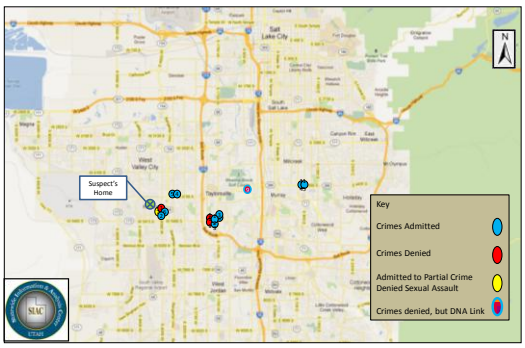
A mixture of DNA profiles from two contributors was obtained from this item. With the exception of identical twins or close relatives, it is concluded to a reasonable degree of scientific certainty that the major DNA profile obtained from this item came from the donor of item 3 (Reference – VICTIM).

The minor DNA portion obtained from this item is attributable to the donor of item 4 (Reference – DEFENDANT).

The frequency of occurrence of this profile among unrelated individuals in the U.S. population is estimated to be:

- 1 in 20.3 million for Caucasians
- 1 in 7.85 million for African Americans
- 1 in 165 million for Hispanics





Hearsay

Sir Walter Raleigh attempts to defends himself against Edward Coke during his trial for treason where crown used alleged co-conspirator's sworn confession of Lord Cobham who was locked in Tower of London and possibly recanted confession.

- The hearsay rule grew out of the fear of convicting a person based upon the untested, out of court statements of those not present in front of the jury.
  - No oath for witness to promise to tell truth.
  - No opportunity to assess competency, demeanor, or credibility of the original declarant.
  - No opportunity for cross-examination.

Hearsay Exceptions

- Hearsay doctrine known most for its exceptions.
- Cross examination not needed to test the hearsay exceptions because the circumstances under which the statement was made provide a guarantee of trustworthiness that the statement is reliable.
  - 8 exclusions
  - 23 "firmly rooted" exceptions
  - Other "unavailability" exceptions so long as they are trustworthy.

If you really want it in, …

- Does anybody—especially the judge—ever understand the rules and all its exceptions while thinking "on the fly"?
- Motion in limine best practice.
- Be prepared to cite specific law.
- What happens when the judge doesn't agree with you.

Hearsay Exceptions

- Exclusions (Rule 801)
  - Declarant-Witness's Prior Statement
    - Prior inconsistent statement
    - Prior consistent statement used to rebut claim of recently fabrication
    - Prior statement identifies a person as someone the declarant perceived earlier
  - Opposing Party's Statement
    - Statement by party
    - Statement party adopted
    - Statement by party's authorized agent
    - Statement by party's employee while within scope
    - Coconspirator's statement during and in furtherance of conspiracy

Hearsay Exceptions

- Exceptions
  - Declarant's availability not at issue
    - 23 exceptions (Rule 803)
  - Declarant must first be established "unavailable" (Rule 804)
    - Former Testimony
    - Dying Declaration
    - Statement Against Interest
    - Statement of Personal or Family History
    - Others: local to state (see infra Crawford)

Unavailability

- Rule 804(a), unavailability is:
  - Privilege
  - Refuses to testify despite court order
  - Not remembering the subject matter
  - Death or a then-existing infirmity, physical illness, or mental illness
  - Not been able, by process or other reasonable means, to procure the declarant's attendance (see Hardy v. Cross, 565 U.S. ___ (2011))
  - Other state statutory exceptions
    - Minor children who have been abused (e.g., UCA 76-4-411).
    - Vulnerable Adult and DV Victims (e.g., Cal. Evid. Code 1370 & 1380).
    - Witness refuses to testify despite court order or where the witness is deceased (e.g., 735 ILCS 5/155-10.2).

Confrontation Clause & Crawford

- Before Crawford, the Court took the view that the Confrontation Clause did not bar the admission of an out-of-court statement of unavailable witness that fell within a firmly rooted exception to the hearsay rule. See Ohio v. Roberts, 448 U. S. 56, 66 (1980).
- In Crawford, the Court adopted a fundamentally new interpretation of the confrontation right, holding that "[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U. S. 36, 59 (2004).

Shifting World

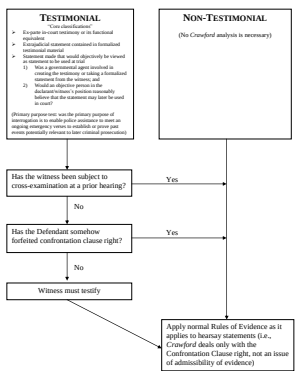
Hearsay under Robert

- The 8 exemptions and 23 exceptions = firmly rooted, so no Confrontation Clause issue for use of hearsay
- The expanding "unavailability" exceptions violate Confrontation Clause unless demonstrating "adequate indicia of reliability" by showing "particularized guarantees of trustworthiness."

Hearsay under Crawford

- No "firmly rooted" safe harbor.
- Now look to whether statement was testimonial or non-testimonial
- Non-testimonial statements now become a matter of hearsay rules alone.

***CRAWFORD* ANALYSIS**



Example: Excited Utterance

Not Testimonial

- Excited utterance statement to bystander
- Not testimonial and Confrontation Clause is not an issue
- Constitutional scrutiny for reliability has no place if hearsay was not testimonial

Testimonial

- Excited utterance statement to a police officer
- If intended meet an ongoing emergency
- Not testimonial and does not violates Confrontation Clause

Testimonial

- Excited utterance statement to a police officer
- If intended to aid criminal prosecution
- Testimonial and violates Confrontation Clause without prior opportunity of cross-examination.

Aftermath of Crawford

- Davis v. Washington, Hammon v. Indiana, 547 US 813 (2006)
- Giles v. California, 554 U.S. 353 (2008)
- Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)
- Michigan v. Bryant, 562 U.S. ___ (2011)
- Bullcoming v. New Mexico, 564 U.S. ___ (2011)
- Williams v. Illinois, 567 U.S. ___ (2012)
- Nearly 40,000 lower court case citations around the nation to *Crawford*.

404(b) Evidence

"You're a very, very bad man!"

"Prior"? Bad Acts

- PRACTICE NOTE: it is "bad acts," not "prior bad acts"
- Although there is no Utah cases on the matter of subsequent bad acts, the Federal Courts have substantially addressed this issue.

"It is settled in the Tenth Circuit that evidence of 'other crimes, wrongs, or acts' may arise from conduct that occurs after the charged offense. Our cases have held that '[r]egardless of whether 404(b) evidence is of a prior or subsequent act, its admissibility involves a case-specific inquiry that is within the district court's broad discretion.' ...

Subsequent acts evidence is particularly relevant when a defendant's intent is at issue. ...

We have routinely upheld the admissibility of subsequent acts evidence in other cases."

– United States v. Mares, 441 F.3d 1152, 1157-58 (10th Cir. N.M. 2006)

Getting Bad Acts into Evidence

- The trial court must "scrupulously examine" evidence (i.e., only way is by motion practice/evidentiary hearing)
- Three Part Test
  - Evidence is being offered for a proper, noncharacter purpose (i.e., rule 404(b)).
  - Evidence meets the requirements of rule 402 (i.e., relevancy).
  - Evidence meets the requirements of rule 403 (i.e., look at *Shickles* factors)

State v. Verde, 2012 UT 60, ¶ 16, 22, 296 P.3d 673

Shot across the bow?

"The difficulty in applying this simple rule, however, springs from the fact that evidence of prior bad acts often will yield dual inferences—and thus betray both a permissible purpose and an improper one. Thus, evidence of a person's past misconduct may plausibly be aimed at establishing motive or intent, but that same evidence may realistically be expected to convey a simultaneous inference that the person behaved improperly in the past and might be likely to do so again in the future. That's what makes many rule 404(b) questions so difficult: Evidence of prior misconduct often presents a jury with both a proper and an improper inference, and it won't always be easy for the court to differentiate the two inferences or to limit the impact of the evidence to the purpose permitted under the rule. ...

... Fidelity to the integrity of the rule requires a careful evaluation of the true—and predominant—purpose of any evidence proffered under rule 404(b). Thus, if proof of intent is merely a ruse, and the real effect of prior misconduct evidence is to suggest a defendant's action in conformity with alleged bad character, the ruse is insufficient and the evidence should not be admitted.

Proper Noncharacter Purpose 404(b)

- Specific list
  - Motive
  - Opportunity
  - Intent – the not-guilty rule is no longer valid theory (see Verde)
  - Preparation
  - Plan - a single, preconceived plan or plot; overarching grand design encompassing both the charged and uncharged offenses (see Verde)
  - Knowledge
  - Identity – pattern theory; but what about doctrine of chances (see Verde)
  - Absence of mistake
  - Lack of accident
- This list is not exhaustive. Some examples:
  - Rebutting the defense of fabrication
  - Modus Operandi
  - Victim's State of Mind
  - Defendant's sense of guilt or proof of sanity
  - Corroboration of claim to have recovered memory

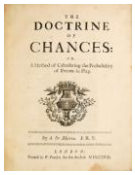
Relevancy

- Rule 402 provides that "relevant evidence is admissible unless otherwise provided."
- Rule 401 states "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Rule 404(b) is "an inclusionary rule," in other words, so long as it is not aimed at suggesting action in conformity with bad character, it is admissible.

State v. Shickles, 730 P.2d 291, 295-96 (Utah 1988)

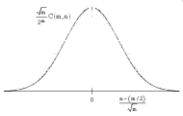
- Strength of the evidence as to the commission of the other crime
  - Live witness vs. documents
- Similarities between the crimes
  - "Striking similarities" language
- The interval of time that has elapsed between the crimes
  - "[P]roximity in time combined with similarity in type of crime virtually guarantees admittance of prior bad acts evidence." (State v. Nelson-Waggoner, 2000 UT 59, ¶29)
- The need for the evidence
  - Rebut charge of fabrication or mistake; avoid reducing the case to a contest of credibility between the defendant and the victim (see State v. Bradley, 2002 UT App 348)
- Efficacy of alternative proof
  - Lack of other physical evidence or eyewitnesses to prove your case
- Degree to which the evidence will rouse the jury to overmastering hostility
  - Multiple acts of similar or identical abuse even if by more than one witness is unlikely to prejudice a jury (see State v. Balfour, 2008 UT App 410)

Doctrine of Chances



Chance, as we understand it, supposes the Existence of things, and their general known Properties: that a number of Dice, for instance, being thrown, each of them shall settle upon one or other of its Bases. After which, the Probability of an assigned Chance, that is of some particular disposition of the Dice, becomes as proper a subject of Investigation as any other quantity or Ratio can be. But Chance, in atheistical writings or discourse, is a sound utterly insignicant: It imports no determination to any mode of Existence; nor indeed to Existence itself, more than to non-existence; it can neither be defined nor understood: nor can any Proposition concerning it be either affirmed or denied, excepting this one, "That it is a mere word."

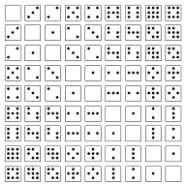
– Abraham de Moivre, 1735



$$\frac{f(x)}{f(0)} = \lim_{k\to\infty} \frac{(2k^2)!(2k^2)!}{(2k^2+2kx)!(2k^2-2kx)!}$$

$$= \lim_{k\to\infty} \frac{(2k^2)(2k^2-1)\cdots(2k^2-2kx+2)(2k^2-2kx+1)}{(2k^2+1)(2k^2+2)\cdots(2k^2+2kx-1)(2k^2+2kx)}$$

Verde: Doctrine of Chances

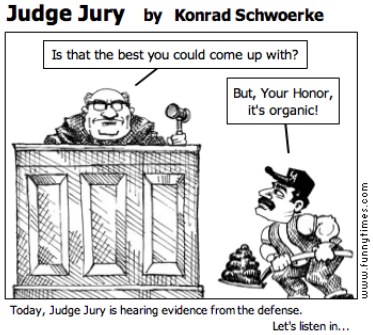


"This doctrine defines circumstances where prior bad acts can properly be used to rebut a charge of fabrication. It is a theory of logical relevance that 'rests on the objective improbability of the same rare misfortune befalling one individual over and over.'" (Verde 2012 UT 60 at ¶47)

"As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar 'accidents' occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point, '[t]he fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed.'" (Verde 2012 UT 60 at ¶49)

Verde Test for Doctrine of Chances

- Uncharged misconduct evidence must be in bona fide dispute
- Each uncharged incident must be roughly similar to the charged crime (need not be as great as that necessary to prove identity under a "pattern" theory)
- Accusations are independent of each others (i.e., no collusion between witnesses/incidents)
- Accusations are more frequently than the typical person endures such accusations accidentally
  - "Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the probability that the same innocent person will be the object of multiple false accusations is extremely low."


Judge Jury by Konrad Schwoerke
Is that the best you could come up with?
But, Your Honor, it's organic!
www.funnytimes.com
Today, Judge Jury is hearing evidence from the defense.
Let's listen in...