UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
June 5, 2019 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Discussion / Action	Tab 1	Judge Blanch
12:05	CR411 Review in light of State v. Lane, 2019 UT App 86	Discussion / Action	Tab 2	Judge Blanch
12:30	Assault Instructions - *Special Verdict Form Review* - *Assault Against Peace Officer / Military Service Member* - *Assault Against School Employee* - *Assault / Aggravated Assault by Prisoner* - *Related Definitions*	Discussion / Action	Tab 3	Sandi Johnson
1:25	Summer meeting schedule	Discussion / Action		Committee
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

September 4, 2019
October 2, 2019
November 6, 2019
December 4, 2019

UPCOMING ASSIGNMENTS:
1. Sandi Johnson = Assault; Burglary; Robbery
2. Judge McCullagh = DUI; Traffic
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes – May 1, 2019 Meeting

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES

Judicial Council Room (N301), Matheson Courthouse
450 South State Street, Salt Lake City, Utah 84114
May 1, 2019 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus		•
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones	•	
Karen Klucznik	•	
Judge Brendan McCullagh	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young	•	
Jessica Jacobs	•	
Elise Lockwood	•	
Melinda Bowen	•	

GUESTS:

None

STAFF:

Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the April 3, 2019 meeting.
Mr. Field moved to approve the draft minutes.
Judge McCullagh seconded the motion.
The motion passed unanimously.

(2) IMPERFECT SELF-DEFENSE:

The committee continued its consideration of imperfect self-defense instructions. Ms. Klucznik had prepared a draft of a practitioner note to this section of instructions prior to the meeting and distributed a copy to the committee members for review. This was prepared with the purpose of informing practitioners about the reasons for why the committee chose to approach these instructions in this way.

Ms. Klucznik also distributed a copy of a case (*State v. Drej*, 2010 UT 35) which she and Mr. Field worried may create an issue for the committee's chosen approach to these instructions. Ultimately, after discussion, the committee concluded that the approach espoused by the committee does not run afoul of the *State v. Drej* case largely because *State v. Drej* was not focused on the issue of how instructions are to be delivered to a jury when a case involves imperfect self-defense. The committee decided that the practitioner note should include a mention of *State v. Drej* so that practitioners are aware that the case was considered as part of the process of adopting this approach to instructing the jury on imperfect self-defense.

The committee briefly discussed any "order of deliberations" issues that may exist in the practitioner note. Judge Blanch recommended that the word "then" be removed from the fourth paragraph of Ms. Klucznik's draft.

The committee discussed how to incorporate a reference to *State v. Drej* in the practitioner note.

The committee then discussed where this practitioner note should be situated within the collection of MUJI instructions, as well as the overall organization of the 1400 series of instructions.

The committee voted to adopt the practitioner note, as follows:

CR1450 Practitioner's Note: Explanation Concerning Imperfect Self-Defense

Imperfect self-defense is an affirmative defense that can reduce aggravated murder to murder, attempted aggravated murder to attempted murder, murder to manslaughter, and attempted murder to attempted manslaughter. See Utah Code Ann. § 76-5-202(4) (aggravated murder); Utah Code Ann. § 76-5-203(4) (murder).

When the defense is asserted, the State must disprove the defense beyond a reasonable doubt before the defendant can be convicted of the greater crime. If the State cannot disprove the defense beyond a reasonable doubt, the defendant can be convicted only of the lesser crime.

Instructing the jury on imperfect self-defense has proved to be problematic because many practitioners have tried to include the defense as an element of either or both of the greater crime and the reduced crime. The inevitable result is that the elements instruction on the reduced crime misstates the burden of proof on the defense as it applies to that reduced crime. See, e.g., *State v. Lee*, 2014 UT App 4, 318 P.3d 1164.

To avoid these problems, these instructions direct the jury to decide the defense exclusively through a special verdict form. Under this approach, the jury is given a standard elements instruction on the greater offense, with no element addressing imperfect self-defense. If the jury finds that the State has proved the elements of the greater offense beyond a reasonable doubt, the jury enters a guilty verdict on that offense. The jury is directed to the imperfect self-defense instructions and instructed that it must complete the imperfect self-defense special verdict form. On the special verdict form, the jury must indicate whether it has unanimously found that the State disproved the defense beyond a reasonable doubt. If the jury indicates the State has disproved the defense, the trial court enters a conviction for the greater crime. If the jury indicates the State has not disproved the defense, the trial court enters a conviction for the lesser crime.

The committee considered *State v. Drej*, 2010 UT 35, 233 P.3d 476, and concluded that it does not preclude this approach.

Last Revised – 05/01/2019

The committee then reviewed the other instructions that were addressed by the committee at the April 3, 2019 meeting to ensure the committee membership still approved of the work completed at that meeting. The

committee reviewed the Murder instruction (a new instruction that will be numbered as CR1411), the Explanation of Perfect and Imperfect Self-Defense as Defenses (which was formerly numbered CR1410, but will now be numbered in its revised form as CR1451), and the Special Verdict Form – Imperfect Self-Defense instruction (previously numbered at earlier meetings as CR219A, but now changed to CR1452 so that it is grouped with the other imperfect self-defense instructions; existing CR219 will have a reference added to direct people to CR1452 for the imperfect self-defense special verdict form instruction). The committee discussed each discussion to ensure that it was in the form intended by the committee, including the name of each instruction. The committee agreed that the work on those instructions completed at the April 3, 2019 meeting is still approved.

The committee then debated the actual special verdict form language. This is a continuation of the discussion from the April 3, 2019 meeting. In particular, the committee discussed the proper method of phrasing the second option / checkbox on the special verdict form. After significant discussion exploring many alternatives for the language (including longer options, shorter options, options that avoid the use of a double negative, and options that mirror the language structure of the first option), the committee agreed that the special verdict form should read, as follows:

SVF1400 SPECIAL VERDICT – IMPERFECT SELF-DEFENSE.

(Case Caption Information)

Having found the defendant, (DEFENDANT'S NAME), guilty of [Aggravated Murder][Attempted Aggravated Murder][Murder][Attempted Murder], as charged in Count [#],

Check ONLY ONE of the following boxes:

☐ We unanimously find that the State has proven beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.

OR

☐ We do not unanimously find that the State has proven beyond a reasonable doubt that the defense of imperfect self-defense DOES NOT apply.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 04/03/2019

This language was agreed upon in order to minimize the possibility that something in the second option would tend, in any way, to encourage the jury to select the first option over the second option. The only reason the second option even exists is to ensure the jury has to make an affirmative indication that it intentionally did NOT check the first box. The risk with the language in the second option is that if carelessly worded it may have an unintended impact on the jury's decision-making process. Mirroring the language structure between the two options minimizes the risk of unintended impact. This mirroring requires the use of a double negative, but the committee believed that the double negative would not be confusing in a way that would be prejudicial to a defendant.

The committee approved staff numbering these instructions in a way that makes sense within the larger numbering scheme in the MUJI instructions as a whole.

(3) ASSAULT INSTRUCTIONS:

This agenda item was not considered during this meeting. It will be considered as part of the next agenda.

(4) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on June 5th, 2019, starting at 12:00 noon. At that time, the committee will review the meeting schedule for the summer months.

TAB 2

CR411 Review

NOTES: On May 23, 2019, the Utah Court of Appeals published State v. Lane, 2019 UT App 86. In this case, the Court of Appeals ruled that the trial court erred in admitted 404(b) evidence without conducting separate 403 balancing. In paragraph 28 of the opinion, the Court noted that the 404(b) jury instruction did not cure the prejudice in the case. That instruction read:

> You have heard evidence that [Lane] brandished a knife in a fight and that he cut an individual's face with a box cutter. Both of these acts occurred before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of self-defense. This evidence was not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other acts at another time.

The Court noted that "the risk of unfair prejudice can be minimized by a clear [and] forceful limiting instruction," but that the instruction in this case did not "properly inform the jury on how to use the [404(b)] evidence."

CR411 (attached) currently reads as follows:

> 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.

The committee should consider whether changes should be made to CR411 to make it a sufficiently "clear and forceful limiting instruction." In making its review, the committee might also review paragraphs 44 and 48 from the concurring opinion of Judge Harris (highlighted below).

Please also find attached the law review article cited by Judge Harris in paragraph 48.

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.

Last Revised - unknown

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ANTHONY TYRONE LANE,
Appellant.

Opinion
No. 20160930-CA
Filed May 23, 2019

Third District Court, Salt Lake Department
The Honorable Katie Bernards-Goodman
No. 161901895

Teresa L. Welch, Attorney for Appellant

Sean D. Reyes and Kris C. Leonard, Attorneys
for Appellee

JUDGE KATE APPLEBY authored this Opinion, in which
JUDGE MICHELE M. CHRISTIANSEN FORSTER concurred.
JUDGE RYAN M. HARRIS concurred, with opinion.

APPLEBY, Judge:

¶1 Anthony Tyrone Lane appeals his convictions for aggravated assault and possession of a dangerous weapon by a restricted person. He argues the district court erred in applying the doctrine of chances and improperly admitted prejudicial prior act evidence. He also argues his trial counsel was ineffective for failing to request the trial court judge's disqualification based on remarks she made during a pretrial hearing. We reject Lane's ineffective assistance of counsel claim but conclude the prior act evidence should have been excluded and therefore remand for a new trial.

BACKGROUND

¶2 Lane lives in Salt Lake City.[1] In February 2016, he was in a physical altercation with the victim (Victim) at a homeless shelter. Lane was arrested and charged with aggravated assault and possession of a dangerous weapon by a restricted person. Trial was held in August 2016.

¶3 Victim was the first witness to testify. Victim previously lived at the shelter and returned there that day to pick up mail. After realizing the mailroom was closed, he wandered around talking to people. There were "50 to 100 people milling around" the shelter, including Lane. Victim testified that as he was talking, he "got side blinded, got punched in the face and . . . just started swinging back at the direction that it came from." Several people broke up the fight. Victim "took a few steps" back and "then it started up again." Victim testified he got punched again, "went down to duck a punch," and when he came back up, he "was bleeding." He thought he had just been punched but guessed he "ended up getting sliced." Victim sustained three lacerations to his face as a result of the incident. Lane ended up with a small cut on his finger. Victim denied using a knife in the altercation and denied having one.

¶4 The State presented surveillance footage of the incident. At first, Victim could not identify himself on the video recording and testified he was unsure with whom he was fighting. Victim added that it was "hard to see" what was going on in the footage. He testified multiple times he did not know who hit him. After the altercation, Victim left the scene to try to catch a train to a hospital. He was bleeding severely and had a towel on

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1. "On appeal, we recite the facts in the light most favorable to the jury's verdict." *State v. Martinez*, 2013 UT App 154, ¶ 2 n.1, 304 P.3d 110.

his face when he was stopped by a security officer. Police officers arrived and called for an ambulance. Victim was treated at a hospital for his injuries.

¶5 A witness (Witness) to the altercation also testified. Witness was a shelter resident who saw Lane and Victim "get into an altercation" and then being "pulled apart." He testified he saw Lane "excuse[] himself," but then "they got into [a] second altercation [and he] noticed both of them had blades." "A crowd was following them," and "when [Lane] left and [Victim] pursued," the crowd "let them get into it again." Witness saw Lane "sidestep [Victim] and throw a punch back at him." Witness testified that Lane "clearly took off . . . [and] was trying to avoid that whole mess."

¶6 One of the responding officers (Officer) also testified. Officer commonly patrols the shelter and considers it a "high crime area." He investigates "anywhere from 15 to 30" incidents a day, ranging from "drug crimes on up to pretty serious cases." He testified that it is "not uncommon for people to have guns and all sorts of other things down there." He arrived on the scene and Victim told him that he challenged Lane first for "being a big mouth" and "acting tough." When shown footage of the incident, Officer testified he "couldn't tell a whole lot from the surveillance video."

¶7 The second day of trial primarily consisted of testimony regarding two prior incidents involving Lane. Before trial, the State filed a motion asking the court to admit evidence of incidents that occurred at the shelter in 2012 (2012 Incident) and 2015 (2015 Incident). The State sought to introduce the evidence under rule 404(b) of the Utah Rules of Evidence or, in the alternative, the doctrine of chances. The State argued that these incidents were offered for a proper non-character purpose under rule 404(b) to show "intent, plan, absence of mistake, motive, lack of accident, and to rebut [Lane's] self-defense claim."

Specifically, the State argued that "the prior bad act evidence will prove [Lane assaulted Victim with unlawful force or violence] by showing that [Lane] knew what he was doing when he assaulted [Victim] with a sharp object, that he had a plan and motive to injure [Victim], and that he was not acting in self-defense." The State also argued this evidence was relevant and that the probative value was not substantially outweighed by unfair prejudice.

¶8 In the alternative, the State argued the evidence should be admitted under the doctrine of chances. The State contended "the evidence of [Lane's] two prior bad acts [was] offered to counter his claim of self-defense in the current case" and to "show that it is unlikely that [he] would be placed in a situation three times in four years that would require cutting the victims' faces in self-defense." The State claimed it was not "assert[ing] that [Lane] has a propensity for cutting faces." The State argued that the evidence was relevant, it was being offered for a proper non-character purpose, and its probative value substantially outweighed its prejudicial effect.

¶9 The district court ruled that the two prior incidents involving Lane were admissible under the doctrine of chances because the foundational requirements were met (that is, materiality, similarity, independence, and frequency). The court admitted the evidence of the two incidents on this ground but did not evaluate it under rule 403.

¶10 At trial, the following evidence was presented regarding the 2015 Incident. A woman (2015 Witness) who once lived at the shelter testified first. She testified that the altercation began with Lane arguing with a man and Lane was "as always . . . letting him know who he was." 2015 Witness testified that after the two stopped yelling Lane walked away, then returned and "slashed" the man in the face. She testified the other man did not have a weapon. After that, 2015 Witness approached the man

and put a shirt on his face and waited for medical assistance. After 2015 Witness was excused, the court—without prompting from the parties—reminded the jury that the "last witness has to do with a separate incident from the one we talked about yesterday. And witnesses from here on out are separate, right? 2015 instead of 2016."

¶11 A responding officer (2015 Officer) also testified about the 2015 Incident. He was patrolling the shelter that day and separated Lane from a man with whom Lane was arguing. A few minutes after separating the men, 2015 Officer was called to respond to a "fight with a knife." As 2015 Officer approached, he saw a man "being attended to by several other individuals . . . [and 2015 Officer] could see blood seeping through [a] cloth [held to the man's face]. There was blood on the ground and then also blood on the [man's] shirt." The individuals attending to the man told 2015 Officer that Lane cut him.[2] When 2015 Officer encountered Lane after the incident, Lane told 2015 Officer "it was self-defense." Another responding officer testified that officers seized a box cutter from Lane. The other man was transported to the hospital for a "deep laceration" on the left side of his face "starting just above the ear and continuing all the way down to the corner of his mouth." Lane was later charged with assault in connection with the 2015 Incident. The case went to trial and a jury found Lane not guilty.

¶12 The State next introduced evidence from the 2012 Incident. A responding officer (2012 Officer) was called to the shelter on a report of a "man with a knife." 2012 Officer "noticed [Lane] bleeding from the mouth, [and it] looked like he'd been involved in an altercation." 2012 Officer observed a knife

2. Defense counsel objected to this statement as hearsay and the court sustained the objection but did not instruct the jury to disregard the statement.

approximately seven to eight feet away from Lane that was "silver in color, had a wooden handle, [and] about a 4-inch blade." Lane told 2012 Officer the knife was his. 2012 Officer could not recall whether there was blood on it. He testified Lane was the only individual bleeding. A second officer testified that Lane said the man he was fighting with "struck him with a head-butt and then punched him and then [Lane] drew a knife." Lane claimed he produced the knife in self-defense. He pled guilty to assault for the 2012 Incident.

¶13 At the conclusion of trial, the jury convicted Lane of two felony charges: aggravated assault and possession of a dangerous weapon by a restricted person. The court sentenced Lane and he appeals.

ISSUES AND STANDARDS OF REVIEW

¶14 Lane raises two issues on appeal. First, Lane contends the district court improperly applied the doctrine of chances analysis in admitting evidence of the 2012 and 2015 incidents. "The appropriate standard of review for a district court's decision to admit or exclude evidence is abuse of discretion." *State v. Lowther*, 2017 UT 34, ¶ 17, 398 P.3d 1032 (quotation simplified). "A district court abuses its discretion when it admits or excludes evidence under the wrong legal standard." *Id.* (quotation simplified). Reversal is warranted if "absent the error, there was a reasonable likelihood of a more favorable result for the party," and therefore "our confidence in the jury's verdict is undermined." *Robinson v. Taylor*, 2015 UT 69, ¶ 39, 356 P.3d 1230 (quotations simplified).

¶15 Second, Lane contends his trial counsel was ineffective for failing to request the trial judge's disqualification based on remarks she made to him during a pretrial hearing. "An ineffective assistance of counsel claim raised for the first time on

appeal presents a question of law." *State v. Ott*, 2010 UT 1, ¶ 16, 247 P.3d 344 (quotation simplified).

ANALYSIS

I. Prior Act Evidence

¶16 Lane argues the district court improperly applied the doctrine of chances in admitting evidence of the 2012 and 2015 incidents. Specifically, Lane contends the court erred in admitting the prior act evidence under rule 404(b) without also weighing it under rule 403. We agree.

¶17 It is "fundamental in our law that a person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts." *State v. Reed*, 2000 UT 68, ¶ 23, 8 P.3d 1025. This concept is articulated in rule 404(b) of the Utah Rules of Evidence, which provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b)(1). But "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* R. 404(b)(2).

¶18 The "doctrine of chances" is also used to admit otherwise excludable prior act evidence under rule 404(b). It is "a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *State v. Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673 (quotation simplified), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. This evidence is used in cases that involve "rare events happening with unusual frequency." *State v. Lopez*, 2018 UT 5, ¶ 52, 417 P.3d 116. Evidence admitted under the doctrine of chances must satisfy four foundational

requirements.[3] *Verde*, 2012 UT 60, ¶ 57. "These . . . include materiality, similarity, independence, and frequency." *State v. Lomu*, 2014 UT App 41, ¶ 28, 321 P.3d 243 (citing *Verde*, 2012 UT 60, ¶ 5).

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3. In *State v. Lowther*, the Utah Supreme Court clarified confusion over whether the doctrine of chances requirements should be assessed as elements under rule 404(b) or as factors replacing the *Shickles* factors under rule 403. 2017 UT 34, ¶ 21, 398 P.3d 1032.

In *State v. Shickles*, the supreme court articulated a set of factors district courts should consider in conducting a rule 403 balancing test prior to admitting 404(b) evidence. 760 P.2d 291, 295–96 (Utah 1988), *abrogated by State v. Doporto*, 935 P.2d 484 (Utah 1997). In *State v. Verde*, 2012 UT 60, 296 P.3d 673, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016, the court articulated a different set of factors courts should consider for the doctrine of chances but it was unclear whether those factors were intended to replace the *Shickles* factors under rule 403. *See State v. Lowther*, 2015 UT App 180, ¶ 25, 356 P.3d 173 ("Given this court's decision in *State v. Labrum*, to interpret *Verde* as replacing *Shickles*, the trial court's strict adherence to *Shickles* is misplaced."), *aff'd on other grounds*, 2017 UT 34, 398 P.3d 1032. The supreme court clarified in *Lowther* that district courts should not "make a mechanical application" of any factors but should simply "apply the text of rule 403." 2017 UT 34, ¶ 34 n.51. Specifically, the court held that "in performing a rule 403 balancing test, a court is not bound by [*Verde*'s] foundational requirements" and can consider any relevant factors in applying the text of rule 403. *Id.* ¶ 21.

But it has always been clear that traditional balancing of probative value and prejudicial effect under rule 403 is required prior to admitting 404(b) evidence. *See, e.g.*, *State v. Thornton*, 2017 UT 9, ¶ 36, 391 P.3d 1016; *Verde*, 2012 UT 60, ¶ 15; *State v. Lomu*, 2014 UT App 41, ¶ 33, 321 P.3d 243; *State v. Labrum*, 2014 UT App 5, ¶ 18, 318 P.3d 1151.

¶19 The difficulty in applying rule 404(b) "springs from the fact that evidence of prior bad acts often will yield dual inferences." *Verde*, 2012 UT 60, ¶ 16. "[E]vidence 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." *Id*. "If such evidence is really aimed at establishing a defendant's propensity to commit a crime, it should be excluded despite a proffered . . . legitimate purpose." *Id.* ¶ 17 (quotation simplified).

¶20 If a court finds a proper non-character purpose for the evidence, it must also engage in a separate rule 403 analysis to weigh these competing concerns. *Id.* ¶¶ 17–18. Weighing this evidence is "essential to preserve the integrity of rule 404(b). Without it, evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character—so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule." *Id.* ¶ 18.

¶21 For purposes of our analysis we assume, without deciding, that the evidence in this case was admissible under rule 404(b).[4] In its ruling, the district court correctly articulated the standard for admitting prior act evidence. First, a court must determine whether the evidence is offered for a proper non-character purpose. Next, a court must find that the evidence's "probative value is not substantially outweighed by the danger of 'unfair prejudice, confusing the issues, misleading

4. Lane does not ask this court to find that the doctrine of chances should not be used to rebut a defense of self-defense. But, as the concurring opinion points out, we have our doubts that it should be applied in this context.

the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'" (Quoting Utah R. Evid. 403.) But despite articulating the proper standard, the court failed to apply rule 403 when it found the 2012 and 2015 incidents admissible under the doctrine of chances.[5] Its analysis simply consisted of mechanically applying *Verde*'s foundational requirements under rule 404(b). *See State v. Lowther*, 2017 UT 34, ¶ 1, 398 P.3d 1032 (holding that the district court abused "its discretion by mechanically applying the *Shickles* factors to assess the probative value of the State's rule 404(b) evidence"). In other words, the court applied the wrong legal standard in admitting this evidence by not conducting a separate rule 403 analysis. This amounts to an abuse of discretion. *See id.* ¶ 17.

¶22 Courts must "carefully consider whether [prior act evidence] is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an

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5. Rule 403 balancing is always required before admitting evidence under rule 404(b). *See Lomu*, 2014 UT App 41, ¶ 33 ("Having taken all of the *Verde* requirements into account and having determined that there was substantial probative value in admitting evidence of the other episode, we *must also* consider whether the potential for prejudice or confusion from admitting the evidence substantially outweighed its probative value." (emphasis added)); *Labrum*, 2014 UT App 5, ¶ 18 ("Evidence offered under rule 404(b) is admissible if it is relevant for a non-character purpose *and* meets the requirements of Rules 402 and 403." (emphasis added) (quotation simplified)); *see also* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 203 (2018–2019 ed.) ("Rule 403 codifies the common law authority of the judge to balance the probative weight of *any item* of evidence against its overall unfairness. If a drafter were required to reduce all the rules of evidence into two rules, it would be rules 402 and 403." (emphasis added)).

improper inference of action in conformity with a person's bad character." *Verde*, 2012 UT 60, ¶ 18. "[E]ven if the evidence may sustain both proper and improper inferences under rule 404(b)," courts must "balance the [inferences] against each other under rule 403, excluding bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose." *Id.* As we articulated *supra* ¶ 18 note 3, courts should not "make a mechanical application" of any factors under rule 403 but should simply apply the text of the rule. *Lowther*, 2017 UT 34, ¶ 33 n.51.

¶23 In this case, the prior act evidence should have been excluded because the prejudicial inference that Lane's character predisposes him to get in knife fights and then claim self-defense substantially outweighs the State's proffered justifications for admitting the evidence. The State claimed it was offering the evidence to show Lane's "non-character purpose of intent, plan, absence of mistake, motive, lack of accident, and to rebut [his] self-defense claim." Specifically, the State argued the evidence would prove Lane's unlawful use of force or violence "by showing that [he] knew what he was doing when he assaulted [Victim] with a sharp object, that he had a plan and motive to injure [Victim], and that he was not acting in self-defense, but that he was, in fact, the actual aggressor." The State also argued the evidence should be admitted under the doctrine of chances. It argued that the prior act evidence shows that "it is unlikely that [Lane] would be placed in a situation three times in four years that would require cutting the victims' faces in self-defense." The State claimed it was not asserting that Lane "has a propensity for cutting faces."

¶24 Merely stating that evidence is not being offered for propensity purposes does not mean the evidence does not present an improper propensity inference. First, it is not highly strange or unlikely that Lane would need to defend himself

multiple times over years of living in a high crime area. Officer testified at trial that he encounters many individuals carrying weapons in that area and responds to "15 to 30" incidents a day ranging from "drug crimes" up to "pretty serious cases." Further, the proffered use of the evidence presented by the State is substantially outweighed by the unfairly prejudicial inference that Lane has the character of someone who continuously provokes altercations, cuts the faces of his victims, and then claims self-defense.

¶25 The way the evidence was presented at trial also supports our conclusion that the prior act evidence in this case presented a prejudicial propensity inference. In opening statements the State told the jury how to view the prior act evidence. "We're here today on an aggravated assault case so I want to tell you a little bit about that. In [2015], prior to the incident in 2016 that we'll be trying over the next two days, the defendant got into an argument with an individual." The State continued,

> [Lane] pulled out a box cutter and sliced . . . [the individual] across the face, opening his cheek. When [Lane] was arrested . . . he said he was only defending himself, it was self-defense. But then he said he would do it again. And that is why we are here today for this 2016 case because he did exactly what he said he was going to do. *He did it again*.

(Emphasis added.) The statement that Lane "did it again" is precisely the type of propensity inference rule 404(b) prohibits. *See* Utah R. Evid. 404(b) ("Evidence of a crime . . . is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character."); *State v. Burke*, 2011 UT App 168, ¶ 28, 256 P.3d 1102 (holding "evidence of a defendant's bad acts is not admissible to prove that a defendant has a propensity for bad behavior and has acted in conformity with his dubious character"); Edward J.

Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851, 856 (2017) [hereinafter Imwinkelried] ("It is axiomatic that the jurors may not reason that the other act shows the accused's bad character and that 'if he did it once, he did it again.'").

¶26 Next, we address whether admitting the prior act evidence was prejudicial to the outcome of trial. The evidence presented at trial for Lane's 2016 charges, standing alone, was weak and based on circumstantial evidence. Victim never identified Lane as his attacker, none of the police officer witnesses saw the incident, and the defense witness testified he saw Lane "trying to avoid that whole mess" and that "both [Lane and Victim] had blades." Also, the surveillance footage from 2016 was blurry and it was "hard to see" what occurred.

¶27 The prior act evidence also took up a significant portion of the two-day trial. The State finished presenting its evidence of the 2016 charges on the first day and spent most of the second day presenting the prior act evidence. Further, at the beginning of the second day, after the first witness testified regarding the prior act evidence, the court sua sponte addressed the jury to remind it that the State was no longer presenting evidence of Lane's 2016 charges. Based on how the evidence presented at trial, it was possible that Lane's conviction "reflected the jury's assessment of his character, rather than the evidence of the crime he was charged with." *State v. Rackham*, 2016 UT App 167, ¶ 24, 381 P.3d 1161. Because the 2016 evidence was weak and the prior act evidence took up a significant portion of the trial, "the likelihood of a different outcome in the absence of the rule 404(b) evidence . . . is sufficiently high to undermine confidence in the verdict." *Id.* (quotation simplified).

¶28 We also note that the jury instruction does not cure the prejudice in this case. The stipulated instruction states,

> You have heard evidence that [Lane] brandished a knife in a fight and that he cut an individual's face with a box cutter. Both of these acts occurred before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of self-defense. This evidence was not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other acts at another time.

The State argues any improper use of the 2012 and 2015 incidents at trial was cured through this instruction. We disagree that this instruction properly informed the jury on how to use the evidence from the 2012 and 2015 incidents. *See* Imwinkelried at 878 (noting that the risk of unfair prejudice can be minimized by a "clear [and] forceful limiting instruction"). The instruction tells the jury it is allowed to consider the 2012 and 2015 incidents for "self-defense" but at the same time it is not allowed to "convict a person simply because you believe he may have committed some other acts at another time." This seems to tell the jury it is allowed to consider Lane's propensity for getting in fights and arguing he was acting in "self-defense" while simultaneously telling it not to convict Lane because he may have been in fights before and then claimed "self-defense."

¶29 We conclude that the prior act evidence should have been excluded before trial under rule 403 and, had it been excluded, there is a "reasonable likelihood of a more favorable result." *Robinson v. Taylor*, 2015 UT 69, ¶ 39, 356 P.3d 1230 (quotation simplified).

II. Trial Judge Disqualification

¶30 Lane also contends his counsel was ineffective for failing to request the judge's disqualification because of remarks she made to Lane during a pretrial hearing. We disagree.

¶31 To succeed on his ineffective assistance of counsel claim, Lane must show "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Montoya*, 2004 UT 5, ¶ 23, 84 P.3d 1183 (quotation simplified). "To prevail on the first prong of the test, a defendant must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness." *Id.* ¶ 24 (quotation simplified). Lane fails to meet the first prong in this case.

¶32 During a pretrial hearing Lane's counsel asked the court to release Lane from jail pending trial. The State opposed his release arguing that the allegations of the current charges along with "his criminal history . . . show[s] that he is a danger to the community" and that "he could potentially be a flight risk." In response the judge stated, "What concerns me is the difficulty with the self-defense claim when you are the one introducing a weapon into a fight. Even if someone else starts that fight, you then can't introduce a weapon into that fight. . . . That's what makes you a danger to society." The judge concluded, "I am not inclined to do a release at this time, not after I've looked at the slashed faces of people you've had contact with."

¶33 The court found Lane was "a danger to society" in the context of considering whether to release him before trial. The court was not, as Lane argues, making a premature

determination of his guilt,[6] but merely engaging in routine and necessary analysis for purposes of determining his pretrial release status. *See State v. Kucharski*, 2012 UT App 50, ¶ 4, 272 P.3d 791 ("The fact that a judge has formed an opinion regarding a particular defendant based on proceedings occurring in front of the judge is not a ground for disqualification." (citing Utah Code of Judicial Conduct rule 2.11(A))); *see also id.* ("[B]ias or prejudice requiring disqualification must usually stem from an extrajudicial source, not from occurrences in the proceedings before the judge." (quotation simplified)).

¶34 We conclude these statements do not establish that the judge was biased and therefore Lane's trial counsel was not ineffective for not requesting the judge's disqualification. *See State v. Tueller*, 2001 UT App 317, ¶ 16, 37 P.3d 1180 (explaining that if "there was no actual bias in the trial judge's actions, we cannot say that trial counsel's failure to attempt to disqualify the judge constitutes" deficient performance); *see also State v. Munguia*, 2011 UT 5, ¶ 19, 253 P.3d 1082 (explaining that if the judge is not required to recuse herself, defense counsel is not ineffective for not requesting it).

CONCLUSION

¶35 We reject Lane's ineffective assistance of counsel claim and find that the judge's statements did not amount to bias requiring disqualification. But we conclude that Lane was prejudiced by the admission of the prior act evidence. The prior act evidence should have been excluded and we reverse and remand for a new trial.

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6. We also note that the jury, not the judge, was the factfinder in this case.

HARRIS, Judge (concurring):

¶36 I am in full agreement with the majority's analysis in this case, and specifically with its conclusion that the district court's failure to conduct a rule 403 analysis of the prior bad acts evidence was prejudicial error. I agree with the majority that, in this case, the prior bad acts evidence was deployed in such a way as to make it nearly impossible for the jury to avoid drawing a propensity inference, and that the evidence should have been excluded on that basis. I write separately, as I did recently in *State v. Murphy*, 2019 UT App 64, to again express reservations about the manner in which the doctrine of chances (the Doctrine) is currently being used in Utah.

I

¶37 My first concern is a big-picture one: I wonder whether it could ever be appropriate for the Doctrine to be applied to admit prior acts evidence to rebut a defendant's claim that he acted in self-defense. Lane does not raise this issue, but I think it would be worthwhile for a future litigant to raise it, so that a Utah appellate court can weigh in on the question after full briefing.

¶38 As described by our supreme court, the Doctrine is "a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *State v. Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673 (quotation simplified), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016; *see also State v. Lopez*, 2018 UT 5, ¶ 52, 417 P.3d 116 (stating that doctrine of chances cases "involve rare events happening with unusual frequency"). At root, the Doctrine is simply "probability reasoning." *Verde*, 2012 UT 60, ¶¶ 50, 53; *cf. Hopt v. People*, 120 U.S. 430, 440 (1887) (referring to the "doctrine of chances" as a tool used to "establish a probability").

¶39 Because the Doctrine is a probability-based construct, it has been widely applied to admit prior bad acts evidence in cases in which the accused's defense is that the allegedly criminal act in question occurred by accident or random chance rather than by design. *See Murphy*, 2019 UT App 64, ¶ 54 (Harris, J., concurring) (citing cases).[7] In such cases, the prosecution may be allowed to introduce evidence of previous incidents involving the defendant in order to demonstrate the extreme statistical improbability that the allegedly criminal act occurred solely by accident or random chance. *See, e.g.*, *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (stating that "[t]he man who wins the lottery once is envied; the one who wins it twice is investigated"), *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999). That is, where the defendant's claim is that "the event in question was an accident," the Doctrine can apply to rebut that claim, as our supreme court explained in *Verde*: "Propensity inferences do not pollute this type of probability reasoning," because "[t]he question for the jury is not whether the defendant is the type of person who, for example, sets incendiary fires or murders his relatives." 2012 UT 60, ¶ 50

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7. The defense of mistake or accident can be raised with regard to either *actus reus* or *mens rea*. In the famous "Brides in the Bath" case, the defense was that there had been no *actus reus*, and that the three brides had each died by accident while bathing. *See State v. Verde*, 2012 UT 60, ¶ 49 n.20, 296 P.3d 673 (citing *Rex v. Smith*, 11 Crim. App. 229, 84 L.J.K.B. 2153 (1915)), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. In the case of Dean Wigmore's famous hypothetical about a hunter who shot at his companion three times, the hunter necessarily concedes the existence of an *actus reus*, but defends the case on the grounds that he did not intend to shoot. *See* 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 302, at 241 (James H. Chadbourn ed., 1979). In these examples, however, the underlying defense is the same: it was a mistake or an accident.

(quotation simplified). Instead, "[t]he question is whether it is objectively likely that so many fires or deaths could be attributable to natural ca[u]ses."[8] *Id.* This evidence "tends to prove a relevant fact without relying on inferences from the defendant's character," and is therefore not impermissible propensity evidence. *Id.* ¶ 51. In the context of rebutting a claim of mistake or accident, "[i]t is that objective unlikelihood [of repeated similar misfortunes] that tends to prove" that actions were brought about by "human agency, causation, and design" rather than by accident or random chance. *Id.* ¶ 50 (quotations simplified).

¶40 A doctrine like this—based on probability reasoning and on the statistical unlikelihood of repeated occurrences of rare, random events—would seem to lose much of its logical coherence if applied in contexts where the underlying acts in question are not random at all, but instead are based on human volition. Applied in such contexts, it would seem to become very

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8. It bears noting that the underpinnings of even this logic have been credibly (albeit impliedly, without mentioning or citing to *Verde*) called into question. *See, e.g.*, *State v. Vuley*, 2013 VT 9, ¶¶ 19–22, 70 A.3d 940 (holding that the Doctrine cannot be used, even in its probabilistic sense, when applied to "human action" rather than to truly random events, because "[i]nferring from the implausibility of all occurrences being accidents that any particular occurrence was not an accident necessarily involves reasoning based on propensity," and that "it would be an inference based on propensity to say that, because a man has intentionally killed *a* wife, he is therefore more likely to have intentionally killed *this* wife"). For the purposes of this opinion, however, I assume that the logic of paragraphs 49–51 of the *Verde* opinion is sound (even though it may not be), and point out additional flaws in *Verde*'s rickety structure that I believe may exist even if its underlying logic is sound.

difficult—if not entirely impossible—to separate the permissible "probability" inference from the impermissible "propensity" inference. I explained in *Murphy* that I fear this problem might exist in cases in which the Doctrine is applied to admit prior bad acts for the purpose of rebutting a defendant's claim that the complaining witness is lying. *See* 2019 UT App 64, ¶¶ 57–59 (Harris, J., concurring). I see the potential for this same problem in cases in which the Doctrine is applied to admit prior bad acts for the purpose of rebutting a claim of self-defense.

¶41 In cases like this one, in which a defendant stands accused of a violent act but claims he acted in self-defense, we may be less likely to believe the defendant's claims if presented with evidence that he has made this claim before, whether successfully or unsuccessfully. But the *reason* we are less likely to credit the defendant's claim in this context has little to do with probability and a lot to do with the easily drawn inference that the defendant might be the type of person who commits violent acts. The fact that he has been previously involved in violent acts is not usually something that is based on randomness or fortune (like winning the lottery or being struck by lightning). It is based on a whole host of factors, most of which involve non-random, purposeful decisions on the part of the defendant and others. Specifically, becoming involved in violent acts involves human decision-making, and a person's state of mind when he commits those acts—e.g., whether the person acted in self-defense—is also volitional rather than random.

¶42 That is, in many instances, the reasons a person is involved in incidents resulting in violent acts, and the reasons a person forms a particular *mens rea* while doing so, are not probability-based, and therefore I wonder about the wisdom of trying to apply a probability-based doctrine in this context. The fact that Person A is much more likely than Person B to be involved in a violent scrape and then claim self-defense would seem to have a lot more to do with propensity or with other non-

random environmental factors than it does with simple mathematical probabilities. *See, e.g.*, Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259, 1262–63 (1995) ("The essence of this probable guilt argument is that there is a disparity between the chances, or probability, that an innocent person would be charged so many times and the chances, or probability, that a guilty person would be charged so many times. If there is such a disparity, however, it is only because a guilty person would have the propensity to repeat the crime. If it were not for the propensity to repeat, the chances, or the probability, that an innocent person and a guilty person would be charged repeatedly would be identical. Hence, the argument hinges on propensity and runs afoul of the first sentence of Rule 404(b)."). At a minimum, it seems that the variables involved in running a metaphorical probability calculation in this context may be too numerous to make the calculation meaningful in any given case.

¶43 In my view, even assuming the soundness of *Verde*'s underlying probability logic, *see supra* ¶ 39 note 8, and even assuming there may exist scenarios in which that logic could be usefully applied in a self-defense (or other volitional) case, the entire exercise is a nonstarter unless two threshold conditions can be met. First, the party asking the court to admit prior bad acts evidence pursuant to the Doctrine should be able to clearly articulate what the event of "rare misfortune" is that triggers the Doctrine's application. *See Verde*, 2012 UT 60, ¶ 47. Where the Doctrine is applied to rebut a claim of mistake or accident, this is usually easily accomplished: the event of rare misfortune is, say, the death of a bride in a bathtub, or the mistaken taking of a horse. *See id.* ¶¶ 48–49. In the self-defense context (as in the fabrication context, *see Murphy*, 2019 UT App 64, ¶¶ 57–59 (Harris, J., concurring)), it is often difficult to articulate what that event is, as illustrated in this case. Is the event of rare misfortune that Lane was previously involved in fights? Is it that Lane was previously involved in fights for which he claimed that he acted

in self-defense? Or is it that Lane was previously involved in fights in which he employed a knife? I cannot tell, and (even upon questioning at oral argument) neither can the State. None of these options involve random events of chance. As in this case, if it is difficult to clearly identify the event of "rare misfortune," it raises the likelihood that the evidence of prior acts is not coming in for permissible probability purposes but, instead, is coming in for impermissible propensity purposes. Moreover, without clear identification of the event of "rare misfortune," it becomes difficult to determine whether the "four foundational requirements," which are prerequisites to the application of the Doctrine, have been satisfied. *See Verde*, 2012 UT 60, ¶¶ 57–61 (listing materiality, similarity, independence, and frequency as the "four foundational requirements" of the Doctrine).

¶44 Second, the party asking the court to admit prior bad acts evidence pursuant to the Doctrine should be able to clearly articulate both (a) the purposes for which the evidence can permissibly be used and (b) the purposes for which the evidence cannot permissibly be used. If these purposes cannot be articulated in a way that a lay juror can readily understand, that is a good clue that the Doctrine is being misapplied. Again, this case is a good example. The jury was instructed that it could "consider [the prior bad acts] evidence, if at all, for the limited purpose of self-defense," but that the "evidence was not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait." I confess that I do not know what this instruction means. No mention at all is made of any probability-based inference that might be permissibly drawn with regard to evidence properly admitted pursuant to the Doctrine. No meaningful guidance is given regarding the purposes for which the evidence may, and may not, be used. I cannot imagine lay jurors having any idea what to make of an instruction like this, and if the jury is not clearly

instructed, the risk of jurors resorting to impermissible propensity inferences is too great.

¶45 All of which leads me not only to conclude that the Doctrine was misapplied in this case, but also to wonder whether the Doctrine could ever be properly applied in a self-defense context. No Utah appellate court has yet held that application of the Doctrine to cases in which the defendant claims self-defense is proper.[9] Some other courts have applied the Doctrine to allow prior acts evidence in this context, *see, e.g.*, *State v. Monroe*, 364 So. 2d 570, 571–73 (La. 1978), but those cases are rare, and it is therefore far from established that the Doctrine applies in self-defense cases. I urge parties in future cases to raise and fully brief this issue, instead of—as the parties did here—simply assuming that the Doctrine applies in this context.

II

¶46 My second set of concerns has to do with the manner in which the Doctrine was specifically applied in this case. That is,

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9. The matter was discussed at some length in *State v. Labrum*, 2014 UT App 5, 318 P.3d 1151, but this court ultimately stopped short of deciding whether the Doctrine could be employed for this purpose because it determined that the prior bad acts evidence was admissible on another ground. *Id.* ¶¶ 29–31. To date, our supreme court has not addressed the issue, although it has generally espoused a remarkably broad view of the Doctrine's applicability, holding that it applies in other contexts also involving non-random volitional acts, including to rebut defenses of fabrication, *see Verde*, 2012 UT 60, and consent, *see State v. Lowther*, 2017 UT 34, ¶ 25, 398 P.3d 1032. For the reasons set forth herein and elsewhere, *see State v. Murphy*, 2019 UT App 64, ¶¶ 45–65 (Harris, J., concurring), my view is that these decisions may merit reexamination.

assuming that the Doctrine could be meaningfully applied to admit relevant, non-character prior acts evidence in the self-defense context, the Doctrine was misapplied in this case in several material ways.

¶47 First, as the majority ably describes, the district court did not conduct a separate rule 403 analysis, a step that is "'essential to preserve the integrity of rule 404(b).'" *See supra* ¶ 20 (quoting *Verde*, 2012 UT 60, ¶ 18). Even if a court concludes that, under governing case law, the Doctrine can logically apply, and even if it concludes that the Doctrine's "four foundational requirements" for application are met, *see Verde*, 2012 UT 60, ¶ 57, the court still must analyze the evidence under rule 403 to ascertain whether the probative value of the *admissible* part[10] of the evidence is substantially outweighed by the danger of unfair prejudice, including the danger of the jury drawing an impermissible propensity inference. The district court failed to take this important step.

¶48 Second, as I have already mentioned, the instruction given to the jury was inadequate, and did not meaningfully assist the jury in navigating its way through a logical and metaphysical minefield. "A complete, properly worded limiting

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10. Propensity evidence has great probative value, which is in part why our rules of evidence ban it. *See* David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 1.2, at 6–7 (2009) (stating that propensity evidence is excluded "not because it has no appreciable probative value, but because it has too much"). In conducting an appropriate rule 403 balancing in this context, the "probative" side of the equation should include only the value of any admissible probability inferences, and should not include the value of any impermissible propensity inferences (which should be assessed on the "prejudice" side of the equation).

instruction has two prongs. The negative prong forbids the jury from using the evidence for the verboten purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about the evidence." Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851, 873 (2017). The instruction given in this case was conclusory, and informed the jury that it could not draw a character inference but could use the evidence for "self-defense." This is precisely the sort of instruction that commentators have rightly criticized. *See id.* at 873–74, 876 (offering as an example of an "inadequate" instruction one where, "[a]fter stating the negative prong of the instruction, in the affirmative prong the judge . . . give[s] the jury only the guidance that they may use the evidence for the purpose of proving 'intent,'" and noting that this sort of instruction "can lead the jury into improper character reasoning"). Assuming that, on the facts of this case, it were possible to articulate purposes for which the evidence could and could not be used, those purposes needed to have been spelled out in much more detail than they were.

¶49 Third, I am concerned about the manner in which the district court analyzed the "frequency" factor. *See Verde*, 2012 UT 60, ¶ 61. The point of this factor is to ensure that the event of "rare misfortune" in question has been visited upon the defendant "more frequently than the typical person." *Id.* ¶¶ 47, 61 (quotation simplified). Assuming that one can pinpoint what the event of rare misfortune is in this instance, and that one can meaningfully apply probability (rather than propensity) reasoning to a situation involving several levels of human volition, our case law then requires the court to compare this defendant to a "typical person" to ascertain whether the event occurred to the defendant with greater frequency. In this case, the court's complete analysis on this point was as follows: "Here, Defendant has been involved with three serious assaults in four

years. Even given his chronic homelessness and the higher frequency of assault surrounding shelters, the rate of Defendant's involvement in these assaults is not mere accident." I find this analysis lacking. The court did not take any evidence to establish the profile of a "typical" resident of that part of Salt Lake City, or any evidence intended to establish a baseline regarding the number of physical altercations per year in which such a resident might typically be involved. Under these circumstances, I see no reasoned basis for the court's intuition-level conclusion that a person living in that part of the city becoming involved in one fight every fifteen months is necessarily "frequent." Bound up in that analysis are various assumptions by the court—arrived at without evidence—of what living conditions are like for homeless citizens of Salt Lake City. This is an instance where the court, in my view, needed to take additional evidence—from experts, if necessary—to arrive at a sound conclusion about whether the number of assaults in which Lane was involved was atypical for a resident of that part of town.

III

¶50 But I question whether our courts should even be asked to engage in inquiries like that, given the bigger problems I see with the application of the Doctrine to admit prior acts evidence in cases in which a defendant claims that he acted in self-defense. Because of my various concerns about the district court's admission, pursuant to the Doctrine, of Lane's prior assaults, I share the majority's view that Lane was not afforded a fair trial, and therefore I concur in the majority's disposition. I also urge litigants in future cases to raise and brief issues they might see with application of the Doctrine, in this or other contexts, in order to enable the Doctrine's application in Utah to be reexamined in an appropriate case.

45 Hofstra L. Rev. 851

Hofstra Law Review
Spring, 2017

Article

Edward J. Imwinkelried [a1]

CRIMINAL MINDS: THE NEED TO REFINE THE APPLICATION OF THE DOCTRINE OF OBJECTIVE CHANCES AS A JUSTIFICATION FOR INTRODUCING UNCHARGED MISCONDUCT EVIDENCE TO PROVE INTENT

[T]here is nothing either good or bad but thinking makes it so.

--William Shakespeare [1]

I. INTRODUCTION

Dean Wigmore once wrote that the hearsay doctrine is the "most characteristic rule of the Anglo-American law of Evidence." [2] Today, it can be said that the character evidence doctrine is the most characteristic rule of American evidence law. At early common law, a proponent could not introduce evidence of an accused's uncharged crime in order to show the accused's bad character and, in turn, treat that character as proof that the accused committed the charged crime. [3] Modernly, most legal systems in the common law world have significantly relaxed that prohibition. [4] However, with few exceptions, [5] the evidentiary codes in ***852** the United States firmly maintain the prohibition. [6] For example, Federal Rule of Evidence 404(b)(1) provides: "Evidence of a crime, wrong, or other 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." [7] Thus, at an armed robbery trial, the prosecution may not introduce evidence of a prior, uncharged robbery by the accused simply to show that the accused is a robber and hence more likely to have perpetrated the charged robbery.

However, the wording of Rule 404(b)(1) should not mislead the reader into believing that the prosecution may never introduce evidence of an accused's uncharged offenses. Quite the contrary is true. Another subsection of the very same rule reads: "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." [8] This provision generates more appellate litigation and published opinions than any other section in the Rules. [9] Rule 404(b)(2) permits the prosecution to introduce evidence of an accused's uncharged misconduct when the evidence is logically relevant on a non-character theory. [10] Prosecutors frequently offer uncharged misconduct under Rule 404(b)(2) because they appreciate that its introduction can have a ***853** devastating impact on the defense. [11] Suppose, for example, that the accused is charged with an armed robbery committed on March 1. When the perpetrator fled the scene, he dropped a pistol with a certain

serial number. The prosecutor has evidence that on February 1, the accused stole that very pistol from a gun store. At the armed robbery trial, Rule 404(b)(2) would enable the prosecutor to introduce testimony about the February 1 theft for the purpose of identifying the accused as the perpetrator of the March 1 charged offense. In this situation, the prosecutor is not arguing simplistically that the earlier, uncharged theft shows the accused is a criminal and, therefore, more likely to have committed the charged robbery; rather, the prosecutor is relying on the non-character theory that by virtue of the prior theft, the accused gained possession of a unique, one-of-a-kind instrumentality found at the scene of the charged robbery. It is true that here the evidence has dual relevance: It is probative on a forbidden character theory as well as a legitimate non-character theory. However, in most cases of dual relevance, the judge admits the evidence and gives the jury a limiting instruction under Rule 105. [12] The instruction directs the jury that although they may not use the evidence to infer the accused's bad character, they may consider the evidence for the limited purpose of deciding whether the accused was the person who wielded the pistol during the charged March 1 robbery.

As the preceding hypothetical illustrates, prosecutors sometimes introduce uncharged misconduct to prove the accused's identity as the perpetrator of the charged offense. However, as the wording of Rule 404(b)(2) indicates, prosecutors may offer uncharged misconduct evidence to establish other elements of the charged crime such as the mens rea, the requisite "intent." As a matter of history, offering such evidence to prove mens rea elements was "[t]he earliest widely recognized use of uncharged misconduct evidence." [13] Today, the introduction of uncharged misconduct to prove intent is the most common use of Rule 404(b) evidence. [14] It is understandable why prosecutors resort to this use of uncharged misconduct so frequently. In ***854** many cases, prosecutors can rely on physical evidence or eyewitness testimony to establish both the occurrence of a crime and the accused's identity as the perpetrator. For example, the victim or a percipient witness may provide direct evidence of the accused's identity. The proof of the mens rea often proves to be the most difficult challenge for the prosecutor, [15] especially in prosecutions for white-collar crimes. [16] Unless the accused has made a confession directly admitting mens rea, the prosecution must almost always rely on circumstantial evidence. [17]

The courts appreciate how difficult it can be for a prosecutor to establish the accused's criminal intent, and they consequently are generally rather liberal in permitting the prosecution to introduce uncharged misconduct evidence for that purpose. [18] Most courts take a lenient attitude toward the admission of such evidence to prove intent. [19] Given the right circumstances, the prosecution may introduce uncharged misconduct to prove the accused's identity as the perpetrator, the accused's formation of a plan to commit the charged and uncharged crimes, or the accused's mens rea; [20] and, the introduction of the evidence for any of these purposes may necessitate a showing of a degree of similarity between the charged and uncharged crimes. The courts routinely assert that the lowest degree of similarity is required when the prosecution offers the evidence to prove intent. [21]

In the final analysis, in many cases in which the courts accept "similar" uncharged misconduct evidence under Rule 404(b) to show intent, they rely-- at least implicitly--on Dean Wigmore's famous doctrine of objective chances; on the facts, there is no other applicable non-character theory. Wigmore stated the doctrine of chances in his monumental evidence treatise:

> ***855** The argument here is ... from the point of view of the doctrine of chances,--the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all .... [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the ... inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; ... the chances of an inadvertent shooting on three successive similar occasions are extremely small .... [22]

Ian Fleming captured the same notion in a classic line from his James Bond novel, *Goldfinger*: "Once is happenstance. Twice is coincidence. The third time it's enemy action." [23]

The conventional wisdom is that the admission of uncharged misconduct to prove intent on this theory is a legitimate non-character theory of logical relevance. As previously stated, Rule 404(b) forbids the prosecution from introducing testimony about an accused's uncharged misconduct to show the accused's personal, subjective [24] disposition or propensity for illegal or immoral conduct. [25] In theory, the doctrine of chances has nothing to do with the accused's character. [26] Instead, to apply the doctrine, the trier of fact focuses on the objective improbability of so many accidental, inadvertent occurrences. [27] To be sure, innocent persons sometimes find themselves enmeshed in suspicious circumstances; but common sense indicates that it is implausible that such involvement will occur repeatedly.

Although the courts now accept the doctrine of chances as an alternative, non-character theory of logical relevance, reliance on the doctrine poses significant probative dangers. As previously stated, ***856** uncharged misconduct evidence almost always possesses dual relevance; even when it is logically relevant on a non-character theory, the evidence also shows the accused's bad propensity and creates the risk that the trier will misuse the evidence for the verboten character purpose. [28] The line between proper non-character reasoning and improper character reasoning is a fine one. [29] It can be a very thin distinction for the lay jurors to draw during deliberations. [30] Again, to trigger the doctrine, the prosecutor must demonstrate that the charged and uncharged crimes are similar. [31] The very similarity of the crimes can sorely tempt the jury to succumb to the character-reasoning syndrome. [32] It is axiomatic that the jurors may not reason that the other act shows the accused's bad character and that "if he did it once, he did it again." However, there is an acute risk that the line between that forbidden theory and the doctrine of chances will blur [33] during deliberations, when the jury has to assess the similarity between the charged and uncharged acts. If the judge decides to admit uncharged misconduct on a doctrine of chances theory, it is his or her responsibility to ensure that the theory does not function as a Potemkin, virtually inviting the jury to engage in forbidden character reasoning. [34]

The thesis of this Article is that in many cases, the courts have shirked that responsibility. The next Part addresses the threshold question of whether the character prohibition has any application when the prosecution offers uncharged misconduct evidence to show mens rea. [35] Although some have suggested that the answer is no, Part II concludes that the prohibition applies with full force whether the evidence is offered to show mens rea or physical conduct. [36] Part III is largely descriptive, reviewing the doctrine of chances. The Part lists the requirements for invoking the doctrine and explains why the courts have concluded that the doctrine is a legitimate, non-character theory. [37]

***857** The fourth and final Part is evaluative. The initial Subpart surveys the current judicial administration of the character evidence prohibition in cases in which the prosecution must turn to the doctrine of chances to justify introducing uncharged misconduct evidence to prove intent. [38] It demonstrates that in a large number of cases in which the courts admit uncharged misconduct to establish intent and the prosecution's only conceivable non-character theory is the doctrine of chances, the court's analysis is conclusory in the extreme. [39] Rather than invoking the doctrine and inquiring whether the prosecution has satisfied the doctrine's requirements, the courts advance the broad generalization that similar misdeeds are admissible to prove intent. [40] Even in the cases in which the doctrine's technical requirements

are satisfied, many courts do little to ensure that the jury focuses on the objective improbability of multiple, similar inadvertent acts rather than engaging in forbidden character reasoning.[41] In particular, the appellate courts have not mandated that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances.[42]

The next Subpart proposes reforming the manner in which the courts apply the doctrine. Under this proposal, when the prosecution invokes the doctrine to rationalize the admission of uncharged misconduct evidence to prove intent, the judge would have to (1) explicitly determine that the evidence satisfies the doctrine's requirements, and (2) administer limiting instructions specially tailored to the doctrine.[43] If the prosecution's foundation does not satisfy the doctrine's requirements, the judge should certainly not rely on the doctrine as the non-character justification for admitting the evidence.[44] In any event, the distinction between verboten character reasoning and legitimate use of the doctrine can be so thin that the trial judge ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of the evidence according to the doctrine. As we have seen, in criminal practice, Rule 404(b) is the most frequently litigated evidentiary issue; and even more to the point, the most common use of Rule 404(b) evidence is to prove intent. Given those realities, the lax practices currently followed in many, if not most, jurisdictions, are intolerable.

*858 II. THE THRESHOLD QUESTION: DOES THE CHARACTER EVIDENCE PROHIBITION APPLY WHEN THE PROSECUTION OFFERS UNCHARGED MISCONDUCT EVIDENCE TO PROVE THE ACCUSED'S MENTAL STATE OF MIND RATHER THAN PHYSICAL CONDUCT?

A. The Probative Dangers That Account for the Character Prohibition

Rule 404(b)(1) codifies an aspect of the character evidence prohibition. By its terms, the rule forbids the prosecution from introducing uncharged misconduct evidence "to [prove] that on a particular occasion the person acted in accordance with" a character or trait for unlawful or immoral conduct.[45] When the federal drafters prepared the original Rule 404, they used section 1101 from the California Evidence Code as a model.[46] The wording of section 1101(b) is strikingly similar to that of Rule 404(b). There are slight linguistic differences, but the thrust of the two statutes is essentially identical. While Rule 404(b) refers to "act[ion]" in accordance with the character or trait, section 1101 uses the expression, "conduct."[47] A narrow reading of the statutory language might support the contention that the prohibition comes into play only when the prosecution offers the uncharged misconduct to show the accused's physical conduct, not his or her mental intention. Indeed, in one case the California Supreme Court stressed the legislature's choice of the word, "conduct."[48] Seizing on that word choice, the court suggested that the prohibition was inapplicable because "[t]he prosecutor [had] offered the evidence to prove defendant's state of mind ... rather than defendant's conduct on any particular occasion."[49]

That suggestion is unsound. Figure 1, below, depicts the character evidence prohibition. As we shall now see, the policy rationale for the character evidence prohibition is that a character rationale poses a combination of two significant dangers; and the use of uncharged misconduct to prove an accused's intent raises both of those dangers.

859** ***FIGURE 1

ITEM OF EVIDENCE Uncharged act by the accused →	INTERMEDIATE INFERENCE The accused's personal, subjective bad character →	ULTIMATE INFERENCE The accused's conduct on the charged occasion consistent with the bad character

A character theory of logical relevance involves two inferential steps, and each inference poses a significant probative danger. The first step is the inference from the item of evidence to the intermediate inference of the accused's personal, subjective bad character.[50] This inference poses the danger that the jury will convict the accused on an improper basis,

namely, his or her criminal past. In order to decide whether to draw this inference, the jury must consciously focus on the question of whether the accused is the type of person who would commit a crime. If the jury is forced to do so at a conscious level, there is a substantial risk that, at least at a subconscious level, the jury will be repulsed by the accused's criminal past. [51] The Eighth Amendment cruel and unusual punishment provision bars criminalizing a person's status. [52] If the jury were to convict due to the accused's past, not because of proof beyond a reasonable doubt of the charged offense, the conviction would not only be on an improper basis; the conviction would also offend a policy of constitutional dimension.

The second step in Figure 1 is the inference from the accused's bad character to the conclusion that on the occasion of the charged offense, the accused acted "in character" and perpetrated the charged offense (similar to the charged crime). [53] This step creates the danger that the jury will overvalue the evidence. [54] Most of the available psychological research points to the conclusion that the general construct of a person's character is a weak predictor of the person's conduct on a specific occasion. [55] In particular, it is difficult to find any published research that would support drawing an inference as to the person's character from a single other instance of the person's conduct. [56]

*860 *B. The Presence of Those Probative Dangers When the Prosecution Offers Uncharged Misconduct Evidence to Prove Intent*

This use of uncharged misconduct undeniably poses the first probative danger. Evidence of an accused's other misconduct is potentially prejudicial because the jury may perceive the conduct as immoral [57] and then be tempted to punish the accused for that misconduct--not because the accused is guilty of the charged crime. For the most part, it is the accused's wrongful intent that gives the conduct its perceived immoral quality. As Shakespeare observed, "[T]here is nothing either good or bad but thinking makes it so." [58] As one article states:

> When a writer wants to express the thought that a person has a criminal disposition, the writer frequently describes the person as a "criminal mind"--rather than a criminal arm or leg. Suppose that the jury concludes that the accused has a warped mind inclined to criminal intent. That conclusion can cause the jurors to experience the very type of revulsion which the character evidence prohibition is designed to guard against. As Judge Goldberg ... noted [in one of the most famous Rule 404(b) decisions], the "character" referred to in Rule 404(b) is "largely a concept of a person's psychological bent or frame of mind ...." [59]

If the uncharged misconduct evidence tends to show that the accused has a perverse mindset, a lay juror may be inclined to believe that whether the accused is innocent or guilty of the charged crime, the accused needs to be incarcerated to protect society.

Like the first probative danger inspiring the character evidence prohibition, the second danger can be present when the prosecution ***861** offers uncharged misconduct evidence to establish the accused's intent. As Subpart A notes, above, the second inference poses the risk that the jurors will ascribe undue weight to the accused's character as a predictor of conduct on a specific occasion, that is, at the time of the alleged commission of the charged crime. [60] How much probative value does the uncharged misconduct have to establish the accused's character as a predictor of conduct at the time of the charged crime? That probative value can be minimal:

> If the only question were the accused's physical response [in the charged and uncharged incidents], to some extent the resolution of the question would be reducible to the applications of the laws of [biology,] chemistry[,] and physics. The application of the laws of the physical sciences can help predict the accused's

> physical reaction. It is the mental component of the accused's conduct which introduces the element of unpredictability. American criminal law operates on the assumption that the typical person possesses cognitive and volitional capacities. The variety of ways in which the person can exercise those capacities makes it difficult to forecast the person's mental state at any given time .... The risk of overestimation exists because the response to a situation includes a variable mental component. [61]

In short, there is no excuse for exempting uncharged misconduct evidence from the character evidence prohibition merely because the prosecution offers the evidence to show the accused's mens rea: "he thought it once, ergo he thought it again" is just as much improper character reasoning as "he did it once, therefore he did it again." Even when the evidence is offered to show intent, the evidence must pass muster under Rule 404(b). [62]

III. IN THEORY, DOES THE DOCTRINE OF OBJECTIVE CHANCES QUALIFY AS A BONA FIDE NON-CHARACTER THEORY FOR ADMITTING UNCHARGED MISCONDUCT EVIDENCE?

As Part II explains, the character evidence prohibition codified in Rule 404(b) applies with full force when the prosecution offers uncharged misconduct evidence to prove intent. [63] Hence, to justify the admission of uncharged misconduct evidence, the prosecution must ***862** convince the judge that the evidence is admissible on a non-character theory of logical relevance. Does the doctrine of chances qualify as a bona fide non-character theory?

A. The Requirements for Invoking the Doctrine

The requirements for properly invoking the doctrine can be extracted from Dean Wigmore's description. [64] To begin with, the charged and uncharged incidents must be generally similar. [65] There is no across-the-board requirement that to be admissible under Rule 404(b), an uncharged incident be similar to the charged offense. [66] The text of Rule 404(b) does not include the adjective, "similar." Under Rule 404(b), the courts often admit "consciousness of guilt" evidence. [67] Thus, in a murder prosecution, Rule 404(b) would allow the prosecution to show that the accused had attempted to bribe a prosecution witness; [68] murder and bribery are dissimilar crimes, but the attempted bribery is relevant for a non-character purpose.

However, a showing of similarity is a logical necessity under the doctrine of chances. [69] The cases recognizing that necessity are legion. [70] Though, as Part I notes, the degree of similarity between the charged and uncharged offenses need not be as high as when the uncharged misconduct is offered to prove the accused's identity as the perpetrator of the charged offense. [71] When the prosecution offers the evidence for identity, the two offenses must be so similar that there is likely only one criminal who uses the modus operandi shared by the two offenses. [72] In ***863** contrast, when the evidence is offered to prove intent, the two crimes need merely fall into the same general category. [73] As Dean Wigmore stated, the charged and uncharged offenses need be similar only "in [their] gross features." [74] Suppose, for example, that the accused is charged with possession of cocaine and that on both the charged and uncharged occasions, the police found cocaine in a vehicle the accused was driving. If the prosecution were offering the uncharged misconduct to establish the accused's identity as the perpetrator of the charged drug offense, the prosecution would have to show that both crimes were committed with the same, unique modus operandi. [75] However, it is sufficient to trigger the doctrine of chances to show intent that in both instances, the accused was driving a vehicle in which drugs were found. Innocent people sometimes end up driving cars containing drugs secreted by other persons, but that is usually a "once-in-a-lifetime" experience for innocent individuals. [76]

The second requirement is that, considering both the charged and uncharged incidents, the accused has been involved in such incidents more frequently than the typical, innocent person. As the late Professor David Leonard observed, the doctrine of chances rests on a sort of "informal probability reasoning." [77] The question is not the absolute number of incidents. [78] Rather, the question is whether the concurrence of the charged and uncharged incidents would amount to an extraordinary coincidence-- exceeding the ordinary incidence of that type of event. [79] If an innocent person is likely to become involved in that type of event only once in his or her lifetime, proof of a single uncharged, similar incident suffices to trigger the doctrine. [80] However, if even innocent persons can encounter such circumstances on multiple occasions, the doctrine comes into play only if, considering the charged and uncharged crimes, the accused has been enmeshed in similar circumstances more frequently than would be expected. [81] In some cases, the judge can rely on common sense and experience to conclude that a particular type of ***864** event is a once-in-a-lifetime experience. [82] In other cases, though, the judge should demand that the prosecution produce evidence of the baseline frequency of such events. [83]

B. The Status of the Doctrine as a Legitimate Non-Character Theory Satisfying Rule 404(b)

Rule 404(b) forbids prosecutors from relying on the theory of logical relevance, set out in Rule 404(b). [84] Revisit Figure 1, above. As Part II explained, this theory of logical relevance involves two inferential steps, and each inference entails a significant probative danger. The first is the inference from the item of evidence to the intermediate inference of the accused's personal, subjective bad character. [85] This inference poses the danger that the jury will convict the accused on an improper basis, that is, his or her criminal past. [86] The second step is the inference from the accused's bad character to the conclusion that at the time of the charged offense, the accused acted "in character"--consistently with the character--and perpetrated the charged offense (similar to the uncharged crime). [87] This step creates the danger that the jury will overvalue the evidence. [88] The bulk of the relevant psychological research points to the conclusion that the general construct of a person's character is a poor predictor of the person's conduct on a specific occasion. [89] Character is an especially poor predictor when the inference as to the person's character is drawn from a single other instance of the person's conduct; in the psychological research studies attempting to draw such inferences, the accuracy rate has been "at best .30." [90]

***865** Contrast the theory of logical relevance underlying the doctrine of chances, using Figure 2, below. [91]

FIGURE 2

ITEM OF EVIDENCE	INTERMEDIATE INFERENCE	ULTIMATE INFERENCE
An uncharged event involving the accused →	Considered together with the charged event, an objectively improbable coincidence →	The probability of the accused's criminal state of mind at the time of one or some of the events

This theory not only differs superficially from the sort of character reasoning forbidden by Figure 1 and Rule 404(b). More fundamentally, it also differs from such reasoning with respect to both of the probative dangers inspiring the character evidence prohibition. This theory does not require the jurors to consciously advert to the question of the accused's personal, subjective character. Rather, they are asked to assess the objective improbability of so many accidents or inadvertent acts. Of course, on their own the jurors might consider the accused's personal, subjective character, since the testimony about the uncharged act has dual relevance. [92] However, that risk is much smaller than when the judge expressly directs the jurors to ask themselves what type of person is the accused. Moreover, the second step does not require the jurors to use character as a predictor of conduct. Rather, the second step necessitates that the jurors do what

the judge will tell them to do in another part of the jury charge, namely, draw on their common sense and knowledge to assess the relative plausibility of the parties' competing versions of the events. [93]

1. Judicial Acceptance of the Doctrine of Chances

In light of the evident differences between character reasoning and the doctrine of chances, the courts have endorsed the doctrine as a legitimate non-character theory. [94] The courts have permitted prosecutors ***866** to use the doctrine for several purposes. One of the leading American cases is *United States v. Woods*. [95] In that case, the accused was charged with infanticide. [96] The victim had died of cyanosis. [97] The accused claimed that the child's suffocation was accidental. [98] To rebut the accused's claim, the prosecution offered evidence that, over an approximately twenty-five-year period, children in her custody had experienced twenty cyanotic episodes. [99] The trial judge admitted the testimony, and the appellate court upheld the ruling. [100] The court reasoned that the testimony established an extraordinary coincidence of cyanotic episodes among children in the accused's custody and that, in turn, that incidence was circumstantial evidence that one or some of the episodes were not accidental but rather the product of an actus reus. [101] Although the court ruled the evidence admissible on a doctrine of chances theory, the court stressed that the record of trial included testimony by a distinguished forensic pathologist, Dr. Vincent Di Maio, that there was a seventy-five percent chance that the charged incident was a homicide. [102] While the uncharged misconduct evidence can be admissible under the doctrine of chances, there is nothing inherent in the doctrine's logic that singles out the charged incident as a crime. The logic only supplies circumstantial evidence that one or some of the incidents were not accidents. In *Woods*, standing alone, the uncharged misconduct evidence might not have been legally sufficient to sustain a conviction; but coupled with the evidence, Dr. Di Maio's testimony satisfied the prosecution's burden of production on the actus reus issue. [103]

Of greater interest for our present purpose, the courts accepting the doctrine also allow prosecutors to employ the doctrine to establish mens rea. [104] Sometimes, criminals plant drugs on an innocent person or in an ***867** innocent person's car in order to implicate them. But again, that seems like a once-in-a-life experience. If an accused charged with drug possession claims that the drugs must have been planted in his or her car but the prosecution has evidence that on another occasion the police also found the accused driving a car containing illegal drugs, cumulatively, the two incidents show a very "odd coincidence." [105] Just as the doctrine permitted the *Woods* prosecution to use the uncharged misconduct as evidence of actus reus, in this case the prosecution may introduce the evidence as proof of mens rea.

2. Scholarly Challenges to the Doctrine's Status as a Non-Character Theory

While there is now extensive judicial support for the doctrine of chances, some commentators have contended that the doctrine is nothing more than a smokescreen for bad-character reasoning. [106] These critics begin their line of argument by noting that the doctrine of chances rests on a species of statistical reasoning. [107] Indeed, when civil rights plaintiffs invoke the doctrine in discrimination suits, they often offer formal statistical testimony to prove the defendant's intent to discriminate. [108] The null hypothesis is that there has been no discrimination. The statistician then estimates what the expected value would be--for example, the number of African Americans or women hired--if the null hypothesis were true. The statistician next determines the observed value, the number actually hired. If the disparity between the expected and observed values is too great to be attributable to random chance, the null hypothesis is rejected; and, its rejection furnishes some evidence of the truth of the alternative hypothesis that there has been discrimination. [109] The critics of the doctrine of chances contend that the probability reasoning underlying the doctrine is propensity-based. [110] In essence, the contention is that once random, innocent chance is eliminated, the only remaining logical route to the ultimate inference is an intermediate inference assuming the accused's ***868** bad character. [111] The critics assert that

without positing the accused has a character that is "continuing," [112] "constant," [113] and "unchanging" [114] "across time," [115] there is no logical nexus between the accused's uncharged act and the charged offense. [116]

However, these criticisms are flawed. First, in Figure 2, work forward from left to right toward the final conclusion. [117] The critics' implicit assumption is that once random, innocent chance is eliminated, the only way to reason toward the final conclusion is to posit an intermediate inference of the accused's constant, unchanged bad character. That assumption is plainly false. The assumption rests on a simplistic, determinist view of human behavior. Consistent with Western philosophic tradition, for the most part, American law assumes that persons are autonomous [118] human beings with volitional capacity. [119] Simply stated, they possess free will. [120] In Figure 2, it is possible to reason to the ultimate inference without assuming the accused's constant bad character:

> A person may have characteristics predisposing him or her to act in a certain way, but situationally the person can make a choice contrary to the character trait. For example, even if a person has a propensity toward criminal conduct, in a given case the deterrent effect of the criminal law might be so strong that she makes an ad hoc choice to refrain from committing a crime. Conversely, even if a person has a propensity toward lawful conduct, in a given case she might encounter a tremendous temptation and make a situational choice to perpetrate a crime. [121]

Now, in Figure 2, work from right to left--that is, backward from the ultimate inference. [122] The critics misconceive the doctrine of chances. If it were true that the accused had a continuing, constant, ***869** unchanging character, the ultimate inference would be that "all" [123] the outcomes were the same. "[E]very" act would be either innocent or criminal. [124] However, the proponents of the doctrine such as Wigmore make a much more limited claim. Their only claim is that when the doctrine applies, one or some of the outcomes are attributable to fault. [125] That is why in the leading *Woods* decision, the court placed such heavy stress on the fact that the lower court record contained both the uncharged misconduct evidence and Dr. Di Maio's findings as to the homicidal character of the death charged in that case. [126] The doctrine of chances yields only a limited ultimate inference. As a matter of simple logic, the doctrine does not entail the intermediate inference of constant, unchanging bad character that the doctrine's critics claim. The upshot is that not only do the courts accept the doctrine of chances, but they also, in principle, may do so without violating Rule 404(b). [127]

IV. IN PRACTICE, ARE THE COURTS APPLYING THE DOCTRINE OF OBJECTIVE CHANCES IN A MANNER THAT ENSURES JURORS WILL USE UNCHARGED MISCONDUCT EVIDENCE ADMITTED UNDER THE DOCTRINE ONLY FOR A NON-CHARACTER PURPOSE?

Part III demonstrates that the courts are justified in treating the doctrine of chances as a legitimate non-character theory for introducing uncharged misconduct evidence. Today, the critical question is not whether it is warranted to recognize the existence of the doctrine. Rather, the key question is the manner in which the courts are applying the doctrine. Are they applying it in a scrupulous manner that upholds the character evidence prohibition, or are they applying it in a loose manner that threatens to undermine the prohibition? An examination of the cases invoking the doctrine to permit proof of mens rea reveals that in many cases, the latter is true.

***870** *A. The Deficiencies in the Current Judicial Administration of the Doctrine of Objective Chances*

1. The Dangerously Conclusory Nature of Many of the Opinions Relying on the Doctrine of Objective Chances to Justify the Admission of Uncharged Misconduct Evidence to Prove Intent

The doctrine of chances is not the only theory of logical relevance that can justify the admission of uncharged misconduct evidence to prove intent. By way of example, suppose that the police stopped a car the accused was driving and found drugs in the trunk. The accused denies both knowing that the truck contained drugs and having any intention to possess the drugs. However, before trial, the accused threatened and attempted to bribe one of the prosecution witnesses. At trial, the prosecution attempts to introduce testimony about the threat and attempted bribe, but the defense objects that the testimony would violate the character evidence prohibition. In all likelihood, the trial judge would both characterize the testimony as evidence of the accused's "consciousness of guilt" [128] and admit it under Rule 404(b) as some evidence that the accused possessed a criminal intent. [129]

However, if the prosecution wants to introduce uncharged misconduct evidence to prove intent and no other non-character theory applies, by process of elimination the prosecution often falls back on the doctrine of chances as a last resort. Even when careful scrutiny of the fact pattern indicates that the prosecution's only tenable non-character theory is the doctrine, the courts frequently do not explicitly invoke the doctrine. [130] *United States v. Evans*, a prosecution for knowing receipt of stolen goods, is a case in point. [131] The court sustained the admission of uncharged misconduct evidence of the accused's receipt of other stolen goods, [132] and, on the facts, the doctrine of chances appears to be the only conceivably applicable non-character theory. Yet the court never mentioned the theory. The court implicitly relied on the doctrine without using the label, "the doctrine of objective chances." [133] *United States v. Campbell*, a 2015 prosecution for the knowing preparation of false tax returns, fits the same mold. [134]

***871** Moreover, even when the courts purport to apply the doctrine in so many words, in many instances their analysis is shallow. [135] These courts do not pause to inquire whether the prosecution has satisfied the foundational requirements for the doctrine. In particular, they rarely demand that the prosecution demonstrate a baseline frequency or incidence for the type of event involved in the instant case to support the inference that cumulatively, the charged and uncharged incidents establish an extraordinary coincidence.

Many cases involving drug prosecutions fall into this pattern. It is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecutions. [136] Especially when the accused is charged with a possessory offense with intent to distribute, the courts routinely admit evidence of the accused's other drug offenses. [137] Although the accused is charged with intent to traffic and distribute, a large number of courts admit uncharged misconduct evidence that the accused possessed mere user quantities. [138] The opinions are replete with sweeping assertions that "virtually any prior drug offense" is admissible to prove intent in a drug prosecution. [139]

However, in any case in which the prosecution is relying on the doctrine of chances, such sweeping generalizations are indefensible. These opinions give the impression that the admissibility of the evidence in these cases turns on a question of precedent, namely, whether uncharged drug offenses are admissible to prove intent in drug prosecutions. However, that generalization is overbroad. The decisive question is fact- and case-specific: whether the prosecution has laid a foundation satisfying both requirements for triggering the doctrine of chances.

There are certainly intent to distribute cases in which it is warranted to apply the doctrine. Suppose that, on multiple occasions, the accused was found in possession of huge quantities of a drug--quantities that ***872** could exceed a lifetime supply for a casual drug user. Even if the accused were a neophyte drug-user who could not accurately predict their personal needs, they would quickly discover that they had acquired a quantity far exceeding their personal needs. It is objectively unlikely that a person could acquire such a quantity on several occasions without at least once entertaining the intent to distribute. That would be a sensible application of the doctrine. However, the generalization that any drug offense is admissible to prove intent to distribute goes well beyond the limits of the doctrine. When the issue is intent to

distribute and engage in commercial trafficking, the possession of a minuscule drug quantity, barely useful for personal use, is hardly similar to the possession of a warehouse full of the drug. For that matter, even a prior conviction for conspiracy to traffic in drugs may not pass muster under the doctrine of chances. The court must examine the facts underlying the conspiracy conviction. An accused may have been convicted of such a conspiracy because he or she was the accountant for the conspiracy and never saw, much less possessed, any quantity of the drug. [140] Similarly, the broad net of conspiracy could extend to an accused who purchased the instrumentation for processing the drug but never held a gram of the drug in his or her hand. Indeed, the accused could have suffered the conspiracy conviction even though he or she had never possessed drugs in his or her entire life. In short, when a court is content with conclusory analysis in a doctrine of chances case, there is a grave risk that the end result will be the introduction of inadmissible bad character evidence.

2. The Inadequacy of the Limiting Instructions Typically Administered in Doctrine of Objective Chances Cases

As previously stated, uncharged misconduct testimony often has dual relevance. [141] When a single item of evidence is relevant for two purposes, one permissible and the other impermissible, the judge ordinarily [142] admits the evidence but gives the jury a limiting instruction. ***873** Rule 105 governs limiting instructions: "If the court admits evidence that is admissible ... for a purpose--but not ... for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." [143] A complete, properly worded limiting instruction has two prongs. [144] The negative prong forbids the jury from using the evidence for the verboten purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about the evidence.

How should the trial judge word the instruction in an uncharged misconduct evidence case? In the past, in many jurisdictions, after instructing the jury not to use the testimony as proof of the accused's bad character, the judge listed a litany of permissible purposes. For example, in the affirmative prong of the instruction, the judge might tell the jury that they could use the evidence as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"--perhaps the entire list of purposes set out in Rule 404(b) or the equivalent state statute. [145] At the very least, a "shotgun" instruction can confuse the jury; on the facts, the uncharged misconduct evidence may not be at all relevant to one or more of the listed purposes. Worse still, the instruction can prompt the jury to engage in improper character reasoning; the evidence may be relevant to one of the listed purposes but only if the jury posits an intermediate inference of the accused's subjective, personal bad character.

Fortunately, a growing number of jurisdictions now forbid trial judges from giving "shotgun" instructions. [146] If the uncharged misconduct is relevant on only one non-character theory, to a degree, the instruction must identify and specify that purpose. [147] However, like many judicial opinions applying the doctrine of chances, even modernly, most pattern instructions on uncharged misconduct evidence are conclusory. After stating the negative prong of the instruction, in the ***874** affirmative prong the judge may give the jury only the guidance that they may use the evidence for the purpose of proving "intent." [148]

Although that wording is preferable to a "shotgun" jury charge, even this instruction is inadequate. Again, uncharged misconduct evidence ordinarily has dual relevance. If the facts satisfy the requirements for invoking the doctrine of chances, the jury can draw the ultimate inference of intent without positing an intermediate assumption that the accused has a disposition or propensity for criminal or immoral conduct. The rub is that the jury can also reason to the same ultimate inference through improper character reasoning. The juror might think, "He had the intent once, therefore he had it again." In a 1991 decision, *Estelle v. McGuire*, the Supreme Court dealt with the instructions in a child abuse case implicating the doctrine of chances. [149] In their concurring and dissenting opinion in that case, Justices O'Connor and Stevens expressed their view that there was a due process violation, warranting federal habeas corpus relief, because the

state judge's instruction blurred the line between character reasoning and the doctrine of chances.[150] In this context, blurring the line is an acute danger; given a choice between "intuitive"[151] character reasoning and more "attenuated"[152] reasoning under the doctrine, the jury may find the character theory simpler and more attractive.

Research reveals no appellate opinion mandating that trial judges give a special limiting instruction in doctrine of chances cases. Similarly, no jurisdiction seems to have adopted a special pattern instruction for doctrine of chances cases.[153]

*875 *B. The Remedies for the Deficiencies*

Once the deficiencies in the current judicial administration in the doctrine of chances are identified, it is relatively clear what corrective action ought to be taken. As Subpart A demonstrates, the first major deficiency is the conclusory nature of many courts' analysis of the application of the doctrine.[154] To remedy that problem, appellate courts ***876** should direct that trial judges do the following. First, if the judge believes that the prosecution's uncharged misconduct evidence is admissible under the doctrine of chances, the judge should reflect on the record that the judge is relying on the doctrine as the non-character theory satisfying Rule 404(b). Next, in these cases, the judge ought to make explicit findings as to whether the prosecution has satisfied the substantive requirements for triggering the doctrine. Why did the judge conclude that all the underlying events are sufficiently similar? In addition, what is the judge's assumption about the baseless frequency or incidence for such events--has there been an adequate showing of an extraordinary coincidence? If the lower court record is fleshed out in this fashion, the appellate courts can engage in much more meaningful review of the propriety of the judge's decision to admit the evidence under the doctrine. Absent such findings by the trial judge on the record, it is difficult--if not impossible--for the appellate court to intelligently second-guess the judge's application of the doctrine.

The second major deficiency is the inadequacy of the limiting instructions given in most jurisdictions. A "shotgun" instruction is certainly insufficient, and even more specific instructions singling out proof of "intent" as a permissible use of the uncharged misconduct can lead the jury into improper character reasoning.[155] In cases involving similar uncharged and charged misconduct, there is such a fine line between character reasoning and reasoning under the doctrine that jurisdictions should develop special instructions on the doctrine. The following illustrative language could serve as a starting point for drafting such an instruction:

> Ladies and gentlemen of the jury, as you know, the defendant is charged with the crime of possession of cocaine in January 2016. The prosecution testimony indicates that when a police officer stopped the defendant's car in January 2016, the officer found cocaine in the trunk of the car. The defendant denies that he intended to possess that cocaine; he denies even knowing that there was cocaine in the trunk.
>
> ***877** (*Initially, the judge must instruct the jury on the standard for deciding whether the accused committed the uncharged act. If the prosecution testimony does not satisfy the governing standard, the jury may not consider the testimony about the uncharged act for any purpose.*)[156] To prove the defendant's criminal intent, the prosecution has introduced testimony indicating that on another occasion in April 2015, while the defendant was driving a different car, he was stopped and cocaine was found in the trunk of that car. Although the prosecution has introduced that testimony, the defendant took the stand and denied that the alleged April 2015 incident ever occurred. I instruct you that the prosecution has the burden of convincing you by a preponderance of the evidence that the other incident occurred, namely, that in April 2015 the defendant was driving another car containing cocaine in the trunk. If you do not believe that the prosecution has met that burden, you must completely disregard the testimony about the alleged April 2015 incident. If you

> reach that conclusion, you cannot consider the testimony for any purpose during your deliberations on the defendant's guilt or innocence of the January 2016 charge.
>
> (*At this point, the judge administers the limiting instruction about the use of the uncharged misconduct evidence. The judge can begin the instruction by stating the negative prong*.) Even if you decide that the prosecution has met that burden, there are limitations on the way in which you can use the testimony about the April 2015 incident. The defendant is on trial only for the alleged January 2016 incident. You may convict the defendant only if you are convinced beyond a reasonable doubt that he committed that crime. Even if you believe the testimony about the 2015 incident, you may not convict him because he intentionally possessed cocaine in 2015. You may not reason: He intended to possess cocaine once before, that shows ***878** that he is a bad man, and that therefore he had that intent again in the January 2016 incident.
>
> (*Now the judge states the affirmative prong of the limiting instruction*.) However, in deciding this case, you may rely on your knowledge of the way things happen in the real world. You may ask yourself: How likely is it that an innocent person would twice be found driving a car containing cocaine in the trunk? Innocent people sometimes find themselves in suspicious circumstances. However, use your common sense and decide whether it is likely that that would happen to an innocent person twice. If you find that that is at odds with everyday experience, you may conclude that on one or both of those occasions the defendant had the intent to possess the cocaine.

If the judge decides to admit uncharged misconduct testimony, the judge's limiting instruction may be the accused's final and most important safeguard against the danger that the jury will misuse the testimony as evidence of the accused's bad character.[157] Since the testimony has dual relevance, there is an unavoidable possibility that on its own motion, the jury will treat the testimony as bad character evidence. However, the judge can minimize that risk by giving the jury a clear, forceful limiting instruction; and defense counsel can further reduce the risk by underscoring the negative prong of the instruction during closing argument. In everyday life, laypersons do not force themselves to identify every intermediate inference between a fact they are presented with and their ultimate conclusion. If the jury is exposed to uncharged misconduct evidence and the judge gives the jury little guidance as to the proper use of the evidence, the jurors may be inclined to intuitively use the simplistic reasoning that "he had the criminal intent before, therefore he had it again."[158] That sort of reasoning comes naturally and easily to laypersons. If we want to honor the character evidence prohibition and encourage lay jurors to reason differently about the evidence, the trial judge must give the jurors a more elaborate limiting instruction. Neither a "shotgun" instruction nor even an instruction singling out "intent" as a permissible use of the evidence is sufficiently respectful of Rule 404(b).

***879 V. CONCLUSION**

It is difficult to overstate the philosophic and practical importance of this issue. Although many nations in the common law world still recognize some version of the character evidence prohibition, only the United States has a full-fledged constitutional ban on the punishment of status offenses.[159] The numbers tell the story about the practical significance of the issue. As previously stated, in criminal cases, Rule 404(b) produces more published opinions than any other provision of the Rules,[160] and prosecutors offer Rule 404(b) evidence to prove intent more often than for any other purpose.[161] If the judicial application of Rule 404(b) is to be more than an intellectually dishonest "exercise in evasion,"[162] we must reform the lax attitude that many courts have taken in determining whether uncharged misconduct evidence offered to

prove intent possesses genuine non-character relevance and how lay jurors are instructed about the permissible use of such evidence.

The root problem is that the distinction between character reasoning and reasoning under the doctrine of objective chances is so thin.[163] In lay jurors' minds, "the events are so similar that it is improbable that there were so many inadvertent acts" can easily elide into "the events are so similar that the accused has a propensity for this criminal intent." To prevent that improper conversion, the courts must do more than most courts presently do. To begin with, the appellate courts have to pressure trial judges to develop records of trial that permit meaningful review of the application of the doctrine in the lower court. It should be insufficient for trial judges to recite on the record the generalization that uncharged misconduct evidence is admissible to prove intent. If the judge intends to rely on the doctrine of chances, he or she should do so explicitly. Furthermore, the appellate court should demand that the judge make findings as to whether the charged and uncharged acts are sufficiently similar and whether, considered together, the concurrence of the charged and uncharged acts establishes an extraordinary coincidence exceeding the baseline frequency for inadvertent events of the same character.

Moreover, it is not enough that the trial judge convince the appellate court that it was proper to invoke the doctrine on the facts in the lower court. Even more importantly, the judge must clearly convey ***880** the doctrine of chances theory to the lay jurors in a limiting instruction. The decisive question is whether the jury engaged in improper character reasoning during their deliberations. The line between character reasoning and reasoning under the doctrine of chances is so fine that neither a "shotgun" instruction nor even an instruction mentioning only proof of "intent" as an allowable use of the evidence should be deemed adequate. Both a character rationale and reasoning according to the doctrine can lead to the same result, namely the jury's conclusion that the uncharged misconduct evidence is some proof of intent. The issue is the logical route or path that the jury takes to reach that result. If that path proceeds through the inference, "the events are so similar that the accused has a propensity for this criminal intent," the accused's conviction may violate the Eighth Amendment.[164] In the large number of cases in which the prosecution must rely on a doctrine of chances theory to justify introducing uncharged misconduct to prove intent, the trial and appellate courts should do more to secure the accused's Eighth Amendment rights. In our system of criminal justice, the well-settled tradition is that a citizen may be convicted only for what he or she has done--their mental and physical conduct at a specific place and time--and not for the type of person they are.[165] The current lax administration of the doctrine of objective chances seriously imperils that tradition.

Footnotes

a1 Edward L. Barrett, Jr., Professor of Law Emeritus, University of California, Davis; former chair, Evidence Section, American Association of Law Schools; author, *Uncharged Misconduct Evidence*.

1 WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2., ll. 249-50 (Harold Jenkins ed., Methuen & Co. Ltd. 1982).

2 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364 (3d ed. 1940).

3 *See*1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE §§ 186-190 (7th ed. 2013).

4 *See* Felicity Gerry et al., *Patterns of Sexual Behaviour: The Law of Evidence: Back to the Future in Australia and England*, INT'L COMMENT. ON EVIDENCE, Dec. 2013, at 29, 56.

5 *E.g.*, FED. R. EVID. 413(a), 414(a), 415(a) (abolishing the prohibition selectively in criminal and civil cases involving allegations of sexual assault and child molestation). These rules have been sharply criticized:
The federal rules ... presuppose that sex offenders are uniquely inclined to high rates of recidivism even though the empirical evidence suggests otherwise .... [S]pecial rules of admissibility should be strongly supported by empirical or other evidence

and ... this standard has not been met in the case of Rules 413 and 414. The special rules of admissibility reflected in Rules 413 and 414 are unsound ....
STEPHEN J. SCHULHOFER & ERIN E. MURPHY, MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES: DISCUSSION DRAFT NO. 2, at 234-35 (2015).

6 It is understandable that the United States takes the character prohibition so seriously. In *Robinson v. California*, the Court held that the Eighth Amendment prohibition of cruel and unusual punishment forbids status offenses. 370 U.S. 660, 666-67 (1962); *see*Joel v. City of Orlando, 232 F.3d 1353, 1361 (11th Cir. 2000). Hence, while in most of the common law world it offends a recognized policy if the accused is punished for being a recidivist, in the United States that policy has been elevated to constitutional status.

7 FED. R. EVID. 404(b)(1).

8 FED. R. EVID. 404(b)(2).

9 United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Rule 404(b) has become the most cited evidentiary rule on appeal."); State v. Johns, 725 P.2d 312, 317 (Or. 1986) (noting that, in the mid-1980s, a Westlaw search of the relevant key numbers identified 11,607 state cases); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L.REV. 201, 211 (2005) ("Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals."); Paul Mark Sandler, *Litigator's Bookshelf: Trial Tactics by Stephen Saltzburg*, LITIG., Winter 2009, at 57, 58 (book review) (discussing Rule 404(b) as "the most highly discussed federal rule of evidence"); Byron N. Miller, Note, *Admissibility of Other Offense Evidence After* State v. Houghton, 25 S.D. L. REV. 166, 167 (1980) ("Admissability of evidence of other acts, wrongs, or crimes is the most frequently litigated question of evidence at the appellate level ...."). *See generally* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115 (2002) (extensively discussing Rule 404(b) litigations).

10 FED. R. EVID. 404(b)(2).

11 *See*United States v. Hawpetoss, 478 F.3d 820, 822, 826 (7th Cir. 2007) (noting the defense argument that the evidence produces the reaction "game over" in the eyes of the jury); People v. Smallwood, 722 P.2d 197, 205 (Cal. 1986) (acknowledging that evidence of other crimes is "the most prejudicial evidence imaginable against an accused"); 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02 (2009).

12 FED. R. EVID. 105.

13 Leonard, *supra* note 9, at 118.

14 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5242 (Supp. 2016); *see* Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 306-07 (1982).

15 *See* Leonard, *supra* note 9, at 133-36. Although you can see a face or a knife, you cannot directly perceive another person's state of mind. *See id.* at 124-28, 169.

16 *See* Abbe David Lowell, *Fighting the 'Presumption of Guilt,'* 24 NAT'L L.J., June 10, 2002, at D8, D8.

17 *See* Leonard, *supra* note 9, at 124-25.

18 *See*WRIGHT &GRAHAM, *supra* note 14, § 5239.

19 *See* Leonard, *supra* note 9, at 132-33.

20 FED. R. EVID. 404(b)(2).

21 United States v. Nelson, 137 F.3d 1094, 1107 (9th Cir. 1998) ("[A] much lower degree of similarity is required to prove a state of mind than to prove identity."); People v. Johnson, 164 Cal. Rptr. 3d 505, 515 (Ct. App. 2013) (requiring "[t]he least degree of similarity" to prove intent (quoting People v. Foster, 242 P.3d 105, 131 (Cal. 2010))); *see also*People v. Harris, 306 P.3d

1195, 1226 (Cal. 2013); People v. Jones, 247 P.3d 82, 102 (Cal. 2011); People v. Carpenter, 935 P.2d 708, 745 (Cal. 1997), *abrogated on other grounds by*People v. Diaz, 345 P.3d 62 (Cal. 2015); People v. Escudero, 107 Cal. Rptr. 3d 758, 766 (Ct. App. 2010); People v. Tapia, 30 Cal. Rptr. 2d 851, 871 (Ct. App. 1994).

22 2 WIGMORE, *supra* note 2, § 302.

23 IAN FLEMING, GOLDFINGER 123 (1959), *quoted in* Stephen E. Fienberg & D. H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC'Y 61, 61 (1991).

24 IMWINKELRIED, *supra* note 11, § 2:19.

25 *Id.*

26 Nancy Bauer, Casenote, People v. Spoto*: Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 803-04 (1992).

27 IMWINKELRIED, *supra* note 11, § 5:06.

28 *See supra* note 12 and accompanying text.

29 United States v. Derington, 229 F.3d 1243, 1247 (9th Cir. 2000); *see*State v. Brown, 900 A.2d 1155, 1160, 1163-64 (R.I. 2006).

30 *See*United States v. Bass, 794 F.2d 1305, 1313 (8th Cir. 1986).

31 *See supra* note 21 and accompanying text.

32 State v. Newton, 743 P.2d 254, 256 (Wash. 1987) (en banc); Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68-71, 80 (1984); *see* Anne F. Curtin, Note, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant-Witness*, 45 ALB. L.REV. 1099, 1104 (1981).

33 Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 110-11 (2013).

34 United States v. Morena, 547 F.3d 191, 194 (3d Cir. 2008).

35 *See infra* Part II.

36 *See infra* Part II.B.

37 *See infra* Part III.

38 *See infra* Part IV.A.

39 *See infra* Part IV.A.1.

40 *See infra* Part IV.A.1.

41 *See infra* Part IV.A.2.

42 *See infra* Part IV.A.2.

43 *See infra* Part IV.B.

44 *See infra* Part IV.B.

45 FED. R. EVID. 404(b)(1).

46 *See*FED. R. EVID. 404 advisory committee's note. The note expressly cites the California Law Revision Commission report discussing California's codification of the doctrine. *Id.*; *see also*CAL. EVID. CODE § 1101 law revision commission cmt. (West 2009); CAL. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 615 (1964), http://www.clrc.ca.gov/pub/Printed-Reports/Pub054.pdf.

47 *Compare*FED. R. EVID. 404(b)(1), *with*CAL. EVID. CODE § 1101(a).

48 People v. Bittaker, 774 P.2d 659, 688 (Cal. 1989).

49 *Id.*

50 Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 426-27 (2006).

51 IMWINKELRIED, *supra* note 11, § 2:19.

52 *See supra* note 6 and accompanying text.

53 IMWINKELRIED, *supra* note 11, § 2:19.

54 *Id.*

55 *Id.*

56 Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 761 (2008) (explaining that in the studies attempting to infer character from a single instance of conduct, the accuracy rate was "at best .30" and that there does not appear to be a single published study concluding that it is possible to accurately predict a person's conduct based on a single other instance of the person's conduct); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 495 (1996) ("Of considerable concern is the fact that [the Rule] ignores the empirical data, which require a wider range of behavior than a single prior incident of wrongful conduct, and a closer match between the earlier situations and the present one, for prior acts to be predictive of current ones.").

57 Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 795-96 (1981).

58 SHAKESPEARE, *supra* note 1.

59 Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 583 (1990) (quoting United States v. Beechum, 582 F.2d 898, 921 (5th Cir. 1978) (Goldberg, J., dissenting)) (citing PHILIP Q. ROCHE, THE CRIMINAL MIND (1958); Don J. DeBenedictis, *Criminal Minds*, A.B.A. J., Jan. 1990, at 30).

60 *See supra* Part II.A.

61 Imwinkelried, *supra* note 59, at 584.

62 United States v. Henry, 848 F.3d 1, 15 (1st Cir. 2017) (Kayatta, J., concurring) ("'He intended to do it before, ladies and gentlemen, so he must have intended to do it again.' That is precisely the forbidden propensity inference." (quoting United States v. Miller, 673 F.3d 688, 699 (7th Cir. 2012))); State v. Sullivan, 679 N.W.2d 19, 26-28 (Iowa 2004).

63 *See supra* text accompanying note 62.

64 *See* 2 WIGMORE, *supra* note 2, § 302. The doctrine of chances turns on circumstantial reasoning. The core notion is that one may be innocently involved in suspicious circumstances. However, if one is recurrently involved in questionable circumstances the likelihood of innocent involvement diminishes. Depending upon the circumstances, at some point the recurrence alone warrants an inference that at least one of the incidents is not attributable to innocent happenstance. Imwinkelried, *supra* note 50, at 436-37.

65 IMWINKELRIED, *supra* note 11, § 3:11.

66 *Id.* § 2:13.

67 *Id.* § 3:4.

68 *Id.*; *see also*People v. McLaurin, 811 N.Y.S.2d 401, 402 (App. Div. 2006).

69 *See* Eric D. Lanserk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1230 (1986).

70 *E.g.*, United States v. Johnson, 458 F. App'x 727, 731-32 (10th Cir. 2012); United States v. Cole, 537 F.3d 923, 928 (8th Cir. 2008); United States v. Nicely, 922 F.2d 850, 857 (D.C. Cir. 1991); People v. Thomas, 256 P.3d 603, 616 (Cal. 2011); People v. Davis, 208 P.3d 78, 128 (Cal. 2009); People v. Yeoman, 72 P.3d 1166, 1190 (Cal. 2003); People v. Daniels, 97 Cal. Rptr. 3d 659, 668 (Ct. App. 2009); People v. Hawkins, 121 Cal. Rptr. 2d 627, 639 (Ct. App. 2002); People v. Everett, 250 P.3d 649, 654 (Colo. App. 2010).

71 *See supra* note 19 and accompanying text.

72 *See*IMWINKELRIED, *supra* note 11, § 3:11.

73 *Everett*, 250 P.3d at 658.

74 2 WIGMORE, *supra* note 2, § 304.

75 IMWINKELRIED, *supra* note 11, § 3:13.

76 *See*I. H. DENNIS, THE LAW OF EVIDENCE 596 (1999) (explaining that "it would be an odd coincidence if the defendant were an innocent victim of drugs planted in his car while being in possession of drugs elsewhere," or on more than one occasion).

77 Leonard, *supra* note 9, at 161-62.

78 Imwinkelried, *supra* note 59, at 590.

79 *See id.*

80 *See*People v. Everett, 250 P.3d 649, 658-60 (Colo. App. 2010).

81 *See id.*

82 *Id.*

83 Imwinkelried, *supra* note 59, at 591-92.

84 FED. R. EVID. 404(b); *see supra* Figure 1.

85 *See supra* note 50 and accompanying text.

86 *See supra* note 51 and accompanying text.

87 *See supra* note 53 and accompanying text.

88 *See*IMWINKELRIED, *supra* note 11, § 2:19.

89 *See supra* note 55 and accompanying text.

90 Imwinkelried, *supra* note 56, at 761 (explaining that in the studies attempting to infer character from a single instance of conduct, the accuracy rate was "at best .30"); Taslitz, *supra* note 56, at 495 ("Of considerable concern is the fact that [the Rule] ignores the empirical data, which require a wider range of behavior than a single prior incident of wrongful conduct, and a closer match between the earlier situations and the present one, for prior acts to be predictive of current ones."). These research findings are one of the reasons why rape sword statutes, such as Rule 413, are so troublesome; on their face, they purport to permit a jury to infer character from a single instance of uncharged misconduct. *See*FED. R.EVID. 413(a).

91 *Compare supra* Figure 1, *with infra* Figure 2.

92 *See supra* text accompanying note 28.

93 *See*United States v. Starks, 309 F.3d 1017, 1021-22 (7th Cir. 2002); United States v. Hamie, 165 F.3d 80, 84 (1st Cir. 1999); United States v. Gainey, 111 F.3d 834, 836 (11th Cir. 1997); United States v. Saccoccia, 58 F.3d 754, 775 (1st Cir. 1995); United States v. Flores-Chapa, 48 F.3d 156, 161 (5th Cir. 1995); United States v. Donovan, 24 F.3d 908, 913 (7th Cir. 1994); United States v. McAfee, 8 F.3d 1010, 1014 (5th Cir. 1993); Zada v. Scully, 847 F. Supp. 325, 328 (S.D.N.Y. 1994).

94 *See*United States v. Young, 65 F. Supp. 2d 370, 372-75 (E.D. Va. 1999) (collecting cases applying the doctrine of chances); Wynn v. State, 718 A.2d 588, 607 (Md. 1998) (Raker, J., dissenting) (listing cases in which appellate courts have utilized the doctrine); *see also*People v. Spector, 128 Cal. Rptr. 3d 31, 65 (Ct. App. 2011).

95 484 F.2d 127 (4th Cir. 1973); *see also* Recent Case, *Evidence-- Proof of Particular Facts--Evidence That Defendant May Have Committed Similar Crimes Is Admissable to Prove Corpus Delicti of Murder*--United States v. Woods *484 F.2d 127 (4th Cir. 1973)*, 87 HARV. L.REV. 1074, 1074-75 (1974).

96 *Woods*, 484 F.2d at 128-30.

97 *Id.* at 129.

98 *Id.*

99 *Id.* at 130-32.

100 *Id.* at 129-34.

101 *Id.* at 133-35.

102 *Id.* at 130.

103 *See id.* at 135.

104 *See, e.g.*, People v. Carpenter, 935 P.2d 708, 745 (Cal. 1997), *abrogated on other grounds by*People v. Diaz, 345 P.3d 62 (Cal. 2015).

105 DENNIS, *supra* note 76, at 596.

106 *See* Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 199-201 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1262-64 (1995); *see also* Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1085-86 (2005).

107 Morris, *supra* note 106, at 192-94.

108 Marshall, *supra* note 106, at 1080-81.

109 *See*DAVID W. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE 91-92 (1983); *see also*Castaneda v. Partida, 430 U.S. 482, 494 & n.13 (1977).

110 *See, e.g.*, Marshall, *supra* note 106, at 1080-82.

111 *Id.* at 1071-72, 1081.

112 Morris, *supra* note 106, at 195, 201.

113 *Id.* at 194, 201.

114 *Id.* at 201.

115 *Id.* at 194.

116 *Id.* at 191-201.

117 *See supra* Figure 2.

118 *See generally*GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988).

119 MORTIMER J. ADLER, SIX GREAT IDEAS 141-42, 164 (1981); Imwinkelried, *supra* note 50, at 451.

120 ADLER, *supra* note 119; Imwinkelried, *supra* note 50, at 451.

121 Imwinkelried, *supra* note 50, at 451; *see also*WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a)(2)-(4) (5th ed. 2010).

122 *See supra* Figure 2.

123 Morris, *supra* note 106, at 203.

124 *Id.* at 201.

125 Imwinkelried, *supra* note 50, at 456-57.

126 *Id.* at 456, 461.

127 United States v. Aguilar-Aranceta, 58 F.3d 796, 798-99 (1st Cir. 1995) ("The justification ... is that no inference as to the defendant's character is required."); United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991) (explaining that under the doctrine of chances, the "inference is purely objective, and has nothing to do with a subjective assessment of [the defendant's] character"); People v. VanderVliet, 508 N.W.2d 114, 125, 128-29, 128 n.35 (Mich. 1993).

128 IMWINKELRIED, *supra* note 11, § 3:4.

129 *Id.* § 5:15.

130 Leonard, *supra* note 9, at 164.

131 27 F.3d 1219, 1222, 1232 (7th Cir. 1994); *see also* Leonard, *supra* note 9, at 164 (discussing *Evans* as a case employing the doctrine of chances without labeling it as such).

132 *Evans*, 27 F.3d at 1232.

133 Leonard, *supra* note 9, at 164.

134 142 F. Supp. 3d 298, 299, 300-01 (E.D.N.Y. 2015).

135 *See* Leonard, *supra* note 9, at 148, 152, 159 (discussing the "weak judicial analysis" of the admissibility of uncharged misconduct, asserting that courts often affirm the admission of uncharged misconduct evidence with "little or no analysis," and discussing that trial courts do not scrutinize the facts carefully to make certain that the evidence possesses genuine non-character relevance under the doctrine of chances).

136 *Id.* at 148 ("The courts have liberally admitted evidence of the defendant's other drug activities ...."); *see* Michael H. Graham, *Other Crimes, Wrongs, or Culpable Acts Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger on; Part I. The War on Drugs--The Seventh Circuit Crosses Over to the Dark Side*, 49 CRIM. L. BULL. 875, 879-81 (2013).

137 *See, e.g.*, United States v. Jefferson, 725 F.3d 829, 836 (8th Cir. 2013).

138 *Id.*

139 United States v. Sanders, 668 F.3d 1298, 1314 (11th Cir. 2012) (quoting United States v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005)).

140 *See*Smith v. United States, 133 S. Ct. 714, 717-18 (2013); Salinas v. United States, 522 U.S. 52, 63-64 (1997); Stewart v. Texas, 474 U.S. 866, 869 (1985) (Marshall, J., dissenting); Pinkerton v. United States, 328 U.S. 640, 647 (1946); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.3 (2d ed. 2003).

141 *See* Leonard, *supra* note 9, at 165.

142 As the text indicates, in these situations, the judge typically admits the item of evidence but gives the jury a limiting instruction, which (1) identifies the permissible use of the evidence but (2) forbids the jury from using the evidence for the impermissible purpose. The courts usually assume that lay jurors are both willing and able to follow limiting instructions. *Cf.* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 414-19, 424-30, 451 (2013).
However, in extreme cases, the judge may conclude that it is fanciful to think that the jury will be willing and able to comply with the limiting instruction. RONALD L. CARLSON &EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 15.3(A) (5th ed. 2017). On rare occasions, the Supreme Court itself has held that it is unrealistic to believe that a jury can carry out a particular type of judicial instruction. *Id.* at 439-41 (citing Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); Shepard v. United States, 290 U.S. 96 (1933)). The fact pattern may create a "perfect storm" rendering the instruction ineffective: the evidence is directly relevant to a critical issue in the case, the source of the evidence presumably has personal knowledge of the facts, and the source is either the opposing litigant himself, herself, or someone with a close relationship to the litigant. *Id.* at 441.

143 FED. R. EVID. 105.

144 IMWINKELRIED, *supra* note 11, §§ 9:73-:74.

145 *Id.* § 9:74.

146 *Id.*

147 *Id.*

148 *See id.*

149 502 U.S. 62, 64-65, 67-68, 70-75 (1991).

150 *Id.* at 64, 75-80 (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part). In this case, the state trial judge's instruction included a negative as well as an affirmative prong. *Id.* at 67 n.1. The negative prong informed the jury that the uncharged misconduct testimony "may not be considered by you to prove that [the defendant] is a person of bad character or that he has a disposition to commit crimes." *Id.* However, the affirmative prong was very vaguely worded. The affirmative prong told the jury that they could consider the evidence:
[O]nly for the limited purpose of determining if it tends to show ... a clear connection between the other two [uncharged] offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case.
Id. The instruction did not define the necessary "clear connection" or direct the jury to consider the objective probability of the defendant's involvement in so many accidents. *Id.*; *see supra* text accompanying notes 26-27. Given the jurors' lack of legal training, it is perfectly plausible that after hearing this instruction, the jurors voted to convict on the basis of improper character reasoning.

151 Leonard, *supra* note 9, at 139, 144.

152 *Id.* at 139.

153 There are pattern instructions on uncharged misconduct evidence in many jurisdictions. *See, e.g.*, ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES)) §§ 1.1-.2, 4.1-.2 (2016), http://www.ca11.uscourts.gov/pattern-jury-instructions; U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, MODEL CRIMINAL JURY TABLE OF CONTENTS AND INSTRUCTIONS §§ 2.23, 4.29 (2016), http://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions; SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS § 7.13 (2016), http://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/13_Chapter_7_0.pdf; U.S. COURT OF APPEALS EIGHTH CIRCUIT,

EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS §§ 2.08-.08A (2014), http://www.juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions_New_and_Revised%208_5_2014.pdf; U.S. DIST. COURT DIST. OF ME., PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 2.06 (2015), http://www.ca1.uscourts.gov/sites/ca1/files/citations/2015%20Revisions%C20to%C20Pattern%C20Criminal%20Jury %20Instructions%20for%C20the%C20District%20Courts %20**of**%20the%C20First%20Circuit.pdf; STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS(CRIMINAL) § 26A (4th ed. 2016), http://www.azbar.org/media/1179884/rajicriminal-4thed2016-final.pdf; JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS § 375 (2016), http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf; PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELAWARE § 4.4 (2016), http://courts.delaware.gov/superior/pattern/pdfs/pattern_criminal_jury_rev4_2016.pdf; GEORGIA STATE BAR JURY INSTRUCTIONS--CRIMINAL § 1.34.10 (2016); HAW. STATE JUDICIARY, HAWAI'I CRIMINAL JURY INSTRUCTIONS § 2.03 (2005), http://www.courts.state.hi.us/docs/docs4/crimjuryinstruct.pdf; STATE OF IDAHO JUDICIAL BRANCH SUPREME COURT, CRIMINAL JURY INSTRUCTIONS § 303 (2010), https://isc.idaho.gov/main/criminal-jury-instructions; MAINE JURY INSTRUCTION MANUAL § 6-15 (2016); MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.29(A) (3d ed. 2016); MASS. DIST. COURT, CRIMINAL MODEL JURY INSTRUCTIONS § 3.800 (2016), http://www.mass.gov/courts/docs/courts-and-judges/courts/district-court/jury-instructions-criminal/criminal-model-jury-instructions.pdf; OHIO JURY INSTRUCTIONS--CRIMINAL § 401.25 (2016); OKLAHOMA UNIFORM JURY INSTRUCTIONS: CRIMINAL § 9-9 (2d ed. 2017), http://www.okcca.net/online/oujis/oujisrvr.jsp?oc=OUJI-CR%209-9; PENNSYLVANIA SUGGESTED CRIMINAL JURY INSTRUCTIONS § 3.08 (2016); SOUTH CAROLINA REQUESTS TO CHARGE--CRIMINAL §§ 1-16, -17 (2007); TEXAS CRIMINAL PATTERN JURY CHARGES §§ 3.1, A3.1 (2016) INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 24-250 (2016); *see also*PROPOSED MISSISSIPPI PLAIN LANGUAGE MODEL JURY INSTRUCTIONS--CRIMINAL § 205 (2012), https://courts.ms.gov/mmji/Proposed%20Plain%C20Language%C20Model%C20Jury%C20Instructions%20-%20Criminal.pdf.

The instructions fall into three general categories. Some are "shotgun" instructions, which merely list a number of permissible non-character uses for uncharged misconduct evidence. *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SUPERIOR COURT OF THE STATE OF DELAWARE, *supra*. Others contain such a list but add a paragraph or short paragraph going into more detail about particular uses. *See, e.g.*, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, *supra*. Still others employ brackets to signal the trial judge that he or she should specify the non-character purpose or purposes that the judge is relying on as the justification for admitting the evidence. *See, e.g.*, MAINE JURY INSTRUCTION MANUAL, *supra*. However, there do not appear to be any instructions that contain an amplification for situations in which the prosecution is relying on the doctrine of chances to prove intent.

154 *See supra* Part IV.A.1.

155 It might be argued that the latter type of instruction is adequate because during closing argument the attorneys can explain the instruction to the jurors. However, that argument is unpersuasive. To begin with, the jurors pay more attention to what the judge tells them. Mark A. Dombroff, *Jury Instructions Can Be Crucial in Trial Process*, LEGAL TIMES, Feb. 25, 1985, at 26, 26. The jurors realize that the attorneys are partisans and tend to discount the attorneys' statements. Moreover, the judge's explanation is more likely to be accurate, at least in the sense that it is more balanced and neutral than either attorney's explanation.

156 In *Huddleston v. United States*, the Supreme Court announced that Rule 104(b) governs the determination of whether the accused committed an uncharged act. 485 U.S. 681, 689-92 (1988). Under Rule 104(b), the judge makes a limited, screening decision whether the prosecution's foundational testimony is sufficient to support a rational, permissive jury finding that the accused committed the act. *Id.* at 690. If the foundational testimony suffices, the judge admits the testimony. In the final jury charge, the judge instructs the jury that they are to determine whether the prosecution has established by a preponderance of the evidence that the accused perpetrated the act. *See id.* The judge further directs the jury to completely disregard the testimony about the uncharged act if they decide that the prosecution has not established by a preponderance of the evidence that the accused committed that act. *Id.* Not all states follow *Huddleston*. Some require that, before admitting the evidence, the judge must find by a preponderance of the evidence that the accused committed the uncharged act. IMWINKELRIED, *supra* note 11, § 2:9. Other jurisdictions demand clear and convincing evidence. *Id.*

157 Edward J. Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence: The Last Line of Defense Against Jury Misuse of the Evidence*, TRIAL DIPL. J., Fall 1985, at 23, 24.

158 *See* Leonard, *supra* note 9, at 144.

159 Robinson v. California, 370 U.S. 660, 666 (1962).

160 *See supra* note 9 and accompanying text.

161 *See supra* note 14 and accompanying text.

162 Blinka, *supra* note 33, at 110.

163 *See*United States v. Derington, 229 F.3d 1243, 1247 (9th Cir. 2000); State v. Brown, 900 A.2d 1155, 1160 (R.I. 2006).

164 Imwinkelried, *supra* note 59, at 581.

165 *See*People v. Allen, 420 N.W.2d 499, 504 (Mich. 1988) ("[I]n our system of jurisprudence, we try cases, rather than persons ...."). In *Romer v. Evans*, the so-called "Colorado Gay Rights Case," the Court used language to the effect that it is improper to penalize a person for his or her status. 517 U.S. 620, 635 (1996).

45 HOFLR 851

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TAB 3

Assault Instructions

NOTES: This section is organized into two subparts:

FIRST: the instructions are organized as requested by the committee by offense level, as follows:

Class B Misdemeanor
Assault

Class A Misdemeanor
Assault of Pregnant Person / Substantial Bodily Injury (combined instruction)
Assault of Pregnant Person (stand-alone)
Assault Causing Substantial Bodily Injury (stand-alone)
Assault (MB) + SVF for Pregnant Person / Substantial Bodily Injury

Third Degree Felony
Aggravated Assault

Second Degree Felony
Aggravated Assault (combined instruction with all possible elements included)
Aggravated Assault (F3) + SVF for "serious bodily injury" OR "loss of consciousness"

SECOND: there are assault-related instructions that have not been considered by the committee, as follows:

- Assault Against Peace Officer / Military Service Member
- Assault Against School Employee
- Assault by Prisoner
- Aggravated Assault by Prisoner
- Related Definitions

CR_____ ~~Simple~~ Assault (Use SVF for SBI or Pregnant Victim).

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)
2. Intentionally, knowingly, or recklessly
   a. attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME).
3. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-102

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 11/07/2018

CR_____ Assault – Pregnant Person or Substantial Bodily Injury.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Pregnant Person or Committing Assault that Caused Substantial Bodily Injury [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME);

AND EITHER

3. (VICTIM'S NAME) was pregnant; and
4. (DEFENDANT'S NAME) had knowledge of the pregnancy;

OR

5. Intentionally, knowingly, or recklessly;
    a. Committed an act with unlawful force or violence; and
    b. The act caused substantial bodily injury to (VICTIM'S NAME).

6. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-102(3)(b)

Committee Notes

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 00/00/0000

CR_____ Assault – Pregnant Person.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a Pregnant Person [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (VICTIM'S NAME) was pregnant; and
4. (DEFENDANT'S NAME) had knowledge of the pregnancy; and
5. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-102(3)(b)

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 12/05/2018

CR_____ Assault – Causing Substantial Bodily Injury.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Causing Substantial Bodily Injury [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly committed an act with unlawful force or violence;
3. The act caused substantial bodily injury to (VICTIM'S NAME).
4. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-102(3)(a)

Committee Notes

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 11/07/2018

CR_____ Special Verdict Form – Assault – Pregnant Person / Substantial Bodily Injury

(Case Caption Information)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Assault, as charged in Count [#].

We also unanimously find beyond a reasonable doubt that (check all that apply):

_____ (DEFENDANT'S NAME) caused substantial bodily injury to (VICTIM'S NAME).

_____ (VICTIM'S NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) knew of the pregnancy.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 00/00/0000

CR_____ Aggravated Assault (Must Use SVF for 3rd Degree or 2nd Degree).

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
   c. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and

~~3. (DEFENDANT'S NAME)~~
~~a. [Used a dangerous weapon; or]~~
~~b. [Committed an act that impeded the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:~~
~~i. applying pressure to the neck or throat of (VICTIM'S NAME); or~~
~~ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]~~
~~c. [Used other means or force likely to produce death or serious bodily injury].~~

~~4.~~3. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-103

Committee Notes

Depending on the facts of the case, practitioners should include a special verdict form under the following circumstances:

- where there is "serious bodily injury" OR "loss of consciousness" (see Utah Code § 76-5-103(2)(a)); or
- where there is "targeting law enforcement officer" AND "serious bodily injury" (see Utah Code §76-5-103(2)(b)).

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 12/05/2018

CR_____ Aggravated Assault (For Use With SVF Only for 2nd Degree).

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
   c. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
   a. [Used a dangerous weapon; or]
   b. [Committed an act that ~~impeded~~ interfered with the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
      i. applying pressure to the neck or throat of (VICTIM'S NAME); or
      ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
   c. [Used other means or force likely to produce death or serious bodily injury].
4. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-103

Committee Notes

Depending on the facts of the case, practitioners should include a special verdict form under the following circumstances:

- where there is "serious bodily injury" OR "loss of consciousness" (see Utah Code § 76-5-103(2)(a)); or
- where there is "targeting law enforcement officer" AND "serious bodily injury" (see Utah Code §76-5-103(2)(b)).

In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated *mens rea* (intentional, knowing, or reckless). Practitioners should review *State v. Barela*, 2015 UT 22.

Last Revised – 12/05/2018

CR_____ Special Verdict Form – Aggravated Assault 2nd Degree

(Case Caption Information)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Aggravated Assault, as charged in Count [#].

We also unanimously find beyond a reasonable doubt that **OPTION ONE –** (check all that apply):

_____ The act resulted in serious bodily injury.

_____ The act interfering with the breathing or the circulation of blood produced a loss of consciousness.

_____ **OPTION TWO –** None of the above.

OPTION THREE – If you find beyond a reasonable doubt that none of the above circumstances apply, leave all boxes unchecked and sign the form.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Last Revised - 00/00/0000

INSTRUCTIONS THAT HAVE NOT YET BEEN REVIEWED BY THE COMMITTEE

CR_____ Assault Against a Peace Officer or Military Servicemember in Uniform.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a [Peace Officer][Military Servicemember in Uniform] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)
2. [Knowing that (VICTIM'S NAME) was a peace officer];
3. Intentionally, knowingly, or recklessly
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); or
    c. threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or
    d. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);
4. (VICTIM'S NAME) was [acting within the scope of (his)(her) authority as a peace officer][on orders and acting within the scope of authority granted to the military servicemember in uniform].
5. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-102.4

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised - 00/00/0000

CR_____ Definitions - Assault Against a Peace Officer or Military Servicemember in Uniform.

"Peace officer" means:
1. A law enforcement officer certified under Section 53-13-103;
2. A correctional officer under Section 53-13-104;
3. A special function officer under Section 53-13-105; or
4. A federal officer under Section 53-13-106.

"Military servicemember in uniform" means:
1. A member of any branch of the United States military who is wearing a uniform as authorized by the member's branch of service; or
2. A member of the National Guard serving as provided in Section 39-1-5 or 39-1-9.

References
Utah Code § 76-5-102.4

Committee Notes

Last Revised - 00/00/0000

CR_____ Assault Against School Employees.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault Against a School Employee [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Knowing that (VICTIM'S NAME) was an employee or volunteer of a public or private school;
3. Intentionally, knowingly, or recklessly
    a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    b. Committed an act with unlawful force or violence that
        i. caused bodily injury to (VICTIM'S NAME); or
        ii. created a substantial risk of bodily injury to (VICTIM'S NAME); or
    c. threatened to commit any offense involving bodily injury, death, or substantial property damage, and acted with intent to place (VICTIM'S NAME) in fear of imminent serious bodily injury, substantial bodily injury, or death; or
    d. made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME);
4. (VICTIM'S NAME) was acting within the scope of (his)(her) authority as an employee or volunteer of a public or private school.
5. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-102.3

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised - 00/00/0000

CR_____ Assault by Prisoner.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Assault by Prisoner [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. At the time of the act (DEFENDANT'S NAME) was
   a. In the custody of a peace officer pursuant to a lawful arrest; or
   b. Was confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles.
4. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-102.5

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised - 00/00/0000

CR_____ Aggravated Assault by Prisoner (Use SVF if Intentionally Caused SBI).

(DEFENDANT'S NAME) is charged [in Count ____] with committing Aggravated Assault By Prisoner [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly
   a. Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
   b. Made a threat, accompanied by a show of immediate force or violence, to do bodily injury to (VICTIM'S NAME); or
   c. Committed an act with unlawful force or violence that
      i. caused bodily injury to (VICTIM'S NAME); or
      ii. created a substantial risk of bodily injury to (VICTIM'S NAME); and
3. (DEFENDANT'S NAME)
   a. [Used a dangerous weapon; or]
   b. [Committed an act that impeded the breathing or the circulation of blood of (VICTIM'S NAME) by use of unlawful force or violence that was likely to produce a loss of consciousness by:
      i. applying pressure to the neck or throat of (VICTIM'S NAME); or
      ii. obstructing the nose, mouth, or airway of (VICTIM'S NAME); or]
   c. [Used other means or force likely to produce death or serious bodily injury];
4. At the time of the act (DEFENDANT'S NAME) was
   a. [In the custody of a peace officer pursuant to a lawful arrest; or]
   b. [Was confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles].
5. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References
Utah Code § 76-5-103.5

Committee Notes
In cases involving domestic violence, practitioners should include a special verdict form and instructions defining cohabitant.

Utah appellate courts have not decided whether the cohabitant relationship between the defendant and the alleged victim is an element of the offense requiring proof of an associated mens rea (intentional, knowing, or reckless). Practitioners should review State v. Barela, 2015 UT 22.

Last Revised - 00/00/0000