AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

January 14, 2020 / 5:15 p.m. – 7:15 p.m.

Council Room - 3rd Floor, N31, Matheson Courthouse

(Next door to Council Room)

450 S. State St., Salt Lake City, UT

***Light Dinner will be served*

Welcome and Approval of Minutes • October 8, 2019 • November 12, 2019	Action	Tab 1	Chris Hogle
Rule Review Drafting Principles	Action	Tab 2	Chris Hogle
URE 512 Update • Waiting for dates from Rep. Snow for meeting • Vote on letter from John	Action		Chris Hogle
URE 1101 Update	Discussion	Tab 3	Matt Hansen, Dallas Young
URE 106 Update	Discussion		Teresa Welch
Body Camera Law Violations	Action	Tab 4	Chris Hogle
URE 404(b). Character Evidence; Crimes or Other Acts. • Supreme Court Directive • *State v. Verde*, *State v. Murphy*, *State v. Lane* • FRE 413, 414, 415 • Pullan Presentation	Action	Tab 5	Chris Hogle Judge Derek Pullan

Queue:

- URE 404(b) – Supreme Court Directive – Doctrine of Chances
- Body Camera Law – Procedural Review, 77-7a-101, et seq.
- Rep. Ivory's Requests (Rep. Ivory resigned. Waiting for new sponsor)
  - URE 409. Payment of Medical & Similar Expenses; Expressions of Apology
  - URE 412. Admissibility of Victim's Sexual Behavior or Predisposition
- Ongoing Project: Rule Comments
  - Law student caselaw review

2020 Meeting Dates:

February 11, 2020
April 14, 2020
June 9, 2020
October 13, 2020
November 10, 2020

Rule Status:

URE 512 – Waiting for meeting with Snow
URE 106 – Back to Committee per SC
URE 1101 – Back to Committee per SC

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
Tuesday– October 8, 2019
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Adam Alba	Teresa Welch	Joseph Wade,	Keisa Williams
Tony Graf	Lacey Singleton	Legislative Research	Nancy Merrill
Nicole Salazar-Hall	Hon. David Williams	Jacquelyn Carter,	Michael Dreschel
Mathew Hansen	Tenielle Brown	Legislative Research	
Ed Havas		Hon. Matthew Bates	
Chris Hogle			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Jennifer Parrish			
Dallas Young			
Deborah Bulkeley			
Hon. Linda Jones			
Michalyn Steele			
Hon. Vernice Trease			

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1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)

Mr. Lund welcomed everyone to the meeting. The following corrections were made to the August 13, 2019 minutes:

- Correct the spelling of John Nielsen's last name throughout
- Page 5, second to last paragraph, change "effect" to "affect"

***Motion:* Adam Alba made a motion to approve the amended minutes from the Evidence Advisory Committee meeting held on August 13, 2019. John Nielsen seconded the motion and it carried unanimously.**

Tony Graf introduced himself to the Evidence Advisory Committee.

2. URE 1101. Applicability of Rules:

The Supreme Court asked that the committee flesh out the committee note. The Court felt the note was too broad and needed to include the case history in *Weeks*. Mr. Nielsen provided an overview of the revisions he made to the Committee Note. Chris Hogle also provided some recommended edits. Mr. Nielsen added another case reference (*Williams v. New York*). For a long time sentencing hearings have included a wide array of information. The note now includes the rationale in *Weeks* about why it's good to have that kind of flexibility at sentencing. Judge Jones noted that "court ordered restitution" is a term of art. There are two kinds of restitution that judges generally order, complete and court-ordered. Is use of that term intentional? Are you focusing only on court-ordered restitution and not complete? Mr. Nielsen stated that he focused on court-ordered restitution because that's what *Weeks* focused on and court-ordered is also the aspect of restitution that takes into account a defendant's ability to pay, etc.. Judge Jones agreed because complete restitution encompasses factors in court-ordered restitution.

Mr. Hogle reviewed his recommended edits. He suggested that a space be added before the paragraph symbol in the case citations. Mr. Lund asked Ms. Williams to use the same format as that included in previous notes. Judge Jones asked whether fines go to the state. Mr. Drechsel stated that fines in district court cases go directly to the state, but fines in justice court cases are split between the local prosecuting entity and the city or county running the court. Mr. Young asked whether "subsection" is the right word in the first line. Mr. Lund asked Ms. Williams to review other notes and ensure the use of "subsection" is consistent. Mr. Lund asked whether this new note should be stacked on top of the older committee notes. The committee agreed that the note should be stacked. Mr. Nielsen reviewed the older notes to ensure they are still accurate. The committee discussed whether case citations should be italicized or underlined and determined that they should be italicized. Mr. Lund stated that he believes this note, in conjunction with the amended language in the rule itself, fulfills the Court's request. The committee discussed and made other nonsubstantive edits.

Motion: ***Chris Hogle moved to recommend Rule 1101 and the Committee Note, including the suggested edits, to the Supreme Court for approval for public comment. Mr. Young seconded the motion and it passed unanimously.***

3. Rule 512. Victim Communications:

Judge Bates reviewed the updated version of Rule 512. The subcommittee hasn't had time to run this past Representative Snow yet. The subcommittee took the existing Rule 512 and kept as much of the original structure and content as possible. The issue with the original version of Rule 512 is that it contains a long list of exceptions and it isn't clear whether those exceptions make the evidence admissible, or whether they allow disclosure but the information isn't admissible. It's confusing because the privilege is created in both the rule and the statute, and the exceptions are found in the rule. The subcommittee left the exceptions in the rule but

divided them up between disclosures in (d) that could be made without waiving the privilege and do not make the communication admissible, and disclosures in (e) where the privilege is waived and the communication becomes admissible. Ms. Williams stated that the heading in (d) isn't clear.

Judge Bates expressed concern about the exceptions in (e)(1)(A). The existing rule includes an exception if the victim gives informed consent to the disclosure. If that happens, the communication can be disclosed to anyone the victim chooses. Judge Bates questioned whether, in that circumstance, the disclosure becomes admissible in court or whether the privilege remains? For this to be a fair rule, if the victim chooses to disclose to someone not listed in (d), then that ought to effect a waiver of the privilege. Therefore, he added (e)(1)(A)(4), which includes a warning in the waiver that the disclosure would waive the privilege. The warning would ensure the victim is aware that the communication will become admissible in court. Mr. Nielsen agreed that the heading "no waiver" isn't clear, and suggested changing the heading in (d) to "circumstances that do not waive the privilege" and (e) to "circumstances that waive the privilege." After discussion the committee amended those two headings to (d) "disclosures that waive the privilege" and (e) "disclosures that do not waive the privilege."

Judge Bates recommended that the subcommittee send the new draft to Representative Snow for review and if he doesn't have any changes, the committee can vote to send it on to the court for approval for public comment. Mr. Young questioned whether the Court asked that statutory references not be included in the rule. He suggested removing the citation in the definitions section and including the actual statutory language. Ms. Williams stated that the Court's feedback was more about not including statutory references in the substance of the rule. Judge Bates noted that the legislature created a privilege in Rule 507 and the definitions in that rule refer to the statute. Judge Bates stated that the legislature invented the Rule 512 privilege and it makes sense to look to them to define who it applies to. Mr. Lund views the committee's role as more about ensuring that, in terms of architecture and consistency with other rules of privilege, Rule 512 has a similar integrity, and not so much about making a decision regarding what should or should not be a disclosure. The substance of the privilege is really coming from the statute. Mr. Lund stated that he envisions the Court asking, does the committee view this version of the rule of evidence as acceptable without getting into policy.

Judge Bates expressed concerns about the scope of (d) and the extent to which the communication can be widely disseminated throughout the criminal justice system except the defendant. It is unclear whether that is a policy or rule issue. If the Court feels it's a policy issue, then this is a good version of the rule. Mr. Lund stated that it seems like a policy issue in a Rule of Evidence, and the Court will ultimately need to make that call. Mr. Lund noted that the Court's primary directive to the committee was not to rush. During the session, there was an urgency to get something on the books before the statutory privilege became effective. In doing that, the committee referenced the statute heavily. That was an issue for the Court because it gave the legislature the ability to change the substance of a Rule of Evidence by legislative

amendment.

Ms. Williams noted that she and Mr. Lund send a memo to the Court when recommending proposed rules. The committee could express in the memo any lingering concerns about the defendant being excluded. That would alert the Court that the committee drafted the rule in a way that appeased Representative Snow, but it's not necessarily the draft the committee would have done. Mr. Young expressed concern that there are still larger Article 8, Section 4 concerns about whether the legislature has the authority to create a Rule of Evidence out of whole cloth. Judge Jones stated that because the Court has adopted Rule 512, the new draft would be an amendment to an existing rule. Mr. Nielsen noted that, historically, there have been legislative privileges in the rules. This is nothing new. The rules have changed a lot. There was a time in the 1980's when the rules were determined entirely by common law. Going back many decades, the legislature created these privileges and the Utah Supreme Court has never really decided whether that's a problem or not. Mr. Lund agreed that there may be a history, but the advisory note in Rule 501 provides clarification and he believes the Court's current view is that the Court makes rules, including rules of privilege. Representative Snow tried to create the rule in collaboration with the committee during the last session, but it just wasn't possible because the pace of the session and the rule-making process didn't match. It would have been much better precedent if the committee was given sufficient time to work through the substantive privilege, similar to the first responder rules.

Ms. Salazar-Hall suggested that the Supreme Court memo also include the committee's constitutional concerns. Ms. Bulkeley questioned whether the committee should even recommend adopting the current version of the rule because of the very clear constitutional problems. Mr. Lund believes there is an open question about whether a valid privilege exists because it was created in statute. Mr. Young asked whether there are grounds for a constitutional challenge. The committee discussed whether the memo should include both the constitutional concern, and the concern regarding the breadth of the exception and exclusion of the defendant.

Judge Trease noted that there are other rules dealing with discovery and subpoenas that allow a judge to determine what goes to a defendant and what doesn't. There may be privileged victim information that, even if it is provided in a criminal action, may not go to the defendant. Mr. Hogle agreed stating that it happens all the time with medical records, counsel records, etc. Judges review those documents in camera. Judge Bates pointed out that those privileges exist by rule and the information isn't given to the multi-disciplinary team or the victim's parents, or anyone else that the victim advocate thinks it needs to go to. None of the information in Rule 512 exceptions is reviewed by a judge. If a judge is managing disclosures in camera, that's okay because it's the judges role, but this rule puts the victim advocate in that position. Judge McKelvie noted that *Brady/Giglio* would supersede the exceptions. No matter what, if it's Brady material, it goes to the defendant. He questioned what communications are left that would really benefit or harm the defendant by not knowing. *Brady/Giglio* also comes into play when

talking about possession. If the documents are in the possession of the government then they must be disclosed. If they are in the possession of the victim advocate, it doesn't apply. Judge Bates agreed. If the documents are in the possession of a private victim advocate then *Brady/Giglio* doesn't apply and neither does (e). For example, *Brady/Giglio* doesn't apply to private advocates at the Crime Victims Clinic or Rape Crisis Center.

Judge Bates noted that Rule 512 doesn't require private advocates to disclose privileged communications to the court or prosecutor, but it lets them disclose it to everybody but the defendant. Looking at (d) "…it can be disclosed in the following circumstances without waiving the privilege…" …if the victim advocate feels the communication is evidence that the victim committed a crime, they can disclose it to anyone they need to for that purpose and it doesn't waive the privilege. Mr. Nielsen stated that the circumstance most concerning for the defendant would be that the victim commits perjury. Judge Bates provided examples of things that could be disclosed that would be relevant to a defendant's case: recantation to the victim advocate, a statement to the victim advocate that the victim intends to commit perjury at trial, or impeaching a witness. Judge Jones pointed out that those things could be disclosed under (d)(3), it just wouldn't waive the privilege. Under (d)(4), it can be disclosed to a universe of folks without waiving the privilege. It is unclear how, why, or when the disclosure should happen.

Mr. Lund stated that when he sits down with a client as a lawyer and says you need to be candid with me and everything you say is going to be kept in confidence, that's partly so that the client is open and truthful. It seems that the legislature's primary intent behind Rule 512 was to ensure victims felt like they could be forthright about whatever it was that they needed to be forthright about. However, that doesn't appear to be true under this rule. Mr. Hansen stated that attorneys at some organizations serve as both attorneys and victim advocates, but primarily victim advocates are social workers, not attorneys.

Mr. Lund outlined two actions for the committee: 1) get feedback from Representative Snow on the current draft before sending it back to the court, and 2) determine how the committee wants to communicate its broader constitutional concerns. Mr. Nielsen recommended that the committee take time to research the constitutional question before deciding whether to include it in the Supreme Court memo. Judge Jones asked whether Representative Snow created the rule out of whole cloth or whether he followed a model from another state. She stated that it would be helpful for the committee to have some historical information about the impetus behind the privilege and why it was crafted the way it was. Subsection (d)(3) is unclear. There is a privilege and it's not waived, but the confidential communication indicates that the victim was planning to commit a crime. The privilege still exists but the communication is out there somewhere. Judge McKelvie questioned whether it then only becomes a testamentary privilege. Is the only restriction that the advocate cannot be called as a witness to testify, but they can disclose to others? Judge Bates noted that the privilege starts in statute so it isn't just about whether it comes in a courtroom, it is more like HIPAA. First, the advocate can't tell anyone. And then the advocate has to figure out that in order to determine whether they can disclose a

communication, they have to go to the Rules of Evidence and look at (d).

Mr. Lund posed a hypothetical. The victim advocate discloses a communication to a DV shelter employee, does the DV shelter employee understand what to do with that information? Do they understand that the communication is confidential? Does the rule continue to apply to the person the advocate tells? Mr. Young stated that the rule would only continue to apply if the person who was told meets the definition of a crime victim advocate. The DV shelter employee is not prohibited from passing it on, and the victim has no way to stop them from disclosing it further. Mr. Hansen reviewed similar privileges in other states. In Hawaii, there is no privilege under the rule "when the victim counselor reasonably believes that the victim has given perjured testimony." The privilege can be breached. But how would the victim advocate know when perjured testimony was given?

Judge Bates suggested that the subcommittee meet with Representative Snow because the committee is trying to draft a rule based on a guess about what the legislature intended. Mr. Drechsel stated that Representative Snow is happy to discuss an amendment to the rule if the committee has a substantive issue. He is open to the possibility of passing clarifying legislation, but now that the rule has been adopted it's up to the committee to identify issues that need his attention. Judge Bates would prefer to meet with Representative Snow to try and craft a rule that both he and the committee support before going back to the Supreme Court. Mr. Havas suggested trying to identify the stakeholders behind the task force and ask them to attend a committee meeting, or the meeting with Representative Snow, to get clarification. Mr. Wade stated that Representative Snow was the House chair of the task force and Senator Weiler was the Senate chair. Mr. Young identified Craig Johnson from the Utah County Attorney's Office as a stakeholder. Mr. Lund is deferring to Judge Bates to determine which subcommittee members want to be included in the meeting. Ms. Williams will email the current draft of Rule 512 to the committee.

<u>Motion:</u> Mr. Lund asked for a motion that the subcommittee request a meeting with Representative Snow and interested parties on the legislative side to talk about Rule 512. Ms. Salazar-Hall made that motion. Ms. Bulkely seconded and the motion passed unanimously.

4. URE 617 Eyewitness Identification:

Mr. Lund reviewed the Rule 617 Subcommittee charge. The subcommittee will keep track of the requirements in Rule 617 and conduct related education. Judge Jones asked that "educate law enforcement" be added because it will be difficult for law enforcement agencies to learn how to apply what's in the rule. Jensie Anderson is in touch with an organization that will train law enforcement for free and she has agreed to help facilitate that training. Mr. Lund noted that Ms. Brown was interested in chairing that group. Judge Jones will stay on the subcommittee as needed. Mr. Lund suggested that the subcommittee get together to determine how they want to implement the charge. The subcommittee should report to the committee at least annually

so that it can be tracked by staff. The Subcommittee will include Teneille Brown (Chair), Judge Jones, Judge D.J. Williams, John Nielsen, and Teresa Welch.

Motion: ***John Nielsen made a motion to approve the Charge. Judge McKelvie seconded the motion and the motion passed unanimously.***

5. Committee Note Review:

Ms. Williams provided an overview of her discussion with Ms. Brown. Some of Ms. Brown's students submitted committee note drafts of various rules. Ms. Brown stated that some of the notes are pretty long and suggested that at least 2 members work together on one rule. Ms. Williams put the notes in a Dropbox folder and shared it with the committee. Mr. Lund suggested that the rules be grouped.

The Committee volunteered to conduct reviews in teams as follows:

- **URE 401, 403, 404, 405:** John Nielsen, Tony Graf, Adam Alba, and Dallas Young
- **URE 406, 407, 409:** Chris Hogle, Ed Havas
- **URE 608, 609:** Deborah Bulkeley, Michalyn Steele
- **URE 801, 803, 804:** John Lund, Jennifer Parrish, and Nicole Salazar-Hall

Ms. Williams will send a follow up email after the meeting with the assignments. Mr. Nielsen suggested waiting to make a decision about due dates until the next meeting after each group has time to review the drafts and determine how long it's going to take. The due dates could be spread out amongst the committee's 2020 meeting dates. The committee will talk to Ms. Brown about whether she wants to invite students to attend committee meetings for educational purposes.

6. Potential Queue Item CCJ/COSCA Resolution:

Ms. Williams reviewed the resolution passed by the Conference of Chief Justices and State Court administrators regarding the admission of information on cell phones and other personal electronic devices. Litigants often want to show judges material stored on their cell phones during judicial proceedings, i.e., photos, call logs, text messages, emails, videos, etc. This is a growing trend especially in cases involving large numbers of self-represented parties. The resolution encourages Chief Justices and State Court Administrators to consider adopting policies or protocols to guide and assist judges in dealing with practical and evidentiary issues.

Mr. Lund question how this related to the rules of evidence. The Federal Rules of Evidence were recently extensively amended on issues surrounding authenticity. Judge Bates agreed that the Court should consider adopting rules that govern the admissibility of information on parties' phones and electronic devices. This issue comes up in the majority of protective order and divorce cases. He now gives a pretrial speech about why that information is inadmissible. He

will sometimes allow them to email it to the in-court clerk so that it can be printed. Mr. Young stated that this doesn't seem like an evidence issue, but rather an issue of creating policies which would provide pro se litigants with more accessibility, such as setting up a copier in the courtroom. Mr. Nielsen stated that it's not a question about the authenticity of the evidence, it's a question about the logistics of getting the information to the court and in the record. Mr. Lund suggested sending the resolution to the Policy and Planning Committee for consideration.

7. Other Business:

Mr. Lund questioned whether Representative Ivory's requests surrounding Rules 409 and 412 should still be in the committee's queue. Ms. Salazar-Hall reminded the committee that Representative Ivory attempted to pass a statute and rule of evidence last session. Ms. Williams reached out to Representative Ivory to see if he still wanted to address the committee. He responded that he resigned from the legislature but still wanted the issue to move forward. He suggested that the committee reach out to Representative Lisonbee. Mr. Drechsel is going to talk to Representative Lisonbee to see if that is something she's planning to take up. Representative Ivory asked that the issue be kept in the committee's queue and that he be included in any committee meetings where the issue is addressed.

Mr. Lund expressed concern that the committee would not find out about a proposed bill or rule until too late into the session. He requested that Ms. Williams keep checking to ensure the committee is informed as soon as possible. Ms. Williams spoke to Mr. Drechsel about it. He didn't know if anyone intends to sponsor a bill this session, but he would talk to Representative Lisonbee and report back to Ms. Williams.

Next Meeting: November 12, 2019
5:15 p.m.
AOC, Council Room

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
Tuesday– November 12, 2019
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Tenielle Brown	Chris Hogle	Joseph Wade,	Keisa Williams
Tony Graf	Dallas Young	Legislative	Nancy Merrill
Nicole Salazar-Hall	Adam Alba	Research	
Mathew Hansen	John Nielson		
Ed Havas	Teresa Welch		
John Lund, Chair	Deborah Bulkeley		
Hon. Richard McKelvie	Lacey Singleton		
Jennifer Parrish	Michalyn Steele		
Hon. David Williams	Hon. Vernice Trease		
Hon. Linda Jones			

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting. Without a quorum the Committee could not vote on the October 8, 2019 minutes, however, the following corrections were recommended:

- Page 3, second paragraph, change "affect" to "effect"
- Page 4, second paragraph, correct spelling of Ms. Salazar-Hall's name

2. URE 1101 Applicability of Rules:

Mr. Lund and Ms. Williams presented URE 1101 to the Supreme Court on October 21, 2019. Mr. Lund pointed to an email from Dallas Young with his feedback, and provided an overview of the Court's discussion. The Committee intended subsection (c)(3)(C) to match the language in the statute verbatim. The court expressed the following concerns:

- As written, (c)(3)(C) is hard to understand.
- The concept is that this is an exception to the rules, and yet it requires a certain type of witness to attend the hearing. It seems like a procedural issue, rather than a question of the scope of the evidence.
- Does this take away the sentencing judge's discretion if the person is not present? Is there no alternative then but to consider the case not established?

The Supreme Court asked the Evidence Advisory Committee to find out when and how the requirement for the appearance of adverse witnesses at probation hearings came about, with a summary of the legislative history. The Court was concerned that this procedure may not be followed in practice. It is problematic to write this requirement into the rule if we have a practicality problem. Ms. Williams noted that the Supreme Court expressed concern about legislative overreach by including an evidentiary procedure in a statute. But before addressing that issue, the Court would like the Committee to research whether this is good policy by looking to see what other states are doing, reviewing legislative history, and identifying practical issues. Judge Jones asked whether the court discussed due process concerns if we don't follow the statute. If the person who isn't making the allegation doesn't come to a probation violation hearing to testify, we're taking someone's freedom away in a case where all the state has to establish is preponderance of the evidence. Ms. Williams stated that the Court did not discuss that issue.

Mr. Lund noted that the biggest question was the pragmatic implication. There was a concern that, requiring the person with percipient knowledge of the violation to appear in person in order to conduct a probation revocation hearing was, practically speaking, not what happens. Judge Jones: In the majority of my revocation hearings, the probation officer appears and testifies about the violation. Mr. Hansen: But probation officers' information is mostly second-hand, "I went to the house and the defendant's mom said they're not living there anymore," or "I did a drug test and they tested positive," but the probation officer didn't conduct the test. Judge McKelvie: Sometimes they'll show up at the house and they'll find drugs in the home or beer in the fridge, but most often probation officers are referring to things that people told them. Mr. Nielsen: They testify about hearsay information. Judge Jones: The number one violation is that the defendant didn't report, which is first-hand knowledge. Ms. Williams: The Court discussed the pragmatic issue extensively, noting that it's hard to get mom and other witnesses into court to testify, and because of that it may not be happening as a practical matter. Judge McKelvie: The people who are most aware of the violations are usually the people most aligned with the probationers, and the most reluctant to show up to hearings. Mr. Lund: Essentially, the Court wants us to put some thought and consideration into how probation hearings should be handled, and not simply follow the statute. This may not be an issue requiring research into other states. It might be unique to what's happening in Utah.

Judge Jones: It's possible that there will be more developing in this area in the future. In August, the U.S. Supreme Court ruled that a State's probation statute allowing a court to revoke probation based on a preponderance of the evidence, in a situation where the allegation was criminal conduct that would lead to a mandatory sentence, violated the defendant's constitutional rights and the State was required to prove that beyond a reasonable doubt. They had to have a mini trial essentially. Judge McKelvie: As a practical matter, what usually happens is if the probation violation is predicated on a new offense, everybody decides to push the probation violation off until after the new offense is adjudicated so you don't run into that problem. No rule mandates that practice, it's just common sense under those circumstances.

Ms. Williams spoke to Brent Johnson about any overlap with the Rules of Criminal Procedure. There is no overlap right now. The Advisory Committee on the Rules of Criminal Procedure is planning on eventually doing an overhaul of procedures related to probation hearings, but they have not yet begun that work.

A URE 1101 subcommittee was created to address the Supreme Court's concerns and report back to the Evidence Committee at the next meeting. The URE 1101 subcommittee consists of: Matt Hansen and Dallas Young. Judge Jones will send Mr. Hansen a copy of the Supreme Court case she discussed above.

3. URE 512 Victim Communications Update:

Ms. Williams reported that Mike Drechsel is attempting to plan a meeting with Representative Snow to discuss URE 512. Ms. Williams is still waiting for meeting dates. Rep. Snow's version of URE 512 and the related statute are currently in effect as passed last session. Mr. Lund raised the question; is the statue going to change in the upcoming legislative session or is there no reason to alter it? Ms. Williams: I belive Representative Snow is willing to discuss any concerns that the Committee may have with the current rule or statute, but from his perspective, the responsibility lies with the Court to propose changes if they feel any are necessary. Mr. Lund discussed the following options:

- Let the issue drop and leave the existing rule, as adopted by the legislature, in effect. It would only be revisited if the Supreme Court addressed it in a case.
- Ask the Supreme Court for guidance as to whether there is anything specific in the Rule that they want the Evidence Advisory Committee to address.

Mr. Havas: The Committee created a second revision of URE 512 that we think is an improvement, but it has not been blessed by Rep. Snow or presented to the Court. Rep. Snow has no incentive to meet with the Committee, so it seems that the Committee should take its revised version to the Court and explain why it's better than the current rule. Judge Jones: The rule is hanging by a thread because the legislature doesn't have constitutional authority to create a rule out of whole cloth. Mr. Lund: The practical issue is, what are victim advocates being told about whether the communications they're having are privileged? Who can waive the privilege and under what circumstances? The agencies and non-governmental organizations are probably reading the current rule and thinking it's valid. Mr. Havas: If they have competent legal counsel, they should be told that it's an open question.

After further discussion, the Committee agreed to the following:

- Mr. Lund will send a letter to Rep. Snow explaining the Committee's view that there continues to be a question about whether the existing rule/legislation is valid.
- The letter will ask to meet with Rep. Snow to discuss the issue further, with a deadline for that meeting.
- After that deadline has passed, the Evidence Committee will report to the Supreme Court and present its revised rule for adoption.

Mr. Lund: If we go back to the Court without attempting to visit with Rep. Snow, the Court may send it back to the Committee again with that direction. A letter may help resolve that issue. Mr. Havas: My experience with Rep. Snow is that he is bright, engaged, and interested in following up with things, but he also has a lot on his plate competing for his attention that may be higher in priority. A letter may elevate the issue on his list. Judge McKelvie: It would be beneficial to both the Supreme Court and the Legislature to resolve any concerns at this level rather than to wait for a case in controversy to arise in the worst possible circumstance, for example, a child abuse homicide.

Without a quorum, the motion was tabled.

4. URE 106 Remainder of or related writings or recorded statements:

Mr. Lund reviewed the history of URE 106 for the new members of the Committee. The Rule 106 question was raised in a Supreme Court decision about which version of Rule 106 should be utilized: 1) Rule 106 is preemptive of all the rules of evidence and if something needs to come in to complete what has already been allowed into evidence, then it doesn't matter if it's hearsay, or 2) Simply treat Rule 106 as a matter of timing - if evidence is coming in, the rest of the story has to be there for context at the time it's coming in.

The issue arose in one of Ms. Welch's cases and the Supreme Court recommended that the Evidence Advisory Committee take a look at it. The Committee researched the question and presented a draft to the Court. Mr. Lund summarized some of the Court's questions:

- What do other jurisdictions do in these cases?
- What does the scholarly writing on the subject say about what is and isn't advisable?
- What does the federal rules committee say on the subject?

Mr. Hansen: Ms. Welch knows of several law review articles on the subject. Mr. Lund identified an extensive note drafted by Emily Nuvan, a University of Utah law student. Mr. Lund will send the note to Ms. Brown. Ms. Brown offered to speak to Ms. Nuvan to get her perspective and see if she has a sense of what other states are doing.

Mr. Lund: If the Committee provided the Court with a thorough memo containing more substantive information backing up the Committee's draft of Rule 106, we can still make the same recommendation. Mr. Hansen: Ms. Welch sent us her motion and the AG's motion with a counter-argument.

Mr. Lund noted the following questions from one of the Justices: What is happening in other states, is there a trend, and is there a majority position? It seems like they don't necessarily want to be on the bleeding edge of this issue, they'd rather hear the pros and cons of different approaches and make a more measured decision. A URE 106 Subcommittee was formed via email prior to the meeting. The members are:

- Teresa Welch, Chair

- Judge Williams
- John Nielsen
- Tenielle Brown

Mr. Lund and Ms. Williams reviewed the Supreme Court's feedback. Mr. Lund: The proposed Rule says that the evidence comes in if necessary to qualify, explain, or place into context the portion already introduced, even if otherwise inadmissible. The Court's question was: Is there no 403 analysis on the rest of it? With that language, what are we saying to trial judges about whether they have any discretion to think about the other rules of evidence when they are looking at the rule of completeness? Ms. Williams: The "unless the court for good cause otherwise orders" language was Mr. Lund's recommendation during the Court conference in response to that question, with the idea that adding the good cause language gives the judge discretion to conduct the 403 analysis.

Mr. Lund: The entire clause is awkward. The other problem is that it's cut from whole cloth. That was a question the Court raised. If you write these in whole cloth, you leave the judges with little idea of how to look at this. Should it be a balancing test? Mr. Havas: If you take away 403, you're taking away a lot. Ms. Brown: There is only one section in the rules where 403 doesn't apply, so this would be unusual. When it says, "the adverse party may require the introduction, at that time" (despite if it's not admissible), is it clear what they mean? Does it mean introduction to the court to be reviewed in camera? Do you have to show it to opposing counsel? Mr. Lund: That language tracks back to the federal rule. I think it means that they can ask that it be admitted into evidence. Ms. Brown: So is it interpreted to be admitted, despite the rest of it not being admissible? Mr. Havas: That's how I've always read it. Either it's going to be an exhibit, or it's read as testimony so that it's part of the record.

Ms. Williams: The Court pointed out that a 2019 note is necessary to counter the language in the original note saying that this is the federal rule verbatim. The Court questioned whether the 2019 note should cite *State v. Sanchez* and/or "other cases." Mr. Lund: It would be helpful to the Court if the Committee presents a rule proposal, along with a memo explaining the background, context, other cases, information from other jurisdictions, and the pros and cons to each approach. They seem to be looking for some framework from which they can make a decision.

Per Ms. Parrish's request, Mr. Lund provided an overview of the Court's decision in *State v. Sanchez* prompting the Supreme Court to look at Rule 106. Mr. Lund: The defendant in *Sanchez* had tortured his girlfriend for hours. He wanted to introduce a statement during his interview with the officer about the fact that the girlfriend was cheating. Ms. Salazar-Hall: The prosecution entered part of the interview, but not all of it. The defendant wanted to admit the rest of the interview to get the cheating statement into evidence as context that he was under extreme emotional duress. The Court didn't let it in. Mr. Lund: The Court deferred on this issue by saying any error was harmless, and asked the Evidence Advisory Committee to review URE

106. One of the questions was, should the prosecutor have anticipated that and presented their case differently so as to not create that argument for the defense?

Ms. Brown: It's not the same rule, but normally when you think about conditions against interest, it's very clear that each statement or section of each statement is treated differently so you can't bring in things that are pro-party to make it look more favorable than it actually would be because it's supposed to come in as against interest, so the parts that are not against interest don't come in under that rule. Normally we don't think of an entire statement as one statement. We carve it up with commas and say which parts can and can't come in. Mr. Lund: In Ms. Nuvan's note, she refers back to *Wigmore on Evidence* and old concepts about how this developed. You can't say half of a statement about what you saw at the scene of an accident, but leave out the part about "he entered the intersection on a red," if it's part of what the witness saw. It's misleading. How does that blossom into undoing all the rules of evidence? Ms. Parrish: So the problem isn't necessarily that fairness ought to be considered at the same time, but the fact that it doesn't discuss whether admissibility comes into play.

Mr. Lund noted that Ms. Welch was appointed to the 3rd District bench. She will remain on the Evidence Advisory Committee.

5. Committee Note Review:

Mr. Havas reported that he and Mr. Hogle were asked to look at Rules 406, 407, and 409. Mr. Havas asked for clarification about the assignment. Is the assignment to review the caselaw cited in the Committee note to determine if it is still applicable, identify any newer, more applicable cases, and refining the note so that it's more on point? Or is the assignment to remove comments or make them historical only and put substantive information in the Rule itself? Are we looking at whether we need a note at all, or are we just looking at notes that exist which reference caselaw and making sure that caselaw is still pertinent? Ms. Parrish: In reviewing the caselaw in the notes, are you only making changes if you come across something that makes it really obvious that the note needs to be revised? Mr. Havas: For example, Rule 407 is a pretty straightforward rule. Not much needs to be elaborated on. One case says that paving portions of a parking lot after a fall is a subsequent remedial measure which is inadmissible. The case is simply saying that Rule 407 applies to that fact situation, which may be helpful in terms of an example, but it doesn't really interpret the rule and I don't think the rule is all that controversial. The existing note to Rule 407 also incorporates the federal note. I don't think that's helpful either. We don't need federal notes in state rules. The question in Rule 407 is do we need a note period? But if you look at Rule 409, it's a much newer iteration of something that's a lot less clearly understood and there hasn't been much elucidation on the issue. There is a case on point that I think would be helpful to synthesize the application of that rule. "I'm sorry" is clearly protected, "we screwed up" is not. I think explaining that in the note is helpful because it provides guidance to practitioners and the courts.

Ms. Brown: I instructed the students to review the caselaw in the notes to determine whether they are still applicable.

Mr. Lund: One thing that's happened with notes is that when we've made a change to a rule, we have often added a note explaining the change. The assignment is to clean out erroneous, outdated information in the Committee notes and only keep current pertinent information ('good law'). Going forward, as the Committee proposes notes to the Court, if the note provides a substantive understanding of the rule then it could be added to the rule itself. The notes should not further develop what the rule is. They don't want the notes to speak to what the law is. What is the line between explaining and developing the rule? Mr. Havas: If we're saying that nothing in the note should help us understand and apply the rule, that eviscerates the beneficial purpose of the note. The cases in Rule 409 explain the application of the rule to very specific facts and certain language, utterances, and semantics. That's what's important. No amount of fine tuning the language of the rule itself would eliminate the need for the note.

Mr. Lund: We've been stacking the new notes on top of the old ones. Do we want to continue that practice or delete the old notes and start fresh? Mr. Havas: As it applies to Rule 409, I would do both. My understanding of the 2011 note was to avoid the inadvertent reinterpretation of the rule; we changed these stylistically, not substantively. Don't argue that if the Court hadn't intended to have a different application, they wouldn't have changed the language. But we've been doing this now for 8 years and I don't know if that admonition is as necessary now as it was then. I would clear out all the old notes and write a new note highlighting new cases.

Mr. Lund: Channeling Rick Schwermer, does that mean that a practitioner can look at the note and be comfortable that any new case or important case about that rule has been catalogued there? Mr. Havas: No, but that's true of every case. You can't be comfortable that a case that came down last month or last year is the most recent expression of the law because there may be something more recent. That's why we have Westlaw and key cites. Ms. Brown: Going forward it probably does make sense to include as much substance and interpretation in the rule as possible to resolve ambiguity. But is there usefulness in having a note for things that haven't been litigated yet, but that reveal some Committee institutional history, similar to legislative intent? Also, is the audience for the note practitioners or pro se parties?

Judge Jones: The biggest challenges will be Rules 404 and 702 because they are both vastly different. Rule 404 includes an extensive note and the Court said 'no' to almost everything in there, but the Court has relied on the note in Rule 702 over and over. Ms. Williams: Just since I've been with the Committee, the Court praised the extensive note in Rule 617 and has asked for more explanatory notes in Rules 106 and 1101. When presenting a rule amendment to the Court, it might be helpful to include an explanation in the accompanying memo about why information in a note was eliminated or added. Mr. Havas: I can see a difference between a change to a note that has universal ongoing application verifying the rule in its very language, as opposed to a note that is about application or different interpretations of the rule. If the rule

can be improved to be less ambiguous, clearer, or more clearly applied, then it should be, but I find the committee notes to be helpful in deciphering the underlying intent and determining how it is supposed to be interpreted and applied. It's not binding, but it's helpful to practitioners and judges.

Mr. Lund suggested writing down drafting principals for guidance when the Committee revises notes:

1. Eliminate outdated and out of jurisdiction material.
2. Keep notes explaining changes to the rule, including any case decisions triggering the changes.
3. Where appropriate, reference significant Utah caselaw interpreting the rule.
4. Assess whether a note is necessary. Not every rule needs a note.
5. Include statutory references if required to understand the context of the rule.

Mr. Lund recommended that the Committee move forward with revising the committee notes and applying the drafting guidelines as discussed. Members will notify Ms. Williams when they have notes ready for review by the Committee. Mr. Havas believes he and Chris can have Rules 406, 407, and 409 ready for the January 14th meeting. Mr. Lund said he will review the remaining unassigned rules and assign the notes that need to be addressed.

6. Other Business:

Judge Williams asked whether the Committee was interested in working on Rule 404(b), per Judge Pullan's recommendation during his presentation at the Annual Judicial Conference. Judge Pullan recommended following Federal Rule 413. Judge Jones: The Supreme Court may have a change of heart about whether we adopt FRE 413. Judge Pullan is willing to attend the next Evidence Advisory Committee meeting in January to discuss the issue. Judge Williams asked Ms. Williams to distribute Judge Pullan's materials to the Evidence Advisory Committee prior to the meeting.

Next Meeting: January 14, 2020
5:15 p.m.
AOC, Council Room

Tab 2

URE Committee Note Review Project

Rule	Member(s) Assigned	Status
URE 401. Test for Relevant Evidence.	John Nielsen Tony Graf Adam Alba Dallas Young	
URE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.		
URE 404. Character Evidence; Crimes or Other Acts.		
URE 405. Methods of proving character.		
URE 406. Habit; routine practice.	Ed Havas Chris Hogle	
URE 407. Subsequent remedial measures.		
URE 409. Payment of medical and similar expenses; expressions of apology.		
URE 608. A Witness's Character for Truthfulness or Untruthfulness.	Deborah Bulkeley Michalyn Steele	
URE 609. Impeachment by Evidence of a Criminal Conviction.		
URE 801. Definitions That Apply to This Article; Exclusions from Hearsay.	John Lund Nicole Salazar-Hall Jennifer Parrish	
URE 803. Exceptions to the Rule Against Hearsay Regardless of Whether the Declarant is Available as a Witness.		
URE 804. Exceptions to the Rule Against Hearsay When the Declarant is Unavailable as a Witness.		

Drafting Principles:

1. Eliminate outdated and out of jurisdiction material.
2. Keep notes explaining changes to the rule, including any case decisions triggering the changes.
3. Where appropriate, reference significant Utah case law interpreting the rule.
4. Assess whether a note is necessary. Not every rule needs a note.
5. Statutory references?

Tab 3

DRAFT: Rule 1101

Table of Contents

Question: Is a defendant entitled to identical pre-trial constitutional rights at a probation revocation hearing?

Review under Federal Case Law

In *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), the United States Supreme Court weighed how the rules of evidence are applicable to the manner in which a judge may obtain information to guide the imposition of sentence upon an already convicted defendant. In *Williams*, the Judge utilized a pre-sentence report that included uncross-examined hearsay evidence. *Id.* at 244. The defendant argued that he should have been afforded the right to examine adverse witnesses. *Id.* The Court noted the historical practice of proceeding without examination by stating:

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Id.*at 246.

In addition to historical tradition, the Court reviewed the practical purpose of treating defendants differently at trial versus later hearings. *Id.* at 246-247. The Court noted that there are sound practical purposes for the distinction. It stated:

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and

> characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id.

The Court noted that modern practices of determining sentencing and probation require an increase in discretion for judges. *Id.* at 240. This discretion draws upon every aspect of a defendant's life and it would be "totally impractical if not impossible [to have] open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." *Id.* at 250.

Williams does have some limitations to the analysis for Rule 1101. *Williams* involved a challenge under the Due Process Clause at sentencing not the confrontation clause. It was also decided before the confrontation clause became applicable to the states. See *Pointer v. Texas*, 85. S.Ct. 1065.

However, *Crawford* did not overrule *Williams*. See *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006)(stating that *Crawford* does not explicitly overrule *Williams* and the law on hearsay at sentencing is still what it was before *Crawford:* hearsay is admissible at sentencing, so long as it is "accompanied by some minimal indicia of reliability." The same conclusion has been reached by the First, Second, Sixth, Seventh, Eighth, and Eleventh Circuits, and none of our sister circuits have reached a contrary conclusion. And we have previously held that "[f]ederal law is clear that a judge may consider hearsay information in sentencing a defendant.")[1]

[1] Federal Courts have found that the right to confrontation applies in a capital sentencing context. See *U.S. v. Mills*, 446 F.Supp 2d 1115. See also *People v. Monge*, 16 Cal. 4th 826, 833, 941 P.2d 1121, 1125–26 (1997), *aff'd sub nom. Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998)(the high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht v. Patterson* (1967) 386 U.S. 605, 606, 87 S.Ct. 1209, 1210, 18 L.Ed.2d 326.) Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner v. Florida* (1977) 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393), *U.S. v. Watts* (1997) 519 U.S. 148, ——, 117 S.Ct. 633, 635, 136 L.Ed.2d 554; see also *Witte v. U.S.* (1995) 515 U.S. 389, 397–399, 115 S.Ct. 2199, 2205, 132 L.Ed.2d 351 ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.' "].) Additionally, the Supreme Court of Arkansas found that the right to confrontation be extended at sentencing hearings for non-death penalty cases? See *Vankirk v. State*, 2011 Ark. 428, 10, 385 S.W.3d 144, 151

In *Black v. Romano,* 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985), the United States Supreme Court held that a probation revocation proceeding by a preponderance standard involves two distinct steps: "(1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." *Id.* at 611. In some limited areas, a preponderance standard for revocation is not adequate. [2]

Federal Courts have found that denying a releasee his right to confrontation in a revocation hearing depends on the circumstance. See *United States v. Comito*, 177 F.3d 1166, 1172 (9th Cir. 1999)(stating that [w]hether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required.)

The United States Supreme Court held in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that certain minimal due process requirements are needed for parole revocation. The Court quickly extended these protections to probation revocation. *See Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Fed.R.Crim.P. 32.1, which applies to supervised release revocation, incorporates these same minimal due process requisites.[3]

(2011)(stating we are convinced that the right of confrontation, guaranteed by both the Sixth Amendment and article 2, section 10, extends to Appellant's sentencing proceeding before a jury.)

[2] *United States v. Haymond*, 139 S. Ct. 2369, 2382, 204 L. Ed. 2d 897 (2019), Recently, the United States Supreme Court held that the preponderance standard is not adequate when applied to pre-trial release actions under §3583 (k) ("[where parole and probation violations generally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard, supervised release violations subject to § 3583(k) can, at least as applied in cases like ours, expose a defendant to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict—all based on facts found by a judge by a mere preponderance of the evidence. In fact, § 3583(k) differs in this critical respect not only from parole and probation; it also represents a break from the supervised release practices that Congress authorized in § 3583(e)(3) and that govern most federal criminal proceedings today. Unlike all those procedures, § 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard. And, as we explained in *Alleyne* and reaffirm today, that offends the Fifth and Sixth Amendments' ancient protections.)

[3] **Rule 32.1 Revoking or Modifying Probation or Supervised Release (Relevant Portions)(Highlights added)**

Review under Utah Case Law

Utah does not have a comparable criminal procedure rule to Fed.R.Crim P. 32.1. The closest rule being Utah Code Ann. § 77-18-1. Historically, the Utah Code provided wide latitude to courts when sentencing.[4] [5] Regarding capital sentencing, "[a]ny evidence the court considers to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against the sentence of death." See Utah Code Ann. § 76-3-207 (West).

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(2) Upon a Summons. When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.
(3) Advice. The judge must inform the person of the following:
(A) the alleged violation of probation or supervised release;
(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).
(b) Revocation.
(1) Preliminary Hearing.
(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.
(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:
(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;
(ii) an opportunity to appear at the hearing and present evidence; and
(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.
(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:
(A) written notice of the alleged violation;
(B) disclosure of the evidence against the person;
(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
(E) an opportunity to make a statement and present any information in mitigation.

[4] "Utah Code Ann. § 76-3-201 (West)—Changed in Utah 2002 Session 35 (H.B. 190)(highlights added)
(7)(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

[5] Utah Code Ann. § 76-3-404(1)(b)—Repealed by Laws 2009, c. 81, § 4, eff. May 12, 2009

Rules on sentencing become applicable to our question if probation hearings are considered part of the sentencing process. In *State v. Snyder*, the court relied on emails to revoke probation that were attached to AP&P's amended probation report which was submitted with its affidavit in support of an order to show cause. *Snyder*, 2015 UT App 172, ¶ 18, 355 P.3d 246, 252. The Utah Court of Appeals stated,

> We have previously recognized that "sentencing and probation hearings are relatively informal. Most rules of evidence do not apply." *State v. Hodges,* 798 P.2d 270, 279 (Utah Ct.App.1990). Indeed, rule 1101 of the Utah Rules of Evidence states that other than the rules regarding privileges, the rules of evidence do not apply to "sentencing, or granting or revoking probation." Utah R. Evid. 1101(c)(3). "While evidence presented at such hearings is certainly subject to challenge on the basis of the traditional reliability concerns underlying evidentiary rules, the overall informality suggests a standard of proof that is comprehensible and relatively simple." *Hodges,* 798 P.2d at 279. *See also Gagnon v. Scarpelli,* 411 U.S. 778, 782 & n. 5, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (stating that courts may rely on "conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" in deciding whether to revoke probation); *Morrissey v. Brewer,* 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (stating that in parole and probation revocation proceedings, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial").

Id. at 251–52.

Clearly, the rules of evidence are treated differently at probation revocation hearings than at trial. For example, even evidence gathered as a result of an illegal search can be admissible at a probation revocation hearing even though it would not be admissible in a criminal trial to determine guilt.[6] However, there are examples where judges used the Rules of Evidence at probation hearings. Utah

[6] *See, e.g., U.S. ex rel. Lombardino v. Heyd,* 318 F.Supp. 648 (E.D.La.1970), *aff'd* 438 F.2d 1027 (5th Cir.), *cert. denied* 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed.2d 160 (1971); *Ex parte Caffie,* 516 So.2d 831 (Ala.1987); *State v. Alfaro,* 127 Ariz. 578, 623 P.2d 8 (1980); *McGhee v. State,* 25 Ark.App. 132, 752 S.W.2d 303 (1988); *People v. Willis,* 149 Cal.App.3d Supp. 56, 197 Cal.Rptr. 281 (1983); *People v. Ressin,* 620 P.2d 717 (Colo.1980); *Bernhardt v. State,* 288 So.2d 490 (Fla.1974); *People v. Swanks,* 34 Ill.App.3d 794, 339 N.E.2d 469 (1975); *Dulin v. State,* 169 Ind.App. 211, 346 N.E.2d 746 (1976); *Tiryung v. Commonwealth,* 717 S.W.2d 503 (Ky.Ct.App.1986); *State v. Caron,* 334 A.2d 495 (Me.1975); *Chase v. State,* 309 Md. 224, 522 A.2d 1348 (1987); *State v. Thorness,* 165 Mont. 321, 528 P.2d 692 (1974); *Lemire v. Bouchard,* 113 N.H. 174, 304 A.2d 647 (1973); *State v. Ray,* 41 Or.App. 763, 598 P.2d 1293 (1979); *Commonwealth v. Davis,* 234 Pa.Super. 31, 336 A.2d 616 (1975); *State v. Spratt,* 120 R.I. 192, 386 A.2d 1094 (1978); *State v. Kuhn,* 7 Wash.App. 190, 499 P.2d 49, *aff'd* 81 Wash.2d 648, 503 P.2d 1061 (1972).

R.Evid. 803 has been employed to admit evidence in a probation hearing.[7] Utah R. Evid. 801 has been found to have incorrectly restricted hearsay if it was used to provide evidence of why officers responded to a probationer's house as opposed to whether the defendant actually committed a new assault.[8]

Arguably, if probation hearings are part of the sentencing process, the formal rules are inapplicable to these proceedings.[9] However, "such proceedings must nonetheless be fundamentally fair so as to satisfy the Due Process Clause of the Federal Constitution."[10] [11] The Utah Supreme Court has stated:

> [I]n a probation modification proceeding, a probationer is entitled only to the "minimum requirements of due process." These requirements include (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body ...; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]. *Gagnon v. Scarpelli,* 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (internal quotation marks omitted). The probationer also has the right to the assistance of counsel in some circumstances. *Black v. Romano,* 471 U.S. 606, 612, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985).

State v. Orr, 2005 UT 92, ¶ 20, 127 P.3d 1213, 1218.[12]

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[7] *Layton City v. Peronek*, 803 P.2d 1294, 1298 (Utah Ct. App. 1990) (holding that a jail incident report that neither satisfied the business records hearsay exception (803(6)), nor the public records hearsay exception (803(8)), was inadmissible as a matter of due process).

[8] *State v. Martinez*, 811 P.2d 205, 210 (Utah Ct. App. 1991).

[9] *Id.* at 205 (Utah Ct. App. 1991) (rejecting an hearsay objection on appeal both because the statement was not offered to prove the truth of the matter asserted, and therefore was not hearsay; also, because under Rule 1101(b)(3) the rules of evidence do not apply to probation revocation hearings).

[11] *United States v. Simmons,* 812 F.2d 561, 564 (9th Cir.1987), Although not all of the procedural and evidentiary protections required in a criminal case are available in probation revocation proceedings, such proceedings must nonetheless be fundamentally fair so as to satisfy the Due Process Clause of the Federal Constitution. See *U.S. v. Holland,* 850 F.2d 1048, 1050 (5th Cir.1988) ("The revocation of probation implicates a probationer's fundamental liberty interest and hence entitles him to procedural due process.").

[12] This is similar to *Morrissey v. Brewer,* at 2604 ("…at a minimum, due process requires that the probationer be given: 1) written notice of the claimed violation of probation; 2) disclosure of the evidence against him; 3) an opportunity to be heard in person and to present witnesses and documentary evidence; 4) the right to confront and cross-examine adverse witnesses,

The Utah Court of Appeals addressed the application of Utah Code Ann. §77-18-1(12)(d)(iii) and the right to confront witnesses in a probation revocation hearing. See Exhibit 1. In *State v. Tate*, Adult Probation and Parole filed an affidavit in support of an order to show cause alleging Tate had violated his probation by committing aggravated assault and forgery. *State v. Tate*, 1999 UT App 302, ¶ 3, 989 P.2d 73, 74. The State presented only hearsay evidence. *Id.* at ¶ 4 and ¶5. The *Tate* court held:

> ¶ 12 In this case, although Tate denied violating the terms of his probation, he was not provided an opportunity to cross-examine the individuals with personal knowledge of the alleged violations. Rather than calling individuals with personal knowledge of the alleged incidents which formed the basis of the probation violation, the State chose to make its case solely through the hearsay statements of Officers Boddy, Salazar and Kent. Although hearsay statements can be admissible in probation revocation proceedings, *see State v. Martinez*, 811 P.2d 205, 210 (Utah Ct.App.1991), the trial court, before admitting hearsay, must determine there is good cause for not permitting the probationer to cross-examine the out-of-court declarant whose statement is sought to be introduced as evidence. *See* Utah Code Ann. § 77–18–1(12)(d)(iii) (Supp.1999). In this case, the prosecution did not seek to show good cause and the trial court failed to meaningfully address the issue, to make a specific finding that good cause existed for not allowing confrontation, or to evaluate the reliability of the hearsay statements used by the State. Also, there is no evidence in the record suggesting there was good cause for denying Tate's right of confrontation.

Id. at 75.

TATE Raises Several Questions

The Utah Supreme Court has not outlined what would be considered good cause in this context. Would that Court allow for the delay and expense arguments raised in *Williams* to be good cause? Without Utah Code Ann. §77-18-1, would *Tate* have been different? If so, does Utah Code Ann. §77-18-1 establish a rule of evidence?

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unless the hearing officer specifically finds good cause for not allowing confrontation; 5) a neutral and detached hearing body; and 6) a written statement by the factfinder of the evidence relied on and reasons for revoking the probation.)

Additionally, if a court admits hearsay evidence from the state but allows the defendant to call witnesses does that satisfy the requirement? For example, in a bail hearing, the state can present proof in affidavit form.[13] However, the defendant can call witnesses to rebut that evidence, if desired. See *Chynoweth v. Larson*, 572 P.2d 1081, 1082–83 (Utah 1977).

Similarly, would rigid application of *Tate* and Utah Code Ann. §77-18-1 hinder judicial discretion? Traditionally in Utah courts, judges exercise wide discretion in applying the rules of evidence to probation revocation hearings.[14]

Legislative History

Utah Code Ann. § 77-18-1 repealed UT ST § 64-13b-101. I was able to track some minor changes to the relevant language over time. Legislative intent prior to 1990 would require additional research.

Effective 5/14/2019 (Relevant portions)	2019 Legislative Changes
77-18-1. Suspension of sentence -- Pleas held in abeyance -- Probation -- Supervision -- Presentence investigation -- Standards -- Confidentiality -- Terms and conditions -- Termination, revocation, modification, or extension -- Hearings -- Electronic monitoring. (12) (d) (i) At the hearing, the defendant shall admit or deny the allegations of	12(a)(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated." Laws 2019, c. 28, § 1, in subsec. (12)(b)(i), inserted "or an unsworn written declaration executed in substantial compliance with Section 78B-5-705,"; in subsecs. (12)(b)(i), (12)(b)(ii), (12)(d)(i), and (12)(d)(ii), inserted "or unsworn written declaration"; in subsec.

[13] Utah Code Ann. §77-20-1(5).
[14] *State v. Sanwick*, 713 P.2d 707, 709 (Utah 1986)(Defendant's arguments with respect to the admission of hearsay evidence are equally rationally flawed. The rules of evidence in general, and the rules on hearsay exclusions in particular, are inapplicable in sentencing proceedings.)

the affidavit or unsworn written declaration. (ii) If the defendant denies the allegations of the affidavit or unsworn written declaration, the prosecuting attorney shall present evidence on the allegations. (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. (iv) The defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.	(14)(d), deleted “or” from the end of the subsection; in subsec. (14)(e), substituted “; or” for a period at the end of the subsection; and added subsec. (14)(f). Laws 2019, c. 429, § 1, in subsec. (1), deleted “Title 77,” preceding “Chapter 2a”; in subsecs. (5)(b)(ii) and (8)(g), deleted “Title 77,” preceding “Chapter 38a”; in subsec. (10)(c)(i), deleted “sentencing” preceding “court”; and in subsec. (12)(b)(i), deleted “that authorized probation” following “the court”. Composite section by the Office of Legislative Research and General Counsel of Laws 2019, c. 28, § 1 and Laws 2019, c. 429, § 1.

UT ST § 77–18–1—Effective April 23, 1990	UT ST § 77–18–1—Effective April 23, 1992
(9)(a) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated. (b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation	(10)(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. (ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated. (b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. (ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why

should not be revoked, modified, or extended. (c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing. The defendant shall show good cause for a continuance. The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. The order shall also inform the defendant of a right to present evidence. (d) At the hearing, the defendant shall admit or deny the allegations of the affidavit. If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. The defendant may call witnesses, appear and speak in his own behalf, and present evidence.	his probation should not be revoked, modified, or extended. (c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing. (ii) The defendant shall show good cause for a continuance. (iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. (iv) The order shall also inform the defendant of a right to present evidence. (d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit. (ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. (iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence. (e)(i) After the hearing the court shall make findings of fact.

STATE by STATE COMPARISON

I could not find any rules of evidence that incorporate language similar to §77-18-1.[15]

[15] The table includes a sample of states. These are included in the chart. The search did not include every state.

Rule 1101 State by State Comparison (highlights added)

Federal Rule	Utah Rule	Notes
Rule 1101. Applicability of the Rules **(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands. **(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; and • contempt proceedings, except those in which the court may act summarily. **(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding. **(d) Exceptions.** These rules--except for those on privilege--do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise. **(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	The most significant difference is that under the Federal Rule of Evidence 1101(d)(3) (but not Utah Rule of Evidence 1101(d)(3)), the rules of evidence are inapplicable to "preliminary examinations in criminal cases."

Arizona	Utah Rule	Notes
Rule 1101. Applicability of Rules (a) Courts and magistrates. These rules apply to all courts of the State and to magistrates, and court commissioners and justices of the peace, masters and referees in actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include magistrates, court commissioners and justices of the peace. (b) Proceedings generally. These rules apply generally to civil actions and proceedings, to contempt proceedings except those in which the court may act summarily, and to criminal cases and proceedings except as otherwise provided in the Arizona Rules of Criminal Procedure. (c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings. (d) Rules inapplicable. The rules (other than with respect to privileges) do not apply to proceedings before grand juries.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Federal Rule 1101 has been supplanted by one which conforms to Arizona state practice. See also Rule 19.3, Arizona Rules of Criminal Procedure. Former Arizona Rule of Criminal Procedure 19.3, which set forth the rules of evidence applicable in criminal proceedings, was abrogated as unnecessary in light of the adoption of the Arizona Rules of Evidence, including Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1).
Arkansas	**Utah Rule**	**Notes**
RULE 1101. RULES APPLICABLE **(a)** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the [courts of this State].* **(b) Rules Inapplicable.** The rules other than those with respect to privileges do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be	

(2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; [preliminary examination]* detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) Contempt proceedings in which the court may act summarily. HISTORICAL NOTES Uniform Law • This rule is similar to Rule 1101 of the Uniform Rules of Evidence (1974). See Volumes 13A to 13F Uniform Laws Annotated, Master Edition, or Uniform Laws Annotated on Westlaw.	determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Michigan	**Utah Rule**	**Notes**
MI Rules MRE 1101 **Rule 1101. Applicability** Currentness **(a) Rules Applicable.** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules Inapplicable.** The rules o ther than those with respect to privileges do not apply in the following situations and proceedings: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to	MRE 1101 is identical with Rule 1101 as recommended by the National Conference of Commissioners on Uniform State Laws in its Uniform Rules of Evidence (1974) except that in MRE 1101(b)(3) the words "[preliminary examination] detention hearing in criminal cases" are deleted, and MRE 1101(b)(5) is added, there being no equivalent in the Uniform Rule.

respect to release on bail or otherwise. (4) *Contempt Proceedings.* Contempt proceedings in which the court may act summarily. (5) *Small Claims.* Small claims division of the district court. (6) *In Camera Custody Hearings.* In camera proceedings in child custody matters to determine a child's custodial preference. (7) *Proceedings Involving Juveniles.* Proceedings in the family division of the circuit court wherever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply. (8) *Preliminary Examinations.* At preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry. (9) *Domestic Relations Matters*. The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(1)(g) or (h). (10) *Mental Health Hearings*. In hearings under Chapters 4, 4A, 5, and 6 of the Mental Health Code, MCL 330.1400 *et seq.*, the court may consider hearsay data that are part of the basis for the opinion presented by a testifying mental health expert.	release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Alabama	**Utah Rule**	**Notes**
Rule 1101. Rules Applicable Currentness **(a) General Applicability.** Except as otherwise provided by constitutional provision, statute, this rule, or other rules of the Supreme Court of Alabama, these rules of evidence apply in all proceedings in the courts of Alabama, including proceedings before referees and masters. **(b) Rules Inapplicable.** These rules , other than those with respect to privileges, do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule	**ADVISORY COMMITTEE'S NOTE** Sentencing, or Granting or Revoking Probation. Traditionally, rules of evidence have been held not to govern sentencing and probation proceedings except as otherwise provided by statute or rule of court. Rule 1101, except as to the assertion of privileges, is intended to continue that principle of inapplicability. See Ala. Code 1975, § 13A-5-45(d) (providing that any evidence that has probative value and that is relevant to sentencing shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements); Ala. R. Crim. P. 26.6(b)(2) (outlining guiding principles of evidence to be used in sentencing hearing, with ending proviso that the court may receive any evidence it deems probative "regardless of its admissibility under

questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) *Contempt Proceedings.* Contempt proceedings in which the court may act summarily.	104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	the rules of evidence"); Ala. Code 1975, § 15-22-50 (dealing with a court's power to suspend sentence and grant probation); Ala. Code 1975, § 15-22-54 (regarding the power to extend or terminate probation). See also *Williams v. New York*, 337 U.S. 241 (1949) (observing that due process does not require confrontation or cross-examination in sentencing or passing on probation; trial judge characterized as possessing broad discretion as to the sources and types of information relied upon); *Chandler v. United States*, 401 F.Supp. 658 (D.N.J.1975), aff'd, 546 F.2d 415 (3d Cir.1976), cert. denied, 430 U.S. 986 (1977); *United States v. Francischine*, 512 F.2d 827 (5th Cir.), cert. denied, 423 U.S. 931 (1975) (except for evidentiary privileges, rules of evidence are inapplicable to probation revocation proceedings).
Delaware	**Utah Rule**	**Notes**
D.R.E., Rule 1101 **RULE 1101. APPLICABILITY OF RULES AND DEFINITIONS** **(a) Rules applicable.** Except as otherwise provided in paragraph (b) and (c) of this Rule, these Rules apply to all actions and proceedings in all the courts of this State. **(b) Rules inapplicable.** The Rules - except for those on privilege - do not apply to the following: (1) the court's determination under Rule 104(a), on a preliminary question of fact governing admissibility; (2) grand jury proceedings; (3) in preliminary hearings in criminal cases; and **(4)** miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons or search warrant; sentencing; granting or revoking probation; detention hearing in criminal hearings; considering whether to release on bail or otherwise; and contempt proceedings in which the court may act summarily. **(c) Definition.** As used throughout these Rules, the term "writing" means information that is inscribed	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible	

on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.	as provided under Rule 1102.	
Minnesota	**Utah Rule**	**Notes**
RULE 1101. RULES APPLICAB LE **(a)** Except as otherwise provided in subdivisions (b) and (c), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules inapplicable.** The rules ot her than those with respect to privileges do not apply in the following situations: (1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand jury.* Proceedings before grand juries. (3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; probable cause hearings; sentencing, or granting or revoking probation;	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation,	COMMITTEE COMMENT--2019 Rule 1101 has been amended to clarify the applicability of the Rules of Evidence to criminal restitution and expungement hearings. In State v. Willis, 898 N.W.2d 642 (Minn. 2017), the Minnesota Supreme Court held that the Rules of Evidence apply to criminal restitution hearings held under Minn. Stat. § 611A.045. It then referred the matter to the advisory committee for review. The advisory committee determined that the Rules of Evidence should continue to apply to restitution hearings, but that the standards for admissibility of hearsay should be relaxed. This approach is intended to ease the burden on victims presenting receipts for expenses, while also ensuring fair and accurate restitution awards. The rule was also amended to clarify that the Rules of Evidence do not apply to criminal expungement proceedings held under Minn. Stat. ch. 609A. This amendment is consistent with existing practice in Minnesota.

issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; and criminal expungement proceedings. (4) Contempt proceedings in which the court may act summarily. **(c) Restitution hearings.** For restitution hearings held under Minn. Stat. § 611A.045, subd. 3(b), these rules apply except that the foundation for admission of documentary evidence offered under Rule 803(6) may be provided by affidavit, or statements signed under penalty of perjury pursuant to Minnesota Statutes, section 358.116, in lieu of testimony.	issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
North Dakota	**Utah Rule**	**Notes**
Rule 1101. Applicability of Rules **(a) To Courts and Magistrates.** These rules apply to all courts and magistrates of this State. **(b) To Cases and Proceedings.** These rules apply in: (1) civil cases and proceedings, (2) special proceedings, (3) criminal cases and proceedings, and (4) contempt proceedings, except those in which the court may act summarily. **(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding. **(d) Exceptions.** These rules, except for those on privilege, do not apply to the following: (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; (2) grand-jury proceedings; and (3) miscellaneous proceedings, such as: (A) extradition or rendition; (B) issuing an arrest warrant, criminal summons, or search warrant; (C) preliminary examination in a criminal case; (D) sentencing; (E) granting or revoking probation or parole; (F) considering whether to release on bail or otherwise;	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	This rule is patterned after Rule 1101 of the Federal Rules of Evidence. It was modified by deleting reference to proceedings which are unique to the federal courts, and by adding detention hearings, juvenile court transfer hearings, and dispositional hearings in juvenile court to the list of miscellaneous proceedings exempted from coverage by paragraph (d)(3). Dispositional hearings in juvenile court are the counterpart to sentencing of adults and require the same evidentiary treatment. A juvenile court transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence.

(G) detention and shelter care hearings; (H) transfer and dispositional hearings in juvenile court. **(e) Other Rules.** A rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.		
Colorado	**Utah Rule**	**Notes**
RULE 1101. APPLICABILITY OF RULES Currentness **(a) Courts.** These rules apply to all courts in the State of Colorado. **(b) Proceedings Generally.** These rules apply generally to civil actions, to criminal proceedings, and to contempt proceedings, except those in which the court may act summarily. **(c) Rule of Privilege.** The rule with respect to privileges applies at all stages of all actions, cases, and proceedings. **(d) Rules Inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations: (1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) **Grand Jury.** Proceedings before grand juries. (3) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. **(e) Rules Applicable in Part.** In any special statutory proceedings, these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	COMMITTEE COMMENT The Colorado rule is culled from Rule 81 of the Colorado Rules of Civil Procedure and Rule 1101(e) of the Federal Rules of Evidence. Colo. R. Civ. P. 81 As amended through Rule Change 2019(15), effective October 24, 2019 Rule 81 - Applicability in General**(a) Special Statutory Proceedings.** These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.**(b) Dissolution of Marriage and Legal Separation.** These rules shall not govern procedure and practice in actions in dissolution of marriage and legal separation insofar as they may be inconsistent or in conflict with the procedure and practice provided by the applicable statutes.**(c) Appeals from County to District Court.** These rules do not supersede the provisions of the statutes of this state now or hereafter in effect relating to appeals from final judgments and decrees of the county court to the district court.

New Mexico	Utah Rule	Notes
RULE 11-1101. APPLICABILITY OF THE RULES **A. To courts and judges.** These rules apply to proceedings before New Mexico district courts, metropolitan court, magistrate courts, municipal courts, and special masters, referees, and child support hearing officers appointed by the court. **B. To cases and proceedings.** These rules apply in civil cases and proceedings, criminal cases and proceedings, and contempt proceedings, except those in which the court may act summarily. **C. Rules on privilege.** The rules on privilege apply to all stages of a case or proceeding. **D. Exceptions.** These rules--except for those on privilege--do not apply to the following: (1) the court's determination, under Rule 11-104(A) NMRA, on a preliminary question of fact governing admissibility; (2) grand jury proceedings, and (3) miscellaneous proceedings, such as (a) extradition or rendition, (b) issuing an arrest warrant, criminal summons, or search warrant, (c) sentencing by the court without a jury, (d) granting or revoking probation or supervised release, (e) considering whether to release on bail or otherwise, (f) dispositional hearings in children's court proceedings, and (g) the following abuse and neglect proceedings: (i) issuing an ex parte custody order; (ii) custody hearings; (iii) permanency hearings; and (iv) judicial review proceedings.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	**Probation revocation proceedings** The Court of Appeals was not required to review defendant's appellate argument that alleged the photographs contained an exhibit were improperly admitted on the basis that the State failed to properly authenticate them for admission; the rules of evidence did not apply to probation revocation proceedings. State v. Green, 2014, 341 P.3d 10, certiorari denied 344 P.3d 987. Sentencing and Punishment 2019 The formal rules of evidence do not apply to probation revocation hearings. State v. Guthrie, 2009, 145 N.M. 761, 204 P.3d 1271, certiorari granted 146 N.M. 604, 213 P.3d 508, reversed 150 N.M. 84, 257 P.3d 904. Sentencing And Punishment 2016 Formal rules of evidence do not apply to probation revocation hearings. State v. Phillips, 2005, 138 N.M. 730, 126 P.3d 546, certiorari granted 139 N.M. 273, 131 P.3d 660, certiorari quashed 140 N.M. 543, 144 P.3d 102. Sentencing And Punishment 2016 Statute making the Rules of Evidence inapplicable to probation revocation hearings does not militate against the application of the exclusionary rule in probation revocation hearings. Const. Art. 2, § 10; SCRA 1986, Rule 11-1101, subd. D(2). State v. Marquart, 1997, 123 N.M. 809, 945 P.2d 1027, certiorari denied 123 N.M. 626, 944 P.2d 274. Sentencing And Punishment 2019 **Sentencing proceedings** Rules of evidence do not apply to sentencing proceedings before court without jury. SCRA 1986, Rule 11-1101, subd. D(2). State v. Smith, 1990, 110 N.M. 534, 797 P.2d 984, certiorari denied 110 N.M. 533, 797 P.2d 983. Sentencing And Punishment 303 NMRA, Rule 11-1101, NM R REV Rule 11-1101 State court rules are current with amendments received through September 1, 2019.
Washington	Utah Rule	Notes
EVIDENCE RULE 1101. APPLICABILITY OF RULES	**Rule 1101. Applicability of rules.**	**Sentencing proceedings** **Rules** of **evidence** do not apply at sentencing. State v.

(a) Courts Generally. Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms "judge" and "court" in these rules refer to any judge of any court to which these rules apply or any other officer who is authorized by law to hold any hearing to which these rules apply. **(b) Law With Respect to Privilege.** The law with respect to privileges applies at all stages of all actions, cases, and proceedings. **(c) When Rules Need Not Be Applied.** The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a). (2) *Grand Jury.* Proceedings before grand juries and special inquiry judges. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court; juvenile court hearings on declining jurisdiction; disposition, review, and permanency planning hearings in juvenile court; dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under RCW 71.05 and 71.34. (4) *Applications for Protection Orders.* Protection order	(a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Hixson (1999) 94 Wash.App. 862, 973 P.2d 496. Sentencing And Punishment 303 **Evidence rules** do not apply in proceedings to grant or revoke probation, and community supervision is modern equivalent of probation. State v. Anderson (1997) 88 Wash.App. 541, 945 P.2d 1147. Under ER **1101**, which exempts sentencing proceedings from application of **Rules** of **Evidence**, **rules** do not have to be applied in restitution hearing. State v. Pollard (1992) 66 Wash.App. 779, 834 P.2d 51, review denied 120 Wash.2d 1015, 844 P.2d 436.

proceedings under Chapters 7.90, 7.92, 7.94, 10.14, 26.50 and 74.34 RCW. Provided when a judge proposes to consider information from a criminal or civil database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider. **(d) Arbitration Hearings.** In a mandatory arbitration hearing under RCW 7.06, the admissibility of evidence is governed by MAR 5.3.		
Oklahoma	**Utah Rule**	**Notes**
§ 2103. Scope of Rules Currentness A. Except as otherwise provided in subsection B of this section, this Code[1] shall apply in both criminal and civil proceedings, conducted by or under the supervision of a court, in which evidence is produced. B. The rules set forth in this Code, other than those applicable to a valid claim of privilege, do not apply in the following situations: 1. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under subsection A of Section 2105 of this title; and 2. Proceedings for extradition or rendition; sentencing or granting or revoking probation; advancement of deferred judgment; issuance of warrants for arrest, criminal summonses and search warrants; proceedings with respect to release on bail or otherwise; and juvenile emergency show-cause hearings.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable	In sentencing and granting probation under § 103(B)(2) even though there is vague statutory direction to observe the rules of evidence in hearing testimonial evidence with respect to sentencing (Okl.Stat. 22 §§ 973 to 975), there is at least one late case in which the Court of Criminal Appeals held that the trial court did not abuse its discretion in considering a pre-sentence report of a probation officer without affording the defendant a right to cross-examine the probation officer relative to the matters contained in the report. See Baker v. State, 494 P.2d 355 (Okla.Cr.1972). It has also been held that the granting or denying of probation under Okla.Stat. 22 § 991(a) is solely a matter within the discretion of the trial court, and the appeals court will only reverse in cases of abuse of discretion. See Kordelski v. State, 506 P.2d 1403 (Okla.Cr.1973). With reference to § 103(B) involving proceedings to revoke probation and advance deferred sentence current Oklahoma law is not entirely clear. Okla.Stat. 22 § 991(b) does provide that a suspended sentence "may not be revoked for any cause unless competent evidence ... is presented" and the probationer is "confronted by the witnesses against him." See Brown v. State, 494 P.2d 344 (Okla.Cr.1972) requiring "competent evidence" under the statute and In re Collyer, 476 P.2d 354 (Okla.Cr.1970) requiring that there be sufficient "competent evidence" to support the revocation of the suspended sentence. And, it has been held error to admit the transcript of the testimony of a police officer in a proceeding to revoke a suspended sentence unless there is a showing of the unavailability of the witness to testify personally. See Moore v. State, 507 P.2d 1290 (Okla.Cr.1973). This is an apparent application of the reported testimony exception to the hearsay rule. On the

	hearsay shall be admissible as provided under Rule 1102.	other hand, in Frick v. State, 509 P.2d 135 (Okla.Cr.1973), the Court of Criminal Appeals defined "competent evidence" as evidence "which is relevant and material to the issues to be determined." Although this case involved the acceleration of a deferred sentence under Okla.Stat. 22 § 991 the only place the word "competent" is used is in Okla.Stat. 22 § 991(b) dealing with revocation of suspended sentences and the court's definition of "competent evidence" in the Frick case, supra, leaves the door about as wide-open as possible. However, the court did go on to say in the Frick case that the "same standard of proof is not required for an acceleration of a deferred sentence as is required for a conviction or revocation of a suspended." The rule will have a clarifying effect on prior Oklahoma law. Admitting preliminary hearing transcript into **evidence** at hearing to revoke suspended sentence was not abuse of discretion; revocation hearing was not "criminal prosecution," and full panoply of rights due in criminal prosecution are not applicable to revocation proceedings. Gilbert v. State, Okla.Crim.App., 765 P.2d 807 (1988). Sentencing And Punishment 2019 **Sentencing proceedings** Hearsay **rule** does not apply to sentencing hearing. Hunter v. State, Okla.Crim.App., 825 P.2d 1353 (1992). Sentencing And Punishment 317
Mississippi	**Utah Rule**	**Notes**
Rule 1101. Applicability of the Rules **(a) To Courts and Proceedings.** These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b). **(b) Exceptions.** These rules--except for those on privilege--do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; **(3)** contempt proceedings in which the court may act summarily; and **(4)** these miscellaneous proceedings: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • probable cause hearings in criminal cases and youth court cases; • sentencing; • disposition hearings; • granting or revoking probation;	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to	**Sentencing proceedings** Circuit court was entitled to sentence defendant in absentia; defendant was remanded to custody of sheriff's department to await sentencing, but he escaped and was still unaccounted for at time of sentencing hearing, and defense was allowed to put on any **evidence**that it had to refute State's claim, but defense presented nothing, and defense counsel admitted to circuit court that he had not had contact with defendant since court entered its judgment, and he was unaware of defendant's location at time of sentencing hearing. West's A.M.C. § 99-17-9; **Rules** of Evid., **Rule 1101**(b)(3). Jenkins v. State, 2008, 997 So.2d 207, rehearing denied, habeas corpus dismissed 2010 WL 5169069. Sentencing And Punishment 345 Report on defendant's prior convictions was admissible in habitual-offender sentencing hearing, although defendant urged that it was hearsay; **rules** of **evidence** did not apply in sentencing hearings. **Probation proceedings** Hearsay is admissible in proceedings to grant or revoke probation. **Rules** of Evid., **Rule 1101**(b)(3). Younger v. State, 1999, 749 So.2d 219.Sentencing And Punishment 1900, 2019

and • considering whether to release on bail or otherwise.	release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Wyoming	**Utah Rule**	**Notes**
Wyoming Rules of Evidence, Rule 1101 **Rule 1101. Applicability of Rules** Currentness **(a) Rules Applicable.** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules Inapplicable.** The rules o ther than those with respect to privileges do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary examination in criminal cases; sentencing, granting or revoking probation other than adjudicatory hearings; juvenile proceedings other than adjudicatory hearings; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) Contempt proceedings in which the court may act summarily.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	1977 Committee Note This is the uniform rule with the deletion from subsection (b)(3) of "detention hearings", and the addition of "juvenile proceedings other than adjudicatory hearings;". Although the terminology in juvenile proceedings is deliberately made different from that in criminal proceedings, the resemblance to criminal procedure is obvious and constitutional guarantees of due process apply. Adjudicatory hearings are the equivalent of trial so the Rules of Evidence apply. Detention hearings and dispositional hearings are equivalents of bail hearings, preliminary hearings and sentencing hearings, and as in criminal cases, the Rules of Evidence do not apply. "Transfer hearings" to determine whether the defendant should be tried as a juvenile or as an adult are often critical, but the Committee recommends that the matter be left to the discretion of the judge without restricting all cases to the Rules of Evidence.
Nevada	**Utah Rule**	**Notes**
47.020. Scope of title 4 of NRS 1. This title governs proceedings in the courts of this State and before magistrates, except: (a) To the extent to which its	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and	

provisions are relaxed by a statute or procedural rule applicable to the specific situation; and (b) As otherwise provided in subsection 3. 2. Except as otherwise provided in subsection 1, the provisions of chapter 49 of NRS with respect to privileges apply at all stages of all proceedings. 3. The other provisions of this title, except with respect to provisions concerning a person with limited English proficiency, do not apply to: (a) Issuance of warrants for arrest, criminal summonses and search warrants. (b) Proceedings with respect to release on bail. (c) Sentencing, granting or revoking probation. (d) Proceedings for extradition. 4. As used in this section, "person with limited English proficiency" has the meaning ascribed to it in NRS 1.510.	proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Iowa	**Utah Rule**	**Notes**
Rule 5.1101. Applicability of the rules Currentness a. *To courts and judges.* The Iowa Rules of Evidence apply to proceedings before the courts of this state, including proceedings before magistrates and court-appointed referees and masters, except as Iowa Supreme Court rules otherwise provide. b. *Rules on privilege.* The rules on privilege apply to all stages of a case or proceeding. c. *Exceptions.* The Iowa Rules of Evidence--except for those on privilege--do not apply to the following: (1) The court's determination, under rule 5.104(a), on a preliminary question of fact governing admissibility. (2) Grand-jury proceedings.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or	

(3) Contempt proceedings in which an adjudication is made without prior notice and a hearing. (4) Miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.	revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
New Hampshire	**Utah Rule**	**Notes**
RULE 1101. APPLICABILITY OF RULES Currentness **(a) Courts.** These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court. **(b) Proceedings Generally.** These rules apply generally to all civil and criminal proceedings unless otherwise provided by the constitution or statutes of the State of New Hampshire or these rules. **(c) Rule of Privilege.** The rules with respect to privileges applies at all stages of all actions, cases, and proceedings. **(d) Rules Inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B:24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Current New Hampshire law appears to indicate that the Rules of Evidence are not strictly applicable in the following instances: 1. Preliminary examination (probable cause) *State v. St. Arnault,* 114 N.H. 216, 317 A.2d 789 (1974). 2. Grand jury *State v. St. Arnault,* 114 N.H. 216, 317 A.2d 789 (1974); *State v. Blake,* 113 N.H. 115, 305 A.2d 300 (1973). See also, e.g., *State v. Walsh,* 76 N.H. 581, 84 A. 42 (1912). 3. Arrest warrants *State v. Greely,* 115 N.H. 461, 344 A.2d 12 (1975); *State v. St. Germain,* 114 N.H. 608, 325 A.2d 803 (1974). 4. Bail hearings McNamara, *Criminal Practice and Procedure,* § 341 (1980) 5. Search warrants *State v. Beaulieu,* 119 N.H. 400, 402 A.2d 178 (1979); *State v. Spero,* 117 N.H. 199, 371 A.2d 1155 (1977); *State v. Titus,* 106 N.H. 219, 212 A.2d 458 (1965), cert. den. 385 U.S. 941, 87 S.Ct. 311, 17 L.Ed.2d 221 (1966). 6. Juvenile proceedings RSA 169-B (probably also CHINS, neglect, etc.) strict evidentiary rules may be relaxed provided juveniles' right to confront witnesses is not compromised. McNamara, § 1104; See, *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). 7. Parole revocation Probably also probation violation. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). 8. Recommittal hearings *State v. Hesse,* 117 N.H. 329, 373 A.2d 345 (1977). 9. Divorce cases *Pflug v. Pflug,* 92 N.H. 247, 29 A.2d 422 (1942). 10.

to release on bail or otherwise; contempt proceedings in which the court may act summarily; proceedings with respect to parole revocation or probation violations; recommittal hearings; domestic relations cases within the jurisdiction of the Family Division of the Circuit Court; civil domestic violence and stalking proceedings.		Extradition *Reeves v. Cox*, 118 N.H. 271, 385 A.2d 847 (1978). 11. Contempt *Town of Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282, 385 A.2d 851 (1978). 12. Domestic violence Proceedings pursuant to RSA 173-B.

EXHIBIT 1

989 P.2d 73
Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Lethron D. TATE, Defendant and Appellant.

No. 981793–CA.
|
Oct. 15, 1999.

Synopsis
Defendant pled guilty in the Third District Court, Salt Lake Department, David S. Young, J., to attempted robbery and was given a suspended sentence and was placed on probation. The Court later found that defendant had violated his probation and reinstated original prison term. Defendant appealed. The Court of Appeals, Wilkins, P.J., held that: (1) trial court's admission of hearsay statements at revocation hearing constituted reversible error, and (2) trial court's error required that order revoking defendant's probation be vacated.

Reversed

West Headnotes (7)

[1] **Criminal Law**
Probation

The Court of Appeals reviews the trial court's decision to revoke defendant's probation for correctness and accords it no particular deference.

[2] **Constitutional Law**
Notice and hearing; proceedings

One of the requirements of due process in the context of a probation revocation hearing is the right to confront and cross-examine adverse witnesses. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

1 Cases that cite this headnote

[3] **Criminal Law**
Cross-examination and impeachment

A finding of good cause for not allowing witness confrontation at a probation revocation hearing requires the trial court to balance the defendant's interest in cross-examining a witness against the State's need to use a particular hearsay statement. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

[4] **Sentencing and Punishment**
Admissibility

The purpose of the good cause requirement for not allowing witness confrontation at a probation revocation hearing is to limit the use of unreliable evidence at revocation hearings. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

[5] **Sentencing and Punishment**
Admissibility

Trial court erred at probation revocation hearing in admitting hearsay statements by police officers that probationer was involved in passing stolen checks and aggravated assault, absent showing good cause for not permitting probationer to confront individuals with personal knowledge of alleged incidents. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

[6] **Criminal Law**
Hearsay
Sentencing and Punishment
Admissibility

Trial court's error in admitting hearsay statements that probationer was allegedly involved in passing stolen checks and aggravated assault constituted reversible error, where probationer was denied opportunity to confront adverse witnesses and his due process rights were violated. U.S.C.A. Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

[7] **Criminal Law**
Hearsay
Sentencing and Punishment
Admissibility

Trial court's error in admitting hearsay evidence at probationer's revocation hearing concerning probationer's alleged involvement in passing stolen checks and aggravated assault required order revoking probation be vacated, where there was no evidence in record to support "good cause" for denying probationer's right to confront adverse witnesses. U.S.C.A.

Const.Amend. 14; U.C.A.1953, 77–18–1(12)(d)(iii).

Attorneys and Law Firms

***74** Joan C. Watt and Stephanie Ames, Salt Lake Legal Defender Association, Salt Lake City, for Appellant.

Jan Graham, Attorney General and Scott Keith Wilson, Assistant Attorney General, Salt Lake City, for Appellee.

Before Judges WILKINS, BILLINGS, and ORME.

OPINION

WILKINS, Presiding Judge:

¶ 1 Defendant Lethron D. Tate appeals the trial court's revocation of his probation and reinstatement of his previously suspended sentence for violating the terms of his probation. The State concedes error. We reverse.

BACKGROUND

¶ 2 In March 1997, Tate pleaded guilty to one count of attempted robbery and was sentenced to zero to five years in prison. That sentence was later suspended, and Tate was placed on probation for three years.

¶ 3 In August 1998, Adult Probation and Parole filed an affidavit in support of an order to show cause alleging Tate had violated his probation by committing aggravated assault and forgery. Tate denied both allegations. The trial court held an evidentiary hearing in October 1998 to determine whether Tate's probation should be revoked.

¶ 4 At this hearing, Officer Richard L. Boddy, who had investigated the forgery charges, testified that he had received information from several people that Tate was involved in passing stolen checks at a Denny's Restaurant where he worked. The State presented no evidence supporting the forgery charges other than the several hearsay statements offered by Officer Boddy.

¶ 5 Officers Gilbert Salazar and Kelly Kent testified about their investigation of the alleged aggravated assault. Officer Salazar stated that he was called to investigate an alleged assault in the parking lot of a fast food restaurant. He testified that upon arrival, he found the injured victim and transported him to the hospital. Officer Kent testified that two witnesses told him that an individual named "Lee" or "Lethron" committed the assault. Officer Kent also spoke with the victim and testified that the victim identified Tate as the assailant from a photo lineup. The only evidence Officers Salazar and Kent had linking Tate to the assault were the statements of several people who allegedly witnessed Tate assault the victim and Officer Kent's statement that the victim identified Tate from a photo lineup. Because neither the victim nor any of the witnesses testified, the officer's testimony consisted solely of several hearsay statements supporting the charge of aggravated assault.

¶ 6 In October 1998, the trial court found that Tate had violated his probation and reinstated the original prison term of zero to five years for attempted robbery. The trial court based this ruling solely on the officers' testimony. Tate appeals.

ISSUE AND STANDARD OF REVIEW

¶ 7 The sole contested issue on appeal is whether the trial court's erroneous admission of hearsay evidence at Tate's probation revocation hearing requires that the order revoking Tate's probation be remanded or vacated.

[1] ¶ 8 We "review the trial court's decision to revoke defendant's probation for correctness" and accord it no particular deference. *State v. Martin*, 976 P.2d 1224, 1227 (Utah Ct.App.1999); *see also Layton City v. Peronek*, 803 P.2d 1294, 1300 (Utah Ct.App.1990) (applying correctness standard and vacating ***75** order revoking probation where revocation was based solely on hearsay).

ANALYSIS

¶ 9 Tate argues the trial court violated his due process rights by denying him the opportunity to confront adverse witnesses and therefore, the order revoking his probation should be vacated. We agree.

I. Due Process

[2] ¶ 10 In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the United States Supreme Court concluded that "revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* at 480, 92 S.Ct. at 2600. Nonetheless, a probationer has a limited liberty interest and is entitled to minimal due process rights. *See Black v. Romano*, 471 U.S. 606, 611–12, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985). One of the requirements of due process in this context is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604.

[3] [4] ¶ 11 This requirement has been codified in Utah Code Ann. § 77–18–1(12)(d)(iii) (Supp.1999), which provides that in probation revocation proceedings where the defendant denies violating the conditions of his or her parole, "[t]he persons who have given adverse information on which the allegations are based *shall be presented as witnesses subject to questioning by the defendant unless the court for other good cause otherwise orders.*" *Id.* (emphasis added). A finding of good cause requires the trial court to balance the defendant's interest in cross-examining a witness against the State's need to use a particular hearsay statement. *See United States v. McCormick*, 54 F.3d 214, 221 (5th Cir.1995). The purpose of the good cause requirement is to limit the use of unreliable evidence at revocation hearings. *See Egerstaffer v. Israel*, 726 F.2d 1231, 1234 (7th Cir.1984).

[5] [6] ¶ 12 In this case, although Tate denied violating the terms of his probation, he was not provided an opportunity to cross-examine the individuals with personal knowledge of the alleged violations. Rather than calling individuals with personal knowledge of the alleged incidents which formed the basis of the probation violation, the State chose to make its case solely through the hearsay statements of Officers Boddy, Salazar and Kent. Although hearsay statements can be admissible in probation revocation proceedings, *see State v. Martinez*, 811 P.2d 205, 210 (Utah Ct.App.1991), the trial court, before admitting hearsay, must determine there is good cause for not permitting the probationer to cross-examine the out-of-court declarant whose statement is sought to be introduced as evidence. *See* Utah Code Ann. § 77–18–1(12)(d)(iii) (Supp.1999). In this case, the prosecution did not seek to show good cause and the trial court failed to meaningfully address the issue, to make a specific finding that good cause existed for not allowing confrontation, or to evaluate the reliability of the hearsay statements used by the State. Also, there is no evidence in the record suggesting there was good cause for denying Tate's right of confrontation. The State concedes this omission constitutes reversible error. Having reviewed the record and the applicable law, we agree. Therefore, we next address what the consequence of this error should be.

II. Remedy

[7] ¶ 13 Tate asserts the trial court's erroneous admission of hearsay evidence at the probation revocation hearing requires the order revoking Tate's probation be vacated. The State counters by arguing that this case should be remanded to the trial court to consider whether good cause existed and, if so, for a finding of good cause to admit hearsay evidence or, if not, to provide Tate an opportunity to cross-examine the witnesses with first hand knowledge of the alleged probation violations if they can be found.

¶ 14 We conclude that *Layton City v. Peronek*, 803 P.2d 1294 (Utah Ct.App.1990), controls this case. In *Peronek*, the trial court ***76** found the defendant had violated the conditions of her probation and reinstated portions of her original sentence. *See id.* at 1296. On appeal, we determined that defendant's due process rights had been violated because the probation revocation was based solely on unreliable hearsay evidence, the trial court failed to make a finding of good cause, and there was no evidence in the record to "suggest good cause for denying defendant th[e] fundamental right [of confrontation]." *Id.* at 1299 & n. 3. Therefore, we concluded the trial court "improperly determined [that the defendant] violated probation" and held that the proper remedy was to vacate the order reimposing the initially suspended terms of the sentence. *Id.* at 1300.

¶ 15 Likewise, the trial court in this case based its decision to revoke Tate's probation solely on the hearsay statements of Officers Boddy, Salazar, and Kent. The trial court failed to evaluate the reliability of the hearsay statements presented by the State or to perform the proper balancing test to determine whether there was good cause for denying Tate's right to confrontation. Furthermore, there is no evidence in the record showing the declarants could not be present at the hearing or that procuring their appearance would be undesirable or impractical. Although the State urges us to remand this case to the trial court, we do not believe this would be the proper course of action. "To ask the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence. Such a mode of proceeding holds too much

potential for abuse." *State v. Ramirez,* 817 P.2d 774, 789 (Utah 1991).

¶ 16 We note that our approach comports with several other jurisdictions that have addressed this issue. *See Commonwealth v. Maggio,* 414 Mass. 193, 605 N.E.2d 1247, 1250 (1993) (vacating trial court's order where revocation of probation was based on unreliable hearsay without a specific finding of good cause for denying confrontation); *City of Cleveland v. Houston,* No. 56969, 1990 WL 66461, at *2, 1990 Ohio App. LEXIS 1916, at *9 (Ohio Ct.App. May 17, 1990) (same); *State v. Greene,* 660 A.2d 261, 263 (R.I.1995) (same); *State v. Koliscz,* 623 A.2d 452, 453 (R.I.1993) (same); *State v. DeRoche,* 120 R.I. 523, 389 A.2d 1229, 1234 (1978) (same). Therefore, the judgment of the trial court, revoking Tate's probation and reimposing the original sentence of incarceration, is vacated.

CONCLUSION

¶ 17 We conclude the trial court's admission of hearsay, in the absence of a specific finding of good cause for denying confrontation, constitutes reversible error. Therefore, we hold the trial court improperly determined Tate violated his probation, and the order so concluding and reimposing the initially suspended terms of sentence is vacated.

¶ 18 WE CONCUR: JUDITH M. BILLINGS, Judge, and GREGORY K. ORME, Judge.

All Citations

989 P.2d 73, 380 Utah Adv. Rep. 22, 1999 UT App 302

End of Document

Tab 4

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Hon. Mary T. Noonan
State Court Administrator

Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

TO: Supreme Court
FROM: Michael C. Drechsel, Assistant State Court Administrator
DATE: Monday, November 25, 2019
RE: Body Camera Policy Violation Sanction – Rules of Evidence, Criminal Procedure, and Civil Procedure

ISSUE:

The Judicial Council's Liaison Committee asks that the Utah Supreme Court consider whether the Utah court rules of procedure and evidence should be amended to provide guidance to judges when presented with issues related to the absence of law enforcement body camera recordings.

BACKGROUND:

In July 2019, the American Civil Liberties Union, the Libertas Institute, and the Utah Association of Criminal Defense Lawyers ("the inquiring parties") contacted the Administrative Office of the Courts through the Courts' Legislative Liaison, Michael Drechsel, to discuss the following issue: should a judge's action in response to a violation of the Utah body camera law[1] ("bodycam law") be outlined in statute or in court rule (or both)? According to the inquiring parties, judges in both district and justice courts around the state are looking for guidance on what constitutes the appropriate court action in response to a bodycam law violation. The bodycam law does not currently contain any direction regarding on this matter. Mr. Drechsel asked the inquiring parties to provide specific case examples so that the legal and factual details could be more fully understood through consultation with experienced judges. To date, no specific examples have been provided for review.

The Judicial Council's Liaison Committee has discussed whether bodycam law issues should be addressed in statute or court rule. The Liaison Committee believes, to the extent such direction for judges is necessary, that the guidance should be outlined in court rules of evidence and procedure (as opposed to in statute) because it bears upon the administration of the courts, the admissibility of evidence, and the possible need to impose sanctions or provide other relief as part of the litigation process.

[1] Utah Code Title 77, Chapter 7a – "Law Enforcement Use of Body-worn Cameras"

RULES OF PROCEDURE AND EVIDENCE:

As judges deal with these issues, some of the relevant rules they might be asked to consider (as identified by staff) may include:

- **Utah Rule of Civil Procedure 37** – Statement of discovery issues; Sanctions; Failure to admit, to attend deposition or to preserve evidence.
- **Utah Rule of Civil Procedure 26** – General provisions governing disclosure and discovery.
- **Utah Rule of Civil Procedure 26.2** – Disclosures in personal injury actions.
- **Utah Rule of Criminal Procedure 16** – Discovery.
- **Utah Rule of Criminal Procedure 17** – The trial.
- **Utah Rule of Evidence 106** – Remainder of or Related Writings or Recorded Statements.
- **Utah Rule of Evidence 401** – Test for relevant evidence.
- **Utah Rule of Evidence 402** – General admissibility of relevant evidence.
- **Utah Rule of Evidence 403** – Excluding relevant evidence for prejudice, confusion, waste of time, or other resources.
- **Utah Rule of Evidence 602** – Need for personal knowledge.
- **Utah Rule of Evidence 616** – Statements made during custodial interrogations.
- **Utah Rule of Evidence 803** – Exceptions to the rule against hearsay.
- **Utah Rule of Evidence 1002** – Requirement of the original.

Effective 5/10/2016

Chapter 7a
Law Enforcement Use of Body-worn Cameras

77-7a-101 Title.

This chapter is known as "Law Enforcement Use of Body-Worn Cameras."

Enacted by Chapter 410, 2016 General Session

77-7a-102 Body-worn cameras -- Written policies and procedures.

(1) Any law enforcement agency that uses body-worn cameras shall have a written policy governing the use of body-worn cameras that is consistent with the provisions of this chapter.

(2)

(a) Any written policy regarding the use of body-worn cameras by a law enforcement agency shall, at a minimum:

(i) comply with and include the requirements in this chapter; and

(ii) address the security, storage, and maintenance of data collected from body-worn cameras.

(b) Except as provided in Subsection 77-7a-104(11), this chapter does not prohibit a law enforcement agency from adopting body-worn camera policies that are more expansive than the minimum guidelines provided in this chapter.

(3) This chapter does not require an officer to jeopardize the safety of the public, other law enforcement officers, or himself or herself in order to activate or deactivate a body-worn camera.

Amended by Chapter 415, 2017 General Session

77-7a-103 Definitions.

(1)

(a) "Body-worn camera" means a video recording device that is carried by, or worn on the body of, a law enforcement officer and that is capable of recording the operations of the officer.

(b) "Body-worn camera" does not include a dashboard mounted camera or a camera intended to record clandestine investigation activities.

(2) "Law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.

(3) "Law enforcement encounter" means:

(a) an enforcement stop;

(b) a dispatched call;

(c) a field interrogation or interview;

(d) use of force;

(e) execution of a warrant;

(f) a traffic stop, including:

(i) a traffic violation;

(ii) stranded motorist assistance; and

(iii) any crime interdiction stop; or

(g) any other contact that becomes adversarial after the initial contact in a situation that would not otherwise require recording.

Enacted by Chapter 410, 2016 General Session

77-7a-104 Activation and use of body-worn cameras.

(1) An officer using a body-worn camera shall verify that the equipment is properly functioning as is reasonably within the officer's ability.

(2) An officer shall report any malfunctioning equipment to the officer's supervisor if:

(a) the body-worn camera issued to the officer is not functioning properly upon initial inspection; or

(b) an officer determines that the officer's body-worn camera is not functioning properly at any time while the officer is on duty.

(3) An officer shall wear the body-worn camera so that it is clearly visible to the person being recorded.

(4) An officer shall activate the body-worn camera prior to any law enforcement encounter, or as soon as reasonably possible.

(5) An officer shall record in an uninterrupted manner until after the conclusion of a law enforcement encounter, except as an interruption of a recording is allowed under this section.

(6) When going on duty and off duty, an officer who is issued a body-worn camera shall record the officer's name, identification number, and the current time and date, unless the information is already available due to the functionality of the body-worn camera.

(7) If a body-worn camera was present during a law enforcement encounter, the officer shall document the presence of the body-worn camera in any report or other official record of a contact.

(8) When a body-worn camera has been activated, the officer may not deactivate the body-worn camera until the officer's direct participation in the law enforcement encounter is complete, except as provided in Subsection (9).

(9) An officer may deactivate a body-worn camera:

(a) to consult with a supervisor or another officer;

(b) during a significant period of inactivity; and

(c) during a conversation with a sensitive victim of crime, a witness of a crime, or an individual who wishes to report or discuss criminal activity if:

(i) the individual who is the subject of the recording requests that the officer deactivate the officer's body-worn camera; and

(ii) the officer believes that the value of the information outweighs the value of the potential recording and records the request by the individual to deactivate the body-worn camera.

(10) If an officer deactivates a body-worn camera, the officer shall document the reason for deactivating a body-worn camera in a written report.

(11)

(a) For purposes of this Subsection (11):

(i) "Health care facility" means the same as that term is defined in Section 78B-3-403.

(ii) "Health care provider" means the same as that term is defined in Section 78B-3-403.

(iii) "Hospital" means the same as that term is defined in Section 78B-3-403.

(iv) "Human service program" means the same as that term is defined in Section 62A-2-101.

(b) An officer may not activate a body-worn camera in a hospital, health care facility, human service program, or the clinic of a health care provider, except during a law enforcement encounter, and with notice under Section 77-7a-105.

Amended by Chapter 285, 2018 General Session

Amended by Chapter 316, 2018 General Session

77-7a-105 Notice and privacy.

(1) An officer with a body-worn camera shall give notice, when reasonable under the circumstances:
  (a) to:
    (i) the occupants of a private residence in which the officer enters and in which a body-worn camera is in use; or
    (ii) a health care provider present at a hospital, a health care facility, human service program, or a health care provider's clinic in which the officer enters and in which a body-worn camera is in use; and
  (b) either by:
    (i) wearing a body-worn camera in a clearly visible manner; or
    (ii) giving an audible notice that the officer is using a body-worn camera.
(2) An agency shall make the agency's policies regarding the use of body-worn cameras available to the public, and shall place the policies on the agency's public website when possible.

Amended by Chapter 415, 2017 General Session

77-7a-106 Prohibited Activities.

An officer is prohibited from:
(1) using a body-worn camera for personal use;
(2) making a personal copy of a recording created while on duty or acting in an official capacity as a law enforcement officer;
(3) retaining a recording of any activity or information obtained while on duty or acting in an official capacity as a law enforcement officer;
(4) duplicating or distributing a recording except as authorized by the employing law enforcement agency; and
(5) altering or deleting a recording in violation of this chapter.

Enacted by Chapter 410, 2016 General Session

77-7a-107 Retention and release of recordings.

(1)
  (a) Any recording made by an officer while on duty or acting in the officer's official capacity as a law enforcement officer shall be retained in accordance with applicable federal, state, and local laws.
  (b) Any recording made by an officer while on duty or acting in the officer's official capacity as a law enforcement officer may not be retained, electronically or otherwise, by a private entity if the private entity has any authority to:
    (i) withhold the recording; or
    (ii) prevent the political subdivision from accessing or disclosing the recording.
  (c)
    (i) Notwithstanding Subsection (1)(b), a political subdivision may continue to retain a recording in a manner prohibited under Subsection (1)(b) if the political subdivision is under contract with a private entity on May 7, 2018, and the contract includes terms prohibited by Subsection (1)(b).
    (ii) A political subdivision may not renew a contract described in Subsection (1)(c)(i).

(d) This Subsection (1) does not prohibit a political subdivision from using a private entity's retention or redaction service if the private entity does not have authority to:
(i) withhold the recording; or
(ii) prevent the political subdivision from accessing or disclosing the recording.

(2)
(a) Any release of recordings made by an officer while on duty or acting in the officer's official capacity as a law enforcement officer shall be subject to Title 63G, Chapter 2, Government Records Access and Management Act.
(b) Notwithstanding any other provision in state or local law, a person who requests access to the recordings may immediately appeal to a district court, as provided in Section 63G-2-404, any denial of access to a recording based solely on Subsection 63G-2-305(10)(b) or (c) due to a pending criminal action that has been filed in a court of competent jurisdiction.

Amended by Chapter 71, 2018 General Session

Tab 5

Supreme Court of Utah
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Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
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DIRECTIVE TO THE ADVISORY COMMITTEE ON THE UTAH RULES OF EVIDENCE

January 2, 2020

In *State v. Verde*, 2012 UT 60, 296 P.3d 673, we laid out some criteria for the application of the "doctrine of chances," a principle allowing for the admission of prior bad acts evidence under rule 404(b) of the Utah Rules of Evidence. Our opinion in *Verde* was provisional, however, in the sense that we were not ruling on the admissibility of a particular piece of evidence, but outlining considerations to be applied by the district court on remand. In *Verde*, moreover, we acknowledged the difficult, sensitive nature of the doctrine of chances inquiry. And the passage of time has served only to highlight the difficulty of the problem, as informed by recent law review publications and opinions from our court of appeals.

We could, of course, seek to refine the doctrine of chances through our opinions as we decide cases that come before us. But we have little control over the nature of the issues that come before us in that process. And some of the concerns that we see seem more susceptible to resolution through our rulemaking power.

With this in mind, the court invites the Advisory Committee on the Utah Rules of Evidence to consider the possibility of proposed amendments to rule 404(b) that may help advance the law in this important area. In the paragraphs below we provide some background on the problem, identify some concerns raised in recent case law and law review commentary, and flag some areas that the committee may wish to consider as possible grounds for proposed amendments to rule 404(b).

Background

Rule 404(b) provides that evidence of prior bad acts is admissible to prove a non-propensity purpose like "motive," "intent," "preparation," or "absence of mistake." The rule also forecloses the consideration of bad acts evidence for impermissible "character" purposes—to suggest a propensity for certain bad behavior. The problem, of course, is

that evidence of prior bad acts "often will yield dual inferences—and thus betray both a permissible purpose and an improper one." *Verde*, 2012 UT 60, ¶16.

Verde identified some criteria for application of the "doctrine of chances." In *Verde* we explained that this doctrine is a "theory of logical relevance" that "rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Id.* ¶ 47. In other words, the more often something happens to the same person, the less likely it is that the repeated occurrences are due to accident, chance, mistake, etc. A classic case is the English "Brides in the Bath" case, *Rex v. Smith*, 11 Crim. App. 229, 84 L.J.K.B. 2153 (1915), in which a defendant charged with drowning his wife in a bathtub asserted that she had died by accident (that there was no *actus reus* of murder). In that case, the fact that two prior brides had died "by accident" while bathing undermined that defense under the doctrine of chances. Another example is "Dean Wigmore's famous hypothetical about a hunter" who after shooting at his companion three times, "defend[ed] the case on the ground that he did not intend to shoot." *State v. Lane*, 2019 UT App 86, ¶ 39 n.7, 444 P.3d 553 (Harris, J., concurring) (citing 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 302, at 241 (James H. Chadbourn ed., 1979)). In both these examples "the underlying defense is the same: it was a mistake or an accident." *Id*. And "[p]ropensity 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 . . . murders his relatives." *Verde*, 2012 UT 60, ¶ 50. Instead, "[t]he question is whether it is objectively likely that so many . . . deaths could be attributable to natural causes." *Id*. (internal quotation marks and citation omitted).

Doctrine of chances evidence thus "tends to prove a relevant fact without relying on inferences from the defendant's character." *Id* ¶ 51. When it does so, it is not impermissible propensity evidence. When the evidence goes to rebutting a claim of mistake or accident, it is the "objective unlikelihood [of repeated similar misfortunes] that tends to prove" that actions were brought about by "human agency, causation, and design," rather than by chance. *Id*. ¶ 50.

We have noted that "it won't always be easy for the court to differentiate" between permissible and impermissible prior bad acts evidence. *Id*. ¶ 16. One commentator has referred to this as the "hinterland of Rule 404(b) metaphysics." Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1564.

With these concerns in mind, our cases have identified "four foundational requirements" for the admission of bad acts evidence: "(1) materiality, (2) similarity, (3) independence, and (4) frequency." *State v. Lowther*, 2017 UT 34, ¶ 32, 398 P.3d 1032. Our

cases have said that "[w]hen each of these requirements has been met, a court should conclude that rule 404(b) has been satisfied regarding certain prior bad acts evidence and proceed to assess the evidence under rules 402 and 403." *Id*. The cited factors may also be relevant to the rule 403 balance. The factors "operate upon an *entire body* of prior bad acts evidence to determine whether the evidence is being offered for purposes of a proper, non-character statistical inference." *Id*. ¶ 39. They may also "provide a preliminary measure of the probative value of the evidence." *Id*.

We have said that the doctrine of chances can be applied to rebut a charge of fabrication or in cases involving the question of a victim's consent. First in *Verde* we acknowledged "the theoretical possibility that evidence of prior misconduct could be admitted under rule 404(b) to establish commission of a criminal *actus reus* by rebutting a charge of fabrication." 2012 UT 60, ¶ 46. Our *Verde* opinion did not hold that any such evidence would actually be admissible. *Id.* We simply identified criteria for consideration of the doctrine of chances and for balancing under rule 404(b) and remanded the case to the district court. *Id.* ¶ 62. Later in *Lowther*, we held that the doctrine of chances was not "limit[ed] . . . to cases involving claims that a witness was fabricating her testimony," 2017 UT 34, ¶ 23, but could be used to prove that an alleged victim did not consent to sex with a defendant, *id.* ¶ 25.

Concerns Raised in Recent Cases and Commentary

Concerns about our approach have been raised in opinions from our court of appeals, *see State v. Murphy*, 2019 UT App 64, 441 P.3d 787 (Harris, J., concurring); *State v. Lane*, 2019 UT App 86, 444 P.3d 553 (Harris, J., concurring), and law review commentary, *see* Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Conduct to Prove Intent*, 45 HOFSTRA L. REV. 851 (2017); Andrea J. Garland, *Beyond Probability: The Utah Supreme Court's "Doctrine of Chances" in* State v. Verde *Encourages Admission of Irrelevant Evidence*, 3 UTAH J. CRIM. L. 6 (2018). We welcome this pushback. And we outline some of those concerns in the paragraphs below.

In *State v. Murphy*, Judge Harris wrote separately to raise two sets of concerns with our opinion in the *Verde* case. First, Judge Harris cites scholarly commentary suggesting that where "'prior bad acts involve sexual misconduct or child abuse, or a combination of both, courts generally find a theory of admissibility, even if no specific theory of admissibility makes sense.'" 2019 UT App 64, ¶ 51 (quoting R. Collin Mangrum & Dee Benson, MANGRUM & BENSON ON UTAH EVIDENCE 227 (2018–19 ed.); citing Melilli, 1998 B.Y.U. L. REV. at 1556 (stating that "creative prosecutors will usually be successful in

generating a theory for introducing evidence of the defendant's prior, uncharged misbehavior before the jury")). And although the doctrine of chances may sometimes be "harnessed" for this purpose, Judge Harris asserts that the doctrine is "controversial" and particularly problematic in some circumstances. *Id.* ¶¶ 51–52. With these concerns in mind, Judge Harris has suggested that it may make sense for our court to consider adopting a rule like rule 413 of the Federal Rules of Evidence. *Id.* ¶ 65.

Judge Harris also identified a doctrinal concern with the doctrine of chances as articulated in *Verde*. He questioned whether the doctrine could properly be extended to a circumstance involving rebuttal of a charge of fabrication. *See id*. ¶¶ 56–59. In Judge Harris's view, it is difficult to identify the "rare misfortune" that "triggers application" of the doctrine of chances in a case involving rebuttal of a charge of fabrication. *See id*. ¶ 57. And Judge Harris raises specific concerns about whether it is possible "to distinguish" the "rare misfortune" of a prior accusation "from straight-up propensity evidence." *Id*. ¶ 59.

Judge Harris elaborated on this concern in a separate opinion in *State v. Lane*, 2019 UT App 86. In that case Judge Harris suggests that the "probability reasoning" of the doctrine of chances "lose[s] 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." *Id*. ¶ 40. His opinion in *Murphy* speaks to this concern as applied in cases where the prior bad acts are aimed at "rebutting a defendant's claim that the complaining witness is lying." *Id*. In *Lane* the concern is extended in cases where the doctrine of chances "is applied to admit prior bad acts for the purpose of rebutting a claim of self-defense." *Id*. Judge Harris acknowledges that "we may be less likely to believe" a defendant accused of a violent act who claims he acted in self-defense "if presented with evidence that he has made this claim before." *Id.* ¶ 41. But in Judge Harris's view "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." *Id*. Judge Harris says that "[t]he 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)." *Id.* "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." *Id*. And for that reason Judge Harris suggests that this use of the doctrine of chances is problematic—since in his view "[t]he 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." *Id.* ¶ 42.

Judge Harris suggests that if the doctrine is to be applied at all to situations involving non-random, volitional acts, at least "two threshold conditions" should be met: (1) "the party asking the court to admit prior bad acts evidence" under the doctrine of chances "should be able to clearly articulate what the event of 'rare misfortune' is" that triggers its application; and (2) "the party asking the court to admit prior bad acts evidence" under the doctrine of chances "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." *Id.* ¶¶ 43–44. "If these purposes cannot be articulated in a way that a lay juror can readily understand," Judge Harris suggests that "that is a good clue" that the doctrine of chances "is being misapplied." *Id.* ¶ 44.

In *Lane*, Judge Harris also raises concerns about the need for careful jury instructions to "assist the jury in navigating its way through a logical and metaphysical minefield" under the doctrine of chances. *Id.* ¶ 48 (citing Imwinkelried, 45 HOFSTRA L. REV. at 873). Judge Harris proposes that our law mandate a "'complete, carefully worded limiting instruction'" with "'two prongs'": (a) a "negative prong," forbidding "the jury from using the evidence for the verboten purpose," and (b) an "'affirmative prong'" explaining "'how the jury is to reason about the evidence.'" *Id.* (citing Imwinkelried, 45 HOFSTRA L. REV. at 873).

Finally, in *Lane* Judge Harris raises concerns about the "manner in which" the "frequency" factor is analyzed under *Verde*. *Id.* ¶ 49. Judge Harris notes that 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,'" and that the "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." *Id.* (quoting *Verde*, 2012 UT 60, ¶¶ 47, 61). And Judge Harris raises questions about whether a judge can make a "reasoned" analysis of these sorts of probabilities based merely on "intuition." *Id.* He says that there may be "instance[s] where the court . . . need[s] to take additional evidence—from experts, if necessary—to arrive at a sound conclusion" about the relevant probabilities. *Id.*

Considerations for the Committee

We are not yet at a point where we are prepared to endorse the full range of proposals and concerns raised by Judge Harris. But we are unanimously of the view that his opinions in *Murphy* and *Lane* raise questions worthy of careful consideration. We also

acknowledge the significance of the concerns raised in some of the above-cited law review commentary. And we ask the advisory committee to delve into these matters and propose recommendations to the court on whether and to what extent we should address the problems highlighted above (or others that the committee identifies) in amendments to our rules of evidence. We are open to a range of options—from making small refinements to our rules to a fundamental overhaul. Questions on the table include whether to foreclose or somehow limit the applicability of the doctrine of chances in certain circumstances (like contexts where the underlying acts in question are not random but based on human volition), whether to impose additional limits or make other refinements to the doctrine (such as a requirement of jury instructions or refinements to the manner in which the "frequency" factor is analyzed), and whether to adopt a variation on federal rule 413.

In considering these issues the committee may wish to seek input from Judge Harris, as he clearly has thought deeply about the problems that he has identified. Judge Pullan may be another helpful resource, as he has taught and lectured extensively on the law of evidence. But we leave that matter to the committee's discretion, and appreciate your attention to these important matters.

KeyCite Red Flag - Severe Negative Treatment
Abrogated by State v. Thornton, Utah, February 21, 2017

296 P.3d 673
Supreme Court of Utah.

STATE of Utah, Plaintiff and Respondent,
v.
James Eric VERDE, Defendant and Petitioner.

No. 20100286.
|
Sept. 25, 2012.
|
Rehearing Denied Jan. 31, 2013.

Synopsis

Background: Defendant was convicted in the Third District Court, West Jordan Department, Terry L. Christiansen, J., of sexual abuse of a child. He appealed. The Court of Appeals, 227 P.3d 840, affirmed. Defendant petitioned for a writ of certiorari.

Holdings: The Supreme Court, Lee, J., held that:

[1] evidence that defendant sexually assaulted two males when they were 18 years old was not admissible under the other-acts rule to establish defendant's specific intent;

[2] any probative value of the evidence was far outweighed by the illegitimate effect of suggesting action in conformity with bad character; and

[3] the evidence was not admissible under the other-acts rule to establish a plan by defendant to commit similar crimes.

Reversed and remanded.

West Headnotes (22)

[1] Criminal Law
Extent of Review as Determined by Mode Thereof

Supreme Court's review of a decision of the Court of Appeals on certiorari is de novo; that said, the correctness of the decision turns, in part, on whether the Court of Appeals accurately reviewed the trial court's decision under the appropriate standard of review.

4 Cases that cite this headnote

[2] Criminal Law
Other offenses

A trial court's admission of evidence of prior bad acts is reviewed for abuse of discretion, but the evidence must be scrupulously examined by trial judges in the proper exercise of that discretion. Rules of Evid., Rule 404(b).

8 Cases that cite this headnote

[3] Criminal Law
Purposes for Admitting Evidence of Other Misconduct

Criminal Law
Showing bad character or criminal propensity in general

When evidence of past misconduct is offered to suggest action in conformity with a person's alleged bad character, it is inadmissible under the other-acts rule; when such evidence is offered for any other purpose, it is admissible. Rules of Evid., Rule 404(b).

7 Cases that cite this headnote

[4] Criminal Law
Purposes for Admitting Evidence of Other Misconduct

Criminal Law
Showing bad character or criminal propensity in general

Other-acts rule lists examples of proper purposes for which evidence of past misconduct may be offered, such as to establish motive, opportunity, and intent, but the list is illustrative and not exclusive; so long as the evidence is not aimed at suggesting action in conformity with bad character, it is admissible under the rule. Rules of Evid., Rule 404(b).

2 Cases that cite this headnote

[5] **Criminal Law**
Showing bad character or criminal propensity in general

Fidelity to the other-acts rule requires a threshold determination of whether proffered evidence of prior misconduct is aimed at proper or improper purposes; if such evidence is really aimed at establishing a defendant's propensity to commit crime, it should be excluded despite a proffered, but unpersuasive, legitimate purpose. Rules of Evid., Rule 404(b).

4 Cases that cite this headnote

[6] **Criminal Law**
Prejudicial effect and probative value

Even if other-acts evidence appears to have a dual purpose, i.e., to be aimed at both proper and improper inferences, it may nonetheless be excluded under the rule allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. Rules of Evid., Rules 403, 404(b).

7 Cases that cite this headnote

[7] **Criminal Law**
Showing bad character or criminal propensity in general

Criminal Law
Prejudicial effect and probative value

When evidence of prior misconduct is presented under the other-acts rule, the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character; even if the evidence may sustain both proper and improper inferences under the other-acts rule, the court should balance the two against each other under the balancing rule, excluding the 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. Rules of Evid., Rules 403, 404(b).

11 Cases that cite this headnote

[8] **Criminal Law**
Other offenses

A trial court's decision to admit evidence under the other-acts rule is entitled to some deference, but such a decision can withstand appellate review only if the evidence falls within the bounds marked by the legal standards set forth in the rules of evidence. Rules of Evid., Rule 404(b).

[9] **Criminal Law**
Plea of Not Guilty

Criminal Law
Other Misconduct Showing Intent

A not-guilty plea technically puts every element of a crime at issue, but the technical relevance of evidence of a defendant's intent is not enough to justify the admissibility of evidence of prior bad acts purportedly aimed at establishing intent under the other-acts rule. Rules of Evid., Rule 404(b).

1 Cases that cite this headnote

[10] **Criminal Law**
Showing bad character or criminal propensity in general

Criminal Law
Other Misconduct Showing Intent

If proof of intent is merely a ruse for introducing evidence of prior misconduct under the other-acts rule, and the real effect of the evidence is to suggest a defendant's action in conformity with alleged bad character, the ruse is insufficient and the evidence should not be admitted. Rules of Evid., Rule 404(b).

6 Cases that cite this headnote

[11] **Criminal Law**
Relevancy

Admissibility of evidence of prior misconduct cannot be sustained under the other-acts rule on the mere basis of a defendant's not-guilty plea. Rules of Evid., Rule 404(b).

[12] **Criminal Law**
Sex offenses, incest, and prostitution

Evidence that defendant sexually assaulted two males when they were 18 years old was not admissible under the other-acts rule at a trial for sexual abuse of a child to establish defendant's specific intent, even though defendant's plea of not guilty technically put his intent in issue; defendant did not contest intent at trial and, in fact, offered to stipulate to his intent, and the state refused defendant's offer and could later identify no legitimate reason for rejecting the offer, thus reinforcing a conclusion that the state's true purpose in offering the evidence was to invite the jury to infer that defendant acted in conformity with the bad character suggested by his prior bad acts. Rules of Evid., Rule 404(b).

1 Cases that cite this headnote

[13] **Criminal Law**
Necessity and scope of proof

Prosecution retains wide discretion to reject a defendant's offer to stipulate, which it might legitimately do, for example, to preserve the right to present evidence with broad narrative value beyond the establishment of particular elements of a crime.

1 Cases that cite this headnote

[14] **Criminal Law**
Sex offenses, incest, and prostitution

Any probative value of other-acts evidence, introduced at a trial for sexual abuse of a child, that defendant sexually assaulted two males when they were 18 years old was far outweighed by the illegitimate effect of suggesting action in conformity with bad character; any legitimate tendency the evidence had to tell a narrative of defendant's specific intent, which was a ground asserted by the state for admission of the evidence, was minimal at best. Rules of Evid., Rules 403, 404(b).

[15] **Criminal Law**
Sex offenses, incest, and prostitution

Evidence that defendant sexually assaulted two males when they were 18 years old was not admissible under the other-acts rule at a trial for sexual abuse of a child to establish a plan by defendant to commit similar crimes; there was no suggestion of a prior, conscious resolve on defendant's part to formulate an overarching grand design encompassing both the charged and uncharged offenses, in that an attempt to entice an adult into a sexual relationship was not equivalent to the sexual enticement of a child, and the evidence would strongly suggest to the jury the likelihood that defendant might have acted in conformity with the bad character implied by his prior acts. Rules of Evid., Rule 404(b).

[16] **Criminal Law**
Other Misconduct Inseparable from Crime Charged

Criminal Law
Similar means or method; modus operandi

In the context of the other-acts rule, "preparation evidence" would indicate steps to facilitate the commission of the crime at issue in the trial, as where a defendant is shown to have stolen a cutting torch that is used in a subsequent burglary; "pattern evidence," by contrast, is implicated where the uncharged and charged conduct is peculiarly distinctive and thus likely to have been committed by the same individual. Rules of Evid., Rules 403, 404(b).

[17] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

In some circumstances, evidence of prior misconduct can be relevant under the "doctrine of chances," which defines circumstances where prior bad acts can properly be used to rebut

a charge of fabrication; it is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over. Rules of Evid., Rule 404(b).

11 Cases that cite this headnote

[18] Criminal Law

Controverting defense evidence or theory

A charge of fabrication is insufficient by itself to open the door to evidence of any and all prior bad acts; as with other questions arising under the other-acts rule, care and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts and to limit the factfinder's use of the evidence to the uses allowed by rule. Rules of Evid., Rule 404(b).

1 Cases that cite this headnote

[19] Criminal Law

Other Misconduct Showing Absence of Mistake or Accident

Under the doctrine of chances, other-acts evidence offered to prove actus reus must not be admitted absent satisfaction of four foundational requirements, which should be considered within the context of a balancing analysis under the rule allowing the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations; those requirements are materiality, similarity, independence, and frequency. Rules of Evid., Rule 404(b).

7 Cases that cite this headnote

[20] Criminal Law

Other Misconduct Showing Absence of Mistake or Accident

Similarity, as a foundational requirement for other-acts evidence to be admitted under the doctrine of chances to prove actus reus, requires that each uncharged incident be roughly similar to the charged crime; the similarity need not be as great as that necessary to prove identity under a pattern theory, but there must be some significant similarity between the charged and uncharged incidents, all of which must at least fall into the same general category, to suggest a decreased likelihood of coincidence and thus an increased probability that the defendant committed all such acts, similarities that are sufficient to dispel any realistic possibility of independent invention. Rules of Evid., Rule 404(b).

3 Cases that cite this headnote

[21] Criminal Law

Sex offenses, incest, and prostitution

Where prior uncharged conduct is an accusation of sexual assault, each accusation must be independent of the others, as a foundational requirement for other-acts evidence to be admitted under the doctrine of chances to prove actus reus; the probative value of similar-accusations evidence rests on the improbability of chance repetition of the same event, and the existence of collusion among various accusers would render ineffective the comparison with chance repetition. Rules of Evid., Rule 404(b).

5 Cases that cite this headnote

[22] Criminal Law

Other Misconduct Showing Absence of Mistake or Accident

Frequency, as a foundational requirement for other-acts evidence to be admitted under the doctrine of chances to prove actus reus, requires the defendant to have been accused of the crime or suffered an unusual loss more frequently than the typical person endures such losses accidentally; it is this infrequency that justifies the probability analysis underlying the doctrine of chances. Rules of Evid., Rule 404(b).

10 Cases that cite this headnote

Attorneys and Law Firms

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Linda M. Jones, Salt Lake City, for petitioner.

Opinion

Justice LEE, opinion of the Court:

¶ 1 James Eric Verde was convicted of sexual abuse of a child. At trial, the court admitted evidence of two prior uncharged sexual assaults by Verde. On appeal to the court of appeals, Verde challenged the admissibility ***676** of that evidence under Utah Rule of Evidence 404(b), asserting either that it was not offered for a non-character purpose or that its probative value was substantially outweighed by a risk of unfair prejudice. The court of appeals deemed the evidence admissible for two non-character purposes and affirmed. We reverse Verde's conviction and remand for a new trial, but leave the door open for the State to offer its evidence on grounds different from those adopted by the court of appeals or the trial court.

I

¶ 2 In 2005, Verde was charged with sexually abusing N.H., a twelve-year-old boy. The charge was based on an incident that occurred in the summer of 2003, when Verde allegedly put his hand down N.H.'s pants and fondled his genitalia. Verde pled not guilty.

¶ 3 Prior to trial, the State filed a motion in limine, asking the trial court to allow testimony from three men who claimed that Verde had sexually assaulted them when they were eighteen years old. The State contended that the testimony was admissible under rule 404(b) for the non-character purposes of demonstrating Verde's "knowledge, intent, plan, modus operandi and/or absence of mistake or accident." Verde challenged the admissibility of the evidence on the ground that it was not relevant to any controverted issues in a manner untethered to his character. The trial court granted the State's motion as to two of the witnesses, concluding that the evidence was admissible to prove Verde's specific intent. The court noted that the evidence could also be admitted to prove "a pattern of behavior," and that Verde "prepared and planned to meet minor males with a motive of enticing them into sexual relationships."

¶ 4 At trial, N.H. testified that he met Verde in the fall of 2001 when Verde moved into N.H.'s neighborhood. According to N.H., Verde took him to a carnival on the day they met, and the two spent extensive time together thereafter—with N.H. playing video games or basketball at Verde's home, riding Verde's ATVs, or working in Verde's yard for pay.

¶ 5 N.H. further testified that Verde sexually abused him in the summer of 2003 when he was at Verde's home. According to N.H.'s testimony, Verde sat by N.H. on the couch and put "his hand down [N.H.'s] pants" and "touched [his] penis and testicles." N.H. said that he told Verde to stop, and that Verde said something like "don't be cool" and then moved to a chair. In December 2004, N.H. reported these events to his mother.

¶ 6 The State also presented evidence at trial that Verde had engaged in sexual misconduct with two eighteen-year-old males in 2002 and 2004.[1] The first witness, J.T.S., testified that Verde first approached him when he was fifteen years old and working as a grocery store bagger. J.T.S. claimed that Verde initiated a conversation with him, gave him a pair of sunglasses, and invited him to play basketball. J.T.S. did not see Verde again until he was eighteen years old. At that time, Verde expressed interest in a car J.T.S. was selling and insisted that J.T.S. come to his house so he could test drive the car.

¶ 7 J.T.S. testified that he went to Verde's home that evening. When J.T.S. realized that Verde was not interested in purchasing the car, J.T.S. attempted to leave. Verde then pulled on J.T.S.'s leg and refused to let him go. According to J.T.S., Verde then rubbed J.T.S.'s leg, unbuttoned his jeans, and groped his genitals. J.T.S. testified that he tried to stop Verde "many times," but that he responded with force, frightening J.T.S. He immediately reported the incident to the police and his parents, but no charges were filed.

¶ 8 M.A. testified to a similar incident. According to M.A., he met Verde at the gym in 2002 when he was eighteen years old. Verde allegedly approached M.A. and invited him home, where Verde groped M.A.'s groin "close enough to his genitals to arouse him." M.H. terminated this encounter and later ***677** reported the incident to police, again without charges ever being brought.

¶ 9 After the State presented its case, Verde testified on his own behalf, denying that he ever sat next to N.H. on the couch or touched N.H. in a sexual manner. Verde presented witnesses who testified about N.H.'s lack of credibility, one saying that N.H. "pathologically lie[d]." Verde also testified that he never had any sexual contact with M.A. or J.T.S.

¶ 10 The jury found Verde guilty, and he appealed. In the court of appeals, Verde pressed his argument that the evidence of uncharged sexual misconduct should not have been admitted because it served no purpose other than to show that Verde's conduct conformed to a propensity to commit sexual crimes. *State v. Verde,* 2010 UT App 30, ¶ 15, 227 P.3d 840.

¶ 11 The court of appeals affirmed, holding that the 404(b) evidence was admissible to establish Verde's specific intent, or alternatively, to rebut Verde's theory that N.H. fabricated his story. *Id.* ¶¶ 18, 19 n. 6. Although Verde never actually disputed intent, the court of appeals deemed the evidence admissible to establish Verde's specific intent, a required element of sexual abuse of a child, regardless of the nature of the case or Verde's defenses. *Id.* ¶ 18. The court based this holding on the so-called "not guilty rule," under which intent is per se controverted once a defendant pleads not guilty to a specific-intent crime. *Id.* In light of this holding, the court of appeals did not address the State's alternative argument that the trial court properly admitted the bad acts evidence for the additional purpose of proving Verde's pattern of conduct, preparation, or plan of enticing and exploiting teenage males. Yet the court did recognize "at least one additional ground for admitting the prior bad acts evidence." *Id.* ¶ 19 n. 6. Because Verde claimed that N.H. invented the alleged misconduct "after not being paid for catching a stray cat," the court held that prior bad acts evidence was admissible to rebut Verde's defense of fabrication. *Id.*

¶ 12 Judge McHugh concurred, opining that the "not guilty rule" should not be used as a substitute for a meaningful inquiry into the actual purpose and relevance of evidence offered under rule 404(b). *Id.* ¶ 38 (McHugh, J., concurring). In Judge McHugh's view, the mere fact that "a defendant pleads not guilty should not excuse the State from identifying the precise link between the bad acts evidence and a contested issue in the trial." *Id.* ¶ 44. Judge McHugh also acknowledged that under current court of appeals precedent, *see State v. Bradley,* 2002 UT App 348, 57 P.3d 1139, the 404(b) evidence could be admitted to rebut Verde's fabrication theory; but for that precedent, however, she would have reversed and remanded for a new trial. *Verde,* 2010 UT App 30, ¶ 43, 227 P.3d 840 (McHugh, J., concurring).

[1] **[2]** ¶ 13 Our review of the court of appeals decision on certiorari is de novo. *State v. Levin,* 2006 UT 50, ¶ 15, 144 P.3d 1096. That said, "[t]he correctness of the court of appeals' decision turns, in part, on whether it accurately reviewed the trial court's decision under the appropriate standard of review." *Id.* A trial court's admission of prior bad acts evidence is reviewed for abuse of discretion, but the evidence "must be scrupulously examined by trial judges in the proper exercise of that discretion." *State v. Decorso,* 1999 UT 57, ¶ 18, 993 P.2d 837. Applying these standards, we reverse the court of appeals' holding that the 404(b) evidence was admissible to prove Verde's intent and remand for a new trial, leaving open the possibility that the trial court could determine that the State's evidence is admissible under the "doctrine of chances" as proof that N.H. did not fabricate Verde's act of abuse.

II

¶ 14 Our analysis must begin with the text of the governing rules of evidence. The principal rule in play here is 404(b), which states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, ***678** plan, knowledge, identity, or absence of mistake or accident.

UTAH R. EVID. 404(b) (2005). [2]

[3] **[4]** ¶ 15 Under this rule, the admissibility of prior misconduct evidence depends on its avowed purpose. When such evidence is offered to suggest action in conformity with a person's alleged bad character, it is inadmissible under the rule. When past misconduct evidence is offered for any other purpose, on the other hand, it is admissible. The rule lists examples of proper purposes—to establish motive, opportunity, intent, etc.—but the list is illustrative and not exclusive. So long as the evidence is not aimed at suggesting action in conformity with bad character, it is admissible under rule 404(b).

¶ 16 That much is clear. The difficulty in applying this simple rule, however, springs from the fact that evidence of prior bad acts often will yield dual inferences—and thus betray both

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

[5] **[6]** ¶ 17 Yet the language and structure of rule 404(b) require the court to make such distinctions. Fidelity to the rule requires a threshold determination of whether proffered evidence of prior misconduct is aimed at proper or improper purposes. *See State v. Nelson–Waggoner,* 2000 UT 59, 6 P.3d 1120. If such evidence is really aimed at establishing a "defendant's propensity to commit crime," it should be excluded despite a proffered (but unpersuasive) legitimate purpose. *See State v. Decorso,* 1999 UT 57, ¶¶ 21–25, 993 P.2d 837. And even if 404(b) evidence appears to have a dual purpose—to be aimed at both proper and improper inferences—it may nonetheless be excluded under rule 403 if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." UTAH R. EVID. 403 (2005).

[7] ¶ 18 Thus, when prior misconduct evidence is presented under rule 404(b), the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. And even if the evidence may sustain both proper and improper inferences under rule 404(b), the court should balance the two against each other under rule 403, excluding the 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. Such weighing 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.

[8] ¶ 19 A district court's decision to admit evidence under rule 404(b) is entitled to some deference. But such a decision can withstand our review only if the evidence falls within the bounds marked by the legal standards set forth in the rules of evidence. And the question in this case is whether the ***679** State's evidence fell within the permissible range.

¶ 20 The State seeks to defend the admissibility of the 404(b) evidence offered in Verde's trial on three grounds: (a) that it was offered to establish Verde's specific intent, (b) that it demonstrated his plan to engage in criminal activity, and (c) that it was presented to rebut Verde's charge of fabrication. We reject the first two grounds and accordingly reverse and remand for a new trial, as these were the grounds on which the evidence was admitted at trial. As to the third ground, we acknowledge that evidence of Verde's prior misconduct could potentially be admitted to rebut a charge of fabrication, but decline to affirm on that basis in the absence of any indication in the record that the district court was asked to conduct the careful weighing required to sustain the admission of such evidence in a case like this one. Thus, on this issue, we leave it to the district court on remand to decide on the admissibility of evidence of Verde's prior misconduct under the "doctrine of chances" as explained below.

A

¶ 21 The first ground put forward by the State for admitting evidence of Verde's past misconduct is its alleged relevance to his state of mind in committing the specific intent crime of child sex abuse. This ground was embraced by the district court and affirmed by the court of appeals, which concluded that a not-guilty plea necessarily puts the question of intent at issue, opening the door to "evidence of other offenses to establish the element of intent even if the defendant has not contested his or her mental state." *State v. Verde,* 2010 UT App 30, ¶ 18, 227 P.3d 840 (internal quotation marks omitted). Because Verde entered a plea of not guilty, the prosecution was required to prove "not only that he 'touch[ed] the ... genitalia of a child' but also that he did so 'with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person.' " *Id.* (alterations in original) (quoting UTAH CODE § 76–5–404.1(2)). And because the prior bad acts evidence purportedly was relevant to Verde's intent, the court of appeals upheld its admissibility under the "not guilty rule." *See id.*

[9] **[10]** ¶ 22 We find the premises of the not-guilty rule unpersuasive and accordingly reject it as a principle of Utah law. A not-guilty plea technically puts every element of a crime at issue. But the technical relevance of evidence of a defendant's intent is not enough to justify the admissibility of evidence of prior bad acts purportedly aimed at establishing intent under rule 404(b). [3] Fidelity to the integrity of the rule requires a careful evaluation of the true—and predominant—purpose of any evidence proffered under rule 404(b). Thus, if proof of intent is merely a ruse, and the real effect of prior misconduct evidence is to suggest a defendant's action in conformity with alleged bad character, the ruse is insufficient and the evidence should not be admitted. That may be because the court determines that the true purpose of the evidence is an impermissible one under rule 404(b). Or it could be on the ground that any permissible purpose is outweighed by its propensity for an improper inference or for jury confusion about its real purpose.

[11] ¶ 23 Either way, the admissibility of prior misconduct evidence cannot be sustained under rule 404(b) on the mere basis of a defendant's not-guilty plea. As Judge McHugh noted in her concurring opinion below, the "not guilty rule" is an undisciplined substitute for careful analysis under rule 404(b). [4] "[M]echanical reliance" on the rule does not "reflect the sort of critical evaluation" of the prosecution's purpose for offering ***680** 404(b) evidence that is required by the language and structure of the rule. [5]

[12] ¶ 24 We accordingly repudiate it. Instead of relying reflexively on the broad implications of a not-guilty plea, courts in Utah should evaluate the true purpose of evidence of past misconduct, determining at the threshold whether the evidence is presented for a proper purpose, or only for the purpose of suggesting an improper inference of action in conformity with alleged bad character. And even if the court finds both legitimate and improper purposes for such evidence, the court should still weigh the proper and improper uses of 404(b) evidence and exclude it under rule 403 where the terms of that rule so require. Applying these standards, we conclude that the evidence of Verde's prior misconduct was not properly admissible to establish his specific intent —despite the fact that his not-guilty plea technically put his intent at issue.

¶ 25 First, we find it difficult to characterize the true purpose of the 404(b) evidence introduced at trial as permissibly aimed at establishing Verde's intent. Aside from his not guilty plea, Verde did not contest intent at trial. *See id.* ¶¶ 17–18. Instead, his primary defense was that he never touched N.H.'s genitalia and that N.H. fabricated his testimony of that *actus reus*. *Id.* In fact, Verde offered to stipulate to his intent in his response to the State's motion in limine, asserting that "if the jury concludes that the touching of N.H. occurred, defendant is willing to stipulate that the defendant did it with the intent to arouse or gratify the sexual desire of any person." And, as even the State admits, intent is inferable from proof that Verde groped N.H.'s genitalia. In these circumstances, it's hard to imagine a jury that would conclude that Verde committed the *actus reus* but with an innocent intent.

¶ 26 Where intent is uncontested and readily inferable from other evidence, 404(b) evidence is largely tangential and duplicative. [6] It is accordingly difficult to characterize its purpose as properly aimed at establishing intent. In context, it seems much more likely that it was aimed at sustaining an impermissible inference that Verde acted in conformity with the bad character suggested by his prior bad acts.

¶ 27 The State resists this conclusion on the ground that Verde made no "enforceable" stipulation of intent and could have reneged on his pretrial offer. But it was the State that refused Verde's offer to formally stipulate intent, and at oral argument in this court the State could identify no legitimate reason for rejecting that offer. That failure is telling. It reinforces the conclusion that the prosecution's true purpose in offering evidence of Verde's prior misconduct was to invite the jury to make the kind of character inference that is proscribed under rule 404(b).

[13] ¶ 28 In so concluding, we do not imply that the prosecution bears an obligation to accept a defendant's offer to stipulate. [7] To the contrary, the prosecution retains wide discretion to reject such an offer, which it might legitimately do, for example, to preserve the right to present evidence with broad "narrative value" beyond the establishment of particular elements of a crime. As the United States Supreme Court put it, "a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters" in the prosecution's case. *Old Chief v. United States,* 519 U.S. 172, 189, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Evidence may thus be appropriately ***681** aimed at completing the "missing chapters" in the prosecution's case, and the prosecution may refuse an offer to stipulate to preserve its ability to tell a complete story.

¶ 29 Sometimes, however, the evidence in question has no legitimate narrative value, as in cases where it is not plausibly linked to any charged conduct. That will often be the case for evidence of prior misconduct. Such evidence may be worse than immaterial to a legitimate narrative. It may risk creating an alternative, illegitimate narrative—that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character in any event.

¶ 30 Absent any legitimate explanation for the prosecution's rejection of the defendant's offer to stipulate, we view this rejection to reinforce the conclusion that the prosecution's purpose was not to tell a legitimate narrative to the jury but instead to present an improper one. So, while the state was free to reject Verde's offer to stipulate, it was not free to distance itself from the probative implications of that decision, which in our view thoroughly undermine the State's position on appeal.

[14] ¶ 31 Second, even if the past misconduct evidence in this case could plausibly be deemed to have been aimed at a legitimate purpose under rule 404(b), it would still fail under the balancing framework required under rule 403. Specifically, and for all the reasons detailed above, we conclude that any legitimate tendency the 404(b) evidence had to tell a narrative of Verde's specific intent was minimal at best. And we likewise conclude that any such legitimate purpose is far outweighed by the obvious, illegitimate one of suggesting action in conformity with bad character.

¶ 32 We accordingly conclude that the district court abused its discretion in admitting evidence of Verde's prior misconduct to establish his specific intent. That evidence was not plausibly aimed at a proper purpose, and in any event any such proper purpose was outweighed by an illegitimate effect.

B

[15] **[16]** ¶ 33 The second ground put forward by the State for admitting evidence of Verde's prior bad acts is its alleged relevance in demonstrating his "plan" to "entic[e] teenage males to be his friends with the motive of exploiting their trust for his sexual gratification." [8] This basis was embraced by the district court, but not addressed by the court of appeals. We reject this as a ground for admitting evidence of past misconduct in this case, as the evidence presented at trial did not legitimately establish a "plan" but was instead effectively aimed at demonstrating mere propensity to act in conformity with bad character.

¶ 34 Under the classic formulation of the rule, prior misconduct evidence can demonstrate a "plan" only where the defendant's "preconceived plan ... encompasses all of the acts" in an overarching design. DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 9.4.2 (2009). This standard requires that

> all the crimes—both charged and uncharged—are the product of some prior, conscious resolve in the accused's mind. The accused formulates a single, overall grand design that encompasses both the charged and uncharged offenses. That design is overarching; all the crimes are integral components or portions of the ***682** same plan. Each crime is a step or stage in the execution of the plan. Each is a means to achieving the same goal. [9]

¶ 35 This type of plan evidence is admissible because it is based on the permissible inference that, regardless of character, a person who has formulated a plan is more likely to carry out the elements of the plan. *Id.* § 9.1. [10] Such evidence is thus relevant without implicating a forbidden inference of action in conformity with immoral character.

¶ 36 We adopted this approach in *State v. Featherson,* 781 P.2d 424, 429 (Utah 1989), *abrogated on other grounds by State v. Doporto,* 935 P.2d 484 (Utah 1997). There, the defendant was charged with sexual assault. In the trial on that offense, the court allowed evidence of prior uncharged sexual assaults on the ground that they demonstrated that the defendant committed each act under a common plan and thus had the requisite state of mind. *Id.* at 425, 429. We reversed, concluding that the evidence was inadmissible because it did not "qualify as links in a chain forming a common design." *Id.* at 429 (internal quotation marks omitted). And absent such a scheme or plan linking the prior acts and the charged offense, we held that the evidence proved

"only a propensity, proclivity, predisposition or inclination to commit" sexual assault, rendering it inadmissible under rule 404(b). *Id.* (internal quotation marks omitted).

¶ 37 In so holding, we cited favorably *People v. Tassell,* 36 Cal.3d 77, 201 Cal.Rptr. 567, 679 P.2d 1, 7–8 (1984), *overruled by People v. Ewoldt,* 7 Cal.4th 380, 27 Cal.Rptr.2d 646, 867 P.2d 757 (1994), in which the California Supreme Court adopted the narrow or classic rule for admissibility of plan evidence. *See Featherson,* 781 P.2d at 429. The *Tassell* court concluded that evidence of a common scheme is admissible only if it reveals a single conception or plot of which the charged and uncharged crimes are individual manifestations. Absent such a grand design, talk of common plan or scheme is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility—the defendants disposition. *Tassell,* 201 Cal.Rptr. 567, 679 P.2d at 5 (citation and internal quotation marks omitted).

¶ 38 *Tassell* was subsequently overruled by *Ewoldt,* 27 Cal.Rptr.2d 646, 867 P.2d at 759. In *Ewoldt,* the court abandoned the requirement that plan evidence reveal a single, continuing conception or plot. *Id.* at 767. Instead, mere similarity between uncharged and charged acts was deemed sufficient for admissibility as evidence of a plan "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *Id.* at 770. (internal quotation marks omitted). Thus, in California, episodes of misconduct unlinked by any overarching plan are admitted as evidence of a "general plan" and thus that the defendant acted in conformity with that plan.

¶ 39 The State heralds the *Ewoldt* rule as the more liberal or modern view and invites us to adopt it. [11] We decline to do so and instead confirm our holding in *Featherson.* Evidence of a general plan to commit crimes with common features is perilously close to evidence of a general disposition to commit crime. Any difference between the two concepts is extremely subtle and quite likely to be lost on a jury. [12] Moreover, while repeated ***683** commission of a crime is only weak evidence of a plan, it gives rise to a strong—and impermissible—propensity inference. A jury presented with evidence of repetitive criminal acts under the theory that the defendant had a general plan to commit similar crimes may find the forbidden inference hard to resist. [13]

¶ 40 Under the Utah standard adopted in *Featherson* and further clarified and confirmed here, the evidence of Verde's prior misconduct was not relevant to establish a "plan" to commit similar crimes, and its admissibility accordingly cannot be affirmed on that basis. There is no suggestion of a prior, conscious resolve on Verde's part to formulate an overarching grand design encompassing both the charged and uncharged offenses. In fact, the "victims" of Verde's past encounters were not even minors like N.H. was. They were adults when Verde is alleged to have sexually assaulted them. And of course an attempt to entice an adult into a sexual relationship is hardly equivalent to the sexual enticement of a child. The age difference is highly significant. It undermines any suggestion of a plan by Verde to engage in the criminal conduct he is accused of here.

¶ 41 While the evidence of Verde's prior misconduct only weakly suggests a plan, it would strongly suggest to the jury the likelihood that Verde may have acted in conformity with the bad character implied by his prior acts. [14] Under the circumstances, this would pose an untenable risk of confusing jurors as to the real purpose for which the evidence was offered and of swaying jurors to base a verdict on the strong inference of action in conformity with bad character. If we adopted the *Ewoldt* approach of routinely admitting powerful propensity evidence under the guise of anemic evidence of a plan, we would "threaten[ ] to undo the essential protection that the character evidence prohibition is designed to afford an accused." [15] This we decline to do.

¶ 42 Under *Ewoldt,* evidence that a defendant had committed three D.U.I.s on the same road (perhaps even in the same car, with the same type of alcohol, on the same day of the week) presumably could be offered to prove the defendant had a plan to drive while intoxicated. And evidence that a defendant frequently possessed controlled substances could be offered to prove a plan to use illegal drugs. The undue prejudice inherent in proof of this sort of general plan will nearly always outweigh any legitimate probative value, and we accordingly repudiate it.

¶ 43 In support of its contrary view, the State cites rule 404(c) of the Utah Rules of Evidence as an example of the "liberal or modern" rule set forth in *Ewoldt.* That provision, as the State notes, expressly endorses the admission of evidence of certain prior bad acts similar to the crime in question—those involving "acts of child molestation" in a "case in which a defendant is accused of child molestation." UTAH R. EVID. 404(c)(1). That provision, however, only undermines the State's position. It does so by confirming that any liberalizing trend toward greater admissibility of prior bad acts evidence

may be accomplished through express amendments to our rules of evidence, *see* FED.R.EVID. 413, 414, 415, an avenue that counsels against the distortion of the otherwise general rule against propensity inferences under rule 404(b). We accordingly adhere to the rule embraced by this court in *Featherson,* 781 P.2d at 429; *see supra* ¶¶ 34–37, a standard the State cannot satisfy here.

C

¶ 44 Lastly, the State contends that its 404(b) evidence was admissible to prove that Verde committed the *actus reus* in question by rebutting Verde's theory that N.H. fabricated his testimony of the sexual assault. The fabrication question was an issue at trial. ***684** In his opening statement, Verde's counsel asserted that N.H. was a "pathological liar" who had invented his account of Verde's sexual abuse. The State countered by pointing to evidence of Verde's prior sexual assaults, which in its view made it more likely that N.H.'s testimony was, in fact, truthful. On appeal, the court of appeals majority concluded that rebutting the defense of fabrication was an "additional ground for admitting the prior bad acts evidence," *State v. Verde,* 2010 UT App 30, ¶ 19 n. 6, 227 P.3d 840 (citing *State v. Bradley,* 2002 UT App 348, 57 P.3d 1139), a conclusion adopted by Judge McHugh in her separate concurrence, *id.* ¶ 43 (McHugh, J., concurring) ("[A] proper purpose for bad acts evidence is to rebut a defense of fabrication.").

¶ 45 In defending the admissibility of the prior misconduct evidence on this basis, the State reasons that "while it may be plausible that one victim might fabricate such charges, it is highly unlikely that three [victims] would independently fabricate" similar accounts of unwanted sexual contact. In response, Verde argues that uncharged misconduct evidence offered to rebut a claim of fabrication is inadmissible because it "qualifies as evidence of propensity."

¶ 46 As a threshold matter, we acknowledge the theoretical possibility that evidence of prior misconduct could be admitted under rule 404(b) to establish commission of a criminal *actus reus* by rebutting a charge of fabrication. Because this argument was not presented by the State in Verde's trial, however, we reject it as a ground for affirmance. To provide guidance for the parties on remand and to explain our basis for reversing the court of appeals, we clarify the legal standards that govern in this area.

[17] ¶ 47 In some circumstances, evidence of prior misconduct can be relevant under the so-called "doctrine of chances." This doctrine defines circumstances where prior bad acts can properly be used to rebut a charge of fabrication. It is a theory of logical relevance that "rests on the objective improbability of the same rare misfortune befalling one individual over and over." [16] Under this analysis, the State suggests that evidence of past misconduct may "tend [ ] to corroborate on a probability theory" that a witness to a charged crime has not fabricated testimony, because it is "[un]likely ... that [several] independent witnesses would ... concoct similar accusations."

¶ 48 One court explained the thinking behind this theory as follows:

> [S]uppose you lose your horse; you find it in the possession of A.; he asserts that he took the horse by mistake; but you find that about the same time he took horses belonging to several others; would not the fact that he took others about the same time be proper evidence to be considered in determining whether the particular taking was or not by mistake? The chances of mistake decrease in proportion as the alleged mistakes increase. [17]

A parallel explanation has been offered in terms more directly applicable here:

> When one person claims rape, the unusual and abnormal element of lying by the complaining witness may be present. But when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story. [18]

¶ 49 This reasoning starts with the low baseline probability that a man would take a horse by mistake or that an innocent person would be falsely accused of sexual assault—or, to cite additional examples from actual cases, that a child would die in her sleep [19] or ***685** that a spouse would drown in the bathtub. [20] The second step in the analysis considers the effect on these already low probabilities of additional, similar occurrences: As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. [21] An innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar "accidents" occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. [22] At some point, " '[t]he fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual or objectively improbable to be believed.' " *State v. Johns,* 301 Or. 535, 725 P.2d 312, 322–23 (1986) (quoting 8 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 5:05 (1984)). [23]

¶ 50 Propensity inferences do not pollute this type of probability reasoning. "The question for the jury is not whether the defendant is the type of person" who, for example, "sets incendiary fires or murders his relatives. The question is whether it is objectively likely that so many fires or deaths could be attributable to natural cases. It is that objective unlikelihood that tends to prove human agency, causation, and design." [24] The inferences required follow this pattern:

— evidence of prior similar tragedies or accusations;

— an intermediate inference that the chance of multiple similar occurrences arising by coincidence is improbable; and

— a conclusion that one or some of the occurrences were not accidents or false accusations. [25]

¶ 51 Under this pattern, prior misconduct evidence may tend to prove that the defendant more likely played a role in the events at issue than that the events occurred coincidentally. [26] And because the evidence tends to prove a relevant fact without relying on inferences from the defendant's character, the evidence is potentially admissible. True, there is a risk of an undue inference that the defendant committed each act because of the defendant's immoral character, but a permissible inference is also possible—under the inferential chain outlined above.

¶ 52 Many courts, in Utah and elsewhere, have employed this "doctrine of chances" reasoning to analyze the relevance of uncharged misconduct evidence when a defense of fabrication has been raised. In *State v. Bradley,* for example, our court of appeals reasoned that evidence of a prior, independent allegation of sexual assault decreased the probability that the charged sexual assault was fabricated, as the defendant claimed. 2002 UT App 348, ¶ 28, 57 P.3d 1139. In the court's view, the defendant's fabrication "theory [was] diminished by [the uncharged conduct evidence] because it is more difficult to believe that [two] mothers were motivated to, and were successful in, convincing their children to fabricate the allegations of sexual abuse." *Id.*

***686** ¶ 53 Probability reasoning is also the best understanding of our analysis in *State v. Nelson–Waggoner,* 2000 UT 59, 6 P.3d 1120. There we noted the similarities among the testimony of two women who alleged that the defendant had previously raped them and the testimony of the victim of the charged rape. *Id.* ¶ 25. And we concluded that the uncharged misconduct evidence was probative of whether the defendant engaged in forceful and nonconsensual sex with the victim because it "laid out a pattern of behavior." *Id.* While we did not explicitly refer to the doctrine of chances, the relevance of the evidence in that case was based on the low probability that multiple victims would independently accuse the defendant of similar assaults. Many other courts have adopted the doctrine in these and similar contexts. [27]

¶ 54 The court of appeals in this case affirmed the admissibility of evidence of Verde's prior misconduct on an alternative ground resting on a vague notion of this doctrine of chances. Without denominating the doctrine as such or elaborating on its elements, the court of appeals held that the evidence was admissible to rebut Verde's charge of fabrication. *Verde,* 2010 UT App 30, ¶ ¶ 19 n. 6, 43, 227 P.3d 840. The State urges the same result here, asserting that Verde's prior acts properly rebut his charge of fabrication because they are "completely independent of the witness to the charged crime and to each other."

[18] ¶ 55 We find the grounds put forward by the State and adopted by the court of appeals insufficient on the current record to affirm the admissibility of evidence of Verde's prior misconduct. A charge of fabrication is insufficient by itself to

open the door to evidence of any and all prior bad acts. As with other questions arising under rule 404(b), care and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts, and to limit the factfinder's use of the evidence to the uses allowed by rule.

¶ 56 We accordingly reverse the court of appeals' decision on this issue and in so doing offer some clarifying limitations on the use of evidence to rebut a charge of fabrication to guide the parties and the district court on remand. The relevant limitations are found in the prevailing case law on the doctrine of chances, which we adopt and explain in the paragraphs that follow.

[19] ¶ 57 Under the doctrine of chances, evidence offered to prove *actus reus* must not be admitted absent satisfaction of four foundational requirements,[28] which should be considered within the context of a rule 403 balancing analysis. First, materiality: The issue for which the uncharged misconduct evidence is offered "*must be in bona fide dispute.*"[29] We have examined this requirement above and need not address it further here. *See supra* ¶¶ 21–32.

[20] ¶ 58 Second, similarity: "*Each uncharged incident must be roughly similar to the charged crime.*"[30] The required similarity ***687** here need not be as great as that necessary to prove identity under a "pattern" theory. But there must be some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence—and thus an increased probability that the defendant committed all such acts:

> [T]he more similar, detailed, and distinctive the various accusations, the greater is the likelihood that they are not the result of independent imaginative invention. It is less likely that two accusers would independently manufacture similar stories that are detailed and unusual than that they would coincidentally tell the same commonplace lie.[31]

¶ 59 Any prescription of a threshold of similarity for admitting similar accusations evidence is inevitably imprecise.[32] But we can say that the similarities between the charged and uncharged incidents must be "sufficient to dispel any realistic possibility of independent invention."[33] All of the incidents must at least "fall into the same general category."[34]

[21] ¶ 60 Third, independence: Where the prior uncharged conduct is an accusation of sexual assault, each accusation must be independent of the others. This is because "the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event."[35] And the existence of collusion among various accusers would render ineffective the comparison with chance repetition.

[22] ¶ 61 Fourth, frequency: The defendant must have been accused of the crime or suffered an unusual loss "*more frequently than the typical person endures such losses accidentally.*"[36] It is this infrequency that justifies the probability analysis underlying the doctrine of chances: "The probability that any given individual who might be accused of rape or child abuse will be falsely accused of those crimes is low.... Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the probability that the same innocent person will be the object of multiple false accusations is extremely low."[37]

¶ 62 Because the trial court is in a superior position to make an initial exercise of discretion to conduct the weighing called for under rules 404(b) and 403, we remand this case for a new trial. At the retrial of this matter, if the state chooses to pursue this theory, the district court should use the standards we have articulated to decide whether evidence of Verde's uncharged sexual assaults may be presented to the jury. Thus, the district court will have to weigh carefully the materiality of and the similarities and the differences between Mr. Verde's alleged advances to and sexual abuse of a twelve-year-old child and the alleged unwanted advances to and touching of two adults. And it will have to consider the independence and the frequency of such alleged acts. Though we have articulated standards to help the parties engage in these discussions on remand, we do so without opining on the admissibility of the prosecution's prior misconduct evidence under the "doctrine of chances." We also emphasize that our opinion is not at all aimed at influencing the district court or at expressing a view on the ultimate viability of this theory on remand.

III

¶ 63 We conclude that the court of appeals erred in affirming the admissibility of evidence of Verde's uncharged misconduct offered to prove his specific criminal intent, which was not a legitimately disputed issue at trial. We likewise hold that the State's evidence was not admissible to prove that ***688** Verde acted in conformity with a plan to entice and abuse young men, as the evidence

did not demonstrate that Verde entertained a preconceived, overarching design to commit the acts in question. We accordingly reverse and remand for a new trial, leaving open the possibility that the district court may deem the prior misconduct evidence admissible under the "doctrine of chances," as that theory is explained above.

Justice LEE authored the opinion of the Court, in which Chief Justice DURRANT, Associate Chief Justice NEHRING, Justice DURHAM, and Justice PARRISH joined.

All Citations

296 P.3d 673, 718 Utah Adv. Rep. 115, 2012 UT 60

Footnotes

1 The State also sought to elicit testimony from a fourth alleged victim, D.J. But the court concluded that the probative value of D.J.'s duplicative testimony was substantially outweighed by risk of unfair prejudice and was thus inadmissible under rule 403.

2 We quote the version of our evidentiary rules in effect when Verde was tried. Though 2011 amendments altered the language of some rules—including rules 403 and 404—these changes were intended only "to make [the rules] more easily understood and to make style and terminology consistent throughout the rules." *See* UTAH R. EVID. 404(b) 2011 advisory committee note. So our analysis here presumably will hold under the newly amended rules, although our discussion is addressed on its face to the rules as they stood at the time of trial.

3 *See Tanberg v. Sholtis,* 401 F.3d 1151, 1167–68 (10th Cir.2005) (other uses of excessive force not admissible to prove intent in civil rights action where officer did not dispute that he intended to use force); *Thompson v. United States,* 546 A.2d 414, 422–23 (D.C.1988) (whether intent is a contested issue "depends, not on the statutory definition of the offense, but on the circumstances of the case and on the nature of the defense[s]").

4 *State v. Verde,* 2010 UT App 30, ¶¶ 27, 29, 227 P.3d 840. (McHugh, J., concurring).

5 *Id.* ¶ 40 (internal quotation marks omitted).

6 *See State v. Shickles,* 760 P.2d 291, 295 (Utah 1988) (instructing courts to examine the prosecution's "need for the evidence" when engaging in rule 403 balancing (internal quotation marks omitted)), *abrogated on other grounds by State v. Doporto,* 935 P.2d 484 (Utah 1997).

7 *See State v. Florez,* 777 P.2d 452, 456 (Utah 1989) (affirming the trial court's refusal to order the prosecution to accept a stipulation because "[t]he State has the right to prove every essential element of a crime in the most convincing manner within the bounds of the rules of evidence and fair play"); *State v. Bishop,* 753 P.2d 439, 475 (Utah 1988) ("As a general rule, a party may not preclude his adversary's offer of proof by admission or stipulation."), *overruled on other grounds by State v. Menzies,* 889 P.2d 393 (Utah 1994).

8 The State also alludes vaguely to the notions that Verde's past misconduct might demonstrate "preparation" for or a "pattern" of the activity he is charged with in this case, but neither of those rubrics fit this case. Evidence of "preparation" would indicate steps to facilitate the commission of the crime at issue in the trial, as where a defendant is shown to have stolen a cutting torch that is used in a subsequent burglary. *See Lewis v. United States,* 771 F.2d 454, 456 (10th Cir.1985). "Pattern" evidence, by contrast, is implicated where the uncharged and charged conduct is "peculiarly distinctive" and thus likely to have been committed by the same individual. *State v. Featherson,* 781 P.2d 424, 428–29 (Utah 1989), *abrogated on other grounds by State v. Doporto,* 935 P.2d 484 (Utah 1997); *see also, e.g., State v. Decorso,* 1999 UT 57, ¶¶ 29–35, 993 P.2d 837 (uncharged misconduct evidence admissible to prove identity because of the "signature-like" similarity between the acts). This case involves neither preparation nor a pattern of this sort, but at best a "plan" by the defendant.

9 Miguel A. Mendez & Edward J. Imwinkelried, People v. Ewoldt: *The California Supreme Court's About–Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct,* 28 LOY. L.A. L.REV.. 473, 480–81 (1995) (footnotes omitted).

10 *See also* 22 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5244 (1st ed.) ("The justification for admitting evidence of other crimes to prove a plan is that this involves no inference as to the defendant's character; instead his conduct is said to be caused by his conscious commitment to a course of conduct of which the charged crime is only a part." (footnote omitted)).

11 The State also asserts that we adopted this more "modern" view in *State v. Nelson–Waggoner,* 2000 UT 59, 6 P.3d 1120, but the best reading of that case is that the evidence was admitted not as plan evidence, but as evidence rebutting the defendant's theory that the victim fabricated the charged conduct. We discuss this theory below in paragraphs 44–62.

12 DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS § 9.2.2 (2009).

13 *See* Mendez & Imwinkelried, *supra* ¶ 34 n. 9, at 501–03 (discussing the "[i]ntolerable [r]isks [p]osed by the *Ewoldt* [t]est").

14 *See id.* at 501 ("Under *Ewoldt* the inference that the accused committed the charged and uncharged offenses as part of one plan is so weak as to be unacceptably speculative.... In contrast, a showing of common features is highly probative of the accused's disposition to engage in the type of criminal conduct with which he is charged.").

15 *Id.* at 500.

16 Mark Cammack, *Using the Doctrine of Chances to Prove* Actus reus *in Child Abuse and Acquaintance Rape:* People v. Ewoldt *Revisited,* 29 U.C. DAVIS L.REV. 355, 388 (1996).

17 *United States v. Russell,* 19 F. 591, 592 (W.D.Tex.1884); *see also* LEONARD, *supra* ¶ 39 n. 12, § 7.3.2 (citing *United States v. Russell*).

18 *People v. Balcom,* 7 Cal.4th 414, 27 Cal.Rptr.2d 666, 867 P.2d 777, 787 (1994) (Arabian, J., concurring).

19 *See United States v. Woods,* 484 F.2d 127, 135 (4th Cir.1973) ("[W]e think that the evidence would prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant's wrongdoing....").

20 See the English "Brides in the Bath" case, *Rex v. Smith,* 11 Crim.App. 229, 84 L.J.K.B. 2153 (1915).

21 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4:01 (rev. ed. 2004).

22 *See* LEONARD, *supra* ¶ 39 n. 12, § 7.3.2 (discussing Wigmore's classic example of a hunter "mistakenly" shooting toward a hunting partner multiple times).

23 Or, as one court put it: "The man who wins the lottery once is envied; the one who wins it twice is investigated." *United States v. York,* 933 F.2d 1343, 1350 (7th Cir.1991), *overruled on other grounds by Wilson v. Williams,* 182 F.3d 562, 567 (7th Cir.1999).

24 1 IMWINKELRIED, *supra* ¶ 49 n. 21, § 4:01.

25 *See* 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, 436 (2006).

26 *See id.* at 436–39 (examining the doctrine's non-character rationale and refuting arguments that character inferences and implicit improbability reasoning both ultimately require a jury to use a "defendant's subjective character as a predictor of conduct").

27 *See, e.g., Westfield Ins. Co. v. Harris,* 134 F.3d 608, 615 (4th Cir.1998) ("[T]he more often an accidental or infrequent incident occurs, the more likely it is that its subsequent reoccurrence is not accidental or fortuitous."); *United States v. York,* 933 F.2d 1343, 1350 (7th Cir.1991) (discussing the doctrine of chances and reasoning that "[i]t is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision."), *overruled on other grounds by Wilson v. Williams,* 182 F.3d 562 (7th Cir.1999); *People v. Everett,* 250 P.3d 649, 656–58 (Colo.App.2010) (examining and applying the doctrine of chances); *Wynn v. State,* 351 Md. 307, 718 A.2d 588, 607 (1998) (examining the doctrine of chances, collecting cases applying the doctrine, and explaining that "[i]t is the objective implausibility of the occurrence, *sans* nefarious activity, which rebuts the claim of an innocent occurrence"); *State v. Johns,* 301 Or. 535, 725 P.2d 312, 321–27 (1986) (examining and applying the doctrine of chances).

28 *See* 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, 588–92 (1990); CAMMACK, *supra* ¶ 47 n. 16, at 404; *see also Everett,* 250 P.3d at 658–60 (adopting and applying the foundational requirements suggested in Imwinkelried, *supra* ¶ 50 n. 25, at 589).

29 Imwinkelried, *supra* ¶ 57 n. 28, at 592.

30 *Id.* at 595.

31 Cammack, *supra* ¶ 47 n. 16, at 404.

32 *Id.* at 405.

33 *Id.* at 405–06.

34 Imwinkelried, *supra* ¶ 57 n. 28, at 590.

35 Cammack, *supra* ¶ 47 n. 16, at 402; *see also id.* at 397–04 (explaining the "product rule" used in calculating probabilities and the necessity of independent events for purposes of the product rule).

36 *See* Imwinkelried, *supra* ¶ 57 n. 28, at 590.

37 Cammack, *supra* ¶ 47 n. 16, at 396–97.

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444 P.3d 553
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Anthony Tyrone LANE, Appellant.

No. 20160930-CA
|
Filed May 23, 2019

Synopsis

Background: Defendant was convicted in the Third District Court, Salt Lake Department, Katie Bernards-Goodman, J., No. 161901895, of aggravated assault and possession of dangerous weapon by a restricted person, and he appealed.

Holdings: The Court of Appeals, Appleby, J., held that:

[1] trial court applied the wrong legal standard when it admitted prior act evidence, under the doctrine of chances, without conducting balancing analysis;

[2] prior act evidence should have been excluded because prejudicial inference that defendant's character predisposed him to get in knife fights substantially outweighed State's proffered justifications for admitting evidence;

[3] defendant was prejudiced by erroneous admission of prior act evidence; and

[4] fact that trial judge found defendant was "a danger to society," in context of considering whether to release defendant before trial, did not show that judge was biased.

Reversed and remanded.

Harris, J., filed concurring opinion.

West Headnotes (24)

[1] Criminal Law
Reception and Admissibility of Evidence

Appropriate standard of review for district court's decision to admit or exclude evidence is abuse of discretion.

[2] Criminal Law
Reception and Admissibility of Evidence

District court abuses its discretion when it admits or excludes evidence under the wrong legal standard.

[3] Criminal Law
Prejudice to rights of party as ground of review

Reversal is warranted if, absent the evidentiary error, there is reasonable likelihood of more favorable result for the complaining party, and therefore, appellate court's confidence in the jury's verdict is undermined.

[4] Criminal Law
Counsel for accused

Ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[5] Criminal Law
Criminal act or omission

Person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts. Utah R. Evid. 404(b).

[6] Criminal Law
Other Misconduct Showing Absence of Mistake or Accident

Doctrine of chances is used to admit otherwise excludable prior act evidence. Utah R. Evid. 404(b).

1 Cases that cite this headnote

[7] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

"Doctrine of chances" is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over.

1 Cases that cite this headnote

[8] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

Doctrine of chances is used in cases that involve rare events happening with unusual frequency.

[9] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

Criminal Law
Similarity to Crime Charged

Evidence admitted under the doctrine of chances must satisfy four foundational requirements, and these include materiality, similarity, independence, and frequency.

1 Cases that cite this headnote

[10] **Criminal Law**
Showing bad character or criminal propensity in general

Criminal Law
Other Misconduct Showing Motive

Criminal Law
Other Misconduct Showing Intent

Evidence of a person's past misconduct may plausibly be aimed at establishing motive or intent, but that same evidence may realistically be expected to convey a simultaneous inference that the person behaved improperly in the past and might be likely to do so again in the future, and if such evidence is really aimed at establishing a defendant's propensity to commit a crime, it should be excluded despite proffered legitimate purpose. Utah R. Evid. 404(b).

[11] **Criminal Law**
Prejudicial effect and probative value

If court finds a proper non-character purpose for prior act evidence, then court must engage in separate balancing analysis to determine if prior act evidence's probative value is substantially outweighed by the danger of unfair prejudice, and weighing this prior act evidence is essential to preserve the integrity of rule, providing that prior act evidence may be admissible to prove motive, opportunity, intent, or preparation; without this balancing analysis, evidence of prior acts could routinely be allowed to sustain inference of action in conformity with bad character so long as proponent of evidence could proffer plausible companion inference that did not contravene the rule. Utah R. Evid. 403, 404(b).

[12] **Criminal Law**
Purposes for Admitting Evidence of Other Misconduct

Criminal Law
Prejudicial effect and probative value

When determining whether to admit prior act evidence, court must determine whether the evidence is offered for a proper non-character purpose, and next, court must find that the evidence's probative value is not substantially outweighed by the danger of unfair prejudice. Utah R. Evid. 403, 404(b).

[13] **Criminal Law**
Prejudicial effect and probative value

Criminal Law
Other Misconduct Showing Absence of Mistake or Accident

Trial court applied the wrong legal standard when it admitted prior act evidence, under the doctrine of chances, without conducting balancing analysis to determine if probative value of prior act evidence was substantially outweighed by danger of unfair prejudice, and

this amounted to an abuse of discretion. Utah R. Evid. 403, 404(b).

1 Cases that cite this headnote

[14] Criminal Law

Prejudicial effect and probative value

Balancing analysis to determine if probative value of prior act evidence is substantially outweighed by danger of unfair prejudice is always required before admitting prior act evidence. Utah R. Evid. 403, 404(b).

[15] Criminal Law

Purposes for Admitting Evidence of Other Misconduct

Criminal Law

Showing bad character or criminal propensity in general

Before admitting prior act evidence, 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 improper inference of action in conformity with a person's bad character. Utah R. Evid. 404(b).

[16] Criminal Law

Prejudicial effect and probative value

Even if prior act evidence may sustain both proper and improper inferences, courts must balance the inferences against each other and exclude prior act 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. Utah R. Evid. 403, 404(b).

[17] Criminal Law

Evidence calculated to create prejudice against or sympathy for accused

Courts should not make a mechanical application of any factors under rule, providing that court may exclude relevant evidence if its probative value is substantially outweighed by danger of unfair prejudice, confusing the issues, or misleading the jury, but, rather, courts should simply apply text of the rule. Utah R. Evid. 403.

[18] Criminal Law

Assault and battery

Criminal Law

Weapons and explosives

Prior act evidence, namely that officer had been called to homeless shelter on report of man with knife and that man was the defendant, who claimed self-defense, and that, on another occasion, defendant had slashed man in face while at shelter, should have been excluded because prejudicial inference that defendant's character predisposed him to get in knife fights and then claim self-defense substantially outweighed State's proffered justifications for admitting the evidence in prosecution of defendant for aggravated assault and possession of dangerous weapon by a restricted person; it was not highly strange or unlikely that defendant would need to defend himself multiple times over years of living in high crime area, and State's remark, during opening statements, that defendant did it again was precisely the type of propensity inference that rule, governing prior act evidence, prohibited. Utah R. Evid. 403, 404(b).

[19] Criminal Law

Showing bad character or criminal propensity in general

Merely stating that prior act evidence is not being offered for propensity purposes does not mean the evidence does not present an improper propensity inference. Utah R. Evid. 404(b).

1 Cases that cite this headnote

[20] Criminal Law

Evidence of other offenses and misconduct

In prosecution of defendant for aggravated assault and possession of dangerous weapon by restricted person, defendant was prejudiced

by erroneous admission of prior act evidence, namely that officer had been called to homeless shelter on report of man with knife and that man was the defendant, who claimed self-defense, and that, on another occasion, defendant had slashed man in face while at shelter, and thus, new trial was warranted; circumstantial evidence presented for defendant's current charges was weak, victim never identified defendant as his attacker, prior act evidence took up significant portion of the two-day trial, and jury instruction did not cure prejudice since instruction told jury it was allowed to consider defendant's propensity for getting in fights and arguing he was acting in self-defense, while simultaneously telling it not to convict defendant because he might have been in fights before and then claimed self-defense. Utah R. Evid. 403, 404(b).

1 Cases that cite this headnote

[21] Criminal Law

Deficient representation and prejudice in general

To succeed on his ineffective assistance of counsel claim, defendant 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. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[22] Criminal Law

Deficient representation in general

To prevail on the first prong of the *Strickland* ineffective assistance of counsel test, defendant must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness. U.S. Const. Amend. 6.

2 Cases that cite this headnote

[23] Judges

Statements and expressions of opinion by judge

Fact that trial judge found defendant was "a danger to society", in the context of considering whether to release defendant before trial, did not show that judge was biased and, thus, should be disqualified; judge was not making a premature determination of defendant's guilt, but, rather, was merely engaging in routine and necessary analysis for purposes of determining defendant's pretrial release status, and jury, not judge, was factfinder in case.

[24] Criminal Law

Judges; recusal

Defendant's trial counsel was not ineffective for not requesting trial judge's disqualification, given that judge's statement that defendant was "a danger to society," in the context of considering whether to release defendant before trial, did not amount to bias requiring disqualification and jury, not judge, was factfinder. U.S. Const. Amend. 6.

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

Attorneys and Law Firms

Teresa L. Welch, Salt Lake City, Attorney for Appellant

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Judge Kate Appleby authored this Opinion, in which Judge Michele M. Christiansen Forster concurred. Judge Ryan M. Harris concurred, with opinion.

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 ***557** 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 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 ***558** 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 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

[1] **[2]** **[3]** ¶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).

[4] ¶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).

***559** 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.

[5] ¶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).

[6] **[7]** **[8]** **[9]** ¶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, 296 P.3d 673. "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, 296 P.3d 673).

[10] ¶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, 296 P.3d 673. "[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).

[11] ¶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 ***560** 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.

[12] **[13]** **[14]** ¶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 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.

[15] **[16]** **[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 improper inference of action in conformity with a person's bad character." *Verde*, 2012 UT 60, ¶ 18, 296 P.3d 673. "[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, 398 P.3d 1032.

[18] ¶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 ***561** the victims' faces in self-defense." The State claimed it was not asserting that Lane "has a propensity for cutting faces."

[19] ¶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.' ").

[20] ¶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,

> ***562** 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.

[21] **[22]** ¶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."

[23] ¶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 ***563** source, not from occurrences in the proceedings before the judge." (quotation simplified)).

[24] ¶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.

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, 441 P.3d 787, 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, 296 P.3d 673; *cf. Hopt v. People*, 120 U.S. 430, 440, 7 S.Ct. 614, 30 L.Ed. 708 (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, 441 P.3d 787 (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 ***564** 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, 296 P.3d 673 (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 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, 441 P.3d 787 (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 ***565** 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, 296 P.3d 673. 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, 441 P.3d 787 (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, 296 P.3d 673 (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 ***566** 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, 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, 296 P.3d 673). 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, 296 P.3d 673, 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 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,' " ***567** 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, 296 P.3d 673. 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.

All Citations

444 P.3d 553, 2019 UT App 86

Footnotes

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.

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.

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 APP 34, ¶ 33 n.51, 398 P.3d 1032. 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, 296 P.3d 673; *State v. Lomu*, 2014 UT App 41, ¶ 33, 321 P.3d 243; *State v. Labrum*, 2014 UT App 5, ¶ 18, 318 P.3d 1151.

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.

5 Rule 403 balancing is always required before admitting evidence under rule 404(b). *See Lomu*, 2014 UT App 41, ¶ 33, 321 P.3d 243 ("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, 318 P.3d 1151 ("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)).

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

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.

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, 193 Vt. 622, 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.

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, 296 P.3d 673, 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, 441 P.3d 787 (Harris, J., concurring), my view is that these decisions may merit reexamination.

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).

441 P.3d 787
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Anthony Charles MURPHY, Appellant.

No. 20170193-CA
|
Filed April 25, 2019

Synopsis

Background: Defendant was convicted in the First District Court, Logan Department, No. 091100683, Thomas Willmore, J., of aggravated sexual assault, aggravated kidnapping, forcible sexual abuse, and aggravated assault. Defendant appealed.

Holdings: The Court of Appeals, Orme, J., held that:

[1] trial court did not abuse its discretion in concluding that probative value of evidence of other allegations of sexual assault made against defendant was not substantially outweighed by danger of unfair prejudice;

[2] defendant was not entitled to mistrial due to victim's statement that defendant's ex-wife shot defendant five times; and

[3] defendant failed to establish ineffective assistance based on counsel's failure to call expert witness to rebut testimony of prosecution's expert witnesses and to find a choking and strangulation expert.

Affirmed.

Harris, J., concurred with opinion.

West Headnotes (29)

[1] Criminal Law
Construction of Evidence

On appeal, courts construe the record facts in a light most favorable to the jury's verdict and recite the relevant facts accordingly.

[2] Criminal Law
Other offenses

Due to a trial court's advantaged position over that of appellate courts to assess the avowed basis for evidence of prior misconduct, and to judge its likely effect in prejudicing or confusing the jury, appellate courts review a trial court's decision to admit evidence under rule on admissibility of evidence of crimes, wrongs, or other acts and rule on exclusion of relevant evidence for prejudice, confusion, waste of time, or other reason for abuse of discretion. Utah R. Evid. 403, 404(b).

[3] Criminal Law
Particular statements, arguments, and comments

Court of Appeals would not address sexual-assault defendant's argument that State committed prosecutorial misconduct when it made inappropriate comments during the rebuttal portion of its closing arguments, where defense counsel did not object to the comments on the ground that they amounted to prosecutorial misconduct and defendant did not argue that an exception to the preservation rule applied.

[4] Criminal Law
Arguments and statements by counsel

Appellate courts will review a trial court's rulings on prosecutorial-misconduct claims for an abuse of discretion.

[5] Criminal Law
Presentation of questions in general

Appellate courts typically review unpreserved issues only when a valid exception to preservation rule applies.

1 Cases that cite this headnote

[6] **Criminal Law**
Issues related to jury trial

Appellate courts review a trial court's ruling on a motion for a mistrial for abuse of discretion and reverse only if the court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial.

1 Cases that cite this headnote

[7] **Criminal Law**
Criminal liability

Appellate court would not address defendant's unpreserved claim that his aggravated kidnapping and aggravated sexual-assault convictions should merge under common-law merger test, even though defendant urged appellate court to review the issue under plain-error and ineffective-assistance-of-counsel exceptions to preservation rule, where defendant focused his argument on the merits of the claim and did not address the issue under the lens of either of those exceptions.

1 Cases that cite this headnote

[8] **Criminal Law**
Review De Novo

A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law which appellate courts consider de novo. U.S. Const. Amend. 6.

[9] **Criminal Law**
Showing bad character or criminal propensity in general

Rule on admissibility of evidence of crimes, wrongs, or other acts generally permits such evidence so long as it has a probative value other than to show an evil propensity or criminal temperament. Utah R. Evid. 404(b).

[10] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

The doctrine of chances, under which a factfinder may infer that a disputed fact is more likely or less likely to be true due to the recurrence of some improbable event, is applied in the context of rule on admissibility of evidence of crimes, wrongs, or other acts. Utah R. Evid. 404(b).

[11] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

The "doctrine of chances," is a theory of logical relevance, which a proponent may use to argue that, using probability reasoning, a factfinder may infer that a disputed fact is more likely or less likely to be true due to the recurrence of some improbable event.

[12] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

As with other evidence of crimes, wrongs, or other acts, courts must undertake a three-step analysis before admitting such evidence under the doctrine of chances. Utah R. Evid. 404(b).

[13] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

The first and second steps of the analysis a court must undertake to admit evidence of crimes, wrongs, or other acts under the doctrine of chances require trial courts to ensure that the evidence is being offered for, and is relevant to, a proper non-character purpose. Utah R. Evid. 402, 404(b).

[14] **Criminal Law**
Other Misconduct Showing Absence of Mistake or Accident

Under the doctrine of chances, determination of whether evidence of crimes, wrongs, or other acts is being offered from, and is relevant to, a proper non-character purpose requires a four-part analysis of (1) materiality, (2) similarity, (3) independence, and (4) frequency. Utah R. Evid. 402, 404(b).

[15] Criminal Law
Other Misconduct Showing Absence of Mistake or Accident

The third step of the analysis a court must undertake to admit evidence of crimes, wrongs, or other acts under the doctrine of chances requires the court to conduct a balancing test, which generally focuses on whether the probative value of the evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Utah R. Evid. 403, 404(b).

[16] Criminal Law
Other Misconduct Showing Absence of Mistake or Accident

Under the doctrine of chances to evaluate admissibility of evidence of crimes, wrongs, or other acts, the focus of the court's balancing of probative value of the evidence against its danger of unfair prejudice is primarily on the risk that the jury may draw an improper character inference from the evidence or that it may be confused about the purpose of the evidence. Utah R. Evid. 403, 404(b).

[17] Criminal Law
Other Misconduct Showing Absence of Mistake or Accident

Under the doctrine of chances to evaluate admissibility of evidence of crimes, wrongs, or other acts, trial courts are not bound to any particular set of factors or elements when balancing the probative value of the evidence against its danger of unfair prejudice and may consider any relevant fact in doing so, including some of the elements of the doctrine of chances' four-part test of materiality, similarity, independence, and frequency. Utah R. Evid. 403, 404(b).

[18] Criminal Law
Sex offenses, incest, and prostitution

Criminal Law
Sex offenses, incest, and prostitution

Criminal Law
Limiting effect of evidence of other offenses

Trial court did not abuse its discretion in concluding that probative value of evidence of other allegations of sexual assault made against defendant, to show defendant's intent and absence of mistake, was not substantially outweighed by danger of unfair prejudice in sexual-assault prosecution, where trial court used reasoning behind doctrine of chances to conclude that the information would be more helpful to a jury than harmful in eliciting truth and trial court twice instructed the jury as to the purpose of the evidence and the limited nature in which the jurors were to consider it. Utah R. Evid. 403, 404(b).

[19] Criminal Law
Custody and conduct of jury

Courts generally presume that a jury will follow the instructions given it.

[20] Criminal Law
Unresponsive, unsolicited, and unexpected testimony

Sexual-assault defendant was not entitled to mistrial due to victim's statement that defendant's ex-wife shot defendant five times, even though one juror asked for the name of defendant's ex-wife after trial court had instructed jury to disregard that statement and even though evidence that ex-wife shot defendant had previously been ruled inadmissible, where statement was made in passing, statement consisted of a single sentence in a trial that

lasted 6 days and had a transcript exceeding 1,000 pages, and overwhelming evidence of defendant's guilt, including testimony of victim and of other women who alleged defendant sexually assaulted them, rendered the statement relatively innocuous.

[21] Criminal Law
Issues related to jury trial

Appellate courts accord great deference to a trial court's ruling on a motion for a mistrial given the advantaged position of the trial judge to determine the impact of events occurring in the courtroom on the total proceedings.

1 Cases that cite this headnote

[22] Criminal Law
Issues related to jury trial

Absent a showing on the record that a trial court's denial of mistrial is plainly wrong in that the incident on which the motion is based so likely influenced the jury that the defendant cannot be said to have had a fair trial, appellate courts will not conclude there was an abuse of discretion.

[23] Criminal Law
Proceedings on request for mistrial

Defendant moving for mistrial bears the burden of showing that the challenged incident substantially influenced the verdict.

[24] Criminal Law
Unresponsive, unsolicited, and unexpected testimony

A trial court need not declare a mistrial where an improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented.

[25] Criminal Law
Conduct of trial

When ruling on a motion for a mistrial, a trial court must determine whether the challenged incident may have or probably influenced the jury, to the prejudice of the defendant.

1 Cases that cite this headnote

[26] Criminal Law
Issues related to jury trial

On appeal from denial of a motion to mistrial, a defendant must show that the verdict was substantially influenced by the challenged testimony.

[27] Criminal Law
Experts; opinion testimony

Sexual-assault defendant failed to establish that defense counsel's failure to call expert witness to rebut testimony of prosecution's expert witnesses and to find a substitute choking and strangulation expert after the expert he had retained passed away prejudiced him and, thus, failed to show ineffective assistance; defendant merely recited the legal standard of the prejudice prong of the ineffective-assistance test. U.S. Const. Amend. 6.

[28] Criminal Law
Deficient representation and prejudice in general

To succeed on a claim of ineffective assistance of counsel, a criminal defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. U.S. Const. Amend. 6.

[29] Criminal Law
Determination

A defendant's inability to establish either element of the *Strickland* test defeats a claim for ineffective assistance of counsel. U.S. Const. Amend. 6.

***790** First District Court, Logan Department, The Honorable Thomas Willmore, No. 091100683

Attorneys and Law Firms

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Judge Gregory K. Orme authored this Opinion, in which Judge Jill M. Pohlman concurred. Judge Ryan M. Harris concurred, with opinion.

Opinion

ORME, Judge:

¶1 Defendant Anthony Charles Murphy appeals his convictions for aggravated sexual assault, aggravated kidnapping, forcible sexual abuse, and aggravated assault of his then-wife (Victim). He argues that the trial court abused its discretion by admitting evidence of other allegations of sexual assault made against him pursuant to rule 404(b) of the Utah Rules of Evidence and by denying his motions for a mistrial. He also alleges that he received ineffective assistance when his trial counsel did not call expert witnesses ***791** to corroborate his version of events. [1] We affirm.

BACKGROUND [2]

[1] ¶2 Defendant and Victim married in August 2008. Soon after, Defendant began to verbally, physically, and sexually abuse Victim, culminating in the events of May 31, 2009, for which he was charged with, and convicted of, various crimes.

¶3 The day in question began "as a fun, relaxing, playful day." The couple spent most of the day in their backyard cultivating their garden and target shooting with BB guns. Defendant began drinking around 10 a.m., and Victim had her first drink around noon. All was well until approximately 7:30 p.m. By then, both Victim and Defendant had consumed copious amounts of alcohol. Defendant received a text message from a woman whom Victim had previously caught flirting with him. Defendant's receipt of the text message infuriated Victim, and she began yelling at him. He responded by laughing at her. Exasperated, Victim left Defendant in the backyard and went to bed.

¶4 Defendant later entered the bedroom and asked Victim if they could "work this out." Victim returned with Defendant to the backyard, and the two started dancing. After dancing for a short while, Defendant began spinning Victim quickly around until she fell to the ground. Victim asked him to stop because he was hurting her. Defendant ignored her pleas, pulled her up from the ground, and tore off her shirt, bra, shorts, and underpants. Victim screamed for help, and Defendant told her to "shut up" and that "[n]obody was coming to save [her]."

¶5 Naked, Victim fled into the house. She ran upstairs to the second floor seeking to dress, retrieve her car keys, and leave the house. Defendant caught up with her when she reached the second floor and pushed her down the staircase. He then dragged her into the family room, repeatedly telling her, "you'll remember me." In the family room, Defendant straddled Victim on the floor with both knees on her chest, constraining her breathing. In this position, he hit her multiple times in the face with his erect penis and repeated, "[S]uck it. Suck it, bitch." Victim initially resisted but eventually gave in. "Off and on" for the next twenty minutes, Defendant forced Victim to perform oral sex on him.

¶6 Victim attempted to crawl away, but when she reached the hallway, Defendant lifted her up by the throat, pressed her against the wall, and strangled her. He told her, "I'm going to kill you, bitch," and Victim passed out shortly thereafter. When she regained consciousness, she found herself soaked in her own urine. Defendant then dragged her into the upstairs bathroom, threw her into the bathtub, turned on the cold water, and ordered her to "get cleaned up."

¶7 Victim's next memory was that of Defendant pushing her down the stairs for a second time after she attempted to escape through the back door. He then dragged her into the back bedroom, used his knees to pin her down by her shoulders, and again forced his penis into her mouth. Victim choked on his penis and lost consciousness for a second time.

¶8 Sometime after midnight, Victim was finally able to escape when Defendant passed out due to his excessive alcohol consumption. Victim put on a robe, grabbed her car keys, and drove to her friends' house. They gave her a mild sedative, and Victim spent the night at their house. She woke the next day feeling like a "punching bag," "[e]verything hurt." Bruises had started forming on her face and on her chest,

where Defendant had knelt on her while pinning her down. Her throat was extremely sore. She described that "it felt like the worst case of strep throat [she] had ever had."

¶9 Fearing the loss of her job, Victim insisted on going to work that day despite ***792** her injuries. One of her friends accompanied her back to her house so that she could get ready. At the house, they found Defendant passed out on a couch. Victim quickly showered, dressed, and applied heavy makeup to cover the bruises on her face. Despite these efforts, her coworkers immediately noticed that her face was red, swollen, and covered in bruises. One coworker described Victim's face as "grotesquely swollen." Victim, who usually had a gregarious personality, was also "unnaturally subdued," "not talkative," and attempted to hide her face from her coworkers. After much coaxing, Victim admitted to a coworker that she had been physically assaulted. Against Victim's wishes, her coworkers then contacted the authorities.

¶10 The officer who responded to the call testified that Victim's face "was very battered" and that she was "probably one of the worst victims [he] had seen." Her eye sockets and cheeks were swollen, her lip was cut, and there was redness around her neck, which appeared to be consistent with strangulation. The officer interviewed Victim and photographed her injuries. The next day, Victim visited a doctor. The doctor noted that her rib cage was "very tender" and that pain prevented her from being able to fully open her jaw. He also noted bruising on her upper chest, right leg, and lip.

¶11 A few days later, two police officers accompanied Victim on a walkthrough of her house to collect evidence. The police observed a handprint on the wall against which Defendant had strangled Victim. Directly underneath the handprint, where Victim had urinated, the officers noted that the carpet was discolored from an attempted cleaning. And in the laundry room, they found bedding with blood stains and torn clothing that matched Victim's description of what she had worn on the day of the assault.

¶12 The State charged Defendant with aggravated sexual assault and aggravated kidnapping, first-degree felonies; forcible sexual abuse, a second-degree felony; and aggravated assault, a third-degree felony. He was tried in 2016. [3] A jury found him guilty of all charges. He was sentenced to two consecutive fifteen-years-to-life sentences for his aggravated sexual assault and aggravated kidnapping convictions, and concurrent sentences of one-to-fifteen years and zero-to-five years for his forcible sexual abuse and aggravated assault convictions, respectively.

ISSUES AND STANDARDS OF REVIEW

[2] ¶13 Defendant raises six claims on appeal, three of which we do not address on the merits. First, he argues that the trial court erred in its application of rules 404(b) and 403 of the Utah Rules of Evidence when it admitted evidence of additional allegations of sexual assault made against him by other women. Due to a trial court's advantaged position over that of appellate courts "to assess the avowed basis for evidence of prior misconduct—and to judge its likely effect in prejudicing or confusing the jury"—we review a trial court's decision to admit evidence under rules 404(b) and 403 for abuse of discretion. *See State v. Thornton*, 2017 UT 9, ¶ 56, 391 P.3d 1016.

[3] **[4]** **[5]** ¶14 Second, Defendant contends that the State committed prosecutorial misconduct when it made inappropriate comments during the rebuttal portion of its closing arguments. Generally, "insofar as this issue was preserved, we will review the trial court's rulings on prosecutorial misconduct claims for an abuse of discretion." *State v. Fairbourn*, 2017 UT App 158, ¶ 13, 405 P.3d 789 (quotation simplified). Otherwise, we typically review unpreserved issues only when a valid exception to the preservation rule applies. *See State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443. Here, Defendant's counsel did not object to the allegedly inappropriate comments made by the State on the ground that they amounted to prosecutorial misconduct. [4] ***793** And because Defendant has not argued that an exception to the preservation rule applies, we have no occasion to address the merits of this issue on appeal. *See Oseguera v. State*, 2014 UT 31, ¶ 15, 332 P.3d 963 ("When a party seeks review of an unpreserved objection, we require that the party articulate an appropriate justification for appellate review in the party's opening brief.") (quotation simplified).

[6] ¶15 Third, Defendant asserts that the trial court erred in denying his motions for a mistrial. We review a trial court's ruling on a motion for a mistrial for abuse of discretion and reverse only if the court's decision "is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." *State v. Allen*, 2005 UT 11, ¶ 39, 108 P.3d 730 (quotation simplified).

[7] ¶16 Fourth, Defendant claims that his aggravated kidnapping and aggravated sexual assault convictions should merge under the common-law merger test of *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243, *overruled by State v. Wilder*, 2018 UT 17, 420 P.3d 1064. [5] Defendant recognizes that this claim was not fully preserved below [6] and urges us to "review this issue under [the] plain error and ineffective assistance of counsel" exceptions to the preservation rule. But he focuses his argument on the merits of the claim and does not address this unpreserved issue through the lens of either of these exceptions. Accordingly, we decline to reach the merits of this claim. *See True v. Utah Dep't of Transp.*, 2018 UT App 86, ¶ 30, 427 P.3d 338 ("If a party fails to argue and establish the applicability of a preservation exception, the appellate court will not reach the unpreserved issue."). *See also State v. Ring*, 2018 UT 19, ¶ 35, 424 P.3d 845 (stating that in order to prevail on a claim of ineffective assistance of counsel, a defendant must show (i) "that his trial counsel's performance was deficient" and (ii) "that the deficient performance prejudiced the defense") (quotation simplified); *Johnson*, 2017 UT 76, ¶ 20, 416 P.3d 443 (stating that "plain error is not established" unless the defendant shows that "(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful") (quotation simplified).

[8] ¶17 Fifth, Defendant claims to have received constitutionally ineffective assistance from his trial counsel. "A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law which we consider de novo." *State v. Courtney*, 2017 UT App 172, ¶ 20, 424 P.3d 198 (quotation simplified).

¶18 Lastly, Defendant argues that the evidence presented at trial was insufficient to support the jury's verdict. However, as with his second and fourth claims, this issue is not preserved and we do not reach it. [7]

***794** ANALYSIS

I. 404(b) Evidence

¶19 In 2010, the State initially sought to admit 404(b) evidence that Defendant had similarly assaulted his then estranged—now ex—wife (GM). The State sought to have the evidence admitted for the non-character purpose of showing Defendant's intent and the absence of mistake. The trial court denied this motion. Defendant contends that the trial court erroneously granted the State's subsequent motion to admit evidence under rule 404(b) of the Utah Rules of Evidence. Specifically, he argues that it failed to sufficiently analyze the evidence under rule 403 before granting the motion.

¶20 The State filed its second motion to admit evidence under rule 404(b) in 2014. This time, in addition to the assault involving GM, the State sought to admit evidence of three other allegations of sexual assault made against Defendant by other women. The motion sought to have evidence concerning all four incidents admitted under the doctrine of chances to refute Defendant's claim that he acted in self-defense and that Victim had fabricated her account. [8]

¶21 Concluding that the State sought to introduce the evidence for a proper non-character purpose, that the evidence was relevant, and that it would not unfairly prejudice Defendant, the trial court granted the State's motion to introduce evidence of the four instances of alleged misconduct. The allegations of sexual assault were made by four women in three different states over the span of sixteen years. In addition to GM, these witnesses were MM, AK, and AM.

¶22 MM accused Defendant of assaulting her while he was out on bond for attacking Victim. In 2013, MM met Defendant at a hotel in West Valley City, Utah, to give him a sensual massage that concluded with a "hand job." Defendant had consumed alcohol that night, and while MM performed the latter portion of their arrangement, Defendant began pulling on her underwear. MM repeatedly told him "no" and pushed his hand away until Defendant, having become enraged, wrestled her to the floor. Defendant reacted to MM's screams by placing his hands around her neck with his thumbs in her mouth and strangling her. MM did not lose consciousness, but her vision "went black," she saw "stars," and she became "dizzy." Defendant eventually let go of MM's throat and climbed off her, but he did not allow MM to get her phone. She was able to escape when the hotel's front desk attendant, responding to a noise complaint, interceded. Defendant was subsequently arrested and charged. Prior to trial in the instant case, but after the hearing on the State's second 404(b) motion, Defendant was convicted of assault and patronizing a prostitute in the case involving MM.

¶23 AK accused Defendant of sexually assaulting her in Kentucky in 2003. She and Defendant were friends and,

on the night in question, the two went for a drive. AK drank whiskey and passed out during the drive. She did not remember whether Defendant also consumed alcohol. When she woke up, she found that her pants and underwear had been removed. Defendant then began insisting that she had promised "to suck his penis" and demanded that she make good on that promise. When AK refused, he hit her in the face with a folder and shoved her head down toward his penis, forcing it into her mouth. AK cried and begged him to let her go home. Defendant repeatedly hit her and, knowing ***795** she had a phobia of water, threatened to drown her in a nearby creek if she did not stop crying. He forced her to sign a document stating that she consented to sex with him. He then laid her down in the front seat of the vehicle and vaginally raped her after unsuccessfully attempting to penetrate her anus. Following the rape, he drove AK to her mother's house. Defendant was not charged in connection with this incident.

¶24 AM accused Defendant of sexually assaulting her in Kentucky in 2001, when she was fifteen years old. She was the daughter of one of Defendant's friends. On the day of the assault, her father and Defendant returned from a bar "pretty intoxicated" and continued drinking in her house. Defendant attempted to dance with AM but, feeling uncomfortable, she refused. She later went to bed and was awakened by Defendant climbing on top of her. He inhibited her breathing by pressing his hand down hard against her face, fondled her breasts under her shirt, kissed her neck, and touched her genitals. AM eventually succeeded in freeing her mouth by biting Defendant's hand, and she screamed to her father for help. Her father ran into the room and pulled Defendant off her. She ran into another bedroom, but Defendant pursued, tackled, and touched her again. AM's father once more managed to pull him away from her. AM then ran to a neighbor's house. Defendant again pursued AM, attempted to break into the neighbor's house, and assaulted the neighbor's husband. Defendant was charged with sexual abuse of AM and with assault of the neighbor's husband. A jury convicted Defendant on the assault charge, but it could not reach a verdict on the sexual abuse charge.

¶25 GM accused Defendant of assaulting her in Florida in 1997.[9] She and Defendant were married but separated at the time of the alleged assault. One early morning in June, Defendant broke into her house. He smelled of alcohol and wanted to talk. When she refused, he grabbed her by the arm, said "okay, no more talk," and dragged her into an unoccupied bedroom. During the hours-long sexual assault that ensued, Defendant twice vaginally raped GM, attempted anal penetration, and sat on her chest and forced his penis into her mouth. Defendant was arrested and charged with aggravated kidnapping and sexual assault. Two months later, while out on bond, Defendant again broke into GM's house. This time, GM pulled a gun from underneath her pillow and shot him five times. The State of Florida entered into a plea deal with Defendant in which Defendant pled guilty to one count of second-degree burglary in exchange for the dismissal of the aggravated kidnapping and sexual assault charges. This generous deal—or so the Utah prosecutor suggested in the case before us—was the product of the five bullet holes that Defendant sustained in the course of the second intrusion into GM's home.

¶26 In conjunction with the testimonies of MM, AK, and AM, the State called a statistician as an expert witness. The statistician testified that there is a 0.0004% chance of a person being arrested for rape or attempted rape in Utah. The probability of being twice accused of or arrested for rape or attempted rape was one in four million; thrice was one in eight billion; four times was one in sixteen trillion; and five times was one in thirty-two quadrillion. The odds of being falsely accused of rape or attempted rape on five separate occasions were further increased, according to the expert, when similar claims of alcohol consumption or strangulation were factored into the analysis.

[9] [10] [11] ¶27 Rule 404(b) of the Utah Rules of Evidence generally permits evidence of a defendant's other crimes, wrongs, or bad acts so long as the evidence has a "probative value other than to show an evil propensity or criminal temperament." *State v. Fedorowicz*, 2002 UT 67, ¶ 27, 52 P.3d 1194 (quotation simplified). The doctrine of chances is applied in the context of rule 404(b). *State v. Lowther*, 2017 UT 34, ¶ 31, 398 P.3d 1032. It is "a theory of logical relevance, which a proponent may use to argue that, using probability reasoning, a factfinder may infer that a disputed fact is more likely or less likely to be ***796** true due to the recurrence of some improbable event." *State v. Labrum*, 2014 UT App 5, ¶ 26 n.9, 318 P.3d 1151 (quotation simplified). In other words, "the claim is based on the disparity between the expected and actual values: How many incidents would we expect the average person to be involved in, and how many incidents was the defendant involved in?" 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, 448 (2006). *See State v. Lopez*, 2018 UT 5, ¶ 50, 417

P.3d 116. Thus far, Utah appellate courts have upheld the application of the doctrine of chances for the purposes of showing intent; establishing lack of mistake, coincidence, or accident; rebutting a charge of fabrication; and in cases involving rape, showing the defendant's requisite mens rea or the victim's lack of consent. [10] *Id.* ¶ 49. *See State v. Lomu*, 2014 UT App 41, ¶ 25, 321 P.3d 243.

[12] **[13]** **[14]** ¶28 As with other 404(b) evidence, courts must undertake a three-step analysis before admitting evidence under the doctrine of chances. *See State v. Killpack*, 2008 UT 49, ¶ 45, 191 P.3d 17 ("Such evidence is admissible if it (1) is relevant to, (2) a proper, non-character purpose, and (3) does not pose a danger for unfair prejudice that substantially outweighs its probative value.") (quotation simplified). The first and second steps, governed by Utah Rules of Evidence 402 and 404(b), respectively, require trial courts to ensure that the evidence is being offered for, and is relevant to, a proper non-character purpose. *See Lowther*, 2017 UT 34, ¶ 32, 398 P.3d 1032. Under the doctrine of chances, this determination requires a four-part analysis of "(1) materiality, (2) similarity, (3) independence, and (4) frequency." [11] *Id.* ***797** Defendant does not challenge the trial court's analysis with respect to these factors, instead concentrating his attack on step three.

[15] **[16]** **[17]** ¶29 The third step requires the court to conduct a rule 403 balancing test, *see id.*, which generally focuses on whether the "probative value [of the evidence] is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Utah R. Evid. 403. Under the doctrine of chances, the focus of the rule 403 analysis is primarily "on the risk that the jury may draw an improper character inference from the evidence or that it may be confused about the purpose of the evidence." *State v. Lowther*, 2015 UT App 180, ¶ 22, 356 P.3d 173 (quotation simplified), *aff'd on other grounds*, 2017 UT 34, 398 P.3d 1032. Trial courts "are not bound to any particular set of factors or elements when conducting a rule 403 balancing test," and "may consider any relevant fact" in doing so, including some of the elements of the doctrine of chances' four-part test—materiality, similarity, independence, and frequency. *State v. Lowther*, 2017 UT 34, ¶¶ 29, 41, 398 P.3d 1032.

[18] ¶30 On appeal, Defendant does not find fault with the trial court's determinations under the first and second analytic steps, but he argues that the trial court failed to conduct a proper analysis under rule 403 before admitting evidence of the aforementioned allegations made against him under the doctrine of chances. He contends that the other misconduct evidence confused the jury and unfairly prejudiced his defense.

¶31 Having concluded that the four other allegations of sexual misconduct made against Defendant satisfied the four foundational requirements of the doctrine of chances, the trial court used the reasoning behind the doctrine to conclude that the "information will be more helpful to a jury than harmful in eliciting truth." It reasoned, quoting *Verde*, that "when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story." *State v. Verde*, 2012 UT 60, ¶ 48, 296 P.3d 673 (quotation simplified), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. We see no abuse of discretion in the trial court's analysis. [12] *See Thornton*, 2017 UT 9, ¶ 56, 391 P.3d 1016 ("[T]he question for us is not whether we would have admitted this evidence. ***798** It is whether the district judge abused his broad discretion in doing so.").

[19] ¶32 Defendant's contention that the jury was likely to be confused as to the purpose of the 404(b) evidence is likewise unavailing. The trial court twice instructed the jury as to the purpose of the 404(b) evidence and the limited nature in which the jurors were to consider such evidence. "We generally presume that a jury will follow the instructions given it," and Defendant has not provided evidence to suggest that the jury in the present case did otherwise. *State v. Beckering*, 2015 UT App 53, ¶ 24, 346 P.3d 672 (quotation simplified).

¶33 For these reasons, we conclude that the trial court did not abuse its discretion by concluding that the 404(b) evidence need not be excluded under rule 403.

II. Mistrial Motions

[20] ¶34 Defendant next appeals the trial court's denial of his motions for a mistrial. He contends that unfairly prejudicial information was presented to the jury, the trial court's curative measures were ineffective, and the court therefore abused its discretion in denying his motions. Defendant's trial counsel first moved for a mistrial after Victim testified that GM shot Defendant five times—evidence the trial court had previously ruled inadmissible unless Defendant first opened the door to

it. The testimony in question was given on the second day of trial and was elicited in the following manner:

> [The State]: At the time that you reported this assault to the Smithfield Police Department were you aware of any general allegation that [GM] had made against this defendant?
>
> [Victim]: That they had filed for divorce.
>
> [The State]: Well, I'm talking about like a criminal accusation. Were you aware that she had accused him of any crimes?
>
> [Victim]: I understand she shot him five times.

¶35 Following this exchange, Defendant's counsel moved for a mistrial. The court ruled that although the State had not intentionally elicited Victim's improper response, the reference to GM having shot Defendant five times unfairly prejudiced his defense. Nevertheless, the trial court determined that the prejudice could be cured. As a remedial measure, the court precluded the State from presenting GM's testimony against Defendant, thereby reducing the number of prior assaults the jury would hear about from four to three. The court also struck from the record all questions and answers between the State and Victim regarding GM and instructed the jury to disregard the stricken exchange.

¶36 At the conclusion of that day of trial, one juror asked for the name of Defendant's ex-wife. After the court stated that it already provided the name in its curative instruction, the juror responded, "We can remember her name. We just can't remember anything else." The court responded, "No. You don't even need to remember her name. You don't even need to consider anything about [GM]." Defendant's trial counsel subsequently renewed his motion for a mistrial asserting that, despite the court's curative instruction, the jury was still considering Victim's testimony regarding GM. The trial court denied the renewed motion, stating that the jury was "trying to understand and follow [the court's] instruction." "Really," according to the court, "the question was 'do we forget her name?,' " and the question "didn't go to anything else."

[21] **[22]** **[23]** **[24]** ¶37 Appellate courts accord great deference to a trial court's ruling on a motion for a mistrial given "the advantaged position of the trial judge to determine the impact of events occurring in the courtroom on the total proceedings." *State v. Butterfield*, 2001 UT 59, ¶ 46, 27 P.3d 1133 (quotation simplified). Accordingly, absent a showing on the record that "the trial court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial," we will not conclude there was an abuse of discretion. *Id.* (quotation simplified). Defendant thus bears the burden of showing "that the challenged incident *substantially influenced* the verdict." *State v. Maama*, 2015 UT App 235, ¶ 19, 359 P.3d 1272 (emphasis in original) (quotation simplified). Furthermore, a trial court need not declare a mistrial "where an ***799** improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented." *State v. Allen*, 2005 UT 11, ¶ 40, 108 P.3d 730.

[25] **[26]** ¶38 To show that the improper statement influenced the jury's decision, Defendant points to the exchange between the juror and the trial court at the conclusion of the second day of trial.[13] We recognize that the exchange suggests that the improper testimony may have been on the minds of the jurors during the second day of trial, but we nonetheless remain unconvinced that, without the testimony, "there is a substantial likelihood that the jury would have found [Defendant] not guilty," *Butterfield*, 2001 UT 59, ¶ 47, 27 P.3d 1133, for the reasons that the statement was relatively innocuous, it was made in passing, and the evidence of Defendant's guilt was overwhelming, *see Allen*, 2005 UT 11, ¶ 40, 108 P.3d 730.

¶39 Although the fact that a defendant was shot might have stood out more prominently in other trials, in the current case the highly graphic and disturbing nature of the evidence presented to the jury over the course of six days—including the testimony of Victim, MM, AM, and AK—overshadowed the fact that GM shot Defendant, rendering the statement relatively innocuous.[14] Victim's improper testimony was also made in passing, and it consisted of a single sentence in a trial transcript that exceeds 1,000 pages. Accordingly, the trial court did not abuse its discretion in denying Defendant's motions for mistrial.

III. Ineffective Assistance of Counsel

[27] ¶40 Defendant argues that he received ineffective assistance when his trial counsel did not call expert witnesses to rebut the testimonies of the four expert witnesses called by the State.[15] In particular, Defendant points to his trial counsel's decision not to call an expert witness to corroborate

Defendant's account that the cuts and bruises on his chest were obtained defensively rather than offensively and to rebut the State's expert who testified that the injuries to Defendant's chest could not have been sustained in the manner claimed by Defendant. Defendant also directs our attention to his trial counsel's failure to find a substitute choking and strangulation expert after the expert he had retained passed away. Although his trial counsel was able to submit the deceased expert's report into evidence and use the report to question the State's expert, Defendant argues that this was not as persuasive as a substitute expert's live testimony would have been.

***800** **[28]** **[29]** ¶41 To succeed on a claim of ineffective assistance of counsel, a criminal defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A defendant's inability to establish either element defeats a claim for ineffective assistance of counsel." *State v. Reid*, 2018 UT App 146, ¶ 19, 427 P.3d 1261.

¶42 Without deciding whether his trial counsel's performance was deficient, we conclude that Defendant's claim fails because he has not established prejudice. To prove prejudice, Defendant bore the burden of "present[ing] sufficient evidence to support a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Archuleta v. Galetka*, 2011 UT 73, ¶ 40, 267 P.3d 232 (quotation simplified). Defendant has presented no such evidence. Instead, his prejudice argument is limited to the reiteration of the legal standard of the prejudice prong, stating that had his trial counsel called corroborating expert witnesses, "there was a reasonable likelihood of a different outcome." This does not satisfy the prejudice prong of *Strickland*. *See id.* ¶ 52 ("Merely repeating the legal prejudice standard is insufficient."). Accordingly, Defendant's ineffective assistance of counsel claim fails.

CONCLUSION

¶43 We conclude that the trial court did not abuse its discretion in ruling that the 404(b) evidence of other allegations of sexual assault against Defendant was not barred under rule 403. It likewise did not exceed its discretion when it denied Defendant's motions for a mistrial because the challenged testimony was made in passing and was relatively innocuous in the context of this case, and because the trial court took sufficient action to cure any potential unfair prejudice that Victim's improper testimony might have produced. Finally, because Defendant did not establish prejudice, his ineffective assistance of counsel claim fails.

¶44 Affirmed.

HARRIS, Judge (concurring):

¶45 I concur in full in the majority opinion. My agreement with Sections II and III is enthusiastic. I have reservations about the analysis in Section I, but concur nonetheless for two reasons. First, Defendant did not raise or argue the issues that concern me, and therefore reversal in this case would not be appropriate. Second, and more substantively, I agree that the result the majority reaches in Section I is indeed driven by Utah Supreme Court precedent that this court is bound to follow, and the lead opinion ably describes that governing law and applies it to the facts of this case. I write separately to express my view—for whatever it might be worth—that the governing law might warrant re-examination in a future case. Specifically, I have concerns about the propriety of admitting, pursuant to rule 404(b) of the Utah Rules of Evidence, evidence of a defendant's prior bad acts under the "doctrine of chances" to rebut a defense of fabrication, and I wonder whether our law should either reconsider the conclusions reached 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, or consider adoption of a categorical rule (akin to rule 413 of the Federal Rules of Evidence) that simply admits, in a more up-front way, evidence of similar crimes in sexual-assault cases that is typically being admitted anyway.

I

¶46 Anglo-American rules of evidence have long contained a general prohibition against the admission of evidence that a criminal defendant committed previous bad acts—separate from the crime with which he is charged—that are similar to the acts he stands accused of committing. *See, e.g.*, David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 1.2, at 2 (2009) (hereinafter "Leonard") (stating that "[o]ne of the oldest principles of Anglo-American law is that a person should not be judged strenuously by reference to the awesome spectre of his past life," but instead by whether the person committed the specific acts with ***801** which he

is charged (quotation simplified)). Utah's evidentiary rules are no exception: our rules state 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).

¶47 This rule finds its origins not in logic, but in policy. *See People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466, 468 (1930) (Cardozo, J.) (stating that the "principle" behind the ban on propensity evidence "is one, not of logic, but of policy"). Indeed, such evidence is excluded

> not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.

Leonard, § 1.2, at 6–7 (quoting 1 John H. Wigmore, *Evidence in Trials at Common Law* § 194, at 646 (3d ed. 1940)); *see also Michelson v. United States*, 335 U.S. 469, 475–76, 69 S.Ct. 213, 93 L.Ed. 168 (1948) (stating that propensity evidence is "not rejected because character is irrelevant," but because such evidence denies defendants "a fair opportunity to defend against a particular charge").

¶48 But this general historical rule is peppered with so many exceptions that it often gets lost in the shuffle. [16] Indeed, our rule of evidence allows admission of evidence of a defendant's prior bad acts if such evidence is used "for another purpose" (other than demonstrating "that on a particular occasion the person acted in conformity with the character"). *See* Utah R. Evid. 404(b)(2). The rule even lists a number of possible "other purposes" for which prior bad acts evidence might be admitted, including "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* In this vein, our supreme court has stated that "[s]o long as the evidence is not aimed at suggesting action in conformity with bad character, it is admissible under rule 404(b)." *Verde*, 2012 UT 60, ¶ 15, 296 P.3d 673.

¶49 The difficulty, of course, lies in attempting to determine when evidence is offered for a permissible non-propensity purpose and when a party is merely attempting to dress up propensity evidence as something else in order to gain its admission. *See id.* ¶ 16 (stating that "it won't always be easy for the court to differentiate" between permissible and non-permissible prior bad acts evidence). Some jurisdictions, in a nod to the difficulties inherent in trying to elicit such fine distinctions, have determined—through legislation, rulemaking, or common-law development—that at least some kinds of propensity evidence ought to be categorically admissible in sexual assault cases. About half of the fifty states have judicially recognized a common-law "lustful disposition" exception to the general ban on propensity evidence. *See* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 Am. J. Crim. L. 327, 338–39 & n.51 (2012) (listing the jurisdictions that have adopted this common-law exception). And some jurisdictions, most notably the federal courts through the enactment of rules 413 and 414 of the Federal Rules of Evidence, categorically allow the admission of prior bad acts in sexual assault cases. *See* Fed. R. Evid. 413, ***802** 414. Rule 413 covers "sexual assault" cases generally, and rule 414 covers "child molestation" cases. Each rule allows the court to "admit evidence that the defendant committed any other" sexual assault or child molestation, without regard to whether the evidence is offered for any of the rule 404(b)(2) purposes. *See id.* R. 413(a), 414(a); *see also* Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 323–24 & nn. 6–21 (2015) (noting that a handful of states, including Utah, have implemented a version of one or both of these rules). [17]

¶50 In 2008, Utah enacted a version of rule 414 of the Federal Rules of Evidence, and now categorically allows propensity evidence in child molestation cases, regardless of whether that evidence meets the requirements of rule 404(b)(2). *See* Utah R. Evid. 404(c) (stating that, "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged"). However, Utah has not enacted any version of rule 413 of the Federal Rules of Evidence, nor

has it ever adopted any version of the "lustful disposition" exception, meaning that in cases where the defendant stands accused of sexually assaulting anyone who is fourteen years of age or older, there is no categorical rule allowing admission of that defendant's prior acts of sexual assault. Prosecutors attempting to introduce such evidence in adult sexual assault cases must demonstrate that the evidence they proffer meets the requirements of rule 404(b)(2).

II

¶51 A pair of leading commentators (including a Utah federal judge) have observed, in their treatise on the Utah Rules of Evidence, that "[i]f the prior bad acts involve sexual misconduct, or child abuse, or a combination of both, courts generally find a theory of admissibility, even if no specific theory of admissibility makes sense." *See* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 227 (2018–19 ed.); *see also* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. Rev. 1547, 1556 (1998) (hereinafter "Melilli") (stating that "creative prosecutors will usually be successful in generating a theory for introducing evidence of the defendant's prior, uncharged misbehavior before the jury"). One theory that —increasingly in recent years—has been harnessed for this purpose is a "theory of logical relevance" known as the "doctrine of chances" (the Doctrine). *See Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673.

¶52 The Doctrine is controversial, *see* Melilli, at 1564 (referring to the Doctrine as "the real hinterland of Rule 404(b) metaphysics"), and a full discussion of its purposes and applications is beyond the scope of this opinion. As I explain below, I do not take issue here with the Doctrine's application in certain contexts (such as, for instance, to rebut a defense of mistake or accident), but I am unconvinced—for two reasons—of the wisdom of our supreme court's extension of the Doctrine to rebut fabrication defenses. First, I have doubts about whether the Doctrine can logically be applied in that context consistently with the historical propensity bar. Second, I wonder whether the Doctrine's application in this context runs afoul of the non-controversial principle that probability evidence is inadmissible to show that a witness is (or is not) telling the truth. I will discuss these two concerns, in turn, after a brief description of the Doctrine and its origins.

A

¶53 As described by our supreme court, the Doctrine is "a theory of logical relevance ***803** that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673 (quotation simplified); *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, 296 P.3d 673; *cf. Hopt v. People*, 120 U.S. 430, 440, 7 S.Ct. 614, 30 L.Ed. 708 (1887) (referring to the "doctrine of chances" as a tool used to "establish a probability").

¶54 The Doctrine has been widely applied to rebut a defendant's claim that a series of extremely unlikely events are nothing more than coincidences or unfortunate accidents. There are several famous examples, including one first articulated in 1884 and quoted in *Verde*:

> Suppose you lose your horse; you find it in the possession of A.; he asserts that he took the horse by mistake; but you find that about the same time he took horses belonging to several others; would not the fact that he took others about the same time be proper evidence to be considered in determining whether the particular taking was or not by mistake? The chances of mistake decrease in proportion as the alleged mistakes increase.

2012 UT 60, ¶ 48, 296 P.3d 673 (quotation simplified). Similarly, in the case of the "Brides in the Bath," *Rex v. Smith*, 11 Crim. App. 229, 84 L.J.K.B. 2153 (1915) (also referred to in *Verde*, 2012 UT 60, ¶ 49, 296 P.3d 673), a defendant was accused of murder when three successive spouses died while taking a bath, and evidence of the circumstances surrounding the deaths of the other two spouses was admitted at the murder trial of the first spouse, for the purpose of showing the defendant had caused the first death. In another more recent example, multiple infants had died in their sleep while in the care of the defendant, and evidence of previous deaths

was admitted to rebut the defendant's claim that the death in question was accidental. *See United States v. Woods*, 484 F.2d 127, 135 (4th Cir. 1973) (also cited in *Verde*, 2012 UT 60, ¶ 49, 296 P.3d 673). In these cases, the Doctrine did not function as an independent exception to the prohibition on character evidence; rather, its logic was used to explain the probative value of prior bad acts evidence that was introduced pursuant to other exceptions (usually to rebut a defense of mistake or accident) that are listed in rule 404(b)(2).

¶55 When applied to rebut a defense of mistake or accident, evidence of previous similar events is relevant not necessarily to show that the defendant had a propensity to commit similar crimes, but to show that it was practically impossible—as a matter of probability—for the events to have occurred accidentally as the defendant claimed. As our supreme court stated in *Verde*, "[p]ropensity 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, 296 P.3d 673. Instead, "[t]he question is whether it is objectively likely that so many fires or deaths could be attributable to natural ca[u]ses." *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.

B

¶56 I have no quarrel with application of the Doctrine to rebut a defense of accident or mistake, because I agree that such application does not necessarily require the forbidden inference that a defendant has acted in conformity with his character or propensity. *Id.* ¶¶ 50–51; *see also* Andrea J. Garland, *Beyond Probability: The Utah Supreme Court's "Doctrine of Chances" in* State v. Verde *Encourages Admission of Irrelevant Evidence*, 3 Utah J. Crim. L. 6, 27 (2018) (criticizing our supreme court's application of the Doctrine in *Verde*, but acknowledging certain "proper uses" for the Doctrine, including application "to rebut claims of accident"). I cannot see how the same holds true, however, when the Doctrine is used to admit evidence to rebut a defense of fabrication. [18]

***804** ¶57 The trigger for any application of the Doctrine is the occurrence of a "rare misfortune" that "befall[s] one individual over and over." *See Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673. In applying the Doctrine to rebut a defense of accident, it is often easy to discern what the "rare misfortune" is—for instance, the death of a bride in a bathtub, or the mistaken taking of a horse. In applying the Doctrine to rebut a defense of fabrication, however, it is not as easy to discern what the "rare misfortune" is that triggers application of the Doctrine. As near as I can tell, the "rare misfortune" in this context must be either (a) that the defendant has been *falsely* accused of nonconsensual sexual assault on multiple occasions, *see id.* ¶ 45 (describing the State's argument as that it is "highly unlikely that three victims would independently fabricate similar accounts of unwanted sexual contact"), or (b) that the defendant has merely been accused—whether falsely or accurately—of nonconsensual sexual assault on previous occasions, *id.* ¶ 53 (stating that the Doctrine might be applied "based on the low probability that multiple victims would independently accuse the defendant of similar assaults"). Regardless of whether the triggering event is (a) or (b), the Doctrine doesn't seem to work in this context.

¶58 If the triggering "rare misfortune" is previous *false* accusations of sexual assault, one would expect the State—in order to properly invoke the Doctrine—to actually put on evidence of previous *false* accusations of sexual assault. But I have yet to find a doctrine of chances case in which any evidence was put on that, in previous cases, the defendant was *falsely* accused of sexual assault. (No prosecutor in her right mind would want to do such a thing, presumably because jurors might think that, if it happened before, it might have happened again.) Instead, in the typical case, the State seeks to introduce evidence that the defendant was *credibly* accused of sexual assault in previous cases. *See, e.g.*, *id.* ¶¶ 6–9; *State v. Balfour*, 2018 UT App 79, ¶¶ 31–33, 418 P.3d 79, *cert. denied*, 429 P.3d 465 (Utah 2018). As a matter of logic, then, if the State seeks to introduce evidence of previous *true* accusations of sexual assault pursuant to the Doctrine, the triggering event of "rare misfortune" cannot possibly be the fact that the defendant was *falsely* accused of sexual assault in previous cases.

¶59 But using previous accusations—regardless of their truth or falsity—as the "rare" triggering event also suffers from logical problems. If one assumes that the accusations are true, and that the defendant actually committed the previous sexual assaults, it becomes extremely difficult to distinguish such evidence from straight-up propensity evidence. *See* Melilli, at 1568 (pointing out that "the explanation for the [Doctrine] in the multiple-accusers context is simply a convoluted explanation of the general propensity inference," because "[e]ach separate accusation would have no bearing upon the

accuracy of another allegation ***805** but for the conclusion that the multiple accusations demonstrate a cross-situational pattern of behavior, which is but a variation on the taboo inference of a general propensity or character trait"). And if one stops short of assuming that the accusations are true, and simply uses accusations—regardless of their truth or falsity—as the "rare" triggering event, that brings its own set of logical problems. As one commentator astutely points out, there is "something awry with rules of evidence that permit the trier of fact in a rape case to infer guilt based merely on prior accusations of rape, but, at least in principle, ordinarily will not allow the trier of fact to infer guilt based on the fact that the accused is actually guilty of rape on prior occasions." *Id.* at 1566.

C

¶60 The other problem I see with application of the Doctrine to rebut a defense of fabrication is that such application allows the introduction of probability evidence for the avowed purpose of demonstrating that the complaining witness is more likely to be telling the truth. Our law allows such evidence in no other context, and it does not appear that our supreme court has ever examined the extent to which *Verde* is inconsistent with its other jurisprudence around this issue.

¶61 Decades ago, in *State v. Rammel*, 721 P.2d 498 (Utah 1986), our supreme court drew a hard line regarding the admissibility of probability or statistical evidence to speak to a witness's credibility. In that case, the credibility of the prosecution's star witness was at issue; that witness was telling a different story at trial than he had told in his first interview with police. *See generally id.* The prosecution attempted to shore up the witness's credibility by calling a police detective to testify that, in his experience, it was not unusual for individuals to lie the first time they met with police. *Id.* at 500. The trial court allowed the testimony, but the supreme court reversed, for three reasons.

¶62 First, the court noted that, "[a]lthough a witness's credibility may always be impeached, the impeaching evidence must go to *that* individual's character for veracity," and probability evidence does not go to a particular individual's character for truthfulness. *Id.* Second, the court determined that the police officer did not have "foundation" to testify anecdotally about the probability of people telling the truth. *Id.* at 501. Third, and most relevant here, the court held as follows:

> Even where statistically valid probability evidence has been presented—and [the officer's] testimony hardly qualifies as such—courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies. *Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth at any given time*.

Id. (emphasis added) (quotation simplified); *see also State v. Burnett*, 2018 UT App 80, ¶ 36 n.9, 427 P.3d 288 (citing *Rammel*, and determining that statistical evidence of probabilities that a particular witness was telling the truth was inadmissible).

¶63 As noted above, the Doctrine is simply a "probability theory" that speaks to the likelihood of a particular "rare" event occurring repeatedly. *See Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673. When the Doctrine is used to rebut a defense of fabrication, the prior bad acts evidence is admitted precisely because that evidence makes it more likely, from a probability standpoint, that the complaining witness is telling the truth. I cannot see a principled way to reconcile *Rammel*'s rule forbidding the introduction of probability-based evidence in this context with *Verde*'s application of the Doctrine to allow it.

III

¶64 In the case before us, the trial court allowed three witnesses to testify that Defendant sexually assaulted them on previous occasions and, in addition, the court allowed a statistician to testify that there is a 0.0004 percent chance of a person being arrested even once for rape or attempted rape in ***806** Utah, and that the chances of such a thing happening to the same person four times was 1 in 16 trillion. The trial

court admitted this evidence pursuant to the Doctrine, because the State offered it, in part, to rebut Defendant's claim that Victim had fabricated her account of the events in question. In this opinion, we affirm that decision, and I concur in that result because Defendant does not ask us to re-examine the applicability of the Doctrine in this context and, in any event, we are bound to follow the analysis set forth in *Verde*. [19]

¶65 But I have reservations about employing the Doctrine, in a case like this, to admit evidence of Defendant's prior bad acts. For the reasons set forth, I wonder whether application of the Doctrine in this context might warrant re-examination, specifically regarding whether such application is at odds with the historical ban on propensity evidence as well as the longstanding rule against admission of probability evidence to speak to a witness's credibility. Decisions about whether to re-examine *Verde*, or to enact a version of rule 413 of the Federal Rules of Evidence—two very divergent pathways—will be made above my pay grade. But I have concerns about whether we can or should continue down our current path, in which we routinely "allow[ ] character evidence to reach the jury while maintaining the pious fiction that we follow the character evidence rule." *See* Melilli, at 1569.

All Citations

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Footnotes

1 Defendant raises other arguments, but we do not reach them because they were not preserved for appeal. *See infra* ¶¶ 14, 16, 18.

2 "On appeal, we construe the record facts in a light most favorable to the jury's verdict" and recite the relevant facts accordingly. *State v. Maestas*, 2012 UT 46, ¶ 3, 299 P.3d 892 (quotation simplified).

3 Although the State charged Defendant in 2009, various pretrial matters significantly delayed the trial.

4 Defendant argues that this issue was preserved by an objection his trial counsel made to the comments during the State's rebuttal. But his counsel did not object to the comments on the ground that they amounted to prosecutorial misconduct, as he now asserts on appeal. Rather, his counsel objected to the remarks on the ground that they exceeded the scope of the defense's closing argument. The limited nature of the objection did not present the trial court with an opportunity to rule on the State's alleged misconduct, thereby rendering the issue unpreserved for appeal. *See Oseguera v. State*, 2014 UT 31, ¶ 10, 332 P.3d 963 ("[A] party that makes an objection based on one ground does not preserve any alternative grounds for objection for appeal.").

5 Although we do not address this claim on the merits, we take this opportunity to recognize that the common-law merger test first articulated in *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243, and which forms the basis of Defendant's claim on appeal, was abrogated after the parties submitted their opening briefs. In *State v. Wilder*, 2018 UT 17, 420 P.3d 1064, our Supreme Court renounced the common-law merger test and held "that the controlling test is the statutory standard set forth in Utah Code section 76-1-402(1)." *Id.* ¶ 38.

6 Following trial, Defendant moved the trial court to merge his (1) aggravated kidnapping conviction into his aggravated assault conviction and (2) his aggravated sexual assault conviction into his forcible sexual abuse conviction, both which the trial court denied. But Defendant does not appeal the trial court's denial of this motion. Instead, he argues for the first time on appeal that his aggravated kidnapping conviction should merge into his aggravated sexual abuse conviction. Because Defendant did not raise this particular merger claim before the trial court, this issue is unpreserved. *See Oseguera v. State*, 2014 UT 31, ¶ 10, 332 P.3d 963.

7 An insufficiency-of-the-evidence argument is preserved for appeal when raised in an appropriate motion. Defendant claims that this issue was preserved by his motion to arrest judgment, which his trial counsel filed following the jury's verdict. *See State v. Holgate*, 2000 UT 74, ¶ 16, 10 P.3d 346. *See also* Utah R. Crim. P. 23. But that motion asked the trial court to arrest judgment based on (1) the admission of the rule 404(b) evidence, Defendant's first claim on appeal, and (2) the presentation of evidence to the jury that had previously been ruled inadmissible by the trial court, Defendant's third claim on appeal. The motion did not argue that insufficient evidence supported the jury's guilty verdict. And because Defendant has not argued an exception to the preservation rule, we do not reach the merits of this claim. *See supra* ¶ 14.

8 Defendant claimed that Victim was the aggressor. He testified at trial that Victim went into "a jealous rage" after he received a text message from the woman she disliked. According to him, Victim grabbed a paring knife and, although not necessarily trying to stab him, she hit him multiple times with it and cut him on the chest. In response, he pushed her back by hitting her in the chin with the palm of his hand. Fearing that she would lunge at him, he then pushed her

further back by kicking her in the chest and shoulder area. She then dropped the knife, grabbed her car keys, and left their house. He testified he acted in self-defense and that Victim fabricated her account of physical and sexual abuse.

9 GM's testimony was ultimately excluded at trial as part of the court's ruling on Defendant's motion for a mistrial. *See infra* ¶¶ 34–35.

10 It is currently unclear whether the doctrine of chances may be applied to show identity. *See State v. Lopez*, 2018 UT 5, ¶ 49, 417 P.3d 116 ("[W]e have not previously applied the doctrine of chances to show identity ... [and] need not resolve whether such application would be proper because the doctrine is inapplicable to the set of facts presented here."). *See also State v. Lucero*, 2014 UT 15, ¶ 15 n.14, 328 P.3d 841 (rejecting, on procedural grounds, the argument that evidence was admissible under the doctrine of chances to show identity), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016.

11 Because Defendant does not challenge the trial court's four-part analysis on appeal, we do not address the foundational requirements further other than to clarify a point of confusion that was expressed during oral argument and is evident in Defendant's briefing. In his reply brief, Defendant argues that our Supreme Court in *State v. Lopez*, 2018 UT 5, 417 P.3d 116—an opinion the Court issued after the parties' opening briefing but before Defendant submitted his reply brief—"set[ ] a higher legal standard on similarity and before a prior act can be admitted under the doctrine of chances." Namely, he argues "the recent *Lopez* case states that the prior incidents must have been 'highly similar' to be introduced as evidence under the doctrine of chances," and the trial court therefore erred in admitting evidence of the other allegations of sexual assault brought against Defendant. However, *Lopez* did not heighten the legal standard of "similarity," the second element of the four-part test, as Defendant claims. When our Supreme Court first announced the doctrine of chances in *State v. Verde*, 2012 UT 60, 296 P.3d 673, it stated that each incident "*must be roughly similar to the charged crime*.... [They all] must at least fall into the same general category." *Id.* ¶¶ 58—59 (emphasis in original) (quotation simplified), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. It also explicitly distinguished the "similarity" requirement of the doctrine of chances from that used to prove identity through modus operandi: "The required similarity here need not be as great as that necessary to prove identity under a 'pattern' theory." *Id.* ¶ 58. *See Modus Operandi*, Black's Law Dictionary 1095 (9th ed. 2009) (defining modus operandi as "[a] method of operating or a manner of procedure; esp. a pattern of criminal behavior so distinctive that investigators attribute it to the work of the same person"). *See also State v. Lucero*, 2014 UT 15, ¶ 15, 328 P.3d 841 ("In seeking admission of prior acts for the purpose of proving 'identity,' parties are most often actually seeking to admit evidence of an intermediate inference, such as modus operandi, that bears on the ultimate issue of identity."), *abrogated on other grounds by Thornton*, 2017 UT 9, 391 P.3d 1016. The inclusion of 404(b) evidence for the purpose of establishing identity through modus operandi—a separate basis from the doctrine of chances—sets a much higher standard of similarity. In *Lopez*, in the context of discussing modus operandi, our Supreme Court reiterated that higher standard: "To use a prior act to show modus operandi, the prior act must bear a very high degree of similarity to the charged act and demonstrate a unique or singular methodology." 2018 UT 5, ¶ 40, 417 P.3d 116 (quotation simplified). Although our Supreme Court did discuss the doctrine of chances later in *Lopez*, *see id.* ¶¶ 48—60, it had not yet broached the subject at the time it provided the heightened standard for evaluating the admissibility of evidence under the modus operandi exception of rule 404(b). Thus, the standard for "similarity" under the doctrine of chances analysis remained unaltered in *Lopez*. The other incidents need only "*be roughly similar to the charged crime*." *Verde*, 2012 UT 60, ¶ 58, 296 P.3d 673 (emphasis in original).

Because the "similarity" standard remains unchanged and because Defendant challenges the trial court's "similarity" analysis for the first time in his reply brief, we do not further address this argument other than to clarify that the standard of "similarity" applied by a court is dependent on the purpose for which the evidence is offered under rule 404(b)—to show identity through modus operandi; or to allow a jury to infer guilt based on the unusual frequency that rare events, such as accusations of sexual assault, befell a defendant. *See Allen v. Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 ("It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.") (quotation simplified).

12 Defendant argues that the trial court had previously ruled the evidence to be unfairly prejudicial in its denial of the State's first 404(b) motion. But this alone is insufficient to conclude that the trial court abused its discretion in later concluding that the evidence was not unfairly prejudicial. Rule 403 of the Utah Rules of Evidence provides, with our emphasis, that a "court may exclude relevant evidence if its probative value is *substantially* outweighed by a danger of ... unfair prejudice." The State initially attempted to admit evidence of GM's allegations against Defendant for the purpose of showing Defendant's intent. In this context, the trial court found that the prejudicial effect of GM's testimony substantially outweighed its probative value in establishing Defendant's intent. When the State brought its second 404(b) motion, it sought to introduce evidence of three allegations in addition to that of GM for the purpose of rebutting Defendant's claim

that Victim fabricated her account. When presented with the second motion, the trial court found that the new purpose—to rebut a charge of fabrication—and the increased number of roughly similar allegations of sexual misconduct made against Defendant greatly enhanced the probative value of the evidence. As such, in that context, the danger of unfair prejudice no longer substantially outweighed the probative value of the evidence.

13 Defendant incorrectly applies the governing legal standard in his analysis, arguing that the exchange suggests that "there is a 'reasonable likelihood' that the improper statement influenced the jury." We take this opportunity to emphasize the distinction between the legal standard applied by a trial court on a motion for a mistrial and the legal standard applied by appellate courts in reviewing a trial court's ruling. When ruling on a motion for a mistrial, a trial court must determine whether the "incident *may have* or *probably* influenced the jury, to the prejudice of the defendant." *State v. Cardall*, 1999 UT 51, ¶ 18, 982 P.2d 79 (emphasis in original) (quotation simplified). But when the trial court's ruling is challenged on appeal, the scope of appellate review is more limited. *See State v. Butterfield*, 2001 UT 59, ¶ 46, 27 P.3d 1133; *Cardall*, 1999 UT 51, ¶ 19, 982 P.2d 79. On appeal, a defendant must show "that the verdict was *substantially* influenced by the challenged testimony." *Butterfield*, 2001 UT 59, ¶ 47, 27 P.3d 1133 (some emphasis omitted) (quotation simplified). Thus, although the argument that there was a "reasonable likelihood" that Victim's improper testimony influenced the jury would have been proper before the trial court, the argument is insufficient to satisfy the legal standard on appeal.

14 We further note that the trial court greatly reduced any potential prejudicial effect of the improper testimony by depriving the jury of the context in which GM shot Defendant. Without knowledge of the circumstances surrounding how Defendant sustained his injuries, it is far from clear that the jury would assume guilt on the part of Defendant instead of feeling sympathy towards Defendant for being the victim of a shooting.

15 Defendant also makes fleeting mention of his trial counsel's failure to call non-expert witnesses to corroborate his account of what happened on the day of the assault. But he does not elaborate upon this argument—he does not identify any witnesses that his trial counsel should have called, nor does he describe how their testimony would have assisted his defense. Accordingly, we have no occasion to further consider this particular argument.

16 One case in point: the lead opinion in this case describes rule 404(b) as a rule of *inclusion*. *See supra* ¶ 27 (stating that rule 404(b) "generally permits evidence of a defendant's other crimes, wrongs, or bad acts so long as the evidence has a probative value other than to show an evil propensity or criminal temperament" (quotation simplified)). The debate over whether the rule is exclusionary or inclusionary is an ancient one. *Compare* John Henry Wigmore, *Treatise on the System of Evidence in Trials at Common Law* § 193, at 231 (1904) (describing the rule as "a general and absolute rule of exclusion"), *with* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 990–91 (1938) (arguing that the rule is inclusionary, "excluding proof where the relevance was merely to the evil disposition of the accused"); *see also* David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 4.3, at 206–19 (2009) (discussing historical views of the rule).

17 These rules of evidence have generally been upheld against constitutional challenges, with courts noting that the continued applicability of rule 403 to all evidence admitted pursuant to these rules is an important factor in their constitutional validity. *See, e.g.*, *United States v. Coutentos*, 651 F.3d 809, 819 (8th Cir. 2011) (holding that rule 414 of the Federal Rules of Evidence was not unconstitutional); *United States v. LeMay*, 260 F.3d 1018, 1031 (9th Cir. 2001) (same); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998) (same); *see also People v. Falsetta*, 21 Cal.4th 903, 89 Cal.Rptr.2d 847, 986 P.2d 182, 187–90 (1999) (holding that California's version of rule 413 was not unconstitutional, in part because review for undue prejudice was still required).

18 This application of the Doctrine, it bears noting, is not widely used. In *Verde*, our supreme court relied largely on one law review article and one concurring opinion from California in extending the Doctrine's application to fabrication defenses. *State v. Verde*, 2012 UT 60, ¶¶ 47–48, 296 P.3d 673. The court did state that "[m]any other courts have adopted the doctrine in these and similar contexts," *see id.* ¶ 53 & n.27, but none of the cases the court cited for that proposition actually applied the Doctrine to a fabrication defense; indeed, all but one of them applied the Doctrine in its traditional context: to rebut a defense of accident or mistake, *see Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998) (stating that "the more often an accidental or infrequent incident occurs, the more likely it is that its subsequent reoccurrence is not accidental or fortuitous"); *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (applying the Doctrine to rebut a defense of accident, stating that "the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance"), *overruled on other grounds by Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999); *Wynn v. State*, 351 Md. 307, 718 A.2d 588, 607 (1998) (stating that "[i]t is the objective implausibility of the occurrence, *sans* nefarious activity, which rebuts the claim of an innocent occurrence"); *State v. Johns*, 301 Or. 535, 725 P.2d 312, 321–27 (1986) (applying the Doctrine to rebut a defense of

mistake or accident); *see also* *People v. Everett*, 250 P.3d 649, 656–58 (Colo. App. 2010) (applying the Doctrine, based partly on statutory guidance, to rebut a defense of lack of consent). To my knowledge, very few other jurisdictions—in a reported majority appellate opinion—have applied the Doctrine to rebut a defense of fabrication. *E.g.*, *De La Paz v. State*, 279 S.W.3d 336, 347 (Tex. Crim. App. 2009).

19 I also concur with the majority's conclusion that the trial court did not abuse its discretion in balancing the contested evidence's probative value with its potential for unfair prejudice. In such situations, a trial court must conduct a separate rule 403 analysis, and may not simply conclude—based solely on a determination that there is a proper non-character purpose for the evidence—that the evidence is admissible. *See supra* ¶ 28 (describing the "three-step analysis" that a court must take, with the third step being rule 403 balancing). In this case, although the trial court discussed some of the doctrine-of-chances factors in connection with its rule 403 analysis—something it is allowed to do, *see* *State v. Lowther*, 2017 UT 34, ¶¶ 29, 41, 398 P.3d 1032—it did not limit itself to those factors, and conducted a separate analysis of whether the evidence's probative value was substantially outweighed by the risk of unfair prejudice.

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FRE Rule 413 – Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

FRE Rule 414 – Similar Crimes in Child Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) “child” means a person below the age of 14; and

(2) “child molestation” means a crime under federal law or under state law (as “state” is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant’s body — or an object — and a child’s genitals or anus;

(D) contact between the defendant’s genitals or anus and any part of a child’s body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

FRE Rule 415 – Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party’s alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses’ statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

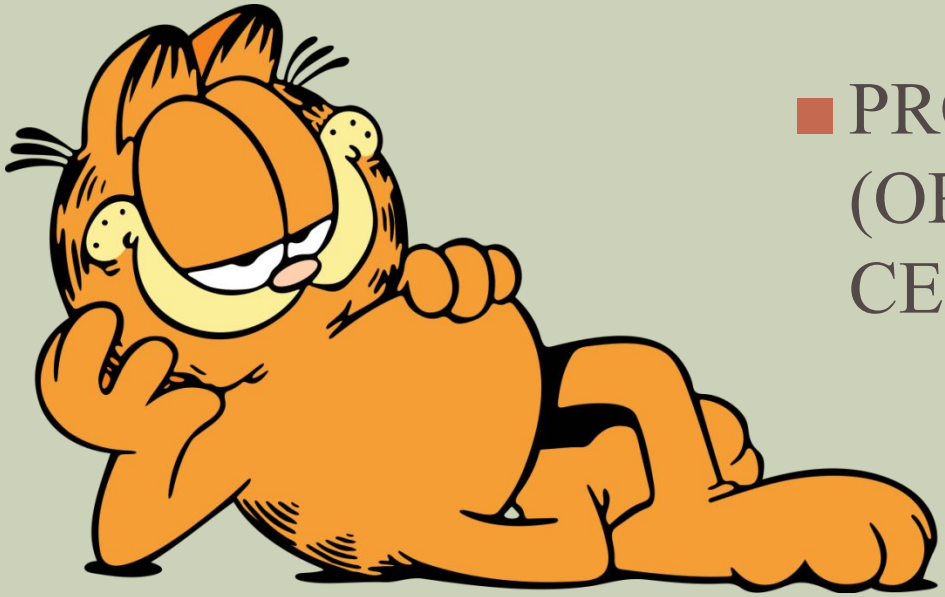
CHARACTER EVIDENCE

URE 404(b)

LEARNING OBJECTIVES

- What is character evidence and why is it not admissible?
- What is the test for admissibility?
- Become familiar with some interesting 2018-2019 cases.
  - The problem with "similarity" in Rule 403 analysis.
  - The problem with the Doctrine of Chances.

WHAT IS CHARACTER EVIDENCE?

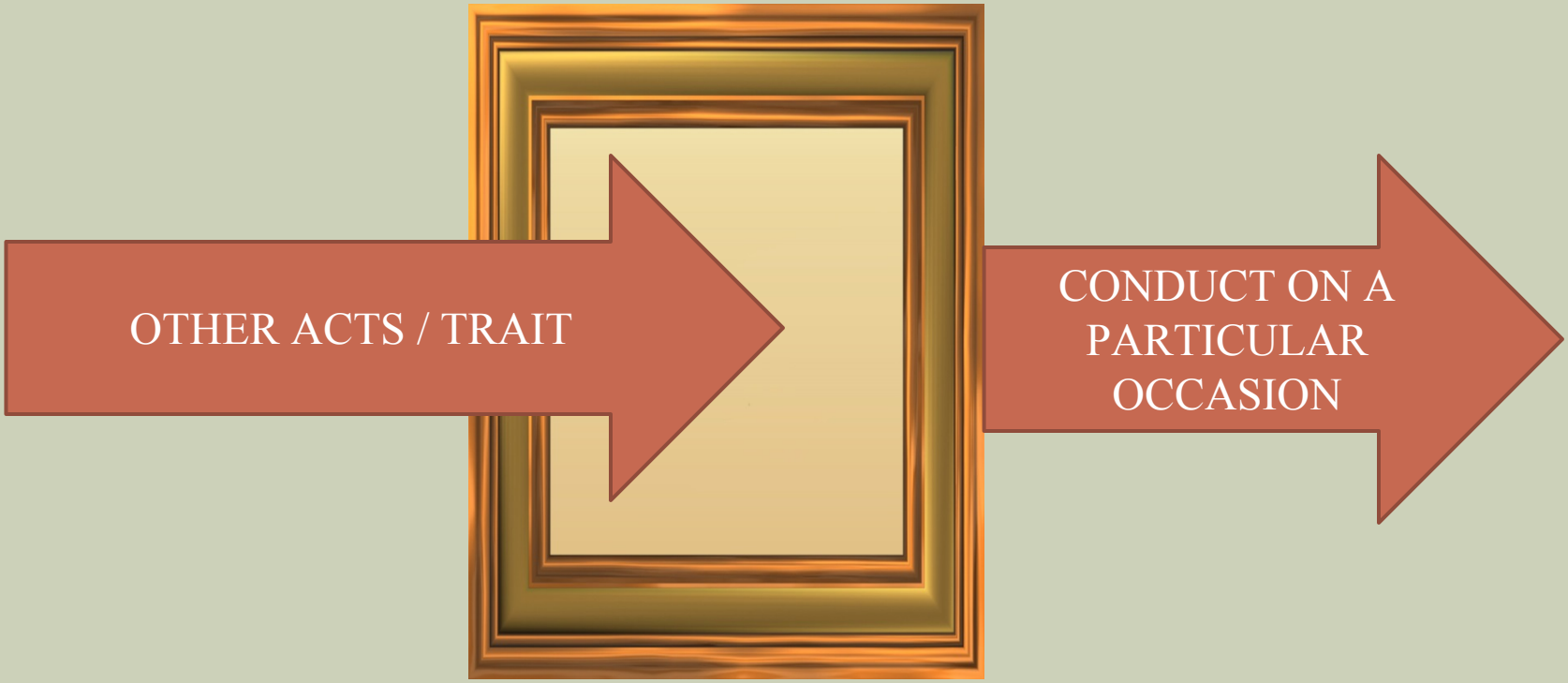


- DISPOSITION
- PROPENSITY TO ACT (OR NOT ACT) IN A CERTAIN WAY

THE TEST FOR ADMISSIBILITY

- Did the Defendant commit the other act? URE 104(b)
- Is there a proper non-character purpose? URE 404(b).
- Are the other act relevant? URE 401
- Is probative value of the other act substantially outweighed by other considerations? URE 403.
  - Unfair prejudice
  - Confusing the issues
  - Misleading the jury
  - Undue delay, waste of time, needless presentation of cumulative evidence

THE PROPENSITY BOX



SO BE CAREFUL . . .

"Merely stating that evidence is not being offered for propensity purposes does not mean the evidence does not present an improper propensity inference."

State v. Lane, 2019 UT App 86

SOME RULE 403 THOUGHTS

PREJUDICE

Unfair Prejudice

Confusion of the Issues

Misleading the Jury

EFFICENCY

Undue delay

Wasting time

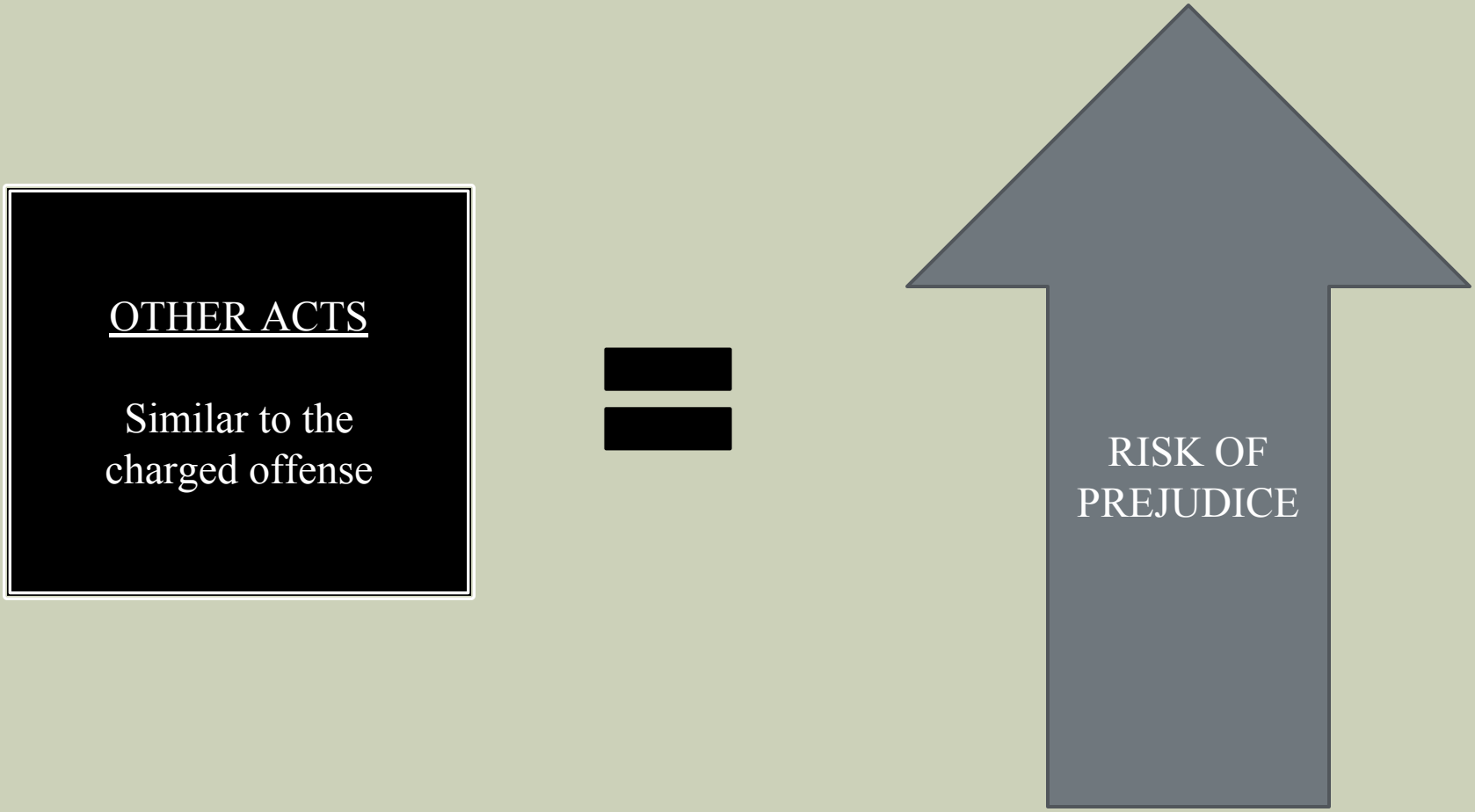
Needless presentation of cumulative evidence

PROBATIVE VALUE VS. PREJUDICE

- What is the risk of prejudice?
- How probative is the other act on the point to be proved?
- Is the point to be proved important?
- Is the point to be proved in dispute?
- Is less prejudicial proof available?
- How similar is the other act to the crime charged?
- Is the proof of the other act weak or strong?
- How likely is that the jury will be confused or misled?
- Will a limiting instruction be effective?

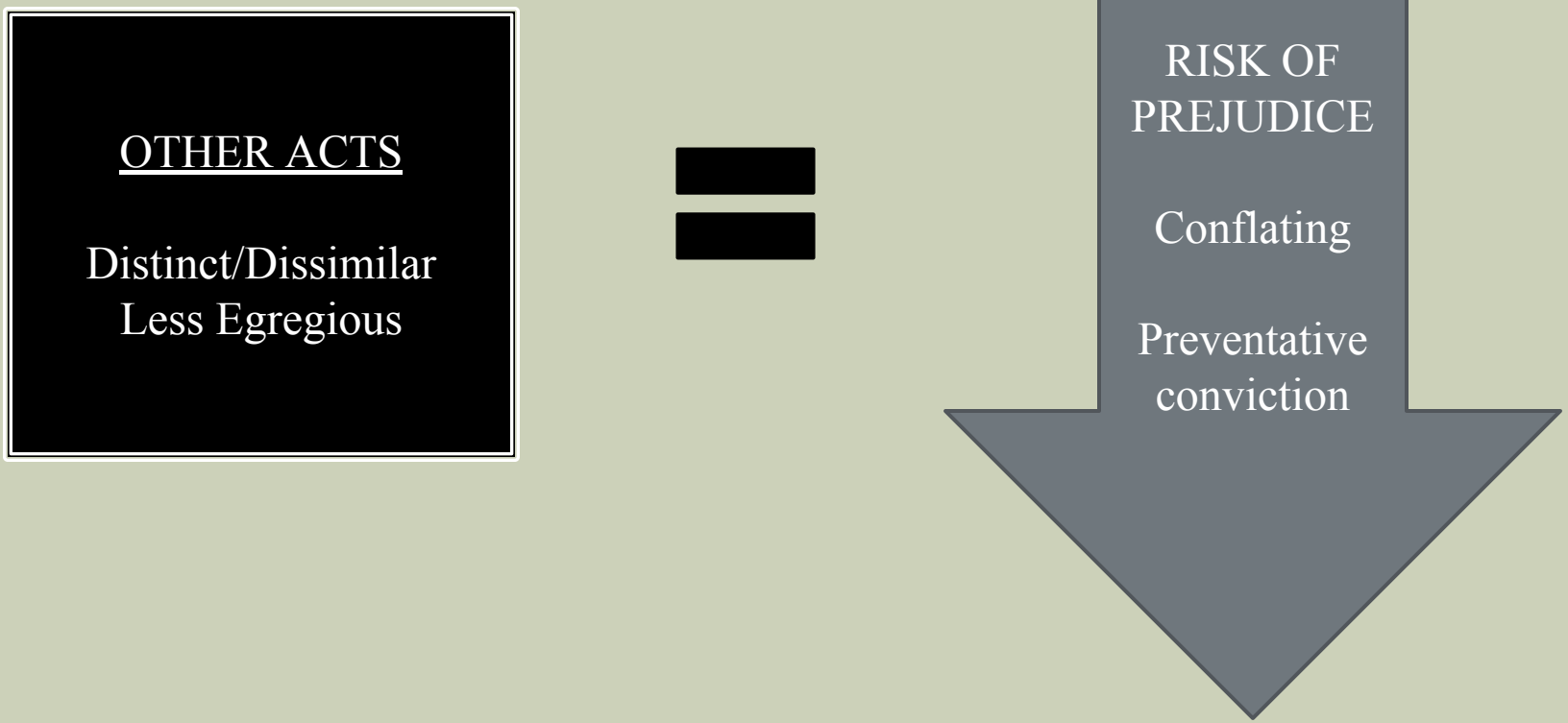
THE SIMILARITY PROBLEM

STATE V. HOOD, 2018 UT APP



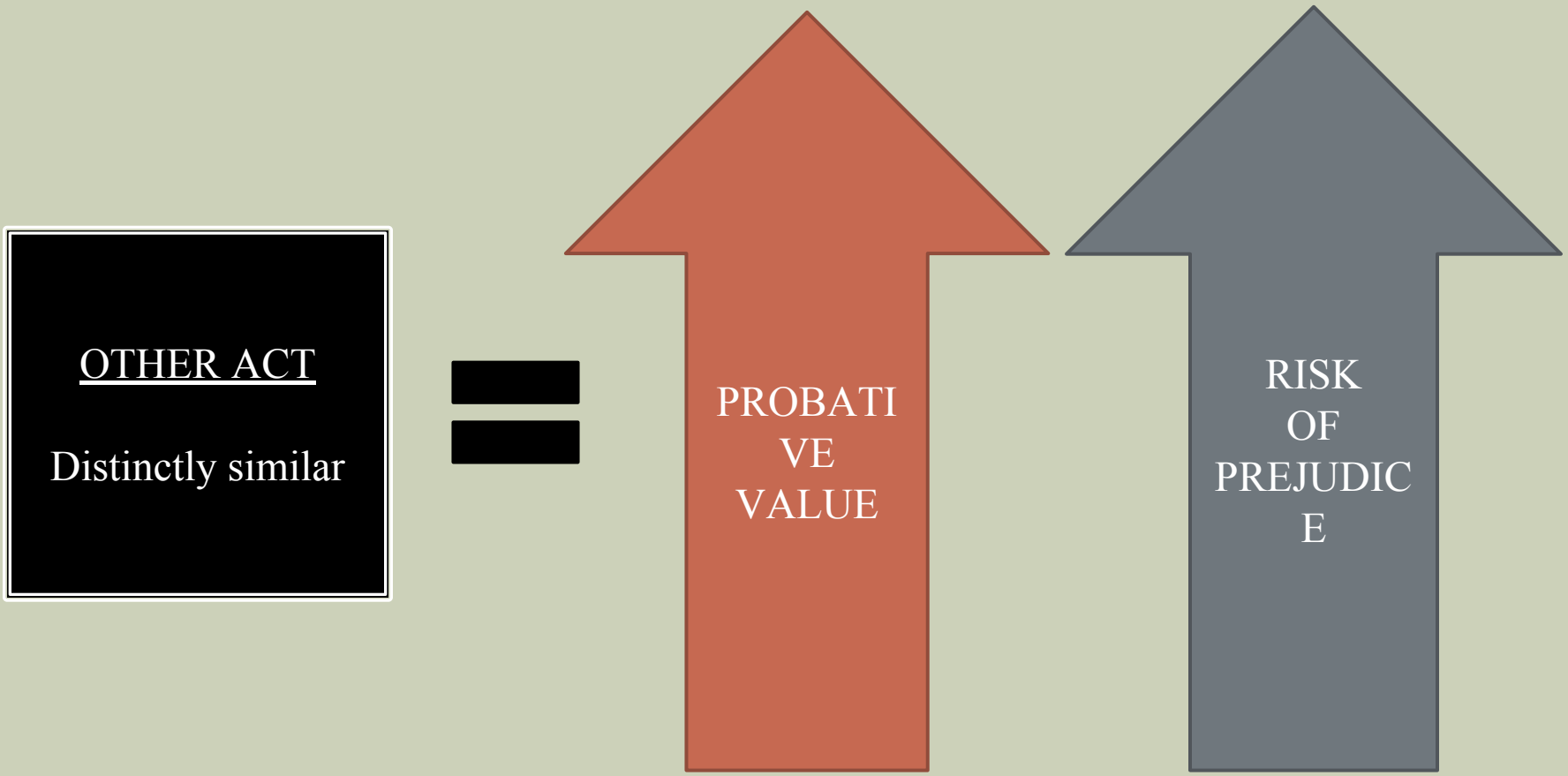
THE SIMILARITY PROBLEM

STATE V. BARNEY, 2018 UT APP 159



THE SIMILARITY PROBLEM

STATE V. GASPER, 2018 UT APP 164 / STATE V. KLENZ, 2018 UT APP 201



THE DOCTRINE OF CHANCES

- Similarity is one of the foundational requirements.
- Judge Harris's Hard Questions:
  - What is the "rare event" at issue?
  - Does the doctrine have logical coherence when applied to non-random acts based on human choice?
  - Isn't this just propensity reasoning?
  - Limiting instructions are unintelligible.

DOCTRINE OF CHANCES