Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. Today’s episode is another suggestion from our listeners but it was repeated over and over again.*

That’s right! Our listeners really wanted us to cover O.C.G.A. § 24-4-404(b) and although Mr. Garon Muller is our normal “Evidence Essentials” guest, we asked another one of our colleagues on the Superior Court bench to cover this particular topic.

*A few years ago, we attended a seminar where our special guest made a presentation on Rule 404(b) and Wade and I looked at one another and said, “he really needs to share this topic on the podcast.”*

Absolutely true. Our special guest today is the one and only Judge Robert McBurney, Superior Court Judge of the Atlanta Judicial Circuit. He is an expert on a whole bunch of topics but particularly on Rule 404(b). Judge McBurney, welcome to the Good Judge-Ment podcast.

**Robert:**

*Tell our listeners a little about your path to the Superior Court bench.*

**Robert:**

Tain, I attended Georgia State University, College of Law. I had the huge honor of learning evidence from Professor Paul Milich. When we got to the topic of Rule 404(b), he talked a great deal about the prohibited “propensity use” of character evidence. Although you did not learn evidence from Professor Milich, explain the propensity use of character evidence and why that is prohibited.

*The idea is that a jury should determine whether a defendant is guilty or not guilty of a crime based upon the evidence relating to the offense on trial. If a party (usually the prosecutor) is allowed to present evidence that the defendant previously committed another crime, there is a huge danger that the jury will conclude that the defendant is the type of person who commits crimes so he probably committed the crime charged in this case, regardless of the evidence of his/her actual involvement in this crime.*

That’s right. If the defendant usually commits crimes, he has the propensity to commit crimes in general and, therefore, he probably committed this crime also.

***[Robert-the following is a list of issues/topics we may elect to cover while we talk. We really want this to be conversational so do not feel the need to follow this in any sort of order]***

**{bullet point topics we need to cover – not necessarily in this order}**

* **Rule 404(b)**
  + (b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of **motive**, **opportunity**, **intent**, **preparation**, **plan**, **knowledge**, **identity**, or **absence of mistake or accident**. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.
* **“To admit evidence under Rule 404(b), the State must show three things: (1) that the evidence is relevant to an issue in the case other than the defendant’s character; (2) that the probative value of the evidence is not substantially outweighed by its undue prejudice; and (3) that there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the other act.”**
  + *Allen v. State*, S20A1081and *McCray v. State*, and S20A1082, Ga. Supreme Court (decided jointly on November 16, 2020), citing *Kirby v. State*, 304 Ga. 472, 479 (2018); *Smart v. State*, 299 Ga. 414, 417 (2016).
* **Pretrial notice**
  + Required under language of 404(b) but not required if the evidence is offered to prove prior difficulties between parties or is intrinsic evidence.
    - But lawyers who appear before me understand that whether the other act is intrinsic is a matter that should be determined prior to trial
* Prior to 2013, we frequently referred to this topic as “**similar transactions**” evidence but now, under 404(b) the statute refers to them as “other crimes, wrongs or acts”
* 404(b) did away with phrases such as “course of conduct” and “bent of mind”
  + In all candor, those phrases were really just fancy ways of saying “propensity” – The defendant usually acts in a certain way and, therefore, be probably did on this occasion
  + So, how important is similarity under 404(b)?
  + See *Kirby v. State*, 304 Ga. 472, 486-487 (2018) and *Strong v. State*, \_\_ Ga. \_\_, 845 S.E.2d 653, 667 (2020) (“Moreover, the other acts had few similarities to, and major differences from, the charged crimes. See *Brooks v. State*, 298 Ga. 722, 725-726 & n.10, 783 S.E.2d 895 (2016) (explaining that a “major difference” between Georgia's current Evidence Code and our old ‘similar transaction’ case law is the need under Rule 404 (b) to consider the dissimilarities as well as the similarities between the extrinsic act and the charged act”).
  + “Indeed, the rule [403] is designed ‘to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’” *Spires v. State*, A20A1079, 2020 WL 6305007 (Ga. App. 10/28/2020).
  + Exclusion under 403 is a remedy that is extraordinary and should be used only sparingly. *Kirby v. State*, 304 Ga. 472, 480 (2018), citing *Hood v. State*, 299 Ga. 95, 102-103 (2016).
* Issues such as **similarity**, **need** by the prosecutor and **temporal remoteness** impacts the second part of the test – the 403 analysis.
  + See *Strong v. State*, \_\_ Ga. \_\_, 845 S.E.2d 653, 667 (2020) (“ Turning to the Rule 403 analysis required by the second part of the test, in determining the probative value of other-act evidence offered to show intent, courts should consider the prosecutorial need for the other-act evidence, its similarity to the charged crimes, and its temporal remoteness”). citing *Jackson v. State*, 306 Ga. 69, 77 (2019).
  + As noted in *Vass v. State*, 347 Ga. App. 535, 540 (2018), “the more strongly an issue is contested, the greater the justification for admitting other acts evidence.”
* Intent is placed in issue by pleading not guilty but….
  + This line of cases began with *Olds v. State*, 299 Ga. 65, 72-75 (2016) and *Bradshaw v. State*, 296 Ga. 650, 656-657 (2015);
  + The subsequent cases have really tempered the “intent is always an issue” statement of law initially set forth in *Bradshaw.*
    - “To begin with, although Appellant put his intent at issue by pleading not guilty, see id., the State's need for evidence to prove his intent was ‘extremely low’ because his sole defense at trial was self-defense.” *Strong v. State*, \_\_ Ga. \_\_, 845 S.E.2d 653, 667 (2020), citing *Brooks v. State*, 298 Ga. 772, 725-726 (2016)
* “Intrinsic” vs. “extrinsic” acts
  + 404(b) really addresses issues that are extrinsic to the crime charged. If the “other act” is intrinsic or part of telling the story of the crime on trial, it does not fall within 404(b).
    - **“**Evidence is admissible as intrinsic evidence, rather than extrinsic evidence subject to Rule 404 (b), “when it is (1) an uncharged offense arising from the same transaction or series of transactions as the charged offense; (2) necessary to complete the story of the crime; or (3) inextricably intertwined with the evidence regarding the charged offense.” *Williams v. State*, 302 Ga. 474, 485, 807 S.E.2d 350 (2017) (citation and punctuation omitted); see also *Brown v. State*, 307 Ga. 24, 29, 834 S.E.2d 40 (2019). Even when evidence is intrinsic, however, it “must also satisfy Rule 403.” *Williams*, 302 Ga. at 485, 807 S.E.2d 350. “[I]t is within the trial court's sound discretion to determine whether to admit such evidence,” *Fleming v. State*, 306 Ga. 240, 245, 830 S.E.2d 129 (2019)” *Harris v. State*, S20A0786, 2020 WL 6122138 (Ga. 10/19/2020).
    - See *Johnson v. State*, 348 Ga. App. 831, 833-834 (2019)
* The list of permitted uses of 404(b) evidence is in the statute and we should probably look at the list more closely for a few minutes:
  + The list is non-exhaustive, but is a really good guide
* **Motive:**
  + “We also conclude that the evidence was admissible to show motive. Motive has been defined as “ ‘the reason that nudges the will and prods the mind to indulge the criminal intent.’ ” *United States v. Beechum,* 582 F.2d 898, 912 n. 15 (5th Cir.1978) (citation omitted). In this case, the evidence of the Ohio murder was relevant to motive because it demonstrated appellant's willingness to use violence when he or someone close to him is cheated in a drug deal. See *United States v. Banks,* 514 F.3d 959, 976 (9th Cir.2008)(holding that evidence of the defendant's prior stabbing of someone who insulted his gang status was admissible to prove motive under Rule 404(b) in his trial for attempted murder of someone else who also insulted his gang status).” *Bradshaw v. State*, 296 Ga. 650, 657 (2015).
* **Opportunity:**
  + “Admission of evidence for the purpose of showing opportunity is “probably the most rarely used purpose of those listed in Rule **404** (b). It admits evidence that relates to the defendant's *specific* ability or wherewithal to commit the crime charged.” (Citation and punctuation omitted; emphasis in original.) *Amey*, 331 Ga. App. at 252 (1) (c), 770 S.E.2d 321. While there are few cases specifically addressing the circumstances under which opportunity may be a proper purpose for admitting other act evidence, a sister court has recognized “it as evidence tending to establish opportunity, in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged.” *Sloan v. State*, 351 Ga. App. 199, 207 (2019).
* **Intent:**
  + Olds v. State, 299 Ga. 65, 72 (2), 786 S.E.2d 633 (2016) (“[E]vidence that an accused committed an intentional act generally is relevant to show ... that the same defendant committed a similar act with the same sort of intent[.]”). Here, Frazier claims that the other acts evidence is irrelevant to intent because he was coerced by the masked carjackers to participate in the crimes. However, that defense squarely put at issue whether Frazier intended to participate in the shooting or whether he was coerced into doing so, and the State was required to prove malicious intent for the malice murder charge. *Frazier v. State*, \_\_ Ga. \_\_. 845 S.E.2d 579, 587 (2020), citing *Gunn v. State*, 342 Ga. App. 615, 621 (2017).
* **Preparation:**
  + “Although there is a dearth of Georgia decisions specifically addressing the admission of other acts evidence for the purpose of showing preparation, federal decisions addressing this component of Federal Rule of Evidence 404 (b)provide guidance. See *Amey*, 331 Ga. App. at 247-248 (1), 770 S.E.2d 321. These decisions show that ‘acts in preparation leading up to the charged offense ... may be admitted under Rule 404 (b).’ Paul S. Milich, Georgia Rules of Evidence, § 11:16 at 338 (2018-2019 ed.). Examples of other acts evidence admitted to show preparation include the theft of weapons used in subsequent robberies and a visit to a nearby bank the day before the charged robbery of the only other bank in a small city.” *Sloan v. State*, 351 Ga. App. 199, 207-208 (2019).
* **Plan:**
  + The evidence must show a plan to commit the specific crime charged – not a design or plan to commit crimes of the sort with which he is charged. *Heard v. State*, 309 Ga. 76 (2020).
* **Knowledge:**
  + “[A] defendant's knowledge may be at issue where it is an element of the charged crime; that is, when knowledge itself is part of the statutory definition of the crime, and thus must be proven by the prosecution. Knowledge is also properly in issue when the defendant claims that he or she was unaware that a criminal act was being perpetrated. In such cases, the hypothesis justifying the admission of other-acts evidence is similar to that invoked with intent: the likelihood that repeated instances of behavior, even if originally innocent, will have resulted in defendant's having the requisite state of knowledge by the time of the charged crime.”
    - *Clarke v. State*, \_\_ Ga. App. \_\_. 848 S.E.2d 192, 201 (2020), citing *Green v. State*, 352 Ga. App. 284, 289 (2019).
* **Identity:**
  + “[E]vidence offered to prove identity must satisfy a particularly stringent analysis. When extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. The extrinsic act must be a “signature” crime, and the defendant must have used a modus operandi that is uniquely his. The signature trait requirement is imposed to [e]nsure that the government is not relying on an inference based on mere character—that a defendant has a propensity for criminal behavior. Evidence cannot be used to prove identity simply because the defendant has at other times committed the same commonplace variety of criminal act.” *Brooks v. State*, 298 Ga. 722, 725 (2016); *Heard v. State*, 309 Ga. 76 (2020).
* **Absence of mistake or accident:**
  + There must be a claim of accident or mistake before extrinsic evidence can be admitted to prove absence of mistake or accident. *Parks v. State*, 300 Ga. 303, 306 (2016); *Thompson v. State*, 302 Ga. 533, 541 (2017).
* **Prior difficulties between the parties**
* Be aware of “other” statutes which allow evidence of other crimes
  + O.C.G.A. § 24-4-413 (Prior sexual offenses)
  + O.C.G.A. § 24-4-414 (Prior Child Molestation offenses)
  + O.C.G.A. § 24-4-418 (Gang Activity)
* Do you normally allow 404(b) evidence based upon a pretrial proffer by a prosecutor or do you require “live witnesses?”

Folks, we want to thank our guest today, Judge Robert McBurney. He truly is a wonderful judge and an even better colleague. He is extremely busy and we are fortunate to have him share his time with us.

*So many of our listeners have asked for an episode on 404(b) and the various issues associated with that Rule, we are glad we have been able to coordinate schedules with Judge McBurney.*

As we have noted, this episode was the product of requests made by our listeners. Please continue to help us help you by providing input and suggestions for episode topics at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com). You can visit our website, goodjudgepod.com for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember, wash your hands every time you talk about “other crimes.” It just makes good sense.*