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"OTHER ACTS" EVIDENCE: PART II

Paul C. Giannelli

Albert J. Weatherhead III & Richard W. Weatherhead
Professor of Law, Case Western Reserve University

This is the second of two articles on the admissibility of "other acts" evidence under Ohio Rule 404(B). Typically, other-acts evidence is admitted as proof of one of four essential elements: (1) to show that the accused was the actor (identity issue); (2) to show that the accused possessed the requisite mental state (*mens rea* issue); (3) to show that a crime was committed (*actus reus* or *corpus delicti* issue); and (4) to show the victim's state of mind in those rare crimes where that is an element of the charged offense. In addition, it is sometimes impossible to separate the charged offense and the other-act. This is often referred to as "interrelated" acts or *res gestae*. Finally, the entrapment defense raises further issues. See generally 1 Giannelli & Snyder, *Baldwin's Ohio Practice Evidence* § 404.11 (1996).

PROOF OF IDENTITY

The identity of the person who committed the charged offense is always an essential element of a crime, and therefore always constitutes a material or consequential fact. "Identity" is specifically listed in Rule 404(B). See *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994) ("[W]e therefore must be careful when considering evidence as proof of identity to recognize the distinction between evidence which shows that a defendant is the type of person who might commit a particular crime and evidence which shows that a defendant is the person who committed a particular crime."). See also 1 *Imwinkelried, Uncharged Misconduct Evidence* Ch 3 (1999).

Moreover, several of the listed "purposes" specified in Rule 404(B), such as motive, opportunity, or preparation, may be relevant to prove identity. Other-acts evidence may show identity in a number of ways. For example:

(1) In a murder case, evidence of the defendant's affair with the victim's wife (the other-act) may be admissible to establish motive, and motive is probative of identity. See also *State v. White*, 85 Ohio St.3d 433, 441, 709 N.E.2d 140 (1999) ("Defendant's beating [his former girlfriend] tends to show his jealousy and resulting rage toward her, emotions that gave defendant a strong motive to kill her mother and boyfriend."), cert.

denied, 528 U.S. 938 (1999); *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998) ("[The defendant] was charged with committing the murder for hire. Accordingly, evidence concerning prior acts performed for [the person who allegedly hired him to commit the murder] is admissible to prove motive under Evid.R. 404(B)."), cert. denied, 527 U.S. 1042 (1999); *State v. Henness*, 79 Ohio St.3d 53, 61, 679 N.E.2d 686 (1997) ("Appellant's drug addiction and use shows his need for money and, hence, his motive to steal and kill."), cert. denied, 522 U.S. 971 (1997); *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000 (1995) (The prosecution introduced evidence that the defendant had previously raped the victim and fathered her child. "This was highly relevant on the issue of [defendant's] motive to murder in order to escape punishment for the rape offense. The evidence was not offered to demonstrate [defendant's] propensity to commit crimes."), cert. denied, 516 U.S. 1095 (1996).

(2) In a murder case, in which the victim was killed by a bomb, evidence that the defendant had used a bomb in a prior offense may be admissible to establish the defendant's technical know-how with explosives, and this *capacity (opportunity)* is probative of identity.

(3) In a bank robbery case, evidence that the defendant had previously stolen a car that was later identified as the robbery getaway car may be admissible to establish *preparation* and is probative of identity.

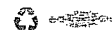
(4) In a murder case, evidence that the defendant participated in a prior robbery in which a weapon was stolen may be admissible to prove identity if the same weapon is found at the murder scene. E.g., *State v. Watson*, 28 Ohio St.2d 15, 21-22, 275 N.E.2d 153 (1971) ("Thus where ... the state is required to show possession of the weapon by defendant it is permissible to allow in evidence proof of other crimes tending to prove such possession, even though such evidence involves proof of crimes other than the one with which the defendant is charged.").

(5) In a robbery case, evidence that the defendant used the victim's credit cards may be admissible to connect the defendant to the robbery. See *State v.*

Chief Public Defender James A. Draper
Cuyahoga County Public Defender Office
100 Lakeside Place, 1200 W. 3rd Street, Cleveland, Ohio 44113

Telephone (216) 443-7223

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Hennessey, 79 Ohio St.3d 53, 61, 679 N.E.2d 686 (1997)(defendant's "use of stolen checks and credit cards shows he possessed [the victim's] property the day after [the victim] disappeared, proving robbery and linking [the defendant] to [the victim's] death"), cert. denied, 522 U.S. 971 (1997).

(6) "Evidence of intimidation of witnesses or attempts at suppression of adverse evidence reflects a consciousness of guilt and is not wholly independent of the charged offenses. These acts are admissions by conduct and are admissible to prove identity because they directly tie the defendant to the criminal act." State v. Hirsch, 129 Ohio App.3d 294, 306-07, 717 N.E.2d 789 (1998), appeal dismissed, 84 Ohio St.3d 1436, 702 N.E.2d 1213 (1998).

Other illustrations are found in the cases. E.g., State v. McNeill, 83 Ohio St.3d 438, 442, 700 N.E.2d 596 (1998) (other-acts evidence of drug sales admissible to corroborate eyewitness identification of the defendant as the shooter in a murder involving a drug dispute), cert. denied, 526 U.S. 1137 (1999); State v. Davis, 62 Ohio St.3d 326, 338, 581 N.E.2d 1362 (1991)(Where accused claims alibi, evidence concerning his narcotics activities to show why he would travel to the scene of the crime is admissible.), cert. dismissed, 506 U.S. 803 (1992); State v. Daniels, 92 Ohio App.3d 473, 492, 636 N.E.2d 336 (1993)("The state's case centered on the theory that Jackson conspired to kill Foster to prevent him from testifying against Jackson with respect to the assault on Foster."), appeal dismissed, 68 Ohio St.3d 1449, 626 N.E.2d 690 (1994).

In State v. Allen, 73 Ohio St.3d 626, 653 N.E.2d 675 (1995), cert. denied, 516 U.S. 1178 (1996), the prosecution introduced evidence that the victim participated in her church's prison ministry program and that she met the defendant through that program while he was incarcerated. The Ohio Supreme Court upheld the admission of the evidence: "Evid.R. 404(B) allows 'other acts' evidence as proof of identity. Since [the victim] was apparently killed by someone she knew, the prior-imprisonment evidence was relevant to explain that [the victim] knew [the defendant] through visiting him in prison." Id. at 632.

Proof of identity: Modus operandi

Evidence of similarity between the other-act and the crime charged is frequently offered to prove identity – i.e., the modus operandi of both crimes is so similar that the same person probably committed both offenses – provided sufficient evidence is admitted to show that the defendant committed the other-act. This theory of admissibility long predated Rule 404(B). E.g., State v. Curry, 43 Ohio St.2d 66, 73, 330 N.E.2d 720 (1975) ("similar crimes within a period of time reasonably near to the offense on trial, [and showing] that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes"); Whiteman v. State, 119 Ohio St. 285, 164 NE 51 (1928) (other robberies by defendants wearing uniforms, impersonating officers, and stopping cars "earmarked" them as the perpetrators of the offense charged); Barnett v. State, 104 Ohio St. 298, 303, 135 NE 647 (1922) ("If the fact tends to establish the identity of the accused, it is competent evidence, no matter what else it may prove.").

The commission of two robberies with a weapon, however, does not satisfy the minimum relevancy standard. According to McCormick, "the mere repeated commission of crimes of the same class, such as repeated murders, rob-

beries or rapes" is insufficient; the "pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." 1 McCormick, Evidence § 190, at 662-63 (5th ed. 1999). See also United States v. Luna, 21 F.3d 874, 881 (9th Cir. 1994) (generic "takeover" bank robberies not sufficiently distinctive); People v. Haston, 69 Cal.2d 233, 245, 70 Cal. Rptr. 419, 427, 444 P.2d 91, 99 (1968) ("It is apparent that the indicated inference does not arise ... from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant.").

The Ohio Supreme Court has addressed this topic numerous times. Other-acts evidence, for example, to prove "the identity of the perpetrator is admissible where two deaths occur under almost identical circumstances." State v. Smith, 49 Ohio St.3d 137, 142, 551 N.E.2d 190 (1990) (accused charged with murder by administering an overdose of morphine to an overnight guest; evidence that another overnight guest also died from a morphine overdose admitted). See also State v. Green, 90 Ohio St.3d 352, 370, 738 N.E.2d 1208 (2000) ("the offenses against Moore showed a 'unique, identifiable plan of criminal activity' helping to prove Green's identity as one who kidnapped, robbed, and killed El-Okdi."); State v. Bey, 85 Ohio St.3d 487, 490, 709 N.E.2d 484 (1999)("[T]he 'other act' evidence established a 'behavioral fingerprint' linking the [defendant] to the [other] crime due to the common features shared by the [prior] homicide and the [present] homicide. The deaths of [the two victims] occurred under practically identical circumstances."), cert. denied, 528 U.S. 1049 (1999); State v. Wogenstahl, 75 Ohio St.3d 344, 366, 662 N.E.2d 311 (1996)("[T]here are 'striking' similarities between appellant's 1985 [aggravated burglary] conviction and the aggravated burglary in the case at bar."), cert. denied, 519 U.S. 895 (1996); State v. Woodard, 68 Ohio St.3d 70, 73, 623 N.E.2d 75 (1993)(evidence of another car-jacking on the same night admissible to prove identity), cert. denied, 512 U.S. 1246 (1994); State v. Hill, 64 Ohio St.3d 313, 323, 595 N.E.2d 884 (1992), cert. denied, 507 U.S. 1007 (1993); State v. Shedrick, 61 Ohio St.3d 331, 338, 574 N.E.2d 1065 (1991) (similarities between two rapes sufficient to show identity); State v. Jamison, 49 Ohio St.3d 182, 552 N.E.2d 180 (1990)(accused charged with robbery-murder in downtown Cincinnati; evidence of seven other robberies by accused over a four-month span in downtown Cincinnati with many similar qualities admitted), cert. denied, 498 U.S. 881 (1990); State v. Hector, 19 Ohio St.2d 167, 177, 249 N.E.2d 912 (1969) ("There must be some similarity of methodology employed which itself would constitute probative evidence of the probability that the same person ... committed both crimes."); State v. Pearson, 119 Ohio App.3d 745, 758, 696 N.E.2d 273 (1997)("The details of all three attacks were strikingly similar."), appeal dismissed, 80 Ohio St.3d 1410, 684 N.E.2d 703 (1997).

In another case, the Court identified the following similarities:

[T]he Wilson and Jackson crimes share a similar modus operandi with the murder. In each case, Waddy entered a woman's apartment at night; he bound the victim's wrists behind her back and tied her ankles; he used a knife; he called each victim a "bitch"; he took the victim's car or car keys; and he stole or demanded bank cards or credit cards. The crimes occurred with-

in a three-month period and within walking distance of each other. Waddy points out that the crimes differ in some ways; however, such differences go to weight, not admissibility. *State v. Waddy*, 63 Ohio St.3d 424, 429, 588 N.E.2d 819 (1992) (citations omitted), cert. denied, 506 U.S. 921 (1992).

See also *State v. Coleman*, 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988), cert. denied, 488 U.S. 900 (1988) (“[S]imilarities in the crimes indicate there is a strong likelihood that the offender in the solved crime also committed the unsolved crime.”); *State v. Williams*, 79 Ohio St.3d 1, 11, 679 N.E.2d 646 (1997) (the evidence of *modus operandi* “established a ‘behavioral fingerprint’ linking the appellant to the crime due to the common features shared by both events”), cert. denied, 522 U.S. 1053 (1998); *State v. Echols*, 128 Ohio App.3d 677, 693, 716 N.E.2d 728 (1998).

Waddy involved a joinder issue. See 2 Katz & Giannelli, *Baldwin’s Ohio Practice, Criminal Law* Ch 57 (1996) (joinder & severance of offenses). If evidence of crimes in the other counts of an indictment are admissible under Evid. R. 404(B), the argument for severance of offenses under Criminal Rule 14 is undercut. See *State v. Echols*, 128 Ohio App.3d 677, 692, 716 N.E.2d 728 (1998) (“In this case, the trial court arguably allowed joinder because the evidence of the various incidents (‘other acts’) would be admissible in any one case to prove identity.”).

However, the Ohio Supreme Court has also ruled evidence inadmissible on this basis:

[T]he acts should show a *modus operandi* identifiable with the defendant. ... A certain *modus operandi* is admissible ... because it provides a behavioral fingerprint which, when compared to the behavioral fingerprints associated with the crime in question, can be used to identify the defendant as the perpetrator. ... To be admissible to prove identity through a certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question. *State v. Lowe*, 69 Ohio St.3d 527, 531-32, 634 N.E.2d 616 (1994) (“The only arguably common feature ... is the use of rope The use of rope itself does not provide a distinctive behavioral fingerprint.”).

Accord *State v. Echols*, 128 App.3d 677, 693, 716 N.E.2d 728 (1998) (“Very seldom is evidence of different crimes sufficiently similar to be a behavioral fingerprint. ... [I]n this case, we conclude that all the joined offenses did not share ‘significant common features’ sufficient to establish a *modus operandi*. Although the crimes occurred in the same geographical area at knifepoint, there was a great deal of variance among the robberies.”) (footnotes omitted).

See also *State v. Hector*, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969) (reversing conviction because evidence of another robbery-murder improperly admitted); *State v. Hall*, 57 Ohio App.3d 144, 148, 567 N.E.2d 305 (1989) (other act “not sufficiently distinctive to demonstrate the identity of the perpetrator”), appeal dismissed, 42 Ohio St.3d 714, 538 N.E.2d 1065 (1989); *State v. Smith*, 59 Ohio App.2d 194, 202, 392 N.E.2d 1264 (1977) (“There was no uniformity in the time of day of the other acts, the method of entry, or the items taken.”).

As explained in Part I, identifying the material issue, such as identity, is only the first step in determining admissibility. The evidence is still subject to exclusion under Rule 403.

PROOF OF MENS REA

Intent & knowledge

Other-acts evidence is often used to show that the accused possessed the requisite mental state for the charged offense, i.e., to establish the *mens rea*. See 1 Imwinkelried, *Uncharged Misconduct Evidence* Ch 5 (1999). Two of the listed “purposes” in Rule 404(B) – intent and knowledge – frequently are *mens rea* elements of crimes, and other-acts evidence may be used to prove these mental states. See R.C. 2901.22 (culpable mental states include conduct done purposely, knowingly, recklessly, or negligently).

Motive and preparation, which are also listed, may relate to these elements. For example, a defendant’s illicit affair with a homicide victim’s wife is an other-act which tends to show “motive,” and a person with a motive is more likely to have intentionally killed than a person without a motive.

Similarly, evidence that the defendant stole a gun the day before a homicide may show *preparation*, and thus is probative of “calculation and design” in an aggravated homicide case. See also *State v. Allard*, 75 Ohio St.3d 482, 501, 663 N.E.2d 1277 (1996) (holding that testimony of witnesses about threatening statements made by the defendant before the murders “was clearly offered to demonstrate the element of prior calculation and design”), cert. denied, 519 U.S. 1031 (1996).

Numerous other examples illustrate the rule. E.g., *State v. Coleman*, 85 Ohio St.3d 129, 140, 707 N.E.2d 476 (1999) (“R.C. 2929.04(A)(8) requires that the state prove motive [“purpose”], and evidence was introduced to demonstrate that Stevens was the key witness against appellant and that her murder would hinder the state’s case against him by preventing her testimony, which explained appellant’s motive and deep obsession with killing Stevens. Thus, the drug sales were not considered ‘other acts’ evidence limited by Evid.R. 404(B); rather, they were introduced to prove ... the death-penalty specification.”), cert. denied, 528 U.S. 954 (1999); *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000 (1995) (The prosecution introduced evidence that the defendant had previously raped the victim and fathered her child. “This was highly relevant on the issue of [defendant’s] motive to murder in order to escape punishment for the rape offense. The evidence was not offered to demonstrate [defendant’s] propensity to commit crimes.”), cert. denied, 516 U.S. 1095 (1996); *State v. Slagle*, 65 Ohio St.3d 597, 606, 605 N.E.2d 916 (1992) (“Appellant’s prior break-ins were relevant under Evid. R. 404(B) to his motive and intent in entering [the victim’s] house.”), cert. denied, 510 U.S. 833 (1993); *State v. Smith*, 49 Ohio St.3d 137, 142, 551 N.E.2d 190 (1990) (“evidence of ‘other acts’ to prove intent to commit a crime”); *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981); *State v. Gardner*, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979); *State v. Flonnory*, 31 Ohio St.2d 124, 285 N.E.2d 726 (1972); *State v. Moore*, 149 Ohio St. 226, 78 N.E.2d 365 (1948); *State v. Haddix*, 93 Ohio App.3d 470, 481, 638 N.E.2d 1096 (1994) (Evidence of other stolen items admissible to show knowledge because “[f]rom the outset, appellant has denied being involved in fencing stolen property or receiving stolen property.”).

Lack of mistake or accident

The defenses of mistake and accident also relate to *mens rea*. Neither is an affirmative defense; both involve a claim that the defendant lacked the requisite *mens rea* of the charged offense. See 3 Katz & Giannelli, *Baldwin’s Ohio Practice, Criminal Law* § 91.8 (1996). An “absence of

mistake or accident" is "not a separate category but merely a converse of the existence of a specific intent." *State v. Snowden*, 49 Ohio App.2d 7, 12, 359 N.E.2d 87 (1976). See also Ohio Jury Instructions § 411.01.

For example, a defendant charged with murder who testifies that the weapon discharged "accidentally" because he was unfamiliar with firearms is raising a defense of accident, which tends to negate the mens rea element of purposefulness. See R.C. 2903.02(A) (defining murder as purposely causing the death of another). To rebut this claim, evidence that the defendant had used a weapon during a prior robbery may be admissible. Similarly, a defendant who claims she made a mistake about the nature of a controlled substance is asserting a lack of mens rea, i.e., knowledge that the substance was heroin. Accordingly, her prior heroin transactions may be admissible to show that she is familiar with heroin and thus a "mistake" is unlikely.

See also *State v. Grant*, 67 Ohio St.3d 465, 471, 620 N.E.2d 50 (1993) ("The existence of these basement fires, not caused by the bedroom fire, tended to prove arson upstairs and negate the possibility of accident. Moreover, these basement fires tended to show a common plan or scheme and identify Grant as the arsonist."), cert. denied, 513 U.S. 836 (1994); *State v. Grubb*, 111 Ohio App.3d 277, 282, 675 N.E.2d 1353 (1996) (Defendant's "testimony also raised an issue regarding whether his wife's injuries were 'accidental' and not the result of any intentional (or knowing) conduct on his part. To that extent 'intent' and 'lack of accident' ... were in issue in this case. Accordingly, the state was entitled to utilize the evidence regarding defendant's assaults on his former wife pursuant to Evid.R. 404(B) ... to prove his intent (culpable mental state) and the lack of accident, in this case."); *State v. McCornell*, 91 Ohio App.3d 141, 147, 631 N.E.2d 1110 (1993) ("The two serious physical injuries caused by appellant to [his wife] and her stories about them [being accidental] are too coincidental to be left unchallenged by the state.").

Evidence of absence of mistake or accident is typically admitted in rebuttal rather than in the prosecution's case-in-chief because the issue is often raised for the first time during the defense's case-in-chief. E.g., *State v. Davis*, 81 Ohio App.3d 706, 717, 612 N.E.2d 343 (1992) ("It is apparent that for some of the purposes for admitting evidence of other acts, as set forth in Evid. R. 404(B) and R.C. 2945.59 (e.g., 'absence of mistake or accident'), it is more appropriate that such evidence be presented in rebuttal after the defendant has asserted a defense (e.g., mistake or accident). However, we do not find that to be true in all cases."); *State v. Snowden*, 49 Ohio App.2d 7, 15-16, 359 N.E.2d 87 (1976).

In *State v. Burson*, 38 Ohio St.2d 157, 159, 311 N.E.2d 526 (1974), the Ohio Supreme Court commented:

The other acts of the defendant must have such a temporal, modal and situational relationship with the acts constituting the crime charged that evidence of the other acts discloses purposeful action in the commission of the offense in question. The evidence is then admissible to the extent it may be relevant in showing the defendant acted in the absence of mistake or accident. The accident issue, of course, could be raised by the defense during opening statements or through the cross-examination of prosecution witnesses, in which case the prosecution should be permitted to introduce this type of evidence in its case-in-chief.

In general, however, the prosecution should not be permitted to introduce other-acts evidence to prove lack of mistake or accident unless mistake or accident is somehow raised by the defendant. See *State v. Blonski*, 125 Ohio App.3d 103, 112, 707 N.E.2d 1168 (1997) ("Because there was no claim of accident or mistake to refute, the evidence of [the defendant's] prior acts of domestic violence should not have been admitted on that basis."), appeal dismissed, 81 Ohio St.3d 1521, 692 N.E.2d 1023 (1998).

As explained in Part I, identifying the material issue, such as mens rea, is only the first step in determining admissibility. The evidence is still subject to exclusion under Rule 403.

PROOF OF CORPUS DELICTI

Although not as common as the identity and mens rea examples cited above, other-acts evidence may be used to show that a crime has been committed, i.e., to establish the corpus delicti or actus reus of the crime. See 1 Imwinkelried, *Uncharged Misconduct Evidence* Ch 4 (1999) (actus reus).

The famous "Brides in the Bath" case, *Rex v. Smith*, 11 Crim. App. 229, 84 L.J.K.B. 2153 (1915), illustrates this use. The defendant was accused of murdering his wife, who had been found drowned in a bath tub. The prosecution introduced evidence showing that two other wives had also drowned while taking baths. The evidence was relevant to show that the death in the charged offense was homicidal and not accidental.

A similar issue arose in *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973), cert. denied, 415 U.S. 979 (1974), where the defendant was charged with the murder of an adopted child. A critical issue was whether the death was homicidal or natural. The prosecution offered evidence showing that nine other young children had died or been hospitalized while in the defendant's care. The court wrote: "Thus, with regard to no single child was there any legally sufficient proof that defendant has done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant."

Perhaps these examples could be classified as "absence of accident" cases. As discussed in the preceding section, however, evidence showing an absence of mistake or accident is admissible to refute a defendant's claim of lack of mens rea. As such, the evidence typically should be admitted in rebuttal. The "Brides in the Bath" and *Woods* cases are different. The other-acts evidence had to be introduced in the prosecution's case-in-chief to prove that a crime had been committed. Otherwise, the case could have been terminated by a directed verdict for the defense. See Crim. R. 29(A)(motion for judgment of acquittal).

As explained in Part I, identifying the material issue, such as corpus delicti, is only the first step in determining admissibility. The evidence is still subject to exclusion under Rule 403.

VICTIM'S MENTAL STATE

There are a few crimes, such as domestic violence, that make the victim's state of mind an essential element of the offense and other-acts may be relevant for this purpose. For

example, in *State v. Collie*, 108 Ohio App.3d 580, 671 N.E.2d 338 (1996), the defendant was charged with domestic violence under R.C. 2919.25(C), which prohibits a person from "knowingly caus[ing] a family or household member to believe that the offender will cause imminent physical harm to the family or household member." The court of appeals in *Collie* held that, "in order to prove the element of the belief of a family member that the offender will cause imminent physical harm, evidence of 'other acts' against the same victim will be admissible." *Id.* at 584.

See also *State v. Drake*, 135 Ohio App.3d 507, 510, 734 N.E.2d 865 (1999) ("The act of previously putting Eva Drake's arm in a cast is admissible to show Eva Drake's state of mind when appellant made the threats in this case. The second statement also goes to Eva Drake's state of mind. The third statement is directly relevant to the threat to put Eva Drake in the river. These two previous threatening statements and one prior act are not generalized bad acts from appellant's past."); *State v. Renner*, 125 Ohio App.3d 383, 708 N.E.2d 765 (1998) (In a prosecution for abduction and assault, the victim was allowed to testify as to past acts of violence that the defendant committed against her "to prove abduction, i.e., to show that while [the defendant] used no words of threat to make [the victim] get in the truck that evening, she felt threatened and complied because of the presence of the gun and because of the past events of violence, including a specific act of violence involving the gun.").

INTERRELATED ACTS

In some cases it is impossible to exclude evidence of other acts that are interwoven with the charged offense, even though such acts are not material to an essential element of the charged offense.¹ McCormick, Evidence § 190, at 660 (5th ed. 1999) (One permissible purpose of other-acts evidence is "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.").

In *State v. Curry*, 43 Ohio St.2d 66, 73, 330 N.E.2d 720 (1975), the Ohio Supreme Court recognized that there are some "situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible ... the 'other acts' testimony must concern events which are inextricably related to the alleged criminal act."

See also *State v. Brown-Austin*, 1998 WL 516301 at *3, No. 1997CA00122 (5th Dist. Ct. App., Stark, 8-3-98) (evidence of gang activity "is closely interwoven into the background and circumstances of this crime and therefore, is admissible pursuant to Evid.R. 404(B)"); *State v. Johnson*, 1998 WL 549342, No. 1997CA00247 (5th Dist. Ct. App., Stark, 9-1-98) (defendant charged with kidnapping, robbery, and assault; evidence of defendant's involvement in drug activity admissible because "it provided the context in which the crimes charged occurred" and "established how the parties knew each other and the nature of their relationship").

Res Gestae

This situation is sometimes described as evidence of "res gestae." See *State v. Spears*, 58 Ohio App.2d 11, 387 N.E.2d 648 (1978). This phrase often confuses more than helps. 1 McCormick, Evidence § 190, at 660 (5th ed. 1999)

("The phrases 'same transaction' or, less happily, 'res gestae' often are used to denote evidence introduced for this purpose."). The term "res gestae" is also misused in the hearsay context.

Intrinsic Acts

Some federal cases hold that this situation is not governed by Federal Rule 404(b) because the interrelated act is not an "other" or "extrinsic" act; rather it is an "intrinsic" act and thus part of the charged crime. E.g., *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990); *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985); *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) ("Evidence of criminal activity other than the charged offense is not considered extrinsic evidence within the proscription of Rule 404(b) of the Federal Rules of Evidence, [1] if it is an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, [2] if it was inextricably intertwined with the evidence regarding the charged offense, or [3] if it is necessary to complete the story of the crime of trial.") (citations omitted). But see *United States v. Levy*, 731 F.2d 997, 1003 (2d Cir. 1984) (Rules 404(b) and 403 govern the admissibility of evidence of uncharged crimes that are inextricably interwoven with the charged offense). See also *State v. Green*, 117 Ohio App.3d 644, 654, 691 N.E.2d 316 (1996) ("The evidence concerning the automobile accident and subsequent conduct of appellant is 'an integral part of the immediate context' of the armed robbery charge."), appeal dismissed, 78 Ohio St.3d 1495, 678 N.E.2d 1231 (1997).

Test for Admissibility

Under any view, however, the critical issue remains the same: "This rationale should be applied only when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar." 1 McCormick, Evidence § 190, at 660 (5th ed. 1999).

For example, the Ohio Supreme Court, in addressing this issue, has written: "The state further argues that the rape is 'inextricably related' to the murder. But it seems clear that the rape was not part of the 'immediate background' of the murder." *State v. Hutton*, 53 Ohio St.3d 36, 40, 559 N.E.2d 432 (1990). One court of appeals held that, "[f]or testimony regarding scheme, plan, or system to be admissible ... it must be 'inextricably related' to the crime and form the immediate background that serves as a foundation of the crime." *State v. Cotton*, 113 Ohio App.3d 125, 133, 680 N.E.2d 657 (1996).

The Ninth Circuit has provided the following guidance: "There are generally two categories of cases in which we have concluded that 'other act' evidence is inextricably intertwined with the crime with which the defendant is charged and therefore need not meet the requirements of Rule 404(b). First, we have sometimes allowed evidence to be admitted because it constitutes a part of the transaction that serves as the basis for the criminal charge. Second, we have allowed 'other act' evidence to be admitted when it was necessary to do so in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime; it is obviously necessary in certain cases for the government to explain either the circumstances under which particular evidence was obtained or the events surrounding the commission of the crime. This exception to Rule 404(b) is most often invoked in cases in which the defendant is charged with being a felon in possession of a firearm." *United States v. Viscarra-Martinez*, 66

DEFENDANT'S PARTICIPATION IN THE "OTHER ACT"

Evidence of other crimes, wrongs, or acts is admissible only if such evidence is relevant to a material or consequential fact under Rule 401. At a minimum, the prosecution must offer evidence tending to show that the defendant committed the other act. Otherwise, the evidence is irrelevant. See *Huddleston v. United States*, 485 U.S. 681, 689 (1988) ("In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."). Some common law courts had required "substantial proof" or "clear and convincing evidence" of the defendant's involvement in the other act. See 1 McCormick, Evidence § 190, at 670-71 (5th ed. 1999).

Ohio Rule

The pre-Rules Ohio cases used the "substantial proof" standard. E.g., *State v. Dick*, 27 Ohio St.2d 162, 271 N.E.2d 797 (1971); *State v. Carter*, 26 Ohio St.2d 79, 269 N.E.2d 115 (1971); *Scott v. State*, 107 Ohio St. 475, 141 NE 19 (1923).

Cases decided under the Rules have continued to apply this requirement. E.g., *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994); *State v. Hill*, 64 Ohio St.3d 313, 323, 595 N.E.2d 884 (1992), cert. denied, 507 U.S. 1007 (1993); *State v. Davis*, 62 Ohio St.3d 326, 338, 581 N.E.2d 1362 (1991) ("The threshold criterion is whether the other acts evidence can show by substantial proof any of those things enumerated."), cert. dismissed, 506 U.S. 803 (1992); *State v. Shedrick*, 59 Ohio St.3d 146, 150, 572 N.E.2d 59 (1991); *State v. Jamison*, 49 Ohio St.3d 182, 187, 552 N.E.2d 180 (1990) ("Other-acts evidence need be proved only by substantial proof, not proof beyond a reasonable doubt."), cert. denied, 498 U.S. 881 (1990); *State v. Pearson*, 119 Ohio App.3d 745, 757, 696 N.E.2d 273 (1997) ("In the present case, substantial proof was offered to establish that the other acts were committed by appellant. That is, Jennifer N. was able to identify appellant as her attacker; DNA evidence linked appellant to the attacks on Stacie S. and Theresa T."), appeal dismissed, 80 Ohio St.3d 1410, 684 N.E.2d 703 (1997).

Federal Rule

In contrast, the United States Supreme Court in *Huddleston v. United States*, 485 U.S. 681 (1988), rejected the common law approach. Instead, the Court, based on Federal Rule 104(b) adopted a *prima facie* evidence standard, a very lax standard. The Court explained: "In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact – here, that the televisions were stolen – by a preponderance of the evidence." Id. at 690.

DUE PROCESS

Several courts have indicated that the improper use of other-acts evidence may violate due process. See 2 Imwinkelried, Uncharged Misconduct Evidence Ch 10 (1999) (constitutional restrictions).

In *Estelle v. McGuire*, 502 U.S. 62 (1991), the United

States Supreme Court considered such a claim. McGuire was convicted of murdering his infant daughter. At trial two physicians testified that the infant was a battered child, a finding based on prior injuries, some of which were discovered during the autopsy. McGuire argued that evidence of these prior injuries violated the rule prohibiting prior-crimes evidence. The Court disagreed, first noting that federal habeas was limited to a review of federal issues, typically federal constitutional issues, and does not extend to violations of state evidentiary rules. Id. at 72 ("Nor do our habeas powers allow us to reverse McGuire's conviction based on a belief that the trial judge incorrectly interpreted the California Evidence Code in ruling that the prior injury evidence was admissible as bad acts evidence in this case."). See also *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules.").

Consequently, admission of the evidence had to be judged on due process grounds. The Court found the evidence relevant and therefore did not have to determine whether the admission of irrelevant evidence violates due process. 502 U.S. at 70 ("Concluding, as we do, that the prior injury evidence was relevant to an issue in the case, we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process [clause] ... for evidence that is not relevant to be received in a criminal trial.").

McGuire also challenged the instruction, arguing that it permitted the jury to use propensity evidence in violation of due process. The Court disagreed with this interpretation of the instruction, finding that it did not violate the propensity rule. Rather, it presented an issue similar to an instruction on other-acts evidence under Federal Rule 404(b). The Court therefore had no reason to determine whether a propensity instruction would be unconstitutional. Id. at 75 n. 5 ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.").

While unlikely in a routine case, the admissibility of other-acts evidence may violate due process in a particularly egregious case. Cf. *State v. Davis*, 62 Ohio St.3d 326, 338-39, 581 N.E.2d 1362 (1991) (evidence properly admitted under Evid. R. 404(B) did not violate due process), cert. dismissed, 506 U.S. 803 (1992).

ENTRAPMENT CASES

Ohio follows the majority rule on entrapment, sometimes known as the "origin of intent" test or subjective theory. See 3 Katz & Giannelli, Baldwin's Ohio Practice, Criminal Law Ch 90 (1996) (entrapment). Under this test, entrapment occurs "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells v. United States*, 287 U.S. 435, 442 (1932). See also Ohio Jury Instructions § 411.25 (entrapment).

Under this view of entrapment, the defendant's predisposition (propensity) is a material issue, and the defendant's prior criminal conduct becomes relevant. As the United States Supreme Court has stated, "[I]f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and

predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." Sorrells v. United States, 287 U.S. 435, 451-52 (1932).

Thus, an entrapment defense raises issues concerning the defendant's character and commission of other-acts. See 1 Imwinkelried, Uncharged Misconduct Evidence § 6.16 (1999) (affirmative defense of entrapment). Although the commentators disagree on the theory of admissibility, they do agree that the Federal Rules of Evidence have not changed the prior law on the subject. The use of disposition evidence in the entrapment context could be considered as raising an issue of (1) other-acts evidence under Rule 404(B), (2) "character in issue," or (3) prosecution rebuttal to a defendant's raising a character issue under Rule 404(A)(1). See 22 Wright & Graham, Federal Practice and Procedure § 5235, at 372-79 (1978).

Nevertheless, this evidence rule has been characterized as the "greatest fault" of the subjective (origin-of-intent) approach and an "indiscriminate attitude toward predisposition evidence is by no means a necessary feature of the subjective test." Park, The Entrapment Controversy, 60 Minn. L. Rev. 163, 272 (1976).

A similar caution is found in *State v. Doran*, 5 Ohio St.3d 187, 192, 449 N.E.2d 1295 (1983), where the Ohio Supreme Court expressed concern about the "scope of admissible evidence on the issue of an accused's predisposition." The Court wrote:

While evidence relevant to predisposition should be freely admitted, judges should be hesitant to allow evidence of the accused's bad reputation, without more, on the issue of predisposition. Rather, while by no means an exhaustive list, the following matters would certainly be relevant on the issue of predisposition: (1) the accused's previous involvement in criminal activity of the nature charged, (2) the accused's ready acquiescence to the inducements offered by the police, (3) the accused's expert knowledge in the area of the criminal activity charged, (4) the accused's ready access to contraband, and (5) the accused's willingness to involve himself in criminal activity. *Id.* at 192.

These factors are not exhaustive. *State v. Seebeck-Horstman*, 67 Ohio App.3d 443, 446, 587 N.E.2d 359 (1990) (*Doran* factors are "by no means an exhaustive list"). Other factors include an accused's own admissions of past deeds or future plans, and the results of a police search

showing the defendant's involvement in a "course of ongoing criminal activity." 1 LaFave & Scott, Substantive Criminal Law § 5.2(f)(1), at 607 (1986).

Numerous Ohio cases address this evidence issue. E.g., *State v. Smith*, 92 Ohio App.3d 172, 176-78, 634 N.E.2d 659 (1993) (applying the *Doran* factors); *State v. Krivitskiy*, 70 Ohio App.3d 293, 296-97, 590 N.E.2d 1359 (1990); *State v. Seebeck-Horstman*, 67 Ohio App.3d 443, 445-46, 587 N.E.2d 359 (1990) (applying the *Doran* factors); *State v. Cheraso*, 43 Ohio App.3d 221, 222, 540 N.E.2d 326 (1988) ("Once [entrapment] is established, the state can rebut the entrapment defense by showing that the defendant was predisposed to commit the crime."); *Columbus v. Corne*, 7 Ohio App.3d 344, 345-46, 455 N.E.2d 696 (1982) ("But, after the prosecution has rested its case and the defense of entrapment is raised and pursued by the accused, then, the prosecution may introduce rebuttal evidence in an effort to show the accused's predisposition to commit the crime."); *State v. Savage*, 1 Ohio App.3d 13, 14, 437 N.E.2d 1202 (1980) (In an entrapment case, "the defendant waives his right to prohibit the state from showing his 'predisposition' and makes predisposition relevant for the state to show on rebuttal.").

A number of other evidentiary issues surface in entrapment cases. Although evidence of predisposition may be admissible, inadmissible hearsay evidence may not be used for this purpose. See *United States v. Webster*, 649 F.2d 346, 349-50 (5th Cir. 1981).

Expert Testimony

Also, several courts have ruled that the defendant may introduce expert testimony concerning his susceptibility to inducement. See *United States v. Hill*, 655 F.2d 512, 516-17 (3d Cir. 1981), cert. denied, 464 U.S. 1039 (1984); *State v. Woods*, 20 Ohio Misc.2d 1, 3, 484 N.E.2d 773 (C.P. 1984) ("[The] defendant shall be permitted to introduce expert psychiatric testimony as to any susceptibility to influence or suggestion as relevant to the predisposition issue. ... The expert shall not however testify as to the actions of government agents or their effect upon the defendant's susceptibility nor as to the ultimate issue of the existence of entrapment which is within the province of the jury."). See also *State v. Dapice*, 57 Ohio App.3d 99, 105, 566 N.E.2d 1261 (1989) ("There is some authority that expert testimony on the issue of predisposition may be admitted. ... However, admission of such testimony is a matter left to the discretion of the trial court."), appeal dismissed, 49 Ohio St.3d 707, 551 N.E.2d 1301 (1990).