1992

"Other Acts" & Character Evidence: Part II

Paul C. Giannelli

PUBLIC DEFENDER REPORTER

Vol. 15, No. 3 Summer 1992

"OTHER ACTS" & CHARACTER 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 a two-part article on "other acts" evidence and character evidence. The first article examined the conditions under which an accused may introduce evidence of his good character and how such character may be proved (e.g., reputation or opinion evidence). That article also examined the prosecution right to rebut such evidence, either on cross-examination or by calling its own character witnesses.

This article discusses when evidence of a victim's character is admissible. In addition, the admission of "other acts" evidence is examined.

CHARACTER OF THE VICTIM

A second exception to the general prohibition against the admissibility of character evidence is recognized in Rule 404(A)(2). That provision permits an accused to present evidence of a pertinent character trait of the alleged victim of the charged offense.

Once the accused has introduced such evidence, the prosecution may offer rebuttal evidence. The prosecution, however, is prohibited from introducing evidence of the victim's character until the defense "opens the door." *See* State v. White, 15 Ohio St.2d 146, 150-51, 239 N.E.2d 65, 69-70 (1968); Reed v. State, 98 Ohio St. 279, 120 N.E. 701 (1918); Upthegrove v. State, 37 Ohio St. 662 (1882); State v. Schmidt, 65 Ohio App.2d 239, 417 N.E.2d 1264 (1979).

Rule 405(A) limits the methods of proof that the accused and the prosecution may use to show or to rebut the character of a victim; only reputation or opinion evidence is permitted.

A victim's character may be relevant in two types of cases: on the issue of self-defense in homicide and assault cases and on the issue of consent in rape and gross sexual imposition cases. In the latter cases, the Ohio Rape Shield law controls. See R.C. 2907.02(D); 2907.05(D).

Self-Defense Cases

Rule 404(A)(2) will be applicable principally on the issue of self-defense. For example, a homicide defendant could introduce evidence of the victim's violent and aggressive character to show that the victim was the first aggressor, thereby establishing one element of self-defense. Once evidence of the victim's character is introduced by the accused, the prosecution may introduce rebuttal evidence of the victim's character for peacefulness.

The prosecution's right to introduce evidence of the victim's character, however, is not limited to cases in which the defendant introduces evidence of the victim's character. *Any* evidence that the victim was the first aggressor in a *homicide case* triggers the prosecution's right to introduce evidence of the victim's peaceful character. Thus, if the accused testifies that the victim was the first aggressor, but does not introduce character evidence on this issue, the prosecution may nevertheless introduce evidence of the victim's peaceful character in rebuttal.

Victim's Character Affecting Defendant's State of Mind

Evidence of the victim's violent character may also be relevant in a self-defense case to show that the accused reasonably believed that he was in danger of death or grievous bodily injury (an element of self-defense that is different from the first aggressor issue). This situation, however, does not involve the circumstantial use of character to prove the conduct of the victim, but rather involves proof of the defendant's state of mind, and thus is not controlled by Rules 404 and 405.

Most of the Ohio cases have involved this issue. *See* McGaw v. State, 123 Ohio St. 196, 174 N.E. 741 (1931); State v. Roderick, 77 Ohio St. 301, 82 N.E. 1082 (1907); Upthegrove v. State, 37 Ohio St. 662 (1882); Marts v. State, 26 Ohio St. 162 (1875); State v. Carlson, 31 Ohio App.3d 72, 73, 508 N.E.2d 999, 1000 (1986).

If character evidence is introduced to show its effect on the accused's state of mind, its relevance obviously depends on whether the accused knew of the victim's violent character. In contrast, if character evidence is introduced to show that the victim acted in conformity with that violent character and was therefore the first aggressor, it is irrelevant whether the accused was aware of the victim's character. *See* State v. Debo, 8 Ohio App.2d 325, 222 N.E.2d 656 (1966). *See also* Ohio Jury Instructions § 411.31 and 411.33 (self-defense).

Public Defender Hyman Friedman Telephone (216) 443-7223
Cuyahoga County Public Defender Office, 1200 Ontario Street, Cleveland, Ohio 44113

Rape Shield Law

Under the common law, an accused in a rape case could introduce evidence of the victim's character for chastity to prove consent. *See* McDermott v. State, 13 Ohio St. 332 (1862); McCombs v. State, 8 Ohio St. 643 (1858). This rule rested on the assumption that a woman who has consented to premarital or extramarital intercourse was more likely to consent than a woman who had not consented to such past intercourse.

In recent years this assumption, along with other aspects of rape prosecutions, has been severely criticized. Most states, including Ohio, have responded to this criticism by enacting "shield" laws which limit the admissibility of evidence of the victim's character. *See* Annot., 94 A.L.R.3d 257 (1979); 95 A.L.R.3d 1181 (1979).

R.C. 2907.02(D) provides that in rape cases:

> Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

A similar rule relating to the defendant's prior sexual activity is also contained in this provision. R.C. 2907.02(E) provides for a pretrial in-chambers resolution of issues that arise under this statute.

The rape shield law is designed to protect several interests:

> First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute is intended to aid in the truth-finding process. State v. Gardner, 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337, 340 (1979).

The statute differs in two respects from the general treatment of character evidence under the Rules of Evidence. First, the statute allows consideration of character evidence only insofar as it relates to sexual activity between the victim and defendant; Rule 404(A)(2) contains no such limitation. Second, the statute permits specific instances of conduct to be introduced; Rule 405(A) limits the methods of proof to reputation and opinion evidence.

Constitutionality of Rape Shield Law

The constitutionality of rape shield laws that preclude a defendant from introducing arguably exculpatory evidence has been questioned. Two U.S. Supreme Court cases, Davis v. Alaska, 415 U.S. 308 (1974), and Chambers v. Mississippi, 410 U.S. 284 (1973), are usually cited in support of the defendant's right to introduce evidence of the victim's character, at least in some circumstances.

In *Davis v. Alaska* the Court held that a state statute excluding evidence of a juvenile adjudication (a type of shield law) violated the defendant's Sixth Amendment right of confrontation under the circumstances of that case. In *Chambers v. Mississippi* the Court held that the application of state evidentiary rules which precluded the defendant from introducing critical and reliable defense evidence violated due process.

Congress recognized the force of the constitutional argument in enacting a federal shield law. Federal Rule 412 explicitly recognizes that the admissibility of evidence of the victim's sexual activity may be "constitutionally required." Fed. R. Evid. 412(b)(1). *See also* 22 Wright & Graham, Federal Practice and Procedure 424-27 (1978); 23 *Id.* §§ 5381-93 (1980).

See generally Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade,* 70 Minn. L. Rev. 763 (1986); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544 (1980); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977).

In *State v. Gardner, supra*, the Ohio Supreme Court upheld the constitutionality of the Ohio statute as applied in that case. The Court, however, left open the possibility that application of the statute might be unconstitutional under different factual circumstances. *Id.* at 19 n. 5. In State v. Graham, 58 Ohio St.2d 350, 390 N.E.2d 805 (1979), the Court was not presented with the constitutional issue. Because the defendant in *Graham* did not assert "the defense of consent, which could well affect the materiality and relevancy of the disputed evidence," evidence of the victim's prior sexual activity was not relevant. *Id.* at 352. *See also* State v. Thompson, 66 Ohio St.2d 496, 422 N.E.2d 855 (1981); State v. Collins, 60 Ohio App.2d 116, 396 N.E.2d 221 (1977).

In State v. Williams, 21 Ohio St.3d 33, 487 N.E.2d 560 (1986), the Court considered the constitutional issue. The alleged victim in *Williams* testified that she was "gay" and thus would not have consented to sexual intercourse with a man. The defendant claimed that the alleged victim had consented. He also claimed that she was a prostitute and that they had had sexual intercourse on numerous previous occasions. In support of these claims, the defense attempted to call a witness to testify about the victim's reputation as a prostitute and another witness who claimed to have had sex with the victim. The trial court excluded, based on the shield law, the testimony of both witnesses.

On review, the Ohio Supreme Court agreed that the evidence was not admissible under the rape shield law. The Court, however, found that "the rape shield law as applied in this case violates appellee's Sixth Amendment right of confrontation." State v. Williams, 21 Ohio St.3d 33, 36, 487 N.E.2d 560 (1986). Unlike its prior cases, which involved the use of the victim's prior sexual conduct as impeachment evidence, the conduct in *Williams* was relevant to consent, an essential element of the charged offense and the one that the prosecution first raised through the testimony of the victim.

False Accusations of Rape

In State v. Boggs, 63 Ohio St.3d 418, 588 N.E.2d 813 (1992), the defendant was precluded from cross-examining an alleged rape victim about a prior false accusation of rape. The trial judge ruled that the question violated the rape shield law. The Supreme Court, however,

disagreed. The Court ruled that "[f]alse accusations, where no sexual activity is involved, do not fall within the rape shield statute." *Id.* at 421. Instead, this line of questioning involves impeachment by prior bad acts that reflect upon credibility. Rule 608(B), which governs this issue, permits inquiry on cross-examination but precludes extrinsic evidence. Moreover, the defense would have to establish that the accusation was false. If, however, the prior accusation involved sexual activity, the rape shield law would prohibit this line of questioning. The Court summarized its holding as follows:

> Therefore, we hold that before cross-examination of a rape victim as to prior false rape accusations may proceed, the trial judge shall hold an *in camera* hearing to ascertain whether such testimony involves sexual activity and thus is inadmissible under R.C. 2907.02(D), or totally unfounded and admissible for impeachment of the victim. It is within the sound discretion of the trial court, pursuant to Evid. R. 608(B), whether to allow such cross-examination. *Id.* at 424.

Sanctions

In Michigan v. Lucas, 111 S.Ct. 1743 (1991), the U.S. Supreme Court ruled that the exclusion of defense evidence for failing to comply with the notice provision of a rape shield statute was not per se unconstitutional. The Court indicated, however, that exclusion in a particular case might be unconstitutional. *Id.* at 1747.

"OTHER ACTS" EVIDENCE

Rule 404(B) provides that evidence of other crimes, wrongs, or acts, although not admissible to prove character, may be admissible for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In effect, Rule 404(B) is a clarification provision. Rule 404(A) prohibits only the circumstantial use of character evidence. When evidence of other crimes, wrongs, or acts is not offered to prove that a person (typically a criminal defendant) acted in conformity with a pertinent character trait, the prohibition of Rule 404(A) does not apply. For example, if a person steals a gun and later uses that weapon to commit a murder, the theft may be relevant in the homicide prosecution to show the identity of the murderer. Thus, although evidence of the theft incidentally shows larcenous character, it is not being offered for that purpose, and Rule 404(A) does not prohibit its admission. *See* State v. Watson, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971).

Similar Acts Statute

Rule 404(B) supersedes R.C. 2945.59, which is known as the "similar acts" statute. The rule and statute differ in several respects. First, the statute applies only to acts of a defendant in a criminal case. In contrast, the rule applies in both civil and criminal cases and to the acts of any person, not only those of an accused.

Second, the rule and statute do not contain the same terminology. The terms "intent," "motive," "plan," and "absence of mistake or accident" appear in both. The terms "opportunity," "preparation," "knowledge," and "identity" appear in the rule, but not the statute. The statute, however, has been interpreted to include "identity." *See* State v. Shedrick, 59 Ohio St.3d 146, 150, 152 N.E.2d 59, 64 (1991); State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975). The terms "scheme" and "system" appear only in the statute. These differences are not critical because the "purposes" listed in Rule 404(B) are illustrative, not exclusive. *See* Staff Note ("non-exclusive listing").

Preliminary Issues

Several preliminary points deserve attention. The terms "similar act" or "prior crime" are frequently used to describe the subject matter of Rule 404(B); these terms are misleading.

Noncriminal Acts

First, the rule, by its own terms, is not limited to crimes; it embraces "wrongs" and "acts" as well.

Subsequent Acts

Second, the "other act" need not have occurred prior to the charged offense; evidence of a subsequent act may be admissible. *See* State v. Wilson, 8 Ohio App.3d 216, 219, 456 N.E.2d 1287, 1291 (1982); United States v. Riley, 657 F.2d 1377, 1388 (8th Cir. 1981), cert denied, 459 U.S. 1111, (1983); United States v. Childs, 598 F.2d 169, 170, 171 (D.C. Cir. 1979); United States v. Bridwell, 583 F.2d 1135, 1140 (10th Cir. 1978).

Similar Acts

In addition, the other act need not be "similar." For example, in the theft-of-a-gun example above, the other act (theft) was not similar to the charged offense (homicide).

Offered by the Defense

Because the overwhelming number of cases involve "other acts" of a criminal defendant, the following discussion will focus on those cases. Nevertheless, an accused may also introduce evidence of "other acts." United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984).

Notice

Because evidence of other acts entails a significant risk of unfair prejudice, care must be exercised in analyzing problems under Rule 404(B). One court has recommended:

> Where the state seeks to use evidence of collateral crimes in its case in chief, it would be prudent (if not mandated by the due process requirement of advance notice) to give the defense specific adequate pre-trial notice and to advise the trial court to screen the evidence in the absence of the jury. The trial court should "pin down" the prosecution as to whether or not the evidence is limited purpose evidence and force the state to declare precisely what specific purpose the evidence is claimed to serve. State v. Smith, 59 Ohio App.2d 194, 199, 392 N.E.2d 1264, 1268 (1977).

In 1991 Fed. R. Evid. 404(b) was amended to include a notice provision. Its purpose is to eliminate surprise and promote early and thoughtful resolution of the issue rather than risk haphazard and erroneous admission of such evidence. As Justice Brennan has remarked: "Only pretrial disclosure of such evidence will allow the defense adequate opportunity to investigate the claim of misconduct and to prepare objections to admission." Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report,* 68 Wash. U.L.Q. 1, 12 (1990). *See also* Imwinkelried, *The Worst Surprise of All:*

No Right to Pretrial Discovery of Prosecution's Uncharged Misconduct Evidence, 56 Ford. L. Rev. 247 (1987).

Several state jurisdictions also require notice in this context. *See* Minn. R. Crim. P. 706; Fla. Stat. 90.404(2)(b)(1); Tex. R. 404(b).

Rule of Construction

The Supreme Court has often advised caution in this area. In State v. Burson, 38 Ohio St.2d 157, 311 N.E.2d 526 (1974), the Court stated that "R.C. 2945.59 must be strictly construed against the state." *Id.* at 158. In State v. Broom, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), cert. denied, 490 U.S. 1075 (1989), the Court wrote: "Because R.C. 2945.59 and Evid R 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *Id.* (syllabus, para. 1). *Accord* State v. Coleman, 45 Ohio St.3d 298, 299 544 N.E.2d 622 (1989), cert. denied 493 U.S. 1051 (1990).

Rule 403

Rule 404(B) provides only that evidence of other crimes, wrongs, or acts *may* be admissible; admission is not mandatory. The rule, however, provides no standard for deciding when such evidence may be admitted. Since admission in this instance involves questions of relevance, Rules 401 to 403 are the controlling provisions.

These provisions, however, must be read in conjunction with prior Ohio cases. Rule 102 provides that the Rules of Evidence "shall be construed to state the common law of Ohio unless the rule clearly indicates that a change was intended. . . ." The Staff Note to Rule 404 indicates that no change was intended. Rules 401 to 403, read in light of the prior Ohio cases, seem to limit admissibility of evidence of other acts to instances where the prosecution can establish that (1) the evidence is probative of a consequential or material fact; (2) such consequential or material fact is a disputed issue in the case; and (3) the probative value of the evidence substantially outweighs the danger of unfair prejudice.

Consequential (material) Facts

As an initial matter, "other acts" evidence must tend to prove a material or consequential fact. *See* Rule 401; State v. Gardner, 59 Ohio St.2d 14, 20, 391 N.E.2d 337, 341 (1979) ("Our task is to determine first, whether any of the elements mentioned in the statute were material to the issue at trial, and if so, whether the disputed testimony was relevant, as tending to prove a material element.").

Facts which tend to prove essential elements of the charged offense are always material. Some of the "purposes" specified in Rule 404(B), such as identity, intent, and knowledge, name essential elements of crimes; thus, evidence relevant to one of these purposes is usually material. Other "purposes" listed in the rule, however, are not typically elements of crimes. For example, motive, opportunity, and plan are rarely essential elements. If the "other acts" evidence is offered for one of these purposes, the prosecutor must establish a relationship between the "purpose" and an essential element of the charged offense. Proof of motive, for instance, may be relevant to show identity or some mens rea element such as intent or purpose; that is, it is more likely that a person with a motive committed a homicide than a person without a motive (identity issue), and it is more likely that a person with a motive acted purposely in causing a death than a person without a motive (mens rea issue).

Thus, the first step in determining admissibility under Rule 404(B) is not to identify which purpose listed in Rule 404(B) the evidence is offered to prove, but rather to identify which element of the charged offense the "other acts" evidence is offered to prove. Typically, "other acts" evidence is admitted as proof of one of three 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); or (3) to show that a crime was committed (corpus delicti). *See* 22 Wright & Graham, Federal Practice and Procedure 460 (1979).

Relevancy

As discussed above, evidence of "other acts" must be relevant to a material or consequential fact. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any" consequential or material fact "more probable or less probable than it would be without the evidence."

Identity

The identity of the person who committed the charged offense is always an essential element, and therefore always constitutes a material fact. "Other acts" evidence may show identity in a number of ways. For example, evidence that the defendant participated in a prior robbery in which a weapon was stolen would be relevant to prove the identity of the murderer in a homicide case in which the same weapon was used. *See* State v. Watson, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971). Several of the "purposes" specified in Rule 404(B), such as motive, opportunity, or preparation may be relevant to the issue of identity.

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 must have committed both offenses. The commission of two robberies with a weapon, however, would not satisfy the minimum relevancy standard of Rule 401 and would thus not be admissible. According to McCormick, "the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts" is insufficient. "The pattern and characteristics of the crimes used must be so unusual and distinctive as to be like a signature." C. McCormick, Evidence § 190, at 560 (3d ed. 1984).

See also State v. Smith, 49 Ohio St.3d 137, 142, 551 N.E.2d 190, 195 (1990) ("evidence of 'other acts' to prove . . . the identity of the perpetrator is admissible where two deaths occur under almost identical circumstances."); State v. Curry, 43 Ohio St.2d 66, 73, 330 N.E.2d 720, 726 (1975) ("similar crimes within a period of time reasonably near to the offense on trial, [and] that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes."); State v. Hector, 19 Ohio St.2d 167, 177, 249 N.E.2d 912, 918 (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. Hall, 57 Ohio App.3d 144, 148, 567 N.E.2d 305, 309 (1989) (other act "not sufficiently distinctive to demonstrate the identity of the perpetrator"), overruled on other grounds, 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, 1269 (1977) ("There was no uniformity in the time of day of the other acts, the method of entry, or the items taken.").

Intent and Knowledge

Intent and knowledge are frequently mens rea elements of crimes, and evidence of other acts may be relevant to prove these elements. Motive and preparation may also 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 to kill 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 be relevant to the issue of calculation and design in an aggravated homicide case. *See* State v. Smith, 49 Ohio St.3d 137, 142, 551 N.E.2d 190, 195 (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).

Absence of Mistake or Accident

Absence of mistake or accident also relates to mens rea. *See* State v. Snowden, 49 Ohio App.2d 7, 12, 359 N.E.2d 87, 91 (1976) (" 'absence of mistake or accident . . .' is not a separate category but merely a converse of the existence of specific intent."); Ohio Jury Instructions § 411.01. For example, a defendant charged with aggravated murder who testifies that the weapon discharged by accident when he was handling it and that he was unfamiliar with weapons is raising a defense of accident. Such evidence tends to negate the mens rea element of purposefulness. In order to rebut this evidence of lack of intent, the prosecution may introduce evidence that the defendant used a weapon during the course of a prior robbery. Evidence of absence of mistake or accident is typically admitted in rebuttal rather than in the prosecution's case-in-chief. *Id.* at 15-16.

In State v. Burson, 38 Ohio St.2d 157, 311 N.E.2d 526 (1974), the 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. *Id.* at 159 (emphasis added).

Interrelated Acts

In some cases it is impossible to exclude evidence of other acts that are interwoven with a charged offense even though such acts are not material to an essential element of that offense. In State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975), the 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 . . . *Id.* at 73.

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).

Defendant's Involvement 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 (Rule 401). At a minimum, the prosecution must establish that the defendant committed the other act. Otherwise, the evidence is not relevant.

Some courts have required "substantial proof" or "clear and convincing evidence" of the defendant's involvement in the other act. C. McCormick, Evidence § 190, at 564 (3d ed. 1984). The Ohio cases have used the "substantial proof" standard. *See* State v. Shedrick, 59 Ohio St.3d 146, 150, 572 N.E.2d 59, 64 (1991); State v. Jamison, 49 Ohio St.3d 182, 187, 552 N.E.2d 180, 185 (1990) ("Other-acts evidence need be proved only by substantial proof, not proof beyond a reasonable doubt."), cert. denied, 111 S. Ct. 228 (1990); 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).

In Huddleston v. United States, 485 U.S. 681 (1988), the U.S. Supreme Court rejected the common law approach, which requires clear and convincing or substantial evidence. Instead, the Court, based on Federal, Evidence Rule 104(b), adopted a prima facie evidence 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 [stolen TVs] 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.

This ruling applies only to federal trials.

Disputed Issues

Even if "other acts" evidence is probative of an essential element of the charged offense, the evidence is not admissible unless that element is a disputed issue in the case. *See* 22 Wright & Graham, Federal Practice and Procedure 489-90 (1979). For example, as noted above, evidence of "other acts" that shows motive may be relevant to the issue of identity. If, however, the defendant admits the act but claims self-defense, identity is not an issue in the case, and the evidence should be excluded because its prejudicial effect will outweigh the need for the evidence under Rule 403(A). *See* State v. Snowden, 49 Ohio App.2d 7, 13, 359 N.E.2d 87, 92 (1976).

In State v. Eubank, 60 Ohio St.2d 183, 298 N.E.2d 567 (1979), the state argued the admissibility of evidence of "other acts" on the theory that such evidence showed an absence of mistake or accident. The Supreme Court held

admission was error because "[m]istake or accident was not a material issue." *Id.* at 186. *See also* State v. Curry, 43 Ohio St.2d 66, 73, 330 N.E.2d 720, 726 (1975) ("In the present appeal, identity was not a material issue.").

Frequently a stipulation will eliminate an issue from dispute and thus preclude the need for "other acts" evidence. *See* United States v. Mohel, 604 F.2d 748 (2d Cir. 1979); United States v. DeVaughn, 601 F.2d 42 (2d Cir. 1979); United States v. Williams, 577 F.2d 188, 191 (2d Cir. 1978), cert denied, 439 U.S. 868 (1978) ("[o]ther crimes evidence is inadmissible to prove intent when that issue is not really in dispute.").

Balancing Probative Value Against Unfair Prejudice

Rule 403(A) provides that relevant evidence must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of issues, or misleading the jury. The decision to admit evidence of other acts is subject to Rule 403. The Advisory Committee's Note to Federal Rule 404(b) states: "No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."

Evidence of other acts presents all three of the dangers specified in Rule 403(A), but especially the danger of unfair prejudice, because the jury may use the evidence for the impermissible purpose of determining character. Rule 403(A), by requiring that unfair prejudice substantially outweigh probative value before exclusion is required, manifests a bias in favor of admissibility.

The Ohio cases, however, demonstrate a bias against admissibility. In State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), vacated on other grounds, 438 U.S. 910 (1978), the Supreme Court required that the evidence of "other acts" be "substantially" relevant for some purpose other than to show a probability that the individual committed the crime on trial because he is a man of criminal character. *Id.* at 402; *accord*, State v. Hector, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969). The prior cases should control because the Staff Notes to Rules 403 and 404 indicate that these rules are not intended to change the existing law. *See also* Rule 102.

Double Jeopardy and Collateral Estoppel

In Dowling v. United States, 493 U.S. 342 (1990), the U.S. Supreme Court considered the admissibility of "other acts" evidence under Federal Rule 404(b) in cases in which the accused had been acquitted of the prior crime. The defendant objected on double jeopardy and due process grounds. The double jeopardy argument focused on the collateral estoppel rule.

According to the Court, the prior acquittal meant only that the prosecution had failed to establish the defendant's guilt of the prior crime beyond a reasonable doubt. The standard of admissibility for evidence of other crimes is far less demanding. The prosecution in a federal trial need only introduce evidence from which the jury could reasonably conclude that the accused had committed the prior act. Thus, collateral estoppel did not apply. In addition, the Court found nothing fundamentally unfair about introducing such evidence.

Entrapment

Ohio follows the majority rule on entrapment, sometimes known as the "origin of intent" test. *See* LaFave & Scott, Criminal Law 5.2 (2d ed. 1986). 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* United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Ohio Jury Instructions § 411.25 (entrapment).

Under this view of entrapment, the question of the defendant's predisposition (propensity) is a material issue, and the defendant's prior criminal conduct becomes relevant. As the Supreme Court has stated, "if 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 the issue." *Sorrells v. United States, supra*, at 451.

Thus, an entrapment defense necessarily raises issues concerning the defendant's character and commission of "other acts." Although the commentators disagree on the theory of the entrapment defense, they do agree that the Federal Rules of Evidence have not changed the prior law on the subject. *See* 2 Louisell & Mueller, Federal Evidence 129-33 (1978); 22 Wright & Graham, Federal Practice and Procedure 372-79 (1978).