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CASE NOTES

EVIDENCE, CHILD ABUSE — Rule 404(b) of the Wyoming Rules of Evidence: What Protection is Left After Grabill v. State, 621 P.2d 802 (Wyo. 1980)?

Sometime during the morning or early afternoon of October 31, 1979, two month old Alysia Snyder received a blow to her head. The injury sent Alysia into a coma and brought on violent life-threatening convulsions. Medical testimony indicated that the injury was caused by "non-accidential trauma," but there was no evidence as to the time the injury was sustained. Neither parent accused the other of inflicting the blow, nor did either one directly deny responsibility for the injury. The only other witness was the victim, who, of course, was unable to testify, being two months old.[1]

When the jury retired to consider the state's case against Gilbert Grabill, they had before them only the barest circumstantial evidence[2] that would prove the charges of child abuse.[3] The evidence presented against Grabill to prove he had abused Alysia Snyder on October 31, 1979 could have been applied with equal strength against the child's other parent.[4] Yet the jury had little trouble finding Grabill guilty, probably because of the testimony of previous instances of family violence allowed into evidence.[5] This testimony was initially barred by the trial judge[6] as improper "propensity evidence" disallowed under Rule 404(b) of the

1. Grabill v. State, 621 P.2d 806 (Wyo. 1980).
2. *Id.* at 806, 814.
3. WYO. STAT. § 6-4-504 (1977) provides:
   Any adult who intentionally or in reckless disregard of the consequences causes violent physical injury or mental trauma to a child under the age of sixteen (16) or commits any assault or assault and battery upon the child to a degree as to require medical, psychological or psychiatric treatment to heal or overcome the injuries or damages sustained by the child, or who sexually molests a child under the age of sixteen (16) is guilty of child abuse and upon conviction shall be sentenced to the state penitentiary for a term of not more than five (5) years.
4. Grabill v. State, *supra* note 1, at 809-10, 814.
5. *Id.* at 816 (dissenting opinion).
6. *Id.* at 807, 811. *See also* Record on Appeal, at 13-15.

Wyoming Rules of Evidence.[7] However, the judge later admitted it on rebuttal to impeach answers received during the cross examination of the defendant.[8]

The testimony by Donna Snyder, Alysia's mother, and by two of Gilbert Grabill's former wives alleged four instances of violence toward members of Grabill's family. First, that in 1974, Grabill beat his four year old daughter for a minor disobedience. Second, that several times during 1975, Grabill put his hand over the mouth of his six month old son, Christopher, until the baby passed out. At the time, he explained he was conducting an exercise to strengthen the baby's lungs. Third, that in 1977, Grabill punished Christopher for spilling talcum powder on a friend's pool table by picking the child up by the neck and "hitting him on the buttocks." Fourth, that in 1979, Grabill beat Donna Snyder during an argument."[9]

On appeal, the Wyoming Supreme Court held that the evidence that Grabill abused Alysia Snyder was sufficient to go to the jury and to withstand a directed verdict in favor of the defendant. In making that determination, the court used the minimum standard: the evidence most favorable to the prosecution was sufficient to draw "a reasonable inference of guilt beyond a reasonable doubt."[10] In fact, the court never referred to the evidence of prior bad acts in ruling on the threshold of evidence it deemed necessary to uphold the conviction. Nevertheless, it made it clear that this evidence was crucial if the jury was to be able to determine both identity and the intent of the person who abused the child.[11] The court held that the evidence of prior bad

7. WYO. R. EVID. 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
The WYOMING RULES OF EVIDENCE were adopted January 1, 1978. See, WYO. R. EVID., Order, In the Matter of Adoption. All the rules discussed in this casenote are identical in wording to the corresponding FEDERAL RULES OF EVIDENCE. (Hereinafter, the WYOMING RULES OF EVIDENCE will be cited in the text simply as Rule [#]).
8. Grabill v. State, *supra* note 1, at 807.
9. *Id.* at 807, 815.
10. *Id.* at 803.
11. *Id.* at 809-10, 813.

acts was admissible under Rule 404(b) even though the trial judge, using the discretionary power inherent in the rule, had rejected this rationale.[12]

This note will review the history of Rule 404(b) in Wyoming and summarize the operation of the rule as it has been interpreted in several jurisdictions and by the commentators. The note will then examine the basis on which the evidence of prior bad acts was admitted and the theory by which its admission was sustained on appeal. Following this summary, a closer examination of the testimony of prior bad acts admitted in Grabill will show that the evidence should not have been permitted under Rule 404(b). Finally, it will become evident that the Wyoming Supreme Court allowed the evidence to be admitted not because it was reliable or highly probative but because in *Grabill* and similar cases there is a lack of evidence. This note will argue that the court's decision to admit the very kind of highly prejudicial evidence that Rule 404(b) was meant to prohibit will eventually destroy the protections of the rule in the cases where they are most important.

THE WYOMING CASES

The principle that a person should not be convicted of a crime by the use of evidence of an unrelated crime was first applied in Wyoming in 1921 in *Anderson v. State.*[13] After *Anderson,* the court has gradually refined the doctrine until in 1957, in *State v. Lindsay,*[14] the court announced the standard in terms very close to those of the present Rule 404. Ten years later, in *Valerio v. State,*[15] the court reconfirmed the holding of *Lindsay.* In both *Lindsay* and *Valerio,* the court sustained the introduction of evidence of prior criminal acts—in *Lindsay* on the theory that it was part of the res gestae of the crime,[16] and in *Valerio* on the theory

12. *Id.* at 807. *See also,* Record on Appeal at 13-15.
13. Anderson v. State, 27 Wyo. 345, 373, 196 P. 1047, 1056 (1921).
14. State v. Lindsay, 77 Wyo. 410, 421, 317 P.2d 506, 510 (1957). [Hereinafter cited in the text as *Lindsay.*]
15. Valerio v. State, 429 P.2d 317, 318 (Wyo. 1967). [Hereinafter cited in text as *Valerio.*]
16. State v. Lindsay, *supra* note 14, at 510.

that it verified the identity of the accused.[17] Both of these theories are recognized exceptions to the basic exclusionary rule listed in Rule 404(b).[18]

Wyoming adopted its present Rules of Evidence in 1978.[19] The text of Rule 404, as well as that of Rules 401, 403 and 608 (all discussed in this note) are identical to the text of the corresponding Federal Rules of Evidence.[20] In fact, while only a handful of cases in Wyoming cite the recent Rule 404(b), in Wyoming and elsewhere similar common law has existed since 1950.[21]

In *Kwallek v. State*,[22] an assault and battery case, the Wyoming court applied the general exclusionary provision of Rule 404 to exclude evidence of similar previous conduct. In doing so, the court rejected the contention that the evidence should be admitted under any of the exceptions listed in Rule 404(b).[23] Thus, with *Kwallek*, the Wyoming court firmly established itself in the mainstream of the case law on Rule 404.

Five months after *Kwallek*, in *Elliott v. State*,[24] the court was once again faced with the problem of applying Rule 404 to evidence of previous misconduct. *Elliott* was a prosecution for the sexual assault of a minor. In order to buttress the child's testimony, the trial court allowed evidence of previous similar assaults by Elliott on both the child and her sister. The court voted unanimously to

17. Valerio v. State, *supra* note 15, at 318.
18. WYO. R. EVID. 404(b), *supra* note 7. *See generally*, LOUISELL & MUELLER, FEDERAL EVIDENCE § 140 (1978). [Hereinafter cited as LOUISELL & MUELLER].
19. *See* note 7, *supra*.
20. The Federal Rules of Evidence were adopted by the U.S. Supreme Court in 1975. LOUISELL & MUELLER, Vol. 1, Preface at iii (1977).
21. The leading U.S. Supreme Court case in the area dates from 1948. Michelson v. United States, 335 U.S. 469 (1948). The majority opinion by Mr. Justice Jackson sets out the general rule of exclusion stated in Rule 404. Mr. Justice Jackson also provides a clear explanation of the theoretical underpinnings of the rule. This opinion is frequently cited in subsequent cases and by the commentators. The opinion does not list the exceptions to the general rule which are now found in subsection (b) of Wyo. R. Evid. 404, presumably because the case did not require an examination of the exceptions.
22. Kwallek v. State, 596 P.2d 1372 (Wyo. 1979) [Hereinafter cited in the text as Kwallek].
23. *Id.* at 1378, 1379.
24. Elliott v. State, 600 P.2d 1044 (Wyo. 1979). [Hereinafter cited in the text as Elliott].

uphold the introduction of the evidence, but was divided in its determination of which exception under Rule 404(b) would justify admission of the evidence.[25] Thus, if the court disagreed on which exception to apply, it agreed that such evidence was admitted almost universally in sexual assault cases and cited twenty-five cases from other jurisdictions to support that contention.[26] The court seemed to be saying that when considering the introduction of testimony of previous crimes and bad acts, sexual assault cases were different from other cases.

The court returned to this line of reasoning in deciding *Grabill*,[27] but did not cite any authority other than *Elliott* for the proposition that child abuse cases deserved special treatment under 404(b). While the narrow holding of *Elliott* and *Grabill* was that the evidence of prior bad acts fit an accepted exception to Rule 404(b), a closer examination will show that under the traditional standard, the evidence should not have been admitted in *Grabill*. In fact, the court appears to have allowed the evidence in *Grabill* primarily in order to solve a problem that often arises in child abuse cases: the lack of reliable evidence.

RULE 404(b) AND RELEVANCY

Rule 404(b) is one of the specialized relevance rules.[28] In order to understand 404(b) fully, it is important to keep in mind both Rule 401,[29] the basic relevancy rule, and Rule 403,[30] its general limitation. Rule 401 announces the underlying proposition that evidence is relevant if it tends to make the existence of a material fact more or less probable.[31] Rule 403 sets up the conflict at the heart of all the subsequent

25. *Id.* Following the analysis in this note and in the sections entitled Intent, and Motive, it becomes apparent that the concurring opinion by Justice McClintock correctly applies Rule 404(b) to the facts of Elliott v. State. *See* note 66.
26. Elliott v. State, *supra* note 24, at 1047, 1048.
27. Grabill v. State, *supra* note 1, at 810.
28. *Id.* at 809, citing WEINSTEIN & BERGER, 2 WEINSTEIN'S EVIDENCE § 404[08] (1980). [Hereinafter cited as WEINSTEIN.] *See also* LOUISELL & MUELLER, *supra* note 18, § 140 (1978), and WEINSTEIN, § 404[09] (1980).
29. WYO. R. EVID. 401.
30. WYO. R. EVID. 403. *See* text accompanying note 32, *infra*.
31. *See* WYO. R. EVID. 401 and LOUISELL & MUELLER §§ 91, 93.

relevancy rules by establishing limits on the admission of relevant material:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of the cumulative evidence.[32]

Thus, the main consideration indicated by Rule 403 is that probative value of the evidence must outweigh the danger of prejudice or misuse by the jury.[33] Rule 404(b) applies this principle to the problem of whether testimony of collateral crimes or bad acts is admissible. Such evidence is not permitted if it only shows the accused's propensity to commit the crime, but will be permitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[34]

This evidence of prior acts is not excluded because the evidence is deemed irrelevant. Rather, it is considered too dangerous for the jury to consider, since a jury is liable to accord the evidence too much weight and convict the accused for being a bad person instead of for having committed the crime. Thus, the likelihood of unfair prejudice is said to outweigh the probative value of the evidence.[35] Indeed, the jury's knowledge of previous bad acts has been shown to be a powerful factor in obtaining convictions on unrelated charges.[36]

However, the use of the broad term "for other purposes" in Rule 404(b) insures that the list of elements of a crime that may be proved by specific evidence of prior bad acts is not limited to those stated in the rule: "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity,

32. WYO. R. EVID. 403.
33. LOUISELL & MUELLER, *supra* note 18, §§ 126, 127.
34. WYO. R. EVID. 404(b).
35. *See* LOUISELL and MUELLER, *supra* note 18, § 140.
36. KALVEN and ZEISEL, THE AMERICAN JURY 160-61 (1966).

or absence of mistake or accident."[37] Therefore, when a policy favoring admissibility is coupled with the ingenuity of an aggressive prosecutor, the basic protection of Rule 404 has frequently fallen.[38] It is thus essential that a trial judge determine whether or not the evidence offered will indeed tend to prove an element of the charge.[39] The judge must also weigh the probative value of the evidence against the amount of unfair prejudice it will cause the defendant. This second test, from Rule 403, should be a part of the judge's discretionary consideration whenever evidence is offered.

HOW THE EVIDENCE WAS ADMITTED AND APPEALED

The trial judge made an initial ruling on a motion in limine that the evidence of previous violence was inadmissible under Rule 404(b), but ruled that the evidence would be allowed in on rebuttal if Grabill testified.[40] When the prosecution questioned Grabill about the four instances of family violence and Grabill denied them, the court allowed in rebuttal testimony from Donna Snyder, from two of Grabill's former wives, and from a police officer.[41] This is contrary to the directive of Rule 608(b) which states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609 may not be proved by extrinsic evidence.[42]

The purposes of this rule are to prevent the waste of time involved in trying collateral issues and to protect the witness from having to answer for acts unrelated either in time or to the issues on trial. When the witness is a party to the case, as in *Grabill*, there is the additional purpose of preventing unfair prejudice and jury misuse.[43]

On appeal, the State conceded that the evidence of prior family violence by Grabill would not be admissible under

37. Wyo. R. Evid. 404(b), *See also*, LOUISELL & MUELLER, *supra* note 18, § 140.
38. LOUISELL & MUELLER, *supra* note 18, § 140.
39. WEINSTEIN, *supra* note 28, at 404-45.
40. Record on Appeal at 15, Grabill v. State, *supra* note 1, at 807.
41. Grabill v. State, *supra* note 1, at 807-08.
42. WYO. R. EVID. 608.
43. LOUISELL & MUELLER, *supra* note 18, § 805, at 239-40.

Rule 608.[44] However, the State argued that it should be admissible under Rule 404(b) to show intent, motive, knowledge, identity, and absence of mistake or accident.[45] To justify the use of the evidence of prior bad acts under the new rationale, the court quoted from a recent Colorado case: "Evidence which is admitted generally may be considered for any legal purpose for which it is admissible although the evidence, when introduced, was intended for a particular purpose."[46] This rule would adequately explain the broadened grounds for admissibility considered under Rule 404(b) if the trial judge had ruled the evidence admissible under that rule. But it is not helpful in explaining what should have been done when the evidence was erroneously admitted under one rule after the judge, exercising his discretion, had rejected the evidence under the only rule that would have authorized its admission.

In upholding Grabill's conviction, the Wyoming Supreme Court allowed the introduction of the evidence under Rule 404(b) and refused to consider the problem of whether it was properly admitted under Rule 608.[47] Moreover, the court ignored the trial judge's ruling that the evidence should not be admissible under Rule 404(b), a decision normally within the discretion of the trial judge.[48] The Wyoming Supreme Court adopted an often cited characterization of the standard for admission of such evidence:

> The principal test as to the admissibility of the proffered evidence under Rule 404(b) is whether or not it tends directly to prove or disprove a consequential fact such as intent or knowledge or whether or not it may tend to establish a proposition such as motive, which through a series of

44. Brief for Appellee at 25, Grabill v. State, *supra* note 1.
45. *Id.* at 25-28. The state's appellate argument broadened the claimed grounds for the admissibility of the bad acts testimony. During the trial the prosecution argued only that the evidence would show notice and intent. Record on Appeal at 2-13, Grabill v. State, *supra* note 1. That the court also considered whether the identity exception applied reflects the court's interest in giving the rule a broad and liberal interpretation.
46. Grabill v. State, *supra* note 1, at 811, citing Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).
47. *Id.*
48. LOUISELL & MUELLER, *supra* note 18, § 125, at 9-12.

inferences may tend to establish the probability of a consequential fact.[49]

A closer examination will show that the evidence of prior acts should not have been admitted under either intent, motive or identity.

INTENT

Intent is an element of the crime of child abuse, and must be proved in order to obtain a conviction.[50] Intent is often defined as "merely the absence of accident." It is frequently mentioned along with knowledge, but is meant to signify something more than knowledge.[51] Intent includes the desire to achieve a particular result or, alternatively, the knowledge that the result is the inevitable consequence of an act.[52]

The cases are in agreement that before evidence of other bad acts can be admitted to prove intent, the issue of intent must be in controversy in the case.[53] Ordinarily, the denial by the accused that he committed the criminal act

49. Grabill v. State, *supra* note 1, citing WEINSTEIN, *supra* note 28, at § 404 [09].

50. Wyo. Stat. § 6-4-504 (1977).

The Wyoming statute provides that specific intent or reckless disregard be proved a conviction of child abuse can be obtained. The court does not discuss whether the inclusion of reckless disregard in the statute has any effect on the admissibility of evidence under Rule 404(b). The court's only use of "reckless disregard" follows a citation of the Wyoming Statute and treats "reckless disregard" as being the same as intent. Grabill v. State, *supra* note 1, at 809-10. There appear to be no Wyoming cases that shed any light on the difference of proof in child abuse cases between intent and reckless disregard.

Reckless disregard has been defined as being the knowledge that an act has the high probability of causing a prohibited result, but it is less than the certain knowledge that is usually understood by intent. La Fave & Scott, Criminal Law § 30. Because reckless disregard involves the element of an uncertain result, it is closely related to the defenses of accident or mistake. If either accident or mistake had been at issue in the case then evidence of similar prior bad acts would be admissible under Rule 404(b) to prove reckless disregard. The argument against admitting the evidence in Grabill v. State would be the same whether the evidence is introduced to prove intent or to prove reckless disregard. In either case, the defense of accident should have to be raised by the accused before intent or reckless disregard *could* be contested by the prosecution. The question of fact to be determined in Grabill v. State is neither the intent nor reckless disregard of the accused but the identity of the child's assailant. *See* sections on Intent and Identity in text.

51. LOUISELL & MUELLER, *supra* note 18, § 140, at 126.

52. *Id.* at 126, 133.

53. Grabill v. State, *supra* note 1, at 809, citing WEINSTEIN, *supra* note 28, § 404 [09].

would not be sufficient to raise the issue of intent. Unless the accused raises a defense of accident or mistake, the evidence of collateral bad acts will be excluded.[54]

In *Grabill*, the Wyoming court cited the rule that the issue of intent must be controverted before evidence of collateral acts is admissible to prove intent.[55] But the court departed from the majority of precedent when it held that Grabill's claim that the injury was present when he first looked in on the child was sufficient to raise the issue of intent.[56] Under the rule as construed in previous cases, even a direct denial by the accused that he committed the act would not open the issue of intent.[57] The court did not discuss this departure from precedent even though several of the cases and all the commentators relied on by the court approve of this rule.[58]

In *Harvey v. State*,[59] the Alaska Supreme Court held it was reversible error in a prosecution for child abuse and manslaughter for the trial court to admit evidence that the defendant had severely beaten another of his children in an incident unrelated to the one causing the child's death.[60] Just as in *Grabill*, the central issue in *Harvey* was not intent but who caused the injury.[61] The court noted that to broaden the intent exception in Rule 404(b) to include the proof of general criminal intent would make such evidence admissible in every crime that would be a felony at common law. To do so, the Alaskan Court said, "would destroy the rule."[62]

The Alaska Supreme Court has correctly diagnosed the danger that lies behind the holding in *Grabill:* if the intent exception in Rule 404(b) is read to allow proof of general criminal intent, then the rule has no application in any trial

54. Harvey v. State, 604 P.2d 586, 590 (Alaska 1979).
55. Grabill v. State, *supra* note 1, at 809, citing WEINSTEIN, *supra* note 28, at § 404[09].
56. Grabill v. State, *supra* note 1, at 809.
57. Harvey v. State, *supra* note 54, at 590.
58. *See* LOUISELL & MUELLER, *supra* note 18, at § 140; WEINSTEIN, *supra* note 28, at § 404[08]; and United States v. Woods, 484 F.2d 127, 134 (4th Cir., 1973).
59. Harvey v. State, *supra* note 54 [Hereinafter cited in the text as Harvey].
60. *Id.* at 589-90.
61. *Id.*
62. *Id.* at 589.

of a serious crime.[63] The requirement that intent be specifically placed in controversy by the defendant's raising of a defense of accident or mistake is an important part of Rule 404(b). It is worth noting that this point was not raised in Grabill's appellate brief[64] and may not have been discussed during oral argument.

Finally, the rule requires that collateral acts bear a "substantial similarity" to the charged act before they can be used to show intent.[65] The incidents offered by the prosecution in *Grabill* are only marginally related to the act of child abuse charged. Certainly, the testimony that Grabill struck Donna Snyder is totally irrelevant. It is worth noting that the court never discussed this testimony. The other three episodes are similar only in that they involve violence to children in Grabill's family, but they involve different children at significantly different ages and in different social settings.[66]

Two of the bad acts involved excessive disciplinary measures triggered by disobedience or misbehavior by children who were from four to seven years old. The most bizzarre testimony concerned Grabill's "exercise" to improve his child's lungs by holding his hand over the child's mouth and nose.[67] No one will suggest this is a defensible act but it does not prove either the intent or the motive of Alysia Snyder's assailant. None of these instances are sufficiently related to the offense charged to establish an exception to

63. *Id.*
64. Brief for Appellant, Grabill v. State, *supra* note 1.
65. LOUISELL & MUELLER, *supra* note 18, § 140 at 128.
66. A comparison of the evidence of bad acts admitted in Elliot v. State, *supra* note 24, and those admitted in Grabill v. State, *supra* note 1, is instructive on this point. In *Elliott v. State* the children involved were nine and eleven years old. The incidents of previous sexual assaults by the defendant that the children testified to were very similar. The defendant was described as proceeding in a particular manner each time. In *Grabill v. State*, each act of family violence was triggered by an unrelated and dissimilar event. The victims included the mother, and children from the ages of six months to four years. Two of the incidents involve excessive discipline for what Grabill perceived as misbehavior. The incident involving the six month old child is lurid, but neither the court nor the prosecution suggested why this isolated incident of partial suffocation might shed light on the assault of Alysia Snyder, who was struck in back of the head. The prosecution's theory that Grabill lost his temper whenever he heard a child cry is not advanced by what appears to be a calculated act. Record on Appeal at 7, Grabill v. State, *supra* note 1. No matter how cruel the act may seem, it does not support any theory advanced under the Rule 404(b) exceptions.
67. Grabill v. State, *supra* note 1, at 898.

Rule 404(b). At most, they show Grabill had a bad character and tended to treat his family members violently. This is the very kind of evidence that is meant to excluded by Rule 404(b).

MOTIVE

Motive is not an element of any crime, but is instead a relevant circumstantial fact from which elements of the crime, such as intent, may be inferred.[68] Motive is an ambiguous term denoting a state of mind such as greed or sexual desire that would cause a person to commit a specific act.[69] During the motion in limine, the prosecution argued that Grabill's four "acts" showed that he had a motive to abuse the child. The prosecutor claimed the incidents showed that Grabill had a short temper, and that when a child cried, he would lose control of himself and strike him or her. This theory was the basis for invoking the motive exception to Rule 404(b).[70]

The Wyoming Supreme Court never discussed whether or not the evidence could be admitted to show motive, mentioning motive only briefly in a general discussion of rule 404(b).[71] An examination of the evidence of prior bad acts shows that only two instances of excessive discipline are at all related to the prosecution's theory. Once again, both these episodes involved children substantially older than Alysia Snyder and both were in very different physical and social settings.[72]

Cases refusing to admit evidence to show motive are rare.[73] Nevertheless, the evidence must logically show the existence of a motive that would cause the accused to commit the charged act when faced with a particular set of circumstances.[74] The prosecution's claim that the evidence tended to establish a motive is not enough. In order to infer motive,

68. LOUISELL & MUELLER, *supra* note 18, § 140 at 122.
69. *Id.* at 123.
70. Record on Appeal at 3-7, Grabill v. State, *supra* note 1.
71. Grabill v. State, *supra* note 1, at 808.
72. *See* note 66, *supra.*
73. LOUISELL & MUELLER, *supra* note 18, § 140 at 123.
74. 1 WIGMORE, EVIDENCE § 117 (3rd ed. 1940).

there must be substantial similarity between the collateral offenses and the act charged.[75] Or else, a causal relationship must be established, for instance, the need to cover up one crime by committing another.[76]

Nothing in the testimony shows that the episodes of excessive discipline were caused by a motive substantially similar to the prosecution's hypothesis, or that a "short temper" is a sufficiently specific mental state to qualify as a motive. In fact, the "temper" argument is merely an attempt to cast evidence of Grabill's propensity for violence in acceptable terminology without showing a clear motivating cause for the actual abuse or the events that triggered it.

IDENTITY

The question of the identity of Alysia Snyder's assailant is at the heart of the court's attempt to provide a foundation for the admission of the evidence of unrelated family violence.[77] Yet, identity is nothing more than the conclusion which can be drawn from the evidence of motive, plan, design, or modus operandi.[78] In the opinions discussing it, identity is normally discussed either in conjunction with one of the other exceptions listed in Rule 404(b), or as a synonym for modus operandi or signature.[79]

The evidence in *Grabill* falls far short of the standard for admission required to prove modus operandi or signature. This exception requires that the collateral acts be uniquely or distinctively similar to the crime charged so that the accused's signature is plainly on the event.[80] Acts that are of doubtful similarity when used to show intent will certainly fail this more exacting test.

The court indicates several times that the primary fact which would identify Alysia Snyder's assailant is the time of the injury.[81] The court's assertion that the evidence of

75. United States v. Birns, 395 F.2d 943, 946 (6th Cir. 1968).
76. United States v. Ring, 513 F.2d 1001, 1004 (6th Cir. 1975).
77. Grabill v. State, *supra* note 1, at 809-10.
78. LOUISELL & MUELLER, *supra* note 18, § 140 at 144. *See also* United States v. Wood, *supra* note 58, at 134.
79. LOUISELL & MUELLER, *supra* note 18, § 140.

prior acts is helpful in making this determination is mystifying. The four acts are truly a diverse lot, unrelated in time, place, or the people involved, and remote in time from one another. Nothing in these previous instances of family violence would help to pinpoint the moment of Alysia Snyder's injury to within twenty minutes during October 31, 1979.

The evidence of prior bad acts does tend to prove the identity of the perpetrator, but only by showing that Gilbert Grabill had a propensity to "lose his temper" and strike members of his family. This is exactly the kind of evidence that should be prohibited by Rule 404(b).[82] Rule 404(b) excludes this kind of evidence not because it is not probative of issues in the case, but because its potential for unfair prejudice is to great to allow the jury to consider it.[83] It should be noted that the weaker the prosecution's case is, the greater the potential for unfair prejudice.[84] In *Grabill*, the court recognizes the weakness of the state's case, but fails to consider that the potential for prejudice rises correspondingly. Rather than expanding and liberalizing the exception in Rule 404(b), under which evidence of prior bad acts may be admitted, the court should carefully scrutinize the purposes for which the evidence is offered.

ELLIOTT V. STATE

In upholding the conviction in *Grabill*, the Wyoming Supreme Court relied heavily on *Elliott v. State*.[85] Both cases presented similar, but not identical, problems of proof.[86] In *Grabill*, the evidence that was offered to show which parent abused the child was entirely circumstantial and was based solely on the testimony of the parents, one of whom committed the crime.[87] In *Elliott*, the problem was whether or not to believe a nine year old girl who accused Elliott of sexual assault. The evidence of previous sexual assaults upon

80. *Id.* at 142-43.
81. Grabill v. State, *supra* note 1, at 806, 807, 809.
82. LOUISELL & MUELLER, *supra* note 18, §§ 136, 140.
83. *Id.*, § 136.
84. *Id.*, § 140 at 116, 120.
85. Grabill v. State, *supra* note 1, at 810-11.
86. *Id.* at 810.
87. *Id.* at 809-10.

the victim's sister was used to corroborate a direct allegation by a witness to the crime. The need for verification in *Elliott* arose because the witness was a child and her testimony was contradicted.[88]

A comparison of *Elliott* and *Grabill* is instructive on two points. First, in *Elliott*, there was direct testimony by the victim, coupled with additional medical testimony indicating the child had been assaulted.[89] Consequently, the evidence of the previous sexual assaults did not carry the same burden of proof as did the evidence in *Grabill*, where it was the only evidence offered to help sort out the parents' conflicting testimony. Second, the prior acts of sexual assault allowed in evidence in *Elliott* are nearly identical to the assault charged.[90] Since the incidents are truly similar, it is proper for the court to discern a modus operandi or plan on the part of the accused.[91]

These differences in the nature or quality of the testimony in the two cases indicate that the potential for unfair prejudice was far less in *Elliott* than it was in *Grabill*. In this respect, the holding in *Grabill* is an exaggeration of the holding in *Elliott*. The admission of evidence of prior bad acts in *Grabill* crosses the line into the realm of unfair prejudice prohibited by Rule 403.

CHILD ABUSE & THE EVIDENCE PROBLEM

Child abuse and infanticide cases frequently present difficult problems of proof.[92] These arise primarily from a lack of evidence, since the abusive act usually takes place in the home without any witnesses.[93] In this respect, *Grabill* is a typical child abuse case.

"We think . . . that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the

88. Elliott v. State, *supra* note 24, at 1047, 1048.
89. *Id.* at 1045, 1046.
90. *Id.* at 1045-1047.
91. *Id.* at 1050 (concurring opinion).
92. *See* Note, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L. J. 257, 259 (1974).
93. *Id.*

crime."[94] This quotation from *United States v. Woods*,[95] a case cited by the court in *Grabill*, is a fair assessment of the difficulties of proof in child abuse cases. On the other hand, the greater the need for evidence of prior bad acts to be admitted to prove the case, the more the danger of unfair prejudice increases.[96] In *Elliott* and in *Grabill*, the court appears to be giving greater weight to the probative value of evidence and less weight to the danger of prejudice, not because the evidence is reliable but because there is no other evidence available.

In order to provide evidence to prove the crime in *Grabill*, the court extended the doctrine it announced in *Elliott*. In *Elliott*, the exception to the prohibition of evidence of prior acts in Rule 404(b) was limited to corroborating testimony of a witness-victim who also was a child.[97] More importantly, the evidence clearly qualified under the plan or *modus operandi* exceptions to Rule 404(b),[98] while in *Grabill*, the evidence of prior bad acts provides the only evidence other than the contradictory testimony of the parents.[99] In allowing this evidence, the court indicated that in child abuse and sexual assault cases the standard for admission under Rule 404(b) will be less stringent than it has been traditionally.

While the court relied almost exclusively on *Elliott* to extend the rule to fit the facts of *Grabill*,[100] the only truly analogous case cited in *Grabill* is *Woods*. Though *Woods* contains many interesting parallels to *Grabill*, unlike *Grabill* the evidence of prior acts admitted in *Woods* is extensive and nearly identical to the charged offense. Because of this,

94. United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973).
95. *Id.* [Hereinafter cited in the text as Woods].
96. LOUISELL & MUELLER, *supra* note 18, § 140 at 120.
97. Elliott v. State, *supra* note 24, at 1045.
98. *Id.* at 1051 (concurring opinion).
99. Grabill v. State, *supra* note 1, at 810.
100. *Id.* at 810-11.

the probative value of this evidence was very high, and the potential for unfair prejudice was low.[101]

The same cannot be said of the evidence of prior bad acts admitted in *Grabill*. Here, the limitations found in Rule 403 and Rule 404(b) have been ignored, resulting in admission of unfairly prejudicial evidence. The focus of the court's inquiry should be on determining whether or not one of the exceptions to the general rule of 404(b) should apply, not on supplementing sparse evidence available to prove the crime. It is not the function of Rule 404(b) to supply evidence for a weak case.

To properly apply Rule 404(b), the court should require that the evidence of previous bad acts clearly shows the existence of a disputed issue or, that the evidence should show a sufficiently specific motive from which a disputed issue can be inferred when coupled with the other facts of the case. In order to establish intent, motive, plan, signature, or modus operandi, the evidence of previous acts must bear a substantial similarity to that of the charged offense. Finally, the court should remember that as the need for the evidence of unrelated acts increases, the danger of unfair prejudice rises proportionately. Under these circumstances, it is not proper for the court to allow evidence of the accused's propensity to commit the criminal act even if it is the only evidence available. Nor is it appropriate when applying Rule 403 for the court to give greater weight to the probative value of evidence of prior bad acts simply because there is an absence of evidence to prove the case.

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101. United States v. Woods, *supra* note 94, was a prosecution for infanticide by suffocation. The prosecution sought to have evidence admitted that children who were under the care of the defendant had suffered from cyanosis or oxygen starvation. Evidence of twenty separate instances of cyanosis was admitted. Of the nine children who had suffered from these attacks of cyanosis, seven had died. The evidence also showed that none of the children had ever suffered from the malady except when they were in Mrs. Woods care. The similarity and frequency of these incidents set them apart from the evidence admitted in *Grabill v. State*.