# 275 CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT [REQUIRED IF REQUESTED][1] — § 904.04(2)(a)

## Evidence Presented

Evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial.

Specifically, evidence has been presented that the defendant (describe conduct). If you find that this conduct did occur, you should consider it only on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][2] (motive) (opportunity) (intent) (preparation or plan) (knowledge) (identity) (absence of mistake or accident) (context or background) (identify other issue).[3]

You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case.

## Definitions

The evidence was received on the issue(s) of [CHOOSE ONLY THOSE THAT APPLY][4]

[motive, that is, whether the defendant has a reason to desire the result of the offense charged.][5]

[opportunity, that is, whether the defendant had the opportunity to commit the offense charged.]

© 2018, Regents, Univ. of Wis. 

[Intent,[6] that is, whether the defendant acted with the state of mind that is required for the offense charged.]

[preparation or plan,[7] that is, whether the other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged.]

[knowledge,[8] that is, whether the defendant was aware of facts that are required to make criminal the offense charged.]

[identity,[9] that is, whether the prior conduct of the defendant is so similar to the offense charged that it tends to identify the defendant as the one who committed the offense charged.]

[absence of mistake or accident,[10] that is, whether the defendant acted with the state of mind required for the offense charged.]

[context or background, that is, to provide a more complete presentation of the evidence relating to the offense charged.][11]

[ describe other issue ][12]

CONTINUE WITH THE FOLLOWING IN ALL CASES

You may consider this evidence only for the purpose(s) I have described, giving it the weight you determine it deserves. It is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged.

© 2018, Regents, Univ. of Wis. 

**COMMENT**

Wis JI-Criminal 275 was originally published in 1978 and revised in 1983, 1989, 1991, 2003, and 2016. The 2016 revision reorganized and updated the Comment, incorporating material that previously appeared in 275.1 which has been withdrawn. This revision was approved by the Committee in April 2018; it updated the Comment.

This instruction is for use where evidence of other crimes or other acts committed by the defendant is admitted for an acceptable purpose under § 904.04(2)(a). An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276. A cautionary instruction for evidence of prior convictions admitted to impeach a defendant is provided in Wis JI-Criminal 327.

Section 904.04(2) was amended by 2013 Wisconsin Act 362 [effective date: April 25, 2014] to create subd. (2)(b)1. which sets forth an exception to the general rule in § 904.04(2)(a) for specified offenses. See the discussion below at the "Greater Latitude" caption.

The rules relating to admissibility of "other acts" evidence do not apply to offenses offered as predicates for a Chapter 980 commitment. State v. Kaminski, 2009 WI App 175, 322 Wis.2d 653, 777 N.W.2d 654. Evidence offered to prove the "course of conduct" element of the crime of stalking is not subject to analysis as "other acts" evidence under § 904.04(2) because it is not offered to prove character. State v. Conner, 2009 WI App 143, ¶24, 321 Wis.2d 449, 775 N.W.2d 105. Affirmed on other grounds, State v. Conner, 2011 WI 8, 331 Wis.2d 352, 795 N.W.2d 750.

The admission of other acts evidence is one of the most commonly litigated issues in criminal cases. The decisions cited here, while numerous, are not intended to be a complete catalog of all cases dealing with other acts evidence.

**Case Law Origins – Whitty v. State**

The general prohibition on proving character is now found in a rule of evidence – § 904.04(2). But that rule had its origin in a decision of the Wisconsin Supreme Court: Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967), cert. denied, 390 U.S. 959 (1968) that was based on due process principles:

> ". . . the rule we adopt . . . is based upon the premise that the accused is entitled to a procedurally and evidentially fair trial . . ." 34 Wis.2d at 295.
>
> ". . . [when other acts evidence is admitted] it runs the danger . . . of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence." 34 Wis.2d at 297.

The references to "fair trial" seem clearly to invoke a due process basis for the rule – it is the Due Process Clause that insures the right to a fair trial.

The general rule that other-crimes evidence is not admissible is based on an appreciation of the prejudicial impact that the evidence may have. The dangers were concisely summarized in Whitty v. State, 34 Wis.2d 278, 292:

The character rule excluding prior-crimes evidence as it relates to the guilty issue rests on four bases: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Despite these possibilities for prejudice, other-crimes evidence may be admissible if it is offered for an acceptable purpose under § 904.04(2)(a) and (b)1.

**Section 904.04(2)(a)**

The rule that originated in Whitty is codified in § 904.04(2)(a) of the Wisconsin Rules of Evidence:

(2) OTHER CRIMES, WRONGS, OR ACTS. (a) *General admissibility.* Except as provided in par. (b)2. 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. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The exception referred to – par. (b)2. – was created as § 904.04(2)(b) by 2005 Wisconsin Act 310. [Effective date: April 21, 2006. Section 3 of the act provides: "This act first applies to criminal actions commenced on the effective date of this subsection."] It was renumbered § 904.04(2)(b)2. by 2013 Wisconsin Act 362. It provides that in cases involving specified sex offenses, evidence of similar prior convictions is admissible to prove character. This exception is addressed by Wis JI-Criminal 276.

**The Three-Step Analytical Framework**

Before evidence of other acts is admitted, the trial court must apply a three-step test to determine that: 1) it is offered for an acceptable purpose under § 904.04(2)(a); 2) it is relevant; and, 3) its probative value is not outweighed by danger of unfair prejudice. State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998). The Sullivan decision noted: "This analytical framework (or one substantially similar) has been spelled out in prior cases, in Wis JI-Criminal 275 [8 1991] and in Wis JI-Criminal 275.1 [8 1990]." 216 Wis.2d 768, 771. [Note: JI 275.1 was withdrawn in 2015; much of its content was incorporated into this Comment.]

The first requirement – that the evidence is offered for an acceptable purpose under § 904.04(2)(a) – recognizes that Wisconsin appellate courts have held that the exceptions listed in § 904.04(2)(a) are "merely illustrative and not exclusive." See, for example, State v. Alsteen, 108 Wis.2d 723, 324 N.W.2d 426 (1982); State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977); State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989); State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989). Examples of acceptable purposes not named in § 904.04(2)(a) are found in footnote 12, below.

Even where a listed exception does apply, it may be difficult to determine which one does, because "[t]he exceptions listed in the statute are not mutually exclusive. The exceptions slide into each other; they are impossible to state with categorical precision and the same evidence may fall into more than one exception." State v. Tarrell,74 Wis.2d 647, 662, 247 N.W.2d 696 (1976) (Abrahamson J., dissenting). However, it is important to be sure either that a named exception applies, or that the evidence is admissible for another

© 2018, Regents, Univ. of Wis.

legitimate purpose so that the reason for the rule – to exclude evidence which is relevant only for showing a general disposition to commit a crime – is not violated. See State v. Spraggin, 77 Wis.2d 89, 100, 252 N.W.2d 94 (1977). For an example of evidence found to be admissible for multiple purposes, see State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399, where other acts evidence was determined to be relevant to several proper purposes – identification, context, credibility, and time and location; it also provided a "complete story" to the jury.

The second requirement is that the evidence be "relevant," defined in Sullivan as having "two facets": whether it relates to a fact or proposition that is of consequence to the determination of the action; and, whether it has probative value – a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. 216 Wis.2d 768, 772. The relevancy requirement is not met if the issue on which the evidence is offered (e.g., identity) is not in dispute in the case (e.g., the defendant admits the act but claims there was consent). See Alsteen, supra. Or, to look at it another way, in such a case the probative value of the evidence would be minimal and would be outweighed by its prejudicial effect. See Judicial Council Committee's Note to § 904.04(2), 59 Wis.2d R79 (1973). While the defendant is under no general obligation to divulge trial strategy, some type of notice must be given to the trial judge to bring the "not in dispute" rule into play. State v. Bedker, 149 Wis.2d 257, 440 N.W.2d 802 (Ct. App. 1989).

To be relevant, the other acts must be similar to those at issue in the case. In State v. McGowan, 2006 WI App 80, 291 Wis.2d 212, 715 N.W.2d 631, a conviction for first degree sexual assault of a child was reversed because evidence of other acts was improperly admitted. The trial took place in 2003 based on conduct alleged to have occurred in 1993. The other acts evidence was of an alleged assault in 1985 when the defendant was 10 years old. The court concluded that the acts were not "sufficiently factually similar" to justify their admission. 291 Wis.2d 212, ¶20.

Another important part of the relevancy inquiry is determining that the other act is not too remote in time. State v. Friedrich, 135 Wis.2d 1, 25, 398 N.W.2d 763 (1987). "Remoteness in time does not necessarily render the evidence irrelevant, but it may do so when the elapsed time is so great as to negate all rational or logical connections between the fact to be proven and the other acts evidence." State v. Mink, 146 Wis.2d 1, 16-17, 429 N.W.2d 99 (Ct. App. 1988), citing State v. Sanford, 76 Wis.2d 72, 81, 250 N.W.2d 348 (1977). But see State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, where testimony that Hurley sexually assaulted his younger sister 25 years before trial was found to be admissible.

The relevancy requirement may be satisfied by evidence of other crimes that occurred after the crime charged. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980); State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983).

The third requirement provides that even if the evidence is admissible for an acceptable purpose and is relevant, the evidence must be excluded if its prejudicial impact exceeds its probative value and the necessity for its use. This balancing is of the type provided for in § 904.03, Wisconsin Rules of Evidence.
State v. Sullivan, 216 Wis.2d 768, 773, 789, and State v. Spraggin, 77 Wis.2d 89, 95.

© 2018, Regents, Univ. of Wis. 

**The "Greater Latitude" Rule**

**Case Law**

A "greater latitude" rule applies to making decisions on other acts evidence in sex crime cases, especially those involving child victims. State v. Davidson, 2000 WI 91, ¶51, 236 Wis.2d 537, 613 N.W.2d 606. "Greater latitude" applies to each step of the admissibility determination: identifying an acceptable purpose; determining relevance; and, balancing probative value against danger of unfair prejudice. State v. Hammer, 2000 WI 92, ¶23, 236 Wis.2d 686, 613 N.W.2d 629. Other acts evidence is not automatically admissible in child sex crimes cases; the three-step analysis must be applied, using the "greater latitude" rule. Davidson, supra, ¶52; courts must determine that the evidence is offered for a proper purpose. State v. Hunt, 2003 WI 81, ¶87, 263 Wis.2d 1, 666 N.W.2d 771.

The Wisconsin Supreme Court discussed the rationale for the "greater latitude" rule in State v. Friedrich, 135 Wis.2d 1, 398 N.W.2d 763 (1987). The court held that the rule is justified by the need to get evidence before the jury that shows the past history of a defendant's plans, schemes, and motives so that the jury can understand how someone could commit such a reprehensible act.

> [O]ur statute makes admissible evidence of those past acts of sexual exploitation of children which demonstrate a scheme or plan. That scheme is to take advantage of the trust children show toward adults. Child exploiters take advantage of a child's physical and emotional vulnerability in order to give gratification to their warped and perverted "propensities" and "leanings." It is this scheme or plan to achieve sexual stimulation or gratification from the young, the most sexually vulnerable in our society, that allows trial courts in the exercise of discretion to admit evidence of past similar acts to show scheme or plan to exploit children.
> 135 Wis.2d 1, 29.

"An additional rationale for the greater latitude rule 'is the need to corroborate the victim's testimony against credibility challenges.'" State v. Hurley, 2015 WI 35, ¶57, 361 Wis.2d 529, 861 N.W.2d 174, citing State v. Davidson, supra, ¶42.

State v. Hurley, supra, employed the Sullivan analysis using the greater latitude rule to affirm the admission of other acts evidence that involved testimony that Hurley sexually assaulted his younger sister 25 years before the current trial when he was 12 to 14 and she was 8 to 10. The court found the evidence was relevant to method of operation and motive, specifically the desire to achieve sexual arousal or gratification. The 25-year time gap was not significant given the similarity of the incidents and the fact that proper cautionary instructions were given. The instructions were given before and after the testimony and generally followed Wis JI-Criminal 275.

**Section 904.04(2)(b)**

Section 904.04(2)(b), as amended by 2013 Wisconsin Act 362, is titled "Greater latitude." However, the rules articulated in the subdivisions of that section differ from those established in the case law cited above.

© 2018, Regents, Univ. of Wis. 

The Wisconsin Supreme Court addressed this issue in State v. Dorsey, 2018 WI 10, 379 Wis.2d 386, 906 N.W.2d 158, a case involving domestic abuse. The court held that greater latitude applies to domestic abuse cases [and the other crimes specified] even though the statute doesn't expressly say so in the text:

> ¶26: "We conclude that the recently amended language allows for the admission of other, similar acts of domestic abuse with greater latitude under a Sullivan analysis."
> . . .
> ¶35: "In sum, we conclude that § 904.04(2)(b)1. permits circuit courts to admit evidence of other, similar acts of domestic abuse with greater latitude, as that standard has been defined in the common law, under Sullivan, because it is the most reasonable interpretation in light of the context and purpose of the statute."

Subdivision 1. of § 904.04(2)(b) provides that in prosecutions for violations of specified statutes, "evidence of similar acts is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act." The specified statutes are: § 940.302(2) – human trafficking; Chapter 948; a serious sex offense, as defined in § 939.615 (1)(b) – these are the offenses subjecting a person to lifetime sex offender supervision; domestic abuse, as defined in § 968.075(1)(a); and, an offense subject to the domestic abuse surcharge in § 973.055.

The Committee considered two issues in connection with interpreting § 904.04(2)(b)1. First, the Committee concluded that the similar acts must still be offered for an acceptable purpose as set forth in sub. (2)(a) and as required by the first step of the Sullivan analysis. This is because sub. (2)(a) begins by stating: "Except as provided in par. (b)2." There is no exception for par. (b) 1., leading the Committee to conclude that the standard analysis applies. The only apparent effect of sub. (2)(b)1. is to make clear that the victim of the current crime need not be the same as the victim of other act. In State v. Dorsey, supra, the Wisconsin Supreme Court confirmed that the Sullivan analysis still applied, albeit with greater latitude applied at each stage: "Thus, for the types of cases enumerated under § 904.04(2)(b)1., circuit courts should admit evidence of other acts with greater latitude under a Sullivan analysis to facilitate its use for a permissible purpose." ¶33.

Second, the Committee concluded that all chapter 948 offenses are covered. This is based on reading the statute as applying in a criminal proceeding "alleging a violation s. 940.302(2) or of ch. 948," "alleging the commission of serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a)," or "alleging an offense that, following a conviction is subject to the surcharge in s. 973.055."

Subdivision 2. of § 904.04(2)(b) provides that in prosecutions "alleging violations of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order show that the person acted in conformity therewith." This is tied to the exception provided in sub. (2)(a): "Except as provided in par. (b)2. . . ." The exception is to the general rule in sub. (2)(a) that other acts evidence is not admissible to prove character. An instruction for use where prior convictions are admissible to prove character under § 904.04(2)(b)2. is provided in Wis JI-Criminal 276.

© 2018, Regents, Univ. of Wis.

**Who Decides; Burden Of Proof**

The determination of relevance, step two of the three-step Sullivan analysis, involves an important issue: Who decides whether the defendant committed the "other crime, wrong, or act" and by what standard of proof? The Wisconsin Court of Appeals resolved these questions in State v. Schindler, 146 Wis.2d 47, 429 N.W.2d 110 (Ct. App. 1988). The court adopted the rule set forth in Huddleston v. United States, 485 U.S. 681 (1988), where the U.S. Supreme Court was urged to require a trial judge to make a formal preliminary finding, by clear and convincing evidence, that the defendant committed the other acts. The court declined, holding that a formal preliminary finding is not required. The evidence is admissible if it is relevant, and it is relevant only if the jury can reasonably conclude that the defendant committed the act. The same general standards apply to the relevancy determination for other acts evidence that apply to any other relevancy determination. But no formal finding that the act occurred is required.

Therefore, under Schindler and Huddleston, a trial court must determine whether the evidence of the other acts was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant committed the other acts. In the Committee's judgment, the jury is not to be instructed as to any burden of persuasion on this issue. The "by a preponderance" standard is used only by the trial court in determining admissibility. It is not to be passed on to the jury. Accord, United States v. Hudson, 884 F.2d 1016, 1021 (7th Cir. 1989).

**"Conduct"; Acquittal Conduct**

The "other acts" analysis can apply to what might technically not be considered "conduct." "Verbal statements may be admissible as other-acts evidence even when not acted upon." State v. Jeske, 197 Wis.2d 905, 914, 541 N.W.2d 225 (Ct. App. 1995) (citing three cases where statements were properly admitted, but affirming a trial court decision excluding the evidence). Admissibility of evidence that the defendant used an alias was treated as other acts evidence in State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991), and was found to be relevant to show the defendant's intent to cover up his participation in the sexual assault and as part of the background facts of the case. Also see, State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 where evidence of pornographic images on the defendant's computer was properly admitted as "other acts" evidence tending to show motive.

In Dowling v. United States, 493 U.S. 342 (1990), the United States Supreme Court held that evidence of a prior offense for which the defendant was acquitted could be admitted as other acts evidence under Federal Rule of Evidence 404(b). The Court concluded that there was not a constitutional bar on the use of the evidence under either the collateral estoppel doctrine of the Double Jeopardy Clause or the due process requirement of fundamental fairness. The evidence could be excluded on nonconstitutional grounds that probative value is outweighed by the risk of unfair prejudice. The Wisconsin Court of Appeals followed Dowling in State v. Landrum, 191 Wis.2d 107, 528 N.W.2d 36 (Ct. App. 1995).

**Other Acts By Third Parties**

Evidence of other crimes or other acts committed by a third party may be admissible when offered by the defendant to show, for example, the identity of the person who committed the crime. State v. Scheidell, 227 Wis.2d 285, 595 N.W.2d 661 (1999). Admissibility is to be determined by using the same test that is used for other crimes or other acts committed by the defendant. But see, State v. Muckerheide, 2007 WI 5, 298 Wis.2d 553, 725 N.W.2d 930, where the defendant, charged with homicide by intoxicated use of a vehicle, was not entitled to introduce "other acts" evidence of the victim [his passenger] in support of the affirmative defense

© 2018, Regents, Univ. of Wis. 

recognized by § 940.09(2). The evidence was that the victim/passenger had grabbed the steering wheel of a car on prior occasions and was offered in support of the defendant's contention that the victim/passenger grabbed the steering wheel of his car during the incident that caused the death.

In State v. Missouri, 2006 WI App 74, 291 Wis.2d 466, 714 N.W.2d 595, convictions for possession with intent to deliver and resisting arrest were reversed because the defendant was improperly denied the right to present "other acts" evidence showing misconduct by the police officer who arrested him. The evidence was relevant to show a motive to lie, to show that the officer intended to frame the defendant, and to show that the officer's prejudice toward black people causes him to commit physical assaults and use excessive force.

1. Whenever evidence has been admitted for a limited purpose, § 901.06 provides that a cautionary instruction must be given upon request.

The Wisconsin Supreme Court has held that the trial judge is under no obligation to give a cautionary instruction in the absence of a request by the defendant. Hough v. State, 70 Wis.2d 807, 817, 235 N.W.2d 534 (1975). The basis for the decision in Hough was a recognition that it may have been a tactical decision by the defense not to request an instruction, out of a desire not to call further attention to the prior act. However, the absence of a curative or limiting instruction has been considered by the court in finding that admission of other acts evidence constituted reversible error. State v. Spraggin, 77 Wis.2d 89, 101, 252 N.W.2d 94 (1977). It may be desirable, therefore, for the trial judge to inquire of the defense whether a cautionary instruction is requested and, if the defendant's tactical decision is not to request the instruction, to make a record of that decision. The trial judge may also wish to consider giving the instruction, or a variation thereof, at the time the other acts evidence is admitted in addition to the instruction given at the close of the case.

2. Evidence of other crimes or conduct may be admissible under more than one of the exceptions to the general rule that the evidence is not admissible to prove that the defendant acted in conformity with his generally bad character. Section 904.04(2)(a) and Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Care must be taken to assure that the evidence does in fact fit one of the recognized exceptions, State v. Spraggin, 77 Wis.2d 89, 252 N.W.2d 94 (1977), or that it is admissible for some other acceptable purpose. See note 3, below. A discussion of the individual issues on which other-crimes evidence is admissible is found in Slough and Knightly, "Other Vices, Other Crimes," 41 Iowa L. Rev. 325 (1956).

A common situation where more than one exception applies occurs in sexual assault cases involving sexual contact. Other acts evidence is often relevant to intent, motive, and absence of mistake. See, for example, State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447; and, State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331.

3. In this blank, name the purpose for which the evidence was admitted, if one of the named exceptions does not apply. The exceptions listed in § 904.04(2) are "merely illustrative and not exclusive." State v. Kaster, 148 Wis.2d 789, 797, 436 N.W.2d 891 (Ct. App. 1989). See the cases listed in footnote 12, below.

4. See note 2, supra, regarding the applicability of more than one exception. See note 3, supra, regarding admissibility for a purpose not covered by a named exception.

© 2018, Regents, Univ. of Wis.

5. Wis JI-Criminal 175 provides an instruction on motive and may be included here. Or, if there is other evidence of motive, it may be preferable to give Wis JI-Criminal 175 at a different place. For cases where evidence of other acts was admitted to show motive, see State v. Tarrell, 74 Wis.2d 647, 247 N.W.2d 696 (1976), Holmes v. State, 76 Wis.2d 259, 251 N.W.2d 56 (1977), Hendrickson v. State, 61 Wis.2d 275, 212 N.W.2d 481 (1973), and Kelly v. State, 75 Wis.2d 303, 249 N.W.2d 800 (1977).

"Motive has been defined as the reason which leads the mind to desire the result of an act. In other words, a defendant's motive may show the reason why a defendant desired the result of the crime charged." State v. Gray, 225 Wis.2d 39, 54-55, 590 N.W.2d 918 (1998), quoting State v. Fishnick, 127 Wis.2d 247, 260, 378 N.W.2d 272 (1985). Also see State v. Plymesser, 172 Wis.2d 583, 594, 493 N.W.2d 367 (1992). Decisions dealing with motive exception include:

- State v. Hurley, 2015 WI 35, ¶74, 361 Wis.2d 529, 861 N.W.2d 174 [evidence of acts with a younger female family member was admissible to show motive – the desire to achieve sexual arousal or gratification].

- State v. Jensen, 2011 WI App 3, ¶¶83, 84, 331 Wis.2d 440, 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show motive – deep-seated and obsessive bitterness regarding his wife's prior affair gave him a motive to kill her].

- State v. Normington, 2008 WI App 8, 306 Wis.2d 727, 744 N.W.2d 867 [evidence of pornographic images on the defendant's computer (showing insertion of objects into persons' anuses) was properly admitted as "other acts" evidence tending to show motive].

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show motive – the purpose of sexual contact].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show motive – the purpose of sexual contact].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show motive – the purpose of sexual contact].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show motive because there was no evidence that the prior offense provided a reason for committing the charge offense].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [other acts tended to show a motive to prevent victim from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show motive to flee from an officer].

- State v. Kourtidias, 206 Wis.2d 574, 585, 557 N.W.2d 858 (Ct. App. 1996): ". . . evidence of a

© 2018, Regents, Univ. of Wis.

defendant's probation or parole status and relevant conditions thereof are admissible in the proper exercise of judicial discretion if such evidence demonstrates the motive for, or otherwise explains, the defendant's alleged criminal conduct. Absent that scenario, such evidence is inadmissible because the nexus between the conduct and the potential penalty is too tenuous."

- State v. Tabor, 191 Wis.2d 483, 529 N.W.2d 915 (Ct. App. 1995) [evidence of prior sexual assaults of a child admissible to prove motive – the desire to obtain sexual gratification from children].

- State v. Plymesser, 172 Wis.2d 583, 493 N.W.2d 367 (1992) [evidence of prior sexual assaults of a child admissible to prove motive – the purpose of the sexual contact, which is an element of the crime].

6. Intent may be at issue, despite the defendant's claim that the act with which he or she is charged never occurred, and thus may be a permissible purpose for the introduction of other acts evidence. State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993), resolving possible conflict among decisions on this issue.

For cases where the admission of other acts evidence on the issue of intent is discussed, see Vanlue v. State, 96 Wis.2d 81, 291 N.W.2d 467 (1980), State v. Spraggin, State v. Tarrell, and Hendrickson v. State, supra. Evidence of crimes committed after the charged crime may be relevant to show intent. Barrera v. State, 99 Wis.2d 269, 298 N.W.2d 820 (1980). State v. Pharr, 115 Wis.2d 334, 340 N.W.2d 498 (1983). However, intent must be an issue in the case for this exception to apply. State v. Danforth, 129 Wis.2d 187, 385 N.W.2d 125 (1986).

Decisions addressing the intent exception include:

- State v. Veach, 2002 WI 110, 246 Wis.2d 395, 630 N.W.2d 256 [evidence of past sexual touchings by the defendant was admissible to show that the touching was intentional].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 348 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was intentional].

- State v. Meehan, 2001 WI App 119, 244 Wis.2d 121, 630 N.W.2d 722 [evidence of the defendant's prior conviction for sexual assault of an adult was not admissible at trial on a charge of sexual assault of a child; slim probative value as to intent and motive was outweighed by the danger of unfair prejudice].

- State v. Derango, 2000 WI 89, 236 Wis.2d 721, 613 N.W.2d 833 [evidence of possession of sexually explicit videotapes admissible to show intent and motive as to a charge of enticing a child].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show intent because intent was not an element of the offense charged].

- State v. Anderson, 230 Wis.2d 121, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was relevant to put a statement into context, where that statement showed intent to kill a witness to prevent her from testifying against him].

- State v. Ingram, 204 Wis.2d 177, 554 N.W.2d 833 (Ct. App. 1996) [parole agent's testimony about defendant's high risk parole status was admissible to show intent to flee from an officer].

© 2018, Regents, Univ. of Wis.

- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child based on sexual intercourse (fellatio) because intent is not an element of that crime].

- State v. Hereford, 195 Wis.2d 1054, 537 N.W.2d 62 (Ct. App. 1995) [evidence that defendant had possessed a gun three weeks earlier similar to the one used in the crime is admissible to show intent even though the defense theory was that the defendant did not shoot the victim].

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [evidence of prior similar sexual assault admissible to show intent and motive for the current charge].

- State v. Clark, 179 Wis.2d 484, 507 N.W.2d 172 (Ct. App. 1993) [evidence of a prior battery is admissible to show intent even where the defendant's theory of defense is that the injuries in the present case were caused by a fall rather than by the defendant].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

7. For cases where the admission of other acts evidence on the issue of preparation or plan is discussed, see Haskins v. State, 97 Wis.2d 408, 294 N.W.2d 25 (1980), Spraggin, Tarrell, and Hendrickson, at note 6, supra.

"The word 'plan' in sec. 904.04(2) means a design or scheme formed to accomplish some particular purpose. . . . Evidence showing a plan establishes a definite prior design, plan, or scheme which includes the doing of the act charged. . . . [T]here must be 'such a concurrence of common features that the various acts are materially to be explained as caused by a general plan of which they are the individual manifestations." State v. Gray, 225 Wis.2d 39, 53, 590 N.W.2d 918 (1999), quoting State v. Spraggin, 77 Wis.2d 89, 99, 252 N.W.2d 94 (1977). Also see:

- State v. Davidson, 2000 WI 91, 236 Wis.2d 537, 613 N.W.2d 606 [prior conviction for sexual contact with young girl is admissible to show plan or scheme because it was sufficiently similar].

- State v. Cofield, 2000 WI App 196, 238 Wis.2d 467, 618 N.W.2d 214 [evidence of prior convictions was not admissible to show common scheme or plan because there is no evidence that the priors were a step in a plan leading to the charged offense].

8. See State v. Johnson, 74 Wis.2d 26, 245 N.W.2d 687 (1976).

9. Other acts evidence is admissible to show identity if it has "such a concurrence of common features and so many points of similarity with the crime charged that it 'can reasonably be said that the other acts and the present act constitute the imprint of the defendant.'" State v. Gray, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1999), quoting State v. Kuntz, 160 Wis.2d 722, 746, 467 N.W.2d 531 (1991) and State v. Fishnick, 127 Wis.2d 247, 263-64, 378 N.W.2d 272 (1985).

The classic case where other acts evidence was admitted to show identity is Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967). Also see Sanford v. State, 76 Wis.2d 72, 250 N.W.2d 348 (1976), and Hough v.

© 2018, Regents, Univ. of Wis. 

State, 70 Wis.2d 807, 235 N.W.2d 534 (1975).

Decisions addressing the identity exception include:

- State v. Hammer, 2000 WI 92, 236 Wis.2d 686, 613 N.W.2d 629 [evidence of previous sexual touching admissible to show identity by showing a mode or method of operation].

- State v. Rushing, 197 Wis.2d 631, 541 N.W.2d 155 (Ct. App. 1995) [evidence of prior consensual homosexual act is not admissible in a trial for sexual assault of a child because the two incidents were too dissimilar].

- State v. Wagner, 191 Wis.2d 322, 528 N.W.2d 85 (Ct. App. 1995) [evidence of prior assault was sufficiently similar to the charged crime to be admissible to show identity].

- State v. Murphy, 188 Wis.2d 508, 524 N.W.2d 924 (Ct. App. 1994) [evidence of ten prior robbery offenses were sufficiently similar to the charged crime to be admissible to show identity].

- State v. Speer, 176 Wis.2d 1101, 501 N.W.2d 429 (1993) [evidence that the defendant previously burglarized homes with "For Sale" signs in front during daylight hours showed identity].

- State v. Rutchik, 116 Wis.2d 61, 341 N.W.2d 639 (1984) [evidence that the defendant previously burglarized homes while the occupants were attending a funeral shows identity].

Related to, or overlapping with, the purpose to show "identity" is evidence relating to "method of operation." See, for example, State v. Hurley, 2015 WI 35, ¶¶63-69, 361 Wis.2d 529, 861 N.W.2d 174.

10. "Other acts evidence is properly admitted to show absence of mistake if it tends to undermine a defendant's innocent explanation for his or her behavior." State v. Evers, 139 Wis.2d 424, 437, 407 N.W.2d 256 (1987). "If a like occurrence takes place enough times, it can no longer be attributed to mere coincidence. Innocent intent will become improbable." Id. at 443. Cited with approval in State v. Gray, 225 Wis.2d 39, 56, 590 N.W.2d 918 (1999).

In State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (1998), the court found that the other acts evidence offered – verbal threats and abuse – was not probative of the defendant's intent or absence of accident with respect to a battery charge based on events two years later.

Evidence of the defendant's prior acts of hostility and aggressiveness was admitted as relevant to absence of mistake in King v. State, 75 Wis.2d 26, 248 N.W.2d 458 (1977). Decisions addressing this exception include:

- State v. Veach, 2002 WI 110, 255 Wis.2d 390, 468 N.W.2d 447 [evidence of past sexual touchings by the defendant was admissible to show that the touching was not a mistake or accident].

- State v. Opalewski, 2002 WI App 145, 256 Wis.2d 110, 647 N.W.2d 331 [evidence of past sexual assaults by the defendant of his daughters was admissible to show that the touching was not a mistake or accident].

- State v. LaBine, 198 Wis.2d 291, 542 N.W.2d 797 (Ct. App. 1995) [evidence of prior thefts of a truck

© 2018, Regents, Univ. of Wis.

admissible to show absence of accidental shooting in connection with a later taking of the truck].

- State v. Bustamonte, 201 Wis.2d 562, 549 N.W.2d 746 (Ct. App. 1996) [evidence of prior acts of child abuse admissible to negate defendant's claim that death of child was accidental].

- State v. Roberson, 157 Wis.2d 447, 459 N.W.2d 611 (Ct. App. 1990) [evidence of **later** possession of a stolen vehicle was admissible as relevant to intent because it tended to undermine the defendant's innocent explanation for his act].

11. The Committee decided to add this alternative to the instruction because several cases have approved evidence admitted to show "context or background." In State v. Seibert, 141 Wis.2d 753, 761, 416 N.W.2d 900 (Ct. App. 1987), the court held that evidence of a pending sexual assault charge and violation of a no-contact order was properly admitted "to furnish part of the context of the alleged crime and a full presentation of the case." In State v. Shillcutt, 116 Wis.2d 227, 236-237, 341 N.W.2d 716 (Ct. App. 1983), the court held that evidence of the defendant's earlier solicitation of a prosecution witness to practice prostitution and of his physical abuse of her was properly admitted "to establish the background relationship between the witness and the defendant [and] was necessary to fully understand the context of the case."

Shillcutt quotes from United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980): an "accepted basis for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case."

For other decisions applying this purpose, see:

- State v. Marinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399 [other acts evidence was relevant to proper purposes – identification, context, credibility, and time and location; it also provided a "complete story" to the jury and was highly probative because it was "intertwined" with the sexual assault allegations].

- State v. Jensen, 2011 WI App 3, ¶84, 331 Wis.2d 440. 794 N.W.2d 482 [evidence of pornographic photos the defendant left around the home was admissible to show context and a full presentation of the case – his hostility and desire to seek revenge against wife for her affair].

- State v. Payano, 2009 WI 86, 320 Wis.2d 348. 768 N.W.2d 832 [testimony of a confidential informant about his observations of the defendant's possession of drugs and a handgun in the defendant's apartment on the day before the police executed a no-knock search warrant at the apartment provided context for an incident in which a police officer was shot by the defendant].

- State v. Bergeron, 162 Wis.2d 521, 470 N.W.2d 322 (Ct. App. 1991) [evidence that the defendant used an alias was treated as other acts evidence and found to be relevant as part of the background facts of the case].

- State v. Anderson, 230 Wis.2d 121, 130, 600 N.W.2d 913 (Ct. App. 1999) [evidence of prior convictions was admissible to show the context of a statement constituting a threat against a witness].

- State v. Hereford, 195 Wis.2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995) [evidence that the defendant had possessed a gun three weeks earlier was admissible to show context and background for the statement, "I'm going to get my shit"].

© 2018, Regents, Univ. of Wis.

- State v. Rundle, 166 Wis.2d 715, 731, 480 N.W.2d 518 (Ct. App. 1992) [evidence of other incidents of abuse of the same victim is admissible "to permit the jury to fully understand the context of the charges" against the defendant].

12. Decisions recognizing other valid purposes that do not fit in the specified categories include the following:

- State v. Parr, 182 Wis.2d 349, 513 N.W.2d 647 (Ct. App. 1994) [suggesting that evidence of a prior similar sexual assault was admissible because it "bore directly on the truthfulness" of the defendant's and the victim's "competing and conflicting versions of the event"].

- State v. Anderson, 176 Wis.2d 196, 500 N.W.2d 328 (Ct. App. 1993) [evidence of defendant's in-custody statement showing familiarity with marijuana was admissible to show elements of the crime of delivery of marijuana].

- State v. Patricia A. M., 176 Wis.2d 542, 553, 500 N.W.2d 289 (1993) [evidence of prior instances of sexual assault admissible to support the credibility of the victim and to help "explain to the jury how the charged acts could have occurred in the manner" the victim described].

- State v. Clemons, 164 Wis.2d 506, 476 N.W.2d 283 (Ct. App. 1991) [evidence that the defendant stole the controlled substance that caused the death of the victim is admissible because it provides an aspect of the crime charge and gave "a complete presentation" of the case at trial].

© 2018, Regents, Univ. of Wis.