

## **Rule 404(b) Evidence of Other Crimes, Wrongs, or Acts**

You **[will hear/have heard]** evidence offered by the State that the defendant allegedly committed (an) act(s) other than what is charged in the indictment. It is alleged the defendant **[summarize the other act evidence]**.

Before you may consider this evidence, you must first be satisfied that the defendant did in fact commit the other act(s). If you are not convinced that the defendant committed the act(s), you must disregard this evidence completely.

If you determine that he/she did commit the act(s), you may consider this evidence only to help you in determining the defendant's **[specify the purpose(s) for which the other act evidence is admitted]**:

**[Read as appropriate]:**

**motive;**

**opportunity;**

**intent;**

**preparation or plan;**

**knowledge;**

**identity;**

**absence of mistake or accident; or**

**for some other relevant or lawful purpose(s).**

**[Read as appropriate]:** *Motive* is something, especially a willful desire, that leads one to act. [Black's Law Dictionary (12th ed. 2024)].

**[Read as appropriate]:** A person acts *intentionally* with respect to a result or to conduct described by a statute defining an offense, when his/her purpose is to cause that result or to engage in that conduct. [Ala. Code 13A-2-2(1)].

**[Read as appropriate]:** While motive is the inducement to do some act, intent is the mental resolution or determination to do it. [Black's Law Dictionary (12th ed. 2024)].

You may not consider this evidence for any other purpose. For example, it should not be used to conclude that the defendant is a bad person, has a bad character, or has a tendency to commit crimes. It is also not to be used to infer that, because the

defendant committed a past act, he/she is more likely to have committed the crime[s] charged in the indictment, and therefore must be guilty.

The use of this evidence is limited because the defendant is not on trial for the other act[s]. Once again, you may only use this evidence for the limited purpose(s) of **[specify the purpose(s) for which the other act evidence is admitted]**, and you should consider it with all the other evidence presented.

### **Use Notes**

Limiting instruction must be given at the end of trial and can be given contemporaneously with the introduction of the evidence, or both.

Rule 404(b) does not provide an exhaustive listing of all proper purposes. The “well-established exceptions to the exclusionary rule include: (1) relevancy to prove identity; (2) relevancy to prove res gestae; (3) relevancy to prove scienter; (4) relevancy to prove intent; (5) relevancy to show motive; (6) relevancy to prove system; (7) relevancy to prove malice; (8) relevancy to rebut special defenses; and (9) relevancy in various particular crimes.” *Willis v. State*, 449 So.2d 1258, 1260 (Ala. Crim. App. 1984); *Scott v. State*, 353 So.2d 36 (Ala. Crim. App. 1977).” *Frye v. State*, 185 So. 3d 1156, 1162-63 (Ala. Crim. App. 2015).

The permissible purpose for the admitted Rule 404(b) evidence must be limited to only those purposes that are plausible in the case at hand. *Ex parte Billups*, 86 So. 3d 1079, 1086 (Ala. 2010). Thus, a limiting instruction that recites every permissible Rule 404(b) theory gives inadequate guidance to the jury. *Id.*

“For collateral-act evidence to be admissible for one of the ‘other purposes’ in Rule 404(b), there must be ‘a real and open issue as to one or more of those “other purposes.” ’ ” *Draper v. State*, 886 So.2d 105, 117 (Ala.Crim.App.2002) (quoting *Gillespie v. State*, 549 So.2d 640, 645 (Ala.Crim.App.1989), quoting in turn *Bowden v. State*, 538 So.2d 1226, 1227 (Ala.1988)). *Moore v. State*, 49 So. 3d 228, 233 (Ala. Crim. App. 2009)

To be admissible as motive there must be a logical tendency “that leads to any inference that because of the prior act the defendant was motivated to commit the now charged crime. See *Horton v. State*, 217 Sp. 3d 27, 56 (Ala. Crim. App. 2016) (rejecting view that prior assault against family members provided motive to kill stranger).

In cases involving allegations of child sexual assault, there is a “liberal view of the motive exception to Rule 404(b) . . . .” *Towles v. State*, 168 So. 3d 124, 132 (Ala. Crim. App. 2013). This liberal view of the motive exception does not apply outside alleged child sexual assault cases. *Id.*

Intent cannot be considered a permissible purpose for the admission of Rule 404(b) evidence in cases where intent is not an element of the charged offense(s). See *Frye v. State*, 185 So. 3d 1156, 1165 (Ala. Crim. App. 2015); see also *Ex parte Cofer*, 440 So. 2d 1121 (Ala. 1983).

The common plan, scheme, or design permissible purposes coexist with the identity exception under Rule 404(b) and for any of these purposes to apply requires that identity actually be at issue in the case. *Lewis v. State*, 889 So. 2d 623 (Ala. Crim. App. 2003). “[T]he plan, scheme, or design exception is an extension of the identity exception -- where the charged crime and the collateral crime are committed in the same novel or peculiar manner, evidence of the collateral crime is admissible to identify the defendant as the perpetrator of the charged crime.” *Hurley v. State*, 971 So. 2d 78, 83 (Ala. Crim. App. 2006) (quoting *Register v. State*, 640 So. 2d 3, 6 (Ala. Crim. App. 1993)).

Use of the identity exception requires something peculiar or novel or such similarity between the charged offense and the prior act(s) to indicate the “handiwork of the accused.” *White v. State*, 179 So. 3d 170, 185 (Ala. Crim. App. 2013). The occurrence of a similar prior act in “ ‘gross features – i.e., the same doer, and the same sort of act, but not necessarily the same mode of acting not the same sufferer’ ” is insufficient.” *Id.* (citing *Brewer v. State*, 440 So. 2d 1155, 1162 (Ala. Crim. App. 1983) (quoting 2 J. Wigmore, *Wigmore on Evidence* § 304 at 251 (Chadbourn rev. 1979))).

For the knowledge exception to apply there must be some logical connection between the prior act and the defendant’s knowledge (if applicable) in the present case. *Ex parte Casey*, 889 So. 2d 615, 621 (Ala. 2004) (holding that a defendant’s prior unrelated theft conviction had no logical tendency to show the defendant had any knowledge related to his current receiving stolen property case).

“Judicial inquiry does not end with a determination that the evidence of another crime is relevant and probative of a necessary element of the charged offense. It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the [state’s] case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects.” *Averette v. State*, 469 So. 2d 1371, 1374 (Ala. Crim. App. 1985)

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