



When Prior Bad Acts Are Probative

Although “[t]he rule excluding evidence of criminal propensity is nearly three centuries old in the common law[,]”¹ modern social science research is contributing to an evolving legal landscape tending toward admission in criminal cases, particularly in cases involving intimate partner violence. This article examines this evolution through the lens of case law from several states. The examination proceeds in two sections: (1) developments in the application of the traditional rule prohibiting propensity evidence, and (2) emerging analysis of new evidence rules allowing propensity evidence.

1. Admitting Prior Bad Act Evidence for Non-Propensity Purposes

The traditional rules of evidence prohibit the admission of defendant’s prior bad acts to suggest to the jury that defendant’s propensity or character is to engage in the charged conduct.² Among the historical reasons for the rule is the idea that the evidence is *too* probative, tending to overpersuade the jury.³ Even these traditional rules, however, universally allow prior bad act evidence to be admitted for alternative purposes. Alaska’s exception is fairly standard:

Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.⁴

Pursuant to this exception, the bad act evidence will only be admitted if it is probative of a material issue⁵ and the court finds that the probative value of the evidence outweighs any prejudicial effect.⁶ With these findings in place, evidence is routinely admitted with a jury instruction limiting the use of the evidence to the non-propensity purpose.⁷

Social science research regarding intimate partner violence supports admissibility of the evidence. In prosecuting these offenses, establishing a history of intimate partner violence against the same victim or previous intimate partners provides context for the fact-finder to understand a defendant’s motivations and intent, thereby allowing a reasoned determination of the *actus reus*. “Only by understanding that a pattern of control is the theme linking the acts does the true value of the prior abuse become evident without resort to any generalized bad man reasoning.”⁸ The realities of intimate terrorism show that intimate partner violence is not an isolated act of abuse; rather it is a pattern of conduct that involves a variety of abusive behaviors that transcend situational conflict and reveal the batterer’s hostile motive or pattern to control and dominate intimate partners.

This is true even where the prior incidents of intimate terrorism are factually divergent from the current charge (*e.g.*, they involve different victims or different forms of violence).⁹ In fact, “[w]hen one is familiar with battering patterns and behavior, even the most factually divergent cases may appear strikingly similar in terms of their controlling, terrorizing, and dominating nature.”¹⁰

Courts are beginning to recognize the developing science.¹¹ For instance, the court of appeals in Washington D.C. upheld the admission of defendant’s prior bad acts against the same victim to “explain the history of the parties’ relationship and the hostility between them and [was] also relevant to [defendant’s] motive and intent in committing the crimes charged.”¹² Specifically, evidence that defendant had previously threatened his intimate partner with physical violence and caused property damage to her belongings was properly admitted in trial charging defendant with assault against the same intimate partner a year later.¹³ In a separate case, the same court upheld admission of prior bad act evidence to demonstrate defendant’s motive where the prior bad act was similar in conduct and directed at members of a class of persons to which the victim was a member.¹⁴ Specifically, defendant’s prior physical abuse committed against defendant’s other children (three of his own children and three stepchildren) was properly admitted because of their membership in the sibling group of which the victim was a member.¹⁵ “[M]isconduct against members of a class may be admitted against an ultimate victim where that ultimate victim has a strong enough connection to the class members subjected to the initial misconduct.”¹⁶

In another example, Georgia’s court of appeals upheld the admission of defendant’s prior bad act committed against defendant’s estranged wife (*i.e.*, defendant attacked her with a machete) in a case in which defendant was charged with pouring rubbing alcohol over his current intimate partner and lighting her on fire.¹⁷ As the court held, “[i]n cases of domestic violence, prior incidents of abuse against family members or sexual partners are more generally permitted because there is a logical connection between violent acts against two different persons with whom the accused had a similar emotional or intimate attachment.”¹⁸ Although the specific violence perpetrated was factually divergent, the reviewing court upheld the admission of the bad act evidence on the state’s theory of admissibility: the prior act demonstrated that defendant reacted violently and with weapons when upset by an intimate partner.¹⁹

2. Admitting Prior Bad Acts to Infer Propensity

In a growing number of states, the traditional rule prohibiting propensity evidence from being admitted for the purpose of showing defendants acted in conformity with their character is being overwritten. The new rules explicitly allow for admission of prior bad acts for the purpose of proving character and conformity therewith. This shift is explored herein in the context of intimate partner crimes,²⁰ and we suggest the changes are justified for at least two reasons.

First, there are the unique characteristics of the crime, which make prosecuting difficult. As the court in *People v. Jennings* explained:

[D]omestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as

intimacy with and intimidation by the perpetrator. The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusually private and intimate context, easily distinguish these offenses from the broad variety of criminal conduct in general.²¹

Second, the vulnerability of the victim makes these cases unique:

An abuser may have a pattern of targeting victims who are vulnerable. Such a victim may be reluctant to testify against her abuser, or the effectiveness of her testimony in court may be affected by fear or anxiety. The abuser may also be adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill. Evidence that the defendant has been involved in a similar incident may persuade a jury that the present victim is worthy of belief because her experience is corroborated by the experience of another victim of the same abuser.²²

An example of the new iteration of the rule can be found in Illinois, where the state legislature introduced a rule that abrogated the traditional common law prohibition of evidence of defendant's character to show their propensity to commit the charged crime: "In a criminal prosecution in which the defendant is accused of an offense of domestic violence . . . evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, and may be considered for its bearing on any matter to which it is relevant."²³ In enacting this rule, the legislature was concerned with the effective prosecution of domestic violence crimes.²⁴ The new rule was upheld against an argument that it violated due process in *Illinois v. Dabbs*,²⁵ a case that arose from defendant's physical abuse of his current intimate partner, in which defendant's former wife was permitted to testify that defendant had previously physically abused her.

Similarly, Minnesota has a statute that helps clear the way for prior intimate partner violence to be admitted into evidence, without an explicit prohibition on its use as propensity evidence.²⁶ The rationale for permitting this type of evidence is explained by the Minnesota Court of Appeals: "Obviously, evidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim."²⁸ Social science research supports this inference and the difficulties of prosecuting intimate partner violence justify its admission. "Such conduct [(i.e., intimate partner violence)] involves family dynamics otherwise masked by the privacy of a home, addresses the difficulties in prosecuting domestic-abuse offenses, and provides a more complete context to aid the finder of fact in determining the credibility of witnesses."²⁹ An increasing number of jurisdictions are implementing similar statutes or rules of evidence to properly admit character evidence and allow the jury to infer the accused's propensity.³⁰

Conclusion

The centuries old rule prohibiting character evidence is being eroded by an influx of social science research and a swell of victims' rights advocacy. This article provided a glimpse of the evolving legal landscape as it relates to the admission of a defendant's prior bad acts in cases charging intimate partner violence.³¹ States are increasingly recognizing that the probative value of prior acts of intimate partner violence, admitted to demonstrate the defendant's proclivity to control and dominate their intimate partner with physical abuse, outweighs any prejudice to defendants. To expressly prohibit the jury from considering a defendant's prior bad acts to infer propensity and conformity therewith frustrates reason and ignores its relevance, as clarified by social science research. This new wave of rules and reasoning admitting this prior bad act evidence restores balance to the scales of criminal justice by easing the barriers to the admission and consideration of this highly probative evidence.

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¹ *People v. Alcala*, 685 P.2d 1126, 1140 (Cal. 1984) (In Bank) (citation omitted), *abrogation by statute recognized by People v. Falsetta*, 986 P.2d 182, 186 (Cal. 1999).

² *See, e.g.*, Alaska R. Evid. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . ."); Colo. R. Evid. 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . ."); Ga. Code Ann. § 24-4-404(a) ("Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."); Minn. R. Evid. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."); Tex. R. Evid. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait . . .").

³ "Such evidence 'is [deemed] objectionable, not because it has no appreciable probative value, *but because it has too much.*'" *Alcala*, 685 P.2d at 1140 (citation omitted) (emphasis added by *Alcala*), *abrogation by statute recognized by People v. Falsetta*, 986 P.2d 182, 186 (Cal. 1999); *see also Old Chief v. United States*, 519 U.S. 172, 181 (1977) (quoting *Michelson v. United States*, 335 U.S. 469, 475-476 (1948)) ("[I]t is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

⁴ Alaska R. Evid. 404(b)(1).

⁵ See, e.g., *Belcher v. State*, 372 P.3d 279, 285 (Alaska Ct. App. 2016) (“The judge’s task is to determine (1) whether the prior-crime evidence is relevant to an issue that is actually contested and, if so, (2) whether the prior-crime evidence is genuinely relevant for a purpose other than to establish that the defendant characteristically commits the type of offense charged.”).

⁶ *Willock v. State*, -- P.3d --, No. A-11379, 2017 WL 2303159, at *2 (Alaska Ct. App. May 26, 2017) (emphasis in original) (“Evidence of a person’s past acts is admissible for *any* non-character purpose—subject to a trial judge’s duty to balance the probative value of the evidence against its potential for unfair prejudice under Evidence Rule 403.”).

⁷ See, e.g., *Clark v. State*, 953 P.2d 159, 165 (Alaska Ct. App. 1998) (“Judge Beistline instructed the jury that the testimony was being presented to show [defendant’s] state of mind when he was confronted with the rifle, and was not to be considered or discussed by the jury for any other purpose. We presume that the jury followed this instruction.”); see also *Whiteaker v. State*, 808 P.2d 270, 277 (Alaska Ct. App.1991) (noting that the jury is presumed to understand and follow jury instructions).

⁸ See Myrna S. Raeder, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. Cal. L. Rev. 1463, 1499 (1996).

⁹ See, e.g., *Smith v. State*, 501 S.E.2d 523, 529 (Ga. Ct. App. 1998) (concluding that admission of prior bad act against a separate victim was proper since previous act, attacking a previous intimate partner with a machete, was sufficiently similar to the current charge of attacking the current intimate partner by dousing her in lighter fluid and igniting the fluid, in that defendant is motivated to attack his intimate partners with weapons).

¹⁰ Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism 359, 377 n.113 (1996).

¹¹ See, e.g., *State v. Howard*, 106 So.3d 1038, 1044 (La. Ct. App. 2012) (holding that defendant’s prior bad acts of domestic violence were properly admitted to demonstrate defendant’s pattern or plan of violent and deviant attitude toward the women he dated); *State v. Blaz*, 398 P.3d 247, 253 (Mont. 2017) (concluding defendant’s prior bad acts of domestic violence were properly admitted to demonstrate a pattern of reacting to family problems with violence); *State v. Moorman*, 670 A.2d 81, 87 (N.J. Super. Ct. App. Div. 1996) (“Evidence of prior episodes of child abuse unconnected with the direct cause of the child’s death was admissible as proof of absence of accident or mistake.”); *People v. Rios*, 213 A.D.2d 726, 726 (N.Y. App. Div. 1995) (holding that the admission of a prior conviction for assaulting another son to rebut contention that this son’s death was accidental was proper); *Grider v. State*, 69 S.W.3d 681, 689 (Tex. Ct. App. 2002) (holding that defendant’s prior assault on previous girlfriend introduced in defendant’s trial for assault on subsequent girlfriend was proper); *State v. Clark*, 507 N.W.2d 172, 175-76 (Wis. Ct. App. 1993) (holding that evidence that defendant had battered a previous girlfriend as proof of intent to injure current girlfriend was proper).

¹² *Bacchus v. United States*, 970 A.2d 269, 276 (D.C. 2009).

¹³ *Id.*

¹⁴ *McCloud v. United States*, 781 A.2d 744, 749 (D.C. 2001).

¹⁵ *Id.* at 748-49.

¹⁶ *Id.* at 749.

¹⁷ *Smith*, 501 S.E.2d at 529 (“In both the prior transaction and the crime charged, [defendant], acting without provocation and to express his anger, used a lethal weapon to attack a woman with whom he had an emotional attachment through a sexual partnership The court did not clearly err in admitting the similar transaction.”).

¹⁸ *Smith v. State*, 501 S.E.2d at 527; see also *Howard v. State*, 492 S.E.2d 683, 685 (Ga. Ct. App. 1997) (“The evidence was probative of [defendant’s] method of resolving disputes with his girlfriends by committing violent acts upon them.”).

¹⁹ See, e.g., *Smith*, 501 S.E.2d at 527.

²⁰ Additional categories of crime that are experiencing a similar evolution in legislation admitting prior bad acts to prove the perpetrators' propensity are sexual assault and child molestation. *See, e.g.*, Cal. Evid. Code § 1108; Ga. Code Ann. §§ 24-4-413, 24-4-414; 725 Ill. Comp. Stat. Ann 5/115-7.3; La. Code Evid. Ann. art. 412.2; Tex. Code Crim. Proc. Ann. art. 38.37(b).

²¹ 97 Cal. Rptr. 2d 727, 737 (Cal. Ct. App. 2000).

²² *People v. Dabbs*, 940 N.E.2d 1088, 1098-99 (Ill. 2010).

²³ 725 Ill. Comp. Stat. Ann 5/115-7.4.

²⁴ *See, e.g., Dabbs*, 940 N.E.2d at 1098 (“When it enacted this statute, the General Assembly was legitimately concerned with the effective prosecution of crimes of domestic violence . . .”).

²⁵ 940 N.E.2d 1088 (Ill. 2010).

²⁶ Minn. Stat. Ann. § 634.20 (“Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ‘Domestic conduct’ includes, but is not limited to, evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; or violation of section 609.749 or 609.79, subdivision 1. ‘Domestic abuse’ and ‘family or household members’ have the meanings given under section 518B.01, subdivision 2.”).

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²⁸ *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. Ct. App. 2010).

²⁹ *State v. Bradley*, No. A10-15, 2011 WL 205485, at *2 (Minn. Ct. App. Jan. 25, 2011); *see also State v. Fraga*, 864 N.W.2d 615, 627 (Minn. 2015) (“[E]vidence of domestic conduct by the accused against family or household members other than the victim may be admitted pursuant to Minn. Stat. § 634.20, which, as a matter of comity, we adopt as a rule of evidence.”).

³⁰ *See also People v. Raglin*, 21 P.3d 419, 424-25 (Colo. App. 2000) *overruled on other grounds by Fain v. People*, 329 P.2d 270 (Colo. 2014) (holding that prior acts of intimate partner violence perpetrated by the defendant against the named victim were properly admitted pursuant to Colo. Rev. Stat. § 18-6-801.5 for the purpose demonstrating defendant’s attitude toward the victim rather than defendant’s character).

³¹ It should be noted that another similarly evolving area of the law is sexual assault crimes perpetrated against children.