

# THE CONTINUING COMPLEXITY OF INDIANA RULE OF EVIDENCE 404(b)

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## INTRODUCTION

Of the numerous provisions in the Indiana Rules of Evidence, few have proved as complicated in application as Rule 404(b). The rule—which provides generally that evidence of crimes, wrongs, or acts other than the conduct that is the subject of the particular case is not admissible as proof of the actor’s character, but is admissible for other purposes<sup>1</sup>—has produced challenging cases in each of the years since the Indiana Rules of Evidence went into effect in 1994. This past year was no exception, as decisions of the Indiana Supreme Court and the Indiana Court of Appeals confronted the numerous problems of application raised by the rule.<sup>2</sup> Because the rule remains the subject of confusion eight years after the adoption of the Indiana Rules of Evidence, and more than twenty-five years after the adoption of a parallel provision in the Federal Rules of Evidence, this Article will focus not on the full range of issues addressed by the courts under the Indiana Rules of Evidence during the survey period, but rather will focus on the past year’s Rule 404(b) cases.

## I. THE SUBSTANTIVE REQUIREMENTS OF RULE 404(b)

Rule 404(b), at its heart, has three substantive requirements. First, the rule’s reference to “other crimes, wrongs, or acts” means that the proffered evidence must involve a crime, wrong, or act that is not itself the subject of the case in which the evidence is sought to be introduced. Second, the rule excludes evidence of such acts if offered solely as character evidence to show action in conformity with that character in the events giving rise to the case. In other words, the evidence must not be used to support the “forbidden inference” that, because an individual has engaged in wrongdoing on occasions other than those at issue in the particular case, she must have done so on the occasion pertinent to the case as well.<sup>3</sup> If the evidence is offered for another purpose, however, it

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1. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

IND. R. EVID. 404(b).

2. The survey period for this Article is the year beginning October 1, 2000 and terminating September 30, 2001.

3. See *Thompson v. State*, 690 N.E.2d 224, 233 (Ind. 1997).

may be admitted. Finally, because of the danger that the jury will indulge in the forbidden inference even if the evidence is offered for a proper purpose, the court must engage in a careful Rule 403 balancing to ensure that the probative value of the Rule 404(b) evidence is not substantially outweighed by the danger of unfair prejudice. Each one of these requirements raises difficulties in application.

A. *What Are "Other Crimes, Wrongs, or Acts?"*

1. *"Crimes, Wrongs, or Acts."*—Rule 404(b) implicates evidence of "crimes, wrongs, or acts."<sup>4</sup> If the evidence in question does not specifically reference an act, the Indiana Supreme Court has held that Rule 404(b) does not apply. Thus, a witness's statement that she feared the defendant was not barred by Rule 404(b), even though the jury reasonably could infer from the witness's testimony that the defendant had engaged in acts that engendered her fear.<sup>5</sup> In addition, it is not enough that there be evidence of a particular act; the act must also be wrongful in some sense.<sup>6</sup>

The Indiana Court of Appeals reiterated both of these points during the past year. In *Allen v. State*,<sup>7</sup> during the defendant's trial on a charge of burglary, the prosecution sought to introduce evidence that, during questioning by the police, the defendant offered to purchase drugs as a confidential informant and that "[h]e'd done these things in the past."<sup>8</sup> The court initially determined that the reference to "these things" plausibly could be interpreted to mean that the defendant had previously acted as a confidential informant, not that the defendant had previously made drug purchases.<sup>9</sup> Evidence of having acted as an informant, however, would not be barred by Rule 404(b), because there was nothing wrongful about the act.<sup>10</sup> And while evidence of having previously acted as a confidential informant might support an inference that the defendant had previously engaged in misconduct, Rule 404(b) did not bar evidence that merely raised such an inference.<sup>11</sup>

The line thus seems to be drawn clearly: if direct evidence of an act by the defendant is presented, Rule 404(b) is implicated, whereas if the evidence presented requires an inference to support the conclusion that the defendant engaged in an act, the Rule does not apply. One recent decision of the Indiana Supreme Court, however, introduced a note of uncertainty. In *McCarthy v. State*,<sup>12</sup> the defendant, a high school teacher, was charged with sexual misconduct

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4. IND. R. EVID. 404(b).

5. *See* Haak v. State, 695 N.E.2d 944, 947 (Ind. 1998).

6. *See* Allen v. State, 743 N.E.2d 1222 (Ind. Ct. App. 2001).

7. *Id.*

8. *Id.* at 1232.

9. *Id.* at 1232 n.13.

10. *Id.* at 1232.

11. *Id.*

12. 749 N.E.2d 528 (Ind. 2001).

with a minor based on allegations that he had molested two of his students. At trial, the prosecution presented evidence that the defendant had played “strip perdiddle,” a sexual game with two other underage girls.<sup>13</sup> The trial court admitted the evidence over the defendant’s objection that the evidence was improper under Rule 404(b).<sup>14</sup> The supreme court, concluding that the trial court’s decision was correct, questioned whether the evidence of the defendant’s participation in “strip perdiddle” even constituted evidence of other acts within the meaning of the Rule.<sup>15</sup>

The court’s objection is difficult to fathom. Playing a game that involves removing one’s clothes unquestionably constitutes conduct and thus would seem to fit within the Rule. The most likely basis for the court’s objection is that the conduct at issue in *McCarthy* was not sufficiently wrongful to fall under the Rule. Again, though, the uncertainty that the court suggests seems unfounded. The inclusion of “wrongs, or acts” in Rule 404(b) suggests that an act need not be criminal to fall within Rule 404(b).<sup>16</sup> And while an adult male teacher who plays a non-contact stripping game with minor females over whom he has authority may not be engaged in criminal conduct, his act certainly is wrongful in the ordinary sense of the word. In any event, the court did not ultimately resolve the issue, resting its decision on other grounds,<sup>17</sup> hence it would seem best not to make too much of this aspect of the opinion.

2. “*Other.*”—Courts commonly refer to Rule 404(b) as addressing evidence of “prior” acts.<sup>18</sup> In many instances, this may simply be because, as a factual matter, the events discussed under Rule 404(b) in the particular cases occurred prior to the events underlying those cases. Repeated use of the word “prior,” however, may suggest, at least implicitly, that the rule requires that the acts in question have occurred before the events giving rise to the case.

The rule contains no such requirement, as a case from this past year demonstrates. In *Murray v. State*,<sup>19</sup> the Indiana Supreme Court considered under Rule 404(b) evidence of uncharged conduct that occurred concurrently with the conduct that was the subject of the criminal charge. The defendant, charged with attempted murder following the shooting of an acquaintance, claimed that the shooting had been accidental.<sup>20</sup> To rebut this claim, and as evidence that the defendant had intended to shoot the victim, the prosecution offered evidence that the defendant did not have a license for the handgun used in the shooting. The

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13. *Id.* at 535.

14. *Id.* at 536.

15. *Id.* at 536-37.

16. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 216 (2d ed. 1999).

17. See *infra* notes 23-24 and accompanying text.

18. See *Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001) (“Rule 404(b) protects against convictions based on past actions . . . rather than facts relevant to the matter at issue.”); *Crain v. State*, 736 N.E.2d 1223, 1234-35 (Ind. 2000); *Allen v. State*, 743 N.E.2d 1222, 1232 (Ind. Ct. App. 2001); *Atwell v. State*, 738 N.E.2d 332, 336 (Ind. Ct. App. 2000).

19. 742 N.E.2d 932 (Ind. 2001).

20. *Id.* at 933.

court, noting that carrying a handgun without a license was a crime, concluded that the evidence was admissible under Rule 404(b) as evidence of an other act relevant to the defendant's intent to engage in the charged conduct: when a person unlawfully in possession of a firearm "openly brandishes" the weapon, "a factfinder could conclude that the person was highly motivated by a specific intent for doing so."<sup>21</sup>

### *B. Purpose for Offering the Evidence*

Rule 404(b) bars evidence of other crimes, wrongs, or acts only when offered for the purpose of showing the actor's character as a means of highlighting that the actor behaved in a manner consistent with that character on the occasion at issue in the particular case. If the evidence is offered for a purpose other than as support for this "forbidden inference," the evidence may be admitted. Because evidence admitted for a proper purpose may be misapplied by the jury in support of the forbidden inference, however, the court is obliged to ensure that the true purpose for offering the evidence is a proper one.

The Indiana Supreme Court and Indiana Court of Appeals have proved receptive to arguments that evidence of other acts is being offered for a purpose other than as character evidence, with one significant exception. Following *Wickizer v. State*,<sup>22</sup> the courts carefully scrutinize other-acts evidence that is offered to show intent. For the most part, though, the cases in this past year demonstrate that reversal on the ground that evidence is offered for an improper purpose under Rule 404(b) is unusual, as is reversal on the ground that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

*1. Routine Application.*—Many of the instances in which evidence is admitted under Rule 404(b) are routine: the evidence plainly relates to an aspect of the case other than the defendant's character. In *McCarthy v. State*,<sup>23</sup> for example, the defendant, accused of sexual misconduct with a minor, disclaimed

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21. *Id.*

22. 626 N.E.2d 795 (Ind. 1993).

23. 749 N.E.2d 528 (Ind. 2001). The *McCarthy* decision is more notable for the fact that it applies harmless error analysis to a deprivation of the defendant's right to cross-examine witnesses, as guaranteed by the Sixth Amendment of the U.S. Constitution and article 1, section 13 of the Indiana Constitution. *Id.* at 534. In rejecting the defendant's argument that deprivation of the right to cross-examine witnesses should be considered error *per se*, the court discarded court of appeals precedent that had supported the defendant's position. *Id.* at 533-34 (*overturning* *Tucker v. State*, 728 N.E.2d 261, 262 (Ind. Ct. App. 2000), *trans. denied*; *Kleinrichert v. State*, 530 N.E.2d 321, 322 (Ind. Ct. App. 1988); *Higginbotham v. State*, 427 N.E.2d 896, 901 (Ind. Ct. App. 1981), *overruled on other grounds by* *Micinski v. State*, 487 N.E.2d 150 (Ind. 1986); *Pfefferkorn v. State*, 413 N.E.2d 1088, 1090 (Ind. Ct. App. 1980); *Haeger v. State*, 390 N.E.2d 239, 241 (Ind. Ct. App. 1979)). The court noted that the U.S. Supreme Court had previously determined that harmless error analysis should be used to assess the impact of violations of the right to impeach for bias. *Id.* at 534 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

knowledge of the game in which he had allegedly indulged with the minor victim before molesting her. To demonstrate that the defendant did in fact have knowledge of the game, the prosecution introduced evidence from two minor witnesses who testified that the defendant had played the game with them as well. The supreme court held that this use of the evidence to show knowledge was proper.<sup>24</sup>

Prior acts of violence by the defendant against the victim of the charged offense are often admitted to show motive, the idea being that the prior acts demonstrate a hostile relationship between the defendant and the victim, a relationship that in turn explains the charged conduct. This use of the evidence avoids the forbidden inference by focusing not on the defendant's propensity for violence broadly but rather on the particulars of the defendant's relationship with the victim. In *Wrinkles v. State*,<sup>25</sup> for example, the trial court admitted (without objection from defendant's counsel) evidence that, two months prior to murdering his wife and two others, the defendant had pointed a gun at his wife.<sup>26</sup> On collateral review, the Indiana Supreme Court concluded that the failure to object did not deprive the defendant of effective assistance of counsel, because the evidence was properly admissible to show motive.<sup>27</sup>

Cases in which evidence is excluded can be equally clear-cut. In *Buchanan v. State*,<sup>28</sup> a child-molesting case, the trial court admitted over the defendant's objection photographs and drawings seized from his home of children in various states of undress, accepting the prosecution's argument that the materials constituted evidence of the defendant's plan to molest young children. The court of appeals made short work of the argument. To constitute proper evidence of plan, the court asserted, the charged offense and the evidence of other acts "'must . . . be so related in character, time, and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime.'" <sup>29</sup> Under this test, the drawings and photographs did not constitute evidence of an overarching plan.

2. *Intent*.—An effort to show intent is a proper purpose for introducing

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24. *McCarthy*, 749 N.E.2d at 536.

25. 749 N.E.2d 1179 (Ind. 2001). *Wrinkles* is most noteworthy for its conclusion that criminal defendants may not be required to wear stun belts in the courtroom. *Id.* at 1195. The court acknowledged the need for defendants to wear restraints in limited circumstances, but concluded that, unlike shackles and other forms of restraint, stun belts generated a fear in the minds of their wearers that had the potential to chill defendants from participating fully in their own defense. *See id.* at 1194-96. Justice Boehm, concurring in the result, opined that stun belts should not be categorically barred, reasoning that, because they were less visible than shackles and thus were less likely to be observed by the jury, some defendants might prefer them. *See id.* at 1205 (Boehm, J., concurring).

26. *See id.* at 1196 & n.7.

27. *Id.* at 1197.

28. 742 N.E.2d 1018 (Ind. Ct. App. 2001).

29. *Id.* at 1022 (quoting *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992)). *Lannan*, it should be noted, predated the adoption of the Indiana Rules of Evidence.

evidence of other acts under Rule 404(b). Permitting evidence of other acts to be introduced to show intent in criminal cases is problematic, however, in that evidence tending to show intent is almost always relevant in such cases. Moreover, the intent argument, which the rule recognizes as proper, is not far removed in operation from the forbidden inference based on character. Each is in a sense a propensity argument; the intent argument is simply more narrowly focused on a particular aspect of the defendant's state of mind, rather than on his general character.

Recognizing this reality, in the 1993 case of *Wickizer v. State*,<sup>30</sup> the Indiana Supreme Court held that evidence of other acts may not be offered to show intent unless the defendant specifically denies intent. A mere denial of involvement in the offense does not amount to a denial of intent; rather, the defendant must argue that, whatever conduct he may have engaged in, he did not possess the necessary *mens rea* for the offense.<sup>31</sup> In many instances, it is readily apparent that the defendant has made the requisite denial, thus opening the door to other-act evidence probative of intent. In *Crain v. State*,<sup>32</sup> for example, the defendant, charged with murder of his wife, claimed that her death was accidental.<sup>33</sup> This claim allowed the prosecution to introduce evidence of several prior batteries by the defendant against his wife as evidence of the requisite intent.<sup>34</sup> And in *Murray v. State*,<sup>35</sup> when the defendant, charged with attempted murder, claimed that he shot the victim by accident, the Indiana Supreme Court held that the prosecution could properly introduce evidence that the defendant's possession of the firearm was illegal, on the theory that one in possession of an illegal firearm would not casually flaunt it but would reveal it only if there were intent

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30. 626 N.E.2d 795 (Ind. 1993).

31. The federal courts of appeals, applying the parallel federal rule, are divided in their approaches as to whether the defendant must controvert intent before evidence of other acts may be introduced pursuant to Rule 404(b). A number follow an approach similar to that of *Wickizer*. See *United States v. Karas*, 950 F.2d 31, 37 (1st Cir. 1991); *United States v. Colon*, 880 F.2d 650, 656-57 (2d Cir. 1989); *United States v. Walton*, 602 F.2d 1176, 1180-81 (4th Cir. 1979); *United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978). Other circuits take the position that, where the crime is a specific intent crime, evidence of other acts may be used to demonstrate intent even if the defendant did not specifically place intent at issue. See *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994); *United States v. Hadley*, 918 F.2d 848, 851-52 (9th Cir. 1990); *United States v. Weddell*, 890 F.2d 106, 107-08 (8th Cir. 1989); *United States v. Mazzanti*, 888 F.2d 1165, 1170-71 (7th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990); *United States v. Soundingsides*, 820 F.2d 1232, 1237-38 (10th Cir. 1987); *United States v. Williams*, 816 F.2d 1527, 1531 (11th Cir. 1987); *United States v. Hamilton*, 684 F.2d 380, 384 (6th Cir.), *cert. denied*, 459 U.S. 976 (1982). The position of the D.C. Circuit appears still to be unresolved, although in admitting other-acts evidence to demonstrate intent, the court in one case did note that the defendant had squarely placed his intent at issue. See *United States v. Watson*, 894 F.2d 1345, 1349 (D.C. Cir. 1990).

32. 736 N.E.2d 1223 (Ind. 2000).

33. *Id.* at 1235.

34. *Id.* at 1235-36.

35. 742 N.E.2d 932 (Ind. 2001).

to use it.<sup>36</sup>

Although the *Wickizer* rule is now well established, it sometimes proves troublesome in application. A recent decision of the Indiana Court of Appeals suggests that it can be difficult to determine whether a defendant has placed his intent in issue. In *Werne v. State*,<sup>37</sup> the defendant was charged with molesting a six-year-old child who lived nearby. According to the child-victim, the defendant had touched her several times “on her shorts” in the pelvic area.<sup>38</sup> The defendant’s attorney asserted in his opening statement, without explaining the significance of the assertion, that the case “was an over the clothing type touching case.”<sup>39</sup> Based on this argument, the trial court concluded that the defendant had denied intent and therefore had opened the door to evidence of a prior incident of molestation.<sup>40</sup>

A divided panel of the court of appeals disagreed. Writing for the majority, Judge Mathias noted that the defendant’s opening statement did not explicitly assert that the alleged touching had been inadvertent or accidental; rather, it simply “sought early on to minimize the seriousness of the charge and thus the unfavorable light in which some jurors may have viewed” the defendant.<sup>41</sup> Dissenting, Judge Bailey noted that the defendant “did not deny that the touching took place”; rather, the emphasis on the fact that the alleged touching occurred over the victim’s clothes “suggest[ed] inadvertence.”<sup>42</sup> The split is perhaps understandable, given the lack of clarity in the defense counsel’s argument; the interpretations of both the majority and the dissent seem plausible. The *Werne* decision therefore is somewhat troubling; however, perhaps because of the fact-specific nature of the split in the appellate panel, the Indiana Supreme Court denied transfer.<sup>43</sup>

3. *Other Purposes.*—Although Rule 404(b) lists a number of purposes for which other-acts evidence may be admissible, it is important to remember that the list set forth in the Rule is not exclusive.<sup>44</sup> Indiana courts are receptive to other-acts evidence offered for purposes other than those listed in the Rule, provided they are satisfied that the proffered purpose is not simply a stand-in for the forbidden inference. Thus, in *Dickens v. State*,<sup>45</sup> a murder prosecution, the fact that the defendant was observed in possession of a handgun two days before

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36. *Id.* at 933.

37. 750 N.E.2d 420 (Ind. Ct. App. 2001).

38. *Id.* at 421.

39. *Id.* at 422.

40. *Id.*

41. *Id.* at 423. The majority further concluded that the trial court’s error was not harmless.

See *id.* at 423-24.

42. *Id.* at 425 (Bailey, J., dissenting).

43. *Werne v. State*, 761 N.E.2d 418 (Ind. 2001).

44. *Dickens v. State*, 754 N.E.2d 1, 4 (Ind. 2001); *Atwell v. State*, 738 N.E.2d 332, 336 n.4 (Ind. Ct. App. 2000).

45. 754 N.E.2d 1 (Ind. 2001).

the murder was deemed relevant to the issue of opportunity.<sup>46</sup> A somewhat more complicated situation arose in *Atwell v. State*.<sup>47</sup> In *Atwell*, the defendant was charged with attempted murder after shooting a neighbor. The shooting occurred after the victim intervened in an argument between the defendant and the defendant's girlfriend.<sup>48</sup> At trial, the victim acknowledged that he had threatened to hit the defendant prior to the shooting; he explained his threat by saying that, several nights before the shooting, the defendant had hit his girlfriend, and that the victim wanted to prevent that from happening again.<sup>49</sup> On appeal, the court rejected the defendant's argument that the evidence that the defendant had previously hit his girlfriend was inadmissible because it invited the jury to indulge in the forbidden inference; instead, the court accepted the government's argument that the other-acts evidence was properly admitted on the question of whether the victim provoked the shooting in some manner.<sup>50</sup>

### C. Rule 403 Balancing

That evidence of other acts is being offered for a proper purpose and is relevant to that purpose is not sufficient to warrant its admission; the court must also determine, pursuant to Rule 403, whether "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."<sup>51</sup> Of course, Rule 403 applies generally to all forms of evidence, not simply to those offered under Rule 404(b). The need for balancing is especially acute under Rule 404(b), however, because of the constant danger that the jury will fall prey to the allure of the forbidden inference. The danger of unfair prejudice is always present in Rule 404(b) cases, then; the only question is how that danger compares to the evidence's probative value when considered for its proper purpose.

The Indiana Supreme Court has recognized the importance of Rule 403 balancing in determining admissibility under Rule 404(b), specifically directing courts to undertake the balancing inquiry when considering other-acts evidence.<sup>52</sup> In practice, however, reversals on appeal based on Rule 403 have been rare. In part, this is because of the standard of review: an appellate court will not overturn a trial court's determination that evidence does not violate Rule 403 absent abuse of discretion.<sup>53</sup> Beyond that, though, the Indiana Supreme Court has effectively set the tipping point between probative value and unfair prejudice at such a high level that even highly prejudicial evidence is deemed admissible if

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46. *Id.* at 4.

47. 738 N.E.2d 332 (Ind. Ct. App. 2000).

48. *Id.* at 334.

49. *Id.* at 334-35.

50. *Id.* at 336.

51. IND. R. EVID. 403.

52. *Hicks v. State*, 690 N.E.2d 215, 221 (Ind. 1997).

53. *Crain v. State*, 736 N.E.2d 1223, 1235 (Ind. 2000).



it has minimal probative value.

An example from this past year was *Crain v. State*.<sup>54</sup> In *Crain*, the defendant was charged with murder after allegedly beating his wife severely in a motel room and leaving her to die.<sup>55</sup> At trial, the prosecution offered evidence that, at the time of the defendant's arrest, the defendant had four outstanding battery charges involving the victim in the five months prior to her death, as well as two prior battery convictions, one three years old and one six years old, both involving the victim. The prosecution contended, and the trial court agreed, that these charges and convictions were proper other-acts evidence, admissible to show intent by rebutting the defendant's argument that the victim's death had been accidental.<sup>56</sup> On appeal, the supreme court agreed that the evidence was proper to show intent; it also concluded that the evidence withstood Rule 403 scrutiny. The four battery charges, being close in time to the victim's death, had sufficient "probative force" to warrant admission. The two prior convictions were "in the lower range of probative value," given the passage of time and the fact that, with the admission of the four battery charges, the evidence of the prior convictions was cumulative.<sup>57</sup> Nevertheless, the court concluded that the admission of the convictions did not constitute an abuse of discretion.<sup>58</sup>

*Crain* focuses largely on assessing the probative value of the proffered evidence; it largely fails to consider the extent of the danger of unfair prejudice caused by the evidence. The court acknowledges that "[a]t some point testimony about every incident of violence between the [defendant and the victim] becomes more prejudicial than probative."<sup>59</sup> Beyond that, though, the court has little to say. It briefly suggests that if the testimony about the prior convictions had been both "graphic" and "prejudicial," it might have excluded the evidence.<sup>60</sup> Again, though, the court says virtually nothing about what would make evidence in this context prejudicial. In particular, the failure to acknowledge the inherent unfair prejudice lurking in the forbidden inference undermines the court's own previous insistence on the importance of Rule 403 balancing in the Rule 404(b) context. Given the one-sided nature of the court's inquiry, it is not surprising that, as long as the evidence's probative value is more than *de minimis*, the court concludes that it is not barred by Rule 403.<sup>61</sup>

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54. 736 N.E.2d 1223 (Ind. 2000).

55. *Id.* at 1229.

56. *Id.* at 1235-36.

57. *Id.* at 1236 & n.9.

58. *Id.* at 1236.

59. *Id.* at 1236 n.9 (quoting *Hicks v. State*, 690 N.E.2d 215, 222 (Ind. 1997)).

60. *Id.*

61. *Crain* dealt with a Rule 403 problem in another portion of the opinion as well. To illustrate expert testimony, the prosecution presented not photographs, video, or charts, but the murder victim's own skull, which the jury was invited to examine up-close. *See id.* at 1233-34. On appeal, the Indiana Supreme Court acknowledged that the use of the victim's skull in this manner was "unsettling," but concluded that "the skull was neither particularly gruesome nor ominous." *Id.* at 1234. Although the court expressed a preference for other means of illustrating

Only once in this past year did the Indiana Court of Appeals conclude that evidence of other acts proffered under Rule 404(b) should be excluded under Rule 403, and the circumstances of that case demonstrate the limited circumstances in which the courts are willing to make such a decision on Rule 403 grounds. In *Buchanan v. State*,<sup>62</sup> the defendant, charged with child molesting, objected to the introduction of photographs of semi-nude children and drawings of nude children seized from his home, claiming that the evidence violated both Rule 404(b) and Rule 403.<sup>63</sup> The government responded that the photographs and drawings were properly admitted under Rule 404(b) as evidence of the defendant's motive and plan.<sup>64</sup> The court of appeals disagreed, concluding that the evidence was relevant to neither motive nor plan.<sup>65</sup> Having reached that conclusion, it further opined that Rule 403 required exclusion of the evidence because "the sheer volume of the drawings and photographs" was "extremely prejudicial."<sup>66</sup> This decision reinforces the impression that the only circumstances in which the Indiana courts are willing to bar Rule 404(b) evidence under Rule 403 are those in which the evidence is not proper under Rule 404(b) to begin with.

## II. PROCEDURAL REQUIREMENTS OF RULE 404(b)

Rule 404(b) requires that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature or any such evidence it intends to introduce at trial."<sup>67</sup>

The absence of a firm deadline for the provision of notice under Rule 404(b) occasionally causes difficulties. In *Hatcher v. State*,<sup>68</sup> for example, the prosecution informed the defendant six days before his trial for murder that it intended to offer evidence concerning a protective order that the victim had previously obtained against him.<sup>69</sup> The defendant objected, claiming that six days advance notice was not "reasonable" within the meaning of Rule 404(b) and that the state had failed to demonstrate good cause for its untimely disclosure. The trial court rejected the defendant's contention, and the Indiana Supreme Court affirmed. The purpose of the notice requirement, the court asserted, "is to reduce surprise and to promote the early resolution of questions of

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the expert's testimony, it ultimately concluded that the use of the victim's skull did not constitute an abuse of discretion. *See id.*

62. 742 N.E.2d 1018 (Ind. Ct. App. 2001).

63. *Id.* at 1021.

64. *Id.* at 1022.

65. *Id.*

66. *Id.* at 1022-23.

67. IND. R. EVID. 404(b).

68. 735 N.E.2d 1155 (Ind. 2000).

69. *See id.* at 1158.

admissibility.”<sup>70</sup> Neither of these purposes was offended: the emergency protective order that the prosecution sought to introduce had been disclosed to the defendant during discovery, as had the identity of the Rule 404(b) witnesses that the prosecution intended to call. In addition, the trial court was able to resolve the dispute in a timely manner, without disrupting the trial.<sup>71</sup>

Although exclusion for lack of timely notice is relatively unusual, a decision from this past year demonstrated that such a decision has real teeth. In *Johnson v. State*,<sup>72</sup> the trial court found inadequate notice by the government identifying the names of potential Rule 404(b) witnesses but failing to state the general nature of their testimony.<sup>73</sup> The court therefore excluded the other-acts evidence. The prosecution then moved to dismiss the charges and, once that motion was granted, refiled the charges, adding a number of new counts relating to the previously-excluded witnesses.<sup>74</sup> On appeal, the Indiana Supreme Court found the tactic improper, noting: “If the State may circumvent an adverse evidentiary ruling by simply dismissing and refiled the original charge, and also ‘punish’ the defendant for a successful procedural challenge by piling on additional charges, defendants will as a practical matter be unable to avail themselves of legitimate procedural rights.”<sup>75</sup>

#### CONCLUSION

Rule 404(b) continues to prove among the most troublesome of the Indiana Rules of Evidence, and controversial decisions have been common in the years since the Rule was adopted.<sup>76</sup> This is perhaps not surprising, given the multiple factors at play in any application of Rule 404(b). Yet the decisions applying Rule 404(b) in the past year suggest that the application of the Rule has stabilized in some ways. There remain areas in the application of the Rule that could profit from further explication by the Indiana Supreme Court, particularly in the nature of the Rule 403 balancing that Rule 404(b) requires.<sup>77</sup> But as the courts become more familiar with the contours of the Rule, there is reason to hope that its application will continue to become more consistent.

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70. *Id.* (quoting *Abdul-Musawwir v. State*, 674 N.E.2d 972, 975 (Ind. Ct. App. 1996)).

71. *See id.* at 1158-59.

72. 740 N.E.2d 118 (Ind. 2001).

73. *See id.* at 119-20.

74. *See id.* at 120.

75. *Id.* at 121.

76. I have discussed Indiana decisions applying Rule 404(b) in my two previous surveys for the *Indiana Law Review*. *See* Jeffrey O. Cooper, *Recent Developments in Indiana Evidence Law*, 32 IND. L. REV. 811, 819-22 (1999); Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049, 1051-56 (1997).

77. *See supra* notes 51-66 and accompanying text.