

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Evelyn's Testimony:

"Other Acts" evidence is admissible per MRE 404(b)(1):

MRE 404(b)(1) 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, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The Michigan Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000):

MRE 404(b)(1) does not require exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b)(1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting the use of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b)(1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b)(1) lists some of the permissible uses. This list is not, however, exhaustive.

Evidentiary safeguards employed when admitting "Other Acts" evidence:

The state has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose in the non-exclusive list contained in MRE 404(b)(1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) even if it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant

solely to the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010) (emphasis in original).

For "other acts" evidence to be admissible, the state has the burden of establishing that the evidence: (1) is relevant under MRE 401 for a proper purpose (not propensity) see *Sabin*, 463 Mich at 55; *People v VanderVliet*, 444 Mich 52, 74, (1993); and *Crawford*, 458 Mich at 385 (1998)); (2) is relevant under MRE 402, as enforced through MRE 104(b) to an issue or fact of consequence at trial; and (3) the danger of unfair (undue) prejudice does not substantially outweigh the probative value of the evidence under MRE 403 in view of the availability of other means of proof and other facts. *Sabin*, 463 Mich at 55-56.

The state must establish the evidence is relevant under MRE 401 for a proper (i.e., non-propensity) purpose:

The state argues that the "other acts" evidence is admissible to show Carl's scheme, plan, or system in doing an act and, thereby, Carl's identity as the perpetrator. Since the grounds articulated by the prosecution establish a permissible purpose for admission, the state's initial burden is satisfied and the next inquiry is whether the evidence is relevant to the theories identified by the prosecution.

The state must establish that the evidence is admissible under MRE 402:

The fact that the prosecution has identified a permissible theory of admissibility does not automatically render the "other acts" evidence relevant in a particular case. *Sabin* at 60. The trial court must determine "whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence," *id.*, so as to make it admissible under MRE 402.

Under the facts presented here, an examinee could appropriately conclude that the prior acts evidence will be deemed relevant under a theory that Carl had devised a plan that he used previously to carry out separate but very similar crimes, wrongs, or acts. Such acts of similar misconduct have been held by the Michigan Supreme Court to be logically relevant and admissible if the charged and uncharged acts are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin* at 63. With respect to the two burglaries, the following facts support the prosecution's theory: (1) the victims were both

Carl's former fiancées after recent break-ups; (2) both burglaries were Monday break-ins while the victims were away; (3) the items stolen were the same - cash and the victims' engagement rings; and (4) the burglar left behind a fresh Gerber daisy - a gift Carl routinely gave to both victims.

Because the prosecutor's theory is to use Carl's plan to prove identity, the court must find that the circumstances in both instances bear "such unique, uncommon, and distinctive characteristics as to suggest the handiwork or signature of a single actor, the defendant." *People v Golochowicz*, 413 Mich 298, 319 (1982). Here, there are uncommon and unique characteristics - a special flower and the theft of a single special piece of jewelry" - so as to render the testimony admissible under MRE 402.

The state must establish that the evidence is not inadmissible under MRE 403:

Unfair prejudice is defined as the "danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398. The court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence in view of other means of proof and other facts. Here, while there are unique and compelling similarities, there is also a substantial potential for prejudice.

Carl was never charged with Evelyn's break-in nor is there evidence an official record was created. Thus, without Evelyn's testimony, the evidence against Carl is purely circumstantial evidence in Francine's theft: with nothing to connect Carl other than a special piece of jewelry he gave her and a special flower left behind. Indeed, the lack of proof of the act undermines or weakens its probative value. Moreover, the only individual who professes to know the alleged facts of the earlier crime - Evelyn - could be the culpable one in the Francine theft. The defense likely has the stronger argument under MRE 403 against admission of Evelyn's testimony. However, an examinee could also argue - and deserve credit for - reaching the opposite conclusion.

The Flower Vendor:

The vendor's testimony is admissible under MRE 406, as evidence of habit:

Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eye

witnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit[.]

Because Carl routinely purchased from the vendor a pink Gerber daisy every Monday for years, the vendor's testimony concerning Carl's habit, based on his personal knowledge of the habit, is admissible regardless of whether the vendor can testify as to the particular Monday in question. *Laszko v Cooper Laboratories Inc*, 114 Mich App 253, 256 (1982).