

# DIRECT AND CIRCUMSTANTIAL EVIDENCE

**Would it violate the rape shield statute for the defendant to cross-examine the victim on her acts of prostitution and for the defendant to testify he knew the rape “victim” was a prostitute and reasonably believed she consented to sexual relations?**

Tina C. went to the defendant’s residence . . . seeking employment as a day laborer. The defendant operated a roofing business and, approximately one and one-half to two years earlier, he had employed the victim as a day laborer for a period of one day when he first met her. Since that time, the victim had interacted socially with the defendant several times, including visiting his home. On at least one occasion, the victim had engaged in consensual sexual activity with the defendant. . . .

When the defendant expressed an interest in engaging in sexual activity with the victim, she indicated that she wanted to go home. . . . The defendant then [according to the victim] forced the victim to submit. . . . When the victim returned from the bathroom, the defendant gave her \$30, and she left the apartment. . . .

The victim then counted the money and suggested that she would return for the balance of the \$50 that she had requested. The defendant told the victim not to do so because his wife would be home. The victim stated, “I warned you”. . . . [T]he primary issue was whether the sexual intercourse was consensual. (*State v. De Jesus*, 856 A.2d 345 [Conn. 2004])

## CHAPTER OUTLINE

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## TEST YOUR KNOWLEDGE

1. Can you give examples of how circumstantial evidence may create an inference that a suspect possesses the capacity to commit the crime with which he or she is charged? In your answer, think about specialized skill, possession of the means to commit the crime, and physical and mental capacity.

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2. Do you know how circumstantial evidence may be used to demonstrate consciousness of guilt? Consider evidence of flight, concealing evidence, and offers to plead guilty. Explain how possession of stolen property and sudden wealth are circumstantial evidence of guilt.
3. Do you understand what types of character evidence about a defendant are admissible at trial and what types of character evidence are admissible by the prosecutor in rebuttal?
4. Can you explain what types of character evidence about victims may be offered by the defense and by the prosecution?
5. Do you know when “other acts” evidence is admissible?
6. Are you able to distinguish character evidence from evidence of habit?
7. Can you explain rape shield laws?

## ■ INTRODUCTION

In a criminal case, the prosecutor is required to prove the defendant’s guilt beyond a reasonable doubt. The defense attorney typically responds by attempting to create a reasonable doubt in the mind of the finder of fact, either the judge or the jury. This may be accomplished by presenting an alternative version of the facts presented by the prosecutor, calling the credibility of the prosecution witnesses into question, or offering affirmative defenses such as self-defense.

The prosecution and defense may rely on direct and circumstantial evidence or a combination of both types of evidence.

In Chapter Three, we distinguished between direct and circumstantial evidence. As you recall, *direct evidence* is based on personal knowledge or observation. The evidence is believed by the jury directly and conclusively establishes the fact or facts, and no inference is required. In contrast, *circumstantial evidence* indirectly establishes a fact. The trier of fact must use an inference or presumption to establish the fact “at issue.” A witness may directly view a killing (direct evidence) or testify that he or she viewed the defendant flee from the crime scene (circumstantial evidence).

Direct evidence always is relevant and admissible so long as it is material and competent and not privileged (e.g., a doctor-patient relationship). The judge exercises discretion in the admission of circumstantial evidence and determines whether the evidence is relevant and whether despite the relevance of the evidence the admission of the evidence will waste time, will create confusion, or is unduly prejudicial.

In the classic story used to distinguish direct evidence from circumstantial evidence, an eyewitness watches the defendant bite off the ear of the victim in a fight. This direct evidence contrasts with the testimony of a second witness who did not see the assailant bite off the victim’s ear but recounts watching the assailant spit out the victim’s bloody ear.

Keep in mind that circumstantial evidence may be used to establish criminal intent as well as a criminal act. In *People v. Conley*, a high school student at a party hit another student with a wine bottle, breaking the victim’s upper and lower jaws, nose, and cheek and permanently numbing his mouth. The attacker was convicted of committing an aggravated battery that “intentionally” or “knowingly” caused “great bodily harm or permanent disability or disfigurement.” An Illinois appellate court held that the “words, the weapon used, and the force of the blow . . . the use of the bottle, the absence of warning and the force of the blow are facts from which the jury could reasonably infer the intent to cause permanent disability.” In other words, the defendant’s actions revealed his intent (*People v. Conley*, 543 N.E.2d 138 [Ill. App. Ct. 1989]).

As noted, the general view is that direct and circumstantial evidence are of equal significance and that guilt or innocence may be determined based on either direct or circumstantial evidence or by a combination of both types of evidence. However, a number of states require judges in prosecutions based wholly on circumstantial evidence to provide the so-called Webster-type charge “that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.” The Webster charge was first given by Justice Lemuel Shaw in the famous 1850 Webster-Parkman murder case in Massachusetts.

## ■ JURY DECISION-MAKING

The judge has sole responsibility for matters of law, and the jury is the finder of fact; in a bench trial without a jury, however, the judge determines the law and the facts. The judge issues instructions to the jury stating the law to be applied in evaluating the facts.

The jury must sort through the evidence presented at trial and, where there is a conflict, decide which version to believe. This may involve an evaluation of the **credibility** (or believability) of witnesses offering different versions of events. Jurors are able to observe the **demeanor** of a witness. Demeanor includes body language and whether the witness acted in a cooperative or evasive fashion. Lawyers on cross-examination attempt to attack the credibility or believability of witnesses. **Impeachment** may involve cross-examination of a witness's inconsistent statements, motive to fabricate evidence, specific acts or reputation for untruthfulness, felony convictions, and criminal convictions for crimes of dishonesty or false statement.

Each juror in his or her own mind assigns **weight** or importance to various items of evidence. In a trial for financial fraud, the jurors may give little significance to the defendant's comment to a friend denying responsibility and give more weight to the defendant's unexplained destruction of documents. The jurors must decide what inference to draw from evidence. For example, they must determine whether the defendant's flight is an admission of guilt or a justifiable reaction based on the fear he or she would be unfairly implicated in the crime.

Juror deliberations may involve multiple ballots and intense disagreements. The judge may intervene to encourage the jurors to reach a verdict.

In the next sections of the chapter, we review several categories of circumstantial evidence.

## ■ CIRCUMSTANTIAL EVIDENCE OF ABILITY TO COMMIT THE CRIME

### *Specialized Skill*

Some crimes require skills and abilities that are not possessed by the average individual. The prosecutor may demonstrate the defendant has the type of aptitudes required to commit the crime. The defense may take the opposite approach and attempt to establish that the defendant lacks the skills required to commit the crime.

Examples of crimes requiring special knowledge include art forgery, cybercrime, accounting fraud, and terrorist offenses involving the construction of sophisticated explosives.

In *United States v. Barrett*, Arthur Barrett was convicted of the theft and sale of valuable postage stamps stolen from a museum. The court admitted evidence of Barrett's sophisticated knowledge of burglar alarms and ability to "bypass" the alarm system.

In affirming the district court's admission of this evidence, the First Circuit Court of Appeals stressed:

Barrett's expertise with alarms indicated that he had the skill to wire off the alarm system prior to the break-in and accordingly helped identify him as one of the guilty parties. . . . One of the stamp burglars had to have sufficient knowledge of the intricacies of burglar alarm systems to locate the alarm wires, which were mingled with other wires inside a telephone cable, and to loop them off. The ordinary person or even burglar would be unlikely to possess the skill to do this. Where the bypassing of the alarm was so distinctive a feature of the stamp burglary, evidence that Barrett had expertise with alarms, while not by itself conclusive of guilt, reinforced the evidence that linked him to the burglary, and thereby to the crimes charged. (*United States v. Barrett*, 539 F.2d 244 [1st Cir. 1976])

### *Means to Commit the Crime*

The defendant's possession of the equipment to commit a crime, which is not possessed by a large cross-section of the public, may be used as circumstantial evidence that the defendant committed a crime. Possession of scales, plastic Baggies, cell phones, beepers, a firearm, and a large amount of cash may be circumstantial evidence of involvement in narcotics trafficking. A stolen credit card may provide circumstantial evidence to prove the individual was responsible for the unauthorized charges on the card. Possession of a firearm found by ballistics evidence to have been involved in a crime also would constitute circumstantial evidence of the means to accomplish a crime. Burglar tools may constitute circumstantial evidence of involvement in a burglary.

In *People v. Hall*, the defendant, an escaped inmate, was identified by the victim of an armed robbery. Two days after the crime, the defendant was arrested in possession of a loaded handgun. The victim testified that during the robbery a pistol had been fired into the ground as a warning. The victim was not certain of the color or caliber of the gun; “[a]ll I knew was that it was a gun.” A Michigan Court of Appeals nonetheless held the firearm was circumstantial evidence of the defendant’s ability to carry out the crime.

[W]here weapons or tools were used to commit a crime, weapons or tools that might have been used to commit the crime found in the accused’s possession at the time of the arrest may be introduced without proof that they were the very weapons or tools in fact so used. (*People v. Hall*, 172 N.W.2d 473 [Mich. App. 1969])

On the other hand, the Oregon Supreme Court held the probative value of a 22-caliber revolver seized from a defendant’s home seventy-five miles from the crime scene, two months after the crime, was outweighed by the risk of prejudice to the defendant. There was no testimony that the gun was “similar to the gun that had been seen by the robbery victim. . . . There was nothing to tie this revolver to the crime alleged other than it was found in the home of the man charged with committing the crime” (*State v. Thompson*, 364 P.2d 783 [Ore. 1961]).

### Physical Capacity

A defendant’s physical capacity to commit a crime also may be relied on by the prosecution as circumstantial evidence of guilt. The defense may present evidence that a defendant lacked the strength to commit the crime with which he or she is charged, arguing, for example, that the defendant was impotent and could not have raped the victim.

An assailant’s physical strength has been relied on by the prosecution to demonstrate that the victim in a rape case reasonably feared a physical assault if she did not consent or that the victim’s will was overborne by the defendant. A New York Family Court decision noted a number of criminal decisions relying on the relative difference in strength between a male defendant and a female victim to demonstrate an absence of consent.

Forcible compulsion by physical force has also been found where the defendant, taking advantage of his superior physical size and strength, engages in a physical act directed against the victim . . . forcible compulsion was established by evidence that defendant, who was 35 years old and 6 feet, 2 inches tall, entered the victim’s bedroom while she was sleeping and tried to put his penis into her vagina, that she told him to stop and tried to move, but he covered her mouth and held her down; . . . forcible compulsion was established by evidence that defendant was approximately seven inches taller and 70 pounds heavier than the victim, and he stopped an elevator between floors, thereby trapping her inside the elevator. . . . forcible compulsion established where the medical evidence showed bruising of the victim’s genitalia and there was large disparity in size and age between the victim and defendant . . . evidence was sufficient to establish forcible compulsion where defendant overcame the victim’s physical resistance with his superior size and strength, by pinning her down and the medical examination showed deep vaginal abrasions; . . . evidence was sufficient to establish forcible compulsion where the victim was pulled into a bedroom by her brother-in-law who was older, bigger and stronger, and the victim’s injuries were severe and painful. (*Matter of Rosaly S. v. Ivelisse T.*, 910 N.Y.S.3d 408 [Fam. Ct., Kings County, 2010])

### Mental Capacity

A defendant may claim that he or she lacked the mental capacity to commit the crime because of legal insanity typically defined as a lack of capacity to appreciate the nature and quality of his or her act or a lack of appreciation of right and wrong as a result of mental disease or defect. Several states recognize the “diminished responsibility” defense in which a defendant establishes an incapacity to form the requisite guilt or innocence.

A jury cannot look into an individual’s brain to determine mental capacity. Mental incapacity is established by expert psychiatric testimony along with circumstantial evidence including a lack of remorse and a bizarre explanation for the criminal act such as the fact the victim was a witch or space alien (*Moler v. State*, 782 N.E.2d 454 [Ind. App. 2003]).

Involuntary intoxication as a result of drugs or alcohol is a complete defense where the defendant meets the state's legal test for insanity. Voluntary intoxication in most states is a defense that negates a finding of a specific intent to commit a crime.

In 2003, in *State v. Kruger*, Daniel Kruger attempted to strike an officer with a beer bottle and, during a struggle, "head butted" the officer. He was arrested and charged with third-degree assault and convicted of intentionally touching or striking an officer in a harmful or offensive manner with intent to inflict bodily harm. A Washington appellate court overturned Kruger's conviction on the grounds that the jury should have received an instruction that it may consider whether the defendant's intoxication prevented the defendant from forming the required intent. The court concluded that the record contains substantial circumstantial evidence of "Mr. Kruger's drinking and level of intoxication. And there is ample evidence of his level of intoxication on both his mind and body, e.g., his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray. He was entitled to the instruction" (*State v. Kruger*, 57 P.3d 147 [Wash.App. 2003]).

## ■ CIRCUMSTANTIAL EVIDENCE OF AN INFERENCE OF CONSCIOUSNESS OF GUILT AND OF GUILT

An individual's behavior following a crime may constitute circumstantial evidence of a consciousness of his or her guilt of a crime. This post-arrest behavior may include escape, flight to avoid trial, the concealment or destruction of evidence, and intimidation of witnesses.

An inference of guilt may not be drawn against individuals invoking their constitutional rights. *Miranda v. Arizona* established that under the Fifth Amendment right against self-incrimination individuals under arrest or whose freedom of movement is restricted in a significant fashion by the police have the right to silence and the right to an attorney and are to be informed that anything they say may be used against them (*Miranda v. Arizona*, 384 U.S. 436 [1966]). In *Doyle v. Ohio*, the U.S. Supreme Court held that a prosecutor may not cross-examine a defendant on the invocation of his or her involved Fifth Amendment right to silence during police interrogation (*Doyle v. Ohio*, 426 U.S. 610 [1976]).

### **Flight**

**Flight** to avoid arrest or prosecution, "jumping bail," and flight following a conviction to avoid a prison sentence all raise the inference the defendant is guilty and wants to avoid a criminal trial, appeal, or incarceration. An individual who is innocent presumably would want to be exonerated and to clear his or her name. A Kentucky court noted the "rule is based on the inference that the guilty run away but the innocent remain" (*Rodriguez v. Commonwealth*, 107 S.W.3d 215 [Ky. 2003]).

The jury is to decide in light of the other evidence the weight to be accorded to flight. The length of time between the crime and the flight and the circumstances of the flight clearly are important in evaluating the probative value of flight.

Judges on occasion have questioned the probative value of flight and whether the evidence is unduly prejudicial. Flight may be motivated by fear or panic, a belief the defendant will not obtain a fair trial, or an existing plan to move to another state.

In *Commonwealth v. Johnson*, Jamar Johnson was wanted for attempted murder. As he was approached by two officers, he fled and before stopping discarded a jar of marijuana. Johnson unsuccessfully claimed the evidence of flight should have been excluded because he was forced to incriminate himself by taking the stand to explain that he fled to avoid arrest for marijuana rather than because of a fear of apprehension for homicide (*Commonwealth v. Johnson*, 910 A.2d 60 [Pa. Super. 2006]).

Armed resistance to arrest and attempt to commit suicide are other acts admissible as evidence of consciousness of guilt.

### **Concealing Evidence**

The concealment or destruction of evidence is admissible to prove an individual's consciousness of guilt. This category includes a range of acts, including shredding of documents, disposing of evidence in the trash, erasing



files, modifying photographs, and falsifying documents. In *United States v. Hanson*, the Sixth Circuit Court of Appeals approved of the instructions issued by a trial court in Hanson's trial for conspiracy to distribute methamphetamines.

[Y]ou find that the defendant attempted to conceal evidence in connection with the crime charged in this case, you may consider such evidence in light of all the other evidence. You may consider whether this evidence shows a consciousness of guilt and determine the significance, if any, to be attached to such conduct. (*United States v. Hanson*, 2000 U.S.App.LEXIS 1351)

In *People v. Yeoman*, the California Supreme Court affirmed the trial court instructions that the defendant's wiping his fingerprints off the automobile that he allegedly used to commit a robbery-murder was admissible to establish consciousness of guilt (*People v. Yeoman*, 31 Cal. 4th 93 [Cal. 2003]).

### **Offers to Plead Guilty**

Offers to plead guilty or to plead nolo contendere and statements made during negotiations over a guilty plea or plea of nolo contendere are inadmissible. Admission of this evidence at trial would be highly prejudicial to a defendant and would discourage individuals from plea bargaining. Defendants who ultimately decided to go to trial would be reluctant to testify in their own defense if this evidence could be used to impeach their credibility if they testified in their own defense at trial. The prohibition on the introduction of offers to plead guilty includes situations in which a defendant pled guilty and later withdrew and proceeded to trial. Keep in mind that statements made during plea negotiations are admissible in situations in which the plea agreement between the defendant and the prosecutor stipulates that plea agreements and statements made during plea agreements are admissible if the defendant fails to meet agreed-upon conditions and the prosecutor proceeds to trial. This situation arises in cases in which the defendant pledged to provide information or to testify against other individuals or to work as an undercover informant (*United States v. Verrusio*, 803 F.2d 885 [7th Cir. 1985]).

### **Possession of Stolen Property**

The possession of stolen property in a prosecution for theft is circumstantial evidence that the defendant was responsible for the theft. An individual may be charged with receiving stolen property without being charged with theft where there is a relatively lengthy period of time between the theft and the possession of stolen goods.

The Indiana Supreme Court observed:

[P]ossession of recently stolen property may provide "an inference the possessor either was the thief or knew the property was stolen." . . . Indeed in *Barnes v. United States*, 412 U.S. 837 (1973) the United States Supreme Court noted that "[f]or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." (*Fortson v. State*, 919 N.E.2d 1136 [Ind. 2010])

### **Sudden Wealth**

Evidence of sudden unexplained wealth may be considered to be probative of criminal activity. The defendant may respond to this evidence by documenting the legitimate source of these funds.

Leandro Salas-Galaviz and two co-defendants were convicted in federal court of drug trafficking and money laundering and of conspiracy to carry out these crimes. The federal district court noted the defendants' sudden increase in wealth. Salas-Galaviz, for example, between 2005 and 2009 had a reported total income of \$30,000 and yet accumulated a bank account of over \$750,000. His wife, Mayra Lopez, reported an income of \$12,000 during this period and was inexplicably able to accumulate a bank account of over \$350,000. The defendant's import-export business in 2008 reported a loss of roughly \$48,000 and yet received wire transfers of over \$61,000. The couple between 2002 and 2008 went from a small rental apartment to a \$500,000 home, and their combined income during this period was \$50,000 (*United States v. Alaniz*, 2013 WL 389878 [5th Cir. 2013]).

## ■ CIRCUMSTANTIAL EVIDENCE THAT AN INDIVIDUAL IS THE VICTIM OF RAPE

The common law definition of rape requires proof of the carnal knowledge of a female without her consent. Injury and bruising of a victim provides circumstantial evidence of the use of physical force and the lack of consent. This definition continues to be followed by a number of states. In a Massachusetts case, the defendant's claim that his sexual interaction with the victim was consensual was challenged by the prosecutor who noted

[t]he treating physician described the bruising to the victim's knees as significant. The physician testified that there had been excessive force and trauma to the [vaginal] area based on his observation that there was a lot of swelling in her external vaginal area and her hymen had been torn and was still oozing. The doctor noted that in his experience it was fairly rare to see that much swelling and trauma. (*Commonwealth v. Lopez*, 745 N.E.2d 961 [Mass. Sup.Jud.Ct. 2001])

A prosecutor may rely on an expert witness to establish that the multiple injuries to a child resulted from physical assaults and are not the result of an accident (*Estelle v. McGuire*, 502 U.S. 62 [1991]).

Most courts accept that rape victims may introduce expert testimony on “**rape trauma syndrome**” to educate the jury of the post-traumatic behavior of the victims of sexual assault, some of which may appear inconsistent with victimization. A number of courts provide that the jury, based on this testimony and other evidence, can draw an inference that the defendant raped the victim.

The Indiana Supreme Court in *Simmons v. State* held “that the trial court's finding that the testimony of the experts was admissible [and] was not an abuse of discretion because they . . . merely [were] showing that her inability to recall certain events was consistent with the ‘clinically observed behavior pattern.’ Thus, it tended to show that the victim had suffered a rape and was not a direct opinion of an expert that the victim was telling the truth” (*Simmons v. State*, 504 N.E.2d 575 [Ind. 1987]). The defense attorney may call his or her own expert to counter expert evidence on rape trauma syndrome (*Henson v. State*, 546 N.E.3d 189 [Ind. 1989]). Other courts limit expert evidence on rape trauma syndrome to explaining to the jury why the calm demeanor following the crime or failure to immediately report the attack is characteristic of sexual victimization (*People v. Bledsoe*, 681 P.2d 291 [Cal. 1984]).

The so-called battered spouse and battered child syndromes are two additional psychological profiles that are admissible at trial to explain the behavior of the victims of alleged abuse. The “battered spouse syndrome” typically is relied on by women accused of killing their husbands. In some instances, the woman is considered the aggressor because her husband was sleeping and did not pose an imminent threat of death or of great bodily harm. The question arises why the female remained in the home throughout the abuse rather than retreating to safety. Expert testimony on the battered spouse syndrome educates the jury on the fear, helplessness, and lack of confidence suffered by a battered spouse and on her psychological inability to flee the home. The “battered child syndrome” applies the framework of the battered spouse syndrome to abused children to explain their assault or murder of their alleged abusers (*State v. Edwards*, 60 S.W.3d 602 [Mo.App. 2001]).

A last important syndrome is child sexual abuse accommodation syndrome (CSAAS), which is relied on in prosecutions for the sexual abuse of children. Experts may offer evidence on this syndrome to explain the conduct of the child that may appear to the jury as inconsistent with abuse and to bolster the child's credibility.

## ■ CHARACTER EVIDENCE

### **Character and Public Policy**

Character evidence is considered highly prejudicial, and as a result, the Federal Rules of Evidence limit the circumstances in which character evidence may be introduced at trial. The thinking is that character evidence diverts attention from the criminal charge, wastes time, and creates a risk of prejudice. The fear is the defendant or victim's “bad character” may lead the jury to return a verdict based on the accused's negative character trait rather than based on the evidence presented at trial (*Whitty v. State*, 159 N.W.3d 557 [Wis. 1967]). A jury in a criminal assault case, for example, may be influenced to convict a defendant who the prosecution demonstrates is a “bad person” who has failed to pay child support to his or her economically dependent former spouse.

The rules of evidence strike a compromise by permitting character evidence on a limited basis. This so-called *mercy rule* is based on recognition that the defendant is entitled to defend him- or herself at trial and in some instances may want to introduce character evidence. Character evidence is regulated by a series of complicated rules that the Supreme Court has called illogical and confusing (*Michelson v. United States*, 335 U.S. 469 [1948]).

Federal Rule 404(a)(2)(A) permits a defendant to introduce evidence of a “pertinent” character trait as evidence he or she acted consistent with the “pertinent trait” on a particular occasion. **Character** evidence includes evidence of a wide variety of human traits including trustworthiness, honesty, law-abidingness, nonviolence, and attention to detail. This often is referred to as *propensity evidence*. A *pertinent trait* is a trait relevant to the charge against the defendant. Honesty and trustworthiness, for example, are pertinent to a charge of fraud or embezzlement. On the other hand, character evidence that the defendant is a devoted and responsible parent is not pertinent to fraud or embezzlement. Character evidence is circumstantial evidence because it does not directly prove the defendant acted in accordance with his or her character. The jury instead must infer that the defendant did not commit the criminal offense with which he or she is charged because he or she acted in a fashion consistent with his or her character and as a result is not guilty of the criminal offense with which he or she is charged.

Federal Rule 405(a) and most states provide proof of character “may be made by testimony” as to *reputation in the community* at the time charges are filed against the defendant or by the witness’s *personal opinion*. Reputation is what other people believe about an individual’s character. Character typically is established through the testimony of character witnesses. A witness testifying as to a defendant’s reputation is reporting what he or she has heard from other people about the defendant’s reputation for a specific trait. The jury may infer that the actions of a defendant with a reputation for nonviolence were consistent with this trait and that he or she did not initiate a fight.

Federal Rule 405(a) also provides proof of character “may be made by testimony” by the personal opinion of a witness. A witness may not testify about specific acts of a defendant’s conduct. The thinking is that this evidence is time-consuming and may divert the jury’s attention from the facts of the case. The jury also may place too much weight on the defendant’s past conduct.

In *United States v. Staggs*, an FBI agent who arrested Lonnie Paul Staggs for desertion from the Marine Corps contended Staggs pointed a firearm at the agent. Staggs denied threatening the officer. The Seventh Circuit Court of Appeals held the trial court improperly had excluded the expert testimony of a therapist who would have testified Staggs was nonviolent and would rather “hurt himself than to think about directing his aggressions towards others.” The Seventh Circuit Court of Appeals held the therapist’s opinion testimony made it more likely than not the defendant was telling the truth when he denied pointing a firearm at the FBI agent (*United States v. Staggs*, 553 F.2d 1073 [7th Cir. 1977]).

The prosecution is barred from attacking the character of the accused unless the defendant “opens the door” by offering evidence of a “pertinent” character trait. Once the defendant introduces evidence of his or her character, the door is opened for the prosecutor to rebut this evidence with evidence of the same trait. The defendant’s presentation of honesty in a theft case may be rebutted by prosecution character witnesses offering reputation or opinion evidence of dishonesty or by opinion evidence the defendant lacks the character trait of honesty.

The prosecutor also may impeach a defendant’s character witness on cross-examination and inquire into the witness’s knowledge of specific, relevant instances of a defendant’s conduct. The cross-examination may focus on arrest, criminal acts, and other bad acts, including the act with which the defendant is charged. The thinking is a witness who does not know about a specific act either has exercised poor judgment in assessing the defendant’s character or has been poorly informed about the defendant’s reputation.

In *Michelson v. United States*, the defendant was charged with bribery of an Internal Revenue Service agent. The Supreme Court held the prosecution on cross-examination properly asked the defendant’s character witnesses about the defendant’s arrest for a property crime that occurred over twenty-seven years earlier. The Court reasoned that the prosecutor had a right to test the witnesses’ knowledge of the defendant on a crime related to a character for honesty and truthfulness and law-abidingness (*Michelson v. United States*, 335 U.S. 469 [1948]).

## Legal Equation

- Defense = Evidence of good character on pertinent trait at issue + reputation and opinion.
- Prosecution = Evidence of negative character on pertinent character trait + reputation and opinion.





## 4.1 YOU DECIDE

Randall Dahlin was charged with bank robbery. He testified he was babysitting his infant niece at the time of the robbery and was “deeply devoted to his niece and his family” and never would have left her alone. The prosecutor responded by asking the district

court judge to admit two types of evidence: (1) Dahlin did not get along with his family; (2) Dahlin took things that did not belong to him. Would you admit this evidence? See *United States v. Dahlin* (734 F.2d 393 [8th Cir. 1984]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.



## 4.2 YOU DECIDE

Boston police officer Richard Nazzaro was convicted of purchasing questions and answers to a civil service exam administered to officers applying for promotion. The trial court judge ruled that Nazzaro could not introduce evidence of the military and police

commendations he had received, including a medal for “special valor.” How would you rule? See *United States v. Nazzaro* (889 F.2d 1158 [1st Cir. 1989]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

### **Character as an Essential Element of a Crime**

Federal Rule 405(b) provides that in cases in which the character or character trait of a person is an essential element of a charge or defense, “proof may be made of specific instances of that person’s conduct” in addition to reputation and opinion evidence. This situation is presented infrequently. One instance is in entrapment cases in which a defendant may rely on specific instances of conduct to demonstrate he or she was not “predisposed” to commit a crime and the defendant’s criminal activity was a product of the creative activity of the government.

### **Victim’s Character in a Criminal Case**

The defense attorney under Federal Rule 404(a)(2)(B) may introduce character evidence about the alleged victim. The character of the victim of an assault may be at issue in a case in which the accused claims to have acted in self-defense. The victim’s violent character trait may support the reasonableness of the defendant’s belief that he or she confronted a threat of imminent and immediate harm and was justified in acting in self-defense. This evidence also is intended for the jury to draw the inference that the victim was the aggressor. The prosecution may rebut the defendant’s evidentiary claim that he or she acted in self-defense by offering evidence of the victim’s character for peacefulness. The prosecutor also may introduce evidence of the defendant’s violent character trait. Evidence of the victim’s character is limited to reputation or opinion evidence.

In *State v. Everett*, a North Carolina appellate court held the trial court was in error in preventing a wife who claimed she killed her husband in self-defense from introducing evidence of his violent character. On one occasion, he had been angry at a car dealer and broke windows of autos on the lot. The appellate court reasoned that the husband’s violent character was relevant to the reasonableness of the wife’s claim she was in reasonable fear of imminent harm and “it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than a peaceable man” (*State v. Everett*, 630 S.E.2d 703 [2006]).

## Victim's Character in a Homicide Case

There is a special rule of evidence in homicide cases that expands the ability of the prosecution to offer evidence of the victim's character. Federal Rule 404(a)(2)(C) provides that "in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut any evidence that the alleged victim was the first aggressor." The prosecutor does not have to wait for the defendant to place the character of the victim at issue. Returning to our bar brawl scenario, an eyewitness may testify the victim assaulted the defendant without provocation. The testimony *suggesting* that the alleged victim was the aggressor entitles the prosecutor to respond by introducing character evidence of the victim's peacefulness. Once again, the prosecutor does not have to wait for the defendant to introduce character evidence regarding the alleged victim.

### Legal Equation

Defense	=	Evidence of victim's bad character + evidence of reputation and/or opinion.
Prosecution	=	Evidence of victim's good character for same trait and/or defendant's bad character for same trait + evidence of reputation and/or opinion.
Defense	=	Evidence in homicide case victim was aggressor + evidence of reputation and/or opinion.
Prosecution	=	Evidence of victim's peaceful character + evidence of reputation and/or opinion.



## 4.3 YOU DECIDE

Ronald Keiser alleged he shot and paralyzed Victor Romero in self-defense. During a recess, Romero encountered Keiser's brother in the hallway outside the courtroom. Romero, in the presence of his family and court security, angrily shouted, "There he is, that's the f\_\_'s brother. And I want you to remember his face, remember

his face." The trial court refused to permit the defendant's lawyer to offer evidence of this confrontation to demonstrate Romero's violent nature and circumstantial evidence that Romero was the aggressor. As a judge, how would you rule? See *United States v. Keiser* (57 F.3d 847 [9th Cir. 1995]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

## CRIMINAL EVIDENCE IN THE NEWS

On November 23, 2012, Michael Dunn and his girlfriend Rhonda Rouer pulled into a service station. Rouer exited the car to buy chips and wine while Dunn waited in the automobile. Rouer later would testify Dunn, a 47-year-old computer programmer, remarked he "hated" the "thug music" loudly playing in an adjacent SUV. Dunn claimed he "calmly and politely" requested the teens to lower the volume of the music. He reportedly quickly became embroiled in a "war of words" with the four teens in the SUV after they turned down and then resumed the volume of what he testified was their "rap-crap" music. He testified that he feared for his life when he saw through the rearview mirror Jordan Davis display what he believed was the barrel of a 12-gauge or 20-gauge shotgun or a pipe, believed the teens were staring at him with "menacing expressions," heard one of the teens utter a profanity-laced threat to kill him, and saw Davis begin to exit the SUV. Dunn, who possessed a concealed carry weapons permit, removed his semiautomatic pistol from the glove compartment, inserted a clip, and fired three shots, which penetrated the SUV and killed 17-year-old Davis. He fired another seven shots as the car sped from the parking lot. Dunn testified he believed this was "life or death," my "death was imminent," and I was "fighting for [my] life. . . . He's showing me a gun and he's threatening me."

Dunn quickly drove off as Rouer entered the car and Dunn explained to Rouer that he acted in self-defense because the teens were "advancing" and he feared for his life. She would testify at trial that he only referred to having seen a firearm on one occasion during the remainder of the evening. They hurried back to their bed-and-breakfast, walked their dog Charlie, drank rum and coke, and ordered a pizza. Both Dunn and Rouer testified they did not know anyone in the car was hurt until they turned on the television news and learned 17-year-old Davis was dead. The next day, they drove two and a half hours back home without calling the police. An eyewitness recorded Dunn's license number, and Dunn was contacted by the police.

Rouer testified that Dunn was an “easygoing guy” and she had never “seen him lose his cool” although he was passionate in conversations about politics and gun control.

The police failed to uncover a weapon in the SUV although Dunn’s attorney later pointed out Dunn had the right to exercise self-defense even if the teens did not possess a weapon if he reasonably believed he was confronted with an imminent and immediate threat of physical bodily harm. Dunn had no duty to retreat under Florida’s so-called stand-your-ground law.

The forensic evidence indicated Davis had been shot while lying in the backseat of the SUV, and there was no evidence at any point that he had exited the car. Witnesses testified Dunn had shouted at Davis, “You can’t talk to me that way!” and that he had opened his door to get a better shooting angle.

Dunn was convicted of attempted second-degree murder, which requires a substantial step toward the taking of the life of another person. The jury included four white women, two African American women, one Asian woman, a Hispanic man, and four white men. Ten of the twelve jurors found sufficient evidence to convict on a first-degree murder charge although two jurors argued Dunn acted in self-defense in killing Davis. The jurors after thirty minutes told the judge they were unable to return a verdict on the charge that Dunn deliberately and intentionally and with premeditation killed Davis, and a mistrial was declared on the first count in the indictment. Dunn was sentenced to sixty years and likely will spend the rest of his natural life in prison. Prosecutor Angela Corey, who had handled the Trayvon Martin case, pledged to prosecute Dunn a second time for first-degree murder.

Corey was criticized for bringing a first-degree rather than second-degree charge for the killing of Jordan Davis although certainly there was enough evidence to support a finding that Dunn reflected and planned to kill Davis.

The prosecution also was criticized for failing to educate the jury about the character of Davis who, in the words of his father, “was a good kid” who along with the other good kids “should have a voice” in the courtroom.

The prosecution avoided interjecting race into the trial and did not ask Dunn about the letters he had written from prison blaming the teenagers for having brought this onto themselves by “embracing the gang culture.” He wrote his experience in prison had made him “more prejudiced” and if more people “would arm themselves and kill those . . . idiots when they’re threatening you, eventually they may take the hint and change their behavior.” In October 2014, Dunn was convicted of first-degree murder by a Florida jury and sentenced to life in prison without parole, and his sentence for attempted murder was increased.

## Character and Habit

**Habit** evidence is admissible to demonstrate that the defendant acted in accordance with his or her habit on a particular occasion. Federal Rule 406 provides that “[e]vidence of a person’s habit or an organizational routine practice” may be admitted to establish that on a “particular occasion the person or organization acted in accordance with the habit or routine practice.” In other words, a habit is a specific behavior that is repeated over and over again when confronted with a specific situation. The Federal Rules of Evidence give the example of an auto mechanic who follows the same steps in changing the oil in an automobile.

What is the difference between character evidence, which is subject to restrictions on admissibility, and habit evidence, which always is admissible? Character is general, and habit is specific. You may have the reputation of being a safe and careful driver and possess the habit of fastening your seat belt.

Character evidence refers to an individual’s general tendencies such as honesty, violence, trustworthiness, and peacefulness. Habit evidence refers to a regular response to a repeated specific situation, such as eating the same food for lunch at the same time each and every day, or parking in the same parking space. Habit is required to be specific, routine, and continuous. Most commentators refer to habit as an act that is virtually automatic. Habit is admissible because it is limited to specific behavior and is considered to possess greater probative value than character and has less capacity to create prejudice against a defendant.

Rule 406 does not define habit. In *United States v. Angwin*, the Ninth Circuit Court of Appeals identified the central characteristics of habit as a specific behavior repeated for a lengthy period of time and carried out in a “semi-automatic” fashion (*United States v. Angwin*, 271 F.3d 786 [9th Cir. 2001]).

Courts have adopted a broad notion of what constitutes habit. In *State v. Allen*, the defendant in a murder prosecution claimed the victim was alive when he left her house. His fingerprints were found on a drinking glass. The court admitted evidence that the victim was an obsessive housekeeper as circumstantial evidence that she likely would have wiped the defendant’s fingerprints off the glass had she been alive (*State v. Allen*, 653 N.E.2d 674 [Ohio, 1995]).

The federal rules leave it to the trial court judge to determine the type of evidence that is admissible to prove habit. Most courts hold that habit may be established through opinion testimony and through specific instances of

conduct and may be established through the defendant or through witnesses familiar with the defendant's habit. A defendant or the individuals who eat lunch with the defendant each and every day may testify that the defendant had the habit of drinking two beers.

## Legal Equation

Habit = Admissible to prove individual acted on a particular occasion in accordance with specific behavior.



## 4.4 YOU DECIDE

The defendant was convicted in 1977 of various offenses including contributing to the delinquency of a minor. The minor female testified the defendant regularly would beat her and that she wrote worthless checks because she was afraid of additional beatings. The defendant denied beating her. The prosecution responded by calling his former wife who claimed he had beaten her three or four times during the one month they lived together in 1975. His former girlfriend testified he

had beaten her on a "number of times" between 1974 and 1976. The trial court admitted this testimony as "evidence of the habit of a person . . . relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." The defendant claimed the beating of the minor occurred under different circumstances from the beatings alleged by the prosecution "habit-witnesses." What is your view? See *State v. Gardner* (573 P.2d 236 [N.M. Ct. App. 1977]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

### Rule 404(a). Character Evidence; Crimes or Other Acts

#### (a) Character Evidence.

- (1) **Prohibited Uses.** 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.
- (2) **Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
  - (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
  - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may
    - (i) offer evidence to rebut it; and
    - (ii) offer evidence of the defendant's same trait; and
  - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

### Rule 405. Methods of Proving Character

- (a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
- (b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

## ■ OTHER ACTS EVIDENCE

Admission of evidence of prior criminal acts generally is not admissible because it is prejudicial. There is a risk the defendant will be convicted because of his or her past acts rather than based on the crime with which he or she is charged, which violates the defendant's right to be tried solely for the offense for which he or she is standing trial. **Other acts evidence** because of its prejudicial character is not admissible to prove the defendant is the type of person with a bad character or criminal predisposition who more than likely committed the crime with which he or she is charged.

There is an exception to the prohibition on other acts evidence. Federal Rule 404(b) provides that the "other crimes, wrongs, or acts" of a defendant are admissible by the prosecution to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Other acts evidence, however, "is not admissible to prove the character of a person in order to show action in conformity therewith." An act under the "other acts" exception may occur prior to or following the commission of the crime with which the defendant is charged.

Rule 404(b) allows admission of evidence of "a crime, wrong, or other act." In other words, the prosecutor may introduce evidence of a crime for which the defendant was not arrested or convicted. The standard for admissibility is flexible, it is sufficient the act is relevant to an "issue in dispute," and the prosecutor submits enough evidence in the view of the judge for a reasonable juror to conclude it occurred (*Huddleston v. United States*, 485 U.S. 681 [1988]).

Keep in mind other acts evidence always may be excluded under Rule 403 because the probative value of the evidence is outweighed by the risk of prejudice. Another important point is that "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" may be established by all types of circumstantial evidence and proof is not limited to other acts evidence. For example, the inference that an individual was responsible for a murder may be established by the defendant's conviction of similar crimes as well as by items belonging to the defendant left at the crime scene.

Some of these exceptions are discussed in the next section of the text. Keep in mind that the judge in admitting other acts evidence will weigh the probative value of this type of evidence against its prejudicial effect on the jury.

### Legal Equation

Crimes, wrongs, or other acts	=	(may be used for) Motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
Crimes, wrongs, or other acts	≠	(may not be used for) Action in conformity with prior act.

## ■ OTHER ACTS EVIDENCE AND CIRCUMSTANTIAL EVIDENCE OF IDENTITY

### *Modus Operandi*

The so-called *signature modus operandi* rule is an exception to the rule that prior crimes generally are excluded from evidence. *Modus operandi* evidence is admissible to prove the defendant's identity as the perpetrator of a crime or may be used to rebut a defendant's denial that he or she committed the crime with which he or she is charged. The crimes must be "so nearly identical" to "earmark them as the handiwork of the accused. . . . [M]uch more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature" (*State v. Sladek*, 835 S.W.2d 308 [Mo. Ct. App. 1999]).

In *Jones v. State*, the defendant was charged with leading his victim into an empty barn where the victim was robbed by a confederate who used a "long-barreled pistol" and wore a Halloween mask and a black wig. The court heard testimony from a criminal investigator who recounted that two weeks following the robbery he went with another investigator to the farm and posed as a cattle buyer. The defendant took him to a barn where the investigator



was robbed at gunpoint by a man holding a long-barreled pistol and wearing a Halloween mask and a black wig. The second offense was admitted to identify the defendant as the perpetrator of the robbery with which he was charged (*Jones v. State*, 460 So.2d 1384 [Ala. Cr. App. 1984]).

In *State v. Vorhees*, Shane A. Vorhees was charged and convicted of the sodomy of his 13-year-old stepdaughter. S. W. testified that beginning when she was 13 years of age Vorhees, her stepfather, repeatedly assaulted her sexually during a two-year period. S. W. testified that during the assaults Vorhees would use his saliva as a lubricant by spitting on his hand, rubbing his penis, and then placing his penis in S. W.'s anus or vagina. On one occasion, Vorhees placed his penis in S. W.'s mouth and urinated, and on other occasions, he ejaculated in her mouth. Vorhees appealed the trial court judge's admission of evidence from another young woman who testified a number of years ago when she was 6 years old that Vorhees had engaged in precisely the same behavior in molesting her. The Missouri Supreme Court held the testimony was admissible to identify Vorhees as the perpetrator of the molestation of his stepdaughter (*State v. Vorhees*, 248 S.W.3d 585 [Mo. 2008]).

## ■ OTHER ACTS EVIDENCE AND CIRCUMSTANTIAL EVIDENCE OF INTENT

### **Intent**

Other acts evidence is relevant to prove intent and also is relevant in those instances in which the defendant denies his or her criminal intent. In *State v. Brewster*, the defendant was convicted of harassment based on his threatening to kill a child support enforcement officer of the New Hampshire Division of Child Support Services. Brewster claimed the trial court improperly admitted evidence of an incident following a child support hearing two years prior to the threatening statement in which Brewster angrily pointed his finger at the officer and proclaimed "this is why people like you get shot."

The New Hampshire Supreme Court held that Brewster's statement was relevant to establish the defendant's intent to "intimidate" and "annoy or alarm" the officer. Although the incidents were two years apart, both events were logically connected because they were provoked by Brewster's resentment over being required to pay child support (*State v. Brewster*, 147 A.2d 158 [N.H. 2002]).

We will find sufficient support for a reliable inference of intent only if the defendant's intent in committing other bad acts and the defendant's intent in the charged offenses is closely connected by logically significant factors. . . . In both instances, the defendant's threatening behavior was directed toward the same person. Both of the defendant's statements were similar, involving [the officer] being shot. Also, the defendant made the statements in circumstances where he was having problems with his child support payments. Therefore, although the prior act occurred two years earlier, these factors provide a sufficient logical connection to the charged act.

### **Knowledge**

Prior criminal convictions are admissible to establish the intent of knowledge. Donovan New drove at a speed of eighty-five miles per hour, lost control of the car, and crashed, killing his father and cousin. A blood alcohol test indicated New's alcohol content was measured at .320. He was charged with involuntary manslaughter, which requires that New was aware or reasonably should have been aware that his conduct posed a threat to others. His two prior convictions for drunk driving were admitted to establish New's knowledge that driving under the influence of alcohol both was illegal and posed a substantial risk of harm to him and to other individuals (*United States v. New*, 491 F.3d 375 [8th Cir. 2007]).

### **Motive**

Conviction of a crime requires the prosecution to establish the required criminal intent beyond a reasonable doubt.

Motive, although not an element of a crime, may be important in proving the intent of an individual to batter or to kill and may be used to rebut the defendant's claim that an injury or death resulted from an accident. Motive also may constitute circumstantial evidence of the defendant's identity as the perpetrator of a crime.

The defendant's hatred of another individual may constitute circumstantial evidence of an intent to kill. Individuals motivated to kill by financial considerations include the beneficiary of a life insurance policy, an individual who stands to inherit a large sum of money, and an individual who owes a large gambling debt. The owner of a failing restaurant may be viewed as having a motive to hire an arsonist to burn down the restaurant or the restaurant of a competitor.

Jealousy of another individual also may provide a motivation to kill. A disappointed lover, a former spouse, or an individual who wants to eliminate a romantic rival all may be viewed as possessing a motive to kill or to injure or maim.

An individual's expression of racial or religious hatred or anger toward women or same-sex couples may provide circumstantial evidence that an individual criminal attack constituted a hate crime.

One individual's motive to kill another may be used to counter a defendant's claim of self-defense or murder in the heat of passion. This would demonstrate an individual intended to kill rather than responded to provocation from the deceased.

In *State v. Kim*, the defendant's significant gambling debt and financial distress were evidence of his motive to rob and to kill the two victims from whom he had unsuccessfully sought a loan.

There is a sufficient logical connection between [the defendant's] declining financial situation and his motive to rob and kill the victims. Evidence of the defendant's debt and financial difficulties establish a motive for [the defendant] to not only rob the Joseph brothers but also to kill them in order to eliminate any potential witnesses. The defendant's dire financial position has further relevance in assessing the motive to kill witnesses to the robbery when viewed in light of his failed attempt to obtain a [twenty thousand dollar] loan from Theodore Joseph immediately prior to the homicides. (*State v. Kim*, 847 A.2d 968 [N.H. 2006])

## Threats

The threat to commit a crime is admissible as circumstantial evidence the defendant committed the crime. The weight to be accorded to the threat depends on the nature and context of the threat, the length of time between the threat and the criminal act, and whether witnesses can testify to the threat (*State v. Dukette*, 761 A.2d 442 [N.H. 2000]).

In *State v. Sawtell*, the defendant shot and killed his girlfriend because of his unhappiness over her having given birth to a child two months earlier. The defendant's threats with a firearm directed against the victim five and ten months prior to the murder were held to be admissible to establish intent to kill (*State v. Sawtell*, 872 A.2d 1013 [2005]).

A defendant's threats against prosecutors, co-defendants, and witnesses generally are considered probative of consciousness of guilt. The reasoning is that these threats are an effort to affect the outcome of the case and are probative of the defendant's awareness that the government likely will obtain a conviction. The jury determined the weight to be accorded to this evidence because threats against prosecutors and other criminal justice personnel may reflect frustration or anger at the government. In *United States v. Copeland*, the Sixth Circuit Court of Appeals determined that the probative value of evidence of threats against the prosecutor was outweighed by the risk that the jury would make the impermissible inference that the defendant possessed a violent nature. The trial court reasoned that the fact the defendant made threats against the prosecutor had little relevance to the charge of conspiracy to distribute a controlled substance. Do you agree with the trial court judge's holding? (*United States v. Copeland*, 321 F.3d 582 [6th Cir. 2003]).

## Opportunity

In *Huang v. McEwen*, the defendant discovered two men entering his house, accused them of attempting to steal his marijuana, and was charged and convicted of holding them captive overnight and killing them and disposing of their bodies in the desert. A number of individuals testified to witnessing the defendant's confinement of the individuals. The federal district court stressed there was circumstantial evidence that the defendant murdered the two hostages and took them captive at knifepoint, killed them, and disposed of their bodies in the desert. The circumstantial evidence supporting the defendant's guilt included the opportunity presented by the defendant's detention of the individuals at his house following their apprehension (*Huang v. McEwen*, 2012 U.S. Dist. LEXIS 86965).

## **Act Not Performed Inadvertently, Accidentally, Involuntarily, or Without Guilty Knowledge**

It has been noted that the death of one spouse in the bath might be accidental; three drownings, however, are not so easily explained (Broun 2000).

The classic example is the Australian case *Makin v. Attorney General of New South Wales*. The bodies of thirteen infants were discovered in the home and former home of John and Sarah Makin. They were charged and convicted of the murder of two of the children and claimed the court had improperly permitted the introduction of the evidence of the eleven other infants. The English Privy Council, with jurisdiction over appeals from British possessions, held that the “recurrence of the unusual phenomenon of bodies of babies having been buried in an unexplained manner in a similar part of the premises, previously occupied” implied that the deaths were “willful and not accidental” (*Makin v. Attorney General of New South Wales*, [1894] App. C. 57 [P.C. 1893]).

## **Prior False Claims**

The filing of a false complaint raises the inference that a present complaint also is false. This type of circumstantial evidence is particularly persuasive in those instances in which an individual is being prosecuted for filing a fraudulent insurance claim.

In *United States v. Jackson*, the defendant received nine checks for educational benefits from the Veterans Administration (VA). The VA later found the defendant had dropped out of college during the 1979–1980 academic year and never should have received the checks. In 1982, Jackson claimed he had never received the checks and filed a claim for the checks. The VA produced evidence that the checks had been cashed. The defendant responded the next year by filing another claim for the checks (*United States v. Jackson*, 845 F.2d 880 [9th Cir. 1988]).

Jackson was convicted of making false claims against the United States for the proceeds of government checks and claimed the court improperly admitted evidence of his first, false claim for the checks. The trial court, however, held that “the fact that Jackson submitted prior false claims involving the same nine VA checks is probative on issues of intent, knowledge, good faith and absence of mistake in his later dealings with the Treasury Department.”

A complaining witness may be discredited by evidence he or she has made a false complaint for the same crime in the past. The inference is that the present complaint also is false. This “false complaint” evidence typically is brought out on cross-examination of the complainant by the defense attorney. In *State v. Stevenson*, the defendant appealed his rape convictions based on the court’s refusal to allow him to cross-examine the victim on her prior claims against him for sexual assault. A Connecticut appeals court held

Courts have recognized that prior false claims of sexual assault may be relevant to a complainant’s credibility. These claims must, however, be proven false. “Without evidence of the falsity of the prior accusation . . . the defendant cannot show the relevance of the proposed cross-examination.” In this case, the defense attorney had no information that J’s [the victim’s] prior sexual assault claims were false. . . . The questioning proposed by the defendant is improper in the absence of proof of any false accusations made by the victim. (*State v. Stevenson*, 686 A.2d 500 [Conn. App. 1996])

Evidence of false claims of victims may have the greatest probative value when involving the same type of offense for which the defendant is being prosecuted and when the same victim is involved and these false complaints have been filed on a number of occasions.

## **Plan**

Gary DeCicco was charged with setting his commercial warehouse on fire in July 1995 and fraudulently collecting insurance proceeds on the building. The prosecutor alleged DeCicco planned to use the money to pay off more than \$1 million in back taxes. The trial court judge excluded government evidence that a 1992 warehouse fire was set in the same manner as one of the 1995 fires. The fire department was able to extinguish the fire. The government argued the 1992 fire demonstrated an ongoing plan to burn the warehouse and to collect insurance proceeds.

The First Circuit Court of Appeals held the trial court was in error in excluding the evidence of the fire set in 1992, reasoning that the jury could infer a plan from three suspicious fires in the same building. DeCicco’s insurance

had been canceled, and the 1995 fires occurred two months after his insurance resumed (*United States v. DeCicco*, 370 F.3d 206 [1st Cir. 2004]). The First Circuit Court of Appeals reasoned that

[t]he degree of resemblance of the crimes . . . favors inclusion of the evidence. Both the 1992 fire and the final fire were set in the same manner: an accelerant was poured on the base of the support pillars on the first floor of the Heard Street warehouse. They are the same type of crime, and, more importantly, the object of all fires was the same property. These factors tend to show that the previous offense leads in progression to the two charged fires, or, put more simply, that DeCicco had one common scheme to burn the Heard Street warehouse, which had previously proven financially unsuccessful. . . . Therefore, the district court erred in not considering whether the 1992 fire was relevant to a common scheme or plan to burn the Heard Street warehouse for the insurance proceeds. The evidence is probative of a common scheme or plan and should be introduced to that effect.

### Preparation

In *State v. Ayer*, the New Hampshire Supreme Court held a number of firearms seized from the defendant's automobile immediately following the killing were admissible at trial. The weapons, though not used in the killing, were admissible as the defendant's truck was "probative of his intent, plan or preparation to commit a violent act." In other words, the weapons provided circumstantial evidence of the defendant's preparation and planning and an intent to murder the victim (*State v. Ayer*, 917 A.2d 219 [N.H. 2006]).



## 4.5 YOU DECIDE

Two Caucasian Air Force police officers were robbed walking back to Fort Dix, New Jersey. They were robbed, and one was sexually assaulted by an African American male wearing a wool cap and a tan nylon jogging suit and brandishing a small, silver handgun. Both men identified Richard Stevens in a lineup as the assailant. Stevens, in his defense, unsuccessfully attempted to introduce "reverse" Rule 404(b) evidence. An African American member of the Air Force, three days after the two Air Force officers were attacked, suffered a similar assault. Tyrone Mitchell, however, stated that Stevens was not his assailant.

A court of appeals noted that similarities between them are significant. Both crimes: (1) took place within a few hundred yards of one another; (2) were armed robberies; (3) involved a handgun; (4) occurred between 9:30 p.m. and 10:30 p.m.; (5) were perpetrated on military personnel; and (6) involved a black assailant who was described similarly by his victims. Indeed, based on these similarities, the United States Army Criminal Investigation Division came to believe, initially, that the same person had committed both crimes. As a judge, would you admit the "reverse" Rule 404(b) evidence? See *United States v. Stevens* (935 F.2d 1380 [3rd Cir. 1991]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

## CRIMINAL EVIDENCE AND PUBLIC POLICY

The common law defined rape as the forcible carnal knowledge of a woman against her will. Carnal knowledge for purposes of rape is defined as vaginal intercourse by a man with a woman who is not his wife. The vaginal intercourse is required to be carried out by force or threat of severe bodily harm without the victim's consent.

(Continued)

(Continued)

The common law of rape reflects a distrust of women, and various requirements were imposed to ensure that the prosecutrix (victim) was not engaged in blackmail or in an attempt to conceal a consensual affair or was not suffering from a psychological illness. There was a fear that a judge and jury would be emotionally carried away by the seriousness of the charge and convict a defendant based on false testimony. The prosecution was required to overcome a number of hurdles under the common law in order to convict the defendant:

*Immediate Complaint.* The absence of a prompt complaint by the victim to authorities was evidence that the complaint was not genuine.

*Corroboration Rule.* The victim's allegation of rape required corroboration, evidence such as physical injury or witnesses.

*Sexual Activity.* The victim's past sexual conduct or reputation for chastity was admissible as evidence of consent or on cross-examination to attack her credibility.

*Judicial Instruction.* The judge was required to issue a cautionary instruction to the jury that the victim's testimony should be subject to strict scrutiny because rape is a crime easily charged and difficult to prove.

*Consent.* The victim's lack of consent was demonstrated through outward resistance. The victim was required to "resist to the utmost."

During the 1970s and 1980s, a number of states abolished the special procedures surrounding the common law of rape. A number of states adopted new sexual assault statutes that fundamentally changed the law of rape. These statutes treated rape as an assault against the person rather than as an offense against sexual morality. These statutes refer to "criminal sexual conduct" or "sexual assault" rather than rape. The modified statutes widely differ from one another although they typically incorporate one or more of the following provisions:

*Gender Neutral.* A male or female may be the perpetrator or victim of rape.

*Degree of Rape.* Several degrees of rape are defined that are distinguished from one another based on factors such as the degree of force and use of a weapon.

*Sexual Intercourse.* Sexual intercourse is expanded to include forced sexual activity or forced intrusion into a person's body, including oral and anal intercourse, and the insertion of an object into the genital or anal opening of another.

*Consent.* State statutes provide that consent requires free, affirmative, and voluntary cooperation or that resistance may be established by either words or actions.

*Coercion.* There is recognition that coercion may be achieved through fraud or psychological pressure as well as through physical force.

As part of rape reform in the 1970s, the states and federal government adopted so-called **rape shield laws**, which restricted the cross-examination of alleged victims and the admissibility of their reputation for sexual "virtuosity." The thinking was that this evidence was irrelevant to the adjudication of the alleged rape at issue in the trial, diverted the attention of jurors and the court to irrelevant events, and discouraged women from coming forward with complaints of rape. The basic framework of rape shield statutes is set forth in Federal Rule of Evidence 412.

The rape shield protections at times may conflict with the defendant's constitutional right to confront his or her accusers. Federal Rule 412 accordingly recognizes certain limited exceptions to the rape shield law. Evidence of past sexual activity with the defendant is admissible as evidence of consent. Courts interpret sexual behavior to include all varieties of intimate contact between the complainant and the accused.

Sexual activity with individuals other than the defendant is admissible to prove that "a person other than the accused was the source of semen, injury or other physical evidence." A final provision provides the judge discretion to admit evidence to protect the right of a defendant to confront his or her accusers. This so-called catchall provision was unsuccessfully relied on in arguing that the defendant reasonably, though mistakenly, believed the victim consented because she was a prostitute (*United States v. Saunders*, 943 F.2d 388 [4th Cir. 1991]).

Prior to the admission of evidence under Rule 412, the judge is required to hold an in-camera (closed to the public) hearing to afford all the parties to the case the opportunity to be heard.

Greg Matoesian (2001) finds that the rape shield statute has provided limited protection to women because of the skill of talented lawyers in getting around the limitations of rape shield laws. Matoesian demonstrates how a talented defense lawyer like Roy Black is able to indirectly infer the female victim consented to the alleged rape. Black represented William Kennedy Smith, a doctor and member of the highly respected and revered Kennedy family, who was charged with the 1991 rape of a young woman in Florida. Black persuaded the judge to exclude the testimony of three rape employs because the allegations were too dissimilar to constitute *modus operandi*.



Matoesian documents how Black's questioning suggests the victim's inability to recall when she removed her pantyhose after leaving the bar with William Kennedy Smith calls her character into question. The victim alleged she drove Smith home, took a tour of the historic Kennedy compound, and took a walk on the beach with Smith, and that he later raped her on the front lawn. Black asked whether the victim was wearing her pantyhose in the car when she drove Smith home. He then asked whether she had them on when she went into the house, walked through the kitchen, walked through the house, walked across the lawn, and walked on the beach. The victim in each instance responded that "I'm not sure." Matoesian notes that the victim's removal of her pantyhose is a normal act before walking on the beach and irrelevant to whether she consented to the sexual interaction with the defendant. Black, however, based his cross-examination on the premise that jurors believed that decent women do not lose track of their underwear when they are with a man. Smith was acquitted by a jury within five minutes of their consideration of the case.

There are two other federal rules addressing sexual offenses. Federal Rule 413 provides that in a criminal case in which a defendant is accused of sexual assault, the court may admit evidence "that the defendant committed any other sexual assault." This evidence may be introduced to support an inference that the defendant's commission of a sexual assault in the past increases the probability he or she committed the offense with which he or she is charged. The prosecutor must disclose to the defendant beforehand his or her intent to introduce this evidence at trial along with the testimony in support of the prior sexual assault. Federal Rule 414 provides in a prosecution of an individual for molestation of a child under 14 that the court may admit evidence the defendant "committed any other child molestation."

#### Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) **Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) evidence offered to prove that a victim engaged in other sexual behavior, or
- (2) evidence offered to prove a victim's sexual predisposition.

(b) **Exceptions.**

(1) **Criminal Cases.** The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights.



## 4.6 YOU DECIDE

The defendant Corey Fells contended that the trial court erred in refusing to allow him to present evidence that the rape victim, S. H., was HIV-positive. Fells argued that this evidence demonstrated that S. H. had a motive to lie about being raped because it is a crime for a person to knowingly expose another to HIV, and S. H. "knew that if she did not say she

was raped, it would be consensual sex and she'd be charged with a crime." Fells argued that the evidence of the victim's HIV status was not subject to the rape shield law because it did not address any prior sexual activity, merely that S. H. was HIV-positive. How would you rule? See *Fells v. State* (207 S.W.2d 498 [Ark. 2005]).

You can learn what the court decided by referring to the study site, <http://study.sagepub.com/lippmance>.

## CASE ANALYSIS

In *State v. Kirsch*, the New Hampshire Supreme Court addressed whether in a prosecution for sexual assault the testimony of three other young women who testified to similar activity was properly admitted under Rule 404(b).

### ***Was the prosecution's other acts evidence of molestation admissible under Rule 404(b)?***

#### ***State v. Kirsch, 662 A.2d 937 (N.H. 1995)***

The defendant was tried on thirteen indictments charging sexual assaults . . . between 1984 and 1987. In addition to the three victims named in the indictments, three other young women testified, pursuant to Rule 404(b), about sexual abuse committed against them by the defendant from the late 1970s to the mid-1980s. With minor variations, each young woman testified to similar activity and association with the defendant. During that time period, the defendant led pre-teen church groups at the Granite State Baptist Church in Salem, occasionally driving the church bus that transported the children from their homes to the church. In addition to leading a group called Alpha-Teens that provided recreational activities, the defendant was one of several church staff members who monitored sleep-overs at the church. He also hosted church sleep-overs at his home in Salem and, later, at his home in Plaistow. Each of the victim/witnesses testified to having been approximately seven to ten years old when she met the defendant through her association with the church and to having become close to him through the church groups she attended. Each rode on the bus or in his van with the defendant and spent the night at the church or at his home. Some remembered sitting in the defendant's lap, and all remembered the defendant's inappropriate touching, from fondling of the breasts and vaginal area to digital penetration, fellatio, cunnilingus, and sexual intercourse. . . .

Prior to trial the State moved to introduce evidence of other uncharged sexual assaults as evidence of the defendant's motive, intent, and common plan or scheme. According to the State's proffer to the trial court, the evidence would show that the defendant "selected and seduced each victim by always choosing as his victims young girls, who lived well below the poverty line, in dysfunctional households, without any real father figure." It would further show, according to the State, that the defendant "positioned himself," through his role in the church, as a trusted father figure who occasionally fed and clothed them and "then seduced each of the little girls in the same manner." After a hearing, the trial court ruled that the evidence was relevant to prove motive, intent, and common plan or scheme, that there was clear proof the defendant committed the acts, and that the probative value of the evidence was not substantially outweighed by prejudice to the defendant.

In ruling that the probative value of the evidence was not substantially outweighed by the prejudice, the court found that the victims all met the defendant through the church, that most of them had no father, came from broken homes, were poor, and that the defendant "offered emotional support to the victims and became a father figure to them," taking them out to eat and to amusement parks. "In this manner," the court explained in its order, "the State seeks to prove that the defendant gained the trust and confidence of the victims to lure them into his home and into his life."

Motive is generally understood to refer to the "reason that nudges the will and prods the mind to indulge the criminal intent" . . . The crux of the State's argument appears to be that the other incidents show the defendant's desire for sexual activity with a certain type of victim. This, however, "is proof of propensity, not motive."

The second reason advanced by the State for admitting the other acts was that they were probative of the defendant's intent. To argue that evidence of the defendant's other similar assaults tends to prove his guilt of the charged offenses is to seek to show "propensity, pure and simple; calling it relevant to prove 'state of mind' does not make it so."

With respect to the State's common plan or scheme rationale for relevance, the State argued to the trial court that the defendant's "routine used in assaulting any one of the victims is similar, if not identical, to the manner in which he assaulted other victims." The common plan exception to the Rule 404(b) prohibition requires more. . . . Showing that the defendant had a pre-existing "plan" to gain the trust of young girls from deprived homes in order to seduce and sexually assault them does not demonstrate a common plan or scheme. . . .

Whether . . . labeled motive, intent or common plan, the ostensible purpose for which the prosecution sought to admit evidence of a multitude of other uncharged sexual assaults was to show the defendant's predilection for molesting young females over whom he was able to gain control through engendering trust. At most, this is evidence of the defendant's disposition to commit the offenses with which he was charged, impermissible under Rule 404(b). Because it was not relevant for a permissible purpose, the evidence should have been excluded, and its introduction was an abuse of discretion.

**Thayer, J., concurring in part and dissenting in part:**

In this case, the prior bad acts alleged by the State and recounted by the majority were offered to show the defendant's plan, and they do so. The majority's narrow reading of the common plan exception essentially requires the State to show the defendant's

state of mind before he started on his spree of criminal conduct, limiting the exception to a mutually dependent series of events. . . . [T]he State can show, by circumstantial evidence, that the defendant's plan was to obtain a position of authority. . . . [H]ere there was evidence of the defendant's common scheme to use his position to sexually assault young girls. In my view, the evidence was clearly relevant for that purpose.

## CHAPTER SUMMARY

Direct and circumstantial evidence are of equal significance, and guilt or innocence may be determined based on either direct or circumstantial evidence or by a combination of both types of evidence. However, a number of states require judges in prosecutions based wholly on circumstantial evidence to provide the so-called Webster-type charge.

Circumstantial evidence commonly is used to establish a defendant's consciousness of guilt and to establish that an individual is the victim of the crime with which the defendant is charged.

Character evidence is considered prejudicial and prohibited from being introduced at trial. Federal Rule 404(b) creates an exception and permits a defendant to introduce evidence of a "pertinent" character trait as evidence he or she acted consistent with the "pertinent trait" on a particular occasion. Character evidence includes evidence of a wide variety of human traits including trustworthiness, honesty, law-abidingness, violence, and attention to detail. A pertinent trait is a trait relevant to the charge against the defendant. Honesty and trustworthiness, for example, are pertinent to a charge of fraud or embezzlement. A pertinent character trait may be established by either reputation or opinion evidence.

The prosecution is barred from attacking the character of the accused unless the defendant "opens the door" by offering evidence of a "pertinent" character trait. Once the defendant introduces evidence of his or her character, the door is opened for the prosecutor to rebut this evidence with evidence of the same trait. The prosecutor also may impeach a defendant's character witness on cross-examination and inquire into the witness's knowledge of specific, relevant instances of a defendant's conduct. The cross-examination may focus on arrest, criminal acts, and other bad acts, including the act with which the defendant is charged.

Federal Rules of Evidence 405(b) provides that in cases in which the character or trait of character of a person is an essential element of a charge or defense, "proof may be made of specific instances of that person's conduct" in addition to reputation and opinion evidence. This evidence must be based on reputation or on opinion.

There is a special rule of evidence in homicide cases that expands the ability of the prosecution to offer evidence of the victim's character. Federal Rule 404(a)(2) provides that in a homicide case the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut "evidence" that the alleged victim was the first aggressor. The prosecutor does not have to wait for the defendant to place the character of the victim at issue.

Habit evidence is admissible to demonstrate that the defendant acted in accordance with his or her habit on a particular occasion. Federal Rule 406 provides that "[e]vidence of a person's habit or an organizational routine practice" may be admitted to establish that on a "particular occasion the person or organization acted in accordance with the habit or routine practice." Admission of evidence of prior criminal acts generally is not admissible because it violates the defendant's right to be tried for the offense for which he or she is standing trial. This evidence may not be admitted to prove a defendant's character or predisposition. In other words, it may not be admitted to prove the defendant is the type of person who commits criminal acts.

Federal Rule of Evidence 404(b) provides that the prior acts of a defendant may be admissible by the prosecution to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Other acts evidence, however, "is not admissible to prove the character of a person in order to show action in conformity therewith." An act under the "other acts" exception may occur prior to or following the commission of the crime with which the defendant is charged.

As part of rape reform in the 1970s, the states and federal government adopted so-called rape shield laws, which restricted the cross-examination of alleged victims and the admissibility of their reputation for sexual “virtuosity.” The thinking was that this evidence was irrelevant to the adjudication of the alleged rape at issue in the trial, diverted the attention of jurors and the court to irrelevant events, and discouraged women from coming forward with complaints of rape.

## CHAPTER REVIEW QUESTIONS

1. Are circumstantial and direct evidence of equal value? Can an individual be convicted solely on the basis of circumstantial evidence?
2. What are some examples of how circumstantial evidence may create an inference of a defendant’s ability to commit a crime?
3. Give examples of how circumstantial evidence may be offered to create an inference of a defendant’s consciousness of guilt or an inference of a suspect’s guilt.
4. How is circumstantial evidence used to create an inference that an individual was the victim of a crime?
5. Why is character evidence prohibited from being introduced at a criminal trial? Discuss the exception for a defendant’s character evidence and the prosecution’s rebuttal under Federal Rule 404(b) and Federal Rule 405.
6. May a defendant introduce character evidence regarding a victim?
7. What is the rule regarding the ability of the prosecutor to introduce character evidence about the defendant in a homicide case?
8. Distinguish between character and habit evidence. When is habit evidence admissible?
9. Outline the requirements of rape shield statutes.

## LEGAL TERMINOLOGY

character  
credibility  
demeanor  
flight

habit  
impeachment  
other acts evidence  
rape shield laws

rape trauma syndrome  
weight

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