

[CAPTION]

DEFENDANT'S MOTION IN LIMINE CONCERNING OTHER MISCONDUCT EVIDENCE

The Defendant, by counsel, respectfully moves the Court as follows:

1. Counsel for the Defendant has reason to believe that the State of Indiana may seek to admit at the trial of this cause, evidence of certain alleged other misconduct by the Defendant.

Specifically, [insert general nature of anticipated misconduct evidence].

2. Ind.R.Evid. 404(b) provides in relevant part that: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

3. Although the rule does provide for admissibility of such evidence for certain other purposes, Defendant is aware of no legitimate purpose for admission of such evidence in this cause and would submit to the Court that no such purpose exists. If the State has a legitimate purpose for admission, the State should be required to notify the defendant of the purpose for which the evidence is offered. Courtroom Handbook on Indiana Evidence, Robert Miller, Jr., p. 62 (2000 Ed.).

4. The probative value of any such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Ind.R.Evid. 403.

5. Moreover, the State cannot prove, by a preponderance of the evidence that the Defendant engaged in the prior misconduct. Ind.R.Evid. 104 (b); Camm v. State, 908 N.E.2d 215 (Ind. 2009); Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011); Collins v. State, 966 N.E.2d 96 (Ind.Ct.App. 2012); Courtroom Handbook on Indiana Evidence, Robert Miller, Jr., p. 63-64 (2000 Ed.) "[T]he Government may [not] parade past the jury a litany of potentially prejudicial [prior bad acts] that have been established or connected to the defendant only by unsubstantiated innuendo." Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997) (quoting Huddleston v. U.S., 485 U.S. 681, 689 (1988)); Shane v. State, 716 N.E.2d 391, 397-98 (Ind. 1999).

WHEREFORE, the Defendant, by counsel, requests that this Motion in Limine be granted; and the Court to order the State of Indiana, through its prosecutors and its witnesses, not to mention, refer to,

interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly any evidence without the permission of this Court, outside the presence and hearing of the jury; further instruct the State of Indiana and its witnesses not to make any reference to the fact that this Motion has been filed and granted, and to warn and caution each and every one of their witnesses to strictly follow these same instructions; and to grant all other relief just and proper in the premises.

(Signature)

CASE LAW

CASEBANK O.4.d

GENERAL

Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (when inquiring into relevance of the extrinsic evidence to the asserted 404(b) exception, the trial court may consider any factor it would ordinarily consider under Rule; these may include similarity and proximity in time of prior bad act to charged conduct, and will typically include tying act to the Defendant).

Garland v. State, 788 N.E.2d 425 (Ind. 2003) (admissibility of evidence about prior bad acts by persons other than the Defendant is subject to the requirements of Indiana Evidence Rule 404(b)).

Maslin v. State, 718 N.E.2d 1230 (Ind.Ct.App. 1999) (overruled on other grounds by Ludy v. State, 784 N.E.2d 459 (Ind. 2003)) (if accused in a criminal case offers evidence of a pertinent trait of his own character pursuant to Ind.Evidence Rule 404(a)(1), the State may offer evidence in rebuttal; rebuttal evidence is limited to that which tends to explain, contradict or disprove evidence offered by an adverse party). See also Pavey v. State, 764 N.E.2d 692 (Ind.Ct.App. 2002).

Thompson v. State, 690 N.E.2d 224, 236 (Ind. 1997) (in its effort to prove guilt, the State may not ‘flood the courtroom’ with unnecessary and prejudicial details of prior criminal conduct merely because some of that evidence is relevant and admissible; unnecessary and inflammatory details of admissible prior bad acts required reversal). See also Barker v. State, 695 N.E.2d 925 (Ind. 1998).

Wertz v. State, 771 N.E.2d 677, 683 (Ind.Ct.App. 2002) (even where questions involve proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident instead of character, there is certainly a point where repetitive nature of such questions stops proving one of listed exceptions under 404(b) and begins to prove the Defendant’s character).

Rhodes v. State, 771 N.E.2d 1246 (Ind.Ct.App. 2002) (fundamental error where the prosecutor flooded the courtroom with irrelevant and prejudicial evidence concerning the defendant and defense witness’ character). See also Meadows v. State, 785 N.E.2d 1112 (Ind.Ct.App. 2003).

Jones v. State, 708 N.E.2d 37 (Ind.Ct.App. 1999) (improper admission of laundry list of prior convictions in driving while HTV case) See also Dumes v. State, 718 N.E.2d 1171 (Ind.Ct.App. 1999).

Swanson v. State, 666 N.E.2d 397 (Ind. 1996) (res gestae exception to uncharged misconduct evidence has not survived adoption of Indiana Rules of Evidence).

Oldham v. State, 779 N.E.2d 1162 (Ind.Ct.App. 2002) (the State’s pursuit of painting a bad and dangerous character of the Defendant constituted fundamental error; further, evidence of weapons possessed by the Defendant but not used in crime for which the Defendant is charged should generally not be introduced because evidence is irrelevant and highly prejudicial).

Johnson v. State, 655 N.E.2d 502 (Ind. 1995) (prior violent uncharged misconduct was erroneously entered into evidence for the sole purpose of proving the forbidden inference, action in conformity therewith).

Wells v. State, 441 N.E.2d 458 (Ind. 1982) (where there was no evidence linking the Defendant to a prior shooting, the prior shooting was inadmissible).

Lannan v. State, 600 N.E.2d 1334 (Ind. 1992) (evidence of prior sexual misconduct is no longer

admissible in certain sex crime prosecutions to show conformity with character trait of "depraved sexual instinct").

Crafton v. State, 821 N.E.2d 907 (Ind.Ct.App. 2005) (Defendant "opened the door" to other bad act evidence after not objecting to a juror's question and then proceeding to answer it).

Harris v. State, 878 N.E.2d 534 (Ind.Ct.App. 2007) (in prosecution for operating while driver's license suspended for life, admission of Defendant's prior convictions for driving while suspended and driving while intoxicated was reversible error).

McIntire v. State, 717 N.E.2d 114 (Ind. 1999) (Rule 404(b) protections cannot be waived by volunteering prior bad acts before trial).

Payne v. State, 854 N.E.2d 7 (Ind.Ct.App. 2006) (in triple murder prosecution, trial court erred in admitting a letter from Defendant into evidence under 404(b) exception; judgment reversed).

Mote v. State, 775 N.E.2d 687 (Ind.Ct.App. 2002) (videotaped interview with police officer was improperly admitted where videotape contained multiple references to Defendant's prior criminal history in violation of IRE 404(b); by allowing references to Defendant's past arrests and convictions without admonishment, jury's determination of innocence or guilt was prejudiced to point of placing Defendant in position of grave peril to which he should not have been subjected).

MOTIVE

Bassett v. State, 795 N.E.2d 1050 (Ind. 2003) (if the State's claim of relevance to motive is too strained and remote to be reasonable, extrinsic act evidence is inadmissible).

Camm v. State, 812 N.E.2d 1127 (Ind.Ct.App. 2004) (in order for Defendant's marital infidelity to be admissible as proof of motive in a trial for murder or attempted murder of the Defendant's spouse, the affairs should be accompanied by evidence that such activities had precipitated violence or threats between the Defendant and the victim in the past or the Defendant and involved in an extramarital relationship at the time of the completed or contemplated homicide).

Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (some, but not all, evidence of the Defendant's violent relationship with victim was relevant under Ind. Evid. Rule 404(b) to show the Defendant's motive and hostility between parties).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (a bad relationship between the Defendant and another person does not bear on the Defendant's motive to harm the victim and will rarely be either relevant or admissible to show motive for the charged conduct).

Weaver v. State, 583 N.E.2d 136 (Ind. 1991) (where the State's theory of motive is based on speculation, prior bad acts supporting the theory are inadmissible).

Bacher v. State, 686 N.E.2d 791 (Ind. 1997) (over protectiveness and jealousy can show motive of crime).

Buchanan v. State, 767 N.E.2d 967 (Ind. 2002) (in child molest prosecution, drawings and photographs depicting naked and semi-clothed little girls found in the Defendant's room were improperly used to prove the Defendant's character).

Kimble v. State, 659 N.E.2d 182 (Ind.Ct.App. 1995) (membership in racially biased group admissible under IRE 404(b) to show Defendant's motive for committing the offense).

SIGNATURE/ IDENTITY

Hardin v. State, 611 N.E.2d 123 (Ind. 1993) (superseded by statute, on other grounds, as stated in Swanson v. State, 666 N.E.2d 397 (Ind. 1996) (evidence that one month after charged drug dealing, the Defendant was attempted middleman in another transaction, and that another person had bought cocaine from the Defendant a number of times prior to charged offense date, was inadmissible uncharged misconduct evidence; mere repetition of similar crimes does not warrant admission; acts or methods employed must be so strikingly similar as to be "signature" of accused).

Berry v. State, 715 N.E.2d 864 (Ind. 1999) (in murder and robbery prosecution, where the Defendant was charged with shooting of acquaintance, the trial court erred in admitting evidence of robbery and shooting of stranger that occurred after charged offenses; two incidents in question were not so unique as to qualify under identity or modus operandi exception of Indiana Evidence Rule 404(b)).

PLAN

Goodner v. State, 685 N.E.2d 1058 (Ind. 1997) (motive or plan do not have to be placed into issue by defendant in order for the State to introduce evidence of acts that are part of "plan" for charged offense within meaning of plan exception under Rule 404(b).

Greenboam v. State, 766 N.E.2d 1247 (Ind.Ct.App. 2002) (evidence of the Defendant's prior molestations of complaining witness was not admissible to establish a "plan" under Ind. Evidence Rule 404(b) where only similarly between prior act and charged act was that they both allegedly occurred in the family home).

INTENT

Roche v. State, 699 N.E.2d 752 (Ind.Ct.App. 1998) (in attempted murder prosecution, evidence of the Defendant's prior acts contained in prison conduct summary card and testimony concerning prison guard's prior altercation with the Defendant was not genuinely relevant to prove Defendant's specific intent to kill at time of offense).

Wickizer v. State, 626 N.E.2d 795 (Ind. 1993) (allegations of prior misconduct are not admissible under Ind. Evidence Rule 404(b) to prove intent unless there has been an affirmative presentation of contrary intent by the Defendant). See also Craun v. State, 762 N.E.2d 230 (Ind.Ct.App. 2002); Werne v. State, 750 N.E.2d 420 (Ind.Ct.App. 2001).

Udarbe v. State, 749 N.E.2d 562 (Ind.Ct.App. 2001) (where the Defendant denied charged acts and did not present claim of particular contrary intent, his intent was not at issue so as to justify admission of prior uncharged acts under intent exception to Ind.R.Evid. 404(b)).

Lafayette v. State, 917 N.E.2d 660 (Ind. 2009) (in a rape case, Defendant did present a claim of particular contrary intent by claiming intercourse was consensual and by challenging the complaining witness's credibility on the issue of consent via cross-examination; further, Defendant's claim of consent does not present a claim of particular contrary intent because such a claim actually puts the alleged victim's intent in issue).

MISTAKE

McCloud v. State, 697 N.E.2d 96 (Ind.Ct.App. 1998) (in order for evidence to be admissible under the mistake exception to 404(b), the Defendant must have placed the defense of mistake in issue).

Ceaser v. State, 964 N.E.2d 911 (Ind.Ct.App 2012) (in Class D felony battery prosecution, Defendant's prior conviction for battering the same child in a manner similar to underlying incident was admissible under the intent and lack of accident or mistake exceptions to Indiana Evidence Rule 404(b) because Defendant raised the parental authority defense).

ADMONISHMENT

Wilhelmus v. State, 824 N.E.2d 405 (Ind.Ct.App. 2005) (trial court should immediately admonish the jury as well as give a final instruction limiting the jury's consideration of extrinsic evidence to the 404(b) exception for which the evidence was admitted).

BIAS

Embry v. State, 923 N.E.2d 1 (Ind.Ct.App. 2010) (where the defense impeaches a State's witness by exposing her bias against the Defendant, the State may not offer evidence of prior misconduct committed by the Defendant against the witness solely to explain the witness's disposition; offering a defendant's prior bad acts to explain a witness's animosity only reinforces--rather than disproves--the witness's disposition).

RULE OF EVIDENCE 403

Jackson v. State, 712 N.E.2d 986 (Ind. 1999) (evidence that witness took marijuana into jail to give to the Defendant was inadmissible under Ind.R.Evid. 403 in a murder trial).

Daniels v. State, 683 N.E.2d 557 (Ind. 1997) (admission and use of calendar confiscated from the Defendant's home had clear prejudicial effect under Indiana Evidence Rule 403 because of its gang-related statements and drawings of guns).

Williams v. State, 677 N.E.2d 1077 (Ind.Ct.App. 1997) (admission of charging information and petition to revoke the Defendant's probation, which contained references to previous convictions, required reversal because the probative value of these documents was substantially outweighed by their unfair prejudice).

Brown v. State, 747 N.E.2d 66 (Ind.Ct.App. 2001) (evidence and testimony relating to shotgun, ski masks, and duct tape found in vehicle at the time of arrest was irrelevant to charge of possession of unlicensed handgun and created an unfair prejudice).