CHARACTER EVIDENCE IN OKLAHOMA

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Introduction

The provisions in the Oklahoma Evidence Code that govern the use of character evidence in the Oklahoma state courts are found at Okla. Stat. tit. 12, §§ 2404, 2405, 2412, 2413, and 2414 (2011). These are based on Rules 404, 405, 412, 413, and 414 of the Federal Rules of Evidence. Character evidence involves attributes such as honesty or dishonesty, violence or nonviolence, chastity or promiscuity, or mental competence or incompetence.

Character in Issue

There are generally two circumstances when character evidence may be admissible. The first is when a person’s character is in issue and is therefore directly relevant. The circumstances when a person’s character is in issue are limited. Examples include cases involving child custody, mental competence, negligent entrustment actions, defamation actions, criminal actions where entrapment is asserted as an affirmative defense, capital murder prosecutions to establish the aggravating circumstance that the defendant is a continuing threat to society, or to show damages in wrongful death or defamation actions. See, e.g., *Hooks v. State*, 2005 OK CR 23, ¶ 17, 126 P.3d 636, 644 (evidence that the defendant had employed several women as prostitutes was relevant to the issue of whether he was mentally retarded); *Johnson v. State*, 1982 OK CR 37, ¶ 29, 665 P.2d 815, 823 (“We find that evidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct is relevant to the determination of whether the defendant is likely to commit future acts of violence that would constitute a continuing threat to society.”). In addition, the defendant in a homicide case may offer evidence of the victim’s character to establish self-defense by proof that the defendant had reasonable fear of the victim.
See Davis v. State, 2011 OK CR 29, ¶ 157, 268 P.3d 86, 125 (“In a homicide case where the defense is that of self-defense, acts of violence by the victim antecedent to the homicide may be introduced where the defendant was aware of the specific prior acts of violence and that awareness or knowledge helped form the basis for his purported fear of the victim resulting in the alleged act of self-defense against the victim, and tending to establish the victim as the aggressor.’

In the limited circumstances, when a person’s character is in issue, evidence of relevant specific instances of the person’s conduct may be used to prove the person’s character. Okla. Stat. tit. 12, § 2405(B) (2011). The person’s character also may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. Okla. Stat. tit. 12, § 2405(A) (2011).

Character as Circumstantial Evidence

In the vast majority of cases, a person’s character is not in issue. A person’s character may influence a person’s conduct, however, and therefore, a person’s character may be circumstantial evidence of conduct. For example, a dishonest person is more likely to lie or steal than an honest person. Nevertheless, Okla. Stat. tit. 12, § 2404 (A) (2011) expressly provides that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”, with some limited exceptions. The rationale for not allowing character evidence to be used in most circumstances as circumstantial evidence of a person’s conduct “despite its admitted probative value,” is “to prevent confusion of issues, unfair surprise and undue prejudice.” Michelson v. United States, 335 U.S. 469, 476 (1948). Thus, other evidence besides character evidence is generally required to prove a person’s conduct on a specific occasion.
Defendant’s Mercy Rule and Character of Victim

There are three exceptions to the rule against using character evidence as circumstantial to prove conduct: 1) the defendant’s mercy rule, 2) proof of character of the victim of the crime, and 3) character of a witness for truthfulness.  Okla. Stat. tit. 12, § 2404 (A) (2011). The defendant’s mercy rule allows the defendant in a criminal case to call character witnesses to testify to the defendant’s good character in order to prove innocence of the crime. If the defendant calls a character witness, the prosecution may subsequently call opposing character witnesses to rebut the testimony of the defendant’s character witness. Similarly, the defendant may call character witnesses to testify to the character of the victim, and the prosecution may subsequently call opposing witnesses to rebut the testimony of the character witnesses called by the defendant to testify to the victim’s character. The defendant’s ability to call character witnesses is limited by the rape shield provision in Okla. Stat. tit. 12, § 2412 (2011), however. In addition, if the defendant in a homicide case offers evidence that the victim was first aggressor to establish self-defense, the prosecution is allowed to offer evidence of the victim’s character for peacefulness. Lastly, evidence of the character for truthfulness of a witness may be offered as authorized by Okla. Stat. tit. 12, §§ 2607, 2608 and 2609 (2011).

The form of character evidence is governed by Okla. Stat. tit. 12, § 2405 (2011). The defendant is limited to offering reputation or opinion testimony to show the defendant’s character or the victim’s character under Okla. Stat. tit. 12, § 2404(A)(1) or (A) (2011). However, the prosecution is allowed to cross-examine the defendant’s character witnesses by asking about relevant specific instances of conduct. Okla. Stat. tit. 12, § 2405(A) (2011).

Rape Shield and Sex Offenses

These rules for character evidence have been modified by the adoption of the rape shield statute, Okla. Stat. tit. 12, § 2412 (2011), and the provisions for the defendant’s propensity

The rape shield statute, Okla. Stat. tit. 12, § 2412 (2011), provides that in the prosecution of a sexual offense, reputation or opinion testimony concerning the victim’s character is not admissible, and evidence of specific instances of the victim’s sexual behavior with persons other than the accused is not admissible to prove that the victim consented to the sexual offense, with three narrow exceptions. Okla. Stat. tit. 12, § 2412(A) (2011). The first exception allows evidence of specific instances of the victim’s sexual behavior to be admitted for other purposes besides the issue of consent, such as proof of the source of semen, pregnancy, disease, or injury. Id. § 2412(B)(1). The second exception allows proof of false allegations of sexual offenses by the victim. Id. § 2412(B)(2). The third exception allows proof of the victim’s similar sexual acts in the presence of the accused with persons other than the accused. Id. § 2412(B)(3). The rape shield statute also requires an accused who intends to offer evidence allowed by the exceptions provided in § 2412(B) to file a written motion and offer of proof at least 15 days before trial so that the court may rule on its admissibility. Id. § 2412(C).

The provisions for the defendant’s propensity evidence in sexual assault and child molestation cases, Okla. Stat. tit. 12, §§ 2413 and 2414 (2011), authorize the admission of evidence of the defendant’s commission of other crimes of sexual assaults and child molestation in prosecutions for sexual assault and child molestation, respectively. The prosecution is
required to disclose the evidence of the defendant’s commission of other crimes of sexual
assaults and child molestation to the defendant at least 15 days the trial.

The effect of these statutes is illustrated by James v. State, 2007 OK CR 1, 152 P.3d 255,
and James v. State, 2009 OK CR 8, 204 P.3d 793. The defendant was charged with rape by
instrumentation and lewd molestation of the four year old daughter of a family friend. In
addition to presenting evidence of the rape of the four year old at the trial, the prosecution also
presented evidence of the defendant’s sexual abuse of the defendant’s three year old former step-
daughter that occurred over a decade before the rape of the four year girl. The Oklahoma Court
of Criminal Appeals reversed the conviction on the ground that the evidence of the earlier sexual
abuse should not have been admitted under Okla. Stat. tit. 12, §§ 2404 and 2405 (2011), because
the defendant’s character was not in issue. Several months after the first decision in James v.
State, the Oklahoma Legislature adopted Okla. Stat. tit. 12, §§ 2413 and 2414 (2011), and the
defendant was tried a second time and again convicted after the same evidence was admitted at
the second trial under § 2414. The Oklahoma Court of Criminal Appeals affirmed the second
conviction on account of the newly added provision.

Prior Bad Acts

Another type of evidence that may be offered, which resembles character evidence, is
evidence of other crimes, wrongs, or acts. Although it has some similarity to character evidence,
this type of evidence is fundamentally different. Okla. Stat. tit. 12, § 2404(B) (2011) expressly
provides 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.” The statute then goes on to state,
though, that this type of evidence may be admissible for other purposes, and then provides a list
of examples of these other purposes. These other purposes include “proof of motive,
opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”
The Oklahoma Court of Criminal Appeals explained the principles governing the use of evidence of prior bad acts in *Williams v. State*, 2008 OK CR 19, 188 P.3d 208, as follows:

The general rule is that, when an accused is placed on trial, he is to be convicted by evidence that shows him guilty of the offense charged and not of other offenses not connected with the charged offenses. Evidence that a defendant committed other crimes, however, is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Id.* at ¶ 36, 188 P.3d at 218.

An example of the use of other crimes evidence to establish motive is found in *Dodd v. State*, 2004 OK CR 31, 100 P.3d 1017, a prosecution for first-degree murder. The trial court permitted the prosecution to offer evidence that the defendant had been obtaining methamphetamine from one of the murder victims in the months preceding the murder. This evidence was admissible to show the defendant’s motive for the murder, which was that the defendant feared that the murder victim would reveal the defendant’s drug use to the defendant’s wife, because the victim believed that the defendant had stolen money and drugs from his apartment. *Id.* at ¶ 51, 100 P.3d at 1034-1035.

An example of the use of other crimes evidence to establish opportunity is *Pickens v. State*, 2001 OK CR 3, 19 P.3d 866, a prosecution for first-degree murder and robbery with firearms that arose out of the robbery of a convenience store in Sapulpa and murder of the store’s clerk. Three .38 caliber unjacketed lead bullets were recovered at the convenience store, and two more were recovered from the clerk’s body. The defendant was arrested five days after the robbery of another convenience store in Tulsa, and the police recovered a .38 caliber revolver from the defendant’s car. The trial court allowed testimony of the defendant’s arrest for the robbery of the Tulsa convenience store and the discovery of the .38 caliber revolver “for the
purpose of showing where the gun came from,” and the Oklahoma Court of Criminal Appeals ruled that the evidence was “properly admissible for that purpose.” *Id.* at ¶ 23, 19 P.3d at 876.


An example of the use of other crimes evidence to establish preparation is *Pennington v. State*, 1995 OK CR 79, 913 P.2d 1356, a capital murder prosecution arising out of the killing of a clerk at a 7-11 convenience store in Lawton with a shotgun. At the trial, the prosecution offered evidence that the defendant had sawed off the barrel of the murder weapon. The Oklahoma Court of Criminal Appeals decided that the evidence was admissible to show preparation, plan and intent. *Id.* at ¶ 55, 19 P.3d at 1368.

An example of the use of other crimes evidence to establish plan is *Matthews v. State*, 2002 OK CR 16, 45 P.3d 907, a murder prosecution arising out of the robbery of a rural residence owned by Earl and Minnie Short. The prosecution offered evidence of the defendant’s participation in a burglary of the storm cellar of the residence the month before the robbery and murder, in which eight to ten thousand dollars was stolen. The Oklahoma Court of
Criminal Appeals held that the evidence of the burglary of the storm cellar “showed a common plan to steal all of the Shorts’ money they believed the Shorts kept at their residence.” *Id.* at ¶ 40, 45 P.3d at 921.

An example of the use of other crimes evidence to establish knowledge is found in *Johnson v. State*, 1988 OK CR 246, ¶ 5, 764 P.2d 530, a prosecution for possession of marijuana with intent to distribute. A garbage bag with two freezer bags of marijuana in it was found in the trunk of a car that the defendant was driving, but did not own. The car’s owner testified that he had loaned the car to the defendant and also to at least five other people. The trial court admitted evidence that a bank bag containing Diazepam pills, some marijuana, and two brown viles containing cocaine was found between the driver’s seat and the console in the car. The Oklahoma Court of Criminal Appeals decided that the contents of the bank bag, especially the marijuana, were relevant to the issue of whether the defendant knowingly possessed the bag of marijuana in the trunk of the car. *Id.* at ¶ 16, 764 P.2d at 534.

An example of the use of other crimes evidence to establish identity is found in *Miller v. State*, 2013 OK CR 11, 313 P.3d 934, a prosecution for the first-degree murder of two victims (“Thurman” and “Bowles”), who were killed in nearby locations about a week apart from gunshot wounds from a silver .38 revolver and a black 9-mm pistol that were found in the tank of a toilet in a motel where the defendant and another man (“Hanson”) were arrested. The Oklahoma Court of Criminal Appeals upheld the admission of four armed robberies in which the defendant and Hanson had participated to show the defendant’s identity. The court explained: “The ‘identity’ value of the armed robbery evidence was that it powerfully and probatively established that at the time of the Thurman and Bowles shootings, Miller and Hanson were regularly committing crimes together, with Miller using the silver .38 (which killed Thurman)
and Hanson using the black 9-mm (which killed Bowles).” *Id.* at ¶ 93, 764 P.2d at 534. In contrast, evidence of a prior bad act was not admissible to show either a common plan or identity in *Neloms v. State*, 2012 OK CR 7, 274 P.3d 161, a rape case in which an intruder had broken into a home. The prior bad act in *Neloms* was the burglary of a residence a year and a half before the rape in which the defendant had broken into another residence and masturbated while viewing images of young girls on a computer in the residence. The Oklahoma Court of Criminal Appeals ruled that there was no unique element in either the burglary or the rape that could be deemed a “signature” that would identify the defendant as the perpetrator of the rape. *Id.* at ¶ 16, 764 P.2d at 165.

An example of the use of other crimes evidence to establish absence of mistake or accident is found in *Cole v. State*, 2007 OK CR 27, 164 P.3d 1089, a first-degree murder conviction arising from the death of the defendant’s nine month old daughter. The defendant admitted causing the fatal injuries to his daughter, but he claimed that he had been trying to get the child to stop crying. The trial court allowed the prosecution to introduce evidence of the defendant’s eighteen year old conviction for aggravated child abuse against his then six month old son. The Oklahoma Court of Criminal Appeals decided that the conviction was admissible to establish absence of mistake or accident. *Id.* at ¶¶ 16-24, 164 P.3d at 1095.

In addition to the grounds for admissibility of other crimes, wrongs, or acts that are expressly enumerated in Okla. Stat. tit. 12, § 2404(B) (2011), the Oklahoma Court of Criminal Appeals has allowed other crimes or bad acts under what is known as the *res gestae* exception. *Eizember v. State*, 2007 OK CR 29, 164 P.3d 208. The justification for the *res gestae* exception is that the evidence is part of the same crime as the one that is the subject of the case; accordingly, the evidence is not of another crime, but is instead part of the same transaction as
the crime that is the subject of the case or has a logical connection with it. *Id.* at ¶ 77, 164 P.3d at 230. “Evidence is considered *res gestae*, and not other crimes or bad acts evidence when: a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events.” *Warner v. State*, 2006 OK CR 40, ¶ 68, 144 P.3d 838, 868. An example of the *res gestae* exception is found in *Eizember v. State*, 2007 OK CR 29, 164 P.3d 208, in which the defendant committed a series of crimes in a crime spree beginning in Depew and then proceeding through Arkansas and Texas as he attempted to avoid capture by police. The Oklahoma Court of Criminal Appeals upheld the introduction of an assortment of the crimes the defendant committed during his spree as evidence of the defendant’s intent, motive, and absence of mistake. *Id.* at ¶ 99, 164 P.3d at 234.

The *res gestae* exception is similar to the ground for admissibility of other crimes used in the federal courts that the other crimes evidence is “inextricably intertwined” with the crime that is the subject of the case. *Andrew v. State*, 2007 OK CR 23, ¶ 48, 164 P.3d 176, 191. Recently, the United States Court of Appeals for the Third Circuit has criticized the inextricably intertwined doctrine in the federal courts on three grounds: it is confusing, unnecessary, and overbroad. *United States v. Green*, 617 F.3d 233, 246-48 (3rd Cir. 2010). It is confusing “because, quite simply, no one knows what it means.” *Id.* at 246. It is unnecessary because Fed. R. Evid. 404(b) (the federal analog of Okla. Stat. tit. 12, § 2404(B) (2011)) provides adequate grounds for admissibility. *Id.* at 247. And it is overbroad, because in some of its formulations, the inextricably intertwined doctrine would allow virtually any act to be admitted. *Id.* at 248. The Third Circuit has therefore decided to replace the inextricably intertwined doctrine with the following: Uncharged misconduct is admissible if it either directly proves the charged offense or
if the uncharged misconduct facilitates the commission of the charged crime. The admissibility of all other crimes should be analyzed under Fed. R. Evid. 404(b). Id. at 248-49. Since the res gestae exception is similar to the inextricably intertwined doctrine, the Third Circuit’s criticism of the inextricably intertwined doctrine applies as well to the res gestae exception, and therefore, it would be desirable for the res gestae exception to be replaced by the Third Circuit’s reformulation of the inextricably intertwined doctrine.

Standard of Proof

The procedures and standard of proof required for the introduction of other crimes evidence differs markedly between federal and Oklahoma state courts. In the federal courts, the introduction of other crimes evidence is treated as a matter of conditional relevance governed by Fed. R. Evid. 104(b). Huddleston v. United States, 485 U.S. 681, 689-92 (1988). Under this standard, a federal court will admit other crimes evidence if there is sufficient evidence for a reasonable jury to find that the defendant committed the other crime. The justification for this standard is that the jury should decide matters of relevance, and it should be allowed to make the determination whether the defendant committed the other crime, because the other crime would not be relevant unless the defendant had indeed committed the other crime. In addition, Fed. R. Evid. 404(b) requires the prosecutor to provide reasonable notice upon the defendant’s request of the general nature of the other crimes evidence that the prosecutor intends to offer at trial.

In contrast, the Oklahoma Court of Criminal Appeals has issued the following guidelines in Burks v. State, 1979 OK CR 10, 594 P.2d 771, overruled in part on other grounds, Jones v. State, 1989 OK CR 7, 772 P.2d 922, for the use of other crimes evidence in prosecutions in Oklahoma state courts:

(1) The State shall, within ten days before the trial, or at a pretrial hearing, whichever occurs first, furnish the defendant with a written statement of the other offenses it intends to show, described with the same particularity required of an
indictment or information. (However, no such notice is required if the other offenses are prior convictions, or are actually a part of the res gestae of the crime charged and thus are not chargeable as separate offenses.) The requirement of notice gives the defendant an opportunity to obtain a pretrial determination on the admissibility of the evidence. However, as we stated in *Teegarden v. State*, Okl.Cr., 563 P.2d 660 (1977), with regard to motions in limine, a pretrial ruling is not binding on the trial court. In order to properly preserve an objection it must be raised again during trial.

(2) At the time the evidence is offered the prosecutor shall specify the exception under which the evidence is sought to be admitted.

(3) Regardless of the exception used, there must be a visible connection between the offense charged and the offense sought to be proved.

(4) There must be a showing by the State that the evidence of other crimes is necessary to support the State's burden of proof; that the evidence is not merely cumulative. Such evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished.

(5) The evidence of the defendant's commission of other crimes need not be established beyond a reasonable doubt, but the proof must be clear and convincing.

(6) At the time the evidence is received, and in the final instructions to the jury, the trial court shall admonish the jury that the defendant cannot be convicted for any crime other than the one with which he is charged and that the evidence of the other offense or offenses is admitted solely for a limited purpose.

(7) In the event the prosecution attempts to use evidence of other crimes in rebuttal, the trial court should conduct an in camera hearing to determine whether the evidence is admissible under the above guidelines.

1979 OK CR 10, ¶¶ 12-18, 594 P.2d 771, 774-75. Thus, the prosecution must provide the defendant with pre-trial notice of the other crimes evidence it intends to introduce, the trial court must find that there is clear and convincing evidence that the defendant committed the other crimes, and the trial court is required to give appropriate limiting instructions to the jury both at the time the evidence is received and in the final instructions to the jury. *Miller v. State*, 2013 OK CR 11, ¶ 89, 313 P.3d 934, 966.

**Conclusion**

The general rule in both the Oklahoma and federal courts is that character evidence is not admissible in civil cases, except in the relatively small number of cases where a person’s character is in issue. There are also limited exceptions to the rule
against the use of character evidence in criminal cases, so that the defendant may offer
carer witnesses providing reputation or opinion testimony to establish the defendant’s
innocence, and the prosecution may introduce evidence of other sexual assaults and child
molestation committed by the defendant in sexual assault and child molestation cases. In
addition, the prosecution may offer evidence of other crimes for a variety of purposes, but
not to prove character in order to show conduct in conformity with the character.