

404(b)

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Crimes, Wrongs, or Other Acts

- (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.



(2) Permitted Uses . . . This evidence may be admissible for another purpose, such as proving:

- motive
- opportunity
- intent
- preparation
- plan
- knowledge
- identity
- absence of mistake
- lack of accident

Other non-character purposes

- *Garcia*, 2017 UT App 200 – Gang affiliation to prove action “in concert with” each other.
- *Whitbeck*, 2018 UT App 88 – Evidence from prior burglary to connect Defendant to charged offense.
- *VonNeiderhausen*, 2018 UT App 149 – Prior sexual touching of victim to prove absence of mistake and intent to cause affront or alarm.
- *Barney*, 2018 UT App. 159 – Other violent acts against victim to explain why she did not flee or report sooner.



However...

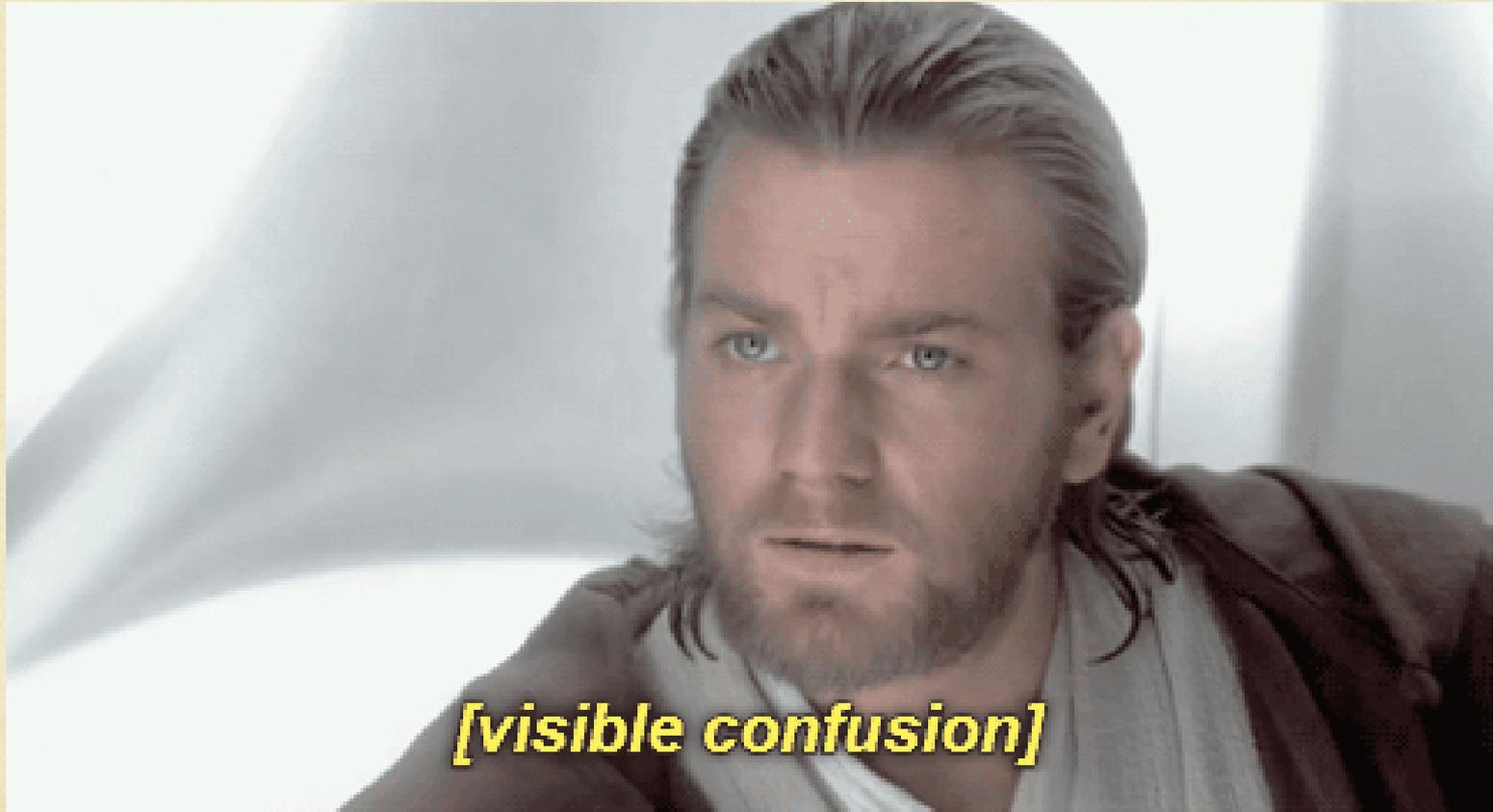
- Courts and litigants alike are confused about how this rule should operate.
- The analysis of the issue in appellate opinions is often incomplete, inconsistent with other opinions, manifestly incorrect, or lacking altogether.



The nearly identical Federal Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules.

There is little difference in state courts. “In many jurisdictions, the admissibility of uncharged misconduct evidence is not only the most frequently litigated issue on appeal, but also the most common ground for reversal.”

What about Utah?





**Biggest problem
with 404b?**

We run to it too often!

THERE'S ANOTHER OPTION!



It's not obvious to me.

404 (b) vs. Intrinsic Evidence

United States v. Parker, 553 F.3d 1309, 1314-15 (10th Cir. 2009):

- “Rule 404(b) limits evidence of ‘other’ crimes, wrongs, or acts — not the crime in question. Similarly, ‘[i]t is well settled that Rule 404(b) does not apply to other act evidence that is **intrinsic** to the crime charged.’ *United States v. O'Brien*, 131 F.3d 1428, 1432 (10th Cir. 1997); see also *United States v. Arney*, 248 F.3d 984, 992 (10th Cir. 2001) (discussing Rule 404(b) as not applying to intrinsic evidence).”

Generally speaking, "[i]ntrinsic evidence is directly connected to the factual circumstances of the crime charged and provides contextual or background information to the jury.

Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense.”

Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 *Syracuse L. Rev.* 1229, 1231 (1997).

- Additionally, a 1991 advisory committee note to Federal Rule 404(b) specifically states that the rule “does not extend to evidence of acts which are ‘**intrinsic**’ to the charged offense.”
- Should this apply to Utah’s nearly identical Rule 404(b)?

Utah History

State v. Burke, 2011 UT App 168:

Federal Rule 404(b) does not apply where the challenged evidence is **inextricably intertwined** with evidence of the crime charged

State v. Lucero, 2014 UT 15, abrogated on other grounds by *State v. Thornton*, 2017 UT 9:
Rule 404(b) applies only “to evidence that is *extrinsic* to the crime charged”

See also *State v. Hood*, 2018 UT App 236

Utah case law is underdeveloped with regards to intrinsic evidence.



**“Inextricably
intertwined”
standard is far too
narrow**

There are other categories of intrinsic evidence that are not subject to Rule 404(b).



Intrinsic evidence not subject to Rule 404(b)

1. Inextricably Intertwined
2. Proof of Involvement in Charged Crime
3. Same Criminal Episode
4. Necessary Preliminary Step
5. Background
6. Context
7. Relation Between Co-defendants



1. Inextricably Intertwined

Crimes that are so linked with the crime charged in point of time and circumstances that one cannot be shown without proving the other

- *US v. Warren*, 25 F.3d 890, 895 (9th Cir. 1995): stabbing one victim right after the other, only charged for one.
- *US v. Kupfer*, 797 F.3d 1233, 1235–36 (10th Cir. 2015): proceeds of one uncharged conspiracy used to pay for the defendant's involvement in the charged crime.



2. Proof of defendant's involvement in the charged crime

Uncharged misconduct ties defendant to the crime.

- *US v. Parker*, 553 F.3d 1309, 1312 (10th Cir. 2009): evidence of fraudulent sales of airplane equipment admissible to prove conspiracy to defraud other purchasers of equipment.
- *State v. Harris*, 742 S.E.2d 133, 135 (W. Va. 2013): evidence of uncharged sex abuse admissible to refute defendant's claim that he was not present for the charged offenses.

3. Same criminal episode

Misconduct that took place contemporaneously with the charged crime or was part of the same transactions as the charged crime.

- *US v. Derring*, 592 F.2d 1003, 1004 (8th Cir. 1979): evidence of uncharged murder admissible in trial for interstate transportation of stolen vehicle, part of 4-day crime spree.
- *US v. Cancelliere*, 69 F.3d 1116, 1118 (11th Cir. 1995): uncharged bank fraud admissible in trial for bank fraud because all conduct occurred during the same period.



4. Necessary preliminary step

Part of decision making process that led to charged crime.

- *US v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993): discussion about robbing a man in a grocery store admissible in trial for bank robbery.
- *US v. Torres*, 685 F.2d 921 (5th Cir. 1982): evidence about uncharged sales of small amounts cocaine admissible in trial for sale of large amount.



5. Background

Background information directly connected to the factual circumstance of the charged crime.

- *US v. Irving*, 665 F.3d 1184, 1187–88 (10th Cir. 2011): evidence or prior drug investigation admissible to show why defendant would seek to kill police Officer.
- *US v. Weeks*, 716 F.2d 830, 831 (11th Cir. 1983): Stolen car investigation relevant to show why officer was present to be assaulted.



6. Context

Allows presentation of coherent and comprehensive story regarding the commission of the crime.

- *State v. McKinley*, 764 S.E.2d 303, 307 (W. Va. 2014): evidence of prior domestic violence admissible in trial for murder of same victim.
- *US v. Hall*, 508 F. App'x 776, 777 (10th Cir. 2013): evidence of prior drug transaction admissible to show how charged transaction came to be.



7. Relationship between co-defendants

Especially particularly compelling role in conspiracy and racketeering prosecutions.

- *US v. Krout*, 66 F.3d 1420, 1424 (5th Cir. 1995): evidence of uncharged murders admissible in racketeering trial because it showed the relationships at play in the gang.
- *US v. Gibbs*, 547 F. App'x. 174, 177 (4th Cir. 2013). : court allows evidence of crimes that took place before the charged conspiracy to show the relationship between the conspirators.



Procedure for Admitting Intrinsic Evidence

- Prosecution should file a notice of intent to introduce intrinsic evidence
- Do not want to force judge to make a ruling mid-trial without adequate time to prepare and make a sound decision
- Defense must file objection indicating why evidence is not intrinsic
- Judge performs Rule 403 analysis
- Judge to give limiting instruction at trial



Old Chief v. United States, 519 U.S. 172 (1997):

“People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.”

Admitting evidence under the doctrine of intrinsic evidence can be a powerful prosecutorial weapon.

Thus, it is imperative that we use it appropriately.



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