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You Can't Escape Your Past: *State v. Blaz* and The Future of 404(b) Evidence in Montana

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YOU CAN'T ESCAPE YOUR PAST: *STATE V. BLAZ* AND THE FUTURE OF 404(b) EVIDENCE IN MONTANA

Britton Fraser*

I. INTRODUCTION

Admitting past actions into evidence to establish a defendant's propensity to commit a crime has long been considered unfairly prejudicial.[1] However, in *State v. Blaz*,[2] the Montana Supreme Court upheld the admission of a prior partner or family member assault ("PFMA") conviction for the purpose of "illustrating a pattern of conduct" probative of the defendant's motive, identity, and absence of mistake or accident.[3] This note focuses on identity evidence—specifically, the admissibility of evidence of past crimes or acts in order to identify the defendant as the perpetrator of a crime. It explains how the Court, by improperly expanding its prior rulings, opened the floodgates to admit types of behavior that have not constituted uniquely identifying criminal signatures. It also seeks to illustrate the effect this expansion might have on the admissibility of such evidence in the future.

Part II of this note begins with a brief background on applicable Montana law and an overview of the law's purpose. Part II also discusses prior case law dealing with the admission of motive and modus operandi evidence, and how this case law and the theories behind it served as the foundation of the Court's holding in *Blaz*. Specifically, while motive and modus operandi evidence have always been closely associated with each other, until *Blaz*, they had remained discrete. Parts III and IV examine the facts of *Blaz* and provide the Majority and Dissent's analysis relating to the admissibility of identification evidence. Part V analyzes how the Court's ruling is distinct from and reinterprets past cases. It argues that the *Blaz* Court created a new standard for admission of motive and modus operandi as identification evidence. Additionally, Part V explains how the *Blaz* decision was foreshadowed by precedent and considers its consequences going forward. Finally, this note concludes by placing the Court's decision in context with

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1. Antonia M. Kopec, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(B) Evidence*, 65 DEPAUL L. REV. 1055, 1060–68 (2016).

2. 398 P.3d 247 (Mont. 2017).

3. *Id.* at 254.

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other jurisdictions and briefly summarizes the author's analyses and predictions.

II. Background on Prior Law

A. Relevant Rules, History, Terms, and Treatises

Montana Rule of Evidence 404(b) controls the admissibility of a defendant's prior acts. Rule 404(b) reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[4]

Montana adopted Rule 404(b) in 1976;[5] it is identical to Federal Rule of Evidence 404(b), except that it lacks the federal rule's notice requirements.[6] Importantly, this rule does not prohibit prior act evidence; instead, it bars a "theory of admissibility" based upon using a defendant's past act or crime to prove his character or propensity to act in accordance with that trait when he allegedly committed the charged offense.[7] If the theory of admissibility is justified under one of Rule 404(b)'s non-propensity purposes (i.e., motive, intent, identity), evidence of the prior act is admissible.[8] It should be noted that the list of permissible theories of admissibility is non-exclusive.[9]

1. Rationale for Exclusion of Past Acts Evidence

Before delving too deeply into the analysis and interpretation of Rule 404(b), it is important to first understand why the general exclusion of past acts evidence is part of evidentiary jurisprudence. The courts' exclusion of evidence of past behavior is relatively recent; discussion of the topic in legal circles seems to have first appeared around the mid-1800s.[10] One early theorist, Julius Stone, proposed that such a rule would be necessary as "[n]o man is bound at the peril of life or liberty, fortune, or reputation, to answer at once and unprepared for every action of his life."[11] Stone rooted his assertion in principles of natural justice.[12] By the early twentieth cen-

4. Mont. R. Evid. 404(b).
5. Cynthia Ford, *A Short History of the MT Rules of Evidence*, 38 Mont. L. Rev. 14, 14 (2012).
6. Fed. R. Evid. 404(b); State v. Dist. Court of Eighteenth Judicial Dist. of Mont., 246 P.3d 415, 428 (Mont. 2010) [hereinafter "*Salvagni*"].
7. *Salvagni*, 246 P.3d at 427.
8. *Id.*
9. State v. Stout, 237 P.3d 37, 54 (Mont. 2010).
10. David P. Leonard, *The New Wigmore: A treatise on Evidence*, ch. 2, § 2.2, 19 (2009).
11. *Id.* at 20.
12. *Id.* at 20.

tury, Stone's broad, philosophical rationale gave way to more concrete principles, such as those expressed in *People v. Molineux*:[13]

> Such [past acts evidence] compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him.[14]

During the mid-twentieth century, the Supreme Court embraced these interests of eliminating unfair surprise, undue prejudice, and confusion of the issues as fundamental necessities for a fair trial.[15] These concerns were addressed by Rules 403 and 404 of the Federal Rules of Evidence.

2. Two Types of Motive[16]

In *Blaz*, the Court attempted to create a link between a defendant's motive and his modus operandi—a person's particular way of doing something; the interplay between the two is the primary focus of this note.[17] As discussed above, under Rule 404(b), evidence of a defendant's past acts can be introduced for the purposes of establishing his motive to commit the charged crime. According to evidence scholar Edward J. Imwinkelried, the motive theory of admissibility under Rule 404(b) can take one of two forms. The first is when the past act itself provides the motive to commit the charged crime.[18] For example: imagine a person sets fire to a building and is charged with arson. Then, before the arson trial, several witnesses receive anonymous phone calls, threatening them with violence if their testimony hurts the defendant. The alleged arsonist is found not guilty at trial but is later charged with witness tampering. At the witness tampering trial, the prosecutor seeks to introduce evidence under Rule 404(b) that the defendant was charged with arson and consequently had a motive to leave the threatening messages. This sets up a logical link: "[U]ncharged misconduct by the defendant . . . furnished or supplied the specific motive for the charged crime."[19] This note refers to this theory of admissibility as proffering "strong motive" evidence, because it establishes a relatively clear rea-

13. 168 N.Y. 264 (N.Y. 1901).

14. *Id.* at 293.

15. Michelson v. United States, 335 U.S. 469, 475–76 (1948).

16. This section relies heavily on Edward J. Imwinkelried's treatise, *Uncharged Misconduct Evidence* (Rev. ed. 2018). As shown later in this note, the Court has adopted rules and rationale regarding the "motive" theory of admissibility largely wholesale from this treatise.

17. State v. Blaz, 398 P.3d 247, 252–53 (Mont. 2017).

18. EDWARD J. IMWINKELRIED, *Uncharged Misconduct Evidence* § 3:15 (Rev. ed. 2018).

19. *Id.* § 3:16. The "uncharged misconduct" does not need to be conduct that had never before been charged in a criminal matter or used as a cause of action in a civil suit, only "uncharged" in the matter presently before the court.

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son why the defendant would be more likely to commit the crime than another person.

The second way prior acts evidence may be introduced to establish motive, and the one most relevant to *Blaz*, is when the proffered prior act and the charged act share a common, underlying motive to create the implication that the same person committed both acts.[20] This note identifies this theory of admissibility as proffering "weak motive" evidence, because it is a more nebulous concept than strong motive evidence.[21] While the terms "strong motive" and "weak motive" do not seem to have been previously applied to Imwinkelried's two types of motive, the characterization of motive evidence as either "strong" or "weak" has been touched upon by evidence scholar David P. Leonard.[22] Specifically, Leonard notes that:

> The inferential steps from the evidence to the existence of a motive, and then from the motive to the behavior at issue, can be strong or weak. In some cases, the evidence gives rise to a strong inference of a specific motive, and the likelihood of the motive gives rise to a strong inference of action in conformity with that motive or the existence of a relevant state of mind. In other cases, one or both of the inferences is hardly persuasive.[23]

In his treatise, *Uncharged Misconduct Evidence*, cited extensively by the Montana Supreme Court in numerous cases, Imwinkelried states:

> [Weak motive] is the cause, and both the charged and uncharged acts are effects. Both crimes are explainable as a result of the same motive. [T]he uncharged act [shows] the existence of the motive, and in turn the motive strengthens the inference of the defendant's identity as the perpetrator of the charged crime.[24]

As argued below, Imwinkelried's definition of this type of motive is adopted almost verbatim by the Court in *Salvagni*.[25] This type of evidence naturally bears a higher risk of characterization as inadmissible propensity evidence than does strong motive evidence, as its causal link to the charged crime is much more attenuated. In other words, a weak motive inference is much more dependent upon the sum of its parts; the motive is demonstrated by a combination of acts which may not individually be indicative of a motive to commit the charged crime. Imwinkelried suggests that establishing that all of the acts were targeted at a certain discernible class of persons

20. IMWINKELRIED, *supra* note 18, § 3:18. **R**

21. *Id.* § 3:18.

22. David P. Leonard, *Character and Motive in Evidence Law*, 34 LOY. L.A. L. REV. 439, 449 (2001).

23. *Id.*

24. IMWINKELRIED, *supra* note 18, § 3:18. **R**

25. *See* Salvagni, 246 P.3d 415, 431 (Mont. 2010). While neither the Court nor Imwinkelried uses the terms "strong motive" and "weak motive," this note uses the terms as shorthand for the specific and distinct types of motive evidence they each represent.

can help negate the risk that weak motive evidence will be excluded.[26] A strong motive argument, on the other hand, is more dependent on a direct inference, like in the arson example above: defendant did X, and because of X, defendant had a motive to commit the charged crime. It is this type of motive evidence—so-called weak motive evidence— that the State sought to introduce in *Blaz* and therefore is the principal type of motive evidence analyzed in this note.

3. "Identity" and Modus Operandi

Although the term "modus operandi" appears nowhere in the rule, it is commonly accepted that for the purposes of Rule 404(b) it is a means of demonstrating identity.[27] Theoretically, modus operandi is used to show that, based on the unique and particularly characteristic or idiosyncratic manner in which a defendant committed a past crime or act, he can be identified as the perpetrator of the charged crime because of similarities in how the charged offense and past act were committed.[28] Imwinkelried argues that to be used as modus operandi evidence, the facts of the two events "must resemble each other so closely that there is a reasonable deduction that the same person committed the two crimes . . . [t]he modus operandi must betray the defendant's personal criminal identity."[29]

As demonstrated in the selected cases below, Montana's path to a broad interpretation of both modus operandi and weak motive evidence began years ago. Understood in this context, *Blaz* is the culmination of the Court's interpretation of these concepts.

B. Relevant Case Law

Past acts evidence is often introduced under multiple theories of admissibility. The following selection focuses on cases wherein the Court analyzed modus operandi or motive evidence to infer the identity of an offender whose identity was contested or unknown. The Court in *Blaz* primarily focused on modus operandi and weak motive evidence, since a primary issue was identifying the guilty party.[30] The Court also discussed the permissive use of Rule 404(b) evidence to prove an absence of mistake; however, its analysis of this theory was merely reflective of its statements re-

26. IMWINKELRIED, *supra* note 18, § 3:18. **R**

27. GEORGE BLUM ET AL., AM. JUR. 2d EVIDENCE § 459 (2d ed. 2019).

28. *Id.*

29. IMWINKELRIED, *supra* note 18, § 3:10. **R**

30. State v. Blaz, 398 P.3d 247, 252–53 (Mont. 2017).

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garding motive and modus operandi.[31] The analysis here begins by examining the use of motive evidence to infer a perpetrator's identity.

1. The Foundational Case for 404(b) Identity Evidence

The history of the several categories of commonly accepted Rule 404(b) evidence, as well as the rule itself, stretches back over a century to *People v. Molineux*.[32] In *Molineux*, Mr. Cornish became seriously ill and his cousin died after they ingested a medicinal seltzer powder laced with cyanide.[33] An anonymous person delivered the powder to Mr. Cornish at his office.[34] The investigation eventually led police to suspect Ronald Molineux, a member of the athletic club where Cornish worked.[35]

At trial, the prosecution presented evidence that several years before, another acquaintance of Molineux, Henry Barnet, died after a disagreement with Molineux.[36] Barnet's death was originally attributed to diphtheria, but police exhumed his body and determined that his organs showed signs of cyanide poisoning.[37] Moreover, his symptoms arose after he ingested a medicinal powder that he received from an anonymous sender.[38] Barnet belonged to the same athletic club as Cornish, and, in both instances, Molineux had had recent disagreements with the victims.[39] Finally, Molineux was a chemist with access to the chemicals necessary to produce the cyanide used in both murders.[40]

Molineux was eventually convicted under the prosecution's theory, and on appeal he argued that the trial court should have excluded evidence of Barnet's death because it was not connected to the charged crime.[41] Judge Warner of the New York Court of Appeals analyzed the admissibility of the evidence of the prior crime under theories that would eventually be refined and adapted into those found in Rule 404(b).[42] Specifically, Judge Warner found evidence of other crimes could legitimately be used to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and

31. *Id.* at 112.
32. 168 N.Y. 264 (N.Y. 1901).
33. *Id.* at 273–77.
34. *Id.* at 273.
35. *Id.* at 277–79.
36. *Id.* at 281.
37. *Id.* at 280.
38. *Id.*
39. *Id.* at 280–82.
40. *Id.* at 277.
41. *Id.* at 291.
42. *Id.* at 293.

(5) the identity of the person charged with the commission of the crime on trial.[43]

2. Montana's Treatment of 404(b) Motive Identity Evidence

Montana courts have a long history of admitting the strong motive type of evidence. This history begins in 1939 with the Court's decision in *State v. Simpson*.[44] There, the trial court was careful when it admitted past acts evidence under a motive theory of admissibility, taking great pains to ensure that the sole purpose of the evidence was to establish the defendant's motive for murder.[45] This careful delineation of the evidence's purpose continued through the twentieth century: "To be admissible as relevant to motive, the commission of the first crime or act should give rise to a motive or reason for the defendant to commit the second crime."[46] In a subsequent case, *State v. Sweeney*,[47] the Court continued to work only within the strong motive framework of admissibility: "the State has not shown a connection between the [prior] Wisconsin sexual assault in 1989 that would give rise to a motive or reason for Sweeney to commit the sexual assault in 1996."[48]

While the strong motive theory was well-established in cases such as *Simpson*, *Sadowski*, and *Sweeney*, it was not until 2010 that the Court unambiguously clarified that its previous jurisprudence should be interpreted to include Imwinkelried's second, indirect type of motive evidence —termed weak motive evidence in this note— as an acceptable theory under Rule 404(b).[49]

In *Salvagni*, the Court granted a petition for a writ of supervisory control and reversed the district court's grant of a motion to suppress in the underlying matter of *State v. Anderson*.[50] There, Anderson was charged with deliberate homicide after the post-mortem performed on her infant daughter, Vanyel, revealed rib fractures and cerebral edema that occurred close to the time of death.[51] Despite these injuries, the autopsy failed to reveal a definitive cause of death.[52] The State proffered past acts evidence to prove that Anderson caused Vanyel's death.[53] This evidence included:

43. *Id.*

44. 95 P.2d 761 (Mont. 1939).

45. *Id.* at 764.

46. State v. Sadowski, 805 P.2d 537, 542 (Mont. 1991) (citing *Simpson*, 95 P.2d at 761); State v. Weldy, 902 P.2d 1, 5 (Mont. 1995).

47. State v. Sweeney, 999 P.2d 296 (Mont. 2000).

48. *Id.* at 301 (citing *Weldy*, 902 P.2d at 5).

49. *Salvagni*, 246 P.3d 415, 431 (Mont. 2010).

50. *Id.* at 417 (citing State v. Anderson (Mont. 18th Jud. Dist. 2010) (No. DC–09–33AX)).

51. *Id.* at 419.

52. *Id.*

53. *Id.* at 430–33.

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statements Anderson made about wanting a male child instead of Vanyel; prior instances of Anderson's abuse of Vanyel; testimony that Anderson would wrap Vanyel so tightly Vanyel would have difficulty breathing; testimony that Anderson knew not to have blankets around Vanyel that could affect her breathing; and testimony about Vanyel's post-mortem.[54] Anderson argued that these acts were prohibited character evidence and not permissible exceptions under Rule 404(b).[55]

The Court rejected this argument, and for the first time explicitly allowed the introduction of evidence demonstrating weak motive under Rule 404(b).[56] It stated: "The prosecutor uses the uncharged act to show the existence of the motive, and the motive, in turn, strengthens the inference of the defendant's identity as the perpetrator of the charged act."[57] Its explanation of weak motive, and presumably the reasoning behind it, was based entirely on and effectively the same as that given by Imwinkelried in *Uncharged Misconduct Evidence*:[58]

> The uncharged act is cause, and the charged act is effect. In other cases, however, the uncharged act evidences the existence of a motive but does not supply the motive. Rather, the motive is cause, and the charged and uncharged acts are effects; that is, both acts are explainable as a result of the same motive. The prosecutor uses the uncharged act to show the existence of the motive, and the motive in turn strengthens the inference of the defendant's identity as the perpetrator of the charged act.[59]

With this new theory in hand, the Court concluded that "[Defendant's] prior abuse of Vanyel, in conjunction with her other conduct and statements reflecting that she resented and did not want Vanyel, show that she had a motive to cause Vanyel's death, which strengthens the inference that she is the perpetrator of the charged homicide."[60]

Four years later, in *State v. Crider*,[61] the Court reaffirmed its holding in *Salvagni*. In *Crider*, the State alleged that Dean Crider had perpetrated a series of physical and sexual assaults against his girlfriend, M.W., after he discovered text messages indicating that she was seeing someone else.[62] At trial, the State introduced evidence of several prior acts under a motive theory of admissibility including: Crider's 2010 PFMA conviction against M.W.; a 2011 police report stating that Crider knocked down M.W.'s door; a 2011 police report stating that Crider constantly called M.W. and parked

54. *Id.* at 420.
55. *Id.* at 421.
56. *Id.* at 431.
57. *Id.*
58. *Id.*
59. *Compare Id.* (internal citations omitted) *with* IMWINKELRIED, *supra* note 18, § 3:16. **R**
60. *Salvagni*, 246 P.3d at 431.
61. 328 P.3d 612 (Mont. 2014).
62. *Id.* at 615.

near where she lived; and a 2011 police report in which M.W.'s mother stated that Crider constantly called her.[63] The jury found Crider guilty of felony sexual intercourse without consent, felony tampering with informants or witnesses, and misdemeanor PFMA.[64]

Crider appealed, claiming that the trial court improperly admitted the evidence under the guise of motive, as well as an absence of mistake or accident.[65] The Court agreed with the State's argument that the prior acts evidence was admissible as evidence of weak motive, stating that common to all the incidents was an underlying motive of exerting power and control, and therefore, the prior acts were probative of Crider's motive to commit the charged act of sexual assault.[66] Relying on *Salvagni*, the Court found that the violent and harassing conduct demonstrated Crider's attempts to physically control M.W.'s physical space and movements, which in turn provided the underlying motive for his use of sexual violence to continue exerting control over her.[67] Justice McKinnon dissented, contending that the Court inappropriately allowed the admission of character evidence under the guise of motive evidence:[68]

> Saying that Crider has a 'habit of abusing, harassing, and stalking' the women in his life, or that he has a 'motive of exerting power and control' over M.W. through force, is just another way of saying that Crider has a 'generalized tendency' or 'enduring general propensity' to behave abusively toward women, and that he acts in conformity with this disposition.[69]

She asserted that the evidence established no underlying motive to commit the charged acts, but rather just a "*propensity* to behave in a physically violent manner when he and M.W. had disputes regarding their relationship," and should therefore be inadmissible under Rule 404(b).[70]

3. The History of 404(b) Modus Operandi Evidence in Montana

In *State v. Kordonowy*,[71] the Court decided the standard for introducing modus operandi evidence.[72] There, the defendant was charged with breaking into K.B.'s home at night and repeatedly raping her.[73] The district court allowed the State to introduce testimony from V.N.O., Kordonowy's

63. *Id.* at 616.
64. *Id.* at 615.
65. *Id.* at 618.
66. *Id.* at 619–20. The Court did not characterize the motive evidence explicitly as "weak motive" in its opinion, but the theory of admissibility used fits that terminology as used in this note.
67. *Id.* at 620.
68. *Id.* at 628 (McKinnon, J., dissenting).
69. *Id.*
70. *Id.* at 629 (emphasis added).
71. 823 P.2d 854 (Mont. 1991).
72. *Id.* at 857.
73. *Id.* at 855.

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previous rape victim, who stated that she had been raped in the same manner as K.B.[74] In both instances, the victims awoke late at night to find Kordonowy in their bed; and, in both instances, he pinned their arms down and attempted sexual intercourse, let them use the bathroom, then raped them again, in similar positions and overall manner.[75] On both occasions, he placed pillows over the victims' heads and wore round-toed boots and a belt buckle.[76] The Court concluded that the events in both crimes resembled each other so much as to "earmark" K.B.'s rape with Kordonowy's distinctive criminal signature.[77]

In contrast to *Kordonowy*, non-distinct acts that occur in the course of a given crime are not considered to be distinctive modus operandi.[78] In *State v. Sweeney*, the State charged defendant Robert Sweeney with rape.[79] It alleged that Sweeney had raped his minor niece on two occasions in April and June of 1996, and Sweeney denied the charges.[80] The State sought to introduce a single prior conviction for a sexual assault Sweeney committed around 1988 or 1989.[81] That assault involved Sweeney "getting on top of his five-year-old stepdaughter, licking her genitalia, and placing her hands on his penis."[82] Testimony from the 1996 assault showed that Sweeney had allegedly "licked [his niece's] genitalia and had on another occasion unbuttoned her shirt and pants and touched her chest."[83] Finding the admission of Sweeney's past conviction to be reversible error, the Court noted that the conduct "is not necessarily distinctive in the context of sexual assaults. Sweeney allegedly performed acts, involving different victims, of a nature that unfortunately give rise to many sexual assault cases."[84] Therefore, the Court ruled that it was an error to treat non-distinct evidence of sexual assault as a modus operandi.[85]

Contrasted with *Sweeney*, *State v. Daffin*[86] and *State v. Madplume*[87] exemplify signature or idiosyncratic behavior admissible to identify a perpetrator and demonstrate a continuation of the Court's reasoning in *Kordo-*

74. *Id.* at 857.
75. *Id.* at 856.
76. *Id.*
77. *Id.* at 857.
78. State v. Sweeney, 999 P.2d 296, 302 (Mont. 2000).
79. *Id.* at 297.
80. *Id.* at 298.
81. *Id.* at 297, 302 (explaining that the victim could not remember if the assault occurred in the last days of 1988 or the beginning of 1989).
82. *Id.* at 302.
83. *Id.*
84. *Id.* at 302.
85. *Id.* at 302–03.
86. 392 P.3d 150 (Mont. 2017).
87. 390 P.3d 142 (Mont. 2017).

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nowy. In *Daffin*, defendant Brad Daffin was convicted of multiple sexual assaults against several minor victims, which he appealed on grounds that the State failed to put forth a proper theory of admissibility for introducing past acts evidence.[88] For purposes of identification and other 404(b) purposes, the State introduced past acts evidence of Daffin's method of grooming his victims.[89] In its analysis of the identity argument, the Court concluded that Daffin had an established modus operandi of "supplying his victims with alcohol and drugs; driving his victims around in his vehicle; 'partying' with his victims; taking them 'mudding;' and, eventually, assaulting them."[90] The Court found that the district court did not abuse its discretion when it allowed admission of this evidence.[91]

Along with *Daffin* and *Blaz*, *Madplume* completes the trinity of Rule 404(b) cases the Court ruled on in 2017.[92] In *Madplume*, the Court analyzed past acts evidence under the modus operandi theory of admissibility, even though the identity of the perpetrator was not disputed.[93] Defendant Preston Madplume was accused of murdering his cousin in a private hot tub suite at the Wild Horse Hot Springs.[94] The State introduced evidence that a week before his cousin's death, Madplume got drunk with a pair of friends, drove to the resort, booked the same hot tub room, and once he was alone with a victim identified as J.B., he made sexual advances on him.[95] When J.B. rebuffed his advances, Madplume physically kept him from leaving the hot tub until J.B. forced his way past and left.[96]

A week later, Madplume did the same thing to a different pair of people, including drinking alcohol beforehand, renting the same room, and waiting until third parties left before making advances; but, this time it ended in death.[97] The Court upheld the trial court's admission of evidence of Madplume's past acts.[98] This decision signaled that the Court was open to arguments assigning a modus operandi theory to cases in which the charged crime did not occur during the course of the proffered prior acts evidence, so long as the conduct leading to crime were sufficiently similar.

In this section, we have seen how the use of modus operandi and motive evidence has changed and grown over time. Departing from the strict

88. *Daffin*, 392 P.3d at 152–54.
89. *Id.* at 152–53.
90. *Id.* at 155.
91. *Id.* at 155–56.
92. *Madplume*, 390 P.3d at 148–50.
93. *Id.* at 148–49.
94. *Id.* at 144–45.
95. *Id.* at 145–46.
96. *Id.* at 145.
97. *Id.* at 146–47.
98. *Id.* at 148–50.

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admissibility standards permitting only strong motive evidence as articulated in *Simpson*, the Court in *Salvagni* found that a common motive underlying all the past acts at issue could be admitted through Imwinkelried's analysis, and thus adopted what this note characterizes as weak motive. Furthermore, regarding the Court's use of modus operandi, it has required that past acts evidence demonstrate a unique "criminal signature" in order to be admitted as a modus operandi. We will see how these two analyses were grafted together by the Court in *Blaz*.

III. *BLAZ*: FACTUAL BACKGROUND

On the night of July 10, 2013, Matthew Blaz came home drunk from a softball game.[99] At the time, his infant daughter Matti was 16 days old.[100] Blaz fell asleep on the couch with Matti in his arms. Wanting to change and feed the baby, Blaz's wife Jennifer took Matti out of Blaz's arms and into the kitchen. Blaz came up behind Jennifer, grabbed her hair, threw her to the floor, and began hitting her head against the floor; she had Matti in her arms throughout the attack. Blaz took Matti, who was unharmed, from Jennifer. Blaz subsequently pleaded guilty to PFMA and received a six-month suspended sentence and a no-contact order relative to Jennifer.[101] However, Blaz apparently moved back in with Jennifer, allegedly because he believed that the no-contact order was the same as the temporary restraining order that Jennifer took out against him after the incident and had dropped shortly thereafter.[102] Jennifer seemed willing to have Blaz move back in, as she had expressed a desire to help him through anger management; moreover she, like Blaz, apparently did not differentiate between the dropped restraining order and the court's no-contact order.[103]

Then, Matti died on August 16, 2013.[104] That day, Blaz, still in violation of the no-contact order, was at the home he shared with Jennifer looking after Matti, Matti's sister, K.Y., and one of K.Y.'s neighborhood friends.[105] Blaz was watching television and Matti was behaving normally when he heard his dog barking outside and the mailman approaching.[106] He went outside to talk to the mailman and calm the dog, leaving Matti on a blanket on the floor—a location that Blaz stated could afford him a view of her through the window. A neighborhood boy arrived to see what his little

99. State v. Blaz, 398 P.3d 247, 250 (Mont. 2017).

100. *Id.*

101. *Id.*

102. Appellant's Opening Br. at 10, *State v. Blaz*, https://perma.cc/C5P3-ZUF4 (Mont. May 24, 2016) (No. DA 14-0807).

103. *Blaz*, 398 P.3d at 250; Appellant's Opening Br., *supra* note 102, at 10. **R**

104. *Blaz*, 398 P.3d at 251.

105. *Id.*

106. *Id.*

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sister (K.Y.'s friend) and K.Y. were up to. From this point on, two versions of events unfolded.

According to Blaz, he allowed the neighbor boy to go into the house, after which he heard a scream; he ran inside and saw the neighbor boy standing over a screaming Matti. Then, the neighbor boy ran downstairs, and Blaz yelled down asking what had happened while trying to calm Matti. The girls responded that they had not done anything and the neighbor boy left.[107]

The neighbor boy testified that Matti was already crying when he entered the house; he tickled her but otherwise didn't touch her and then went downstairs. He stated that Blaz called down asking what happened to Matti, and then he left because he was bored with the girls.[108]

Matti eventually calmed down and went to sleep for most of the afternoon. Around 4:00 that afternoon, Blaz, K.Y., and Matti picked up Jennifer from work and went to Walmart.[109] This trip is when Blaz first mentioned to Jennifer that he thought the neighbor boy had dropped Matti earlier that day, prompting Jennifer to check on Matti while they were in the Walmart parking lot.[110] She noticed Matti's eyes were bulging, her breathing was unusual, and her skin was pallid; they called 911 and Matti was taken to the hospital.[111]She died shortly thereafter.[112]

Blaz was charged with deliberate homicide.[113] Blaz filed a pretrial motion in limine to exclude testimony regarding the prior PFMA.[114] He argued that the State would only use the evidence to show "[his] character was violent, aggressive, or abusive in nature" in violation of Rule 404(b).[115] The State countered that it only sought to admit the evidence to show Blaz's opportunity to commit the offense, a motive to hide the offense, and that the offense was not the result of a mistake or accident, thus fulfilling legitimate Rule 404(b) purposes.[116] Over Blaz's objection, the court granted the State permission to enter evidence of the prior PFMA conviction to demonstrate motive, opportunity, and absence of accident or mistake under the theory that they were "reflective and therefore probative of motive."[117]

107. *Id.*
108. *Id.*
109. *Id.*; Appellant's Opening Br., *supra* note 102, at 8–9. **R**
110. *Blaz*, 398 P.3d at 251; Appellant's Opening Br., *supra* note 102, at 8–9. **R**
111. *Blaz*, 398 P.3d at 251; Appellant's Opening Br., *supra* note 102, at 8. **R**
112. *Blaz*, 398 P.3d at 251.
113. *Id.* at 249–50.
114. Appellant's Opening Br., *supra* note 102, at 1. **R**
115. *Id.*
116. *Id.*
117. *Blaz*, 398 P.3d at 251; Appellant's Opening Br., *supra* note 102, at 1 (internal quotations omitted). **R**

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At trial, Blaz's defense was that Matti's death was a result of acts by the neighbor boy.[118] Deputy State Medical Examiner Dr. Walter Kemp testified that Matti's autopsy revealed blunt force trauma to the head and neck, abrasions on the left side of the chin and on the right side of the neck and chest, and evidence of an older rib injury.[119] Dr. Kemp further testified that there was no chance Matti's injuries could be attributed to an unintentional act, such as a fall, and that he believed the injuries were an intentional harmful act caused by another person; therefore, he characterized her death as a homicide.[120] The State presented testimony from Jennifer and the responding officer regarding the prior PFMA and events that unfolded afterward.[121] During closing arguments, the State again referenced the past acts as showing that Blaz "knows he loses control of his emotions" and the death of Matti "was not a mistake . . . [nor] an accident."[122] The jury found Blaz guilty of deliberate homicide.[123]

IV. The Supreme Court's Holding and Dissent

A. The Majority's Decision and Reasoning

In an opinion authored by Justice Rice, the Supreme Court analyzed the admission of Blaz's PFMA under three categories listed in Rule 404(b): motive, identity, and absence of mistake or accident.[124] The Court analyzed PFMA as evidence of motive and discussed the evidence's relevance to identity and pattern—Blaz's modus operandi.

1. Motive

The Majority spent a significant portion of its analysis of Rule 404(b) on the motive theory of admissibility.[125] The State initially argued that both strong and weak concepts of motive evidence were present.[126] The prior PFMA was admissible as weak motive evidence because it demonstrated Blaz's underlying "complete disregard" for Matti.[127] Additionally, due to the resulting no-contact order, the Court, in effect, found that a strong motive theory of admission of the PFMA was proper to demonstrate a causal

118. *Blaz*, 398 P.3d at 251.
119. *Id.* at 250.
120. *Id.*
121. Appellant's Opening Br., *supra* note 102, at 10–11. **R**
122. *Id.* at 11.
123. *Blaz*, 398 P.3d at 249–50.
124. *Id.* at 252–54.
125. *Id.* at 252–53.
126. *Id.* at 252.
127. *Id.*

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link as to why Blaz would not report Matti's symptoms earlier—his violation of the no-contact order would be discovered.[128] At oral argument, the State seemed to downplay its strong motive theory and instead relied solely on its weak motive theory that the past act evidences an underlying "complete disregard" and a "general hostility" toward Matti.[129] The Court was not persuaded by this, finding that "*without more*, [a cause of general hostility] would define motive very broadly and cast a wide net . . . potentially encroaching on use of motive as propensity evidence."[130] Importantly, it concluded that something additional was necessary to establish the cause and effect relationship between the motive (cause) and the uncharged acts (effects) under the *Salvagni* analysis of weak motive.[131]

2. Modus Operandi

The Court used the modus operandi theory of admissibility to establish the link between the prior PFMA and Matti's death.[132] The Court began by citing *Daffin* and *Salvagni*, stating that a criminal's distinctive method of operating can be used to identify an defendant and past acts evidence may be offered to show that a defendant committed past bad acts with "a modus operandi strikingly similar to that of the charged act."[133] The Court compared the way in which Blaz's PFMA occurred with the manner in which Matti's death occurred, noting that Blaz's actions in both crimes showed "a pattern of resolving family issues with violence and demonstrate[d] his careless disregard for Matti's safety and wellbeing."[134] The Court observed that both Jennifer and Matti suffered injuries with "similar mechanics," namely, blunt force trauma to the head.[135] The Court also drew parallels between how both incidents took place inside of Blaz's home and both were directed at female family members.[136] The Court ultimately found Blaz's modus operandi consisted of: "(1) reacting to family problems, specifically with female family members, with violence; (2) attacking the heads of his victims; (3) striking his victims' heads against a broad or flat surface; and (4) attacking in the privacy of the family home."[137] Concluding that such a

128. *Id.*
129. *Id.* at 252–53.
130. *Id.* at 253 (emphasis added).
131. *Id.* at 252–53.
132. *Id.* at 253.
133. *Id.*
134. *Id.* (emphasis added).
135. *Id*.
136. *Id.*
137. *Id.*

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pattern of behavior was admissible under Rule 404(b), the Court found the evidence was properly admitted.[138]

B. The Dissent's Analysis and Reasoning

In her dissent, Justice McKinnon expressed concern about the Majority's reasoning and its implications for Rule 404(b), focusing on the Majority's treatment of the PFMA as modus operandi identity evidence.[139] She contended that "regardless of which theory of admissibility relied upon—that offered by the State, the District Court, or this Court—none are premised upon relevance that is sufficiently independent of the intermediate inference [of a character trait]."[140] Going on, she stated she would only address the Court's reasoning regarding Blaz's "criminal signature" and the "absence of mistake or accident," implying that she found the Court's weak motive analysis lacking as well.[141] Justice McKinnon characterized the pattern of behavior exhibited in the PFMA as "generic and characteristic of many crimes."[142] She pointed out numerous differences between the PFMA and the facts surrounding Matti's death: for example, Matti was not injured and apparently remained asleep throughout the PFMA offense, and the PFMA was directed toward an adult and not an infant.[143] She also noted differences in Blaz's state of mind between the two incidents. Blaz was drunk during the PFMA and sober on the day of Matti's death. The conduct that caused Matti's death was intentional, but no evidence demonstrated that Blaz intended to harm Matti in the PFMA.[144]

Justice McKinnon distinguished the facts of *Blaz* from *Daffin* and *Madplume*, noting that the past acts evidence admitted in those cases was more specific.[145] She further equated the past acts evidence presented in *Blaz* with those presented in *Sweeney* as being representative of non-distinctive or non-idiosyncratic behaviors, and therefore should be inadmissible as identity evidence.[146] Justice McKinnon stated the Court has "never allowed, as here, the admissions of prior acts evidence on the basis of a contrived 'linking' together of generic evidence," and that the ruling "distorted our precedent and the purposes underlying Rule 404(b), and opened the door to impermissible use of propensity evidence."[147] The Dissent ulti-

138. *Id.*
139. *Id.* at 256 (McKinnon, J., dissenting).
140. *Id.*
141. *Id.*
142. *Id.* at 257.
143. *Id.*
144. *Id.*
145. *Id.* at 257–58.
146. *Id.* at 258.
147. *Id.*

mately concluded that the PFMA evidence was improperly admitted and the case should be reversed and remanded for a new trial.[148]

V. Analysis

This section proposes that *Blaz* creates an ambiguous evidentiary standard for Montana cases dealing with identity evidence, and, through an analysis of the Court's reasoning and logic in linking weak motive evidence and modus operandi, that the Court created an essentially new, self-referencing type of identity evidence. Finally, this section concludes with an argument that this new type of identity evidence not only lowers the threshold for admitting past acts evidence, but it is also illogical.

A. Blaz *is Distinct from Previous Fact Patterns Regarding Identity Evidence*

In the specific context of using past act evidence under the modus operandi theory to infer identity, *Blaz* is unique as the first non-sex crime case in which the Court has affirmed the admission of only a single past act. Using multiple past actions to establish modus operandi is within the scope of Rule 404(b), as well as Montana case law, as *Daffin* illustrates.[149] Courts have admitted evidence of a single past act to prove modus operandi in sex-crime cases since *Kordonowy*.[150] *Madplume* follows this pattern as well, with a slight variation; there, the evidence at issue was a single previous instance of a defendant's attempted sexual assault, which was determined to follow the same modus operandi as his attempted sexual assault prior to murder.[151] It should be noted that despite Justice McKinnon's use of *Madplume* in her *Blaz* dissent, and the *Madplume* Court's analysis of the facts under a modus operandi framework, *Madplume* is not wholly analogous to the *Kardonowy* pattern because Madplume's identity was never disputed.[152] Recall that modus operandi evidence was at issue there because the district court bundled it together with other Rule 404(b) theories of admissibility.[153]

Blaz is the first Montana 404(b) case in which one past instance of domestic abuse was sufficient to establish a modus operandi theory of admissibility in a deliberate homicide case; previously the Court had only found a single past act to be sufficient for the modus operandi theory in

148. *Id.* at 259.
149. State v. Daffin, 392 P.3d 150, 155 (Mont. 2017).
150. State v. Kordonowy, 823 P.2d 854, 857 (Mont. 1991).
151. State v. Madplume, 390 P.3d 142, 149 (Mont. 2017).
152. *Id.* at 148.
153. *Id.* at 148–49.

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sexual assault cases.[154] If there is a theoretical "threshold" number of prior acts required to establish a modus operandi, *Blaz* can be seen as an expansion of the previous modus operandi cases in that a single instance of past domestic abuse was ruled sufficient.[155] Rule 404(b) does not militate a threshold number of prior acts, and no mainstream commentators discuss one. But, in Montana, *Blaz* indicates that one instance is now possibly sufficient—not just in sex-crime cases, but deliberate homicide cases as well. Standing alone, this is not too troubling; many jurisdictions routinely allow a single previous incident to be a sufficient indicator of modus operandi.[156] However, considered with the totality of the Court's holding in *Blaz*, a more expansive and problematic picture of what constitutes admissible past acts evidence emerges.

B. Blaz *is Distinct from Previous Fact Patterns Regarding Weak Motive Evidence*

In much the same way *Blaz* is distinct from previous cases in its application of the modus operandi theory, it is further distinct from other cases that have admitted the weak motive type of evidence. As the Montana Supreme Court only explicitly allowed evidence fitting the weak motive framework as recently as 2010 in *Salvagni*, there are few cases addressing it.

In *Salvagni*, the Court found that a host of violent and non-violent acts perpetrated against Vanyel could be explained by a common underlying motive: Anderson's desire to have had a boy instead of a girl.[157] The tightness with which Anderson rolled Vanyel in a blanket, her statements about wanting a boy, her rough handling of Vanyel, her "aggressive" behavior when Vanyel cried, and her anger over Vanyel's gender, all evidenced an underlying frustration and anger toward Vanyel.[158] This frustration and anger could be inferred to provide the underlying motive to explain why Anderson killed her daughter.[159] Consistent with the evidence rendered inadmissible in *Sweeney*, the Court held that such evidence would be an impermissible use of modus operandi by creating an assumption that Anderson

154. *Kordonowy*, 823 P.2d at 857.

155. State v. Blaz, 398 P.3d 247, 253 (Mont. 2017).

156. *See generally*, United States v. Smalls, 752 F.3d 1227 (10th Cir. 2014) (discussing how defendant's prior attempt to kill his wife by denying her an asthma inhaler was sufficiently similar to the charged crime of attempting to kill his cellmate by strangulation and blaming the death on asthma to establish a modus operandi); People v. Morales, 298 P.3d 1000 (Colo. App. 2012) (where a single uncharged act of robbery was sufficiently similar to charged acts to establish a modus operandi).

157. *Salvagni*, 246 P.3d 415, 431 (Mont. 2010).

158. *Id.* at 430.

159. *Id.* at 430–31.

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was likely an abusive mother and therefore probably killed Vanyel.[160] Still, the Court allowed this evidence to be used for identification purposes through another Rule 404(b) permissible use—motive. It stated that Anderson's prior acts "show that she had a motive to cause Vanyel's death, which strengthens the inference that she is the perpetrator of the charged homicide."[161] The phrase "inference that she is the perpetrator" speaks to identity and evinces the Court's use of a weak motive analysis.

The Court's treatment of weak motive evidence was already a contentious topic before *Blaz*, as *Crider* demonstrated.[162] Relying on *Salvagni*, the Court ruled that evidence of Crider's prior harassment and abusive treatment toward his girlfriend was properly admitted.[163] It found that the common motive underlying Crider's past acts and the sexual assault charge was one of "exerting power and control" over her.[164]

As in *Blaz*, Justice McKinnon dissented on the grounds that the Majority's weak motive analysis was simply a substitution for inadmissible propensity evidence.[165] Specifically, she stated that "[n]either the Court nor the State identifies a situationally specific basis for Crider's 'motive'; rather, [they] simply view Crider as someone who has a propensity—which [they] relabel as 'motive'—to act abusively toward his partner as a means of controlling her, as evidenced by his past conduct."[166]

Blaz stands out from *Salvagni* and *Crider* for several reasons, the primary one being that in *Blaz*, there was only a single past act proffered to supply the common motive. While a single, clearly similar past act may be enough to supply a modus operandi (as in *Madplume*), a single past act proffered to prove weak motive, while possible, stands on shakier ground. The *Blaz* Court stated: "Causes of general hostility or complete disregard for others, without more, would define motive very broadly and cast a wide net indeed for use of motive under Rule 404(b), potentially encroaching upon the impermissible use of motive as propensity evidence."[167] In *Blaz*, these motives of "general hostility" and "complete disregard for others" were based upon Blaz's prior PFMA; therefore, the Court seems to imply that a sole past act to supply weak motive will likely be insufficient on its own to be admitted under Rule 404(b).[168]

160. *Id.* at 431.
161. *Id.*
162. State v. Crider, 328 P.3d 612, 620 (Mont. 2014).
163. *Id.* at 619–20.
164. *Id.* at 620.
165. *Id.* at 628 (McKinnon, J., dissenting).
166. *Id.*
167. State v. Blaz, 398 P.3d 247, 253 (Mont. 2017) (internal quotation marks omitted).
168. *Id.* at 252–53.

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Secondly, *Blaz* is distinct from previous weak motive cases because the victim of the charged act, Matti, was different from the victim of the past act, Jennifer.[169] The Court stated that Matti was a victim of the violent acts in both cases, as Jennifer was holding her when Blaz attacked her.[170] That very well may be true; however, Matti was unharmed in the PFMA, and the act that caused Blaz to lash out was Jennifer's taking Matti from him.[171] The target of the PFMA was Jennifer, though Matti ended up being a victim as well. However, there is support for the admission of weak motive evidence when different parties are involved in the past act and the charged act: "The prosecutor's case for admissibility is strongest when the sole object of the hostility is the victim . . . [t]here must be some relationship between all the victims. Otherwise, the evidence would show only the defendant's general violent nature."[172] The Court in *Blaz* expanded what "some relationship between all the victims" entails, and thus expanded its rulings in *Crider* and *Salvagni*.

C. Blaz*,* Salvagni*, and the Distinction Between Two Types of Identity Evidence*

Justice McKinnon speaks of a "contrived link" in the Majority's opinion, which she fears will open the door to otherwise impermissible use of propensity evidence in Montana.[173] She states that "[the Court] ha[s] never allowed, as here, the admission of prior acts evidence on the basis of a contrived 'linking' together of generic evidence."[174] The Majority's "contrived link," according to Justice McKinnon, is the link between theories of admissibility, not a link between the facts of Blaz's crimes.[175] As the Majority put it: "In this case, linking *motive evidence* with pattern and identity evidence creates a clear picture of Blaz's '*criminal signature*.'"[176] This section explores the Majority's "contrived link."

1. The Motive Evidence Introduced by the State is Explicitly Character Evidence

The Court was correct in its wariness to accept the State's argument that Blaz's prior PFMA evidenced an underlying motive of a "complete disregard" or "general hostility" toward Matti, which would lead him to kill

169. *Id.* at 252.
170. *Id.* at 253.
171. *Id.* at 257.
172. IMWINKELRIED, *supra* note 18, § 3:18. **R**
173. *Blaz*, 398 P.3d at 258 (McKinnon, J., dissenting).
174. *Id.* (internal citations omitted).
175. *Id.* at 253.
176. *Id.* (emphasis added).

her, because it "potentially encroach[ed] upon the impermissible use of motive as propensity evidence."[177] The Court ruled that the district court erred when it admitted the evidence; instead of "potentially encroaching" upon impermissible propensity evidence, it was simply pure propensity evidence.

Imwinkelried, in the same treatise from which the Court previously adopted its weak motive analysis, explained the difference between motive and propensity: "Motive qualifies as a legitimate noncharacter theory; although character 'carries a connotation of an enduring general propensity,' a motive is 'a situationally specific emotion.'"[178] Under this definition, both of the State's arguments to justify the admission of this evidence—that Blaz had a "complete disregard" toward Matti's wellbeing and that he had a "general hostility" toward Jennifer and Matti—fail. If Blaz did indeed have a "complete disregard" for Matti's safety and wellbeing, there would be no situationally specific emotion.[179] Blaz made this point in his reply brief: "'Disregard' merely means '[t]o ignore,' '[t]o treat without proper attention,' or 'neglect'." Blaz's alleged "disregard" for his daughter displayed during the PFMA would not have spurred Blaz to action or given him a reason or desire to take the affirmative action of killing her.[180]

At oral argument, the State contended that Blaz's underlying motive was his "general hostility" toward Matti and Jennifer.[181] Even so, a "general hostility," as the State described, does not demonstrate a motive (i.e., a "situationally specific emotion")[182] as to why Blaz would either assault his wife or kill his child.[183] It demonstrates only that he has a trait of "general hostility" and is inclined to act upon it. In other words, he has a propensity to act in conformity with a character trait. This is illustrated through Blaz's actions during the PFMA: he only became violent toward Jennifer once she

177. *Id.* at 252–53.

178. IMWINKELRIED, *supra* note 18, § 3:15. It is notewowrhty, however, that the *Blaz* Majority used a definition of motive drawn from *Black's Law Dictionary*: **R**

> [S]omething . . . that leads one to act." Black's Law Dictionary 1172 (Bryan A. Garner ed., 10 ed. 2014) . . . '[t]he term "motive" is unfortunately ambiguous. That feeling which internally urges or pushes a person to do or refrain from doing an act is an emotion, and is of course evidential toward his doing or not doing the act." . . . (quoting John H. Wigmore, A Students' Textbook of the Law of Evidence 76 (1935)).

Blaz, 398 P.3d at 252. While this might be an acceptable definition of motive in the colloquial sense, because it dates from 1935, it fails to adequately account for the use of the word "motive" in the more specific Rule 404(b) context, which did not fully emerge until the middle of the 20th Century.

179. App.'s Response Br. at 25, *State v. Blaz*, https://perma.cc/KL4S-QE2R (Mont. Nov. 6, 2016) (No. DA 14-0807).

180. Appellant's Reply Br. at 3, *State v. Blaz*, https://perma.cc/UA83-TXUX (Mont. Jan. 30, 2017) (No. DA 14-0807) (internal citations omitted).

181. *State v. Blaz*, Audio of Oral Argument at 27:55 (May 1, 2017), *available at* https://perma.cc/ME8A-ZFEG.

182. IMWINKELRIED, *supra* note 18, § 3:15. **R**

183. Audio of Oral Argument, *supra* note 181. **R**

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took Matti from him.[184] Blaz's underlying motive could, for example, be jealousy of Jennifer's relationship with Matti or anger when the child is taken without asking. However, to say that his "general hostility" *caused* Blaz to assault his wife and kill his child is inaccurate. Blaz's motive, if any exists, remains unknown. The State's theory of "general hostility" indicates instead that Blaz had an "enduring general propensity"—a character trait—that could be triggered by one cause or another.[185] This propensity for hostility that culminates in violence is inadmissible character evidence under Rule 404(b).

2. The Court's Combination of Motive and Modus Operandi Analyses Rests on Circular Reasoning

While both weak motive and modus operandi evidence may be offered to prove the identity of a defendant, both types of evidence rely on fundamentally different logical justifications for admission and are not co-dependent or reinforcing. Weak motive and modus operandi evidence may be introduced independently in the same case; however, their logical underpinnings do not support merging them like the *Blaz* Court did.

Weak motive deals with a "situationally specific emotion"[186] present in both the past act and the charged act.[187] Anderson's treatment and statements about Vanyel indicate an underlying motive of resentment and frustration toward Vanyel, giving Anderson a reason to kill her.[188] The effects of this motive evidence (the past acts sought to be introduced) were a series of remarks and actions that took the form of non-distinctive verbal and physical abuse—yelling at Vanyel, hitting Vanyel's head on objects, and wishing for Vanyel to have been a boy— that ultimately led to the child's murder. The factfinder, then, is left to infer that both the charged act and uncharged acts stem from the same underlying cause: the motive.[189]

In a weak motive analysis, every effect is the result of the same underlying cause. Again, per Imwinkelried:

> [Weak motive] is the cause, and both the charged and uncharged acts are effects. Both crimes are explainable as a result of the same motive. [T]he uncharged act [shows] the existence of the motive, and in turn the motive strengthens the inference of the defendant's identity as the perpetrator of the charged crime.[190]

184. State v. Blaz, 398 P.3d 250 (Mont. 2017).

185. IMWINKELRIED, *supra* note 18, § 3:15. **R**

186. *See* Salvagni, 246 P.3d 415, 430 (Mont. 2010); *see also* IMWINKELRIED, *supra* note 18.

187. *See Salvagni*, 246 P.3d at 431; *see also* IMWINKELRIED, *supra* note 18.

188. *Salvagni*, 246 P.3d at 430.

189. IMWINKELRIED, *supra* note 18, § 3:18; *Blaz,* 398 P.3d at 252. **R**

190. IMWINKELRIED, *supra* note 18, at § 3:18. **R**

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One way to conceptualize the inference made in a weak motive analysis is through the following equation: ((cause 1 = effect 1) + (cause 1 = effect 2) + **(cause 1 = effect 3)**) = D.[191] Here, "cause 1" is the motive, "effects 1 and 2" are the uncharged acts, and the bolded "effect 3" represents the charged act. "D" represents the defendant's identity. Using the uncharged acts from *Salvagni*, the input would look like this:

Cause 1 = motive (frustration with and resentment toward Vanyel)

Effect 1 = hitting Vanyel

Effect 2 = wrapping Vanyel unreasonably tightly

Effect 3 = charged act that led to Vanyel's death

D = Anderson, the identity of the offender

Modus operandi, on the other hand, concerns "effects" (the past acts) in and of themselves. It is irrelevant what motivates a person's modus operandi, so long as that the effects—the past acts and charged acts—are the same. *Madplume* provides a clear example of this. Madplume displayed a clear modus operandi of: (1) bringing his victims to the same private hotel room; (2) encouraging his victims to drink alcohol; (3) bringing along a younger relative to make the victim feel more comfortable; (4) creating a situation where he and the victim were alone; and (5) once alone, attempting to engage in sexual contact with or otherwise assaulting the victim.[192] The motive for each assault is irrelevant. In one instance, the motive could be a need for Madplume's own sexual gratification, and in the other, the motive could be a desire to kill or injure the victim. The defining characteristic is the distinctiveness of the effect—the similarity in how the two victims were isolated and assaulted.

An equation to represent modus operandi would therefore be distinctly different from the weak motive equation that can be found in *Salvagni*. Taking into account the focus on the similarity in "effects" rather than "causes," the equation representing a modus operandi inference would look like: ((effect 1 = 1+2+3+4+5) + **(effect 2 =1+2+3+4+5)**) = D, where "effect 1" is the past act, and the subsequent numerals represent the distinct ways in which the act was carried out. The bold portion represents the charged act ("effect 2") and the ways in which it was carried out (bold numerals), and D is the defendant who is identified by the criminal signature of each act.[193] The input in using facts from *Madplume* would look like this:

191. This equation and the ones that follow are an attempt by the author to put Imwinkelried's and the Court's explanations of motive and modus operandi in an easier to visualize and somewhat more analytical format.

192. State v. Madplume, 390 P.3d 142, 149 (Mont. 2017).

193. Therefore, the numerals in each half of the equation, i.e., the components of the criminal signature of each past act, must be the same for there to be a modus operandi.

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Effect 1 = sexual assault of victim 1

Effect 2 = assault and death of victim 2

1–5 = the modus operandi described above

D = Madplume, the identity of the offender

While it is true that weak motive and modus operandi can reinforce and complement each other, that reinforcement can only be logically accomplished when each theory of admissibility is independently valid and does not rely on the other. The underlying rationale of Rule 404(b) and the jurisprudence that flows from it is to ensure that past acts evidence is not used to prove a defendant's propensity to commit a charged act.[194] Without the distinctive, identifying, criminal signature of a true modus operandi, the jury learns about the defendant's previous bad act but is left with a gap in logic as to why the act demonstrates that the defendant committed the charged act. The fear is that the jury will fill in that gap with the defendant's character trait. Likewise, as mentioned by Imwinkelried and alluded to by the *Blaz* Court, a purported underlying motive shared by both charged and uncharged acts that fails to establish a "situationally specific emotion" could lead the jury to replace a defendant's motive with the defendant's propensity to act in accordance with a character trait.[195]

In *Blaz*, the Court stated that, because a weak motive of "general hostility" bordered on impermissible character evidence, "something further" is needed to show a "cause and effect" relationship:

> However, to conclude that the acts at issue here 'can be explained by the same motive,' or that both acts 'are effects,' of the 'causes' of general hostility or complete disregard for others, without more, would define motive very broadly and cast a wide net indeed for use of motive under Rule 404(b), potentially encroaching upon the impermissible use of motive as propensity evidence. We conclude that something further is necessary to demonstrate a cause and effect relationship.[196]

The Court would find modus operandi to be that "something further."[197] Although the Court would describe this evidence as "identity and pattern," the actual methodology that is linked to their motive analysis is unmistakably modus operandi:[198]

> Under Rule 404(b), identity and pattern often overlap because unique behavior patterns can be used to establish identity. As we noted in *Daffin*, evidence of 'distinctive or idiosyncratic methods' can illustrate 'criminal

194. MONT. R. EVID. 404 comm'n cmt. (June 1990 amend. to subdiv. (b)).

195. IMWINKELRIED, *supra* note 18, §§ 3:15, 3:18 (citing LEMPERT & SALTZBURG, *A Modern Approach to Evidence*, 226 (2nd ed. 1982)); State v. Blaz, 398 P.3d 250, 253 (Mont. 2017). **R**

196. *Blaz*, 398 P.3d at 252–53 (internal citations omitted).

197. *Id.* at 253.

198. *Id.*

> signatures' and demonstrate a pattern, which can be used to identify a specific individual. In some instances, the evidence may be 'offered to identify the defendant by showing that she committed the uncharged act with a modus operandi strikingly similar to that of the charged act.' In this case, linking motive evidence with pattern and identity evidence creates a clear picture of Blaz's 'criminal signature.'[199]

As above, a formula can be used to express the relationship the Court ultimately finds in *Blaz*. Assuming that the weak motive evidence offered by the State is not actually character propensity evidence, the Court created what Justice McKinnon characterized as the "contrived link" between evidentiary theories by importing motive into its modus operandi analysis.[200] While the Court is not specific about where the weak motive theory of admissibility is linked, the link appears to be made by placing the alleged motives of "general hostility" and "complete disregard for Matti's wellbeing" into a modus operandi framework that traditionally deals solely with effects. Specifically, when the Court states that "[f]acets of Blaz's PFMA were similar to facets of the crime alleged here . . . Blaz's earlier action illustrates a pattern of *resolving family issues with violence* and demonstrates his *careless disregard* for Matti's safety and wellbeing."[201]

The cause and effect formula the Court creates here thus seems to be a combination of the weak motive and modus operandi formulas previously discussed. However, by inserting a weak motive analysis into a modus operandi analysis, the Court is creating a self-proving, circular equation, in which the same facts are both a cause and effect used to identify the defendant. The rather complex equation is: ((cause 1 = (effect 1 = (cause 1)+2+3+4)) + **(cause 1 = (effect 2 = (cause 1) + 2 + 3 + 4))** = D.

Cause 1 = motive[202]

Effect 1 = PFMA

Effect 2 = Matti's homicide

2 = "attacking the heads of his victims"[203]

3 = "striking his victims' heads against a broad or flat surface"[204]

4 = "attacking while in the privacy of the family home"[205]

D = Blaz, the identity of the offender

199. *Id.* (internal citations omitted).

200. *Id.* at 258 (McKinnon, J., dissenting).

201. *Id.* at 253 (emphasis added).

202. It is immaterial here whether the motive is "general hostility," "complete disregard," or both, because any motive inserted here will, later in the equation, be used to essentially prove itself— a logically shaky proposition that risks the underlying motive justifying itself as true.

203. *Blaz*, 398 P.3d at 253.

204. *Id.*

205. *Id.*

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Written out, the equation can be expressed as such: Blaz is identifiable as the perpetrator of both the PFMA and the homicide. Blaz's motive for the PFMA was his "general hostility" toward Matti and Jennifer, the effects of which were: Blaz's general hostility; attacking the heads of his victims; striking his victims' heads against a broad or flat surface; and attacking in the privacy of his home. The motive for the homicide was Blaz's "general hostility" toward Matti and Jennifer, the effects of which were: Blaz's general hostility; attacking the heads of his victims; striking his victims' heads against a broad or flat surface; and attacking in the privacy of his home.

Here, it appears that the Court confusingly created a cause and effect relationship that is based upon Blaz's motive being both a cause and the effect of Blaz's "criminal signature." Even assuming a valid weak motive theory, there does not appear to be a logical way in which something can be both a cause of and effect of itself.

Taking into account the likelihood that the weak motive evidence was actually propensity evidence, the Court's analysis raises additional questions. By inserting "character propensity" in place of "motive" in the equation above, the Court is twice creating an inference of the identity of the defendant through an alleged tendency to act in a certain way, through both the weak motive theory and the modus operandi theory. The Court has held that 404(b) prohibits "[u]sing propensity evidence to draw 'the inference from bad act to bad person to guilty person.' [The] prohibition 'applies only when that ultimate inference [of conduct] is coupled with the intermediate inference of the defendant's personal, subjective character.'"[206] That is precisely what happened in *Blaz*. Essentially: Blaz's general hostility toward female family members motivated him to perform his signature criminal trait, which includes reacting to a family problem with general hostility, attacking Matti's head, etcetera. This is coupling an ultimate inference of conduct with a defendant's character trait, which Rule 404(b) prohibits.

Going forward, it is unlikely that the equation above will be used by the Court in the future; it is merely meant to illustrate how the Court analyzed and rationalized the admission of Blaz's past PFMA. To that end, the formula above may be of use to practitioners as a framework to consistently apply the Court's holding in *Blaz*.

3. Blaz *Establishes a Lower Threshold for the Admission of Identity Evidence*

The Court has previously expressed a willingness to broaden the use of propensity evidence, so its decision in *Blaz* is not a complete surprise. In his

206. State v. Crider, 328 P.3d 612, 619 (Mont. 2014).

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dissenting opinion in *State v. Aakre*,[207] Justice Rice stated that "if [he] were intent on changing [Rule 404(b)] to reflect a policy preference, [he] would first consider the enormous challenge faced by a young, vulnerable, abused child who must carry the evidentiary load for the State."[208] While Justice Rice was discussing a case resting on different Rule 404(b) theories of admissibility than those in *Blaz*—in *Aakre* a child was killed, and the defendant implicated another child as the perpetrator—the sentiment he expressed is equally applicable.[209] Justice Rice stated that he believed such a change would allow both public policy and the "purpose" of Rule 404(b) to be served.[210] Taken in conjunction with *Blaz*, this statement suggests at least one Justice is receptive to the use of propensity evidence when the complaining witness is either a minor or deceased, or both, as was the case in *Blaz* and *Salvagni*.

However, the *Blaz* decision ultimately seems to encompass more than the concerns Justice Rice raised in *Aakre*. When the above analyses of the Court's interpretation of "motive" and "modus operandi" are combined, a picture emerges that reflects Justice McKinnon's concern that *Blaz* will allow propensity evidence going forward.[211] Courts will admit a single, generalized past act as evidence of both a criminal signature and common underlying motive as long as the prosecutor can strengthen or link such identity evidence through some other Rule 404(b) theory of admissibility. This would be a diversion from the previous high standard found in *Kordonowy* and *Madplume*, and the high standard that the Court found the State failed to meet in *Sweeney*. Due to the circular nature of *Blaz*'s theory, as well as how it connects a "cause"-focused theory of weak motive to the "effect"-focused theory of modus operandi, the Court seems to have created a fundamentally new theory of admissibility.

Whether *Blaz* means the theory "linked" to modus operandi must remain the weak motive theory or if it can be expanded to others remains to be seen. For now, precedent appears to limit that link solely to the motive theory of admissibility, though the Court has given no explicit limitation in that regard. Going forward, an analysis of the Court's reasoning on other theories of admissibility used in *Blaz*, as well as its analysis of Montana Rule of Evidence 403, will be necessary to determine the full extent of the change in admissibility ushered in by *Blaz*.[212] Further, the nature of the link between weak motive and modus operandi allows for a cause-and-effect

207. 46 P.3d 648 (Mont. 2002).

208. *Id.* at 657 (Rice, J., dissenting).

209. *Blaz*, 398 P.3d at 251.

210. *Aakre*, 49 P.3d at 657 (Rice, J., dissenting).

211. *Blaz*, 398 P.3d at 255 (McKinnon, J., dissenting).

212. MONT. R. EVID. 403 (this rule allows exclusion of evidence when its probative value is outweighed by potential prejudice).

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relationship in which a proposed underlying motive can be used to prove itself. Ultimately though, *Blaz* is a clear expansion on the permissible inferences regarding whether a defendant's past actions establishes his identification as the perpetrator of a charged crime.

VI. Conclusion

What emerges from *State v. Blaz* is a situation in which the applicability of Rule 404(b) in Montana is drastically expanded. To be sure, there are reasons why such an expansion may be necessary in certain areas, particularly in domestic abuse cases. It is no secret that a person who commits one act of domestic abuse is likely to commit another.[213] Two commonly proposed methods of addressing this issue are statutory provisions singling out domestic violence as partially or wholly exempt for 404(b) and through court decisions addressing domestic violence specifically as it relates to the standards of 404(b) theories of admissibility.[214] The Federal Rules of Evidence have taken the former approach to an extent and have been amended to have separate sections modifying Rule 404 for cases involving certain sex crimes.[215] Those amended Rules allow for the use of past acts evidence in criminal and civil cases involving sexual assault or child molestation and contain narrow descriptions of what should constitute those offenses.[216] Notably, they also require that the defense be put on notice that such evidence will be proffered at least 15 days before trial.[217] At the state level, similar legislation has been enacted by California, Illinois, and Connecticut.[218] Montana might take note from Illinois's statute, which goes so far as to allow into evidence past acts of domestic violence, as well a defendant's previous acts that resulted in a conviction if the victim is same in the prior conviction and the charged offense.[219] A similar rule in Montana, specifically carving out instances of sexual assault or domestic violence, could be a fine-tuned solution to the problem these endemic issues present. As it stands, the Court has taken a carving knife to issues more suited for a scalpel.

Blaz allows for more past acts evidence to be admitted in domestic abuse cases and will probably result in convictions of defendants who are likely to commit domestic abuse in the future. However, nothing in *Blaz*,

213. Sarah J. Lee, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. Haw. L. Rev. 221, 241 (1998).

214. *Id.*

215. Fed. R. Evid. 413–415.

216. *Id.*

217. Fed. R. Evid. 413(b), 414(b), 415(b).

218. Cal. R. Evid. § 1108; Ill. R. Evid. 413; Conn. R. Evid. § 4–5(b).

219. Ill. R. Evid. 413(b)–(c).

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the case law that forms its basis, or precedent's underlying logic limits this new lower standard solely to domestic abuse cases. The past acts of any defendant can now be subject to the tortured link the Court established between weak motive evidence and modus operandi evidence.

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