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THE MODIFIED JUST RULE: A NEW STANDARD FOR THE ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS UNDER RULES 403 AND 404(b) OF THE MONTANA RULES OF EVIDENCE

Robert Cameron*

I. INTRODUCTION

An individual is arrested and charged with burglary and theft. The accused was arrested four years ago for burglary, but not convicted. Six months before the alleged burglary and theft the accused was convicted of writing bad checks and is currently under investigation for spouse abuse. May the state introduce evidence of the accused's other crimes, wrongs, or acts in its burglary/theft prosecution? ¹

In Montana other crimes evidence² has been subject to widely varying standards of admissibility. The Montana Supreme Court has been extremely inconsistent in its application of the other crimes rule over the years. The law has changed again significantly.

Rule 404(b) of the Montana Rules of Evidence provides:

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.³

From 1979 to 1991, Montana law mandated that other crimes evidence was admissible under Rule 404(b) only if it met the four criteria of the Just Rule.⁴ Just required the party offering the evi-

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¹ For reasons more fully discussed infra, the court would probably find that the prior burglary is too remote in time to be relevant; the incident involving the accused's writing bad checks is too dissimilar to the pending charges; and the alleged spouse abuse is too dissimilar to the pending charges, and unduly prejudicial. Thus, none of the other crimes evidence would be admissible.

² Such evidence, although often described as other crimes evidence, extrinsic acts evidence, or bad acts evidence, includes all evidence of other crimes, wrongs or acts. Such acts need not be wrongful or criminal in nature. State v. Gilpin, 232 Mont. 56, 65, 756 P.2d 445, 450 (1988). The author intends references to "other crimes evidence" to include all evidence of other crimes, wrongs or acts.

³ MONT. R. EVID. 404(b).

⁴ State v. Just, 184 Mont. 262, 602 P.2d 957, 961 (1979). In 1979 the court adopted a four-element test to determine the admissibility of other crimes evidence. This test, commonly referred to as the Just Rule, is based on three criteria identified in State v.
dence to demonstrate that the other crimes, wrongs or acts (1) were similar in nature; (2) were not remote in time; (3) tended to establish a common scheme, plan or system; and (4) the probative value of the evidence was not substantially outweighed by its prejudice to the party against whom the evidence was offered.6

In State v. Matt6 the court modified the admissibility criteria for evidence of other crimes.7 Specifically, the court eliminated the third element of the Just limitation, which required a showing of a common scheme, plan or system.8

This comment reviews the history of other crimes evidence in Montana and explores the current status of other crimes evidence as enunciated in State v. Matt.9 Next, a comparison of case law governed by the original Just Rule with cases under the Modified Just Rule demonstrates the extent to which the modified rule departs from its predecessor. An examination of the adequacy of the procedural protections of the Modified Just Rule explores the degree to which defendants are afforded protection from unfair prejudice. Additionally, this article addresses the need for the Montana Supreme Court to render more consistent decisions regarding the admissibility of other crimes evidence. Finally, this comment suggests substantive and procedural schemes which place increased emphasis on the plain language of the Montana Rules of Evidence, as a means through which the courts can achieve a proper balance between the competing interests of defendants and prosecutors when Rule 404(b) questions arise.

II. HISTORICAL OVERVIEW OF THE ADMISSIBILITY OF OTHER CRIMES, WRONGS OR ACTS

During the past forty years, the Montana Supreme Court has alternatively contracted and expanded the circle delineating the scope of admissible other crimes evidence in criminal proceedings.10 The court’s adoption of the Modified Just Rule in Matt11 is


8. Matt at ___, 814 P.2d at 56.

9. Id. at ___, 814 P.2d at 52.

10. No Montana Supreme Court case has, to date, answered the question of whether Rule 404(b) applies in the civil context. The court has, however, described the original Just Rule as “a four element rule to determine the admissibility of evidence of other crimes, wrongs or acts in criminal prosecutions.” State v. Matt, ___ Mont., ___, 814 P.2d 52, 55.
the latest chapter in the ever-changing status of the other crimes rule in Montana.

In the early 1900s Montana followed the common law rule that held other crimes evidence inadmissible if offered for the sole purpose of showing that a party had a bad character. Other crimes evidence would not necessarily be excluded if it incidentally cast a party's character in a bad light. The Montana Supreme Court followed the common law rule that held evidence of a distinct and independent offense generally inadmissible; however, such evidence could be admissible if it tended to show an accused's uniform plan or action, to prove identity, knowledge, intent, or to disprove inadvertence or mistake.

In 1951, however, the Montana Supreme Court in *State v. Sauter* launched its departure from the practice followed in most American jurisdictions. In *Sauter* the trial court admitted witness testimony of a prior rape involving the accused and a different victim. The Montana Supreme Court reversed Sauter's conviction, holding that the evidence failed to establish a systematic scheme or plan and was thus inadmissible. *Sauter* established a rule that barred evidence of an accused's prior sex crimes. Later, the court interpreted *Sauter* as prohibiting the admission of other crimes evidence for any purpose, regardless of the circumstances. The applicability of Rule 404(b) in the civil context was brought before the Montana Supreme Court in *Smith v. Roosevelt County*, 242 Mont. 27, 36, 788 P.2d 895, 901 (1990). The court refused to address the merits of the issue, raised for the first time on appeal, because the plaintiff failed to object to the Rule 404(b) jury instruction at the district court level. *Id.*


12. *See, e.g., State v. Cesar, 72 Mont. 252, 255, 232 P. 1109, 1109 (1924); State v. Hopkins, 68 Mont. 504, 510, 219 P. 1106, 1108 (1923).*
13. *Id.*
17. *Id.* at 112, 232 P.2d at 732.
18. *Id.* at 113, 232 P.2d at 733.
19. *State v. Searle, 125 Mont. 467, 471, 239 P.2d 995, 997 (1952).* As Justice Metcalf's dissent in *Searle* indicates, "we now learn that the rule [promulgated in *Sauter*] is a flat
Searle decision's absolute ban on all other crimes evidence thus placed Montana in a unique position among American jurisdictions.

The Montana Supreme Court began a retreat from the peculiar Sauter-Searle rule in the early 1960s. In State v. Merritt the court recognized the existence of certain extremely limited exceptions to the general rule excluding other crimes evidence, but the exceptions could apply only when the other crime was closely connected to the crime charged. Merritt and subsequent decisions thus blurred the distinction between the other crimes rule and the transaction rule.

Montana's turning point in the admissibility of other crimes evidence occurred in 1969 in State v. Jensen. In Jensen the court established a three-element test to determine whether other crimes evidence could properly be admitted: (1) Similarity, (2) Nearness in time, and (3) Tendency to establish a common scheme, plan or system. The court in Jensen specifically overruled State v. Searle to the extent that Searle held evidence of other crimes as always inadmissible.

On July 1, 1977, the Montana Rules of Evidence, including Rule 404(b), took effect pursuant to Montana Supreme Court order. The Montana Supreme Court Commission on Rules of Evidence adopted the final draft of Rule 404 of the Federal Rules of Evidence declaration that evidence of other crimes is not admissible for any purpose. This constitutes a reversal of many precedents in the criminal law of this state." Id. at 479-80, 239 P.2d at 1001 (Metcalf, J., dissenting).


22. The transaction rule is essentially the res gestae doctrine; i.e., any declaration, act or omission which forms a part of the litigated event, or transaction, is admissible. Mont. Code Ann. § 26-1-103 (1991). In State v. Rollins, 149 Mont. 481, 483, 428 P.2d 462, 463 (1967), the court noted an exception to the general rule that other crimes evidence is inadmissible, when a criminal act is so closely related to the act for which the defendant is charged as to form a part of the res gestae. The Montana Supreme Court later acknowledged that other crimes evidentiary rules simply have no application where the purported other crime is inextricably or inseparably linked with the crime charged. State v. Romero, 224 Mont. 431, 438, 730 P.2d 1157, 1162 (1984). More recently, however, the court returned to a Rollins type of analysis, holding that other crimes evidence may be introduced if it is "inextricably or inseparably related to the crime charged." State v. Wolfe, --- Mont. ---, 821 P.2d 339, 346 (1991).


24. Jensen at 239, 455 P.2d 634.

25. Id. at 239, 455 P.2d at 634.

26. Sup. Ct. Ord. 12729. Under the 1972 Montana Constitution, art. VII, § 2, par. 3, the Montana Supreme Court has the power to "make rules governing appellate procedure, [and] practice and procedure for all other courts."
Evidence for the purpose of uniformity with the federal rule.\textsuperscript{27} The Commission also intended that "there be no change in the admissibility of such evidence under existing Montana law."\textsuperscript{28} The adoption of Rule 404(b) did not affect the status of case law developed before the rule became operative. Accordingly, the Montana Supreme Court has not hesitated to rely on pre-1977 case law\textsuperscript{29} to support post-1977 decisions.

The other crimes rule enunciated in \textit{Jensen}\textsuperscript{30} remained effective for ten years, and was revised by the Montana Supreme Court in \textit{State v. Just}.\textsuperscript{31} From \textit{Just} emerged a four-element test to determine the admissibility of evidence of prosecution for other crimes.\textsuperscript{32} The \textit{Just} test was an amalgam of the three elements set forth in \textit{Jensen}, plus the provisions of the recently adopted Rule 403 of the Montana Rules of Evidence.\textsuperscript{33}

\textbf{III. \textit{State v. Matt}: An Expansion of the Scope of Evidence Admissible Under Rule 404(b)}

On November 10, 1988, Allen Ray "Speedy" Matt went to the office of the Flathead Irrigation Project.\textsuperscript{34} At the Project office, Matt attempted "to get money for a windshield that he claimed had been damaged by one of [the Irrigation Project] trucks."\textsuperscript{35} When Matt failed to get the money, he threw a rock through a Project office window.\textsuperscript{36}

A tribal officer went to Speedy Matt's residence later that day to discuss the incident at the Irrigation Project.\textsuperscript{37} An altercation occurred between Matt and the tribal officer, resulting in Matt's arrest.\textsuperscript{38} Matt continued to resist, escaped from the officer, and returned to his house.\textsuperscript{39} Matt shortly thereafter came out brandishing a knife and another fight ensued; the officer suffered injuries.\textsuperscript{40} Other officers arrived, and Matt was placed in a police
vehicle. Matt repeatedly kicked the door of the vehicle, was removed from the vehicle and was finally subdued. Matt was convicted of felony assault following a jury trial; he then appealed the verdict to the Montana Supreme Court.

A central issue on appeal was whether the trial court properly admitted testimony concerning Matt's altercation with law enforcement in Okanogan County, Washington, which occurred three months before the Montana incident. The prosecution argued that the evidence of the Washington altercation was relevant to show Matt's state of mind or intent at the time of the alleged assault. The prosecution contended this was admissible under Rule 404(b) of the Montana Rules of Evidence. The defense argued that such evidence did not establish a common scheme, plan or system, and therefore did not satisfy the requirements of the Just Rule. Thus the trial court's admission of the evidence, the defense asserted, was reversible error.

After surveying the development of the Just Rule, the Montana Supreme Court determined that the other crimes rule in recent years had unduly narrowed the scope of evidence admissible under Rule 404(b). Specifically, the court recognized “that evidence of other crimes, wrongs or acts may be admissible for many other purposes, including those specifically listed in Rule 404(b), as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The court concluded that the Just Rule should be modified. The Modified Just Rule as adopted in State v. Matt states:

1) The other crimes, wrongs or acts must be similar.
2) The other crimes, wrongs or acts must not be remote in time.
3) The evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

41. Id.
42. Id.
43. Id. at ___, 814 P.2d at 53.
44. Id. at ___, 814 P.2d at 54.
45. Id. at ___, 814 P.2d at 54-55.
46. Id. at ___, 814 P.2d at 55.
47. Id. at ___, 814 P.2d at 54.
48. Id.
49. Id. at ___, 814 P.2d at 55.
50. Id. at ___, 814 P.2d at 56.
51. Id.
4) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 52

Consequently, under the Modified Just Rule, failure of the other crimes evidence to demonstrate a common scheme, plan or system no longer precludes admission of the evidence in Montana courts. The Montana Supreme Court now recognizes that the Just element described as “common scheme, plan or system” is to be classed as a “plan” under Rule 404(b). 53 A showing of common scheme, plan or system is now viewed as merely one of the many purposes for which other crimes evidence may be admitted.

A. Analysis of the Modified Just Rule, Contrasted with the Original Just Rule

1. Similarity—The First Element

The Original Just Rule:

The prosecution must show the similarity of the other crimes or acts. 54

The Modified Just Rule:

The other crimes, wrongs or acts must be similar. 55

The Montana Supreme Court’s inconsistent application of the similarity element is perhaps best illustrated by State v. Hansen, 56 a case involving an appeal from a conviction of sexual intercourse without consent. The defendant (Hansen), a friend of Hansen’s, and the complaining witness (Birdsall) met in a bar; the three then traveled to an isolated area to smoke marijuana after the bar closed. 57 According to Birdsall’s testimony, Hansen’s companion passed out; Hansen then made sexual advances toward her. 58 Birdsall testified that when she resisted, Hansen attacked her, twisted her thumb against her wrist, and raped her. 59

At trial another witness testified that two and one-half years
previously, she had accepted a ride home from the defendant after the bars closed, and that the defendant drove her to an isolated location where he made sexual advances toward her. The witness testified that when she resisted, the defendant attacked her, twisted her thumb against her wrist, and raped her. The defendant was convicted of aggravated assault as a result of this earlier attack.

The sole issue on appeal in *Hansen* was whether the trial court committed reversible error in admitting the evidence of the earlier sexual assault. Incredibly, the Montana Supreme Court found that the prior sexual assault was not sufficiently similar to the attack on Birdsall to meet the similarity requirement of the Just Rule. The court focused on differences such as the presence of the defendant’s passed-out companion during the second attack, and the fact that the defendant had not met the victim before that evening, whereas in the earlier incident, no passed-out third parties were present, and the defendant knew the victim fairly well. Hearkening back to *Sauter*, the court in *Hansen* observed: “Sexual acts, whether rape or no rape, originating in barroom pickups, powered by the urge, and consummated in automobiles, are entirely too common in this day and age to have much evidentiary value in showing a systematic scheme or plan.” Consequently, the prior rape was held to be so dissimilar that the trial court committed reversible error in admitting evidence of the earlier incident.

60. *Id.* at 94, 608 P.2d at 1085.
61. *Id.*
62. *Id.*
63. *Id.*
64. The court in *Hansen* noted that:
   Numerous rapes follow the pattern of barroom pickup, voluntary entry into the offender’s vehicle by the victim, driving to a remote area, advances, resistance and forcible intercourse. The sequence of events has no distinctive qualities that distinguish the acts from other rapes thus bringing the events within the purview of the similarity element of the other crimes admission rule exception.
   *Id.* at 97, 608 P.2d at 1086.
65. *Id.* The court was not persuaded by the following facts:
   Each incident began in a Lincoln County bar. Both victims left the bar with Hansen in the early morning hours. Hansen drove both women into the mountains and allegedly made advances toward them. When [the victims] resisted, Hansen grabbed them, *twisted their thumbs against their wrists* and forced intercourse with them. Hansen also drove both women back to town and told them not to report the rape.
   *Id.* at 95, 608 P.2d at 1086 (emphasis added).
66. *Id.* at 98, 608 P.2d at 1087 (quoting *State v. Sauter*, 125 Mont. 109, 112, 232 P.2d 731, 732 (1951)).
67. *Hansen* at 100, 608 P.2d at 1088. The practical effect of *Hansen* and its predecessors is to bar prosecutors from introducing other crimes evidence in cases in which rapists follow a pattern of picking up their victims in bars. Prosecutors are thus precluded from
Hansen's application of the similarity requirement is wholly irreconcilable with the court's subsequent analysis. In State v. Sadowski, the Montana Supreme Court again examined the degree of similarity necessary to sustain a trial court's admission of other crimes evidence under the Just Rule.

In Sadowski the court affirmed a conviction of deliberate homicide which occurred at Sadowski's furniture repair business at his home near Bozeman. Sadowski and his cousin were drinking at a bar where they became acquainted with a man and his girlfriend. When the bar closed, the four went to Sadowski's home where they continued drinking. Shortly thereafter, Rob Hare arrived. The girlfriend introduced Hare to Sadowski and the others. Sadowski testified that he eventually concluded that he and his cousin might be in danger of being robbed by their new acquaintances, and so he went to his bedroom and retrieved a revolver. Testimony at trial conflicted as to what happened next. Sadowski testified that Hare menacingly approached him, and when Sadowski retreated as far as he could, Sadowski fatally shot Hare in self defense. Sadowski was later convicted of deliberate homicide.

On appeal Sadowski alleged the trial court had erred in admitting evidence of a prior incident in which Sadowski pointed a gun at a deputy sheriff. In the earlier incident, Sadowski, experiencing marital difficulties, called the sheriff's office and told sheriff's office personnel he was going to commit suicide. A deputy arrived and talked with Sadowski for a considerable period of time. When Sadowski's wife returned home, the deputy rose to speak with her, and Sadowski pointed the gun at the deputy, allegedly stating that he now had control of the situation, rather than the deputy.

introducing highly relevant evidence; rape victims picked up in bars are relegated to a comparatively unprotected status. The Montana Supreme Court should consider overturning Hansen.

69. Id. at 65-66, 805 P.2d at 538-39.
70. Id. at 66, 805 P.2d at 539.
71. Id.
72. Id.
73. Id.
74. Id. at 67, 805 P.2d at 539.
75. Id. at 68, 805 P.2d at 540.
76. Id.
77. Id. at 69, 805 P.2d at 541.
78. Id.
79. Id.
80. Id.
Sadowski was subsequently arrested but not charged with a crime.\textsuperscript{81}

The Montana Supreme Court affirmed the homicide conviction, finding that "although the crimes were not identical, they were like enough to meet the \textit{Just} similarity criteria."\textsuperscript{82} In many respects the two incidents were strikingly different. Nonetheless, the court focused on common facts such as the unlawful use of a firearm and the stressful nature of both situations and thus determined that the similarity element of \textit{Just} was satisfied.\textsuperscript{83} A comparison of \textit{Sadowski} and \textit{Hansen} graphically illustrates the need for the Montana Supreme Court to address the Modified \textit{Just} Rule's similarity criterion in a more consistent manner.

The requirement that evidence of prior acts must be similar, in the vast majority of cases, properly functions as a safeguard against the introduction of irrelevant evidence. The similarity requirement can, however, unnecessarily restrain trial courts from permitting introduction of highly relevant evidence. A case decided by the Mississippi Supreme Court illustrates the problem inherent in Montana's apparent total ban on dissimilar Rule 404(b) evidence.\textsuperscript{84}

At RoseMarie Hogan's trial for aggravated assault, testimony revealed that the defendant, while riding in a van, shot six people who were standing in front of a Vicksburg, Mississippi nightclub.\textsuperscript{85} The state also introduced evidence that earlier in the evening of the shooting, RoseMarie's husband went to the same nightclub to buy marijuana.\textsuperscript{86} While attempting to buy the marijuana, he was beaten and robbed.\textsuperscript{87} Relying on Rule 404(b) of the Mississippi Rules of Evidence,\textsuperscript{88} the defense had filed a motion \textit{in limine} requesting that the court preclude the state from offering any evidence bearing on the earlier incident.\textsuperscript{89} The state argued that the earlier incident tended to show the defendant's motive for the shooting, and was thus admissible under an enumerated exception in Rule 404(b).\textsuperscript{90} The trial court denied the defense motion and permitted evidence of the other crime.\textsuperscript{91}

\textsuperscript{81. Id.}
\textsuperscript{82. Id. at 71, 805 P.2d at 542.}
\textsuperscript{83. Id. at 73, 805 P.2d at 543.}
\textsuperscript{84. Hogan v. State, 580 So. 2d 1275 (Miss. 1991).}
\textsuperscript{85. Id. at 1276.}
\textsuperscript{86. Id.}
\textsuperscript{87. Id.}
\textsuperscript{88. Miss. R. Evid. 404(b) is identical to Mont. R. Evid. 404(b).}
\textsuperscript{89. Hogan, 580 So. 2d at 1277.}
\textsuperscript{90. Id.}
\textsuperscript{91. Id.}
On review, the Mississippi Supreme Court held that Rule 404(b) permitted evidence of the earlier incident, although Rose-Marie Hogan was not involved, and the earlier incident bore no resemblance to the act for which she was charged. The other crimes evidence allowed in Hogan would likely be inadmissible under the Modified Just Rule; it was entirely dissimilar. Still, the evidence was highly relevant, clearly showing RoseMarie's motive for the shooting, and was not unduly prejudicial because Rose-Marie was not directly implicated in the earlier event.

As Hogan demonstrates, a strict application of the similarity requirement of the Modified Just Rule could result in exclusion of relevant evidence. Consequently, the Montana Supreme Court should view the similarity element as a factor for the trial court to consider, rather than an absolute prerequisite.

2. Nearness in Time—The Second Element

The Original Just Rule:

Nearness in time of the prior conduct.

The Modified Just Rule:

The other crimes, wrongs or acts must not be remote in time.

The question of whether evidence of prior crimes is too remote is directed to the discretion of the trial court and is a matter that goes to the weight of the evidence rather than its admissibility, "unless the remoteness is so great that the proffered evidence has no value." The Montana Supreme Court has not fixed any period of time as the definitive standard for remoteness. "[E]ach case must be examined in light of its unique set of facts."

The Montana remoteness standard is well reasoned. An arbitrary cutoff of one, three, or five years would deny the trial courts the discretion to consider the special circumstances of each case, such as whether the prior act indicates a pattern of behavior in contrast to an isolated incident, the nature and complexity of the previously committed act, and a number of other relevant considerations. In State v. Tecca, for example, the court approved the

92. Id. at 1277-78.
93. See infra text accompanying notes 142-44.
admission of other crimes evidence dating back to nine years before the incident for which the defendant was charged. In *Tecca* the evidence showed a continuous pattern of criminal conduct. Consequently, the court reasoned that “an isolated incident from nine years ago is too remote, however, where there is a continuing pattern of similar conduct, the remoteness problem is alleviated.”

3. Permissible Uses of Other Crimes Evidence—The Third Element

The Original *Just* Rule:

The prior conduct must have a tendency to establish a common scheme, plan or system.

The Modified *Just* Rule:

The evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with such character; but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The third element is the most significant facet of the Modified *Just* Rule. The third requirement under the Modified *Just* Rule is merely a reiteration of Rule 404(b), and adds no new criteria. The significance of the third element is in its elimination of the common scheme requirement, and its corresponding expansion of the purposes for which other crimes evidence may be introduced.

Other crimes evidence found inadmissible in *State v. Brown* under the original *Just* Rule illustrates the broader scope of evidence now allowed under the Modified *Just* Rule. Following a jury trial, Brown was found guilty of driving under the influence, driving while his license was suspended or revoked, and felony assault. The supreme court reversed, holding that evidence of other crimes Brown committed within the last year was improperly admitted to prove motive and intent with respect to his conduct in

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100. *Id.*
101. *Id.*
105. *Id.* at 508, 791 P.2d at 1385.
assaulting a police officer. Such crimes or acts, the court reasoned, were spontaneous and dictated by Brown's character and the situation at hand; the prior acts thus lacked any common scheme or plan, and were, therefore, inadmissible.

In Brown, the court found that the prosecution failed to satisfy the third element of the Just Rule; i.e., the state failed to establish the requisite common scheme, plan, or system. The evidence had been admitted to show motive and intent—impermissible purposes under a strict reading of the Just Rule. Chief Justice Turnage's dissent in State v. Brown foreshadowed the new direction the court would take in the following year:

Under Rule 404(b) the evidence does establish the defendant's opportunity, motive and intent. Further, the language of Rule 404(b), M.R.Evid., provides a basis for sustaining the introduction of the evidence at issue. The rule provides that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Chief Justice Turnage's dissent impliedly rejects the application of the "common scheme, plan or system" criterion in the narrow manner applied by the majority under the original Just Rule. Chief Justice Turnage, in effect, argued for a return to the express language of Rule 404(b) regarding the purposes for which Rule 404(b) evidence could be offered. This return to the express language of the rule has now been realized in State v. Matt.

4. Grounds for Exclusion of Other Crimes Evidence—The Fourth Element

The Original Just Rule:

The probative value of the evidence is not substantially outweighed by the prejudice to the defendant.

The Modified Just Rule:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair
prejudice, confusion of the issues, misleading of the jury, considerations of undue delay, waste of time, or needless presentation of cumulative evidence.112

The fourth element of the Modified Just Rule is merely a verbatim recitation of Rule 403 in its entirety. This element, like the third element, adds no admissibility requirement beyond what the Rules of Evidence have always required for all offered evidence.

The Montana Supreme Court has recently determined that Rule 404(b) should be construed as inclusionary, rather than exclusionary.113 Trial courts are thus to view Rule 404(b) as generally permitting such evidence insofar as it does more than merely cast the defendant's character in a bad light.114 Other crimes evidence is apparently presumptively admissible. The Montana Supreme Court has, however, inconsistently taken both inclusionary and exclusionary approaches, often depending on the nature of the crime with which the defendant is charged.115

The Montana Supreme Court's recent inclusionary view of Rule 404(b), as articulated in Sadowski, is well reasoned. On its face, Rule 404(b) does not purport to exclude other crimes evidence; it merely excludes such evidence when offered to prove a person's character for the purpose of showing action as conforming with such character. Additionally, the broad "such as" language of

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113. State v. Sadowski, 247 Mont. 63, 70, 805 P.2d 537, 541 (1991). See Gezzi v. State, 780 P.2d 972, 974 n.3 (Wyo. 1989), in which the Wyoming Supreme Court observed, In 2 D. Louisell and C. Mueller, Federal Evidence, § 140, at 36 (Supp. Aug. 1989), the authors characterize Rule 404(b) as an "inclusionary" rule, as opposed to the traditional characterization of the rule as "exclusionary," thus emphasizing the more liberal stance taken by most jurisdictions regarding the admission of prior bad acts evidence. Nine federal circuit courts have determined that Congress' use of "such as" in Rule 404(b) commits the federal courts to this inclusionary approach. See e.g. United States v. Moore, 732 F.2d 983 (D.C. Cir. 1984); and United States v. Gustafson, 728 F.2d 1078 (8th Cir. 1984), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). Also, thirty state jurisdictions have adopted evidence codes patterned after the liberal federal rules. Under today's liberal position, exclusion is the exception to the rule of inclusion, which is the norm. "The true problem in administering this inclusionary principle is not to find a pigeonhole in which the proof might fit, but to determine whether the prior act does tend to prove something other than propensity and, if so, to determine whether its particular relevancy outweighs the risk of prejudice—that is, the risk that the jury will either draw the forbidden and deadly three-step inference from bad act to bad person to guilt, or give way to unthinking and emotional impulse to punish."

Id.

114. For a comprehensive, particularly eloquent, yet sharp attack on the modern trend to permit other crimes evidence, see Justice Urbigkit's dissent in Gezzi, 780 P.2d at 978-86 (Urbigkit, J., dissenting).
115. See infra text accompanying notes 122-23.
the second sentence of the rule indicates that the list of permissible purposes for other crimes evidence is not exclusive. 116

Trial courts routinely address issues of competence and relevancy; through their considerable experience dealing with these fundamental evidentiary principles, trial courts are thoroughly equipped to apply the plain language of Rule 404(b). Consequently, lower courts have "broad discretion to determine whether or not [other crimes] evidence is relevant." 117

The Montana Supreme Court would clear up much of the confusion surrounding its application of the other crimes rule which has existed in Montana for the past forty years if the court would emphasize that (1) the plain language of Rule 404(b) itself is the trial court's primary guide, and (2) the Montana Rules of Evidence, particularly Rule 403, 118 apply in the other crimes context. 119 The court could accomplish this result by adopting a "Sadowski Rule," emphasizing deference to the admissibility determination made by the trial court.

Rule 404(b) provides that other crimes evidence may be admissible for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." 120 Attorneys and trial court judges would be better served by a Montana Supreme Court focus on providing reasoned and consistent guidance as to what constitutes those specific purposes enumerated in Rule 404(b), rather than the court's pronouncements of rules which provide limited substantive guidance. 121

The inconsistency with which the Montana Supreme Court has applied the other crimes rule can be best understood by examining the underlying facts of the individual cases brought before the court. The court generally tends to relax the application of the rule, thereby giving the state greater freedom in cases in which,

116. But see State v. Ramstead, 243 Mont. 162, 793 P.2d 802 (1990): "Such evidence is admissible only if it is introduced as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. at 162, 793 P.2d at 805 (emphasis added).
117. Sadowski, 247 Mont. at 69, 805 P.2d at 541.
118. MONT. R. EVID. 403 requires trial courts to weigh the probative value of proffered evidence against its potential for causing unfair prejudice.
119. Of course, the Montana Supreme Court has never held Rule 403 inapplicable in the other crimes context; Rule 403 is incorporated in the Modified Just Rule. However, as discussed infra, the court does not consistently give proper emphasis to the unfair prejudice inquiry. See infra text accompanying notes 126-32.
120. MONT. R. EVID. 404(b).
121. See, e.g., State v. Keefe, 232 Mont. 258, 267, 759 P.2d 128, 134 (1988). There, the Montana Supreme Court provided guidance for the application of the purposes listed as "plan," "motive," and "identity" in Rule 404(b). Id. Unfortunately, however, Keefe appears to be an anomaly in the court's jurisprudence in this area.
from the court's perspective, particularly nefarious crimes are alleged. For example, the Montana Supreme Court is much more inclined to approve the admission of other crimes evidence in cases in which the defendant is charged with a sex crime involving a child victim. Conversely, the court has demonstrated its reluctance to affirm convictions of alleged rapists where the defendant met the adult victim in a bar and the lower court proceedings involved other crimes evidence pertaining to offenses involving previous "barroom pickups." The court should focus on developing a more consistent approach in applying existing rules and principles of admissibility, rather than periodically modifying the principles themselves.

B. The Adequacy of the Procedural Protections in the Modified Just Rule

In State v. Matt, in conjunction with the adoption of the Modified Just Rule, the court stated:

[W]e do not overrule the procedural protections required under Just. We do clarify those protections however by specifically holding that the following procedural protections shall apply as a part of the Modified Just Rule.

1) Evidence of other crimes, wrongs or acts may not be received unless there has been written notice to the defendant that such evidence is to be introduced. The notice to the defendant shall specify the evidence of other crimes, wrongs or acts to be admitted, and the specific Rule 404(b) purpose or purposes for which it is to be admitted.

2) At the time of the introduction of such evidence, the trial court shall explain to the jury the purpose of such evidence and shall admonish it to weigh the evidence only for such purposes.

3) In its final charge, the court shall instruct the jury in unequivocal terms that such evidence was received only for the limited purposes earlier stated and that the defendant is not being tried and may not be convicted for any offense except that charged, warning them that to convict for other offenses may result in un-


123. See, e.g., State v. Hansen, 187 Mont. 91, 608 P.2d 1083 (1980). As Hansen illustrates, even when the defendant allegedly has engaged in a distinctive practice or method in carrying out the criminal act, the court sometimes glosses over the method where the overall act is deemed so commonplace as to have little or no evidentiary value. See supra text accompanying notes 64-66.
just double punishment.124

The purpose of providing notice to defendants of the prosecution's intent to introduce evidence of other crimes, wrongs or acts is to insure that defendants are fully informed of what acts the defendants will need to defend against, to avoid surprise at trial.125 To be sure, no Montana defendant could legitimately claim prejudicial surprise when the prosecution complies with the strict notice requirements of the Modified Just Rule.

But the danger of surprise is not the predominant prejudicial threat where other crimes evidence is involved. Other crimes evidence is, by its nature, prejudicial.126 When a defendant is convicted after the prosecution successfully offers Rule 404(b) evidence, a serious question is raised: has the defendant merely been found guilty of the crime with which the defendant has been charged, or has the jury returned a verdict predicated on a finding that the accused's past justifies incarceration? The Montana Supreme Court has recognized that prior crimes evidence is susceptible to misuse by the jury; cautionary instructions and other procedural safeguards are thus required.127

Do the Modified Just Rule's procedural protections sufficiently safeguard the defendant from the jury's potential misuse of the offered evidence? Juries may not always be capable of cataloging and categorizing other crimes evidence, particularly when the "other crime" is inextricably intertwined with the act for which the defendant is actually charged. Rule 403 of the Montana Rules of Evidence mandates that the trial court exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."128 From the text of the rule itself, it is apparent that defendants can be unfairly prejudiced; juries can be confused and misled.

Consequently, it is imperative that trial courts rigorously adhere to the requirement of Rule 403, excluding all unduly prejudicial other crimes evidence. The Modified Just Rule's most significant weakness lies in its failure to highlight the importance of the trial court's responsibility to closely balance the potential of unfair prejudice against the probative value of proffered other crimes evi-

127. Sadowski, 247 Mont. at 71, 805 P.2d at 542.
128. Mont. R. Evid. 403.
dence. Perhaps motivated by a sensitivity to the inherently prejudicial nature of other crimes evidence, the Montana court has unnecessarily complicated the area of other crimes evidence with its four-pronged Modified Just Rule (the last two prongs of which are redundant recitations of existing rules of evidence) and three-pronged procedural protection requirements. The question of whether particular other crimes evidence is unfairly prejudicial, however, is in danger of being lost in a litany of factors trial courts must address.

*State v. McKnight*¹²⁹ is an example of how the Modified Just Rule de-emphasizes the importance of the unfair prejudice inquiry.¹³⁰ *McKnight* involved review of a defendant's conviction for sexual intercourse without consent, in which the Montana Supreme Court affirmed the trial court's admission of testimony of other victims.¹³¹

On its face the court's rationale in *McKnight* seems reasonable. The testimony of the other victims was properly deemed highly probative; it provided strong evidence that the defendant had engaged in numerous other acts which were not only similar to the charged crime, the other crimes were in some instances indistinguishable.¹³² Further, the other sexual assaults occurred within three years of the charged crime.¹³³ The court could have then carefully addressed the degree to which the other crimes evidence threatened to unfairly prejudice the defendant, balanced the potential for unfair prejudice against its substantial probative value, and justifiably concluded that admission of the evidence was proper. The court should have ended its analysis at this point and reasonably decided that the probative value of the other crimes evidence was so great that it outweighed the admittedly prejudicial effect of permitting the jury to hear testimony of the other sexual assaults. The court in *McKnight*, however, went one step too far.

The Montana Supreme Court found that the other victims' testimony "was clearly prejudicial, but because it meets other aspects of the Modified Just Rule, such prejudice alone is not a sufficient reason to refuse admission."¹³⁴ The rule emerging from *McKnight* appears to be that where the first three elements of the Modified Just Rule are met, trial courts can properly conclude,

¹³⁰. *Id.* at __, 820 P.2d at 1282.
¹³¹. *Id.*
¹³². *Id.*
¹³³. *Id.*
¹³⁴. *Id.* at __, 820 P.2d at 1284 (emphasis added).
without the balancing required by Rule 403, that the other crimes evidence is not unfairly prejudicial.\textsuperscript{135}

IV. **Full Circle: Back Where We Started**

In sum, the Modified Just Rule requires that:

1) The other crimes, wrongs or acts must be similar;
2) The other crimes, wrongs or acts must not be remote in time;
and
3) Montana Rules of Evidence 404(b) and 403 apply to other crimes evidence.\textsuperscript{136}

Furthermore, to satisfy the procedural protections enunciated in *State v. Matt*, the prosecution must give the defendant prior notice that it plans to introduce such evidence and the trial court must give specific cautionary instructions to the jury, both at the time the evidence is offered, and in the court's final charge to the jury.\textsuperscript{137}

A. *A Proposed Substantive Scheme*

The Modified Just Rule defeats a fundamental purpose of Rule 404(b): to provide Montana practitioners with a rule in conformity with the federal rule, for the purpose of uniformity.\textsuperscript{138} Montana attorneys who practice in state and federal court are forced to cope with radically different standards for the admissibility of other crimes evidence.\textsuperscript{139} The fact that Montana's Rule 404(b) and the federal Rule 404(b) are textually identical further complicates the problem, particularly for the Montana lawyer who practices in federal court only occasionally.

The text of Rule 404(b) is straightforward. Rule 404(b) disputes arise primarily as a result of a problematic fact pattern in which other crimes evidence is both relevant and prejudicial. Conforming the application of the rule to the practice in federal courts would provide Montana trial courts and practitioners with a

\textsuperscript{135} It can be legitimately argued that thorough consideration of the first three elements of the Modified Just Rule is, in effect, a weighing of the probative value of the proffered other crimes evidence. However, a finding that the other crimes evidence holds significant probative value does not end the inquiry required by Rule 403. Trial courts should not overlook the possibility that the potential for unfair prejudice may be so great as to outweigh substantial probative value of the evidence.


\textsuperscript{137} *Id.*

\textsuperscript{138} *See supra* text accompanying note 27.

\textsuperscript{139} *See Huddleston v. United States*, 485 U.S. 681, 685 (1988), (federal courts' treatment of other crimes evidence under FED. R. EVID. 404(b)).
broader base of cases from which to draw.

To what extent should the courts approach the other crimes rule differently than the courts deal with other evidentiary rules? The answer should focus on the degree to which the other crimes rule itself differs from other rules of evidence. Two notable differences exist: (1) Other crimes evidence, when properly admitted, is always to be confined to a particular limited purpose, and (2) Other crimes evidence is, by its nature, more likely to result in undue prejudice than most other evidence. Consequently, any special treatment of other crimes evidence should address these two considerations as paramount. In all other respects, the courts should treat other crimes evidence in the same manner in which other evidentiary questions are addressed.

*State v. Matt* is a step in the right direction; the elimination of the “common scheme” requirement affords trial courts increased flexibility in applying Rule 404(b) in close cases. The *Just* Rule had developed into a strict framework forcing lower courts to exclude relevant evidence which, in some cases, would have assisted the trier of fact in reaching a fair result. In its effort to provide guidance through the *Just* Rule, the Montana Supreme Court forced trial courts to take a more mechanical approach to difficult admissibility questions, whereas the trial courts’ proper inquiry should focus on relevance and determining the possibility of undue prejudice.

Granting greater deference to the trial courts would render the status of other crimes evidence more consistent with all other evidence. The Montana Supreme Court has, indeed, indicated that all four elements of the *Just* Rule need not be shown to establish admissibility, in *State v. Sadowski.* The court in *Sadowski,* relying on its holding in *State v. T. W.,” explicitly stated that “failure to meet one element of the *Just* formula was not enough to refuse admission of prior acts.” This critical issue is not often highlighted in the Montana Supreme Court’s analysis.

140. When a defendant urged the Utah Supreme Court to adopt the protections of Montana’s *Just* Rule, the court responded: “We decline to adopt that rigid procedure.” *State v. Rocco,* 795 P.2d 1116, 1119 (Utah 1990).

141. For example, Idaho applies a simple two-tiered test in determining whether evidence of other bad acts or crimes may be admitted: (1) the evidence must be relevant to a material issue concerning the crime charged, and (2) the probative value of the other crimes evidence must outweigh its prejudicial effect. *State v. Arledge,* 808 P.2d 1329, 1333 (Idaho Ct. App. 1991). Idaho appellate courts grant great deference to the trial judge whose ruling “will not be disturbed on appeal, unless [the trial court’s] discretion has been abused.” *Id.*


144. *Sadowski,* 247 Mont. at 71, 805 P.2d at 542.
A solution to the confusion would be for the Montana Supreme Court to focus on consistency with its treatment of other evidentiary questions and on the federal courts' approach to Rule 404(b). Specifically, the Montana Supreme Court should clarify and emphasize that the similarity and nearness requirements of the Modified Just Rule are factors for the trial court to consider, rather than as absolute prerequisites for admissibility. When other crimes evidence is offered, the primary focus of trial courts should be on the text of existing rules of evidence. To accomplish this result, the Montana Supreme Court should consider adopting the following criteria for the admission of other crimes evidence:

1) The evidence must be offered for a purpose other than to merely prove a person's character;  
2) The evidence must be relevant; and  
3) The probative value of the evidence must outweigh the danger of undue prejudice, in light of other available means of proof.

B. A Proposed Procedural Scheme

Existing Montana Rules of Evidence, to a degree, provide for the procedural protections of the Modified Just Rule. For example, regarding the cautionary jury instructions required under the Modified Just Rule, Rule 105 of the Montana Rules of Evidence provides: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” The jury instructions required under the Just procedural protections likewise are mandatory only when a party requests them. In light of the existence of Rule 105, the requirement of cautionary jury instructions under the procedural protections of the Modified Just Rule is redundant.

145. State v. Wells, 202 Mont. 337, 348-49, 658 P.2d 381, 387-88 (1983); State v. Van Natta, 200 Mont. 312, 319-20, 651 P.2d 57, 60-61 (1982). In Wells and Van Natta the Montana Supreme Court discussed the elements of the Just Rule as factors to consider; implicit in this characterization is the notion that all the Just elements may not necessarily be indispensable prerequisites.

146. MONT. R. EVID. 404(b). The evidence should not be excluded, however, if it incidentally reflects negatively on a person's character. Permissible purposes include, but are not limited to, those enumerated in Rule 404(b).

147. MONT. R. EVID. 401. The relevance inquiry should include examination of the similarity and remoteness of the other crime as factors for the trial court to consider.

148. MONT. R. EVID. 403.

149. MONT. R. EVID. 105.

The other procedural requirement under the Modified Just Rule mandates that the prosecution give advance notice of its intent to introduce other crimes evidence at trial. To that end, the Federal Commission on Rules of Evidence has proposed amending Rule 404(b) of the Federal Rules of Evidence as follows:

Other crimes, wrongs, or acts. 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.¹⁵¹

The notice requirement of the proposed amendment to Rule 404(b) of the Federal Rules of Evidence does not contain the comprehensive provisions of the Just Notice currently mandated by the Montana Supreme Court under Matt. Under the proposed amendment, the accused has the burden of requesting advance notice of the prosecution's intent to introduce other crimes evidence. As in civil litigation, the party desiring the information would have the burden of requesting it. The proposed amendment to the federal rule also gives the trial court the flexibility to excuse a lack of notice when appropriate under the circumstances. Nonetheless, the accused would still be afforded a similar degree of procedural protection provided under the protections of the Modified Just Rule.

V. Conclusion

Other crimes evidence in Montana has historically been subject to changing standards of admissibility. Consequently, when confronted with the issue of other crimes evidence, the practitioner must carefully examine and rely on the most recent cases addressing the issue. Rule 404(b) questions are the subject of a considerable number of appeals each year;¹⁵² thus, the practicing lawyer

needs to be familiar with the court's most recent pronouncements. Conversely, the Montana lawyer should not view the Montana Supreme Court's latest decision as the court's final word on the subject of other crimes evidence. By carefully analyzing the most recent decisions, practitioners should familiarize themselves with the specific issues upon which the court has most recently placed greatest emphasis. Still, lawyers must recognize the court's tendency to periodically change the admissibility standards of other crimes evidence and should not be surprised when the court occasionally alters the criteria.

The Montana Supreme Court should place increased emphasis on the plain language of the applicable rules of evidence, along with greater deference to trial court determinations. By adopting this article's approach, Montana courts would eliminate the redundancy and potential for confusion inherent in the Modified Just Rule. A renewed emphasis on the plain language of Rules 403 and 404(b) would place other crimes evidence back in the mainstream with all other evidence and would still adequately address the special considerations involved when other crimes evidence is offered. Moreover, because trial courts are in the better position to balance relevance and the potential for unfair prejudice in the cases over which they preside, an increased deference to trial courts' admissibility rulings is particularly appropriate. This approach will make the trial judge's job easier and would significantly benefit prosecutors and the defense bar alike, by providing the consistency and stability needed in Montana's criminal justice system.

