

A “Grotesque,” “Perverse” and
“Quixotic” Set of Rules:
Character, Other Acts, and Act 362
Evidence

Professor Daniel D. Blinka

Marquette University Law School

November 21, 2014

Wis SPD Conference

Objectives

Overview of character-related evidence

What is character? When can it be used as proof?

What are the permissible forms of character proof?

When may other act evidence be used to prove facts?

A three-step analysis governs other act evidence.

Act 362's puzzling revamp of other act proof.

The “greater latitude” standard properly understood.

Recent Other Act Cases

State v. Jackson, 2014 WI 4, ___ Wis.2d ___, 841 N.W.2d 791 (homicide prosecution where the court discusses the admissibility of prior acts of violence by the victim).

State v. Lock, 2013 WI App 99, ¶¶40-41, 344 Wis.2d 166, 823 N.W.2d 378 (proponent bears the burden of establishing the first two prongs of the *Sullivan* standard; the opponent bears the burden of establishing the third prong; the case involves a very fact intensive analysis of testimony by ten witnesses in which the court concluded that the testimony either comported with *Sullivan* or constituted harmless error even if it did not).

State v. Adamczak, 2013 WI App 150, 841 N.W.2d 311 (in a prosecution for sexual exploitation by therapist, harmless error occurred in admitting other act evidence through the testimony of former patients).

State v. Echols, 2013 WI App 58, ¶¶18-20, 348 Wis.2d 81, 831 N.W.2d 768 (in a prosecution of a school bus driver for sexually assaulting a student, reversible error occurred when the trial court excluded evidence of the student's school disciplinary records, which met all three elements of the *Sullivan* test: (1) they were offered to show the student's motive to fabricate, not her character generally, (2) the records were relevant to the girl's motive to fabricate (her checkered history at the school allegedly motivated her to accuse the bus driver of something really bad for fear he would report her misconduct on the bus), and (3) the probative value of the evidence "far outweighed any prejudice to the student").

State v. Vollbrecht, 2012 WI App 90, 344 Wis.2d 69, 820 N.W.2d 443

Basics of Character Evidence: Definition

How is character defined?

Character or habit? See Wis. Stat. § 904.06

Character or a witness's "background"?

Character or "plan," "motive," "knowledge" etc.

Character is a product of our culture and society; think stereotypes, including the worst ones

When is character admissible?

The rules restrict when a person's character may be used to prove conduct in conformity on a particular occasion

Only in criminal cases

Only at the defendant's "election"

Only the character trait of the defendant or a crime "victim"

Exception: A witness's truthful character, §§ 906.08 and 906.09 (in all cases, civil and criminal)

Are these rules "grotesque," "perverse" and "quixotic"?

Proving “character” traits

Wis. Stat. § 904.05

- Proponent: limited to reputation and opinion (+ or -)
- Opponent: may inquire about specific instances (reverse polarity: - or +)

Reputation (gossip): “Have you heard talk about . . .”;

- This is hearsay: § 908.03(21)

Lay opinion (§ 907.01): “Do you know X well enough to have formed an opinion about her honesty?”

- No specific instances on Dx

Expert opinions?

What about guilt-assuming hypotheticals?

Other Act Evidence

State v. Sullivan, 216 Wis.2d 768 (1998)

Domestic violence prosecution

Roadmap for the use of other act evidence in criminal and civil cases

The three-step analysis

The proponent (the prosecutor) was undone by the trial record

- The other acts passed step 1 but failed steps 2 and 3

What is “other act” evidence?

“other acts” = events that are distinct in time, place, and circumstances from the charged offenses

“context” and “background” are mischievous

The proponent bears the burden on steps 1 and 2 under Sullivan

The opponent bears the burden under step 3

Sullivan Step One: A Proper Purpose?

Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?” (Sullivan, ¶6)

The burden is on the proponent.

What about “context”? See *State v. Payano*, 2009 WI 86, 768 N.W.2d 332

Hypo:

Sullivan Step 2: Relevance

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.” (Sullivan, ¶7)

The burden is on the proponent.

Sullivan Step 3: Dangers of unfairness and confusion

(3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? Wis. Stat. § (Rule) 904.03.” (Sullivan, ¶8)

Here the burden is on the opponent, not the proponent. Why?

How effective are limiting instructions?

Is there a downside to requesting a limiting instruction?

Defense Use of Character and Other Act Evidence

Richard A.P. evidence (character proof); see *State v. Kleser*, 2010 WI 88, ¶114, 328 Wis.2d 42

McMorris evidence (other act proof)

- See *State v. Jackson*, *supra*

State v. Vollbrecht, 2012 WI App 90, 344 Wis.2d 69, 820 N.W.2d 443 (similarity to crimes committed by another – a third-party defense)

State v. Sarfraz, 2014 WI 78, 851 N.W.2d 235 (evidence of past sexual conduct between defendant and alleged victim property excluded)

Act 362's "Greater Latitude"

New Wis. Stat. § 904.04(b)

(b) Greater latitude.

1. In a criminal proceeding alleging a violation of s. [940.302 \(2\)](#) or of ch. [948](#), alleging the commission of a serious sex offense, as defined in s. [939.615 \(1\) \(b\)](#) or of domestic abuse, as defined in s. [968.075 \(1\) \(a\)](#), or alleging an offense that, following a conviction, is subject to the surcharge in s. [973.055](#), evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. [940.225 \(1\)](#) or [948.02 \(1\)](#), sub. [\(1\)](#) and par. [\(a\)](#) do not prohibit admitting evidence that a person was convicted of a violation of s. [940.225 \(1\)](#) or [948.02 \(1\)](#) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

What's Behind Act 362?

Provides that evidence of similar acts may be admissible without regard to whether the victim of the crime is the same as the victim of the similar act in criminal proceedings for any of the following:

- Human trafficking.
- Any offense against a child.
- A serious sex offense.
- Domestic abuse.
- Any offense that is subject to a domestic abuse surcharge.

What does Act 362 mean for other acts?

The three-step approach applies, regardless
Steps 2 (relevance) and 3 (§ 904.03 balance) are especially critical

What acts are sufficiently “similar” to the charged offense?

- E.g., “same” act, different victim

What is the point of the “greater latitude” label on this subsec.?

Would State v. Sullivan come out differently under Act 362?

“Greater Latitude” Properly Understood

Child of case law involving crimes against children

Affinity to Fed. Rule of Evidence 414?

State v. Martinez, 2011 WI 12, 331 Wis.2d 568, 797 N.W.2d 399 (where the court provides a roadmap for greater latitude assessments)

Closing Thoughts

Pretrial orders may shape the use of other act evidence

Defense counsel should demand prosecutor's disclose other act evidence well before trial; use § 904.03

Counsel should master the three-step analysis as explained in *State v. Sullivan*

Act 362 is odd but unlikely to reshape the evidentiary playing field