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EVIDENCE

ADMISSIBILITY OF OTHER CRIMES EVIDENCE UNDER THE FEDERAL RULES OF EVIDENCE

United States v. Gubelman

The standard for admissibility of evidence of other crimes in federal criminal prosecutions is set forth in Rule 404(b) of the Federal Rules of Evidence.¹ While Rule 404(b) specifically excludes other crimes evidence offered merely to show the defendant's bad

¹ Rule 404 codifies the rule, long established at common law, that evidence of other crimes or acts offered solely to show the defendant's character or disposition to commit the charged crime should be excluded. See C. McCORMICK, EVIDENCE §§ 189-190 (2d ed. 1972); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404 [04] (1977); 1 J. WIGMORE, EVIDENCE §§ 193-194 (2d ed. 1940); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1, 12-15 (1956); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 766-68 (1961). See generally Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

While consistent with this general "rule," Rule 404(b) permits other crimes evidence to be admitted for other purposes. FED. R. EVID. 404(b) provides:

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 that he acted 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.

In the original version of Rule 404(b), the second sentence began with the phrase: "This subdivision does not exclude the evidence when offered" H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 7 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081. The Report of the Committee of the Judiciary, in altering the language of Rule 404(b) to its present form, explained that the amended "formulation properly placed greater emphasis on admissibility than did the final [Supreme] Court version." H.R. REP. NO. 93-650, 93d Cong., 1st Sess. 7 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081. This codification of the common-law rule reflected an inclusionary approach that favored the admission of other crimes evidence if relevant. See *id.* Evidence of other crimes was to be admitted *except* when offered *only* to demonstrate criminal character, thus establishing a "broader range of admissibility." *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967) (quoting *Spencer v. Texas*, 385 U.S. 554, 561 n.7 (1967)). This "inclusionary approach" has long been accepted by the Second Circuit, *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967), and has gained acceptance in other circuits as well. See, e.g., *United States v. Long*, 574 F.2d 761, 765-66 (3d Cir. 1978); *United States v. Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978); *United States v. James*, 555 F.2d 992, 998 n.38 (D.C. Cir. 1977); *United States v. Czarnecki*, 552 F.2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977); *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir. 1977).

Once other crimes evidence is found to be admissible under Rule 404(b), the trial judge should apply Rule 403 to determine if there are factors counselling against the jury being presented with the evidence. FED. R. EVID. 403 provides:

Although relevant, evidence may be excluded if its probative value is 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.

character or propensity to commit the charged crime,² it goes on to enumerate several purposes for which such evidence may be admitted.³ One of these "exceptions" permits the admission of other crimes evidence where identity is at issue. Although there is not a well-developed body of case law on the identity exception, questions have arisen concerning its intended scope. With little legislative history available to aid in interpreting Rule 404(b), one circuit has

² FED. R. EVID. 404(b); see, e.g., *United States v. Young*, 573 F.2d 1137, 1140 (9th Cir. 1978); *United States v. Wright*, 573 F.2d 681, 683 (1st Cir.), cert. denied, 98 S.Ct. 2857 (1978); *United States v. Benedetto*, 571 F.2d 1246, 1248 (2d Cir. 1978); *United States v. Scholle*, 553 F.2d 1109, 1121 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States v. Dansker*, 537 F.2d 40, 57-58 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). See generally 10 MOORE'S FEDERAL PRACTICE § 404.21[1]-[2] (2d ed. 1976); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08] (1977). This rule is apparently not of constitutional proportions. See *id.* ¶ 404[04]. The Supreme Court has held that the introduction of other crimes evidence for sentencing purposes before a verdict on guilt is not a violation of due process. *Spencer v. Texas*, 385 U.S. 554, 564 (1967).

The issue for which the evidence is admitted must actually be in dispute. See *United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978); *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978). If the fact is proven by other evidence, or is conceded, the other crimes evidence is not admissible. *United States v. Ring*, 513 F.2d 1001, 1006-10 (6th Cir. 1975); *United States v. DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970); *United States v. Fierson*, 419 F.2d 1020, 1023 (7th Cir. 1969).

³ See note 1 *supra*. The purposes listed in Rule 404(b) for which evidence of other crimes may properly be admitted are intended to be illustrative only. C. McCORMICK, EVIDENCE § 190, at 447-52 (2d ed. 1972); 10 MOORE'S FEDERAL PRACTICE § 404.21[2], at 113 (2d ed. 1976); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 42 (1977).

In determining whether other crimes evidence meets the federal standard, the trial court is afforded wide discretion. See *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), cert. denied, 99 S.Ct. 577 (1978); *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977) (en banc), cert. denied, 435 U.S. 905 (1978); *United States v. Ashley*, 555 F.2d 462, 465 (5th Cir.), cert. denied, 434 U.S. 867 (1977); *United States v. Czarnecki*, 552 F.2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977); *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir.), cert. denied 434 U.S. 904 (1977); *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir.), cert. denied, 430 U.S. 971 (1977); *United States v. Williams*, 545 F.2d 47, 50 (8th Cir. 1976). The wide latitude afforded the trial judge in determining the ultimate admissibility of evidence is based on his

superior position to evaluate the impact of the evidence, since he sees the witnesses, defendant, jurors, and counsel, and their mannerisms and reactions. He is therefore able, on the basis of personal observation, to evaluate the impressions made by witnesses, whereas we [the appellate court] must deal with the cold record.

United States v. Robinson, 560 F.2d at 514 (citation omitted); see *United States v. Long*, 574 F.2d at 767; Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971). Appellate courts generally are reluctant to reverse a trial court's exercise of discretion. 10 MOORE'S FEDERAL PRACTICE § 403.02[4], at 73-74 (2d ed. 1976); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[01] at 7 (1977); see note 35 *infra*. This wide discretion, in effect, grants the lower court "a limited right to be wrong." Rosenberg, *Judicial Discretion*, 38 THE OHIO BAR 819, 823 (1965). Such discretion does not, however, imply "immunity from accountability." *United States v. Robinson*, 560 F.2d at 519 (Oakes, J., dissenting) (quoting *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976)); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 401[01], at 8.1 (1977). See also *Michelson v. United States*, 335 U.S. 469, 480 (1948).

chosen to limit this exception to cases in which the other crimes and the charged crime share enough unique characteristics so that an inference may be drawn that all were the handiwork of the same individual.⁴ Recently, however, in *United States v. Gubelman*,⁵ the Second Circuit rejected such a limitation and held that mere relevance to the issue of identity provides a sufficient basis for the admission of other crimes evidence.⁶

Robert Gubelman was a federal meat inspector for the United States Department of Agriculture who was indicted on two counts of accepting bribes in connection with his official duties.⁷ In its direct case the Government elicited testimony from two owners of meat packing companies, both named in the indictment, that the defendant requested and obtained regular payments from them.⁸ Officers of two other plants, not named in the indictment, testified that they also had given weekly payments to Gubelman.⁹ Gubelman denied receiving money or anything else of value from any meat-packer and argued that the government witnesses had mistakenly identified him.¹⁰ In rebuttal, the prosecution introduced evidence to show that the defendant had accepted cigars and packages of meat products on two other occasions.¹¹ Following his conviction on both counts, Gubelman appealed.

A divided Second Circuit panel affirmed.¹² Writing for the majority, Judge Feinberg¹³ utilized the two-part test of admissibility traditionally applied to other crimes evidence.¹⁴ The court initially determined that the testimony regarding similar acts was admissible under Rule 404(b) since it was relevant to the identification of

⁴ See notes 27-29 and accompanying text *infra*.

⁵ 571 F.2d 1252 (2d Cir.), *cert. denied*, 98 S. Ct. 2853 (1978).

⁶ 571 F.2d at 1255 & n.12.

⁷ *Id.* at 1253. Gubelman's duties as a federal meat inspector included enforcing sanitary regulations at meatpacking plants to ensure that meat was properly branded and of good quality. *Id.*

⁸ *Id.* at 1254. These payments were the subject of the indictment and ranged in amount from \$20 to \$50. *Id.* at 1253-54.

⁹ *Id.* at 1254.

¹⁰ In his summation to the jury, defense counsel argued:

So there is no question in my mind that when they picked him out they were picking out *the wrong guy* . . . I say to you that there is not one shred of credible evidence to associate *this inspector* . . . with having taken one thing, one thing of value.

Id. at 1255 (emphasis in original).

¹¹ *Id.* A meat packer testified that he gave cigars to Gubelman. In addition, a surveillance agent took a movie of a meat packing company employee placing two bundles that allegedly contained meat products in Gubelman's car. *Id.* at 1254 & n.5.

¹² *Id.* at 1253.

¹³ *Id.* at 1254. Judge Timbers concurred in Judge Feinberg's opinion. Judge Mansfield filed a dissenting opinion.

¹⁴ See notes 2-3 *supra*. See also *United States v. Gerry*, 515 F.2d 130 (2d Cir. 1975).

the defendant as the person who accepted the bribes.¹⁵ In concluding that Gubelman “sufficiently raised the issue of mistaken identity at trial to justify the admission” of the evidence, Judge Feinberg pointed to defense counsel’s cross-examination of Government witnesses on their ability to identify the defendant, Gubelman’s testimony indicating that the witnesses “erred in their identification,” and defense counsel’s remarks in summation that the “wrong guy” was being accused.¹⁶

¹⁵ 571 F.2d at 1254-55. The majority observed that the Government had contended that the “other crimes” evidence was admissible under Rule 404(b) to show Gubelman’s “pattern of conduct,” and to counter his defense of mistaken identity. *Id.* at 1254. The court expressed uncertainty that the evidence would be admissible to show appellant’s common scheme or plan, since it was unclear that the other crimes evidence was intertwined with the bribes forming the basis for the indictment. *Id.*

Evidence of common schemes or plans is generally related to transactions where either the evidence is necessary to complete the narrative of the charged crime or to demonstrate the existence of an ongoing scheme wherein one crime is committed in preparation for the commission of the charged crime. *See* *United States v. O’Connor*, 580 F.2d 38, 41 (2d Cir. 1978). In *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978), decided the same day by the same panel and involving similar facts, the court indicated that evidence of other bribes might be admissible to show a continuing plan to receive payoffs by meat inspectors seeking to capitalize on their position. *Id.* at 1249; *see* *United States v. Murphy*, 480 F.2d 256, 260 (1st Cir.), *cert. denied*, 414 U.S. 912 (1973); *United States v. Laurelli*, 293 F.2d 830, 832 (3d Cir. 1961), *cert. denied*, 368 U.S. 961 (1962). *See generally* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 404[09], at 57-61 (1977). While the *Gubelman* court seemed less willing to accept the common plan or scheme theory, *see* 571 F.2d at 1254, it did not have to resolve that issue since it found the evidence admissible under the identity exception. *See id.* In response to the Government’s suggestion that the other bribes evidence might be admissible to show knowledge and intent, the court stated that these issues were only technically in dispute. *Id.* at 1254 n.8 (citing *United States v. DeCicco*, 435 F.2d 478, 483-84 (2d Cir. 1970)).

¹⁶ 571 F.2d at 1255; *see* note 10 *supra*. It is not necessary that other crimes be proven “beyond a reasonable doubt” for admission. A somewhat lesser quantum of proof is acceptable. *See* 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5249, at 431-32 (1978). Most federal appellate courts seem to require clear and convincing proof. *See, e.g.,* *United States v. David*, 551 F.2d 233, 234 (8th Cir.), *cert. denied*, 431 U.S. 923 (1977); *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977); *United States v. Ostrowsky*, 501 F.2d 318, 321 (7th Cir. 1974). The Second Circuit, however, seems to require only proof by a preponderance of the evidence. *See* *United States v. Kahan*, 572 F.2d 923, 932 (2d Cir.), *cert. denied*, 995 S. Ct. 112 (1978); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

In *Gubelman*, the Second Circuit sustained the admission of the other crimes evidence to prove identity on the ground that the defendant raised the issue. 571 F.2d at 1254-55. It should be noted that although the identity issue was raised by the defendant, part of the other crimes evidence was admitted in the government’s case in chief, prior to the defendant’s claim of mistaken identity. *Id.* at 1253-54. While it is permissible to admit other crimes evidence to prove an element of the crime, *see* *United States v. Jardan*, 552 F.2d 216, 219 (8th Cir.), *cert. denied*, 433 U.S. 912 (1977), it is preferred that the evidence be withheld until the end of the defendant’s case. *See* *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Kaufman*, 453 F.2d 306, 311 (2d Cir. 1971).

Having decided that the "other crimes" evidence was relevant to prove the identity of the defendant under Rule 404(b), the court turned its attention to Rule 403, which requires the exclusion of otherwise admissible evidence if its prejudicial effect substantially outweighs its probative value.¹⁷ Looking first to the testimony regarding similar acts offered on the Government's direct case, Judge Feinberg characterized it as "strongly probative on the identification issue. . . . [and] not inflammatory in the way that an unrelated violent crime might be."¹⁸ Thus, the court upheld the admission of the testimony since there was no clear indication that any prejudice which may have resulted from the evidence of other crimes substantially outweighed its probative value.¹⁹ On the other hand, the majority stated that the Government's rebuttal evidence concerning Gubelman's acceptance of cigars and meat products probably should have been excluded.²⁰ In view of the strong evidence indicating Gubelman's guilt and the broad latitude afforded a trial judge, however, the court did not find that the judge abused his discretion.²¹

¹⁷ See FED. R. EVID. 403; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10], at 66 (1977); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 769 (1961).

¹⁸ 571 F.2d at 1255. In contrast, Chief Justice Burger, while sitting on the Court of Appeals for the District of Columbia Circuit, pointed out that evidence of the commission of the same crime, as opposed to an unrelated one, could be damning because juries might easily infer that, since the defendant committed a crime before, he probably did it again. See *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). See generally Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 SO. CALIF. L. REV. 220, 220-39 (1976); Note: *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 773-74 (1961).

¹⁹ 571 F.2d at 1255-56. Under Rule 403, the potential for prejudice must "substantially" outweigh the probative value of the evidence to warrant exclusion; slight prejudice is insufficient. See *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), cert. denied, 99 S.Ct. 577 (1978); *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir. 1976), cert. denied, 429 U.S. 893 (1977); *United States v. Bozza*, 365 F.2d 206, 213-14 (2d Cir. 1966); 10 MOORE'S FEDERAL PRACTICE § 403.023 (2d ed. 1976). For a discussion of prejudice generally, see Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 SO. CALIF. L. REV. 220 (1976).

The "necessity" doctrine, advocated by some courts, see, e.g., *United States v. Rice*, 550 F.2d 1364, 1372 (5th Cir.), cert. denied, 434 U.S. 954 (1977), makes the need for the evidence a factor to be weighed in balancing probative value and prejudice. See *United States v. Cochran*, 546 F.2d 27, 29-30 (5th Cir. 1977). Thus, other crimes evidence would be excluded when the prosecution has sufficient evidence for proof beyond a reasonable doubt without it. One commentator has criticized the necessity test as "too mechanical to work." 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[10], at 67 (1977). Another commentator has pointed out that the necessity test serves to exclude evidence only when it is least likely to affect the outcome, and admitted when the prejudicial effect would be maximized. Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 771-73 (1961).

²⁰ 571 F.2d at 1255. The court termed the testimony on the acceptance of the cigars and packages as "equivocal." *Id.*

²¹ *Id.* at 1256; see note 4 and accompanying text *supra*.

In his dissent, Judge Mansfield stated that the "mere showing of general similarity" between the crime charged and evidence of other similar acts was insufficient to satisfy the identity exception of Rule 404(b).²² Citing other circuits which apply a stricter standard,²³ he reasoned that the crime in question and the other acts sought to be admitted must have "unique and specific characteristics" in common, such as a similar "*modus operandi*," in order to render them admissible on the identity issue.²⁴ The dissent stated that, without a showing of "uniqueness" in conduct, the admission of similar acts would "identify" the defendant as the perpetrator of the charged crime merely by providing a basis for the inference that he was likely to engage in similar conduct again.²⁵ Judge Mansfield concluded that evidence of bribetaking by Gubelman on other occasions, without more, served only to demonstrate "a propensity for bribe-taking," and shed no light on his identity as the person who had committed the crimes in question.²⁶

²² 571 F.2d at 1256 (Mansfield, J., dissenting).

²³ *Id.* (Mansfield, J., dissenting) (citing *United States v. Cavallino*, 498 F.2d 1200, 1207 (5th Cir. 1974); *United States v. McCray*, 433 F.2d 1173, 1175 (D.C. Cir. 1970); *United States v. Bussey*, 432 F.2d 1330, 1333 (D.C. Cir. 1970); *Parker v. United States*, 400 F.2d 248, 252 (9th Cir.), *cert. denied*, 393 U.S. 1097 (1968)).

²⁴ 571 F.2d at 1256 (Mansfield, J., dissenting). To support his belief that there must be unique and specific characteristics common to both acts, Judge Mansfield quoted from *United States v. Benedetto*, decided the same day. 571 F.2d 1246 (2d Cir. 1978). In *Benedetto*, the majority found generally similar conduct insufficient to be indicative of a common scheme or pattern of conduct. *Id.* at 1249. Benedetto, a federal meat inspector, was convicted of receiving bribes in connection with his official duties. At his trial, the government presented evidence of other crimes both in its direct case and in rebuttal of Benedetto's testimony that he had never accepted bribes. *See id.* at 1247-48. On appeal, it was claimed that the admission of other crimes evidence was improper. *Id.* at 1248. The Second Circuit found that the other crimes evidence was properly admitted to counter the defendant's character evidence. *Id.* at 1250. The *Benedetto* court rejected the notion that the evidence of uncharged bribes demonstrated a "unique scheme or pattern." The court stated that the method used to pass the money, a handshake, was "about as unique as using glassine envelopes to package heroin." *Id.* at 1249. It was noted that a different view might have been taken if the bribes were made in "an unusual way." *Id.*

The court relied upon the language of Professor McCormick that more is required for admission than that the same kind of crimes have been repeated: "The device used must be so unusual and distinctive as to be like a signature." *Id.* (quoting C. McCORMICK, EVIDENCE § 190, at 449 (2d ed. 1972)). *See generally*, 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[09], at 61-66 (1977).

Judge Mansfield's reliance on *Benedetto* for the proposition that uniqueness is required for similar uncharged crimes to be admitted is questionable. In *Gubelman*, identity was clearly in issue, while in *Benedetto* the other crimes evidence was admitted to impeach the defendant. The *Benedetto* court used the "signature" standard to refute the government's contention that Benedetto used a "unique scheme or pattern." 571 F.2d at 1249. This exception is not necessarily equivalent to identity. *See id.* at 1255 n.12.

²⁵ 571 F.2d at 1256 (Mansfield, J., dissenting).

²⁶ *Id.* at 1257 (Mansfield, J., dissenting). Judge Mansfield paraphrased Rule 404(b) to

The *Gubelman* majority appears to be correct in opting for a liberal application of the exceptions listed in Rule 404(b). In contrast to the approach employed in *Gubelman*, the Fifth Circuit maintains a strict standard of admissibility when identity alone is in issue.²⁷ In that circuit, "other crimes" evidence relevant to the defendant's identity must share such unique characteristics with the charged crime to permit an inference that both are the handiwork of the same individual.²⁸ This approach seems proper when identity is sought to be proved by demonstrating the defendant's *modus operandi*. It appears overly restrictive, however, when evidence of other crimes is offered to prove identity by other means, such as rebutting an alibi defense or bolstering a witness' in-court identification by revealing other opportunities he had to observe the defendant. There is nothing in the legislative history of Rule 404(b) to indicate that the Fifth Circuit's narrow construction of the identity exception was intended by the drafters of the Federal Rules of Evidence.²⁹

When Congress enacted Rule 404(b), it apparently did not intend to effect a significant change in existing federal common law

reflect the *Gubelman* facts: "Evidence of other . . . [bribes] is not admissible to prove [Gubelman's propensity to take bribes] in order to show that he [took bribes at the places charged]." *Id.* (Mansfield, J., dissenting).

²⁷ See *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977); *United States v. Goodwin*, 492 F.2d 1141, 1153-54 & n.12 (5th Cir. 1974); accord, *D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE* § 190(9), at 144 (1978).

²⁸ See *United States v. Myers*, 550 F.2d 1036, 1045-46 (5th Cir. 1977). The rationale for a strict admissibility standard is that other crimes evidence is likely to improperly influence a jury. See *United States v. Goodwin*, 492 F.2d 1141, 1148 (5th Cir. 1974); *United States v. Broadway*, 477 F.2d 991, 994 (5th Cir. 1973). Also implied is the notion that "a defendant must be tried for what he did, not for who he is." *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977). The *Myers* court stated that "[t]he probity of evidence of other crimes where introduced [to prove identity] depends upon both the uniqueness of the *modus operandi* and the degree of similarity between the charged crime and the uncharged crime." *Id.* at 1045; see *United States v. Goodwin*, 492 F.2d 1141, 1154-55 (5th Cir. 1974). The *Goodwin* court required that other crimes and the charged crime "bear such peculiar, unique, or bizarre similarities as to mark them as the handiwork of the same individual." *Id.* at 1154.

The Fourth, Ninth, and District of Columbia Circuits also appear to have adopted uniqueness, signature, or handiwork as the standard for admissibility of other crimes evidence to prove identity. See, e.g., *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976); *United States v. McCray*, 433 F.2d 1173 (D.C. Cir. 1970); *Parker v. United States*, 400 F.2d 248 (9th Cir. 1968), cert. denied, 393 U.S. 1097 (1969). Additionally, although not specifically adopting the handiwork standard, a recent Eighth Circuit decision upheld a kidnapping conviction, finding that evidence of another kidnapping attempt was properly admitted on the identity issue, based on its similarity to the charged kidnapping. *Durns v. United States*, 562 F.2d 542 (8th Cir.), cert. denied, 434 U.S. 959 (1977). It should be noted that *McCray* and *Parker* were decided prior to the adoption of the Federal Rules of Evidence. Neither the Ninth nor the District of Columbia Circuits have been presented with the issue since then.

²⁹ See note 1 *supra*.

concerning the admissibility of other crimes evidence.³⁰ Still, a new emphasis was placed on the admissibility of other crimes evidence when offered to prove something other than the defendant's propensity to commit the charged crime.³¹ With respect to evidence offered to prove identity, it was anticipated that the evidence would be admissible if relevant.³² Therefore, evidence found to be admissible under Rule 404(b) would only be excluded if its probative value would be substantially outweighed by the possibility of unfair prejudice.³³

The Second Circuit has long applied this liberal standard.³⁴

³⁰ See *id.* In addition to the identity exception, Rule 404(b) enumerates several other purposes for which other crimes evidence may be admissible. Intent may be proven by other crimes evidence in cases where it is an element of the crime. See, e.g., *United States v. Miller*, 573 F.2d 388 (7th Cir. 1978); *United States v. Bradford*, 571 F.2d 1351 (5th Cir.), *cert. denied*, 98 S.Ct. 3100 (1978); *United States v. Henciar*, 568 F.2d 489 (6th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978). Knowledge, often connected with intent, may be proven when the defendant claims an unawareness that a criminal act had been committed. See, e.g., *United States v. Brown*, 562 F.2d 1144 (9th Cir. 1977); *United States v. Johnson*, 562 F.2d 515 (8th Cir. 1977); *United States v. Sparks*, 560 F.2d 1173 (4th Cir. 1977). When the prosecution seeks to show that the defendant had a reason to commit the charged crime, evidence of other crimes that indicates the defendant's state of mind may be admitted under the motive exception to permit an inference that he committed the charged crime. See, e.g., *United States v. Stover*, 565 F.2d 1010 (8th Cir. 1977); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 433 U.S. 182 (1977). Evidence of plan or design is admissible in two situations. First, when two crimes are committed as part of the same transaction, such as multiple thefts, the evidence is admissible to complete the story. See, e.g., *United States v. Carrillo*, 561 F.2d 1125 (5th Cir. 1977); *United States v. Dudek*, 560 F.2d 1288 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037 (1978). Second, other crimes evidence may be used to show that one crime was committed in preparation for commission of another crime. See, e.g., *United States v. Weidman*, 572 F.2d 1199 (7th Cir.), *cert. denied*, 99 S.Ct. 87 (1978); *United States v. Conley*, 523 F.2d 650 (8th Cir.), *cert. denied*, 424 U.S. 920 (1976).

³¹ H.R. REP. NO. 93-650, 93d Cong., 2d Sess. 7 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081; see note 1 *supra*.

³² Relevancy is the basic requirement for the admission of evidence. 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 401 [01] (1977). See generally C. McCORMICK, *EVIDENCE* §§ 184-185 (2d ed. 1972); 1 J. WIGMORE, *EVIDENCE* §§ 24-36 (3d ed. 1940); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1 (1956); Comment, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 167, 167-71 (1969).

Rule 401 provides that: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; see, e.g., *United States v. Young*, 573 F.2d 1137 (9th Cir. 1978); *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978); *United States v. Fosher*, 568 F.2d 207 (1st Cir. 1978); *United States v. Tibbetts*, 565 F.2d 867 (4th Cir. 1977).

³³ See 1 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 403[03] (1977).

³⁴ See, e.g., *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). In *Deaton*, decided prior to the passage of the Federal Rules of Evidence, the Second Circuit noted that it was among the minority of courts that had adopted the inclusionary approach to other crime evidence. See *id.* at 117. After the Rules were enacted, the Second Circuit continued to take the same view. See, e.g., *United States v. Benedetto*, 571 F.2d 1248 (2d Cir. 1978).

A predecessor of *Deaton*, *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966), indicated

Significantly, however, it seems that the facts in *Gubelman* did not justify the admission of evidence of other bribetaking. Since different witnesses testified to the charged and uncharged acts, it is difficult to see how the "other crimes" evidence could bolster the government's case on the mistaken identity issue, except by impermissibly showing propensity. In this sense, Judge Mansfield was correct in reasoning that something more than mere similarity was needed. For uncharged crimes to be relevant to a defendant's identity in this circumstance, and not solely indicative of propensity, the other crimes ought to evince a unique *modus operandi*.

The result reached on the facts in *Gubelman* illustrates the problems that obtain when evidence only tangentially related to an issue other than character or propensity is found to meet the Rule 404(b) standard. Although Rule 403 theoretically works as a check on the admission of prejudicial evidence, the broad discretion afforded to judges in the Second Circuit renders the availability of appellate review an inadequate safeguard.³⁵ Therefore, unless care-

the flexibility of the common-law "other crimes" rule. Stating that the exceptions to inadmissibility were not "formalized," the *Bozza* court reasoned that, so long as evidence of the other crime was "substantially relevant" to some issue other than character, it would be admissible. *Id.* at 213; see *United States v. Bradwell*, 388 F.2d 619, 622 (2d Cir. 1968). In *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976), the court used broad language to note that "other crimes" evidence was admissible "for all purposes except to show [the] defendant's criminal character or disposition." *Id.* at 1134; *accord*, *United States v. Brettholz*, 485 F.2d 483, 487 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). The inference to be drawn from these cases is that the Second Circuit is extremely liberal in its use of other crimes evidence.

³⁵ In *United States v. Benedetto*, 571 F.2d 1246 (2d Cir. 1978), the court noted that the Second Circuit almost always affirms the admission of other crimes evidence. *Id.* at 1248; see, e.g., *United States v. Williams*, 577 F.2d 188, 191 (2d Cir. 1978); *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978); *United States v. Ravich*, 421 F.2d 1196 (2d Cir. 1970); *United States v. Bozza*, 365 F.2d 206 (2d Cir. 1966). This is due, in part, to a generally recognized belief that the trial court is in a better position than an appellate court to weigh the factors influencing the admissibility of such evidence. See note 4 *supra*. Additionally, the standard established by the Second Circuit for abuse of discretion contributes to its reluctance to reverse.

The Second Circuit has defined abuse of discretion as an "arbitrary" or "irrational" decision by the trial judge. *United States v. Robinson*, 560 F.2d at 520; *accord*, *Construction, Ltd. v. Brooks-Skinner Bldg. Co.*, 488 F.2d 427, 431 (3d Cir. 1973). See also *Napolitano v. Compania Sud Americana De Vapores*, 421 F.2d 382, 384 (2d Cir. 1970). Hence, in *United States v. Gubelman*, 571 F.2d 1252 (2d Cir. 1978), the majority noted that while the admission of the testimony of other bribe-taking in the government's case in chief was within the trial court's discretion, it would not have been an abuse of discretion to exclude it for being of questionable "necessity." *Id.* at 1255; see *United States v. Ravich*, 421 F.2d 1196, 1204-05 (2d Cir. 1970); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States v. Byrd*, 352 F.2d 570, 572 (2d Cir. 1965); note 24 *supra*. The *Gubelman* majority also remarked that, despite its feeling that other crimes evidence offered in rebuttal should have been excluded, it would again defer to the broad discretion of the trial judge. 571 F.2d at 1255-56. The breadth of discretion afforded trial judges and the scope of appellate review in the circuit is exempli-

fully applied by trial judges, the utilization of mere "relevance" as the standard under Rule 404(b) will have the unintended effect of permitting prejudicial character evidence to reach the jury.

Regardless of the approach taken in examining other crimes evidence, the crucial factor to be considered is whether the evidence is probative of an accepted purpose, or whether it merely serves to establish the defendant's bad character. Although Rules 403 and 404(b) favor the admission of relevant evidence,³⁸ their application cannot be mechanical, but rather, must also include a careful consideration of the defendant's right to a fair trial.

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fied by *United States v. Robinson*, 560 F.2d 507, 512-16 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978). There, the trial court admitted evidence concerning a gun possessed by the defendant at his arrest, ten weeks after an armed robbery in which a similar gun was used. 560 F.2d at 512. In affirming the defendant's conviction, the Second Circuit found that the trial judge's action was not arbitrary or irrational and, therefore, upheld his exercise of discretion. *Id.* at 515. Judge Mansfield, writing for the majority, stated that the "remarkable coincidence" of that possession "tended directly to identify [defendant] as one of the participants" in the robbery. *Id.* at 512. In contrast, Judge Oakes viewed the evidence that the defendant was found with a gun similar to that used in the charged crime as having "virtually no probative significance" in view of the probability that "hundreds of thousands of persons" possessed the same caliber gun. *Id.* at 520 (Oakes, J., dissenting).

³⁸ See note 1 *supra*.