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Evidence - Pretrial Discovery of Uncharged Misconduct Evidence - No More Pulling the Uncharged Misconduct Card From the Sleeve. Howard v. Wyoming, 42 P.3d 483 (Wyo. 2002)

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EVIDENCE – Pretrial Discovery of Uncharged Misconduct Evidence – No More Pulling the Uncharged Misconduct Card From the Sleeve. *Howard v. State*, 42 P.3d 483 (Wyo. 2002).

INTRODUCTION

In April 1998, Carrie Huff lived with Warren Harlow and his wife.[1] During that time, Huff was in the process of getting a divorce from her husband, Eric Huff.[2] It was also during this period that Carrie Huff wrote her husband's credit card numbers down and gave them to Warren Harlow.[3] Harlow never actually possessed the credit card, but used the numbers to purchase gasoline, cigarettes, groceries, and other items from both the Phillips 66 store and the Trailside Convenience Store in Casper, Wyoming.[4] Melody Howard was a clerk at both convenience stores where Harlow used the numbers to obtain goods and sometimes money from cash back transactions.[5]

In May 1998, Eric Huff received his Visa bill with around fifteen unauthorized charges, totaling approximately $950.[6] Huff contacted the credit card company and completed an affidavit of forgery.[7] An investigation soon followed.[8] None of the signatures on the sales slips was legitimate.[9] All of the fraudulent sales slips except one were signed "Eric Huff." The one exception was a sales slip signed "Carrie Huff."[10] Storeowners at the Phillips 66 were informed they would be charged back for the unauthorized charges to Eric Huff's card.[11] Four sales slips had been processed on Huff's credit card at the Phillips 66, totaling $273.46.[12] Later that summer, management for the Trailside Convenience Store in Casper was informed that Howard had processed similar transactions as an employee at that store.[13] The Trailside's regional supervisor had all the sales slips pulled

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1. Howard v. State, 42 P.3d 483, 484 (Wyo. 2002).
2. *Id.*
3. *Id.*
4. *Id.*; Brief for Appellee at 5, Howard v. Wyoming, 42 P.3d 483 (Wyo. 2002) (No. 00-243) [hereinafter Appellee's Brief]. These are the facts as alleged by the State. The facts in this case are not disputed significantly. The disputed issue in this case lies in the interpretation of Wyoming Rule of Evidence 404(b).
5. *Howard*, 42 P.3d at 484 (Wyo. 2002).
6. Appellee's Brief, *supra* note 4, at 5.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 7.
11. *Id.*
12. *Id.*
13. *Id.*

from the suspect transactions.[14] The Trailside had processed eleven transactions, totaling $694.33.[15] All of the charges at both stores had occurred while Howard was working.[16]

When questioned, Howard claimed she asked Harlow if he had permission to use the numbers.[17] Harlow insisted that Carrie Huff had the card and that she had given him permission to use the numbers.[18] Howard claimed she verified that Harlow had permission to use the numbers.[19] Howard claimed that before one of the transactions, Harlow made a phone call to someone Harlow said was Eric Huff and handed her the phone.[20] The person on the other line told Howard that Harlow had permission to use the card.[21] Howard admitted that she manually entered the numbers into the machine and that Harlow signed Eric Huff's name on the charge slips.[22] A criminal information was filed and an arrest warrant was issued in January, charging Howard with two counts of forgery, two counts of conspiracy to commit forgery, and one count of unlawful use of a credit card.[23]

Prior to trial, Defense counsel filed a paper captioned: "Defendant's Demand for a Speedy Trial and Demand for Notice of Intent to Introduce Evidence Under 404(b)."[24] The Defense also filed several motions *in limine* to bar the prosecution from: (1) introducing evidence under Wyoming Rule of Evidence 404(b) (hereinafter WRE 404(b)); (2) mentioning any of Howard's drug related activity; (3) using her prior criminal history; or (4) mentioning that she had flunked a urinalysis test while on parole.[25] Despite these

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14. *Id.*
15. *Id.*
16. Howard v. State, 42 P.3d 483, 484 (Wyo. 2002).
17. Appellee's Brief, *supra* note 4, at 5.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 2;
24. Howard v. State, 42 P.3d 483, 485 (Wyo. 2002). There is no precedent for the demand to create a burden on the part of the State to disclose the evidence, but it appears the defense was planning on using the demand to bolster their argument that admitting the evidence would be unfair. The demand, in relevant part, provided:

> The Defendant Hereby Further Demands the State provide Notice of intent to introduce any evidence under Rule 404(b) of the Wyoming Rules of Evidence (W.R.E.). Said Notice shall include the specific evidence the State wishes to introduce, and the legal authority or theory for the admissibility of same. Said Notice shall also be given to the Defense in a timely manner prior to the trial in this matter so the Defense may prepare objections and request a hearing to determine the admissibility of said evidence.

Howard, 42 P.3d at 485.
25. WYO.R.EVID. 404(b) [hereinafter WRE 404(b)]; Appellee's Brief, *supra* note 3, at 3.

demands, the morning of trial the State gave the first indication it planned to introduce evidence of Howard's illegal drug use, specifically methamphetamines.[26] The State intended to show that Howard used the money from the cash back transactions to buy drugs[27] The State planned to introduce the drug evidence through testimony from Harlow and the police detective who interviewed Howard.[28]

Defense counsel objected to the introduction of the evidence because they were not given notice of the intent to use the evidence (especially in light of the demand for notice of intent to use such evidence) and on the grounds that the evidence would be more prejudicial than probative, was not relevant, and would only confuse the jury.[29] The district court decided to admit the evidence under WRE 404(b) as proof of motive and because the evidence was relevant to the elements of the conspiracy charge.[30]

Although the trial judge believed the evidence was admissible because it was relevant to the conspiracy charge, the district court also examined the evidence in light of WRE 404(b) and applied the admissibility criteria set out by the Wyoming Supreme Court in *Vigil v. State*.[31] *Vigil* required a timely objection to admission of uncharged misconduct before the prosecution was required to show the evidence was offered for a proper purpose under WRE 404(b).[32] The *Vigil* court also held it would follow the lead of the United States Supreme Court and adopted the 4-part test from *Huddleston v. United States*.[33]

At trial, only the police detective offered testimony about Howard's drug activity.[34] The State called Harlow to testify, but he refused to testify on the drug evidence.[35] Harlow was not charged with any drug related crime

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26. *Howard*, 42 P.3d at 485.
27. *Id.*
28. *Id.*
29. Appellee's Brief, *supra* note 4, at 11.
30. *Howard*, 42 P.3d at 486-87 (citing United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990)).
31. *Id.*; Vigil v. State, 926 P.2d 351 (Wyo. 1996).
32. *Vigil*, 926 P.2d at 355.
33. *Id. See* Huddleston v. United States, 485 U.S. 681, 691-92 (1988) (setting forth the 4-part test). The Vigil Court explained:

> The *Huddleston* Court held other acts evidence was admissible if: 1) it was offered for a proper purpose; 2) it met relevancy requirements; 3) the probative value was not outweighed by the potential for unfair prejudice (from Rule 403); and 4) upon request the trial court would instruct the jury that the evidence was to be considered only for the proper purpose for which it was admitted.

Vigil, 926 P.2d at 355.
34. *Howard*, 42 P.3d at 485.
35. *Id.*

or offered immunity for his testimony and understandably invoked his Fifth Amendment right against self-incrimination.[36] The police detective's testimony related to statements Howard made over the course of three interviews.[37] At first, Howard denied benefiting from the transactions and stated that she allowed the transactions only as a favor to her friend Harlow.[38] Later, Howard admitted she had received money as a result of some of the cash back transactions and that the purpose was to get money for drugs, which she and Harlow shared.[39]

After the State rested, Howard moved for acquittal on all charges for lack of evidence.[40] The court granted acquittal on the two conspiracy counts because there was no evidence presented to establish an agreement to commit forgery.[41] The jury was given the duty to decide Howard's fate on one forgery count and one count of unlawful use of a credit card.[42] The jury convicted Howard of forgery in violation of WYO. STAT. § 6-3-602(a)(ii), and of unlawful use of a credit card, in violation of WYO. STAT. § 6-3-802(a)(i).[43] Harlow, meanwhile, pled guilty to charges of forgery and of credit card fraud and agreed to testify against Howard.

Howard appealed claiming the court abused its discretion by admitting the drug evidence in light of the "Demand for Notice of Intent" to use such evidence.[44] The Wyoming Supreme Court affirmed the conviction and held that the trial court did not abuse its discretion in admitting the evidence.[45] Without a district court order to do so, the State was under no obligation to notify the defense of its intent to use WRE 404(b) evidence.[46] Notification was mandatory only if the evidence was exculpatory.[47] The court held that in the future, a demand for notice of intent to use WRE 404(b) evidence would be considered the same as a timely objection to the offering of any WRE 404(b) evidence.[48] The State's response would then trigger an admissibility hearing applying the *Huddleston* criteria adopted in *Vigil*.[49]

This case note will discuss why it was appropriate for the Wyoming Supreme Court in *Howard v. State* to adopt a pretrial notice requirement for

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36. *Id.*
37. Appellee's Brief, *supra* note 4, at 14.
38. *Id.*
39. *Id.* at 15-16.
40. *Id.* at 4.
41. *Id.*
42. *Id.*
43. *Id.* at 12.
44. Howard v. State, 42 P.3d 483, 494 (Wyo.2002).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

other acts evidence offered under WRE 404(b). First, this case note will examine why pretrial notice for other acts evidence promotes fairness and correct decisions on admissibility. Second, this case note will discuss why there should be a good cause exception to pretrial notice in cases where witness intimidation is a concern. Finally, this case will urge the Wyoming Supreme Court to more clearly define what is meant by a "timely" WRE 404(b) objection.

BACKGROUND

WRE 404(b) has developed with a watchful eye on Federal Rule of Evidence 404(b) (hereinafter FRE 404(b)) and relevant case law pertaining to the federal rule.[50] The most recent changes to WRE 404(b) have been made judicially rather than by amending the rule.[51] The *Howard* court follows that trend by judicially adopting a pretrial notice requirement.[52] A general discussion of FRE 404(b) and WRE 404(b) follows to highlight the interaction between the federal rule and the Wyoming rule.

Other Acts Evidence Under Federal Law

> The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying condemnation irrespective of guilt of the present charge.[53]

Rulings on whether to admit other acts evidence are frequently appealed and are a crucial part of a criminal trial.[54] The evidence can be so potentially damning to defendants that it has been referred to as a "Prosecutor's Delight."[55] Generally, other acts evidence is not admissible to prove that a person acted in accordance with her propensity to commit bad acts.[56]

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50. Vigil v. State, 926 P.2d 351, 354 (Wyo. 1996).
51. *Vigil*, 926 P.2d at 354.
52. *Howard*, 42 P.3d at 494.
53. State v. Zackowitz, 172 N.E. 466, 472 (N.Y. 1930).
54. Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 255-56 (1987) (discussing the importance of appeals involving uncharged misconduct evidence).
55. *Id.* at 249.
56. FED.R.EVID. 404(a). Rule 404(a) states:

> Evidence of a person's character or trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same,

FRE 404(b) allows for admission of other bad acts evidence offered for relevant and proper purposes distinct from the impermissible character-propensity inference.[57] FRE 404(b) states:

> 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.[58]

Although the Rule lists purposes for which the evidence may be admitted under FRE 404(b), the list is not exhaustive.[59] Regardless of the purpose for which other acts evidence is potentially admissible, any other acts evidence offered under FRE 404(b) is subject to the balancing test of FRE 403.[60] Federal Rule of Evidence 403 weighs the probative value of the evidence against its potential for unfair prejudice.[61]

Standard of Proof

In *Huddleston v. United States,* the United States Supreme Court articulated the standard for admissibility of other acts evidence in the federal courts.[62] The Court held that evidence offered under FRE 404(b) is admissible if: (1) it is offered for a proper purpose; (2) it meets relevancy requirements; (3) the probative value is outweighed by the potential for unfair prejudice (from Rule 403); and (4) upon request the trial court will instruct

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> or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

FED.R.EVID. 404(a).

57. FED.R.EVID. 404(b).

58. FED.R.EVID. 404(b).

59. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.15 (2d ed. 1999).

60. *Id.* § 4.16.

61. FED.R.EVID. 403. Rule 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." *Id.*

62. Huddleston v. United States, 485 U.S. 681, 691-92 (1988).

the jury that the evidence is to be considered only for the proper purpose for which it is admitted.[63]

Huddleston involved the admission of "similar acts" evidence to show that Huddleston knew Memorex videotapes he was selling were stolen.[64] There was no dispute whether the tapes he sold were stolen; the only question was whether Huddleston knew they were stolen.[65] The Prosecution presented similar acts evidence that Huddleston had sold stolen goods from the same source and should have known the videotapes in the present case were stolen as well.[66] The trial court allowed the evidence to show Huddleston's knowledge and instructed the jury that the evidence was to be used for that purpose only.[67] Huddleston was convicted of possessing stolen goods.[68] He appealed, challenging the admissibility of the similar acts evidence.[69]

Prior to *Huddleston* the federal courts of appeals were divided on what standard of proof to use for the admission of FRE 404(b) evidence that was unsupported by a conviction.[70] No courts of appeals had adopted a beyond a "reasonable doubt" standard of proof. The Seventh, Eighth, Ninth, and D.C. Circuits had adopted a "clear and convincing" evidence standard of proof.[71] The Second Circuit had adopted a "preponderance of the evidence" standard of proof.[72] All of the federal courts, however, required that the decision be made by a judge pursuant to FRE 104(a). The *Huddleston* Court adopted a more lenient standard than any of the three just described. In *Huddleston*, the Court adopted a preponderance of the evidence standard of proof, but added that the decision should be made pursuant to FRE 104(b).[73] Under FRE 104(b) the judge in a jury trial need only find that there is sufficient evidence to support a finding by a reasonable jury that the other acts were proved by a preponderance of the evidence.[74]

The *Huddleston* Court noted its continuing concern that evidence under FRE 404(b) may be unduly prejudicial to a jury, but held that sufficient protection from unfair prejudice is provided by other sources within the Rules.[75] It held that as long as the evidence satisfied relevancy requirements

63. *Id.* at 691.
64. *Id.* at 683.
65. *Id.*
66. *Id.* at 686.
67. *Id.* at 684
68. *Id.* at 682.
69. *Id.* at 688.
70. *Id.*
71. *Id.*; United States v. Leight, 818 F.2d 1297, 1302 (7th Cir. 1987); United States v. Weber, 818 F.2d 14, 14 (8th Cir. 1987); United States v. Vaccaro, 816 F.2d 443, 452 (9th Cir. 1987); United States v. Lavelle, 751 F.2d 1266, 1276 (D.C. Cir. 1985).
72. United States v. Leonard, 524 F.2d 1076, 1090-91 (2nd Cir. 1975).
73. *Huddleston*, 485 U.S. at 689.
74. *Id.*
75. *Id.* at 691.

it was up to the jury to find whether the alleged other act occurred.[76] The Court explained that the requirement of a non-character-propensity purpose, and other protections, would preclude the State from parading potentially prejudicial similar acts evidence past a jury.[77] The *Huddleston* Court held it was inconsistent with both the meaning of FRE 104(b) and the legislative history of FRE 404(b) to require a finding by the judge before trial.[78]

After *Huddleston*, debate continued over procedures for admitting FRE 404(b) evidence. Increasingly important in the debate was the role of pretrial notice.[79] In 1991, FRE 404(b) was amended to include a pretrial notice requirement for evidence offered under the rule.[80] The rule was amended for the stated purposes of reducing surprise and facilitating the early resolution of admissibility issues.[81] The rule now includes the phrase:

> [U]pon 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 produce at trial.[82]

Other Acts Evidence in Wyoming

The recent development of WRE 404(b) begins with *Bishop v. State*.[83] In *Bishop v. State,* the Wyoming Supreme Court adopted a five-part test to evaluate admissibility of 404(b) evidence: (1) there must be plain, clear, and convincing evidence; (2) the other acts must not be too remote in time from the charged offense; (3) the evidence must be offered for a proper purpose; (4) the element that the evidence was introduced to prove must have been material; and (5) there must be a substantial probative need for the evidence.[84] Applying the test, the Wyoming Supreme Court held that evidence of other unsolved burglaries in the area in which Bishop was charged, was improperly admitted (but that this was harmless error).[85]

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76. *Id.* at 689-90.
77. *Id.*
78. *Id.* at 688. "Petitioner's reading of 404(b) as mandating a preliminary finding by the trial court that the act in question occurred not only superimposes a level of judicial oversight that is nowhere apparent from the language of the provision, but it is simply inconsistent with the legislative history behind Rule 404(b)." *Id.*
79. Imwinkelried, *supra* note 54, at 255.
80. FED.R.EVID. 404(b).
81. *Id.*
82. *Id.*
83. Bishop v. State, 687 P.2d 242, 243 (Wyo. 1984).
84. *Id.* at 244.
85. *Id.* at 246.

Lower courts were urged, but not required to follow the *Bishop* procedure and give a reasoned basis for their decision based on the criteria.[86]

As discussed, in 1988, the United States Supreme Court in *Huddleston* adopted the most lenient of the four possible standards of proof. *Huddleston* required only that there be sufficient evidence to support a finding by a preponderance of the evidence that the other act occurred.[87] In *Bishop,* which was decided before *Huddleston,* the Wyoming Supreme Court adopted a higher clear and convincing standard.[88] In 1989, the Wyoming Supreme Court had an opportunity in *Pena v. State* to adopt the more lenient standard articulated in *Huddleston,* but did not do so. In *Pena,* the Wyoming Supreme Court reiterated the clear and convincing standard announced in *Bishop* without mentioning *Huddleston.*[89] Wyoming was not alone in this decision, as several other states refused to adopt the *Huddleston* standard for proof.[90]

The Vigil Decision

In 1996, the Wyoming Supreme Court held that it was the court's intention to follow the lead of the federal courts in evaluating other acts evidence.[91] In *Vigil v. State* the Wyoming Supreme Court adopted both the four-part *Huddleston* test for admissibility and the *Huddleston* standard for proof.[92] The Wyoming Supreme Court also held that there must be a timely objection to admission of other acts evidence before the prosecution was required to show the evidence was offered for a proper purpose.[93] The *Vigil* court did not create a pretrial notice requirement, nor has WRE 404(b) been amended to adopt the 1991 pretrial notice amendment added to FRE 404(b).[94]

The Wyoming Supreme Court in *Vigil* clarified several other aspects of evidence offered under WRE 404(b). First, upon request the trial court should give a limiting instruction to the jury on the proper purpose of the evidence. Second, if the evidence is challenged on appeal and there had been no objection at trial, the accused may raise only a claim of plain error and the prosecution may justify the evidence on any proper purpose under WRE 404(b). Third, if a timely objection is lodged, then the trial court

86. Howard v. State, 42 P.3d 483, 487 (Wyo. 2002).
87. Huddleston v. United States, 485 U.S. 681, 681 (1988).
88. *Bishop,* 687 P.2d at 244.
89. Pena v. Wyoming, 780 P.2d 316 (Wyo. 1989).
90. State v. Cofield, 605 A.2d 230, 234-35 (N.J. 1992); Daniels v. United States, 613 A.2d 342, 347 (D.C. 1992); Phillips v. State, 591 So.2d 987, 989 (Fla. 1991); State v. Garner, 806 P.2d 366, 370-74 (Colo. 1991).
91. Vigil v. State, 926 P.2d 351, 354 (Wyo. 1996).
92. *Id.*
93. *Id.* at 355.
94. *Id.*

should apply the *Huddleston* test and the State is limited to the proper purpose for which the evidence was admitted.[95]

PRINCIPAL CASE

Melody Howard's trial took place in the Seventh Judicial District Court. Evidence of Howard's drug use was allowed under two theories: (1) because it was relevant to the conspiracy charge; and (2) because it was allowable under WRE 404(b) to show motive.[96] For purposes of admitting the evidence under WRE 404(b), the district court held a hearing pursuant to *Vigil*.[97] The trial judge held that the drug evidence was admissible under WRE 404(b) to show motive.[98] The Wyoming Supreme Court disagreed with the district court's finding that the evidence was relevant as substantive proof of the conspiracy charge, but agreed that it was admissible was under WRE 404(b) to show at least partial motive.[99]

Howard argued that the district court abused its discretion in admitting the drug evidence.[100] Howard contended that *Vigil* required the prosecution to notify her of intent to use WRE 404(b) evidence in light of her request.[101] The State countered that neither *Vigil* nor any provision of WRE 404(b) required them to respond to a "Demand for Notice of Intent to Introduce Evidence Under 404(b)" and that such a demand was not a timely objection as required by *Vigil*.[102] The *Howard* court clarified that nowhere in *Vigil* was the State required to respond to a demand for notice of intent to introduce the evidence.[103] *Vigil* only required a response if a timely objection were lodged.[104] The Demand was not technically an objection so no response was necessary.[105] The court went on to address the question of whether a demand for notice should be considered a timely objection.[106]

The *Howard* court found that the stated purpose of the *Vigil* decision was to conform the Wyoming procedure to the procedure used in the federal courts.[107] Justice Hill stated that "[u]nder the current federal rule a defendant's request for notice would have triggered a duty on the part of the State to provide him with reasonable notice in advance of the trial of the general

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95. *Id.*
96. Howard v. State, 42 P.3d 483, 490 (Wyo. 2002).
97. *Id.* at 485.
98. *Id.*
99. *Id.* at 486-87.
100. *Id.* at 486.
101. *Id.*
102. *Id.*
103. *Id.* at 488.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

nature of any WRE 404(b) evidence it intended to use at trial."[108] Wyoming, however, had not adopted the 1991 amendment to FRE 404(b).[109] Accordingly, the State in *Howard* was under no duty to respond to the Demand for Notice.[110] The *Howard* case brought to light a discrepancy between FRE 404(b) and WRE 404(b).[111] As Justice Hill stated, "From this proposition then followed the specific holding that has led to the problem so well exemplified by the instant case . . . ."[112]

Under *Vigil,* the State is required to justify the evidence and the trial court is required to evaluate admissibility only in the presence of a timely objection.[113] As Justice Hill stated, "The problem, of course, is that if the State is allowed to withhold its WRE 404(b) evidence until the trial is underway, the defendant's opportunity to file a timely objection is largely illusory."[114] The Wyoming Supreme Court in *Howard* upheld the conviction and held that in the future:

> [W]here a defendant files a pretrial demand for notice of intent to introduce evidence under W.R.E. 404(b), the same shall be treated as the making of a timely objection to the introduction of such evidence. The State must then respond with sufficient information to meet the balance of the *Huddleston* test adopted in *Vigil.*[115]

ANALYSIS

First, this analysis will discuss why it was appropriate for the Wyoming Supreme Court in *Howard v. State* to make pretrial notice for other acts evidence a reality in Wyoming. In supporting the appropriateness of the *Howard* rule, this analysis will discuss the benefits and possible objections to pretrial notice for other acts evidence. Second, this analysis will discuss why WRE 404(b) should have a good cause exception to the pretrial notice requirement. Finally, this analysis will highlight the ambiguity of what a "timely" objection is and urge the Wyoming Supreme Court to more clearly define what the term means.

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108. *Id.* at 490.
109. *Id.* at 491.
110. *Id.* at 490.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 491.
115. *Id.*

Making Pretrial Notice a Reality in Wyoming

Prior to the 1991 amendment to FRE 404(b) and continuing today, there was significant debate among academics, prosecutors, and defense attorneys about the utility of pretrial notice. The arguments supporting pretrial notice proved more persuasive in 1991, and a pretrial notice requirement was added to FRE 404(b).[116] WRE 404(b) has never been amended to adopt a pretrial notice requirement.[117] In *Howard*, however, the Wyoming Supreme Court judicially adopted a pretrial notice requirement for other acts evidence offered under WRE 404(b).[118]

Prior to *Howard,* the Wyoming Supreme Court held in *Vigil* that a timely objection to WRE 404(b) evidence would trigger an admissibility decision, but since the defense could not know about the 404(b) evidence until it was offered at trial, the ability to object to other acts evidence was largely illusory.[119] In *Howard*, the Wyoming Supreme Court wisely created the equivalent of a pretrial notice requirement for WRE 404(b) evidence. The court made a demand for notice the equivalent of a timely objection.[120] A demand for notice now creates an affirmative duty to disclose other acts evidence intended to be used at trial. The demand also triggers application of the admissibility standards adopted in *Vigil.*

Pretrial Notice Promotes Fairness and Correct Admissibility Decisions

A pretrial notice requirement is an important tool for ensuring fairness and correct admissibility decisions. Pretrial notice enhances the judge's ability to correctly rule on admissibility, avoids the pitfalls of trial by ambush, and generally gives the defendant the ability to meet the case brought against her.[121] These factors greatly contribute to better trials for both prosecutors and defendants.

Other acts evidence is generally inadmissible to support a general inference of the defendant's bad character.[122] The evidence, however, may be admissible if it is offered on a non-character theory of logical relevance such as motive, plan, intent, opportunity, or knowledge.[123] The line between inadmissible character evidence and admissible non-character evidence can be

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116. FED.R.EVID. 404(b).
117. WYO.R.EVID. 404(b).
118. *Howard*, 42 P.3d at 491.
119. Vigil v. State, 926 P.2d 351, 354 (Wyo. 1996).
120. *Howard*, 42 P.3d at 491.
121. Imwinkelried, *supra* note 54, at 255 (discussing and advocating reasons for pretrial discovery, but noting that pretrial notice could facilitate perjury by defense witnesses and possibly lead to witness intimidation).
122. FED.R.EVID. 404(a).
123. FED.R.EVID. 404(b).

fine.[124] Trial judges are charged with the duty to draw the line amidst the subtle and even "paradoxical" distinctions between admissible and inadmissible other acts evidence.[125] It is reasonable to believe that this takes time and careful consideration. As Chief Justice Hill stated in *Howard,* "Rulings on uncharged misconduct evidence are too important to be made in the heat and pressure of a trial, with the jury twiddling its thumbs in the next room."[126] A trial judge is more likely to err in drawing the line if surprised by the evidence and required to rule on the spur of the moment. Having an effective pretrial notice requirement allows a trial judge to be more informed and more meticulous in analyzing admissibility.

Eliminating Trial by Ambush

Absent a pretrial notice requirement there exists a risk that prosecution attorneys will adopt surprise trial tactics.[127] Pretrial notice reduces the chance of trial by ambush and gives the defendant the ability to meet the case brought against her. If the defense is notified about the other acts evidence it will have an opportunity to investigate fully both the factual basis and the legal precedent for the other acts evidence. If the prosecution surprises the defense with other acts evidence, then the defense is likely to be unprepared meet the evidence.[128] This puts the defense at a great disadvan-

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124. H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom,* 130 U. PA. L. REV. 845, 879 (1982). Professor Uviller states:

> [T]he division between the prescribed and the proscribed uses of the fact of prior conviction may be a bit difficult to perceive. The layman's difficulty, moreover, rests on a solid logical basis. The evidence of prior crime is admissible to show knowledge or the absence of mistake because a person who has once engaged in such a transaction demonstrates or acquires a trait of character that might be termed "criminal sophistication." Evidence of that trait supports the supposition that the defendant was criminally sophisticated in the transaction in question. Put more generally, evidence of the prior crime tends to prove that a defendant's conduct was criminal in the case in issue because of the assumed continuity and dominance of a relevant trait of character. Precisely the same principle would admit the evidence to prove the defendant's commission of the later crime as action in conformity with established character – the very device explicitly barred by the federal rules. It thus appears that, although an element of a crime or aspect may be proved by evidence of prior misconduct, the crime itself may not be. An inexplicable paradox can no longer be denied.

Id.

125. Uviller, *supra* note 124, at 879.

126. Howard v. State, 42 P.3d 483, 491 (Wyo. 2002).

127. Imwinkelried, *supra* note 54, at 259.

128. *Id.* at 260.

tage, especially considering the gravity and importance often placed on the other acts evidence.[129]

Possible Criticisms of Pretrial Notice

While arguments for pretrial notice are compelling, there are two strong objections to such a requirement. Generally the arguments are as follows: (1) pretrial discovery may facilitate perjury by defense witnesses if they have time to concoct false rebuttals to the other acts evidence; and (2) disclosure of witnesses could lead to witness intimidation. These arguments were made prior to the amendment of FRE 404(b) and continue today. The *Howard* court did not address these concerns, but it is useful to understand what may have been keeping the court from adopting a pretrial notice requirement prior to *Howard.*

The first criticism of a pretrial notice requirement is that the defense is given the opportunity to fabricate perjured testimony to rebut the state's other acts evidence.[130] This problem has not been overlooked, but its validity is questionable. Justice Brennan dubbed this concern "the old hobgoblin."[131] Little evidence concerning the magnitude of the problem exists and the risk has largely gone unverified.[132] The criticism also overlooks the need to deter perjury by the prosecution's witnesses.[133] In *Howard*, as in other cases involving other acts evidence, the prosecution's witnesses are often the defendant's accomplices.[134] If the accomplice is looking to gain favor with the prosecution (i.e. plea bargain) then there is strong motivation for the accomplice to give perjured testimony.[135] If there is pretrial notice, however, the accomplice would likely realize that the defense will have time to expose the perjured testimony, requiring him to think twice about the truthfulness of his testimony.[136]

A second argument against pretrial notice is embodied in the fear that if the defense learns the identity of the prosecution's witnesses before trial, then the defendant will have the opportunity to intimidate the prosecu-

129. *Id.* at 259-60.
130. William J. Brennan, J.R., *The Criminal Prosecution: Sporting Event of Quest for the Truth?*, 1963 WASH. U. L.Q. 279, 289 (1963).
131. *Id.* at 291.
132. *Id.* at 290 n.39. "What meager statistical evidence there is suggests that perjury is a very slight danger indeed." *Id. See* Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 310 (1960) (stating that the risk of defense perjury is an "unverified assertion").
133. Fletcher, *supra* note 132, at 309-11.
134. Howard v. State, 42 P.3d 483, 485 (Wyo. 2002) (explaining that the accomplice was called to the stand but refused to testify); United States v. Shepard, 793 F.2d 510, 513 (10th Cir. 1984) (explaining that the prosecution's case rested entirely on testimony from an accomplice).
135. Fletcher, *supra* note 132, at 308-09.
136. *Id.*

tion's witness. Witness intimidation is a viable concern for prosecutors. If it is thought that being a witness means being harassed, then potential witnesses may be reluctant to testify. Although it is believed that witness intimidation only occurs in a minority of cases, there is data to suggest thousands of examples of such activity.[137] The Federal Rule has eliminated much of the concern over witness intimidation by including a "good cause" provision in FRE 404(b). The good cause provision allows the prosecution to move that a witness's identity be protected in a case where intimidation is likely. In Wyoming, however, neither the Wyoming Supreme Court nor the Wyoming Legislature has adopted a "good cause" provision for WRE 404(b).

Admission During Trial for "Good Cause"

Either by judicial decision or rulemaking, the Wyoming Supreme Court should clear up any ambiguity by adopting a good cause exception to the *Howard* notice requirement. The court stated in *Vigil* it was the court's intention to conform the Wyoming rules of evidence to the federal rules of evidence so that Wyoming attorneys would have a wider scope of case law to refer to when dealing with WRE 404(b) issues.[138] Adopting a good cause exception would further the stated goal of *Vigil.*

In addition to expanding relevant case law for Wyoming attorneys to reference, allowing pretrial notice to be suspended for "good cause" helps to reduce the fear of witness intimidation. It is not hard to conceive an example where the judge perceives a reasonable threat of witness intimidation. If counsel can persuade the trial judge of the veracity and credibility of a threat, then counsel may be able to have pretrial notice suspended for good cause. In the absence of a good cause exception, the trial judge may not be able to suppress the identity of the witness even though there is a significant threat of witness intimidation.

Interpreting "Timeliness"

The *Howard* decision created a pretrial notice requirement for other acts evidence in Wyoming by making a demand for notice the same as an objection.[139] It is still unclear, however, when the demand needs to be submitted. To trigger the four-part admissibility test the objection must be "timely."[140] Similarly, under FRE 404(b), the demand is expected to be timely.[141] Other than requiring that the request and notice be in advance of

137. Imwinkelried, *supra* note 54, at 270.
138. Vigil v. State, 926 P.2d 351, 354 (Wyo. 1996).
139. Howard v. State, 42 P.3d 483, 491 (Wyo. 2002).
140. *Id.*
141. FED.R.EVID. 404(b).

trial, however, no other specific time limits are stated in the Federal Rule.[142] Wyoming can look to the federal courts of appeals, State courts, and other Federal Rules of Evidence for guidance in defining timely.

Interpretation of what is timely varies widely in the federal and State courts. In the Eleventh Circuit notice immediately before trial will suffice.[143] A Florida statute requires notice of intent to use the evidence 10 days before trial.[144] Texas has no time constraint.[145]

Other Federal Rules of Evidence have set time constraints on when other acts evidence has to be disclosed.[146] FRE 413 through FRE 415 deal with the admission of similar crimes evidence in sexual assault and molestation cases.[147] Any evidence offered under these rules has to be disclosed at least fifteen days before the scheduled trial date.[148] The time limit is not absolute; the court may allow the evidence to be disclosed later if good cause is shown.[149]

The definition of "timely" in Wyoming and in other courts that have not decided the issue directly will depend largely on the facts and circumstances of each case.[150] This author suggests the adoption of a rule similar to the 10-day rule followed by Florida. For pretrial notice to be effective and provide the benefits discussed herein it is important that all parties involved have a clear representation of what the case is about. Without a clear definition of what is meant by timely there remains a strong motivation to wait until the last minute to disclose other acts evidence. If this is allowed to happen the pretrial notice requirement created in *Howard* may be rendered impotent by trial courts that allow for last minute disclosure of the evidence. There may be times when extraneous circumstances exist and the facts of the case support an exception for good cause, but it would benefit the Wyoming courts to have a guiding principle as to what satisfies timeliness.

CONCLUSION

The court in *Howard* appropriately created a pretrial notice requirement. While there is still an obligation on the part of the defense to file a demand for notice, this formality should not stand in the way of eliminating the prior unfairness of not having a pretrial notice requirement. No longer will trial by ambush be routine in the Wyoming courts. There still remains,

142. *Id.*
143. United States v. Perez-Tosta, 36 F.3d 1552, 1560-62 (11th Cir. 1994).
144. FLA. STAT. ANN. § 90.404(2)(b) (West 2001).
145. TEX.R.EVID. 404(b).
146. FED.R.EVID. 413; FED.R.EVID 414; FED.R.EVID 415.
147. *Id.*
148. *Id.*
149. *Id.*
150. FED.R.EVID. 404(b).

however, room for improvement and clarification on the rule. A good cause exception should be added to WRE 404(b) in order to eliminate concerns over witness intimidation. The Wyoming Supreme Court should also clarify what is meant by timeliness so that the pretrial notice requirement created in *Howard* is not circumvented by allowing last minute disclosure of other acts evidence.

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