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The Time is Right to Amend Rule 404(b)

BROOK LATHRAM* AND JONATHAN NELSON**

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I. INTRODUCTION

Rule 404(b) of the Tennessee Rules of Evidence ("Tennessee Rule 404(b)") bars the admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a *person* in order to show action in conformity with the character trait."[1] In *State v.*

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1. TENN. R. EVID. 404(b) (emphasis added). Tennessee Rule Evidence 404(b) in its entirety provides:

> (b) 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 with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

Stevens,[2] the Tennessee Supreme Court held that the word "person," as used in the rule, refers only to the defendant in a criminal case.[3] In the twelve years that *Stevens* has been entrenched in Tennessee jurisprudence, and despite several opportunities to do so, the Tennessee Supreme Court has refrained from revisiting its decision.[4] Unwilling to wait any longer for judicial modification, the Tennessee General Assembly recently passed the Channon Christian Act, a law that, when it went into effect on July 1, 2014, barred, in all criminal cases, the admission of "other acts" evidence of any person, not just those of the defendant, if the evidence is offered to prove that the person acted in accordance with the character trait reflected by that person's other acts.[5] Although the General Assembly is to be commended for enacting this law, the legislation does not go far enough. Tennessee Rule 404(b) should be amended to make it clear that, like its similarly-worded, federal counterpart, it applies in both civil and criminal cases and that the word "person" is not limited to parties. This amendment would return to the rule the meaning intended for it when it was originally adopted in 1990.

Part II of this article contrasts the federal courts' treatment of Federal Rule of Evidence 404(b) ("Federal Rule 404(b)") with the Tennessee Supreme Court's treatment of Tennessee Rule 404(b). Part III explains why and how Tennessee Rule 404(b) should be amended in order to restore it to its original meaning.

> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Id.

2. 78 S.W.3d 817 (Tenn. 2002).
3. *Id.* at 837.
4. *See infra* note 60 and accompanying text.
5. *See* Channon Christian Act, 2014 Tenn. Pub. Acts ch. 713 (codified as amended at TENN. CODE ANN. § 24-7-125 (West 2014)). The bill was signed by Governor Bill Haslam on April 16, 2014. *Id.* The bill is named in honor of Channon Gail Christian, a young woman from Knoxville who, along with her boyfriend, Hugh Christopher Newsom, were tortured and murdered during the perpetration of a carjacking/kidnapping plot in January 2007. *See Christians go to Nashville in Support of 'Channon Christian Act,'* WBIR (Feb. 10, 2014, 6:59 PM), http://www.wbir.com/story/news/local/2014/02/10/christians-go-to-nashville-in-support-channon-christian-act/5365185/.

II. FEDERAL VS. TENNESSEE RULE

A. Federal

In federal court, the evidence of an individual's conduct on another occasion is inadmissible to show that, on the specific occasion at issue in the trial, the individual displayed the same character that he exhibited on the other occasion. This is the command of Federal Rule of Evidence 404(b)(1).[6] The rule applies to both civil and criminal cases[7] and without regard to whether the "other acts"[8] are those of a party or a non-party.[9] Accordingly, in federal court,

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6. Federal Rule 404(b)(1) provides:

> (b) Crimes, Wrongs, or Other Acts.
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

FED. R. EVID. 404(b)(1). *See generally* Jeffrey Cole, *"Bad Acts" Evidence in Civil Cases under Rule 404(b): It's Not Just for Prosecutors Anymore*, LITIG., Spring 2011, at 47 (giving a short, but excellent overview of Federal Rule 404(b)).

7. Huddleston v. United States, 485 U.S. 681, 685 (1988) (noting that Federal Rule 404(b) "applies in both civil and criminal cases") (dictum); Agushi v. Duerr, 196 F.3d 754, 760 (7th Cir. 1999) ("Neither the plain language of Rule 404(b) ('a person'), nor any other consideration, suggests that a court should distinguish between the criminal and civil contexts when determining the admissibility of [other acts] evidence."); *see also* FED. R. EVID. 404 advisory committee's note (2006) ("The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases."). *See generally* Brian L. Porto, *Admissibility of Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b) of the Federal Rules of Evidence, in Civil Cases*, 171 A.L.R. FED. 483 (2001) (collecting civil cases in which federal courts have ruled under Rule 404(b)).

8. It is commonly thought that Federal Rule 404(b) applies only to other acts that are "bad;" however, that is incorrect. *See, e.g.*, United States v. Curtin, 489 F.3d 935, 943 n.3 (9th Cir. 2007) (concluding a good act occurring on an occasion other than the one at issue must, in order to be admissible, be relevant for a non-propensity purpose). Another common misconception is that the other act must have occurred *prior* to the act at issue. Federal Rule 404(b) also applies to acts that occur subsequent to the one at issue. *See, e.g.*, United States v. Perry, 438 F.3d 642, 647 n.2 (6th Cir. 2006); Ansell v. Green Acres Contracting Co., 347 F.3d 515, 520 (3d Cir. 2003).

9. Wynne v. Renico, 606 F.3d 867, 871 (6th Cir. 2010) ("Federal Rule 404(b) applies to all propensity evidence, whether used to show that the defendant or another individual acted in conformity with their prior misconduct.");

a party offering "other acts" evidence is prohibited (assuming a timely objection by the adversary) from introducing it and subsequently arguing: "This person's conduct on the other occasion shows that he has a propensity for behaving in the manner my client has alleged here. His conduct on the other occasion shows that he is in fact the type of person who behaves as my client has alleged."

The federal rule's prohibition against this "propensity" use of "other acts" evidence is not premised on a lack of probative value. If propensity evidence lacked probative value, there would be no need for Federal Rule 404(b). Propensity evidence would simply be irrelevant under Federal Rule 402.[10] The use of "other acts" evidence to show propensity is barred precisely because of the *strength* of its probative value.[11] The "'indubitable relevancy' [of character evidence] is based on the teaching of human experience that a 'bad' man is more likely to commit crimes than a 'good' one."[12] "And so, the risk looms large that a party may be found guilty or liable because of the jury's willingness to assume present

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United States v. Lucas, 357 F.3d 599, 606 (6th Cir. 2004) (holding Federal Rule 404(b) applies to accused's offer of evidence of other acts of a non-party); *Agushi*, 196 F.3d at 761–62 (noting district court's incorrect ruling that Federal Rule 404(b) does not apply to non-parties, but holding the error was harmless because the "other acts" evidence was relevant for a non-propensity purpose).

10. *See* FED. R. EVID. 402 ("Irrelevant evidence is not admissible."); FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

11. *See* Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The inquiry [into an individual's character, including character revealed by acts committed on other occasions] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (quoting Michelson v. United States, 335 U.S. 469, 475–76 (1948))); *see also* State v. Rodriguez, 254 S.W.3d 361, 375 (Tenn. 2008) (acknowledging that "propensity evidence presents strongly persuasive proof").

12. Cole, *supra* note 6, at 48 (quoting 1 J. WIGMORE, EVIDENCE § 194 (3d ed. 1940)).

guilt from some prior misdeed."[13] The rationale for the rule is that our justice system should not accept this risk.[14]

Some may find this hostility to propensity evidence surprising. Laymen, in particular, may question the wisdom of a rule that prohibits a jury from inferring present guilt from misconduct on another occasion. Why, they may ask, should the jury be barred from considering other acts that demonstrate an individual's propensity to act in the way alleged at trial? The answer is that courts and scholars have long concluded, overwhelmingly, that the introduction of "other acts" evidence to show propensity creates a serious risk for the innocent that the jury will place disproportionate, if not exclusive, weight on this evidence and thus fail to properly consider the evidence of the events that are the subject of the trial.[15] Indeed, the introduction of the "other acts" evidence might even induce the jury to decide in favor of the proponent of the evidence irrespective of the merits of the charge or claim the jury is actually being called upon to decide.[16]

The prejudicial effect of "other acts" evidence, particularly its capacity to distract the jury from focusing on the dispositive

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13. *Id.*

14. *See Old Chief*, 519 U.S. at 183–84 ("It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.").

15. *See, e.g.*, People v. Zackowitz, 172 N.E. 466, 469 (N.Y. 1930) (reversing first-degree murder conviction because of introduction of evidence that defendant possessed weapons not connected to the homicide). Then-Judge Benjamin Cardozo explained the rationale for the exclusion of propensity evidence perhaps as well as it has ever been explained:

> There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime. "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 a condemnation irrespective of guilt of the present charge."

Id. at 468 (quoting WIGMORE, *supra* note 12, § 194).

16. *See id.*

questions, is exacerbated by the proliferation of issues and evidence that often accompany the introduction of such evidence. In the typical case, the party against whom the propensity evidence is offered will attempt to refute it, thus generating "mini-trials" on whether the alleged other acts did indeed occur and, if so, in the manner claimed by the proponent of the evidence.[17] Consequently, if "other acts" were admissible to show propensity, juries would often be called on to listen to the testimony of multiple witnesses giving conflicting testimony about the occurrence of, and circumstances surrounding, the alleged "other acts." Juries so tasked might well be distracted from focusing, with the intensity that our system of justice should demand, on the events directly associated with the issues actually dispositive of the case.[18]

The fact that "other acts" evidence may not be used to show propensity does not mean that such evidence is never admissible in federal court. To the contrary, "other acts" evidence is often admitted into evidence.[19] The introduction of "other acts" evidence is permitted, however, only when the evidence is relevant for a specific "non-propensity" purpose,[20] and when, in addition, its introduction is not barred by Federal Rule of Evidence 403 ("Federal Rule 403").[21] Thus, a federal district court, when considering an offer of "other acts" evidence for a non-propensity purpose, must: (1) require the proponent of the evidence to identify the specific non-propensity purpose for which the evidence is being offered; (2) determine whether the purpose identified by the

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17. *See* Huddleston v. United States, 485 U.S. 681, 689 (1988) (discussing the admissibility of propensity evidence to prove something other than character and finding that "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor").

18. *See, e.g.*, United States v. Alayeto, 628 F.3d 917, 922 (7th Cir. 2010); United States v. Stout, No. 3:06CR-94-H, 2006 WL 2927505, at *4 (W.D. Ky. Oct. 12, 2006).

19. *See generally* Cole, *supra* note 6.

20. Federal Rule 404(b)(2) makes this clear: "[Crimes, wrongs, or other acts] may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2).

21. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

proponent is material—that is, "in issue" in the case; and, finally, (3) if the court finds that the identified purpose is material, determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or one of the other risks identified in Federal Rule 403.[22] "Unfair prejudice," as used in Rule 403, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[23] When determining whether "other acts" evidence is unfairly prejudicial under Federal Rule 403, a federal district court must, of course, be particularly concerned with whether the jury is likely to consider it for the propensity purpose that is expressly barred by Rule 404(b)(1).[24] Otherwise, the proponent of the evidence, having been fortunate enough to identify a non-propensity purpose for which the "other acts" evidence is relevant, would profit from the jury's misuse of the evidence for a propensity purpose.

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22. *See* United States v. Merriweather, 78 F.3d 1070, 1076–77 (6th Cir. 1996); *see also* United States v. Feagan, 472 F. App'x 382, 388–89 (6th Cir. 2012). Another requirement for admissibility is that there be sufficient evidence of the other act to enable the jury to conclude that the act did in fact take place. *Huddleston*, 485 U.S. at 690; *see also* Okai v. Verfuth, 275 F.3d 606, 610–11 (7th Cir. 2001). Historically, these procedural requirements have often been applied with rigidity. *See, e.g.*, United States v. Mack, 258 F.3d 548, 553 (6th Cir. 2001) ("The Rule 404(b) inquiry consists of three parts. First, the trial court must make a preliminary determination as to whether sufficient evidence exists that the prior act occurred. Second, the district court must make a determination as to whether the "other act" is admissible for a proper purpose under Rule 404(b). Third, the district court must determine whether the "other acts" evidence is more prejudicial than probative under Rule 403."). More recent cases, however, suggest that the rigid procedural requirements of the rule have been relaxed. *See* United States v. Dimora, 750 F.3d 619, 631 (6th Cir. 2014) ("[Defendant] argues that 'the court failed to apply any steps of the standard [404(b)] analysis when it addressed [the] evidence.' But this argument has been raised and rejected in this circuit. We do not require district courts to follow 'a rigid order of battle' when considering other-acts evidence. So long as 'a court . . . exercise[s] its discretion within the boundaries of the Rule,' we will accept the court's decision-making process." (alterations in original) (citations omitted)).

23. FED. R. EVID. 403 advisory committee's note; *see also* Old Chief v. United States, 519 U.S. 172, 180 (quoting advisory committee's note).

24. *Old Chief*, 519 U.S. at 181–82 (ruling that because propensity is an improper use of "other acts" evidence, it is an impermissible basis for decision for purposes of Federal Rule 403).

B. Tennessee

In Tennessee courts, the treatment of "other acts" evidence is markedly different from that of federal courts. This is because, as noted at the outset of this article, the Tennessee Supreme Court, beginning with its decision in *State v. Stevens*, has held that Tennessee Rule 404(b) applies only when the other acts sought to be introduced are those of the defendant in a criminal case.[25] According to the *Stevens* court, the word "person," as used in Rule 404(b), refers only to the defendant in a criminal case.[26] Tennessee Rule 404(b) thus does not apply, said the *Stevens* court, when the "other acts" evidence is offered to show that some person besides the defendant in a criminal case acted in conformity with the character he exhibited on another occasion.[27] Tennessee Rule 404(b) thus does not govern the evidentiary treatment of the other acts of any party to a civil case or those of a non-party in either a civil or a criminal case.[28]

The *Stevens* court's construction of Tennessee Rule 404(b) is perplexing given that the rule, on its face, does not limit its application to criminal cases.[29] Nor does the rule suggest that, in a criminal case, it is to be applied only when the "other acts" sought to be introduced are those of the defendant. As authority for its holding, the *Stevens* court relied on its decision five years earlier in *State v. DuBose*.[30] In that case, a prosecution for first degree murder aggravated by child abuse, the State introduced, over the defendant's objection, evidence of a previous injury to the child victim's abdomen, that being the same part of the child's body where the subsequent fatal injury at issue occurred.[31] There was no testimony identifying the perpetrator of the previous injury.[32] From this fact, the *DuBose* court reasoned that the evidence of the prior injury was not introduced against the defendant to show his pro-

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25. State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002).
26. *Id.*
27. *Id.*
28. *See id.*
29. *See id.*; *see also* TENN. R. EVID. 404(b).
30. *Stevens*, 78 S.W.3d at 837 (quoting State v. DuBose, 953 S.W.2d 649, 653 (Tenn. 1997)).
31. *DuBose*, 953 S.W.2d at 652–53.
32. *See id.* at 651.

pensity for violence against the child and thus was not inadmissible under Rule 404(b).[33] The court concluded that the evidence was admissible under the less stringent standards of Rules 401, 402, and 403, and affirmed the defendant's conviction.[34] In the course of reaching its conclusion on the inapplicability of Rule 404(b), the court stated, "[e]vidence of crimes, wrongs, or [other] acts, if relevant, are not excluded by Rule 404(b) if they were committed by a person other than the accused and are only conditionally excluded if committed by the accused."[35] It was onto this statement that the *Stevens* court latched to support its determination that the word "person," as used in Rule 404(b), refers only to the defendant in a criminal case.[36]

While in *DuBose* the identity of the individual who committed the other act was supposedly unknown, that was not the case in *Stevens*. That individual was specifically identified in *Stevens*, and it was the defendant, not the State, who proffered the evidence.

William Stevens was convicted and sentenced to death for hiring eighteen-year-old Corey Milliken to kill Stevens's wife and mother-in-law.[37] These crimes occurred on December 22, 1997.[38] Stevens's defense theory was that Milliken acted on his own in committing the murders—more specifically, that Milliken did so "as a violent reaction to an argument that Milliken had with his mother and step-father the night before the crimes."[39] Stevens sought to support his theory through the testimony of Milliken's former foster parent, Barry Morris.[40] Stevens wished to elicit testimony from Morris that Milliken had, on multiple occasions in 1996, argued with his mother over the use of the telephone and had

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33. *Id.* at 655. Of course, in actuality, this was precisely why the prosecution introduced the evidence. The prosecution wanted to suggest to the jury that the defendant was responsible for the previous injury and that he thus was also more likely to have been responsible for the later fatal injury on which the conviction was based. *Id.* at 655–56 (Birch, J., dissenting).

34. *Id.* at 653–55.

35. *Id.* at 653.

36. *See* State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002).

37. *Id.* at 829.

38. *Id.* at 823.

39. *Id.* at 836.

40. *Id.*

vented his frustration "by throwing things and damaging furniture."[41] It was Stevens's hope that the jury would be permitted to infer from Morris's testimony that Milliken was the type of person who likely would have committed these murders on his own.[42]

The trial court excluded Morris's testimony under Rule 404(b).[43] In a jury-out offer of proof, Morris provided no testimony that Milliken had actually ever physically assaulted anyone.[44] He did, however, testify that "Milliken had warned him once or twice to be careful when he went to sleep."[45]

The court of appeals, affirming the judgment below, agreed with the trial court that Rule 404(b) prohibited the introduction of Morris's testimony.[46] The intermediate court further observed that the connection between Milliken's earlier acts of rage and the murders was so tenuous as to make the evidence of the earlier acts irrelevant under Rule 402.[47] The court of appeals therefore concluded that Milliken's other acts were not even relevant to show Milliken's propensity for committing violent acts like the murders at issue.[48]

Rejecting the lower courts' construction of Rule 404(b), the supreme court determined that the rule's purpose is limited to protecting a criminally accused person from the risk that the jury will, after considering the "other acts" evidence, be predisposed to believe him guilty of the crime charged.[49] So limited, Rule 404(b), in the *Stevens* court's view, had no role to play in determining the admissibility of Morris's testimony since Milliken was not the accused party.[50] The court thus concluded that the trial court had erred in not allowing Stevens to introduce Morris's testimony to

41. *Id.*
42. *Id.* at 837.
43. *Id.* at 836.
44. *Id.*
45. *Id.*
46. *Id.* at 836–37.
47. *Id.* at 837.
48. *Id.*
49. *Id.*
50. *Id.*

show Milliken's propensity to act violently at the time of the murders.[51]

The *Stevens* decision has, for twelve years running, left the door wide open for the use of "other acts" evidence to show propensity. As long as the other acts are not those of the defendant in a criminal case, "other acts" evidence is relevant in Tennessee to show that an individual acted in conformity with those other acts on the occasion at issue in the trial.[52] Although the evidence is still subject to possible exclusion under Tennessee Rule 403,[53] the analysis is necessarily substantially different from the Rule 403 analysis employed by federal courts when considering the admissibility of "other acts" evidence. This is because a Tennessee court, when performing its Rule 403 analysis, is, thanks to *Stevens*, forbidden from considering the risk that the "other acts" evidence might induce the jury to decide the case on the basis that the individual in question has a propensity to act, and thus did act, in the manner claimed at trial. To the contrary, *Stevens* says that the use of propensity evidence is fair game in Tennessee—except, of course, when the "other acts" are those of the defendant in a criminal case.[54]

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51. *Id.* The court, however, went on to find that the error was harmless. *Id.* at 838.

52. For an example of a civil case in which "other acts" evidence was deemed admissible under Rule 404(b), see Hall v. Stewart, No. W2005-02948-COA-R3-CV, 2007 WL 258406, at *11 (Tenn. Ct. App. Jan. 31, 2007) ("Rule 404(b) sets forth the procedure by which a *criminal* trial court may admit character evidence offered for other purposes. It requires the proponent of the evidence to satisfy a balancing test more rigorous than that set out in Rule 403. But, as part of a civil case, this issue requires the application of Rules 401 and 403, which allow for the exclusion of relevant evidence if its 'probative value is *substantially outweighed* by the danger of unfair prejudice.'" (footnote omitted) (citation omitted)).

53. TENN. R. EVID. 403 ("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.").

54. Compare the limited Tennessee Rule 403 analysis in which a Tennessee court is to engage with that prescribed by the Sixth Circuit in *United States v. Merriweather*. *See also supra* note 22 (citing cases applying the Federal Rule 404(b) analysis).

Why, one is constrained to ask, has the Tennessee Supreme Court adopted such a construction of Tennessee Rule 404(b)? The answer is supplied by the court's decision in another case published in the same year that *Stevens* was decided. In that case, *State v. James*, the court went out of its way to point out that the procedural protections afforded by Tennessee Rule 404(b) are substantially more stringent than those provided by its federal counterpart.[55] As the court noted in *James*, a Tennessee trial court, unlike its federal counterpart, must upon request hold a hearing outside the jury's presence;[56] must exclude the evidence of the other act if proof of its occurrence is not "clear and convincing;"[57] and "must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice."[58] The *Stevens* court, it seems, felt that the extra protections provided for in Tennessee Rule 404(b) are unnecessary and unduly cumbersome in situations in which the "other acts" offered into evidence are those of persons other than the defendant in a criminal case. Rather than using an opinion to "re-write" the rule, however, the court should have proposed to the General Assembly an amendment limiting these procedural protections to criminal cases.[59]

III. RULE 404(b) SHOULD BE AMENDED

For the reasons discussed herein, one would assume that the *Stevens* decision is an outlier. Surprisingly, however, it has

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55. State v. James, 81 S.W.3d 751, 759 (Tenn. 2002) ("This procedure for admitting other-acts evidence under Tennessee Rule of Evidence 404(b) represents a significant departure from that set forth in the federal rules.").

56. TENN. R. EVID. 404(b)(1).

57. TENN. R. EVID. 404(b)(3). A federal court need only determine, under Federal Rule 404(b), that the jury could reasonably find that the individual committed the other act. *See supra* note 22.

58. TENN. R. EVID. 404(b)(4). A federal court must weigh the probative value and dangers under Federal Rule 403 and must exclude the evidence only if its probative value is "*substantially*" outweighed by the danger of unfair prejudice or one of the other dangers specified in Federal Rule 403. *See* FED. R. EVID. 403 (emphasis added).

59. These procedural protections were added in 1991, six years before *Dubose* was decided. *See* FED. R. EVID. 404(b) advisory committee's note to 1991 amendments; State v. Dubose, 953 S.W.2d 649 (Tenn. 1997).

been perpetuated in subsequent decisions.[60] In recognition of that fact, and under growing pressure from victims and their families, the Tennessee General Assembly stepped in and enacted Tennessee Code Annotated section 24-7-125. The new law is limited to criminal cases. It provides as follows:

> In a criminal case, evidence of other crimes, wrongs, or acts is not admissible to prove the character of any individual, including a deceased victim, the defendant, a witness, or any other third-party, in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.[61]

The preamble to the statute expressly states that the law was enacted in order to reverse the holding in *Stevens*.[62] The preamble thus states in pertinent part:

> WHEREAS, Tennessee Rule 404(b) is substantially similar to the federal rule and on its face, extends the protection of the rule to any person. However, *surprisingly*, the Tennessee Supreme Court, in State v. Stevens, 78 S.W.3d 817, 836-837 (Tenn. 2002) held that a 'person' for purposes of Rule 404(b) means only the defendant . . . .[63]

As the preamble further makes clear, the General Assembly was particularly concerned that, given the *Stevens* court's construction of the rule, defendants were being permitted to introduce a victim's

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60. *See, e.g.*, State v. Gomez, 367 S.W.3d 237, 245 n.6 (Tenn. 2012) ("We have previously held that in the context of Rule 404(b), 'a person' is the defendant who allegedly committed the 'other crimes, wrongs, or acts.'" (citing State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002)); State v. Rogers, 188 S.W.3d 593, 612–13 (Tenn. 2006) ("We have since clarified, however, that Rule 404(b) does not apply when a third-party defense is raised." (citing *Stevens*, 78 S.W.3d at 837)).

61. TENN. CODE ANN. § 24-7-125 (West 2014).

62. *See* Channon Christian Act, 2014 Tenn. Pub. Acts ch. 713; *see also* discussion *supra* note 5.

63. 2014 Tenn. Pub. Acts ch. 713 (emphasis added).

other acts that were "totally irrelevant to the instant offense."[64] Although protection of victims appears to have been its primary motive, the General Assembly wisely did not attempt to limit "person" to defendants and victims, but instead made sure that the word person includes "any individual."[65]

Although the General Assembly is to be commended for partially correcting the *Stevens* court's construction of Rule 404(b), it did not go far enough. Tennessee Rule 404(b), like its federal counterpart, should apply to civil as well as criminal cases.[66] The risk that propensity evidence will distract the jury is great in both civil and criminal cases.[67] The Supreme Court Rules Advisory Commission should propose to the Tennessee Supreme Court an amendment that will ensure that henceforth Rule 404(b) will be construed in the way it was originally written. The amendment should state: "This rule applies in both civil and criminal cases, and without regard to whether the 'other acts' sought to be introduced are those of a party or a non-party." The Commission's comment should state that the amendment effectively overrules *Stevens*, and should further indicate that the amended rule is fully consistent with Tennessee Code Annotated section 24-7-125. If the Commission believes that some or all of the procedural protections adopted in 1991[68] should apply only in criminal cases, the Commission can fashion the amendment accordingly.

Presented with this proposed amendment, the supreme court would, we can hope, recognize the soundness of the Commission's recommendation and forward it to the General Assembly for enactment. The General Assembly likely would look with fa-

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64. *Id.* ("[The *Stevens* court's construction of Rule 404(b)] seems contrary to Tennessee Code Annotated, Section 40-38-113, which was enacted to implement Article 1, § 35 of the Constitution of Tennessee . . . ."). Article 1, section 35 of the Tennessee Constitution sets forth the rights of victims of crimes. *See* TENN. CONST. art. I § 35.

65. TENN. CODE ANN. § 24-7-125.

66. For cases applying Federal Rule 404(b) in civil cases, see Porto, *supra* note 7.

67. *See, e.g.*, Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming, in a breach of contract action, the district court's exclusion of propensity evidence—evidence of a prior lien dispute between the defendant and a third party—because such evidence "could have led to a side trial that would distract the jury from the main issues of the case").

68. *See supra* note 59.

vor on an amendment that reinforces for criminal cases the action it took in enacting Tennessee Code Annotated section 24-7-125 and that, for civil cases, re-establishes the same rule that the General Assembly originally approved twenty-four years ago. Upon enactment of the amended rule, Tennessee litigants would once again be afforded the same protection against propensity evidence that is aptly provided in the federal courts.