**IN THE SUPERIOR COURT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ COUNTY**

**STATE OF GEORGIA**

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**STATE OF GEORGIA**

**INDICTMENT NO. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**vs.**

**[DEFENDANT]**

**Defendant**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

[NOTE: THIS BRIEF WAS INITIALLY DRAFTED SHORTLY AFTER THE PASSAGE OF THE NEW EVIDENCE CODE IN GEORGIA. MORE RECENT GEORGIA SPECIFIC CASE LAW MAY BE AVAILABLE]

[NOTE: IF THE PRIOR ACT IS SEXUAL IN NATURE, CONSIDER FILING FOR ADMISSION UNDER OCGA 24-4-413 AND/OR 414]

# **BRIEF IN SUPPORT OF STATE’S NOTICE OF INTENT TO INTRODUCE**

# **OTHER ACTS EVIDENCE PURSUANT TO O.C.G.A. §§ 24-4-404(b) and 24-4-403**

# **COMES NOW** the State of Georgia, by and through the undersigned Assistant District Attorney, and submits this brief in support of its “Notice of Intent to Introduce Other Acts Evidence Pursuant To O.C.G.A. §§ 24-4-404(b) and 24-4-403.” Under the new Georgia Rules of Evidence codified at O.C.G.A. §§ 24-4-404(b) and 24-4-403, which became effective January 1, 2013, the State is entitled to introduce evidence of other acts in cases like this one where the other act evidence is relevant to demonstrate the defendant’s motive, opportunity, intent, knowledge, preparation, plan, identity and/or absence of mistake or accident. In support of its notice, the State shows as follows:

1. **The General Assembly Continues to Favor the Admission of Other Acts Evidence**

In 2011, the General Assembly enacted House Bill 24, which was designed and intended to “to revise, modernize, and reenact the general laws of [Georgia] relating to evidence while adopting, in large measure, the Federal Rules of Evidence.” The Bill specifically provided that “there are many issues regarding evidence that are not covered by the Federal Rules of Evidence . . . Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained.” 2011 Ga. Laws 52 at 1.

The general evidentiary rule within Georgia’s new evidence code that governs the admissibility of other acts evidence is codified at O.C.G.A. § 24-4-404(b). This rule, which also *partially* displaces Georgia’s preexisting similar transaction rules, provides as follows:

§ 24-4-404. Character evidence not admissible to prove conduct; exceptions; other crimes.

1. Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

Because “Rule 404(b) ‘is a rule of inclusion,’” United States v. Souksakhone Phaknikone, 605 F.3d 1099, 1108 (11th Cir. Ga. 2010),[[1]](#footnote-1) under which the admissibility of evidence of other crimes is preferred so long as the evidence is not used as proof of a defendant’s character to show “action in conformity therewith,” O.C.G.A. § 24-4-404(b) provides the mechanism for the admission of other acts.

1. **A Brief Analysis of O.C.G.A. §§ 24-4-404(b) and 24-4-403.**

Because O.C.G.A. § 24-4-404(b) was expressly modeled on Federal Rule of Evidence 404(b), it is important to observe that in the preamble to House Bill 24, the legislature stated that “[i]t is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the Eleventh Circuit Court of Appeals.” 2011 Ga. Laws 52 at 1. Based upon this statement of legislative intent, Georgia trial courts seeking to correctly interpret O.C.G.A. § 24-4-404(b) must look to the Federal Circuit Courts of Appeal—and particularly the Eleventh Circuit Court of Appeals—to gain a full understanding of the application of the rule.

The Eleventh Circuit Court of Appeals utilizes a three-part test to evaluate the admissibility of Rule 404(b) evidence. First, the evidence must be relevant to an issue other than the defendant's character; second, the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; and third, the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403[[2]](#footnote-2). United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. Fla. 1995). Once the State satisfies each part of the test, it is not an abuse of discretion for the trial judge to admit the other acts evidence. In this case, the proffered other acts evidence meets each of the three components of the test.

1. **Permissible Purposes under O.C.G.A. § 24-4-404(b).**

O.C.G.A. § 24-4-404(b) contains a list of “other purposes” for which other acts evidence is admissible that tracks Federal Rule of Evidence 404(b) almost verbatim. The list includes “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Id.

When considering *intent* as a proper purpose for the admission of other acts evidence, it has been said that “[i]n criminal cases, intent is probably the most common purpose for admitting other-crimes evidence. Criminal intent is the state of mind that negatives accident, inadvertence or casualty. Consequently, *evidence of another crime that tends to undermine defendant’s innocent explanation for his or her act will usually be admitted.”* [2-404 Weinstein's Federal Evidence § 404.22](http://www.lexis.com/research/xlink?app=00075&view=full&searchtype=get&search=2-404+Weinstein%27s+Federal+Evidence+%A7+404.22" \t "x" \o "Clicking this link retrieves the full text document in another window)[1][a]. Furthermore, as the Eleventh Circuit noted, “[a] defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue.”[[3]](#footnote-3) Delgado at 1365. When the intent element of the crime being prosecuted is *identical* to the intent element of the other act, use of the other act evidence to prove intent is proper. United States v. Beechum, 582 F.2d 898, 911-912 (5th Cir. Tex. 1978).

Even in cases of DUI, the Ninth Circuit agrees that prior DUIs establish a defendant’s knowledge and absence of mistake or accident. *See* United States v. Loera, 923 F.2d 725 at 729 (9th Cir. 1991) (holding that prior DUI convictions are relevant both to establish the defendant’s awareness of the risk his drinking and driving while intoxicated presented to others and to prove a mental state inconsistent with mistake and consistent with culpable mental state). Based upon the foregoing authority, it is proper for the State to admit other act evidence in this case for the purpose of showing one of the statutory permissible principles.

1. **The Defendant’s Commission of the Other Act under O.C.G.A. § 24-4-404(b).**

Once the State has identified the relevant non-character purpose for which it seeks to introduce the other acts evidence, it must next provide “sufficient proof to permit a jury finding that the defendant committed the extrinsic act.” Delgado at 1365. This requirement is, in effect, identical to the requirement under the former Georgia rules of evidence that the State prove “the defendant was in fact the perpetrator of the independent crime.” Williams v. State, 194 Ga. App. 822, 823 (1990). Therefore, in keeping with the express intent of the General Assembly to retain the substantive law of evidence in Georgia as it existed on December 31, 2012 “[u]nless displaced by the particular provisions of [the new evidence code],” this portion of the three-part 404(b) analysis should be analyzed in exactly the same way it always has been. 2011 Ga. Laws 52 at 1. Among the factors Georgia courts consider when determining whether the State has sufficiently demonstrated that a particular defendant committed the other act tendered into evidence are identity of name, Williams v. State, 62 Ga. App. 679, 681 (1940); competent testimony from witnesses, Aldridge v. State, 229 Ga. App. 544, 546 (1997); whether or not the defendant contests the fact that he committed the separate offense, Adams v. State, 208 Ga. App. 29, 35-36 (1993); and whether the existence of a conviction establishes the identity of the defendant as the perpetrator of the extrinsic crime, Williams v. State, 261 Ga. 640, 643 (1991).

1. **The Balancing Test of O.C.G.A. §§ 24-4-404(b) and 24-4-403.**

After demonstrating the permissible purpose of the other act and the identity of the defendant as the perpetrator of the extrinsic crime, the State must finally show that “the probative value of the evidence [is not] substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.” Delgado at 1365. As the text of O.C.G.A. § 24-4-404(b) indicates, the most important component of the third part of the Delgado analysis—which is imported from O.C.G.A. § 24-4-403—is whether the probative value of the proffered other act evidence is substantially outweighed by the danger of unfair prejudice to the defendant. The *probative value* of an item of evidence is determined by comparing evidentiary alternatives, i.e., the availability of other, less prejudicial, evidence on the same point. Old Chief v. United States, 519 U.S. 172, 184 (1997). When other, less prejudicial evidence on a given point exists, the probative value of the extrinsic evidence is reduced. Id. However, “the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in.” Id. at 183. Furthermore, in assessing the probative value of other act evidence, a trial court should give due consideration to the State’s need for “evidentiary richness and narrative integrity.” Id. at 186-187.

On the other hand, "‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.” Id. at 180. However, the rule protects defendants only from *unfair* or *undue* prejudice, and not from the damage to a defendant's case that results from the legitimate probative force of the evidence. 2 [Weinstein's Federal Evidence § 404.21[3][b]](http://www.lexis.com/research/buttonTFLink?_m=cadb14ad31efd3c75964832d69509262&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b137%20F.3d%20823%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=168&_butInline=1&_butinfo=WEINSTEINS%20FEDERAL%20EVIDENCE%20404.21&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=ed187e9089e71de0e5633620b6c0a614) (2d ed.); *see also* United States v. Grimmond, 137 F.3d 823, 833 (4th Cir. 1998). Properly understood, the concept refers to the tendency of the other act evidence to provoke an emotional response in the jury or otherwise to suggest a decision on an improper basis. [Old Chief](http://www.lexis.com/research/buttonTFLink?_m=cdcb3dff7835513942e8cabb622aaa6f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.21%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=408&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b519%20U.S.%20172%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=deda91762346db6409b5df9e033300dc) at 180. If the danger of unfair prejudice does not *substantially* outweigh the probative value of the proffered other act evidence, then exclusion of the evidence is unwarranted. Grimmond at 833; United States v. Buckner, 91 F.3d 34, 37 (7th Cir. 1996) (“substantially” is an important qualifying word in Rule 403). Limiting instructions on the proper purpose and use of other act evidence, given contemporaneously with the admission of the evidence or with the court's final instructions to the jury, serve to reduce the prejudicial effect of the extrinsic evidence. See e.g., United States v. Manning, 79 F.3d 212, 217 (1st Cir. 1996); United States v. Long, 86 F.3d 81, 86 (7th Cir. 1996); United States v. Graham, 83 F.3d 1466, 1473 (D.C. Cir. 1996).

As the advisory committee notes to Federal Rule of Evidence 404 indicate, there is no “mechanical solution” for a trial court to implement when determining whether the probative value of other act evidence is substantially outweighed by the danger of undue prejudice. However, the Eleventh Circuit provided some insight into how trial courts should balance the two considerations. When the evidence is offered for the purpose of showing a defendant’s intent or knowledge[[4]](#footnote-4), “a court should consider the differences between the charged and extrinsic offenses, their temporal remoteness, and the government's need for the evidence to prove intent.” United States v. Diaz-Lizaraza, 981 F.2d 1216, 1225 (11th Cir. 1993) (citations omitted). As the similarity between the extrinsic crime and the crime before the court increases, so does the probative value of the evidence on the issue of intent. Id.; *see also* United States v. Ramirez, 426 F.3d 1344, 1354 (11th Cir. Fla. 2005). In contrast, as the temporal remoteness between the other act and the crime at issue decreases, the probative value of the evidence increases. Diaz-Lizaraza at 1225. Courts must also consider whether other methods of proving a defendant’s intent, knowledge, plan, or absence of mistake or accident exist, and if so, whether they would not be effective. When such alternate methods do not exist or would be ineffective, the probative value of the extrinsic evidence increases. Id.

Finally, courts should keep in mind that the prejudicial effect of other act evidence can be mitigated with the use of appropriately phrased and timed limiting instructions, Ramirez at 1354, and that—because rule 404(b) is a rule of *inclusion*—in close cases, the other act evidence *should be admitted*. Beechum at 916-918.

1. **Notice Provisions and Pre-trial Hearing.**

O.C.G.A. § 24-4-404(b) provides that “[t]he prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial.” This notice requirement complements the notice requirements found in Uniform Superior Court Rules 31.1 and 31.3, which require the State to notify a defendant’s attorney in writing at least 10 days before trial of the nature of the other act evidence and the “date, county, and the name(s) of the victim(s) for each similar transaction or occurrence sought to be introduced. Copies of accusations or indictments, if any, and guilty pleas or verdicts, if any, shall be attached to the notice.” Ga. Unif. Super. Ct. 31.3(B). Because the Uniform Superior Court Rules remain in effect, the State concedes that it must comply with both sets of notice requirements. The State also acknowledges that the requirement that trial courts hold a pre-trial hearing to determine the admissibility of other act evidence pursuant to Uniform Superior Court Rule 31.3(B) remains in effect.

**III. Application of O.C.G.A. §§ 24-4-404(b) and 24-4-403 in This Case.**

Here, the State shows the facts and circumstances surrounding the Defendant’s crime permits the introduction of the proffered other act evidence under O.C.G.A. §§ 24-4-404(b) and 24-4-403. Each one of the three parts of the Eleventh Circuit’s Delgado test for the evaluation of the admissibility of evidence under Rule 404(b) has been satisfied.

# First, as stated in its “Notice of Intent to Introduce Other Act Evidence Pursuant to O.C.G.A. §§ 24-4-404(b) and 24-4-403,” the other act in this case is relevant to prove the Defendant’s [INSERT REASON]. Based upon the foregoing discussion, each purpose is both relevant and an appropriate basis for the admission of other act under O.C.G.A. § 24-4-404(b).

Secondly, the State shows that the above-named Defendant did, in fact, commit the other act at issue in this case. **[INSERT SPECIFICS HERE]**

Finally, the probative value of the other act evidence in this case is not substantially outweighed by the danger of undue prejudice to the Defendant because the other act will not lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.

Further, the State specifically requests that this Court provide a limiting instruction to the jury empanelled to try this case—both at the time the other act evidence is introduced and in the final charge to the jury—concerning the appropriate purposes for and the limitations upon the other act evidence.

The State has complied with all notice requirements contained in O.C.G.A. § 24-4-404(b) and Uniform Superior Court Rules 31.1 and 31.3 by attaching to and incorporating by reference in its “Notice of Intent to Introduce Other Acts Evidence Pursuant to O.C.G.A. §§ 24-4-404(b) and 24-4-403,” either a statement of, or documentation including the nature, date, and county of occurrence of the other act as well as a list of the witnesses the State expects to call at trial in regard to the other act evidence. In addition, the State will provide a copy of the police reports, if not already attached to this notice, and supplement as necessary.

**WHEREFORE**, the State prays that this Honorable Court set a date for the hearing required by Uniform Superior Court Rule 31.3 at which the State is prepared to present evidence in support of its request to present other act evidence at trial. Once the requirements of the Uniform Superior Court Rules and new rules of evidence O.C.G.A. §§ 24-4-404(b) and 24-4-403 are met, the State asks this Court issue a written order specifically permitting the admission of the enumerated other acts evidence at the trial of this case.

Respectfully submitted this \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_.

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Assistant District Attorney

1. Almost every federal circuit court of appeals treats Federal Rule of Evidence 404(b) as a rule of inclusion, rather than a basis for exclusion of similar transaction evidence. *See e.g.,* [United States v. Pascarella, 84 F.3d 61, 69 (2d Cir. 1996](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=375&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b84%20F.3d%2061%2cat%2069%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=7332d2146e987626e6d77d21cda4f452)); [United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=378&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b701%20F.2d%20367%2cat%20386%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=95eab25baa255c65d822a476afe3bb58); [United States v. Moore, 845 F.2d 683, 685 (7th Cir. 1988)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=381&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b845%20F.2d%20683%2cat%20685%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=995148e53addc3d54434638e7fddb9f5); [United States v. Johnson, 892 F.2d 707, 709 (8th Cir. 1989)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=382&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b892%20F.2d%20707%2cat%20709%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=06b1d72704611191c643db96e4976b2c); [United States v. O'Connell, 841 F.2d 1408, 1422-1423 (8th Cir. 1988)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=383&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b841%20F.2d%201408%2cat%201422%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=3c75a1aefe6d8c6e61293bbd5f943210); [United States v. Ford, 632 F.2d 1354, 1375 (9th Cir. 1980)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=386&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b632%20F.2d%201354%2cat%201375%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=9749872956cbeff95e0c893799d7c397); [United States v. Segien, 114 F.3d 1014, 1022 (10th Cir. 1997)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=387&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b114%20F.3d%201014%2cat%201022%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=b86e328b85cd1a3ba9baa5454c28bbbe); *and* [United States v. Linares, 367 F.3d 941, 946 (D.C. Cir. 2004)](http://www.lexis.com/research/buttonTFLink?_m=ed96a5bec36cdda6a7b7dcb061fe2414&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.20%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=390&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b367%20F.3d%20941%2cat%20946%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=f28050ab53cf9debe1f80128cbe6cc8e). [↑](#footnote-ref-1)
2. § 24-4-403.  Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time   
      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. [↑](#footnote-ref-2)
3. Even when a criminal defendant expressly states that intent *will not be actively contested*, such a concession may be insufficient to preclude the admission of other act evidence. *See* United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980). [↑](#footnote-ref-3)
4. “Knowledge and intent are commonly lumped together in criminal cases by the courts, because in many instances both are disputed and must be proved by the prosecution.” 2-404 Weinstein's Federal Evidence § 404.22[1][a]. *See e.g.,* [United States v. Nickens, 955 F.2d 112, 124-125 (1st Cir. 1992)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=242&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b955%20F.2d%20112%2cat%20124%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=bcd05a631af4bc4e65590603eb27f1ac); [United States v. Edwards, 342 F.3d 168, 178 (2d Cir. 2003)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=244&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b342%20F.3d%20168%2cat%20178%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=440efb8a378b28c386d3eeca95c5ae5b); [United States v. Clemente, 22 F.3d 477, 482-483 (2d Cir. 1994)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=245&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b22%20F.3d%20477%2cat%20482%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=fe0666510ea3b8e8e754b5d3445f6915); [United States v. Vega, 285 F.3d 256, 262-263 (3d Cir. 2002)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=246&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b285%20F.3d%20256%2cat%20262%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=d5876a8f703c8f6c74eabd5e6d03ec37); [United States v. Penniegraft, 641 F.3d 566, 575 (4th Cir. 2011)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=249&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b641%20F.3d%20566%2cat%20575%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=cb716de30886ddcd4181fba5d0cef79e) (evidence of defendant's prior arrest for possession of crack cocaine was properly admitted, in prosecution for intent to distribute cocaine base and being felon in possession of firearm, to prove his knowledge and lack of mistake and to prove element of intent); [United States v. Duffaut, 314 F.3d 203, 209-210 (5th Cir. 2002)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=253&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b314%20F.3d%20203%2cat%20209%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=c2930df4dae22b24e8d818d916ec9da0); [United States v. Campbell, 845 F.2d 1374, 1380 (6th Cir. 1988)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=256&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b845%20F.2d%201374%2cat%201380%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=6acf88df896f32c8c28e52b0b7a4a6f5); [United States v. Green, 258 F.3d 683, 694-695 (7th Cir. 2001)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=260&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b258%20F.3d%20683%2cat%20694%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=6a047b6a2508e620d8b38fcf69a4c32e) (evidence relating to defendant's prior sales of same type of drug, more than one year before charged drug conspiracy, was relevant to show knowledge and intent, and not too remote in time); [United States v. Hill, 638 F.3d 589, 592 (8th Cir. 2011)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=261&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b638%20F.3d%20589%2cat%20592%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=6f9174d13933dc59db4044d4e913bde3); [United States v. Jackson, 845 F.2d 880, 884 (9th Cir. 1988)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=264&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b845%20F.2d%20880%2cat%20884%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=c393159fa574de72e5123e13f91cfa5b); [Turley v. State Farm Mut. Auto Ins. Co., 944 F.2d 669, 674-675 (10th Cir. 1991)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=268&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b944%20F.2d%20669%2cat%20674%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=0016783a48ef64971f41c708249fd51f); [United States v. Sellers, 906 F.2d 597, 604-605 (11th Cir. 1990)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=270&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b906%20F.2d%20597%2cat%20604%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=2d206c47d6042f29ef5d452c3e205c7d) (evidence of defendant's past violent acts admissible to show co-defendants' knowledge and intent in allowing defendant into victim's cell, which led to incident underlying charge of deprivation of victim's constitutional rights); and [United States v. Washington, 969 F.2d 1073, 1081 (D.C. Cir. 1992)](http://www.lexis.com/research/buttonTFLink?_m=d75cd716d453af3ecbdb9d9fe01d570c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2-404%20Weinstein%27s%20Federal%20Evidence%20%a7%20404.22%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=241&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b969%20F.2d%201073%2cat%201081%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=04773d03621dc258cec00358884c1a01) (prior drug transaction probative of intent and knowledge). [↑](#footnote-ref-4)