HB

105

SEVENTEENTH LEGISLATURE
SENATE JUDICIARY COMMITTEE BILL FILE

Bill Number: H 105
Abbreviated Title: Joint Trial/Multiple Defs.

Sponsor: House Jud Original Received: May 3, 1991
Written Request to Schedule Rcv'd: _____ From: _____
Sponser's Statement Rcv'd: _____ From: _____
Sectional Analysis Rqst'd: _____ From: _____
Sectional Analysis Received: _____
Fiscal Note (Original)
Rqst'd Of: _____ Rcv'd From: ~~Court O~~ Date: Will File
Rqst'd Of: _____ Rcv'd From: ~~Law O~~ Date: "
Rqst'd Of: _____ Rcv'd From: ~~Transpers O~~ Date: "
Fiscal Note (C.S.) "
Rqst'd Of: _____ Rcv'd From: ~~OPA O~~ ~~PD O~~ Date: "
Rqst'd Of: _____ Rcv'd From: _____ Date: _____
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Five Day Notice Given: By House - Notice of Hearings Given: _____
Committees of Referral: First: _____ Second: _____ Third: _____
LAA Contact: _____ To Senate Secretary: _____

COMMITTEE ACTION

DATE:
5-7-91 Heard - Passed out with Ind Rec 3 yes - 1 no
Adams no
Franklin Rasley & Caldwell Yes
All vote to pair on House Sense of Intent
Delivered to Sen Sec - 5-7-91

PERSONS TO BE NOTIFIED OF HEARING

1. Sponsor
2. Agency
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

LETTER OF INTENT

HB 105

In adopting the amendment to Evidence Rule 404, the Legislature does not intend to require the court to admit, in all circumstances, evidence that is admissible under Evidence Rule 404. Instead, the Legislature intends that the court will retain the discretion under Evidence Rule 403 to exclude evidence if its probative value is 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. The amendment changes Rule 404(b) to one of inclusion, rather than exclusion. At the same time, it establishes that the non-propensity purposes listed in the rule are not inclusive, and that evidence can be admitted if it is relevant to a purpose not listed in the rule.

Alaska State Legislature

House of Representatives
House Judiciary Committee
Chairman Dave Donley

P. O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

MEMORANDUM

TO: Senator Rick Halford, Judiciary Chair

FROM: Representative Dave Donley, Judiciary Chair DD

DATE: May 2, 1991

RE: Request to hear HB 105

I respectfully request that HB 105, a House Judiciary Committee bill, be scheduled for a Senate Judiciary hearing. By amending three court rules, HB 105 will increase the number of cases in which only one trial need be held when either (1) two or more people are charged with committing the same crime or (2) one person is charged with more than one crime.

The amendments have the effect of forcing the Alaska Supreme Court to adopt the federal courts' interpretation of the rules being amended. Although the text of each of the rules was copied from (and is identical to) the federal rules, the Alaska courts have interpreted the rules in a much more restrictive manner than the federal courts. As a result, a case that is efficiently handled in one trial in the federal system often requires a series of trials to be held in Alaska. For example, a recent Fairbanks case in which a man was charged with abusing a series of minors was recently severed into eight separate trials.

The U.S. Supreme Court noted the importance of joint trials in Richardson v. Marsh, 481 U.S. 200, 209 (1987), stating that "joint trials play a vital role in the criminal justice system, accounting for almost one third of federal criminal trials in the past five years." However, Alaska trial statistics are dramatically different; in this state only 2% of the trials held annually involve multiple defendants.

The efficiency and fairness of the criminal justice system will be enhanced if more joint trials can be held. Witnesses will not be required to testify at multiple trials, thereby reducing the inconvenience and trauma to them. The possibility of inconsistent verdicts is also diminished when joint trials are held.

The legislation is strongly supported by the Departments of Law and Public Safety, the Alaska Association of Chiefs of Police, the Network on Domestic Violence and Sexual Assault, and Victims for Justice.

Thank you very much for your consideration of this request.

DD:lc

Alaska State Legislature

House of Representatives

Representative Fran Ulmer

TO: Representative Johnny Ellis DATE: April 3, 1991

FROM: Representative Fran Ulmer

SUBJ: Request to Calendar HB 105

I want to express my support for HB 105, a Judiciary Committee bill that changes three court rules. The effect of HB 105 is to increase the number of cases in which only one trial need be held when either: (1) two or more people are charged with committing the same crime, or (2) when one person is charged with committing multiple similar crimes.

The bill will eliminate an injustice in our criminal justice system that has been created by the way the Alaska Court of Appeals interprets three rules of court (the Alaska interpretation is the direct opposite of the way the exact same rules are interpreted by the federal courts). This interpretation results in an expensive and inefficient system which is unfair to victims and does not serve the interests of justice.

A recent case points out the clear need for the legislation. This case involves a Fairbanks man who has been charged with molesting many different children. Instead of having one trial for all charges, the court ordered that eight separate trials be held. The man was convicted in the first trial held in Fairbanks; however, the publicity surrounding the first trial caused the judge to order that the second trial be held in Anchorage. Having so many trials, and having to travel to Anchorage to testify, will greatly multiply the trauma and burden placed on the child victims. In addition, the substantial cost involved in holding eight separate trials has been dramatically increased by the need for witnesses, lawyers, judges, troopers and the defendant to travel to Anchorage for court.

Unfortunately, this is not a unique case in Alaska, but it illustrates why HB 105 is necessary and should be passed by the legislature.

FU/bvh

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April 3, 1991

The Honorable Dave Donley, Chair
House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: HB 105 (Joinder)

Dear Representative Donley:

As I indicated in my remarks on HB 105 before the Judiciary Committee in early March, the federal courts and most other states promote judicial efficiency by permitting the joinder of offenses and defendants when it is reasonable to do so. One of the means they have to do this is their interpretation of Evidence Rule 404(b) as a rule of "inclusion," rather than a rule of "exclusion."[1]

Federal Evidence Rule 404(b) and its Alaska counterpart, Alaska Evidence Rule 404(b), sets out the standard a judge is to apply when determining whether to admit evidence in a particular criminal trial of a defendant's "prior bad acts." The rule provides that evidence of prior acts of the defendant is not admissible to prove criminal propensity, but that the evidence is admissible if it is relevant to prove an issue in the case such as motive or intent.

Although the same language is used in both rules, the courts of Alaska have interpreted the rule differently than has the federal judiciary. The Alaska courts treat Rule 404(b) as a rule of exclusion -- i.e., the evidence is presumed prejudicial and inadmissible even if it is relevant to an issue at trial. Lerchenstein v. State, 697 P.2d 312, 315 & 318 n.2 (Alaska App. 1985), aff'd, State v. Lerchenstein, 726 F.2d 546 (1986). The federal courts, on the other hand, interpret Rule 404(b) as a rule

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[1] This is because of the issue of "cross-admissibility" of such evidence in joined charges, which is a factor considered by courts when determining whether joinder is appropriate or severance should be granted; if the evidence is admissible as to both charges, joinder is much more likely.

of "inclusion," meaning that the evidence is admissible at trial if it is relevant to some issue other than the defendant's propensity to commit crimes.

At one point, the proper interpretation of Evidence Rule 404(b) was the subject of debate within the federal court system. As the following listing demonstrates, however, there is now unanimity within the federal circuits that Rule 404(b) was meant to be and is a rule of inclusion, as provided in HB 105, rather than a rule of exclusion:

First Circuit: United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984) ("The most striking aspect of the rule is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403").

Second Circuit: United States v. DeVaughn, 601 F.2d 42, 45 (2d Cir. 1979) ("Although this court has taken the 'inclusionary' approach to Rule 404(b), there is no presumption that other-crime evidence is relevant").

Third Circuit: United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978) ("The draftsmen of Rule 404(b) intended it to be construed as one of 'inclusion,' and not 'exclusion'").

Fourth Circuit: United States v. Masters, 622 F.2d 83, 85 (4th Cir. 1980) ("The Federal Rule, both prior to and as stated in Rule 404(b), Federal Rules of Evidence -- characterized as the 'inclusive rule,' -- 'admits all evidence of other crimes [or acts] relevant to an issue in a trial except that which tends to prove only criminal disposition'").

Fifth Circuit: United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983) ("Rule 404 is a rule of inclusion, United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978), which admits evidence of other acts relevant to a trial issue except where such evidence tends to prove only criminal disposition.... The rule is exclusionary only as to evidence admitted to establish bad character as such; it very broadly recognizes admissibility of prior crimes for other purposes").

Sixth Circuit: United States v. Acosta-Cazares, 878 F.2d 945, 948 (6th Cir. 1989) ("Thus, we have explained that Rule 404(b) 'is actually a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified').

Seventh Circuit: United States v. Jordan, 722 F.2d 353, 356 (7th Cir. 1983) ("'The draftsmen of Rule 404(b) intended it to be construed as one of "inclusion," and not "exclusion." They

intended to emphasize the admissibility of "other crime" evidence'").

Eighth Circuit: United States v. Johnson, 892 F.2d 707, 709 (8th Cir. 1989) ("Because 404(b) is a rule of inclusion, rather than exclusion, this court will not disturb the trial court's discretion absent a showing by the defendant that the proof '"clearly had no bearing upon any of the issues involved"'").

Ninth Circuit: United States v. Bradshaw, 690 F.2d 704, 708 (9th Cir. 1982) ("Rule 404(b) is 'one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove only criminal disposition'").

Tenth Circuit: United States v. Naranjo, 710 F.2d 1465, 1467 (10th Cir. 1983) ("Thus, Rule 404(b) is not exclusionary, and allows admission of uncharged wrongs unless they are introduced solely to prove a defendant's criminal disposition").

Eleventh Circuit: United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989) ("The rule is one of inclusion which allows such evidence unless it tends to prove only criminal propensity").

D.C. Circuit: United States v. Miller, 895 F.2d 1431, 1435 (D.C. Cir 1990) ("'The threshold inquiry,' imposed by Federal Rule of Evidence 404(b), 'is whether th[e] evidence is probative of a material issue other than character.'... 'If offered for such a proper purpose, the evidence is [then] subject only to general strictures limiting admissibility,' the most important of which being the requirement of Rule 403 that the probative value of the evidence not be 'substantially outweighed' by its potential prejudice").

The interpretation that the Alaska courts have given to Evidence Rule 404(b) means that relevant evidence is being withheld from juries. HB 105 would change this by making it clear that Rule 404(b) has the same meaning as its federal counterpart.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: Margot O. Knuth
Margot O. Knuth
Assistant Attorney General

Rule 8. Joinder of Offenses and of Defendants.

(a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate court for each offense if the offenses charged, whether felonies, misdemeanors or both,

(1) are of the same or similar character and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense,

(2) are based on the same act or transaction, or

(3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. The disposition of the indictment or information as to one of several defendants joined in the same indictment or information shall not affect the right of the state to proceed against the other defendants.

(Adopted by SCO 4 October 4, 1959; amended by SCO 906 effective nunc pro tunc May 28, 1988)

Note: SCO 906 incorporated changes in Criminal Rule 8(a) made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added the language in subparagraph (a)(1), "and it can be determined before trial that it is likely that evidence of one charged offense would be admissible to prove another charged offense."

Annotations

Cases

Crime of uttering or publishing a forged instrument and crime of procuring of offering forged instruments for recordation were properly charged in the same indictment in several counts. **Chambers v. State**, Op. No. 237, 394 P2d 778 (Alaska 1964).

A complaint which charged defendant in one and the same count with the separate crimes of failure to remain at the scene of an accident [AS 28.35.050(a)] and failure to render assistance to passenger [AS 28.35.060(a)] was duplicitous. **Drabosb v. State**, Op. No. 485, 442 P2d 44 (Alaska 1968).

Prejudice must be shown before the Supreme Court will reverse on grounds that a trial judge erred or abused his discretion in failing to order separate trials for different counts of an indictment. **Richards v. State**, Op. No. 527, 451 P2d 359 (Alaska 1969).

An allegation that the joint trial of two counts for escape created in the jurors' minds the image of defendant as criminally disposed toward escaping from jail is insufficient to raise the question whether the joint trial of the offenses prejudiced the defendant. **Richards v. State**, Op. No. 527, 451 P2d 359 (Alaska 1969).

The rationale underlying the prohibition of duplicitous indictments is to give notice to the defendant of exactly what charges he must defend against and to avoid the consequences of the inability of the jury to indicate which way they are voting on each of the charges. **Kimble v. State**, Op. No. 1184, 539 P2d 73 (Alaska 1975).

Propriety of joinder in cases where there are multiple defendants must be tested by Criminal Rule 8(b) alone. **Amidon v. State**, Op. No. 1434, 565 P2d 1248 (Alaska 1977).

Where one defendant shot at gas station shortly after he and his brother had attacked gas station attendant, their actions were "the same series of acts or transactions," and it was proper to consolidate their trials. **Larson v. State**, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Assault by firing a shot towards two people is a single offense and may be included in a single count. **Larson v. State**, Op. No. 1502, 569 P2d 783 (Alaska 1977).

Offense of robbery in the first degree for theft of taxi and offense of theft in the second degree for theft of apartment were closely connected and constituted parts of a common scheme or plan, so as to justify charging both offenses in the same indictment. **Nell v. State**, Op. No. 77, 642 P2d 1361 (Alaska App. 1982).

Where each larceny count against defendant involved airplane theft accomplished through his role as partner in aircraft company and all of the thefts occurred within a five-week period, there was a common scheme or plan within the meaning of this rule justifying joinder of the offenses. **Montes v. State**, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Antagonistic defenses do not ordinarily require severance, however, where the defenses are irreconcilable, that is, mutually exclusive to the extent that one must be disbelieved if the other is to be believed, severance should be granted. **Abdulbaqui v. State**, Op. No. 659, 728 P2d 1211 (Alaska App. 1986).

Where codefendants presented defenses which were different but not irreconcilable, trial court did not abuse its discretion in refusing to grant severance. **Abdulbaqui v. State**, Op. No. 659, 728 P2d 1211 (Alas). App. 1986).

Trial court erred in denying severance of two similar sexual assault charges involving the same defendant where the evidence did not establish a common scheme or plan, whether or not the evidence of the assault on each victim would have been admissible in a trial for assault on the other victim. **Johnson v. State**, Op. No. 668, 730 P2d 175 (Alaska App. 1986).

Where the weapons that were the subject of theft by receiving charges against defendant were also the subject of felon in possession charges against him, the charges stemmed from the same act or transaction, thus initial joinder of the offenses was proper. **Elerson v. State**, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

Where prior conviction, admissible as an element of felon in possession of firearm charges, would have been inadmissible in a separate trial on theft by receiving charges, trial court erred in denying defendant's severance motion without pursuing the alternative of bifurcation, requiring reversal of the theft by receiving conviction but not the felon in possession conviction. **Elerson v. State**, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

Unless joinder is permitted under this rule, codefendants may not be tried together. **Greiner v. State**, Op. No. 736, 741 P2d 662 (Alaska App. 1987).

Trial court committed reversible error in denying defendant's motion to sever his trial on Counts I and IV from that of this codefendants on Counts II and III, in which he was not charged, since although each count involved drug offenses and there was evidence that all defendants were willing to sell drugs and were well-acquainted and cooperated with each in individual drug sales, there was no real evidence of a conspiracy, joint venture, or common scheme or plan justifying joinder. **Greiner v. State**, Op. No. 736, 741 P2d 662 (Alaska App. 1987).

Since the charges against defendant could properly have been joined in a single indictment, contemporaneous preservation of the same charges in separate indictments to the same grand jury did not violate defendant's due process right to an unbiased grand jury. **Massey v. State**, Op. No. 915, 771 P2d 448 (Alaska App. 1989).

Wherever there is more than one defendant, the joinder of both defendants and issues is governed by the subsection of this rule pertaining to joinder of defendants; the subsection of this rule

the prosecution were under such single indictment or information.

(Adopted by SCO 4 October 4, 1959)

Annotations

Cases

Propriety of joinder in cases where there are multiple defendants must be tested by Criminal Rule 8(b) alone. Amidon v. State, Op. No. 1434, 565 P2d 1248 (Alaska 1977).

Where one defendant shot at gas station shortly after he and his brother had attacked station attendant, their actions were "the same series of acts or transactions," and it was proper to consolidate their trials. Larson v. State, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Rule 14. *Relief From Prejudicial Joinder.*

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

(Adopted by SCO 4 October 4, 1959; amended by SCO 98 effective September 16, 1968)

Annotations

Cases

This rule permits the trial court to order election or separate trial of counts if a defendant is prejudiced by the joinder, but a motion to sever counts not made until after the jury had been selected and sworn, was properly denied in absence of a showing of sufficient cause and prejudice. State v. Selman, Op. No. 302, 406 P2d 181 (Alaska 1965).

Prejudice must be shown before the Supreme Court will reverse on grounds that a trial judge erred or abused his discretion in failing to order separate trials for different counts of an indictment. Richards v. State, Op. No. 527, 451 P2d 359 (Alaska 1969).

An allegation that the joint trial of two counts for escape created in the jurors' minds the image of defendant as criminally disposed toward escaping from jail is insufficient to raise the question whether the joint trial of the offenses prejudiced the defendant. Richards v. State, Op. No. 527, 451 P2d 359 (Alaska 1969).

That defendant's trial was consolidated with that of his brother, who had shot at gas station after the assault on attendant with which defendant was charged was not prejudicial in view of instructions. Larson v. State, Op. No. 1459, 566 P2d 1019 (Alaska 1977).

Trial court did not abuse its discretion in denying defendant's request for separate trials on two offenses charged to him where the charges arose out of the same incident, where much of the evidence pertaining to one charge would be relevant to the other, and where the public interest in avoiding duplicative trials might reasonably have been thought to outweigh any possible prejudice which might inhere in a combined trial. Catlett v. State, Op. No. 1752, 585 P2d 553 (Alaska 1978).

Where co-defendant refused to take the stand, but by affidavit indicated that if she were called in a court proceeding in which she was not a defendant she would testify in favor of one of the other co-defendants, refusal to grant the latter co-defendant's motion for severance was not error where the proposed testimony was only marginally relevant. Hawley v. State, Op. No. 2137, P2d 1349 (Alaska 1980).

Where defendant, charged with both theft and robbery, had a good possibility of being able to testify on the robbery charge without being cross-examined on the theft charge, his generalized fifth amendment argument for establishing his need to refrain from testifying on the theft charge was not sufficient to support a severance motion. Nell v. State, Op. No. 77, 642 P2d 1361 (Alaska App. 1982).

It was not error to deny severance on charges of misdemeanor assault, felony assault and felony escape, where second assault occurred while police officers were arresting defendant for the first assault and the escape occurred shortly after defendant had been arrested. Maynard v. State, Op. No. 136, 652 P2d 489 (Alaska App. 1982).

Where trial court has made a decision to deny severance under this rule, it can be overturned only for abuse of discretion. Maynard v. State, Op. No. 136, 652 P2d 489 (Alaska App. 1982).

Defendant's generalized fifth amendment argument, standing alone, did not suffice to show that joinder was prejudicial; a defendant must make a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. Montes v. State, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Contention that severance should be routinely granted whenever an accused moves to sever similar offenses was rejected; on appeal, denial of a motion for severance will be reversed only when the court has abused its discretion and a showing of prejudice to the defendant has been made. Montes v. State, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Trial court erred in denying severance of two similar sexual assault charges involving the same defendant where the evidence did not establish a common scheme or plan, whether or not the evidence of the assault on each victim would have been admissible in a trial for assault on the other victim. Johnson v. State, Op. No. 668, 730 P2d 175 (Alaska App. 1986).

Where prior conviction, admissible as an element of felon in possession of firearm charges, would have been inadmissible in a separate trial on theft by receiving charges, trial court erred in denying defendant's severance motion without pursuing the alternative of bifurcation, requiring reversal of the theft by receiving conviction but not the felon in possession conviction. Elerson v. State, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

By waiting until the date of trial to move for severance, defendant waived his ability to do so. Knutson v. State, Op. No. 702, 736 P2d 775 (Alaska App. 1987).

Trial court did not err in joining cocaine charges with murder, kidnapping, and robbery charges against two defendants, but did err in denying their timely motion to sever based upon prejudice. Mathis v. State, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

Trial court erred in not granting defendants' motion to sever cocaine and murder charges where substantial risk existed that their defense on the cocaine charges was severely prejudiced by the evidence of murder; accordingly, the appellate court vacated the cocaine convictions but affirmed the murder convictions. Mathis v. State, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

Where defendant was charged with a murder which occurred on August 5 and several murders which occurred on August 6, joinder of the offenses was proper, since the August 6 murders resulted from defendant's belief that he was going to be killed because of his role in the August 5 murder; furthermore, the trial court did not err in denying defendant's motion for severance given the relevance of the August 5 murder to the August 6 murders and the absence of any specific and convincing showing of prejudice resulting from joinder. Collins v. State, Op. No. 962, 778 P2d 1171 (Alaska App. 1989).

There was a close nexus between the drug charges against defendant and drug charges against his codefendants, thus defendant's argument that he was prejudiced by the trial court's failure to

The probative value of polygraph evidence is insubstantial because the polygraph has not been proven reliable, thus the prejudicial impact it may have on a jury clearly outweighs its probative value; accordingly, trial court did not abuse its discretion in refusing to admit defendant's polygraph results at trial. **Hankason v. State**, Op. No. 837, 760 P2d 1030 (Alaska App. 1988).

The primary purpose of the Rape Shield Statute is to prevent the use of evidence of past sexual conduct as proof of the victim's current willingness to consent; it is not intended to exclude evidence of prior sexual conduct when such evidence is directly relevant to establish bias, prejudice, or motive to fabricate. **Daniels v. State**, Op. No. 900, 767 P2d 1163 (Alaska App. 1989).

Where the defense witness in a DWI prosecution testified that she in fact had been driving the vehicle but traded places with the defendant because there was a warrant out for her arrest, the trial court did not commit error in permitting the state to cross-examine the witness on her prior DWI arrest and license suspension, since the knowledge that her license was suspended was directly relevant to her willingness to drive and since any additional prejudice was slight considering that the defendant introduced the issue. **Alward v. State**, Op. No. 901, 767 P2d 1175 (Alaska App. 1989).

In trial of defendant for murder arising out of an altercation between the defendant, the victim and the victim's brothers, where defendant claimed self-defense, the trial court did not err in preventing defendant from cross-examining one of the brothers about a prior hindering prosecution charge (later dismissed) against that brother as evidence of bias under this rule, since although the evidence arguably demonstrated the brother's willingness to engage in illegal conduct to protect his brother, the trial judge's conclusion that the probative value of the evidence was outweighed by the danger of unfair prejudice was not unreasonable considering that the brother had admitted to burglary and theft convictions and that defendant was still fully able to develop the brother's bias and interest in the case. **Lerchenstein v. State**, Op. No. 921, 770 P2d 1150 (Alaska App. 1989).

Trial court committed plain error requiring reversal by permitting questions concerning defendant's prearrest silence in the presence of police officers, silence which was at least as consistent with innocence as with guilt, without first determining whether the probative value of the challenged line of inquiry was outweighed by its potential for prejudicial impact. **Silvernail v. state**, Op. No. 945, 777 P2d 1169 (Alaska App. 1989).

There is a presumption that the prejudicial effect of propensity evidence outweighs its probative value; when, however, a prior bad act is relevant to a material fact other than propensity, the court may admit evidence of the prior bad act if it is more probative than prejudicial. **Mathis v. State**, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

In action against airline for property damage resulting from a runway collision at Anchorage International Airport where jury concluded that the airline's flight crew committed wilful misconduct in taking off in fog without knowing where they were on the runway, trial judge did not err in excluding, on grounds of relevance and potential prejudice to plaintiff, evidence that ground navigation in foggy conditions was known by the FAA and the State to be a dangerous problem at the airport, since the difficulty of taxiing in the fog was not a contested issue in the case and exclusion of the evidence did not in fact prejudice the airline, which was allowed to introduce other evidence as to the confusion on the taxiways on the day of the crash. **Korean Air Lines, Ltd. v. State**, Op. No. 3492, 779 P2d 333 (Alaska 1989).

In murder trial, trial court did not err in refusing to allow an Immigration Department investigator to testify for the defense regarding reports from unidentified informants of rumors that the victim's family had threatened to kill anyone who testified in favor of the defendant at trial; although the testimony of the informants themselves might not have been hearsay, the investigator's testimony would have been; futhermore, the probative value of the investigator's testimony would have been outweighed by possible confusion of issues and needless presentation of cumulativ dence, particularly since the prosecution's primary witness a defendant acknowledged her awarness of the rumors. **Zec State**, Op. No. 956, 779 P2d 795 (Alaska App. 1989).

The standard of this rule, that relevant evidence ca excluded if the probative value of the evidence is outweigh confusion of the issues or by considerations of undue delay, proper standard to apply in determining whether cross-exar tion should be allowed in criminal cases; the case law dealing the issue of cross-examination in criminal cases does not c standards to replace this rule, but rather augment it. **Brown v. S** Op. No. 957, 779 P2d 801 (Alaska App. 1989).

In trial of a black defendant for misconduct involving a trolled substance, trial court did not err in prohibiting him cross-examining the undercover officer involved in the case cerning racial bias, because the evidence which would have developed through the cross-examination was so marginally bative, the judge's decision to exclude it due to possible confusi the issues and delay was justified. **Brown v. State**, Op. No. 95 P2d 801 (Alaska App. 1989).

Trial judge did not abuse his discretion in admitting eviden defendant's flight from the scene of the crime as evidence o consciousness of guilt. **Charles v. State**, Op. No. 963, 780 P2d (Alaska App. 1989).

In prosecution of defendant for criminally negligent homi in failing to timely seek medical treatment for her child, statem by policeman in taped interview of defendant that the po received several calls from people saying that defendant had abu her child would have been unfairly prejudicial and therefore hac be excised from the tape. **Pinkerton v. State**, Op. No. 996, 784 P 671 (Alaska App. 1989).

In drunk driving prosecution, trial court did not err in adr ting an audio tape recording, which the police made when defe ant was arrested and while he was being transported to the po station, despite the tape's poor quality; the jury could tell when voices on the tape were obscured by background noise and sta and would not conclude that the background noise and static w slurred or garbled speech by defendant. **Suiter v. State**, Op. No. 9 785 P2d 28 (Alaska App. 1989).

Rule 404. Character Evidence Not Admissible to Prove Conduct—Exceptions—Other Crimes.

(a) **Character Evidence Generally.** Evidence of person's character or a trait of his character is no admissible for the purpose of proving that he acte in conformity therewith on a particular occasio except:

(1) *Character of Accused.* Evidence of a relevan trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a relevant trait of character of a victim of crime offered by an accused, or by the prosecution to rebut the same, 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, subject to the following procedure:

(i) When a party seeks to admit the evidence for any purpose, he must apply for an order of the court at any time before or during the trial or preliminary hearing.

Evidence offered by defendant to show reasonableness of defendant's apprehension of being in imminent danger from shooting victim is not relevant when defendant did not know of such evidence at the time of the shooting. Byrd v. State, Op. No. 2184, 626 P2d 1057 (Alaska 1980).

Although the presentation of irrelevant evidence as to the scope of burglaries is error, it is harmless error if the presentation produces little or no prejudicial effect. Nelson v. State, Op. No. 2350, 628 P2d 884 (Alaska 1981).

Admissibility of breathalyzer refusals should be determined on a case-by-case basis by weighing probative value against potential for unfair prejudice. Coleman v. State, Op. No. 229, 658 P2d 1364 (Alaska App. 1983).

In prosecution for murder, admission into evidence of a .380 caliber automatic pistol owned by the defendant was not error even though expert testimony could not conclusively establish that the gun was the murder weapon. Bangs v. State, Op. No. 253, 663 P2d 981 (Alaska App. 1983).

In drunk driving prosecution of defendant who refused to submit to a breathalyzer examination, court erred in excluding expert testimony for the defense concerning defendant's blood alcohol level at the time of his arrest. Quinto v. City and Borough of Juneau, Op. No. 265, 664 P2d 630 (Alaska App. 1983).

Defendant's conviction for sexual abuse of child was reversed because extensive evidence of prior consistent statements made by the victim was admitted at trial without any determination of its actual probative value and before any charge of recent fabrication or improper motive or influence was made against the victim. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Evidence of consistent statements made by a child abuse victim on prior occasions may be admitted to bolster the testimony of the victim in a case involving the sexual abuse of the child, provided that it is actually relevant to rebut an express or implied charge of recent fabrication or improper motive or influence, and provided that its probative value outweighs its potential for prejudicial impact; before such evidence is admitted, however, the victim must testify and be subjected to a charge of recent fabrication or improper motive or influence; furthermore when it appears that the alleged motive to testify falsely arose before the prior statement was made, the statement may be admitted only for the purpose of rehabilitating the victim's credibility and may not be considered as substantive evidence of guilt. Nitz v. State, Op. No. 629, 720 P2d 55 (Alaska App. 1986).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

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

(Added by SCO 364 effective August 1, 1979)

Annotations

Cases

Where only prejudice was possibility that jury might misestimate probative value of certain real evidence for state's case, even slight probative value outweighed such prejudice. Eben v. State, Op. No. 1920, 599 P2d 700 (Alaska 1979).

Where informant's credibility was relatively unimportant because testimony was corroborated by police officer's evidence that informant had made written statement alleging informant's testimony before grand jury in unrelated case was product of police coercion was properly excluded on grounds whatever relevancy statement had to issue of informant's credibility was outweighed by likelihood it would confuse the issues, mislead jury and consume an undue amount of time. Taylor v. State, Op. No. 1932, 600 P2d 5 (Alaska 1979).

Where defendant was charged with assault and battery, evidence that victim was 9 months pregnant was relevant and not unfairly prejudicial to right of defendant. Rathbun v. Anchorage, Op. No. 1928, 599 P2d 751 (Alaska 1979).

Exclusion of relevant evidence concerning rape victim's poor grades and excessive school absenteeism was proper where other evidence had already made the jury aware of these factors. Alexander v. State, Op. No. 2077, 611 P2d 469 (Alaska 1980).

Evidence regarding prior confrontations between the defendant and trespassers was relevant and admissible to show that the defendant's pointing of a shotgun at the victim was not accidental or inadvertent. Adkinson v. State, Op. No. 2090, 611 P2d 528 (Alaska 1980).

At trial for murder, it was reversible error for the trial court to exclude a journal written by the victim, parts of which reflected a sense of mental instability and a violent nature. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska 1980).

Evidence of the circumstances of a prior rape committed by the defendant was properly admitted for the purpose of providing the identity of the assailant by showing a distinctive modus operandi employed in both the prior rape and the rape of the current victim. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused and indicated that the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. Dorman v. State, Op. No. 2272, 622 P2d 448 (Alaska 1981).

The evidenciary rule precluding admission of post-injury accidents or design changes toward proof of negligence is inapplicable in products liability cases based on strict liability. Caterpillar Tractor Co. v. Beck, Op. No. 2304, 624 P2d 790 (Alaska 1981).

In statutory rape case, evidence of defendant's prior sexual conduct with victim was admissible. Burke v. State, Op. No. 2194, 624 P2d 1240 (Alaska 1981).

Testimony and photographs concerning the physical condition of a child allegedly kidnapped by defendant from state custody were admissible to show motive for kidnapping. Crump v. State, Op. No. 2309, 625 P2d 857 (Alaska 1981).

It was not error for the court to allow a defendant charged with drunk driving to be cross-examined regarding a possible law suit against the City of Fairbanks arising out of the same incident upon which the drunk driving charge was based. Roth v. State, Op. No. 13, 626 P2d 583 (Alaska 1981).

The trial court has considerable discretion in determining whether the probative value of an admission by silence is outweighed by the danger of unfair prejudice. Doisher v. State, Op. No. 30, 632 P2d 242 (Alaska App. 1982).

Evidence that defendant, charged with driving while intoxicated, refused to take the breathalyzer examination had possible probative value, and trial court did not err in finding that the probative value outweighed the possibility of prejudice. Williford v. State, Op. No. 148, 653 P2d 339 (Alaska App. 1982).

Where the evidence in each of five rape and assault incidents was sufficiently similar and sufficiently unusual when viewed in its totality and in the common pattern it presented to constitute a modus operandi probative of defendant being the assailant in all instances, trial court did not err in denying defendant's request for severance of the various rape, burglary with intent to rape, and assault charges. Nix v. State, Op. No. 157, 653 P2d 1093 (Alaska App. 1982).

Defendant's contention that because his conviction for driving while intoxicated was predicated on his blood alcohol rate and not his driving it was error for the trial court to admit evidence that he

(ii) The court shall conduct a hearing outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim. The hearing may be conducted *in camera* where there is a danger of unwarranted invasion of the privacy of the victim.

(iii) The court shall order what evidence may be introduced and the nature of the questions which shall be permitted.

(iv) In prosecutions for the crime of sexual assault in any degree and attempt to commit sexual assault in any degree, evidence of the victim's conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this rule, in the absence of a persuasive showing to the contrary.

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible to show a common scheme or plan if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

(i) are not too remote in time;

(ii) are similar to the offense charged; and

(iii) were committed upon persons similar to the prosecuting witness.

(Added and amended by SCO 364 effective August 1, 1979; amended by SCO 906 effective nunc pro tunc May 28, 1988)

Note: SCO 906 incorporated changes in Evidence Rule 404 made by the legislature in ch. 66, §§ 8 and 9, SLA 1988. The legislation added subparagraph (b)(2).

Annotations

Cases

In prosecution for negligent homicide of 18-month-old child, where no defense of accident or mistake was raised, admission of evidence that defendant had on a prior occassion beaten another child to the point of leaving belt marks was reversible error. Harvey v. State, Op. No. 1996, 604 P2d 586 (Alaska App. 1979).

Evidence regarding prior confrontations between the defendant and trespassers was relevant and admissible to show that the defendant's pointing of a shotgun at the victim was not accidental or inadvertent. Adkinson v. State, Op. No. 2090, 611 P2d 528 (Alaska App. 1980).

The giving of a jury instruction which drew attention to possible prejudicial inadmissible information regarding the accused was prejudicial error. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska App. 1980).

A defendant may offer evidence of a relevant character trait of a victim without its having the effect of granting to the prosecution the right to introduce evidence of defendant's character. Keith v. State, Op. No. 2099, 612 P2d 977 (Alaska 1980).

An unintentional reference at trial to defendant's probation did not violate this rule to the extent that a motion for mistrial should have been granted. Preston v. State, Op. No. 2146, 615 P2d 594 (Alaska 1980).

Trial court's refusal to permit defendant and others to testify concerning alleged prior instances of violent conduct committed by the victim toward third parties was not abuse of discretion where reputation and character evidence concerning the victim's propensity for violence had been admitted. Loesche v. State, Op. No. 2202, 620 P2d 646 (Alaska 1980).

Evidence of the circumstances of a prior rape committed by the defendant was properly admitted for the purpose of proving the identity of the assailant by showing a distinctive modus operandi employed in both the prior rape and the rape of the current victim. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Evidence of drug use by the accused was admissible where it established direct contact between the victim and the accused and indicated that the accused possessed sufficient amounts of cocaine for him to have invested more than pocket cash in his purchase from the victim. Doman v. State, Op. No. 2272, 622 448 (Alaska 1981).

Defendant's conduct at a store minutes after the armed robbery of another store for which he was accused was admissible to show that he was the same man who robbed the first store. Vessel v. State, Op. No. 2295, 624 P2d 275 (Alaska 1981).

In statutory rape case evidence of defendant's prior sexual conduct with victim was admissible. Burke v. State, Op. No. 2194, 624 P2d 1240 (Alaska 1981).

Evidence that defendant had previously vandalized the aircraft of customers who refused to pay their bills is admissible to prove the motive and identity of defendant as the one who vandalized plaintiffs' aircraft for their refusal to pay their bill. State v. Grogan, Op. No. 2356, 628 P2d 570 (Alaska 1981).

The admission of evidence proscribed by this rule is harmless error if the evidence does not have a substantial influence on the jury's verdict. Fields v. State, Op. No. 2360, 629 P2d 46 (Alaska 1981).

When a defendant through testimony places his intent in issue, evidence of similar assaults previously committed against other women by defendant is admissible upon the issue of intent. Davis v. State, Op. No. 23, 635 P2d 481 (Alaska App. 1982).

In negligence action against waterbed manufacturer, it was error to allow testimony concerning post-accident conduct of manufacturer in not recalling the product or issuing a warning. Amer. Nat. Watermattress Corp. v. Manville, Op. No. 2477, 642 P2d 1330 (Alaska 1982).

Trial court did not err in refusing to sever assault charge, arising from an incident which took place on September 19, 1977, from murder charge based on an incident which occurred six days later, since defendant's actions could be viewed as a continuing course of conduct and since the assault charge would have been admissible in the murder trial to prove criminal intent or motive or to show a common scheme or plan even if the charges had been severed. Davidson v. State, Op. No. 78, 642 P2d 1383. (Alaska App. 1982).

Where the evidence in each of five rape and assault incidents was sufficiently similar and sufficiently unusual when viewed in its totality and in the common pattern it presented to constitute a modus operandi probative of defendant being the assailant in all

MEMORANDUM

State of Alaska

TO: Legislative Information Office

DATE: February 11, 1991

FILE NO:

TELEPHONE NO:

SUBJECT: House Bill 105

THRU:

FROM: Barbara K. Brink BKB
Deputy Public Defender
Public Defender Agency

I would appreciate it if the attached comments on HB 105 are read into the record at the hearing today at 1:30 p.m. in House Judiciary. Thanks.

BKB:sh

Attachment

HB 105

This bill proposes significant changes in two areas of procedural criminal law. The Department of Law has previously proposed these changes in an attempt to persuade the legislature to overrule decisions of the Alaska Court of Appeals that the state does not like. The legislature has wisely rejected these proposals in the past, and they should again be rejected.

A. Section 2 of HB 105 proposes to modify the Alaska Rules of Criminal Procedure regarding joinder of multiple defendants in a single trial. The express purpose stated in Section (1)(a) is to overrule Greiner v. State, 741 P.2d 662 (Alaska App. 1987).

The proposed rule misstates the significance of Greiner. Greiner is a fact-bound decision, based on the appellate court's conclusion that the evidence presented by the state established no real connection between the defendants. The proposed modification of the rule would not change the result in Greiner.
In Greiner, the Court of Appeals relied explicitly on cases interpreting Federal Criminal Rule 8(b), which at present is essentially identical to Alaska Criminal Rule 8(b). Any claim that Alaska Rule 8(b) requires severance more frequently than the federal rule is simply erroneous. (There are many possible explanations why proportionately more joint trials may occur in the federal system than in Alaska; the point here is that any difference is not due to a narrower reading of Rule 8(b)in Alaska).

When the rules regarding joinder are relaxed, the chances that unfair prejudice will occur and that the defendant will not receive a fair trial increase greatly. The present rules exist to ensure that evidence from separate cases or related to other defendants does not infect the process of fact-finding. Relaxing the joinder rules as to joint trials for separate defendants can create a situation where a defendant against whom the state has a weak case can still be convicted through guilt by association.

B. Section 3 of the bill proposes a change to Alaska Criminal Rule 14(b), which governs judges' discretion to sever for separate trials charges previously joined under Criminal Rule 8. The "purpose" statement in Section (1)(b) misstates the current law. Contrary to the bill's statement, the Alaska Court of Appeals does not require that evidence be completely mutually cross-admissible in order for charges to remain joined for trial. In Mathis v. State, 778 P.2d 1161, 1167 (Alaska App. 1989), the Court of Appeals stated "Perfect cross-admissibility of evidence is not required under Criminal Rule 8(b) as long as 'the counts ... are logically interrelated or involve overlapping proof,'" quoting United States v. Swift, 809 F.2d 320, 322 (6th Circuit 1987). As the cite to Swift illustrates, the Alaska court tends to follow the federal law. See also Collins v. State, 778 P.2d 1171 (Alaska App. 1988) (allowing joinder of cases where evidence of one crime was relevant to establish the motive for other crimes, but there was no cross-admissibility).

One particular problem with the proposal is its attempt to define what is or is not prejudicial. Any attempt by a statute to legislate what is or is not prejudicial must fail. Prejudice can only sensibly be defined by a judge dealing with the specific facts of the case before him. The Court of Appeals has made clear that proving prejudice sufficient to require severance is a "heavy and difficult burden" for the defendant, and that the trial court may take special steps, such as giving cautionary instructions, to minimize prejudice. Mathis v. State, 778 P.2d at 1167.

Trying multiple charges together can create a perception, even if the cases are weak, that the defendant must have done something wrong. This is similar to the old cliche that "where there is smoke there must be fire." Thus a jury may convict not because the case has been proven beyond a reasonable doubt, but because is seems that the person is generally deserving of punishment.

In summary, relaxing the rules of joinder accomplishes very little except to increase the potential for unfair prejudice. While some judicial economy would be realized through advancement of these changes, it should be noted that over ninety percent of the cases which are prosecuted do not result in trials.

C. Section 4 proposes changes to Alaska Evidence Rule 404(b)(1). The purpose section notes two cases where specific "bad act" evidence was not allowed, but to call Alaska Rule of Evidence 404(b)(1) a "rule of exclusion" is misleading to people not familiar with the criminal justice system. A review of the Alaska cases shows plainly that admission of bad act evidence is not substantially restricted by the courts' interpretations of the existing evidence rule; in fact there is widespread use of this evidence against defendants in the Alaska courts. For every Lerchenstein case where the appellate court has ruled that the trial court impermissibly admitted prior bad act evidence, there are several cases where a defendant has unsuccessfully appealed his/her conviction based on the prosecution's successful use of this type of evidence. See, e.g., Adkinson v. State, 611 P.2d 528 (Alaska App. 1980) (evidence regarding prior confrontation between defendant and trespassers admitted); Coleman v. State, 611 P.2d 869 (Alaska 1980) (evidence of the circumstance of a prior rape committed by defendant was admitted); Dorman v. State, 622 P.2d 448 (Alaska 1981) (evidence of prior drug use by defendant admitted); Vessell v. State 624 P.2d 275 (Alaska 1981) (defendant's conduct at a store after armed robbery of another store admitted); Burke v. State, 624 P.2d 1240 (Alaska 1981) (evidence of defendant's prior sexual conduct with victim admissible in statutory rape case); State v. Grogan, 628 P.2d 570 (Alaska 1981) (evidence that defendant previously vandalized an aircraft admitted); Davis v. State, 635 P.2d 481 (Alaska App. 1982) (assaults previously committed against other women admitted); Bidwell v. State, 656 P.2d 592 (Alaska App. 1982) (evidence of a previous assault of a pharmacist and an attempt to pass a forged prescription admitted in a kidnapping case).

The above-cited cases are by no means a complete list of the reported appellate decisions. See annotations to Alaska Rule of Evidence 404, Alaska Rules of Court, 1990 edition. Even a complete list of reported appellate decisions where the defendant unsuccessfully argued that prior bad acts were admitted would represent just the tip of the iceberg. Trial courts around the state of Alaska regularly admit evidence of this nature against a defendant. The exact number of cases in which this is true would be difficult to discern as not all cases are appealed and thus reported. Cases which are appealed and where convictions are affirmed based on application of settled law appear frequently as memorandum decisions, and thus are not published opinions.

This proposed revision of the evidence rules is being advanced based on the contention that the Alaska Court of Appeals treats Alaska Rule of Evidence 404(b) as a rule of exclusion, whereas the federal system supposedly interprets the rule as one of inclusion. The fact of the matter is there is no unanimity either within the federal system or among the states. Among the federal courts, the Seventh Circuit, the Eighth Circuit and the District of Columbia have adhered to what some term the "exclusionary view". See, e.g., United States v. Foskey, 636 F.2d 517, 523-24 (DC Cir., 1980); U.S. v. DeJohn, 638 F.2d 1048, 1052 (7th Cir., 1981); U.S. v. Frederickson, 601 F.2d 1358, 1365 (8th Cir., 1979). The federal courts in the Third and Sixth Circuits are

undecided as to the issue. See, e.g., U.S. v. Lebovitz, 669 F.2d 984 (3rd Cir., 1982); U.S. v. Reed, 647 F.2d 678, 686 (6th Cir., 1981). The exclusionary rule apparently prevails in most other jurisdictions. State v. Lerchenstein, 726 P.2d at 550 n.8. (Rabinowitz dissenting)

Even though there is reference in appellate decisions to Alaska's exclusionary approach to 404(b) evidence, the case decisions and the evidence rule itself suggest otherwise. The "such as" language in the existing rule makes clear that the enumerated non-propensity reasons for which bad act evidence may be admitted are illustrative, not an exhaustive list. If Alaska strictly applied the rule of exclusion, prior bad act evidence would only come in against a defendant if it was relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Alaska Rule of Evidence 404(b)(1). A review of the reported decisions in Alaska shows that our jurisdiction goes beyond that exclusionary view. For example, in Patterson v. State, 732 P.2d 1102 (Alaska App. 1987), the Alaska Court of Appeals created the "lewd disposition" exception in a case involving sexual assault. See also Burke, cited supra. The Court of Appeals in Soper v. State, 731 P.2d 587 (Alaska App. 1987), allowed in evidence of prior sexual assaults on members of an immediate family even though it did not fall within the "motive" exception. See also Davis v. State, 635 P.2d 481 (Alaska App. 1981) (a date rape case where the court allowed in evidence of prior sexual assaults by the defendant on similarly situated victims). Section (1)(c) quotes Lerchenstein, but the short passage quoted leaves a false impression of the case's holding. Far from prohibiting balancing, as the quote implies, Lerchenstein specifically states, "When a prior bad act is relevant to a material fact other than propensity, the court may admit the evidence if ... balancing shows the evidence to be more probative than prejudicial." 697 P.2d at 315. A particularly undesirable change is the proposed change of one small word, from "may be admissible" to "is admissible". It is imperative to leave trial judges with discretion under Evidence Rule 403 to preclude evidence which is time-consuming, cumulative, or too distracting from the central issues of the trial.

It is also important to remember that Alaska Rule of Evidence 404(b)(1) must apply to both the prosecution and the defense. That is, the rule circumscribes a defendant's ability to admit bad act evidence concerning state witnesses, as well as the state's ability to offer such evidence about the defendant and defense witnesses. The rule as currently written represents a reasonable accommodation of each side's ability to present relevant evidence and the needs of both sides to prevent the trial from expanding with issues of marginal relevance but high potential to distract the jury from the real issues of the case.

In sum, the Lerchenstein opinion does not represent our courts' unwillingness to admit prior bad act evidence. Instead, the few cases prohibiting such evidence reflect the courts' careful study and treatment of this type of evidence and the need for determining these issues on a case by case basis. Given the already broad admissibility of "bad act" evidence, no change to the current law is necessary or desirable. Alaska Evidence Rule 404(b) guards against convicting defendants based on evidence they are bad people, as distinct from evidence that proves they committed the specific crime with which they are now charged. The rule is constitutionally based. Opening trials too broadly to bad act evidence risks depriving the accused of the presumption of innocence and violates the federal and state constitutional guarantees of due process.

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February 11, 1991

TO: House Judiciary Committee

FROM: Christine S. Schleuss and James H. McComas

RE: House Bill 105

Dear Committee Members:

We are attorneys practicing substantially in the area of criminal law in Anchorage, Alaska. Ms. Schleuss has practiced for 12 years in the state and federal courts of Alaska. Mr. McComas has practiced for more than 12 years in state and federal courts in Washington, D.C., Wisconsin, and Alaska.

We first learned of the existence of House Bill 105, and of a proposed hearing on that bill, on Friday, February 8, 1991. Mr. McComas immediately contacted the Committee staff and requested an opportunity to testify telephonically in opposition to this bill. Subsequently, we were informed that no telephonic testimony would be permitted, but that written comments could be submitted by telefax to be read into the record.

The short notice and time constraints have prevented us from preparing extensive written comments. Given the radical nature of the proposed changes in criminal procedure which would be effected by House Bill 105, we urge the Committee to take more time in considering this proposal and to afford interested individuals and entities on both sides of the criminal justice system an adequate opportunity to address the important issues raised by this legislation.

Our initial review of this legislation convinces us that it is nothing more than a Prosecutor's Relief Act. Each of the three proposed changes would make it easier for prosecutors to convict presumptively innocent individuals in cases where the proof that the accused had committed the charged crime was weak or insufficient simply by admitting unfairly prejudicial evidence or allegations of other crimes by the accused. Even in its most general terms, this proposal is offensive to the basic assumptions underlying our adversary criminal system.

The focus of the criminal trial has been, and should remain, upon the sufficiency of the proof that an accused citizen has committed specifically charged offenses. It is the offense, not the person, which has always been the focus of fact-finding in our criminal jurisprudence. This focus is one of the hallmarks of our system. We do not permit the reasoning process that because people have done something wrong in the past they are probably guilty of a present charge. Yet, the common thread of the proposals contained in House Bill 105 is to seriously undercut this historical starting point and to greatly expand the occasions upon which evidence of other, barely relevant or irrelevant alleged criminal activity would be introduced in trials.

Alaska Courts have long recognized the tremendous potential for unfair prejudice to the accused which arises from the introduction of such other crimes evidence. The Supreme Court has explained that improper admission of such evidence will "dilut[e] the requirement that present guilt be proved beyond a reasonable doubt." Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). Such evidence also denies the accused the right fairly to defend against the particular crime charged. Adkinson v. State, 611 P.2d 528, 531 (Alaska 1980).

Alaska Rule of Evidence 404(b)(1), as presently construed, recognizes the tremendous potential for unfair prejudice to an accused person which arises from the admission of evidence of other crimes, wrongs, or bad acts. Lerchenstein v. State, 697 P.2d 312 (Alaska App. 1985), aff'd State v. Lerchenstein, 726 P.2d 546 (Alaska 1986), clearly articulates what lawyers and judges who deal

daily in criminal trials must candidly admit -- that the introduction of evidence that an accused person has committed or has been accused of committing other unrelated criminal acts in the past frequently has an overriding and inflammatory effect upon jurors. Jurors naturally tend to assume that a person who has committed other wrongs is more likely to have committed the wrong charged, yet this sort of propensity-to-commit-crime inference has no place in our jurisprudence. Indeed, even the rule as amended by HB 105 does not purport to overturn this basic assumption. Yet, by deliberately expanding the occasions on which other crimes evidence may be admitted, the proposed amendment of Rule 404 contained in HB 105 would, as a practical matter, greatly increase jury misuse of presumptively prejudicial and inflammatory information. This, in turn, would result in convictions for the wrong reasons. If an accused person is found guilty, it should be on the basis of proof beyond a reasonable doubt which legitimately establishes his or her guilt of the charged offense, not on the basis for propensity inferences or juror animosity towards a "bad man" or "bad woman".

The Judiciary, not the Legislature, and not the Department of Law, is in the best position to assess the reality of the impact of the introduction of other crimes evidence upon jurors. The judicial interpretations of Rule 404(b) by the Alaska Appellate Courts reflect considered judicial judgments, based upon the experience of reviewing hundreds and hundreds of instances cases dealing with these issues. That judgment is that the introduction of such inherently prejudicial information should be limited to those instances in which there is <u>legitimate</u> probative value which outweighs the risk that an accused will be <u>unfairly</u> convicted for the wrong reasons. We concur in this judgment.

Under 404(b), as presently construed, other crimes evidence which is <u>really</u> offered for a legitimate reason is routinely admitted. But evidence with the primary effect of unfairly prejudicing the jury for no legitimate reason is excluded.

Strong law enforcement is certainly a desirable goal, and a strong political force. However, increased convictions obtained by methods which promote prejudice, and not accuracy, in the fact-

finding process should not be confused with that laudable goal. We have an historical commitment to protecting the innocent from wrongful conviction in this country. We balance the tremendous resource advantages enjoyed by the State in the criminal system by according rights to the accused which guarantee that guilt will only be found upon proof beyond a reasonable doubt of a specific charged offense. Legislation like HB 105 undercuts the confidence that all of us can have in the proper functioning of our judicial system by dramatically and substantially increasing the risk that the increased convictions gained by such legislation will not comport with the demands of fairness to which we are constitutionally committed, but will rather reflect a conviction-at-any-cost mentality. This Bill will very likely lead to the wrongful conviction of innocent people whose only offense was that they did something wrong in the past.

Equally undesirable, and perhaps more radical, is the proposed amendment to Alaska Rule of Criminal Procedure 14 which would codify a legislative judgment that "showing that evidence of one offense would not be admissible during a separate trial of a joined offense or a co-defendant does not constitute prejudice that warrants relief under this rule." What in the world is the empirical basis for such an obviously wrong assertion? It is difficult enough for an accused person to get a fair trial when evidence of crimes other than the charged offense is admitted purportedly for a legitimate, relevant purpose. The amendment to the joinder rule, however, purports to exclude from the category of potentially unfairly prejudicial material, the joinder for trial of wholly separate crimes as to which there is not even a claim of inter-admissibility. In such situations, the likelihood that the accused would be convicted for the wrong reason -- that is, an inference of criminal propensity or conclusion that this is just a bad person needing punishment -- is extremely high. And since the evidence of each offense is admittedly not admissible to prove the other, the absence of a legitimate justification for the prejudice is apparent.

The way Rule 14 is presently administered, the court is free to consider the extent of prejudice which may result from a joint

trial on charges where the proof is not interadmissible. Where the risk of unfair prejudice is slight, the court may permit a joint trial. On the other hand, where offenses are likely to have a prejudicial effect upon a fair consideration of each other if they are tried together, and where the evidence pertaining to the separate offenses could not be admitted in separate trials, the court has the authority to prevent what would be the obvious and unfair prejudice engendered by a joint trial.

An additional and unfortunate result of amending Rule 14 as proposed would be the likelihood that prosecutors would obtain indictments containing multiple offenses as to many of which the evidence would be of dubious sufficiency. The limitations of Rule 404(b)(1) could be circumvented as a practical matter by simply charging other crime allegations in the indictment. Then, whether they are separately admissible or not, the prosecution would achieve the tactical advantage of a joint trial on which the jury would be exposed to evidence which would facilitate improper inferences of criminal propensity or bad character.

If there is perceived to be a problem with the conviction rate in criminal trials in this state, the appropriate solution is not to change the rules to make it easier to unfairly prejudice the people accused. The solutions lie in better investigation, preparation, advocacy, and exercise of discretion by state prosecutors.

Sincerely yours,

LAW OFFICES OF SCHLEUSS & McCOMAS

James H. McComas

Christine S. Schleuss

JHM:ja

VICTIMS for Justice

March 5, 1991

Representative Dave Donley
P.O. Box V
Juneau, Alaska 99811

Dear Representative Donley,

Victims for Justice supports HB 105. Paul Stockler, an ex-district attorney who is on the Board of Victims for Justice will be representing VFJ on this important public hearing.

Thank you for the 1991 Anti-Crime Legislative package. Victims for Justice and its members will be responding in the up coming months. Thank you and your colleagues for all your hard work.

Sincerely,

Janice Lienhart

Janice Lienhart

Fax# 465-2299

(907) 278-0977 619 East 5th Avenue Anchorage, Alaska 99501

ALASKA NETWORK
ON
DOMESTIC VIOLENCE
AND
SEXUAL ASSAULT

130 Seward, No. 301 • Juneau, Alaska 99801 • (907) 586-3650

February 28, 1991

Judiciary Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Committee Members:

The Network has had the opportunity to discuss information presented at the recent hearing of HB 105 and would like to express its support for the bill.

I have attached some statistics on rape compiled by the U.S. Senate Judiciary Committee which speak to the prevalence of date or acquaintance rape. The majority of sexual assault is not stranger assault (except for very young girls) but is in fact perpetrated by someone with whom the victim is acquainted. When these cases are reported and come to trial the primary issue at trial is that of consent, and juries are faced with a contest of credibility between the defendant and the victim.

Studies indicate that it is common for rapists to have many victims prior to the time they are first convicted of their first offense, and indeed, to have recidivism rates of around 80% after that conviction. It is also the case that rapists often develop a common pattern of behavior in locating and assaulting their victims.

When a defendant is accused of the rape and attempted rape of 3 women within the period of one month, as occurred in the case of Velez v. State, and argues that he believed that sex was consensual, if those cases are tried singly the jury is deprived of vital information as to the defendant's pattern of actions and state of mind. The Network believes that the result of separation of trials in cases like Velez, in an attempt to be just toward the defendant, is being manifestly unjust toward victims.

The Network believes trial joinder is also appropriate when there are multiple perpetrators and a single victim; i.e., gang rape. After the trauma of a rape, many victims simply cannot face the prospect of trial and cross-examination as it is. Asking a rape victim, or child sexual assault victim to repeatedly testify at separate trials is so traumatic that it can prevent prosecution because the victim simply cannot go through it.

The Network appreciates your consideration of these issues.

Sincerely,

Cindy Smith

Cindy Smith
Executive Director

Alaska Association Chiefs of Police

February 2, 1991

Representative Dave Donley
Alaska State Legislature
P. O. Box V (MS 3100)
Juneau, AK 99811

Dear Representative Donley,

As President of the Alaska Association of Chiefs of Police, I would like to extend our support for House Bill 105. The ability to prosecute multiple defendants and join charges against one defendant have long been hampered by existing court rules.

The result of this has been costly in terms of excessive trials. In some cases, the ability to prosecute is severely hindered, because certain types of evidence are excluded. The citizens of Alaska are the victims of this cumbersome system. They deserve better, and House Bill 105 would help balance the scales.

If I can be of any assistance, please contact me.

Sincerely,

Duane S. Udland
President