ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6924 HOUSE JUDICIARY

WAYNE ANTHONY ROSS
POST OFFICE BOX 101522
ANCHORAGE, ALASKA 99510

Rupe Andrews
9416 Long Run Drive
Juneau, AK 99801

Dear Rupe:

I have examined the copy of HB 104 and have the following objections to it:

Page 3, line 29. "(4) manufactures, possesses, transports, sells, or transfers metal knuckles; or" This section makes no provision for collectors of weapons and serious students of weaponry. The mere possession of an inanimate object of no intrinsic evil should not be prohibited. I know a number of weapons collectors who have these items and they should not be subject to criminal penalties simply because of the mere fact of their possession. Likewise, the sale or transfer of these items should not be prohibited between law abiding persons, and especially between collectors. Metal knuckles have not ever been any problem in Alaska and this provision should be deleted from the present and proposed law. If this is not possible then there should be added a provision that says "It is an affirmative defense to this section that the possession, transportation, sale, or transfer of such weapons is for historical or educational purposes."

Page 3, line 30-31. "(5) manufactures, sells, or transfers a switchblade, a gravity knife, or a butterfly knife." Again, I object to this provision. In Alaska, it is often necessary to have a knife available that opens quickly. Fisherman are particularly mindful of this need. Switch blades, gravity knives, and butterfly knives fulfill this need. The law makes no provisions for Alaskans with such a need, and again, it makes no provision for collectors of knives and serious students of weaponry. The mere possession of an inanimate object of no intrinsic evil should not be prohibited. I know a number of fishermen, outdoorsmen, and knife collectors who have these items and they should not be subject to criminal penalties simply because of the mere fact that they sell or transfer these items to other fishermen, outdoorsmen, or knife collectors. Switchblades, gravity knives, and butterfly knives have never been a real problem in Alaska and this provision should be deleted from the present and proposed law. If this is not possible then there should be added a provision that says "It is an affirmative defense to this section that the sale or transfer is to a person who has no criminal record, and intends to use the switchblade, gravity knife, or butterfly knife for lawful purposes in his employment, for lawful recreation, or for historical or educational purposes."

Page 4, line 5. "or a defensive weapon" I fail to see why we

are adding another type of weapon, regularly used by women to protect themselves, to the Concealed Weapons statute. People have the right to protect themselves, and to outlaw the mere possession, by a law-abiding citizen, of a recognized and state defined "defensive weapon" simply makes it that harder for the law-abiding to protect themselves against the criminals who, because they are criminals, <u>won't abide by the law anyway!</u> This law simply further penalizes the good guys and gals. There is no reason for it.

Page 4, line 10-13. <u>"(4) knowingly possesses a firearm within the grounds of or on a parking lot immediately adjacent to a public or private preschool, elementary, junior high, or secondary school, without the permission of the chief administrator of the school or district or the designee of the chief administrative officer; or"</u>

This provision, if enacted at all, should be limited to <u>loaded</u> firearms and only <u>loaded</u> firearms, if any, should be prohibited. Often in Alaska, parents, who are leaving on a hunting trip, drop their kids off at school before leaving for the hunting grounds, or the parents may pick the kid up at school to leave together for a hunt. Such parents, who simply have an unloaded and encased firearm in their car, could be prosecuted under this law. I know that I would often pick my kids up at school, especially after a Saturday school activity, with a firearm in my car. Often we would be planning to leave from the school to go to the range together, or to go fishing or hiking. To require a parent to have to first get permission, which may or not be granted, before picking up his or her own child under such circumstances, is ridiculous.

Page 4, line 14. <u>"(5) possess or transports a switchblade, a gravity knife, or a butterfly knife."</u> See my comments for page 4, lines 30-31.

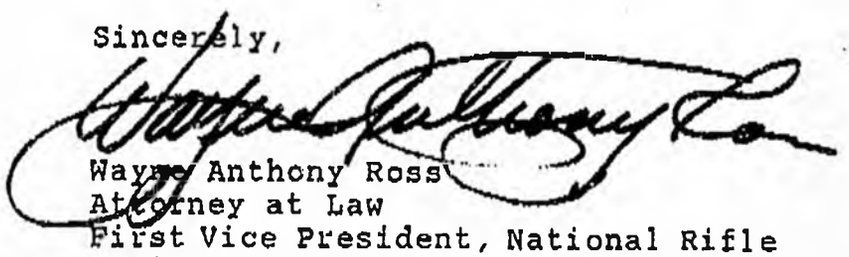
Page 4, line 19-page 5, line 5, singles out semi-automatic firearms as if they are some type of bogeyman, or as if they are some type of firearm more deadly or more evil than others. This emphasis is totally improper. If felons can have firearms, and I don't advocate that they should, a felon can do just as much damage with a pump shotgun or rifle as he can with a semi-automatic. Listing semi-automatics as a different, and perhaps more deadly, type of firearm, is setting a very bad precedent. After all, what makes a Remington Model 740 OK, but a Model 742 a prohibited weapon? There simply is no basis for this provision.

Page 6, lines 3-5. Again, this provision singles out semi-automatic firearms. Please see my comments to page 4, line 19-page 5, line 5.

Please feel free to circulate these comments as you feel necessary. I would be happy to testify telephonicly when the

opportunity arises.

Sincerely,



Wayne Anthony Ross
Attorney at Law
First Vice President, National Rifle Association of America
Chairman, NRA Gun Collectors Committee
President Emeritus, Alaska Gun Collectors Association
Director, National Firearms Museum Fund
Honorary Life Member, Ohio Gun Collectors Association
Life Member, Dallas Arms Collectors
Member, Alaska State Rifle and Pistol Association
Member, Alaska Rifle Club
Member, Colt Collectors Association
Member, Great Lakes Weapons Collectors
Member, Ruger Collectors Association
Member, Smith and Wesson Collectors Association
Member, Toy Gun Collectors Association
Member, Toy Gun Purveyors
Member, Wyoming Weapons Collectors

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 104

HB 104 makes various changes to state laws defining defensive weapons prohibiting their possession and use in certain circumstances, and amends criminal laws relating to misconduct involving weapons.

These changes include making it a crime for felons to possess semi-automatic firearms; making it a crime to sell a semi-automatic firearm to a felon; prohibiting felons from living where firearms and prohibited weapons are located during the period that they are banned from possessing these weapons; and adding "butterfly knives" to the list of prohibited knives.

The bill also makes it a crime to possess firearms on school grounds; makes the ban on felons possessing concealable firearms, semi-automatic firearms, and prohibited weapons permanent when the felon's conviction was for a violent crime; otherwise, increasing to ten years the period of time during which felons are banned from possessing these weapons.

The bill also increases the level of offense to a class B felony for felons to possess (for some period of time following conviction) concealable firearms and prohibited weapons; reduces the penalty for selling or possessing metal knuckles, or for selling switchblades and other prohibited knives, from a class C felony to a class A misdemeanor; and reduces the penalty for possessing switchblades and other prohibited knives from a class C felony to a class B misdemeanor.

Because the bill's provisions will serve overall to prevent crime, it is the Department of Law's view that the bill will not cause a fiscal impact for the department.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. H.B. 104

Revision Date: _____ Department Affected: Corrections

Title: An act defining defensive weapons and prohibiting their possession BRU: _____

Component: _____

Sponsor: Rep. Donley

Requestor: _____ **COMPONENT SERIAL NO.** | | | | |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Tom Sutton, Director Tom Sutton Phone: 465-3376

Division: Administrative Services Date: 2-10-91

Approved by Commissioner: Lloyd Hoomes

Agency: Department of Corrections Date: _____

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 104

Revision Date: _____ Department Affected: Department of Law

Title: "An Act defining defensive weapons ...misconduct involving weapons." BRU: Prosecution

Component: Criminal Justice Litigation

Sponsor: Representative Donley

Requestor: House Judiciary COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: February 11, 1991

Richard I. Pegues /for/

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 11, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 104

Revision Date:
Title: An Act defining defensive weapons and prohibiting their possession...
Sponsor: Donley
Requestor: Judiciary Committee

Department Affected: Alaska Court System
BRU: Trial Courts
Components:

COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/08/91

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/08/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 4, 1991 FURTHER REFERRALS: Finance

Date of Committee Action: 3-13-91

The JUDICIARY Committee considered: HB 104

HOUSE BILL NO. 104 WEAPONS OFFENSES

"An Act defining defensive weapons and prohibiting their possession and use in certain circumstances; and amending the criminal laws relating to misconduct involving weapons."

RECOMMENDATIONS: [ ] the same title
be replaced with CS HB 104 (Jud) [ ] a new title

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

4 see [X] zero fiscal note Pub. Safety; Courts; Corrections; LAW [ ] zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

Dave Donley	*Check appropriate column:*	*Do Not Pass*	*No Rec*	*Amend*
Kevin Pat Parnell				
Mike Miller				
Terry Martin				
Mark Hamley				
M L Ivan				

Dave Donley

Chairman's Signature

easily concealed and quickly brought to bear. These characteristics are indicative of knives which are used as weapons, rather than tools. Some utility knives are quickly brought to bear, such as a fishing or hunting knife in a sheath, but are not easily concealed. Indeed, it is only when these utility knives are concealed that their possession is unlawful. AS 11.61.220(a)(1).[1] An ordinary pocket knife may be carried concealed upon the person. AS 11.61.220(a)(1). However, an ordinary pocket knife is incapable of being quickly brought to bear.

Finally, we will not generally find a statute vague on the grounds that it is subject to arbitrary or discriminatory enforcement where there is no history of selective or arbitrary prosecution. *Summers v. Anchorage*, 589 P.2d 863, 868 (Alaska 1979); *Levshakoff v. State*, 565 P.2d 504, 507 (Alaska 1977); *Morrow v. State*, 704 P.2d 226, 233 (Alaska App.1985). Weaver has presented no evidence that the statute has a history of being discriminatorily enforced.

[4] Weaver also seems to argue that a statute which makes the possession of a gravity knife in one's home a crime, violates the right to privacy under the Alaska Constitution, article 1, section 22. The legislature may properly prohibit the possession of an object which "interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." *State v. Erickson*, 574 P.2d 1, 21 (Alaska 1978). "No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely." *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975). The legislative commentary to AS 11.61.200, discussing the definition of "prohibited weapon," states:

> Such weapons have little or no legitimate function, are unnecessary for protection and are not commonly used for commercial or recreational purposes. Substantial risk of harm to others and the furtherance of crime result from private possession of such weapons.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 47 at 101, 1978 Senate Journal 1399. The legislature could reasonably conclude that gravity knives have no legitimate purpose and are too dangerous to be casually possessed.

[5] Apparently, Judge Van Hoomissen never made a factual finding concerning whether or not the knife seized from Weaver was a gravity knife within the statute's meaning. We therefore remand for further proceedings.

The superior court's judgment is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.[2]

William E. CROUSE, Appellant,

v.

STATE of Alaska, Appellee.

No. A-1800.

Court of Appeals of Alaska.

May 8, 1987.

Following first-degree burglary defendant's violation of probation, under ten-

1. Alaska Statute 11.61.220(a)(1) states:
Misconduct involving weapons in the third degree. (a) A person commits the crime of misconduct involving weapons in the third degree if the person
(1) knowingly possesses a deadly weapon, other than an ordinary pocket knife, that is concealed on the person.

2. Weaver also appeals the trial court's denial of his suppression motion which alleged that the search, during which the knife was seized, was illegal. Since the trial court dismissed the charges resulting from the search, the only "final judgment" in the case favored Weaver and we have no jurisdiction to hear this issue. AS 22.07.020; Alaska R.App. P. 202(b). Should the charges be reinstated and result in a conviction, Weaver may then appeal the denial of his suppression motion.

HB

105

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

Schleuss & McComas
ATTORNEYS AT LAW
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501
(907) 258-7807
FAX (907) 276-1150

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 [redacted]eparately 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

MEMORANDUM

State of Alaska

TO: Legislative Information Office

DATE: February 11, 1991

FILE NO:

TELEPHONE NO:

SUBJECT: House Bill 105

THRU:

FROM: BKB
Barbara K. Brink
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.

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

REPLY TO:

☑ *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

February 11, 1991

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

Re: HB 105 ("Facilitating Joint Trials")

Dear Representative Donley:

By letter dated January 31, 1991, you have asked us whether we believe there are any "legal, constitutional, policy, or practical problems" with the above-referenced bill. You have also asked whether we support, oppose, or are disinterested in the bill.

We are unaware of any problems with this bill and we support its passage. The court rules that would be amended by this legislation restrict the state's ability to try several defendants together or to try all charges against a single defendant at one time. Multiple trials are not only expensive for the government, but they impede our ability to obtain convictions. This bill would help solve these problems. It would also make it easier to let the judge and jury know, when relevant, that the defendant has committed similar acts in the past. We believe that this bill is designed to improve the criminal justice system and that it will have that effect.

Thank you for the opportunity to comment on this bill. If you have any further questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

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

MOK:me-019

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

WALTER J. HICKEL, GOVERNOR

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February 20, 1991

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

Re: HB 105 (Joinder/Severance; Evidence Rule 404(b))

Dear Representative Donley:

You have asked us to respond to the letters of Deputy Public Defender Barbara Brink and of Schleuss & McComas, both dated February 11, 1991, regarding HB 105. This bill proposes amendments to three court rules: Criminal Rule 8(b), relating to joinder of offenses for trial, Criminal Rule 14, relating to the severance of joined offenses, and Evidence Rule 404(b), relating to the admissibility of evidence of other "crimes, wrongs, or acts" committed by the defendant. Ms. Brink and the firm of Schleuss & McComas have expressed concerns about these proposed amendments and ask that this legislation be withdrawn. We believe that these amendments will improve the criminal justice system and we urge the committee to recommend passage of this bill. Our specific responses to the letters are set out below.

Section 2. JOINDER. This section (following the statement of purpose in Section 1), amends and broadens Criminal Rule 8(b) to allow the joinder of charges against multiple defendants when they are "parties to an express or tacit agreement to aid each other to commit an act or transaction constituting a criminal offense or offenses." The purpose of the amendment is to change the result in cases such as Greiner v. State, 741 P.2d 662 (Alaska App. 1987), so that joinder of charges against co-defendants is permissible when a tacit joint venture can be established.

This section is not addressed by Schleuss & McComas. Ms. Brink, however, argues that the section is unnecessary because Greiner v. State is a "fact-based decision." We disagree. Greiner was charged in two counts of a four-count indictment. Count I charged Greiner and "A" with delivering heroin on August 22. Count II charged "A," "B," and "C" with delivering heroin on August 23rd. Count III charged "A" with delivering cocaine on August 30th and

Count IV charged Greiner with delivering of heroin in September 6. The court held that joinder was inappropriate as to Greiner despite evidence that all defendants were willing to sell drugs, were well acquainted, and "cooperated with each other in individual drug sales." 741 P.2d at 665.

This type of situation is not unique. Drug sellers frequently act in concert. Due to the precautions drug dealers take, it may only be possible to show they are acting together by circumstantial evidence. The possibility of prejudice, caused by the spill-over of evidence as mentioned by the critics of the bill, can be met by instructions telling jurors the reasons why evidence is admitted and how it should be considered. Larson v. State, 566 P.2d 1020, 1022 (Alaska 1977). The advantage of joinder in cases such as the above is judicial economy, which has been recognized by the Alaska Supreme Court as being a legitimate goal. Richards v. State, 451 P.2d 359 (Alaska 1969). Joinder will reduce the number of trials in our crowded courts. See Richardson v. Marsh, 481 U. S. 200, 209, 109 S. Ct. 1702, 1708 (1987) (joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the last five years).

Joint trials involving multiple charges play a vital role in the criminal justice system. The efficiency of the system is enhanced by joint trials because the system is not required to conduct multiple trials in which much of the same evidence is presented. Witnesses are not required to testify at multiple trials, thereby reducing the inconvenience and trauma to the witnesses. The possibility of inconsistent verdicts is also diminished in joint trials; the last tried defendant is otherwise advantaged in seeing the evidence presented beforehand. Charges against multiple defendants in most other jurisdictions, particularly in cases involving conspiracies, are efficiently handled in a single trial.

Section 3. Severance. Section three of this legislation will make two changes to Criminal Rule 14, governing "relief from prejudicial joinder." The first change is that it amends the rule to provide that relief from prejudicial joinder is appropriate only when the state or a defendant is **"unfairly"** prejudiced by the joinder of multiple offenses or defendants. The insertion of the word "unfairly" in the first sentence of the rule will make it clear that a defendant must show more than the fact of joinder of charges or co-defendants to establish prejudice. Instead, before multiple trials are ordered, the defendant must make show that the jury will not be able to sort out the evidence relating to the different charges or defendants.

The second change made by this section is that it amends Rule 14 to make it clear that the fact that all evidence of one offense would not be admissible at a separate trial of a joined

offense or co-defendant does not in itself constitute the prejudice that warrants a severance of the charges. Instead, the defendant must establish unfair prejudice resulting from the joinder to warrant severance under Rule 14. Contrary to the fears of Ms. Brink and Schleuss & McComas, this bill does not dictate what constitutes sufficient prejudice to warrant severance; this is a matter committed to the judgment of the trial courts.

It appears that the Alaska Court of Appeals may have recently embraced these concepts in Newcomb v. State, 800 P.2d 935, 943 (Alaska 1990). In Newcomb, the court stated:

> Newcomb merely asserts that evidence of his Kenai and Anchorage charges would not have been cross-admissible in separate trials. The relevant question, however, is whether Newcomb suffered actual prejudice by joinder. Severance of charges is required when a lack of cross-admissibility creates an appreciable risk of actual prejudice from joinder.... A lack of cross-admissibility, however, does not inevitably result in prejudice. The likelihood of prejudice must be evaluated on a case-by-case basis.

800 P.2d at 943. The amendment to Criminal Rule 14 proposed in this legislation will not have the far-reaching effects predicted by Ms. Brink and Schleuss & McComas. It will, however, serve to clarify the law in this relatively narrow area.

Section 3. Evidence Rule 404(b). Section three of this legislation amends Alaska Rule of Evidence 404(b)(1). Federal Evidence Rule 404(b) and its Alaska counterpart, Alaska Evidence Rule 404(b), provide 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.

The federal courts have adopted an "inclusionary" approach to Rule 404(b). For example, in United States v. McKoy, 771 F.2d 1207, 1213-14 (9th Cir. 1985), the court noted, "We permit the admission of any evidence of other crimes or acts relevant to an issue in the trial, except where the evidence proves only the defendant's criminal disposition. The inclusionary approach recognizes that evidence of other crimes may be probative on issues that are not listed specifically in Rule 404." (emphasis in original, citations omitted).

Alaska courts, on the other hand, treat Rule 404(b) as a rule of exclusion -- 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); Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980). In Lerchenstein, the court explained that "The exclusionary provision of Evidence Rule 404(b) represents the 'presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity. No case by case balancing is permitted.'" 697 P.2d at 315.

This legislation would bring Alaska's Evidence Rule 404(b) into consonance with the interpretation given to federal rule 404(b).[1] It does this by establishing that evidence of other crimes, wrongs, or acts is inadmissible when its sole purpose is to prove propensity. The amendment also clarifies that the nonpropensity purposes for introducing such evidence that are enumerated in the rule are illustrative, rather than inclusive.

In her letter, Ms. Brink suggests that it may be misleading to characterize Alaska's Rule 404(b) as a "rule of exclusion," because there are a number of reported decisions affirming the admission of such evidence at trial. Letter of Barbara Brink at 2. The phrases "rule of exclusion" and "rule of inclusion," however, are terms of art that have special meaning to the judiciary. The issue is whether there should be a presumption that the evidence is inadmissible. We do not believe such a

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[1] Ms. Brink mistakenly claims that the federal courts are split on whether Rule 404(b) is a rule of "inclusion" or "exclusion." Research discloses that the Federal Circuits unanimously view Federal Rule 404(b) as a rule of inclusion rather than exclusion. In 1977, Louisell and Mueller, in their treatise Federal Evidence indicated that Federal Rule 404(b) should be characterized as a rule of inclusion because so many courts at that time admitted evidence of other crimes for purposes other than those listed in Rule 404(b) as adopted by various jurisdictions. 2 Louisell & Mueller, Federal Evidence, §140 at 172-173 (1977). Judge Weinstein, another commentator, also characterizes Federal Rule 404(b) as a rule of inclusion. 2 J. Weinstein & M. Berger, Weinstein's Evidence §404[08], at 404-54, 55.

The cases cited in the Louisell and Weinstein treatises and the most recent supplements to those treatises establish that the Federal Circuit courts, with the exception of the District of Columbia Circuit, hold that Rule 404(b) is a rule of inclusion. Moreover, the District of Columbia has seemingly joined the other circuits, overruling United States v. Foskey, 636 F.2d 517, 523-524 (D.C. Cir. 1980) (the case relied on by Ms. Brink), sub silentio in United States v. Miller, 895 F.2d 1431, 1436 (D.C. Cir. 1990) ("any purpose for which bad-acts evidence is introduced is a proper purpose so long as the evidence is not offered solely to prove character").

presumption is either necessary or desirable.

Alaska's evidence rules, as is true of the evidence rules of all jurisdictions, starts with the presumption that all relevant evidence is admissible. Evidence Rule 402. That presumption, however, is rebuttable and relevant evidence may be excluded "if its probative value is outweighed by the danger of unfair prejudice ...." Evidence Rule 403. The Alaska courts have interpreted Rule 404(b) to create a presumption that evidence of "prior bad acts" is not admissible, even when the judge finds that this evidence is relevant to the case; i.e., that it tends to prove a fact in dispute at the trial of the current charge.[2] HB 105 would eliminate the presumption of inadmissibility. Instead, once again relevant evidence would be presumed admissible. It would be excludable, however, upon a showing of unfair prejudice.

Ms. Brink expresses concern about the change from "may be admissible" to "is admissible," (page 3, line 21, of HB 105), and she assumes that this change restricts the trial court's discretion to exclude the offered evidence even if it is unfairly prejudicial, time-consuming, or cumulative. Letter of Barbara Brink at 3. This concern, however, overlooks Evidence Rule 403, which establishes the court's continued discretion to exclude such evidence (on grounds of prejudice, confusion, or waste of time).

We agree with Schleuss & McComas that the judiciary "is in the best position to assess the reality of the impact of the introduction of other crimes evidence upon jurors." Letter at 3. Once again, Evidence Rule 403 guarantees the court that discretion. We similarly agree that "prior bad acts" should be admitted into evidence only when "there is [a] legitimate probative value which outweighs the risk that an accused with be unfairly convicted for the wrong reasons." Id. This principle is not jeopardized by the amendment to 404(b); the rule, together with Rule 403, plainly requires this type of balancing. Only evidence that is relevant to an issue at trial is ever admissible and our rules ensure that unfairly prejudicial evidence will be excluded.

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[2] Experienced prosecutors in Alaska uniformly report that trial judges seldom approve the admission of other crime evidence under existing Rule 404(b); instead, they bend over backwards to exclude it in order to comply with the presumption that it is inadmissible. Trial judges naturally do not care to be reversed and they frequently rely on the presumption that this evidence is inadmissible to exclude it when the issue of admission presents a close question. The decisions by trial judges concerning the admission of "other crime" evidence are frequently even more restrictive than the decisions of the court of appeals, which are noticeably more restrictive than other jurisdictions.

We share the sentiment expressed by Schleuss & McComas, that trials are to determine whether the defendant committed the charged offense, rather than to determine whether the defendant is or has in the past been a "bad" person. In proving its case, however, the state should be allowed to present evidence that is relevant to the charges. It should also be allowed to join offenses or co-defendants when there is a logical reason for doing so and severance should be available when that joinder is unfairly prejudicial. The amendments proposed in HB 105 will bring Alaska into harmony with these principles and with the law as it exists in most other jurisdictions.

Thank you for the opportunity to comment on this bill. If you have any further questions that we may be able to answer, please do not hesitate to call upon us.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

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

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

TEN FACTS ABOUT VIOLENCE AGAINST YOUNG WOMEN

- Although campus studies suggest that 1,275 women were raped at America's 3 largest universities in 1989, only 3 only those rapes were reported to police.

- 1 out of every 7 women currently attending college has been raped.

- 486,000 of the girls now attending high school will have been raped before they graduate.

- The average age of a rape victim is 18 1/2 years old.

- Young women aged 16 to 19 are the most likely to be raped.

- 57% of college rape victims are attacked by dates.

- Girls raped before age 18 are least likely to report to police about their victimization.

- Girls aged 12 to 15 are the most likely to be raped by strangers.

- Rape victims aged 12 to 19 are the least likely to receive hospital care.

- Since 1974, the rate of assaults against young women (20 to 24) has jumped 48%. For men of the same age group, it has decreased 12%.

Compiled by the majority staff of the Senate Judiciary Committee (August 29, 1990)

STATISTICS ON SEXUAL VIOLENCE AGAINST WOMEN

(Source: Koss, Woodruff, & Koss -- A Criminological Study)
(Released August 29,1990)

Prevalence of Rape

1 in 5 adult women will be raped at some point in their lives.

1 in 3.5 adult women will be attacked by a rapist.

1 in 7 of the women now in college have been raped.

1 in 4 of the women now in college have been attacked by a rapist.

Prevalence of Acquaintance Rape

More than half of college rape victims are attacked by dates.

More than 4 out of 5 rape victims know their attackers.

Immediate Physical Consequences of Rape

1 in 15 rape victims contracts a sexually transmitted disease as a result of being raped.

1 in 15 rape victims becomes pregnant as a result of being raped.

Reporting of Rape

Rape remains the most under-reported of all major crimes: only 7% of all rapes are reported to police. (By comparison, the reporting rate for robbery is 53%; assault, 46%; and burglary, 52%.)

Less than 5% of college women report incidences of rape to the police.

More than half of raped college women tell no one of their victimization.

Incidence of Rape

The number of women raped in 1986 is 15 times higher than officially reported in the National Crime Survey.

The number of college women raped in 1986 is 14 times higher than officially reported in the National Crime Survey.

The definition of "rape" employed in these statistics is the one formulated by the FBI for its Uniform Crime Report, which is the narrowest official definition.

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

BILL NO: HB 105

DATE: 2/8/91

TITLE: Amending Rules of Criminal Procedure and Evidence

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF PUBLIC SAFETY / DIVISION OF STATE TROOPERS

Because of the way the appellate courts in Alaska have interpreted Alaska's court rules regarding joinder and severance of defendants and charges in criminal trials, many more separate trials have to oe held in Alaska criminal cases than would be required under the federal or other states' systems. This is a waste of public resources, and causes additional trauma for the innocent victim, who may be required to testify in two, three, or more trials.

Under present interpretations of Alaska's Evidence Rule 404 (b) relevant evidence is withheld from the jury. Even though Alaska's Rule is virtually identical with the federal evidence rule, it has been applied much more restrictively in Alaska.

HB 105 would address both of these problems by making it clear that Alaska's court rules should be construed in a manner that would bring them into conformity to the federal rules and those in other states. The DPS strongly supports HB 105 and believes passage of the bill would significantly increase the efficiency of the criminal justice system in Alaska.

Richard L. Burton
Commissioner

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 105

Revision Date: _____
Title: Amending Rules of Criminal Procedure and Evidence
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments

COMPONENT SERIAL NO. | | 7 | 9 | 9 |

EXPENDITURES/REVENUES: (Thousands of Dollars) (Inflation not Included)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER/PROG RCPT						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated

Prepared by: Gayle A. Horetski
Phone: 465-4322
Division: Commissioner's Office
Date: 2/7/91

Approved by Commissioner: Gayle A. Horetski for Richard L. Burton
Agency: Department of Public Safety
Date: 2/8/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 4, 1991 FURTHER REFERRALS: Finance

Date of Committee Action: 3-6-91

The JUDICIARY Committee considered: HB 105

HOUSE BILL NO. 105 JOINT TRIALS/JOINT CHARGES

"An Act amending Rule 8(b) and Rule 14 of the Alaska Rules of Criminal Procedure to facilitate joint trials of multiple defendants and joint charges in criminal prosecutions and amending Rule 404(b)(1) of the Alaska Rules of Evidence as applicable to civil actions and criminal prosecutions."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

5 see [X] zero fiscal note Courts, Law, Pub. Saf., Admin OPA - PD [ ] zero fiscal note(s) _____

SIGNING ~~DO~~ PASS: SIGNING OTHER RECOMMENDATIONS:

Dave Donley	*Check appropriate column:*	*Do Not Pass*	*No Rec*	*Amend*
Mike Miller				
Kevin Pat Parnell				
H. Ellis			X	
Terry Martin				
Mark Hanley				
	Mike Phillips			✓

Dave Donley
Chairman's Signature

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 105

Revision Date:
Title: An Act amending Rule 8(b) and Rule 14 of the Alaska Rules of Criminal Procedure...
Sponsor: Judiciary Committee
Requestor: Judiciary Committee

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/08/91

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/08/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 105

Revision Date: _____ Department Affected: Department of Law

Title: "An Act amending Rule 8(b) and Rule 14...Rules of Criminal Procedure..." BRU: Prosecution

Component: Criminal Justice Litigation

Sponsor: House Judiciary Committee

Requestor: House Judiciary Committee COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: February 11, 1991

Richard I. Pegues/mc

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 11, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 105

HB 105 would overrule the Court of Appeals current holding in Greiner v. State, governing the joinder of two or more defendants at trial. IF the bill is adopted, fewer trials would be severed helping to conserve scarce prosecutor resources. This change will not have a fiscal impact on the Department of Law, but it will free-up some resources to better handle the criminal division's existing caseload.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 105

Revision Date: _____ Department Affected: Administration

Title: "An Act amending Rule 8(b) and Rule 14 of Alaska Rules..." BRU: Office of Public Advocacy

Component: Office of Public Advocacy

Sponsor: (H) Judiciary Committee

Requestor: House Judiciary COMPONENT SERIAL NO. 4 3

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.) See Attached

Prepared By: Brant McGee, Public Advocate Phone: 274-1684

Division: Office of Public Advocacy Date: 2/8/91

Approved by Commissioner: Millett Keller

Agency: Department of Administration Date: 2/11/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 105

Passage of this bill will have no fiscal impact on Office of Public Advocacy operations.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 105

Revision Date: _____ Department Affected: Department of Administration

Title: An Act amending Alaska Rules of Criminal Procedures to facilitate joint trials of multiple defendants and joint charges in crim. prosecutions...

BRU: Public Defender Agency

Component: _____

Sponsor: _____

Requestor: _____

COMPONENT SERIAL NO. 4 2

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL TIME	0	0	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Barbara Bink for

Prepared By: John Salemi, Public Defender Phone: 279-7541

Division: Public Defender Agency Date: 2/11/91

Approved by Commissioner: Millett Keller Kevin Brooker (for)

Agency: Department of Administration Date: 2.11.91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

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. Drahosh 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 (Alaska 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. **Haakason 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 cumulative dence, particularly since the prosecution's primary witness ag defendant acknowledged her awarness of the rumors. **Zeci State**, Op. No. 956, 779 P2d 795 (Alaska App. 1989).

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

In trial of a black defendant for misconduct involving a c trolled substance, trial court did not err in prohibiting him fr cross-examining the undercover officer involved in the case c cerning racial bias; because the evidence which would have b developed through the cross-examination was so marginally p bative, the judge's decision to exclude it due to possible confusio the issues and delay was justified. **Brown v. State**, Op. No. 957, P2d 801 (Alaska App. 1989).

Trial judge did not abuse his discretion in admitting evidenc defendant's flight from the scene of the crime as evidence of consciousness of guilt. **Charles v. State**, Op. No. 963, 780 P2d 3 (Alaska App. 1989).

In prosecution of defendant for criminally negligent homici in failing to timely seek medical treatment for her child, stateme by policeman in taped interview of defendant that the poli received several calls from people saying that defendant had abus her child would have been unfairly prejudicial and therefore had be excised from the tape. **Pinkerton v. State**, Op. No. 996, 784 P2 671 (Alaska App. 1989).

In drunk driving prosecution, trial court did not err in adm ting an audio tape recording, which the police made when defen ant was arrested and while he was being transported to the poli station, despite the tape's poor quality; the jury could tell when t voices on the tape were obscured by background noise and stat and would not conclude that the background noise and static wa slurred or garbled speech by defendant. **Suiter v. State**, Op. No. 99 785 P2d 28 (Alaska App. 1989).

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

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a relevant 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. Dolsher 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

Adolph LERCHENSTEIN, Appellant,

v.

STATE of Alaska, Appellee.

No. 7729.

Court of Appeals of Alaska.

April 5, 1985.

Defendant was convicted before the Superior Court, Third Judicial District, Anchorage, J. Justin Ripley, J., of three counts of assault in the third degree and one count of murder in the first degree, and he appealed. The Court of Appeals, Coats, J., held that trial judge erred in admitting evidence of prior bad acts, consisting of evidence that defendant broke into apartment of former employee and destroyed property, and evidence of defendant's verbal threats to kill former employee, since even assuming that such evidence was relevant for a permissible purpose, its prejudicial impact outweighed its probative value; moreover, error required reversal, since it could not be said that evidence did not appreciably affect jury's verdict.

Reversed and remanded.

1. Criminal Law ⇐369.2(1)

When a prior bad act is relevant to a material fact other than propensity, court may admit evidence of such act if balancing shows the evidence to be more probative than prejudicial. Rules of Evid., Rules 403, 404(b).

2. Criminal Law ⇐369.2(1)

In determining whether evidence of prior bad act may be admitted, trial court's inquiry is twofold: court must first determine that evidence sought to be admitted has relevance apart from propensity, and then court must determine that nonpropensity relevance outweighs the presumed highly prejudicial impact of the evidence; if there is no genuine nonpropensity relevance, balancing step is never reached. Rules of Evid., Rules 403, 404(b).

3. Criminal Law ⇐369.2(1)

In evaluating probative value of evidence of prior acts, Court of Appeals may consider whether there was sufficient other evidence introduced for the same purpose.

4. Criminal Law ⇐1144.12

A limiting curative instruction is generally presumed to be effective and to cure error.

5. Criminal Law ⇐1169.5(3)

Instruction to jury to consider evidence of prior bad acts in form of testimony of telephone conversations during which defendant allegedly threatened to kill former employee on morning of shooting of third party only as it related to whether defendant carried a gun across street from his store to an auto body shop where shooting occurred and that jury should not consider it as evidence of propensity for threatening, violent or assaultive behavior on part of defendant was not sufficient to remove prejudice caused by the improperly admitted evidence, since by its nature, the evidence was likely to affect the jury more in their assessment of defendant's temperament than to assist them in their factual finding of how a gun arrived at scene of shooting.

6. Criminal Law ⇐369.3

Trial judge in murder prosecution erred in admitting evidence of prior bad acts, consisting of evidence that defendant broke into apartment of former employee and destroyed property, and evidence of defendant's verbal threats to kill former employee, since even assuming that such evidence was relevant for a permissible purpose, its prejudicial impact outweighed its probative value; moreover, error required reversal, since it could not be said that evidence did not appreciably affect jury's verdict. Rules of Evid., Rules 403, 404(b).

Linda R. MacLean, Drathman & Weidner, Anchorage, for appellant.

Michael S. McLaughlin, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

Adolph Lerchenstein was charged with three counts of assault in the third degree and one count of murder in the first degree. Following a jury trial, Lerchenstein was convicted on all four counts and sentenced to serve four years on one count of assault, three years on each of the other two assault counts, and sixty years on the murder count, all to run concurrently. Lerchenstein appeals his conviction and his sentence, raising three points of error. First, he contends certain evidence of prior bad acts should have been excluded. Second, he asserts that the trial court should have given his transitional jury instruction rather than the trial court's. Third, he appeals his sentence as excessive.

On May 17, 1982, at approximately 1:00 p.m., Adolph Lerchenstein, owner of Alert TV, phoned Custom Coach Auto Body, which is located across the street from Alert TV. He spoke with Michael Hoffman, a co-owner of the auto repair shop. Lerchenstein called to inquire about the progress of an estimate for repair work on his truck which he had left at Custom Coach a week earlier. When Hoffman informed Lerchenstein that the estimate was not ready, an argument ensued in which, according to Hoffman and not disputed by other evidence, Lerchenstein became extremely angry, and in a rash tone cursed Hoffman and made disparaging remarks about his business. Hoffman requested that Lerchenstein come get his truck.[1]

Lerchenstein sent an employee across the street to Custom Coach to retrieve the truck. When the employee arrived, Hoffman told him that a thirty-five dollar storage fee would be charged on the truck. Hoffman testified that he decided to charge this fee, which he did not customarily collect, because he was angry about Lerchenstein's comments to him on the phone. The employee returned to Alert TV.

A short time later, Lerchenstein crossed the street and entered his truck. Michael Hoffman approached the window of the truck with a bill and told Lerchenstein that he owed the storage fee. At this point, Hoffman testified, Lerchenstein "started acting real erratical.... [H]e was inside the truck and he just started jumping up and down...." Hoffman testified he told Lerchenstein that he was going to call the police, and then walked down the side of and behind the truck.

At this point the particular events giving rise to the charges occurred. Lerchenstein drove his truck in reverse (there was a large sand pile in front of the truck), striking Michael Hoffman and dragging him beneath the vehicle as Hoffman held on to the bumper. Lerchenstein stopped travel-

1. On direct examination Michael Hoffman gave this account of the phone conversation:
   Q. And tell us about the conversation.
   A. Okay. He just—he called me up and he wanted to know if I had his estimate completed, and I explained to him that I didn't have it done yet, but I was still working on it and for some reason, he just started getting real rude and abrupt with me.
   Q. What do you mean by that?
   A. Well, he just started ranking on my business and asked me if I was running a shoestring operation or something like that and I replied, you know, that I'm working on his estimate as much as I can and, you know, maybe it'd be another day or so before I could get it done.
   Q. How did he react to that?
   A. He didn't like it. He flew off and said something about you assholes or something like that, and then finally I told him, I says, well, Adolph, I says, if that's the way you feel about it, why don't you just come and get your truck, and, you know, no problem, you just go ahead and come over and pick it up and, you know, and go ahead and take it somewhere else, matter of fact, I prefer you do that.
   Q. And he said?
   A. He just said, well, okay, you butt fucker, if that's the way you want it, and then he hung up.

ling in reverse and apparently began to shift to drive. The truck stalled. Around this time Don Hoffman, Ron Hoffman, and Lance DeSaw ran towards Lerchenstein's truck. Michael Hoffman's brother, Don Hoffman, reached the truck on the passenger's side. Don Hoffman testified that he opened the door of the cab and climbed partly onto the front seat of the truck. He then noticed a handgun on the seat. Lerchenstein picked up the gun and pointed it in Don Hoffman's direction, but did not fire. Don Hoffman slid out of the truck. At about the same time another Hoffman brother, Ron, reached the driver's side of the truck, along with DeSaw, co-owner of Custom Coach. Both reached in through the window on the driver's side. Ron Hoffman had a cast on his wrist at the time. At some point after Don Hoffman slid out of the truck, Lerchenstein's glasses were knocked off. Lerchenstein fired twice in the direction of Ron Hoffman and DeSaw, striking Ron Hoffman in the chest with one of the shots and fatally wounding him. Then, DeSaw testified, Lerchenstein pointed the gun directly at him, at which point DeSaw dropped to the ground.

Ron Hoffman ran to a nearby service station where he collapsed. Lerchenstein went to the same station, where he announced that he had just been assaulted, and made a "911" emergency telephone call reporting the "assault." After the phone call, one witness testified, Lerchenstein walked over to the collapsed Ron Hoffman and said, "lay there and die, you son of a bitch." When informed later that Hoffman had died, Lerchenstein commented to an investigating police officer, "It's tough, it happened, I don't regret it."

While it was undisputed that Lerchenstein fired the shot which caused Ron Hoffman's death, the state and the appellant characterize the preceding chain of events quite differently. Under the defense theory, Michael Hoffman was struck by the truck by mistake, and Ron Hoffman was shot (and Don Hoffman and DeSaw assaulted) in perceived self-defense. The prosecution, rather, characterizes the events as an intentional overreaction by an angered Lerchenstein. There was conflict as to whether Lerchenstein knew Michael Hoffman was behind the truck. Testimony conflicted as to whether the three men running toward the truck were yelling, "stop, stop" (testimony of Don Hoffman), and "hey, you're—you're killing him, you know, he's under the truck" (testimony of DeSaw), or "hold him back, don't let him get out of here" (testimony of bystander). The defense presented testimony that one of the men struck Lerchenstein in the head before any shots were fired. Finally, whether the gun had been carried across the street by Lerchenstein that day or had been pulled out from under the seat of the truck just prior to the shooting was an issue of considerable disagreement, and an issue to which the parties and the court attached great significance.

EVIDENCE OF PRIOR BAD ACTS

Prior to trial, the defense moved to exclude evidence concerning a dispute between Lerchenstein and his former employee, Henry Buchholz, including Buchholz' testimony that Lerchenstein had destroyed property at Buchholz' home the day before the Hoffman shooting, and evidence of three telephone conversations. The trial judge ruled that all of this evidence except one of the telephone conversations would be admitted.

The state was allowed to introduce evidence that on the day prior to the shooting, Lerchenstein damaged a stereo, television, and car stereo at Buchholz' apartment while Buchholz was not at home. The appliances were apparently "acquired" from Alert TV, and not fully paid for.

Evidence of a telephone conversation between Lerchenstein and Buchholz' landlord, occurring about 9:00 or 9:30 a.m. on the day of the shooting, was introduced. The landlord, Rand Walls, had been phoned by Lerchenstein. Walls testified that Lerchenstein shouted and cursed during the conversation, and that Lerchenstein commented, when discussing Buchholtz, "I ought to get a gun and get the SOB."

Walls said that the conversation did not involve any aggressive expressions toward him personally, and that the conversation ended on a friendly note.

Evidence of a phone conversation between Lerchenstein and Buchholz which took place at about noon on the day of the shooting was also introduced. Three witnesses testified concerning this conversation. Buchholz testified that he had phoned Lerchenstein who, after hanging up on him several times, spoke to Buchholz "very irrationally and violently and [used] quite abusive language." Buchholz testified that Lerchenstein told him "he was pissed off because he thought I'd lied to him and though I'd stolen from him ... and didn't want to see me again." Buchholz' account of the conversation included no mention of a gun or threat. Lerchenstein's employee, Scott Thomas, overheard Lerchenstein's side of the conversation and testified that while Lerchenstein's tone was angry, no threats were made, and that Lerchenstein told him, "I don't want anything else to do with you, all you've been for me is wrong, just don't come in my store anymore." Fifteen-year-old David Stone, who later witnessed the shooting, was in Alert TV at the time of this conversation. His uncle, Dan Bishop, testified that Stone, upon leaving Alert TV, excitedly told Bishop that he had heard somebody talking on the phone about killing somebody.

The prosecution was not allowed to introduce evidence of a third phone conversation in which Lerchenstein phoned his friend Dorothy Joy around midnight on the night preceding the shooting. According to the prosecution's proffer, Joy would have testified that Lerchenstein told her "he was tired of being ripped off by everybody or he'd had enough of people screwing him over," and that he had gotten angry at Joy.

Alaska Rule of Evidence 404(b) provides:

> (b) *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show 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.

[1, 2] The exclusionary provision of Evidence Rule 404(b) represents the "presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity. No case by case balancing is permitted." *Oksoktaruk v. State*, 611 P.2d 521, 524 (Alaska 1980). When, however, a prior bad act is relevant to a material fact other than propensity, the court may admit the evidence if an Evidence Rule 403 balancing shows the evidence to be more probative than prejudicial.[2] In making this balance, the Alaska Supreme Court has cautioned that "[i]f prior crimes were found admissible whenever offered to prove a fact classified as material to the prosecution's case, 'the underlying policy of protecting the accused against unfair prejudice ... [would] evaporate through the interstices of the classification.'" *Oksoktaruk*, 611 P.2d at 524, *quoting* E. Cleary, *McCormick on Evidence* § 190, at 453 (2d ed. 1972). The trial court's inquiry, then, is two-fold. First, the court must determine

2. Alaska Rule of Evidence 403 provides:

> 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.

In *Oksoktaruk*, the supreme court held that, when evidence of prior misconduct is involved, Evidence Rule 404(b) modifies the normal balancing process under Evidence Rule 403 by requiring the trial court to begin with the assumption that the evidence should be excluded. We recognize that Alaska Rule of Evidence 404 is based on Federal Rule of Evidence 404, and that the prevailing view under federal law is to view Evidence Rule 404 as a rule of inclusion rather than exclusion. Thus, under the federal rules, if the evidence of other misconduct is relevant for purposes other than propensity, the evidence is presumptively admissible. *See, e.g., United States v. Long*, 574 F.2d 761, 766 (3d Cir.1978). Alaska Evidence Rule 404, however, is a "rule of exclusion of evidence and not one of admission." *Oksoktaruk*, 611 P.2d at 524, *quoting United States v. Burkhart*, 458 F.2d 201, 204 (10th Cir.1972); thus the opposite presumption arises.

that the evidence sought to be admitted has relevance apart from propensity. Second, the court must determine that the nonpropensity relevance outweighs the presumed highly prejudicial impact of the evidence. *Freeman v. State*, 486 P.2d 967, 977–79 (Alaska 1971). If there is no genuine nonpropensity relevance, the balancing step is never reached.

The trial court admitted the evidence as relevant to the question of whether Lerchenstein carried a gun from his store to Custom Coach in anticipation of a confrontation or pulled it from its customary storage space under the seat.[3] This factor bears on the issue of Lerchenstein's intent. It is not at all clear, however, how the evidence of the Buchholz/Walls incidents is relevant to the question of the gun's transportation unless one indulges in precisely the type of inference-making that Evidence Rule 404(b) prohibits. The jury would have to conclude that since Lerchenstein's actions and words showed a willingness to take the law into his own hands in his dispute with Buchholz, that he was likely to have acted that way with respect to Hoffman, and that it was consequently more likely that he carried the gun to the auto shop. This appears to be propensity relevance, if relevance at all. While Lerchenstein's behavior in these incidents may be generally probative of his angry and unreasonable state of mind at the time of the offense, a proper nonpropensity relevance, the relevance is highly attenuated as to the question of whether Lerchenstein was actually armed when he went to reclaim his truck. Admission of the evidence cannot be supported by this point of relevance.

The state asserts that the testimony in question was properly admitted to show that Lerchenstein was likely to react violently and unlawfully in response to those he believed were treating him unfairly, regardless of the severity of the threat to him. It cites to *Frink v. State*, 597 P.2d 154 (Alaska 1979) and *Adkinson v. State*, 611 P.2d 528 (Alaska), *cert. denied*, 449 U.S. 876, 101 S.Ct. 219–20, 66 L.Ed.2d 97 (1980), in support of the admission of the evidence.

In *Frink*, the defendant was convicted of killing his former girlfriend's lover. Along with considerable testimony about threats directed at that lover, the prosecution was allowed to introduce testimony that two years earlier the defendant had fired a gun at the same former girlfriend's then husband. The supreme court held that this evidence was properly admitted:

> Evidence of prior crimes is generally inadmissible to show bad character of the accused, but is admissible if it is relevant to a material fact in the case at trial and if its probative value outweighs its prejudicial impact. *Eubanks v. State*, 516 P.2d 726, 729 (Alaska 1973). McCormick on Evidence § 190 at 447–54 (2d ed. 1972). We agree with the state that this evidence was relevant to the issue of defendant's motive for allegedly taking Hillier's [the victim] life, and also was probative of the defendant's state of mind toward Hillier. Robert Check [the ex-husband] was a member of the class of persons to which Hillier belonged, that is, persons with whom Check [the former girlfriend] was romantically involved. The determination of whether the probative value of a piece of evidence outweighs its prejudicial impact is initially committed to the discretion of the trial judge, and we review the judge's evidentiary rulings for abuse of discretion.... We find no abuse in admission of evidence relating to the [shooting] incident.

597 P.2d at 169–70 (citations and footnote omitted).

In *Adkinson*, the defendant, charged with manslaughter in the shooting of a trespasser on his property, admitted the shooting but claimed it had been accidental, asserting that he would never point a gun at another person and had never done so. 611 P.2d at 531. The supreme court held

3. Nobody saw Lerchenstein take a gun across the street with him. At trial, both prosecution and defense introduced circumstantial evidence suggesting that he did or did not take a gun with him.

that evidence of two separate incidents when Adkinson had pointed a gun at suspected trespassers on his land was properly admitted. The court in *Adkinson* found that Evidence Rule 404(b) did not bar the admission of this evidence because it was relevant to show a lack of accident or inadvertence. In doing so, it distinguished *Oksoktaruk v. State*, 611 P.2d 521 (Alaska 1980), a companion case. *Adkinson*, 611 P.2d at 532.

In *Oksoktaruk*, the defendant was arrested at 2:30 a.m. inside a photo lab. He allegedly told police he had entered to escape the cold. At his trial for burglary, the state was permitted to introduce evidence of a prior burglary committed by Oksoktaruk. *Oksoktaruk*, 611 P.2d at 523. The supreme court reversed Oksoktaruk's conviction, finding that:

> The nexus between Oksoktaruk's burglary of the fur store and his alleged burglary of the photo lab two years later does not meet the standard of relevance we have previously demanded. The only characteristic shared by the proven and alleged crimes is that both involve an intent to steal. The inference to be drawn by the jury, therefore, was simply that since Oksoktaruk once before intended to steal, he was capable of formulating the intent to steal from Kelly's Photo Lab; the forbidden "guilt by propensity" could be stated no differently.

Id. at 525.

In *Adkinson*, *Oksoktaruk* is distinguished by the fact that "Adkinson's prior acts are 'so related to the crime charged in point of time or circumstances that evidence thereof is significantly useful in showing the defendant's intent in connection with the crime charged.'" *Adkinson*, 611 P.2d at 532, *quoting Oksoktaruk*, 611 P.2d at 521, *quoting* 1 C. Torcia, *Wharton's Criminal Evidence* § 245, at 556 (13th ed. 1972). *See also Kugzruk v. State*, 436 P.2d 962, 966–67 (Alaska 1968) (witness's testimony identifying defendant as person she had seen fumbling to open door of apartment which she knew was not his, admissible in case where that defendant is accused of illegally entering a different apartment of the same building on the same night).

The state contends that the victims in this case and Buchholz, the target of Lerchenstein's earlier anger, were within "the same class of people . . ., a class created by Lerchenstein and composed of those who he thought were out to 'screw him over' or 'rip him off.'" The trial court also found the victims and Buchholz to be of the same "class of persons," like the trespassers in *Adkinson*.

This stretches *Frink* and *Adkinson* too far. In those cases, the class was narrowly defined, and the prior actions more closely akin to the alleged actions at issue. To expand upon those cases, by finding prior acts of the nature testified to in this case outside of the exclusion of Evidence Rule 404(b), increases the danger that the rule will "evaporate through the interstices." *Oksoktaruk v. State*, 611 P.2d at 524.

The state also argues, however, that the evidence admitted is relevant to Lerchenstein's state of mind at the time of the offense. It was properly admitted, the state contends, to show Lerchenstein's explosive, overreactive mood immediately prior to the shooting. As such it helped "set the stage" for the shooting incident. *See Dulier v. State*, 511 P.2d 1058, 1061 (Alaska 1973); *McKee v. State*, 488 P.2d 1039, 1041 (Alaska 1971).

From the outset of the trial, the primary issue in this case was whether Lerchenstein was acting in self-defense when he shot Ron Hoffman. In order to establish that Lerchenstein did not act in self-defense, the state was entitled to rely on evidence indicating that, at the time of the shooting, he was angry, emotionally agitated, and extremely combative—in other words, that he was not acting reasonably. All of the challenged evidence concerning Lerchenstein's dealings with Buchholz was at least marginally probative of Lerchenstein's state of mind at the time of the offense. Since this evidence had specific relevance beyond its mere tendency to establish a propensity toward violence, its

admission was not categorically precluded by Evidence Rule 404(b).

[3] Even if deemed relevant for a permissible purpose under Evidence Rule 404(b), however, the evidence should only have been introduced if its probative value outweighed its prejudicial impact to such an extent that the presumption favoring exclusion was overcome.[4] In evaluating the probative value of the evidence, this court may consider whether there was sufficient other evidence introduced for the same purpose. *See Fields v. State*, 629 P.2d 46, 48–52 (Alaska 1981); *Frink v. State*, 597 P.2d at 170–71.

The undisputed evidence presented at Lerchenstein's trial showed that he was of an angry, verbally aggressive state of mind during the hour preceding the shooting.[5] The probative value of the prior acts testimony as to state of mind is, then, to some extent cumulative. On the prejudice side of the balance stands the whole rationale for excluding prior bad acts generally: "it is all too likely that a determinative inference of present guilt will be drawn from the fact of the prior act, thus diluting the requirement that present guilt be proved beyond a reasonable doubt." *Oksoktaruk*, 611 P.2d at 524. "Tenuous or marginal probative value of prior crimes evidence must never be allowed to serve as an excuse for implanting prejudice in the minds of the jury." *Freeman v. State*, 486 P.2d at 979.

The incidents testified to varied in their probative value and their prejudicial impact. The unauthorized entry of Buchholz' apartment and destruction of his property on the day prior to the shooting was only marginally relevant to Lerchenstein's state of mind at the time of the shooting. It was also the most prejudicial information introduced. Testimony concerning this incident should have been excluded. Similarly, evidence of Lerchenstein's verbal threats to kill Buchholz, although occurring closer in time to the shooting, was only marginally relevant to the reasonableness of Lerchenstein's later conduct toward the Hoffman brothers and DeSaw. Express reference to these threats was unnecessary to establish that Lerchenstein's dealings with Buchholz had placed him in a hostile and combative frame of mind. There was no evidence of any similar threats in connection with the dispute that led to Lerchenstein's conviction. Evidence of Lerchenstein's verbal threats toward Buchholz was, however, potentially highly prejudicial. This evidence literally invited the jury to conclude that Lerchenstein had a propensity toward violence, was dangerous, and therefore deserved to be convicted even if the proof in this case tended to support his claim of self-defense.

[4, 5] The trial court did instruct the jury to consider testimony of the telephone conversations regarding Buchholz on the morning of the shooting "only as it relates to whether or not Mr. Lerchenstein carried a gun across the street from his store to Custom Coach Auto Body when he went to pick up his truck" and not "as evidence of a propensity for threatening, violent, or assaultive behavior on the part of Mr. Lerchenstein." A limiting curative instruction is generally presumed to be effective and to cure error, *Roth v. State*, 626 P.2d 583, 585 (Alaska App.1981). However, we do not believe the instruction given here was sufficient to remove the prejudice presented by the improperly admitted evidence. By its nature, the evidence was likely to affect the jury more in their assessment of Lerchenstein's temperament than to assist them in their factual finding of how the gun arrived at the scene of the shooting. Further, the instruction did not refer to perhaps the most prejudicial of the prior acts evidence, the fact that Lerchenstein broke into Buchholz' residence and damaged property in the residence the day prior to the shooting.

While the evidence against Lerchenstein was strong, this case turned on the jury's

4. *See supra* note 2. *See also Oksoktaruk v. State*, 611 P.2d at 524; *Freeman v. State*, 486 P.2d at 979.

5. *See, e.g., supra* note 1.

acceptance of the prosecution's view that the actions were intentional rather than a combination of mistake and a reasonable self-defense response. The prejudicial impact of the evidence in question goes directly to that point. Despite the limiting instruction given by the court, "[w]e cannot fairly say that the ... evidence did not appreciably affect the jury's verdict against appellants." *Love v. State*, 457 P.2d 622, 632 (Alaska 1969).

[6] We find that Lerchenstein is entitled to a reversal of his conviction because of the erroneous admission of evidence. If this case is retried, evidence that Lerchenstein broke into Buchholz' apartment and destroyed property, and evidence of Lerchenstein's verbal threats to kill Buchholz, should be excluded. We conclude that the trial judge did not abuse his discretion in admitting other evidence concerning Lerchenstein's angry and combative behavior immediately prior to the shooting incident. Of course, if the case is retried, the trial judge should again weigh this latter evidence and admit it only if its relevance to Lerchenstein's state of mind at the time of the charged incident outweighs the danger of prejudice. Factors which the trial judge should consider include the proximity in time to the charged incident of conversations or incidents testified to, the amount of cumulative evidence, and the likelihood that the jury will use the evidence for the proper purpose, i.e., to evaluate the defendant's mood at the time of the charged incident.

PROPOSED JURY INSTRUCTION

Since we have decided that this case must be reversed, it is not necessary for us to reach Lerchenstein's argument that his proposed instruction on jury consideration of lesser-included offenses should have been accepted by the trial court.

This issue is before us in several other cases.[6] If Lerchenstein is retried, we expect that our decision in some of those cases will be available to give guidance to the trial court.

We also do not reach the issue of whether the sentence imposed was excessive.

REVERSED and REMANDED.

6. *See, e.g., Dresnek v. State*, File No. A-19, and *Staael v. State*, File No. A-78.

STATE of Alaska, Petitioner,

v.

Adolph LERCHENSTEIN, Respondent.

No. S-954.

Supreme Court of Alaska.

Oct. 16, 1986.

Petition for Hearing from the Court of Appeals, on appeal from the Superior Court for the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Michael S. McLaughlin, David Mannheimer, Asst. Attys. Gen., Anchorage, and Harold M. Brown, Atty. Gen., Juneau, for petitioner.

Linda Wilson, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for respondent.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON, and MOORE, JJ.

OPINION

PER CURIAM.

The opinion of the court of appeals, *Lerchenstein v. State*, 697 P.2d 312 (Alaska App.1985), is affirmed for the reasons expressed therein.

RABINOWITZ, Chief Justice, with whom BURKE, Justice, joins, dissenting.

Adolph Lerchenstein was charged with three counts of assault in the third degree and one count of murder in the first degree. Following a jury trial, Lerchenstein was convicted on all four counts and sentenced to serve four years on one count of assault, three years on each of the other two assault counts, and sixty years on the murder count, all to run concurrently. The court of appeals reversed his convictions on the ground that certain evidence of prior bad acts should have been excluded. *Lerchenstein v. State*, 697 P.2d 312 (Alaska App.1985). I would reverse the court of appeals and affirm the four convictions.

FACTS

On May 17, 1982, at approximately 1:00 p.m., Adolph Lerchenstein, owner of Alert TV, phoned Custom Coach Auto Body, which was located across the street from Alert TV.[1] He spoke with Michael Hoffman, a co-owner of the auto repair shop. Lerchenstein called to inquire about the progress of an estimate for repair work on his truck which he had left at Custom Coach a week earlier. When Hoffman informed Lerchenstein that the estimate was not ready, an argument ensued in which, according to Hoffman and not disputed by other evidence, Lerchenstein became extremely angry, and in a rash tone cursed Hoffman and made disparaging remarks about his business. Hoffman requested that Lerchenstein come get his truck.[2]

1. The statement of facts in this opinion is taken substantially from the court of appeals' opinion.

2. On direct examination Michael Hoffman gave this account of the phone conversation:
Q. And tell us about the conversation.
A. Okay. He just—he called me up and he wanted to know if I had his estimate completed, and I explained to him that I didn't have it done yet, but I was still working on it and for some reason, he just started getting real rude and abrupt with me.
Q. What do you mean by that?
A. Well, he just started ranting on my business and asked me if I was running a shoestring operation or something like that and I replied, you know, that I'm working on his estimate as much as I can and, you know, maybe it'd be another day or so before I could get it done.
Q. How did he react to that?
A. He didn't like it. He flew off and said something about you assholes or something like that, and then finally I told him, I says, well, Adolph, I says, if that's the way you feel about it, why don't you just come and get your truck, and, you know, no problem, you just go ahead and come over and pick it up and, you know, and go ahead and take it somewhere else, matter of fact, I prefer you do that.
Q. And he said?
A. He just said well, okay, you butt fucker, if that's the way you want it, and then he hung up. [697 P.2d at 313 n. 1]

Justice, with whom
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Lerchenstein sent an employee across the street to Custom Coach to retrieve the truck. When the employee arrived, Hoffman told him that a thirty-five dollar storage fee would be charged on the truck. Hoffman testified that he decided to charge this fee, which he did not customarily collect, because he was angry about Lerchenstein's comments to him on the phone. The employee returned to Alert TV.

A short time later, Lerchenstein crossed the street and entered his truck. Michael Hoffman approached the window of the truck with a bill and told Lerchenstein that he owed the storage fee. At this point, Hoffman testified, Lerchenstein "started acting real erratical.... [H]e was inside the truck and he just started jumping up and down...." Hoffman testified he told Lerchenstein that he was going to call the police, and then walked down the side of and behind the truck.

At this point the particular events giving rise to the charges occurred. Lerchenstein drove his truck in reverse (there was a large sand pile in front of the truck), striking Michael Hoffman and dragging him beneath the vehicle as Hoffman held on to the bumper. Lerchenstein stopped travelling in reverse and apparently began to shift to drive. The truck stalled. Around this time Don Hoffman, Ron Hoffman, and Lance DeSaw ran towards Lerchenstein's truck. Michael Hoffman's brother, Don Hoffman, reached the truck on the passenger's side. Don Hoffman testified that he opened the door of the cab and climbed partly onto the front seat of the truck. He then noticed a handgun on the seat. Lerchenstein picked up the gun and pointed it in Don Hoffman's direction, but did not fire. Don Hoffman slid out of the truck. At about the same time another Hoffman brother, Ron, reached the driver's side of the truck, along with DeSaw, co-owner of Custom Coach. Both reached in through the window on the driver's side. Ron Hoffman had a cast on his wrist at the time. At some point after Don Hoffman slid out of the truck, Lerchenstein's glasses were knocked off. Lerchenstein fired twice in the direction of Ron Hoffman and DeSaw, striking Ron Hoffman in the chest with one of the shots and fatally wounding him. Then, DeSaw testified, Lerchenstein pointed the gun directly at him, at which point DeSaw dropped to the ground.

Ron Hoffman ran to a nearby service station where he collapsed. Lerchenstein went to the same station, where he announced that he had just been assaulted, and made a "911" emergency telephone call reporting the "assault." After the phone call, one witness testified, Lerchenstein walked over to the collapsed Ron Hoffman and said, "lay there and die, you son of a bitch." When informed later that Hoffman had died, Lerchenstein commented to an investigating police officer, "It's tough, it happened, I don't regret it."

While it was undisputed that Lerchenstein fired the shot that caused Ron Hoffman's death, at trial the state and the defendant characterized the preceding chain of events differently. Under the defense theory, Lerchenstein struck Michael Hoffman with the truck by mistake and shot Ron Hoffman (and assaulted Don Hoffman and DeSaw) in perceived self-defense. The state characterized the events as an intentional action by an angered Lerchenstein. There was conflicting evidence as to whether Lerchenstein knew Michael Hoffman was behind the truck. Testimony also conflicted as to whether the three men running toward the truck were yelling, "stop, stop" (testimony of Don Hoffman), and "hey, you're—you're killing him, you know, he's under the truck" (testimony of DeSaw), or "hold him back, don't let him get out of here" (testimony of bystander). The defense presented testimony that one of the men struck Lerchenstein in the head before any shots were fired. Finally, whether the gun had been carried across the street by Lerchenstein that day or had been pulled out from under the seat of the truck just prior to the shooting was an issue of fact about which there was considerable disagreement.

EVIDENCE OF PRIOR BAD ACTS

To rebut Lerchenstein's claim of self-defense, the prosecution sought to introduce

evidence that Lerchenstein was in an irrational, violently angry mood the morning of the shooting and that he was particularly prone to lash out at those whom he perceived to be "ripping him off." The state's offer of proof consisted of the testimony of Henry Buchholz, Lerchenstein's former employee; Rand Walls, Buchholz's landlord; and Dorothy Joy, Lerchenstein's business neighbor. Each of these witnesses had had a confrontation with Lerchenstein in the twelve hours preceding the shooting, and each characterized Lerchenstein's conduct as irrational and upset.

Lerchenstein's confrontation with Buchholz ended only one hour before the shooting. The day before the shooting Lerchenstein had gone to Buchholz's apartment when he was not there and had damaged his television, a stereo system, as well as a tape player in Buchholz's car. Buchholz apparently had acquired these items from Alert TV but had not fully paid for them. The morning of the shooting, Buchholz called Lerchenstein. Buchholz testified that Lerchenstein, after hanging up on Buchholz several times, spoke to him "very irrationally and violently and [used] quite abusive language." Buchholz testified that Lerchenstein told him "he was pissed off because he thought I'd lied to him and thought I'd stolen from him ... and didn't want to see me again." Buchholz's account of the conversation included no mention of a gun or threat. Lerchenstein's employee, Scott Thomas, overheard Lerchenstein's side of the conversation and testified that while Lerchenstein's tone was angry, no threats were made. He further testified that Lerchenstein told Buchholz, "I don't want anything else to do with you, all you've been for me is wrong, just don't come in my store anymore." Fifteen-year-old David Stone, who later witnessed the shooting, was in Alert TV at the time of this conversation. His uncle, Dan Bishop, testified that Stone, upon leaving Alert TV, excitedly told Bishop that he had heard somebody talking on the phone about killing somebody.

At trial the state also introduced evidence of a telephone conversation between Lerchenstein and Buchholz's landlord, Rand Walls. Lerchenstein phoned Walls at about 9:00 or 9:30 a.m. on the day of the shooting. Walls testified that Lerchenstein shouted and cursed during the conversation, and that Lerchenstein commented about Buchholz, "I ought to get a gun and get the SOB." Walls said that the conversation did not involve any aggressive expressions toward him personally, and that the conversation ended on a friendly note.[3]

The state argued that the evidence of Lerchenstein's angry, violent reactions to those he believed were taking advantage of him explained his violent, irrational reaction when he learned that Michael Hoffman was charging him a $35 storage fee for an uncompleted estimate. In the state's view this evidence was relevant to the issue of whether Lerchenstein had taken the pistol to the body shop expecting a confrontation as well as relevant to the issue of whether Lerchenstein honestly and reasonably believed that deadly force was necessary to save himself from death or serious physical injury.

Lerchenstein's position was that the evidence was inadmissible because it was not offered for a permissible purpose. The defense further contended that Lerchenstein had had a "cooling down period" between his last conversation with Buchholz at noon and his telephone conversation with Michael Hoffman concerning the truck at 1:30 p.m.

The superior court ruled that the evidence of Lerchenstein's conversations with Buchholz and Walls was admissible, but

3. The superior court did not allow the State to introduce evidence of a third conversation that occurred when Lerchenstein telephoned his friend Dorothy Joy at about midnight the night before the shooting. According to the prosecution's proffer, Joy would have testified that Lerchenstein told her "he was tired of being ripped off by everybody or he'd had enough of people screwing him over," and that he had gotten angry at Joy. She would have also testified that Lerchenstein's anger upset her so much that she did not go to her business the day of the shooting because she feared seeing him.

that the evidence of Lerchenstein's conversation with Joy should be excluded. The superior court also admitted testimony that Lerchenstein had damaged property in Buchholz' apartment. On appeal, the court of appeals reversed Lerchenstein's convictions, holding that the evidence of prior bad acts, although relevant to Lerchenstein's state of mind, was inadmissible since its probative value did not outweigh its prejudicial impact. 697 P.2d at 317–19.

Alaska Rule of Evidence 404(b) states:

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

The determination of whether prior bad acts evidence is admissible involves a two step analysis. First, the court must determine whether the evidence sought to be admitted has relevance apart from propensity under Evidence Rule 404(b); second, it must determine that the probative value of the evidence outweighs its prejudicial impact under Evidence Rule 403.[4] *Fields v. State*, 629 P.2d 46, 49 (Alaska 1981).

Although at trial the state never clearly articulated the purpose for which it offered the questioned evidence, in essence the offer was to establish Lerchenstein's motive in shooting Ron Hoffman and in pointing the gun at Don Hoffman and Lance DeSaw. The state sought to introduce this evidence to demonstrate Lerchenstein's intense personal hostility toward those he perceived were taking advantage of him. *See* 2 J. Weinstein & M. Berger, Weinstein's Evidence § 404[14], at 404–108, 109 (1985). (Evidence of other crimes has been admitted to show the likelihood of defendant having committed the charged crime because he was filled with hostility.)[5]

The state argued that the prior bad acts were relevant to whether Lerchenstein had the gun with him when he crossed the street to go to the body shop and to Lerchenstein's state of mind at the time of the shooting. [697 P.2d at 316, 317] The superior court focused on the first issue, but both issues essentially are factors in determining Lerchenstein's motive.[6] Motive was fiercely disputed, and was material to the case because Lerchenstein claimed that he acted in self-defense.[7]

Since the evidence offered was relevant to Lerchenstein's motive in connection with the shooting and the assaults, the question then becomes whether its probative value outweighs its prejudicial impact under Rule 403. Admission of evidence of prior bad acts is by its nature highly prejudicial and the outcome must be subject to careful scrutiny. *Coleman v. State*, 621 P.2d 869, 874 (Alaska 1980), *cert. denied*, 454 U.S. 1090, 102 S.Ct. 653, 70 L.Ed.2d 628 (1981). In *Lerchenstein*, the court of appeals analyzed the probity versus prejudice balance in a Rule 404(b) context as follows:

> In *Oksoktaruk*, the supreme court held that, when evidence of prior misconduct is involved, Evidence Rule 404(b) modifies the normal balancing process

4. Alaska R.Evid. 403 provides:

> 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.

5. In making the offer of proof, the prosecutor stated:

> It's a heck of a lot different case if a gun happens to be underneath and he grabs for it in self-defense as three people are coming at him versus walking across the street, being in a bad mood, consciously taking a gun.

6. Intent was not a material issue, since Lerchenstein did not contend that the shooting was accidental.

7. In *Wakaksan v. United States*, 367 F.2d 639 (8th Cir.1966), *cert. denied*, 386 U.S. 994, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967), a prior conviction of assault and battery against decedent was admitted where defendant claimed self-defense against charges of voluntary manslaughter. The court stated: "By arguing self defense the appellant's possible motives and mental attitude toward the victim become especially important." *Id.* at 645–46.

> under Evidence Rule 403 by requiring the trial court to begin with the assumption that the evidence should be excluded.

697 P.2d at 315 n. 2.

Later in the opinion, the court of appeals elaborated:

> Even if deemed relevant for a permissible purpose under Evidence Rule 404(b), however, the evidence should only have been introduced if its probative value outweighed its prejudicial impact to such an extent that the presumption favoring exclusion was overcome.

697 P.2d at 318.

The presumption against admissibility explained in *Oksoktaruk v. State*, 611 P.2d 521, 524 (Alaska 1980), is applicable to the first step of the Rule 404(b) analysis (whether the evidence has any relevance apart from propensity), not to the second (whether probative value outweighs its prejudicial impact), as the court of appeals stated above. In *Oksoktaruk*, we noted:

> [E]ven though a prior crime may show a propensity on the part of a defendant to commit crimes, which in turn is relevant to the question of present guilt, it is a presumption in our law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist *with regard to propensity*. No case by case balancing is permitted; a prior crime may not be admitted to show propensity.

611 P.2d at 524 (emphasis added).

In my view *Oksoktaruk* stands for the proposition that there is an irrebuttable presumption that the prejudicial effect outweighs the probative value of evidence offered to show propensity. It was not intended that this presumption affect the second step of the Rule 404(b) analysis, the Rule 403 balancing of prejudicial impact and probative value of prior bad acts evidence introduced to prove a material fact other than propensity.[8]

I now turn to whether the superior court erred in determining that the probative value of the prior bad acts evidence outweighed its prejudicial impact. This court will reverse the trial court's resolution of this issue only upon a showing of a clear abuse of discretion. *Ladd v. State*, 568 P.2d 960, 968 (Alaska 1977), *cert. denied*, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978); *Newsom v. State*, 533 P.2d 904, 908 (Alaska 1975). In the case at bar I would hold that the superior court did not abuse its discretion in admitting the prior bad acts evidence which was relevant to Lerchenstein's motive in pointing his gun at the body shop employees and in shooting Ron Hoffman.

Lerchenstein's motive was a material issue, and the state had substantial need for the prior bad acts evidence. Need is an important consideration, because it is the incremental probity of the evidence that must be balanced against its potential for undue prejudice. *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir.1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Therefore, if the government has a strong case on the disputed issue, the evidence of a prior bad act may add little and consequently will be excluded more readily. *Id.*

Here the state needed to demonstrate Lerchenstein's intense hostility toward people he perceived as "ripping him off" in order to rebut his claim of self-defense. There was very little evidence to support the state's position other than the testimo-

8. I also disagree with the court of appeals' implication that the fact that Alaska R.Evid. 404 is a "rule of exclusion" is a ground for a modified balancing process. *Lerchenstein*, 697 P.2d at 315 n. 2. Whether the courts of a particular jurisdiction consider the rule to be one of inclusion or exclusion again bears on the first step of the Rule 404(b) analysis, not the second.

In federal practice, Rule 404(b) is an "inclusionary" rule, which admits all evidence of other crimes relevant to an issue in trial, except that which tends to prove only criminal disposition. 2 J. Weinstein & M. Berger, *supra* § 404[08], at 404–54, 55. Under the "exclusionary" rule prevailing in most other jurisdictions, all other crimes evidence is excluded unless it is relevant to specified facts and propositions, such as identity, motive, common scheme or plan, and knowledge. *Id.*

ny about Lerchenstein's actions in Buchholz' apartment and about the content of the questioned telephone conversations which took place on the same day as the shooting. The state did produce independent evidence suggesting that Lerchenstein carried the gun across the street, which contradicted his testimony and also tended to rebut his claim of self-defense. Without the questioned evidence however, this evidence did not establish Lerchenstein's motive. I therefore conclude that the prior bad acts evidence was highly probative of a material issue in the case.

Adkinson v. State, 611 P.2d 528 (Alaska 1980), lends support for this conclusion. Adkinson was convicted of manslaughter after a confrontation with trespassers on his land. The deceased's two companions testified that Adkinson was upset as he approached them, that Adkinson was belligerent, and that Adkinson pointed his gun directly at the deceased moments before it discharged. Adkinson testified that the weapon was pointed "to the side of" the deceased and that the deceased was in an agitated state and attempted to grab the weapon from Adkinson's hands, thereby pulling it towards himself when it discharged. On rebuttal, the prosecution offered the testimony of two witnesses who described two separate incidents when Adkinson pointed a gun at suspected trespassers on his land.

Adkinson argued on appeal to this court that the admission of evidence of purported prior similar acts toward trespassers was error because it was character evidence prohibited by Evidence Rule 404(b). Adkinson contended that the introduction of the evidence was for the purpose of portraying him as a person with a predisposition to commit that sort of crime. In upholding the admission of the evidence this court stated:

> However, it is equally well-established that where the evidence of prior crimes or acts is relevant to a material fact in the case at trial, it does not fall within the prohibition. This court has admitted evidence of other crimes, wrongs, or acts where it has been offered to prove motive, intent, identity or has "set the stage" for the crime being tried.
>
> ....
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> The trial judge ruled that this evidence regarding prior confrontations between Adkinson and trespassers was relevant to show that Adkinson's pointing of his shotgun at Butts was not accidental or inadvertent. We agree with this determination. Here, unlike the situation presented in *Oksoktaruk v. State*, 611 P.2d 521 (Alaska 1980) and *Eubanks v. State*, 516 P.2d 726, 729 (Alaska 1973), Adkinson's prior acts are "so related to the crime charged in point of time or circumstances that evidence thereof is significantly useful in showing the defendant's intent in connection with the crime charged." However, this does not end the inquiry. As we stated in *Eubanks v. State*, 516 P.2d 726, 729 (Alaska 1973), "[e]ven when such evidence is relevant, the probative value must outweigh its prejudicial impact." This is a question which is left to the trial court's discretion, and reversal is required only where it is found that the trial court has abused that discretion.
>
> It cannot be denied that the testimony by Banks and Blessington was highly damaging to the defense. The evidence was probative of a material fact in this case, *i.e.*, whether Adkinson intentionally pointed his gun at Butts. The testimony itself was clear and convincing. It rendered Adkinson's version of the incident much less believable in a case which largely turned upon his credibility and that of the other witnesses. While there is always a danger of jury misuse of this sort of evidence, in this case the evidence was not of the type to arouse the jury to "overmastering hostility." We cannot find that the trial court abused its discretion in admitting the evidence.

611 P.2d at 531, 532.

Prior bad acts evidence is always prejudicial. The risk of prejudice increases where the previous offense is similar to the offense for which the accused is presently

on trial. *See United States v. Lavelle*, 751 F.2d 1266, 1278 (D.C.Cir.) *cert. denied*, —— U.S. ——, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985). The evidence of prior bad acts in this case is not totally dissimilar to the charged offense, but its similarity is not such that its prejudicial impact outweighs its probative value. The evidence indicated that Lerchenstein was so angered at Buchholz for failing to fully pay for the appliances from his store that he went to Buchholz's apartment and damaged them. While this evidence is prejudicial in its suggestion that Lerchenstein is a violent person, the implication is weakened by the vast difference between the act of damaging a stereo and the act of shooting a person. Lerchenstein's behavior during the two telephone conversations is less prejudicial because it consisted only of words, not acts. Buchholz testified that Lerchenstein spoke to him "very irrationally and violently and [used] quite abusive language," and that he said "he was pissed off because he thought I'd lied to him and thought I'd stolen from him ... and didn't want to see me again." Walls testified that Lerchenstein commented, when discussing Buchholz, "I ought to get a gun and get the SOB." The prejudicial impact of this statement is also lessened by the fact that it was an angry threat, not an act. All this evidence was prejudicial to Lerchenstein, but not so prejudicial as to outweigh its value in proving his irrational, enraged state of mind when confronted with the perception that someone was seeking to take advantage of him. Therefore, I would hold that the superior court did not abuse its discretion in admitting the prior bad acts evidence.

Frank ANNAS, Appellant,

v.

STATE of Alaska, Appellee.

No. A-954.

Court of Appeals of Alaska.

Oct. 10, 1986.

Defendant was convicted in the Third Judicial District Court, Palmer, Michael White, J., of driving while intoxicated, and he appealed. The Court of Appeals, Singleton, J., held that: (1) finding that defendant was not competent to represent himself was supported by evidence; (2) defendant was not entitled to be represented by lay counsel; (3) defendant's refusal to cooperate with public defender did not constitute good cause for delay in filing motions; (4) defendant's charge for driving while intoxicated did not have to be severed for separate trial from charge of refusing to submit to breath test; and (5) defendant was not entitled to withhold decision regarding breath test until his brother-in-law arrived at police station.

Affirmed.

1. Criminal Law ⇐641.4(1)

Defendant, who is competent to do so, has right to waive counsel and represent himself.

2. Criminal Law ⇐641.9

Finding that defendant was not competent to represent himself was supported by psychiatrist's testimony that defendant was nonreader and that he had problems with his memory.

3. Criminal Law ⇐641.10(1)

"Lay representation" is not retained right under Constitution. Const. Art. 1, §§ 11, 21.

4. Criminal Law ⇐641.4(2)

Only defendants who knowingly, intelligently, and voluntarily waive counsel, and are competent to waive attorney's assist-

Degler also argued that "the conduct constituting the offense was among the least serious conduct included in the definition of the offense." AS 12.55.155(d)(9).

Under former AS 11.15.240, Degler's conduct would have constituted an attempted robbery. The current robbery statutes define the conduct of "taking *or attempting* to take property from the immediate presence and control of another" as robbery. AS 11.41.510 (emphasis added). Degler contends that an attempt has historically been considered less serious than a completed act of robbery. Therefore, he argues, the mitigator of "least serious conduct" should apply.

[5, 6] It can be argued that the reason attempted robbery was formerly a separate and less serious crime is because the conduct is inherently less harmful. However, robbery is essentially a crime against the person; it is not a property offense. *Nell v. State*, 642 P.2d 1361, 1365–66 and n. 6 (Alaska App.1982). In the instant case, Degler pointed a loaded gun at the victim. The potential harm created by Degler's conduct was not lessened because he received no property. Therefore, Judge Hanson was not clearly erroneous in rejecting this mitigator.

[7] Degler also argued that he was "motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for [his] immediate family." AS 12.55.155(d)(11). Degler cites no authority to support this mitigator. He simply argues that "[n]o motive for the crime was even suggested, other that [sic] Mr. Degler's desperate desire to provide a decent home for his daughter...."

Judge Hanson rejected this mitigator, stating that AS 12.55.155(d)(11) contemplated necessities such as food or water; it did not include the desire to attend a future court proceeding. We find that Judge Hanson properly rejected this mitigator.

[8] Finally, relying on *Dancer v. State*, 715 P.2d 1174 (Alaska App.1986), Degler argues that Judge Hanson erred in refusing to refer his case to the three-judge panel. In *Dancer*, the sentencing judge indicated that he believed that the presumptive sentence which applied to Dancer was unjust, yet refused to send the case to the panel because he had "concluded that referral would be futile." This court held that the trial court's refusal to refer Dancer's case to the three-judge panel was plain error. 715 P.2d at 1183.

In Degler's case, Judge Hanson apparently found that the presumptive sentence was manifestly unjust. Judge Hanson remarked, "I find that ... being required in this case to give Mr. Degler, as I've come to know him, 7 years simply makes no sense to me." Given these remarks, we conclude that this case is controlled by *Dancer*. We therefore find that Judge Hanson was required to send Degler's case to the three-judge panel along with his recommendations and findings. AS 12.55.-165–.175; *Lloyd v. State*, 672 P.2d 152, 154–55 (Alaska App.1983).

The conviction is AFFIRMED; the sentence is VACATED, and this case is REMANDED to the superior court with directions to enter an order referring the matter to the three-judge panel.

James GREINER, Appellant,

v.

STATE of Alaska, Appellee.

No. A–1036.

Court of Appeals of Alaska.

Aug. 21, 1987.

Defendant was convicted of two counts of misconduct involving a controlled substance in the second degree in the Superior Court, Third Judicial District, Rene J. Gonzalez and Eben H. Lewis, JJ., and defendant appealed. The Court of Appeals, Coats, J., held that: (1) joinder of counts which involved defendant with counts in-

volving other defendants, which did not mention defendant, was erroneous, and (2) defendant failed to establish defense of entrapment.

Reversed and remanded.

1. Criminal Law ⇐622

Unless joinder is specifically permitted, codefendants may not be tried together. Rules Crim.Proc., Rule 8(b).

2. Criminal Law ⇐622.2(8)

Joinder of the counts which involved defendant with the counts involving other defendants was improper where the other counts did not mention defendant, and there was no real evidence of a conspiracy, joint venture, or common scheme or plan. Rules Crim.Proc., Rule 8(b).

3. Criminal Law ⇐37(2), 330

Entrapment is an affirmative defense, and burden is on defendant to establish by a preponderance of evidence that police induced defendant to commit offense by persuasion or inducement as would be effective to persuade an average person, other than one who is ready and willing, to commit the offense.

4. Criminal Law ⇐739.1(1), 1158(1)

Issue of entrapment is for court, whose factual findings will not be reversed unless clearly erroneous.

5. Criminal Law ⇐569

Defendant failed to establish entrapment despite his testimony that he sold heroin to officer because officer's companion was complaining about feeling sick and needing drugs and that defendant, as an addict, sympathized with the man's problems.

Sidney K. Billingslea, Asst. Public Defender, Kenai, and Dana Fabe, Public Defender, Anchorage, for appellant.

Robert D. Bacon, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

COATS, Judge.

James Greiner was convicted, following a jury trial, of two counts of misconduct involving a controlled substance in the second degree. AS 11.71.020(a). Greiner was charged with selling heroin to undercover officer Wilbur E. Hooks on August 22, 1984, and September 6, 1984. Greiner appeals his convictions raising several issues. We conclude that the trial court did not err in finding that Greiner failed to establish the defense of entrapment. However, we conclude that the trial court erred in allowing the counts which involved Greiner to be joined with counts involving other defendants. We accordingly reverse Greiner's convictions.

JOINDER

Greiner was indicted on two counts of a four-count indictment along with three other defendants, Darrel D. Frazier, Lamar Merrill, and Judy Alexander. Count I of the indictment charged Frazier and Greiner with delivering approximately one-half gram of heroin to Officer Hooks on or about the 22nd day of August, 1984. Count II charged Frazier, Merrill, and Alexander with delivering approximately one gram of heroin to Officer Hooks on or about the 23rd day of August, 1984. Count III charged Frazier with delivering approximately two grams of cocaine to Officer Hooks on or about the 30th day of August, 1984.[1] Count IV charged Greiner with delivering approximately one-eighth of a gram of heroin to Officer Hooks on or about the 6th day of September, 1984.

Greiner sought to sever his trial on Counts I and IV from that of his codefendants on Counts II and III, in which he was not charged. Greiner based his motion to sever on Alaska Rule of Criminal Procedure 8(b), which provides in relevant part:

1. James Greiner was apparently present during this transaction but was not charged.

> *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.

Superior Court Judge Eben H. Lewis denied Greiner's motion.

[1] Alaska Rule of Criminal Procedure 8(b) is essentially identical to Federal Rule of Criminal Procedure 8(b). Consequently, we have turned to the federal cases and authorities interpreting Federal Rule 8(b) to interpret the Alaska rule. In general, the interpretations of Federal Criminal Rule 8(b) do not permit joinder of codefendants who are charged with similar but unrelated acts. *See* 8 *Moore's Federal Practice* § 8.06[2] (2d ed. 1987); 1 C. Wright, *Federal Practice and Procedure* § 144, at 494–514 (2d ed. 1982); *United States v. Velasquez*, 772 F.2d 1348 (7th Cir.1985) *cert. denied*, — U.S. —, 106 S.Ct. 1211, 89 L.Ed.2d 323 (1986); *United States v. Andrews*, 765 F.2d 1491 (11th Cir.1985) *cert. denied* 474 U.S. 1064, 106 S.Ct. 815, 88 L.Ed.2d 789 (1986); *United States v. Perry*, 731 F.2d 985 (D.C.Cir.1984); *United States v. Hatcher*, 680 F.2d 438 (6th Cir. 1982) Unless joinder is permitted under Rule 8(b), codefendants may not be tried together. *See, e.g.*, 1 C. Wright, *supra* § 144, at 513.

[2] The difficult question under Rule 8(b) is when can defendants be said to have engaged in "the same series of acts or transactions constituting an offense or offenses." Generally, under the federal cases, the unifying factor is a conspiracy charge, although a conspiracy charge is not required. However, it appears that there must be a significant connection between the different acts charged, such as a common scheme or plan or joint venture, in order to permit counts involving different defendants to be joined. We find the following discussion from Wright's *Federal Practice and Procedure* to be helpful:

> No matter how similar offenses may be, they may not be joined in a case in which there is more than one defendant unless they can be said to arise out of a series of acts or transactions. Three kinds of situations may arise, but the principle just stated is controlling, and the same result should be reached, in each.
>
> The simplest situation is that in which it is charged that one defendant committed an offense and that a second defendant committed a similar offense, but there is no allegation that the two offenses arose out of a series of transactions in which both defendants participated. Joinder is not permitted. Next is the situation in which two defendants are jointly charged with committing an offense, and there is an unrelated charge that on some other occasion one of the defendants committed a similar offense. Again joinder is not permitted. The final situation can be best presented by an illustration. An indictment against two defendants charges each of them in one count with having transported a stolen automobile from Oklahoma to Colorado, and in a second count charges each of them with having transported a stolen automobile from Colorado to Oregon. Unless the two incidents can be said to have been part of a series of acts or transactions, joinder is not permitted. There must be two trials, although the government has a choice of how to proceed. It may try both of the defendants for the Oklahoma to Colorado trip and in a separate trial try both of them for the Colorado to Oregon trip. Joinder in each case would be proper under Rule 8(b) since each of the defendants had participated in the transaction giving rise to each trial. Alternatively the government could try the first defendant charging both offenses and separately try the second defendant charging both offenses. If it chooses to proceed in that fashion a single defendant would be involved in each case and the joinder as to him of offenses of the same character would be authorized by Rule 8(a). The one thing the government cannot do is try both defendants on both charges in a single trial.

There is good reason why this restriction should apply. As stated by the District of Columbia Circuit:

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense or related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the Rules do not permit cumulation of prejudice by charging several defendants with similar but unrelated offenses.

1 C. Wright, *Supra* § 144, at 508–13 (footnotes omitted).

We have reviewed the record in this case and fail to see a sufficient connection between Counts II and III, which do not mention defendant Greiner, and the two counts in which he was charged. Although there was evidence that all the defendants were willing to sell drugs and were well-acquainted and cooperated with each other in individual drug sales, there was no real evidence of a conspiracy, joint venture, or common scheme or plan. Rather, the evidence suggests individuals who, either separately or in combination, made separate drug sales. Under these circumstances, joinder of the offenses was improper. We accordingly reverse Greiner's convictions.

ENTRAPMENT

Although our ruling on joinder disposes of this case, we must still review Greiner's claim of entrapment. If we found merit to his claim, he would be entitled to a dismissal of Count IV. The following is the factual background necessary for a discussion of the entrapment issue.

Greiner's Testimony

Greiner testified that Frazier was driving him to work when they saw Wilbur Hooks and Jerry Raygor. Frazier stopped and went over to their car. Greiner stated that he is a heroin addict and knew that Raygor was also a heroin user. When Frazier and Greiner reached Hooks' car, Raygor said that he was sick and asked if they knew where to get heroin. Greiner said that he did, and agreed to go get drugs for Raygor. Hooks, who was paying for the drugs, was afraid to let Greiner leave with his money, so Greiner gave Hooks his personal heroin supply to hold until he returned.

Greiner stated that he was unable to obtain more heroin and returned to Hooks' car. He asked Hooks to return the heroin, but Hooks asked Greiner to sell him the bag that Hooks was holding. Greiner was reluctant because it was his personal supply, but eventually sold Hooks the bag. However, Greiner testified that he never received the money; Hooks handed the money to Frazier. Greiner testified that he sold Hooks the heroin because Raygor was complaining about feeling sick and needing drugs, and that he, as an addict, sympathized with Raygor's problems. Greiner contended that he would not have given up his personal heroin supply if Raygor had not said that he was sick.

Officer Hooks' Testimony

Officer Hooks testified that he and Raygor were driving when Greiner flagged down Hooks' car. Greiner handed Hooks a bag of heroin to examine. Frazier was present, but did not participate in the transaction.

Hooks told Greiner that he wanted more heroin than was in the bag that Greiner handed him. Greiner took $100 from Hooks to go obtain more heroin while Hooks held the first bag as collateral. Greiner returned without finding more heroin and agreed to sell Hooks the original bag. Hooks testified that Greiner kept the $100 which Hooks had given him and gave Hooks $50 in change. Officer Hooks denied that Raygor said anything about being sick and stated that Raygor did not exhibit any symptoms of drug withdrawal.[2]

Judge Lewis concluded that there was no entrapment. He found that the speed with which Greiner agreed to go get more heroin and the quickness of the sales transac-

2. Darrel Frazier, relying on his fifth amendment right, did not testify at the entrapment hearing.

tion indicated a willingness on Greiner's part to sell drugs. The court found that Officer Hooks was a more credible witness than Greiner and accepted Hooks' version of the events. Judge Lewis found that he could not find entrapment "even granting Mr. Greiner the benefit of the doubt."

[3, 4] Entrapment is an affirmative defense. Alaska applies an objective standard and the burden is on the defendant to establish by a preponderance of the evidence that the police "induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an average person, other than one who is ready and willing, to commit the offense." AS 11.81.450; *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969); *Folsom v. State*, 734 P.2d 1015, 1017 (Alaska App.1987). The issue is for the court, not for the jury, and the trial court's factual findings are to be reversed only if clearly erroneous. 734 P.2d at 1017.

[5] In *Folsom v. State*, 734 P.2d 1016–18, on very similar facts, we concluded that the trial court did not err in rejecting an entrapment defense. In the instant case, Judge Lewis indicated that even under Greiner's version of the facts, Greiner had not established an entrapment defense. For the reasons stated in *Folsom*, we conclude that the trial court did not err in rejecting the entrapment claim even if it accepted Greiner's version of the transaction.[3]

Greiner's conviction is REVERSED and the case is REMANDED to the superior court.

3. Given our decision that there was no entrapment, even under Greiner's version of the events surrounding Count IV, it follows that Greiner was not prejudiced by his inability to call Jerry Raygor as a witness at the entrapment hearing. We note, however, that the record does not reflect that Greiner made an attempt to call Raygor as a witness at the entrapment hearing.

Santiago VELEZ, Appellant,

v.

STATE of Alaska, Appellee.

No. A-1642.

Court of Appeals of Alaska.

Oct. 7, 1988.

Defendant was convicted of sexual assault and attempted sexual assault in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., and he appealed. The Court of Appeals, Singleton, J., held that: (1) evidence of other sexual assaults by defendant could not be admitted to show modus operandi in case in which identity of defendant was not in issue; (2) evidence of prior sexual assaults by defendant in case in which consent was the only issue was inadmissible propensity evidence; (3) probative value of evidence of sexual assault defendant's prior sexual assaults to establish mens rea was more than outweighed by potential for prejudice; and (4) sexual assault and attempted sexual assault charges involving different victims were improperly joined for trial.

Reversed.

Coats, J., filed concurring opinion.

Bryner, C.J., filed dissenting opinion.

1. Criminal Law ⇐369.15

Proof of modus operandi by defendant charged with sexual assault and attempted sexual assault was not relevant to identify the defendant as the perpetrator of the offense in a case in which both victims knew the defendant. Rules of Evid., Rules 403, 404(b).

2. Criminal Law ⇐369.8

In a sexual assault case in which consent is the sole issue, the defendant's past conduct is irrelevant to the victim's state of mind unless the victim is aware of the conduct.

3. Criminal Law ⇐369.8

In case in which consent was the sole issue, sexual assault defendant's conduct with his former girl friend was not relevant to show victim's state of mind absent any allegations that victim was aware of defendant's actions with girl friend or girl friend was aware of defendant's actions with victim. Rules of Evid., Rule 404(b).

4. Criminal Law ⇐369.8

Although sexual assault defendant's activities with other women were marginally relevant to show how he conducted himself with each of his victims, and to that extent corroborated their testimony about his conduct with them, it was inadmissible propensity evidence. Rules of Evid., Rule 404(b).

5. Criminal Law ⇐371(9)

Probative value of evidence of prior sexually assaultive activity by sexual assault defendant establishing mens rea was more than outweighed by potential for prejudice, which might result when jury faced with multiple accusers, although unconvinced that any one accuser was accurately describing her past experience, could nevertheless weigh the number of accusers' testimony and conclude that defendant deserved punishment. Rules of Evid., Rule 403.

6. Criminal Law ⇐620(6)

Sexual assault charges involving one victim were improperly joined with attempted sexual assault charges involving another victim, the evidence of the experiences were not cross-admissible to establish defendant's propensity to commit sexual assaults, State's obligation to prove defendant's specific intent to commit sexual assault was clearly satisfied by unequivocal evidence regarding defendant's sexual motivation, and it was unnecessary to offer other evidence to clarify defendant's intentions when he grabbed victim.

7. Criminal Law ⇐369.8

Offering evidence of attempted sexual assault defendant's statements to victim regarding his former girl friend's accusation of rape and act of obtaining a restraining order against him was unjustified even though the testimony might be admissible to show that victim was frightened and to

explain her lack of resistance, where evidence was undisputed that victim successfully resisted defendant's attack.

R. Scott Taylor and Susan Orlansky, Asst. Public Defenders, and Dana Fabe, Public Defender, Anchorage, for appellant.

John A. Scukanec, Asst. Atty. Gen., Office of Sp. Prosecutions and Appeals, Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Santiago Velez was charged in separate counts of an indictment with one count of sexual assault in the first degree, AS 11.41.410(a)(1), and one count of attempted sexual assault in the first degree, AS 11.31.100(a) and AS 11.41.410(a)(1). Each count involved a different incident and a different victim. He unsuccessfully sought severance of the two counts for trial and was convicted on both counts. Alaska R.Crim.P. 8, 14. He appeals, arguing that the trial court erred in denying his motions for a continuance and a severance, and that the trial court abused its discretion in admitting, over his objection, evidence of prior uncharged sexual assaults.

Velez argues that we should apply our recent decision in *Johnson v. State*, 730 P.2d 175 (Alaska App.1986), in which we granted pretrial review of an order denying severance and reversed, concluding that automatic severance should be ordered in any case upon timely request by the defendant where counts are joined solely on the basis that they are of the same or similar character. *See also Stevens v. State*, 582 P.2d 621 (Alaska 1978). The state counters that *Johnson* was decided after Velez's trial and should not be given retroactive effect. *See Farleigh v. Anchorage*, 728 P.2d 637 (Alaska 1986) (discussing circumstances under which a judicial decision should be given retroactive effect). The state argues that we should follow our prior decisions in which we have refused to find prejudicial error in denial of severance where evidence from each of the cases joined would have been cross-admissible. *See Montes v. State*, 669 P.2d 961, 966 (Alaska App.1983); *Nix v. State*, 653 P.2d 1093, 1095–96 & n. 3 (Alaska App.1982); *Davidson v. State*, 642 P.2d 1383, 1390 n. 8 (Alaska App.1982).

We conclude that the evidence regarding the two charges joined in this case was not cross-admissible. Velez therefore suffered prejudicial error without regard to the rule of *Johnson*. Accordingly, we reverse Velez's convictions and remand this case for a new trial.[1]

FACTS

A number of women have reported that Velez assaulted them. Evidence of three incidents was presented at trial: a sexual assault on C.S. on October 24, 1985, an attempted sexual assault on G.J. on November 14, 1985, and a sexual assault on S.F. on November 23, 1985. The incidents with G.J. and S.F. were charged in the indictment, and the incident with C.S. was introduced in evidence as a prior bad act.

S.F. testified that she met Velez at a bar in Anchorage on November 19, 1985. During the evening she and Velez talked and danced. She mentioned that she had a car that needed painting, and Velez told her that he worked at a body shop and would be happy to give her an estimate on repairs if she would bring her car to the shop where he worked. Velez called S.F. a couple of nights later and asked her to go out with him. During this conversation, S.F. mentioned that one of her headlights was out, and Velez suggested that she bring her car to the shop the next day and he would fix it.

On November 23, S.F. took her car to the body shop where Velez worked, and Velez completed the repairs by late afternoon. Velez, S.F., and several other individuals

1. Our decision to reverse renders Velez's complaints about denial of a continuance moot. I will consider Velez's other arguments to the extent that they are likely to reoccur at retrial.

then remained in the waiting room of the auto shop drinking beer and smoking marijuana. After everyone had left except for S.F. and Velez, he pushed her down onto the couch and removed her pants and underpants. As she continued to struggle, Velez became more aggressive and forced S.F. to have intercourse with him. When he got up from the couch she attempted to get her clothing. He then wrestled her to the ground and assaulted her again. After this assault, Velez let S.F. leave. Later, after returning to her home, S.F. went to the hospital for an examination.

G.J. became acquainted with Velez at an Anchorage bar where she worked part-time as a nude dancer. Velez worked in an automobile body shop nearby and was a regular lunch-time customer at the bar. Velez visited G.J. and her boyfriend at G.J.'s trailer on several occasions and helped G.J.'s boyfriend work on his truck.

On November 14, 1985, G.J. went to the body shop where Velez worked to pick up a coat she had lent him while he was working on her boyfriend's truck. Velez drove G.J. home, stopping on the way to purchase blackberry brandy and beer. When they arrived at G.J.'s trailer, G.J. invited Velez to come in for a drink. After drinking the brandy and beer, Velez asked G.J. to perform a striptease dance for him. She refused to dance. Velez made several suggestive comments about wanting her body, referring to sexual intercourse. When she requested that he leave, he threw her down on the couch. Velez held her down with his knees and attempted to unbutton her shirt. G.J. screamed and told Velez to get out and leave her alone, but Velez struck her in the face and they continued to struggle. G.J. managed to get away and picked up the telephone, telling Velez she was going to call the police. After a few minutes, Velez left and, shortly thereafter, G.J. called the police.

Velez was charged with sexually assaulting S.F. and attempting to sexually assault G.J. These charges were joined for trial.

In addition, the jury heard from Velez's former girlfriend, C.S., who testified as a rebuttal witness. C.S. testified that she met Velez in September 1985, at her place of employment. She indicated that he was friendly and would often come into the liquor store where she worked. Initially, she refused his invitations to go out, but eventually she succumbed and went out with him. She said he was a perfect gentleman during their first few dates.

On October 24, 1985, approximately three weeks before the incident with G.J., Velez and C.S. spent the evening drinking with several other people at the body shop where Velez worked. Velez was drinking blackberry brandy and beer. Later that evening, Velez and C.S. drove to his apartment and he invited her in for a drink. According to C.S., when they were in his apartment Velez became aggressive and tried to kiss her. She told him that she did not want to have sex with him. They struggled, and C.S. began to cry. Velez pulled C.S. down on the floor and forced her to have sexual intercourse. C.S. initially obtained a restraining order against Velez, but allowed it to be dismissed. She testified that she did not follow through with the restraining order or file formal charges against Velez because she was afraid of him.

DISCUSSION

Velez contends that the trial court erred in denying his motion for a severance. He argues that the testimony of G.J. would not otherwise have been admissible in a trial of S.F.'s charges. He further argues that C.S.'s testimony should not have been admitted in trials of either G.J.'s charges or S.F.'s charges. *See* A.R.E. 404(b),[2] 403.[3]

2. Alaska Evidence Rule 404(b) provides:

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

3. Alaska Evidence Rule 403 provides:

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

The appellate courts of Alaska have considered the admissibility, in sexual assault cases, of evidence that the accused sexually assaulted or attempted to sexually assault the victim or another person on other occasions in a number of cases. *See Burke v. State*, 624 P.2d 1240, 1246–51 (Alaska 1980); *Freeman v. State*, 486 P.2d 967, 977–78 (Alaska 1971); *Soper v. State*, 731 P.2d 587, 589–91 (Alaska App.1987); *Johnson v. State*, 730 P.2d 175 (Alaska App. 1986); *Johnson v. State*, 727 P.2d 1062 (Alaska App.1986); *Bolden v. State*, 720 P.2d 957, 960–61 (Alaska App.1986); *Pletnikoff v. State*, 719 P.2d 1039 (Alaska App. 1986); *Oswald v. State*, 715 P.2d 276 (Alaska App.1986); *Moor v. State*, 709 P.2d 498 (Alaska App.1985).

In *Lerchenstein v. State*, 697 P.2d 312 (Alaska App.1985), *aff'd*, 726 P.2d 546 (Alaska 1986), we applied a two-step analysis to determine whether prior bad acts evidence is admissible under Rule 404(b). First the court must determine if the evidence sought to be admitted has relevance apart from showing the character of the defendant in order to show the defendant's propensity to commit the crime in question. When evidence is offered solely to show propensity, it is inadmissible.[4] If the court determines that the evidence has some relevance apart from propensity, then it must determine if the nonpropensity relevance outweighs the prejudicial impact of the evidence under Rule 403. Of course, if there is no genuine nonpropensity relevance, the balancing step is never reached. 697 P.2d at 315–16.[5]

[1] Alaska courts have frequently permitted the state to introduce evidence of other sexual assaults to show *modus operandi*, and thereby identify the defendant as the perpetrator of the offense when identity was a disputed issue. *See Coleman v. State*, 621 P.2d 869, 874–76 (Alaska 1980), *cert. denied*, 454 U.S. 1090, 102 S.Ct. 653, 70 L.Ed.2d 628 (1981); *Stevens v. State*, 582 P.2d 621, 628–29 (Alaska 1978); *Nix v. State*, 653 P.2d 1093, 1096–1100 (Alaska

> 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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

4. Precisely what this means, however, is open to some doubt. For present purposes, evidence is used to show propensity, and therefore violates Rule 404(b), whenever the jury is asked to infer from the fact that a defendant engaged in certain conduct in the past that the defendant had a disposition or propensity to engage in similar conduct on other occasions, and to further infer that the defendant acted in accordance with that disposition by engaging in the conduct which constitutes one or more of the elements of the crime in question. *See* 22 C. Wright & K. Graham, *Federal Practice and Procedure* § 5233–34 (1978 & Supp.1987) (hereinafter C. Wright & K. Graham).

5. Two observations are important. First, propensity evidence is not excluded because it has too little probative value, but because it has too much:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.
>
> 1A J. Wigmore, *Evidence* § 58.2 (Tillers rev. ed. 1983) (citations omitted).

Second, in Alaska, the rule prohibiting prior bad acts evidence under Rule 404(b) is one of exclusion, not one of inclusion. *Oksoktaruk v. State*, 611 P.2d 521, 524–25 & n. 9 (Alaska 1980). A rule of inclusion allows use of prior bad acts for any purpose relevant to the prosecution's case except to show criminal propensity. In contrast, a rule of exclusion precludes use of prior bad acts evidence for any purpose except a limited number of generally recognized exceptions to the rule. Thus, prior bad acts evidence *is not* admissible just because it is offered to prove a fact material to the prosecution's case other than propensity. It must fall within one of the specifically recognized exceptions to the exclusionary rule. *Id.* at 524. *See also State v. Lerchenstein*, 726 P.2d 546, 551 n. 8 (Alaska 1986) (Rabinowitz, C.J., dissenting). The distinction between defining the rule as a rule of exclusion or one of inclusion is discussed in 22 C. Wright & K. Graham, *supra*, § 5239 at 428–35. Rule 404(b) is based upon a federal rule that is generally interpreted as one of inclusion rather than exclusion. *Moor v. State*, 709 P.2d 498, 505–06 n. 5. In Alaska, recognition of the exclusionary character of Rule 404(b) requires substantially curtailing the discretion that trial courts would otherwise have under Rule 403 in determining whether to admit other crimes evidence. *Id. But see Lerchenstein*, 726 P.2d at 550–51 (Rabinowitz, C.J., dissenting).

App.1982). Identity is not an issue in this case because G.J. and S.F. both knew Velez. Therefore, proof of *modus operandi* is irrelevant.

In *Burke*, 624 P.2d at 1249–50, the supreme court recognized evidence of a "lewd disposition," *i.e.*, propensity to engage in unlawful sexual activity, as a limited exception to Rule 404(b) akin to proof of motive. *See Patterson v. State*, 732 P.2d 1102, 1104 (Alaska App.1987). The lewd disposition exception was limited to those cases in which the prior sexual acts involved the same victim as part of an ongoing relationship consisting of several separate sexual acts, and in which evidence of the entire relationship was necessary in order to place the alleged incident in context and explain the victim's actions. *Burke*, 624 P.2d at 1249–50. The supreme court cautioned, however, that the prejudicial effect of such testimony is substantial, and before admitting it the trial court must carefully weigh the testimony's probative value against its prejudicial effect. *Id.* at 1250–51.

In *Soper*, 731 P.2d at 590–91, we extended this lewd disposition exception to include sexual assaults on members of an immediate family under circumstances that would not fall within a "motive" exception.[6] In *Bolden* and *Moor* we were asked to extend this exception to testimony regarding sexual conduct with persons other than the victim and members of her immediate family who, nevertheless, had substantial similarities to the victim, *e.g.*, similar ages or similar relationships to the accused. We declined to do so. *Bolden*, 720 P.2d at 960; *Moor*, 709 P.2d at 506. In *Bolden*, *Pletnikoff*, and *Moor* we also rejected the state's arguments that such evidence was admissible based on its relevance to show common scheme or plan, motive,[7] or to corroborate the prosecuting witness. *See, e.g., Pletnikoff*, 719 P.2d at 1042–44. I adhere to those rulings.

6. In context, motive can mean a sexual desire for the alleged victim of the offense. *Patterson*, 732 P.2d at 1104. If the state seeks to show an illicit sexual interest in women generally, however, the evidence ceases to show motive and simply shows criminal propensity. *Oswald*, 715 P.2d at 279. Evidence regarding a motive to have intercourse with one woman does not legitimately support an inference that the defendant was motivated to have intercourse with a second woman. *Pletnikoff*, 719 P.2d at 1043. Using past incidents to show a willingness to force or coerce another person to engage in sexual activity is proof of propensity, not motive or intent. *Id.*

The terms "motive" and "intent" are frequently used interchangeably to mean goal, object, or desired result. If the defendant concedes intercourse and claims consent, however, the goal of intercourse is not in dispute; the issues are whether the defendant recklessly disregarded the victim's lack of consent or used force or a threat of force to coerce her. The term "intent" is also sometimes used to generally describe the defendant's *mens rea*. I will discuss the interplay between the defendant's *mens rea* and the consent defense later.

Rule 404(b) also allows evidence of other acts to show absence of mistake or accident. Nevertheless, in the case of date rape it is misleading to speak of a consent defense as raising issues of accident or mistake. *Id.* at 1044 n. 4. In contrast, in cases of sexual contact, short of intercourse, with children by a parent or custodian, a true "mistake" or innocent motive defense may be interposed. *See Freeman*, 486 P.2d at 978–79. When the conceded contact is unequivocally sexual, no such defense is plausible, and use of such evidence to show intent violates the rule of evidence now codified in Alaska Evidence Rule 403. *Id.* at 979. *Cf. Moor*, 709 P.2d at 510 & n. 8 (because of the relationship between the defendant and the adolescent friend of his niece, it is not possible that he could have innocently, but inadvertently, digitally penetrated her vagina).

7. We have declined to permit admission of such evidence to show a "common plan." Plan is not an element of sexual assault. To be admissible, a "plan" would have to be relevant to an element of the offense or to a theory of the defense. In the context of a sexual assault, the term "plan" might be construed to include a situation in which the assailant had a pre-existing plan to meet women, seek sexual favors, and then sexually assault them if they refused. To admit evidence of other sexual assaults on this basis, however, undermines the policy of Rule 404(b) by permitting the use of evidence of propensity to prove conduct. We have adhered to the view that admissibility under the rule requires more than a showing that each incident is close in time, has common factors, and may be said to have been planned in the same way. To qualify under the common-plan exception to the rule, we have required that each of the incidents be constituent parts of some overall scheme. *See Bolden*, 720 P.2d at 961 n. 2; *Pletnikoff*, 719 P.2d at 1043–44 & n. 2; *Oswald*, 715 P.2d at 279–80 & n. 2; *Moor*, 709 P.2d at 506–07. In reaching these conclusions, we have relied on the analysis in 22 C. Wright & K. Graham, *supra* § 5244 at 359.

The state, in partial reliance on *Davis v. State*, 635 P.2d 481 (Alaska App.1981), asks that we recognize a general exception to Rule 404(b) to cover situations in which a defendant concedes genital intercourse, but claims that the alleged victim consented. Such an exception is particularly necessary, the state urges, in cases of date rape in which the victim's testimony is uncorroborated, and the defendant can show that the relationship with the victim was previously friendly and may even have involved prior corroborated or conceded instances of consensual sexual activity. When the incident occurs in privacy and the victim is coerced by the defendant's greater strength or unconsummated threats of violence, the jury may have no basis for determining which version of the incident is more worthy of belief. If the state is precluded from corroborating the victim's testimony by showing that the defendant consistently forces sexual demands on acquaintances, the state apparently concludes that many rapists will be acquitted and may even be encouraged to force their intentions on other social acquaintances in the future. Similar concerns led the supreme court to create an exception to Rule 404(b) for assaults on the same victim in *Burke*, which we extended to members of the immediate family in *Soper*.[8]

We addressed this issue in *Davis* and concluded in part that, because the defendant placed his intent in issue, the prosecution was justified in offering evidence of other sexual assaults to contradict the defendant's claim that his alleged victim consented. 635 P.2d at 485. *Davis*, however, is distinguishable on its facts from this case. Davis was charged with kidnapping as well as sexual assault. Davis and his companion came across the complaining witness, who was having difficulty with her car, and offered to give her a ride. Once inside the car, Davis made sexual overtures to the victim and ignored her resistance. *Id.* at 483. Ultimately, she was taken to an isolated spot and sexually assaulted. *Id.* at 484. In order to prove kidnapping under its theory of the case, the state was compelled to show that Davis restrained his victim, intending to sexually assault her. *Id.* at 483 n. 2. Evidence of other occasions in which Davis and the same companion offered women rides and Davis then sexually assaulted them provided some evidence that Davis formed an intent to sexually assault his victim prior to restraining her, satisfying part of the state's burden to prove kidnapping. In addition, it is possible that Davis and his companion had a pre-existing plan to pick up hitchhikers and other vulnerable young women and sexually assault them, which might qualify for admission as a common scheme or plan. *Compare Davis*, 635 P.2d at 485 n. 3 *with Bolden*, 720 P.2d at 961 n. 2 *and Oswald*, 715 P.2d at 279–80 & n. 2.

Nevertheless, to the extent that *Davis* stands for the proposition that evidence of all prior sexual assaults by a defendant on similarly situated victims becomes admissible any time the defendant concedes sexual intercourse and argues that the complaining witness consented, I believe *Davis* goes too far, and I would specifically disapprove that holding.

Sexual assault in the first degree, based on the theory that one adult coerced another adult into sexual intercourse, does not require any showing of sexual motive or interest beyond the act itself. *Moor*, 709

8. Courts in other jurisdictions are divided on this issue. A number of courts permit evidence of sexual assault on other women to rebut a consent defense in a specific case. *See State v. Huey*, 145 Ariz. 59, 699 P.2d 1290, 1292–93 (1985); *State v. Hampton*, 529 P.2d 127, 130 (Kan.1974), *overruled on related grounds in State v. Cantrell*, 673 P.2d 1147 (Kan.1983); *Williams v. State*, 95 Nev. 830, 603 P.2d 694, 696–97 (1979); *State v. Fears*, 690 Or.App. 606, 688 P.2d 88, 89–90 (1984); *State v. Willis*, 370 N.W.2d 193, 198 (S.D.1985). *See also People v. Salazar*, 144 Cal.App.3d 799, 193 Cal.Rptr. 1, 8 (1983); *People v. Jackson*, 110 Cal.App.3d 560, 167 Cal.Rptr. 915, 918 (1980). *But see People v. Tassell*, 36 Cal.3d 77, 201 Cal.Rptr. 567, 679 P.2d 1 (1984).

A number of courts reject similar evidence when offered to rebut a defense based on consent. *People v. Key*, 153 Cal.App.3d 888, 203 Cal.Rptr. 144, 147–50 (1984) (criticizing *Salazar* and *Jackson*; *State v. Saltarelli*, 98 Wash.2d 358, 655 P.2d 697, 699–701 (1982); Annotation, *Admissibility, in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other Than Prosecutrix*, 2 A.L.R. 4th 330 (1980 and Supp.1987).

P.2d at 510 n. 8. "In order to prove a violation of AS 11.41.410(a)(1) [sexual assault in the first degree], the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent." *Reynolds v. State*, 664 P.2d 621, 625 (Alaska App.1983). In order to determine precisely what is at issue when it is contended that sexual intercourse took place "without consent," we should look to the defining statute, AS 11.41.470, which provides in pertinent part:

> *Definitions.* For purposes of sections AS 11.41.410–11.41.470 [sexual offenses], unless the context requires otherwise,
>
> ....
>
> (3) "without consent" means that a person
>
> (A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone; or
>
> (B) is incapacitated as a result of an act by the defendant.

Alaska Statute 11.81.900(b) defines "force" and "physical injury" as follows:

> (22) "Force" means any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement; "force" includes deadly and nondeadly force....
>
> ....
>
> (40) "Physical injury" means a physical pain or an impairment of physical condition....

The code does not further define "coerced," and we must therefore look to general usage for its meaning. AS 01.10.040. "Coerce" means "to compel by threats or force," *Oxford American Dictionary* 120 (1980), and "compel" means "to use force or influence to cause (a person) to do something, to allow no choice of action.... A person compelled to do something is forced to act against his or her will." *Id.* at 128.

Whenever consent is the sole issue, an act of sexual intercourse or penetration is presumed and three related questions are presented. First, what was the attitude or motivation of the complaining witness regarding the act of intercourse and, more particularly, was the alleged victim induced to assent by fear of one of the specific results set out in the statute, *i.e.*, fear of violence, kidnapping, or injury to property? Second, what conduct did the defendant engage in to coerce the alleged victim? Third, did the defendant consciously disregard a substantial risk that the alleged victim failed to consent? *Reynolds*, 664 P.2d at 625.

When we examine these three issues, it is clear that the defendant's prior conduct is irrelevant to the first issue. It is relevant to the second issue to the limited extent that the state can prove that the defendant has a disposition or propensity to engage in forcible sexual relations and acted in accordance with that disposition or propensity by assaulting the complaining witness. The defendant's prior conduct is only marginally relevant to the third issue.

[2, 3] As to the first issue, the defendant's past conduct is irrelevant to the victim's state of mind unless the victim is aware of it. In the present case, it is not alleged that G.J. was aware of Velez's actions with S.F., or S.F. aware of Velez's actions with G.J.[9] Because a person's state of mind cannot be affected by matters of which they are in ignorance, it necessarily follows that Velez's conduct with S.F. was not relevant to show G.J.'s state of mind, and vice versa.

[4] The second issue turns on whether, and to what extent, Velez engaged in coercive behavior or engaged in conduct likely to induce fear in his victim if she denied his request for sexual intercourse. Velez's activities with other women were marginally relevant to show how he conducted himself with each of his victims, and to that extent

9. G.J. was apparently aware of Velez's actions with C.S., and S.F. was aware of Velez's actions with certain women in Illinois. This knowledge raises other issues which will be discussed later. It does not make G.J.'s experience cross-admissible with S.F.'s because they were in ignorance of each other's experiences.

corroborated their testimony about his conduct with them, but this is pure propensity evidence, absolutely forbidden by Evidence Rule 404(b). Thus, the state cannot offer evidence that Velez coerced S.F. to support an inference that he had a disposition to force his affections on unwilling women, and then infer from that disposition that he forced his affections on G.J. Despite its relevance, this evidence is absolutely precluded. *Lerchenstein*, 697 P.2d at 315–16.

The final issue concerns the defendant's *mens rea*. In context, this issue requires a determination of whether Velez's actions with G.J. were relevant to show that he was aware of the substantial risk that S.F. did not consent to sexual intercourse.[10] Arguably, Velez's past experiences with women who charged him with assault and battery and swore out restraining orders against him, particularly if the experiences were close in time to the charged offenses, might alert him to the risk that his dating behavior, if consistently and habitually pursued, might result in sexual intercourse with nonconsenting partners.[11] The evidence in this case might therefore minimal-

10. *Shane v. Rhines*, 672 P.2d 895, 899 n. 3 (Alaska 1983), and *Abruska v. State*, 705 P.2d 1261, 1263–65 (Alaska App.1985), seem to suggest that a person's past experience when arrested for driving while intoxicated might be relevant to show recklessness when the person became intoxicated and drove thereafter. *See also United States v. Fleming*, 739 F.2d 945, 949 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193, 105 S.Ct. 970, 83 L.Ed.2d 973 (1985). Past experiences of being arrested while driving drunk may alert one to the risk that one presents to others when one is intoxicated and drives a car. At the least, it provides notice of the community's disapproval of drinking and driving. *See Rhodes v. State*, 717 P.2d 422, 428 (Alaska App.1986).

11. A drunk driver always presents the same risk to the community at large. The risk does not depend on any particular potential victim's actions or responses. In contrast, Velez presented a particular risk to certain of his acquaintances under certain circumstances. An arrest for drunk driving focuses the arrested driver's attention on specific prohibited behavior. In contrast, the relationship between a charge of sexual assault and specific prohibited behavior is more ambiguous. The probative value of the reaction of Velez's past social companions to his sexual overtures to show notice that his conduct created a substantial risk of coercing nonconsenting partners into sexual activity depends upon how similar his conduct with each woman was. The issue comes down to the probability that Velez could on several occasions be involved in conduct which his partners viewed as rape without his becoming aware of its true nature. *See* 22 C. Wright & K. Graham, *supra* § 5245.

Wright and Graham appear to be correct when they point out that use of prior crimes to show knowledge or recklessness is somewhat cynical where no one would lack the knowledge in question. *See id.* § 5245 n. 15 at 497–98 (Supp.1987). In order to find that Velez's experiences with one woman should have alerted him to the risk of nonconsensual intercourse with another woman, the jury would have to find that Velez's actions toward each woman was essentially the same. Each woman, however, testified to a violent assault. Virtually, anyone should realize that such conduct would create a substantial risk that the resulting intercourse was coerced. If a jury believed each complaining witness' testimony that she was violently attacked, it is unlikely that it would, nevertheless, conclude that Velez did not realize the risk that his victims were not consenting to subsequent sexual relations. Thus, the real use of the evidence is to establish the coercive conduct, not the accompanying *mens rea*. Under such circumstances, to argue that the evidence should be admissible (to show *mens rea*) ignores the prohibition on character evidence to prove conduct contained in Alaska Evidence Rule 404(b).

Contrast the incidents in this case in which each alleged victim testified to overt coercive behavior punctuated with violence with a case in which each alleged victim denied that her assailant had overtly assaulted or threatened her. If a number of women, nevertheless, testified to common circumstances existing when they were alone with a common assailant which were innocuous viewed in isolation, but when considered together created an ominous atmosphere effectively terrorizing them into involuntary sexual activity, the evidence might have probative value outweighing its prejudicial effect. Any one victim's testimony might be dismissed by the jury as the product of an overactive morbid imagination. Viewed as a whole, however, the jury might infer that the defendant had successfully developed a procedure for communicating menace without overt violence. Such an inference would be highly probative of an otherwise ambiguous or even innocent appearing state of mind. The prejudice in such a hypothetical would be low because none of the victims would be testifying to any particularly outrageous behavior. It is only when all of the testimony is viewed in context that inferences adverse to the defendant will be drawn. This hypothetical may also serve to illustrate Wigmore's doctrine of "chance" discussed in n. 13, *infra*. The fact that any one or even two of the alleged victims was terrified by the circumstances might well be dismissed as a mistake on her part, but when three or more witnesses testify

ly satisfy the first prong of the *Lerchenstein* test and take the case out of Evidence Rule 404(b).

[5] I believe, however, that the probative value of this evidence to establish *mens rea* is more than outweighed by the potential for prejudice. A jury faced with multiple accusers may not be convinced that any one accuser is accurately describing his or her past experience, but may, nevertheless, weigh the numerous accusers' testimonies and conclude that the defendant deserves punishment. Consequently, the evidence cannot survive the balancing test required under Alaska Evidence Rule 403. In any event, S.F.'s reactions to Velez could not have put him on notice of G.J.'s lack of consent, because Velez encountered S.F. on November 23, although he allegedly assaulted G.J. nine days earlier on November 14, 1986.

[6] In order to justify denial of severance, S.F.'s and G.J.'s experiences with Velez must be cross-admissible. Because the foregoing analysis establishes that G.J.'s experiences were not admissible to prove S.F.'s complaints, severance was incorrectly denied even if S.F.'s experience was admissible to prove G.J.'s accusation. In reaching this conclusion, I recognize that Velez was charged with attempted sexual assault of G.J., not with sexual assault. The state was therefore under an obligation to prove Velez's specific intent, *i.e.*, that his motive or goal with regard to his restraint of G.J. was to sexually assault her.

Arguably, under *Davis*, Velez's experiences with other women might have been relevant to prove intent if there was any doubt regarding his intentions. When the evidence establishes an assault and battery, but the assailant's motive is unclear, evidence of prior acts may be relevant to show the assailant's intentions regarding the assault on the occasion in question. G.J.'s testimony, however, was unequivocal regarding whether Velez's motivations were sexual. She testified that he asked her to do a striptease for him, that he put his arm around her, and that he told her that he had not had a woman in a while and wanted someone to hold him. Velez told her, "Come on, I want it and you want it too." He pushed her down on the couch, laid on top of her, and attempted to separate her legs with his knees. Under the circumstances, if G.J. was telling the truth, Velez's intentions were blatantly sexual, and it was unnecessary to offer other evidence to clarify his intentions when he grabbed her.[12] To use the other evidence

that they were terrified by the defendant, it becomes more likely that there was some objective basis for their fear.

12. In *Moor*, we addressed the state's need for other-crimes evidence and said:

> In evaluating the probative value of the evidence, [in order to balance probative value against prejudicial effect under Evidence Rule 403] the court must consider whether or not there was sufficient other evidence introduced for the same purpose. If sufficient other evidence has been introduced, the evidence of other crimes must be excluded so that "[t]enuous or marginal probative value of prior crimes evidence [will] never be allowed to serve as an excuse for implanting prejudice in the minds of the jury."
>
> We do not suggest that, in order to be admissible, other crimes evidence must be strictly necessary to the prosecution's case in the sense that failure to admit the evidence would leave the case subject to a motion for directed judgment of acquittal.... We do stress, however, that the issue upon which the evidence is offered must be truly disputed in the case. Thus, where the prosecution wishes to use the evidence to rebut an anticipated defense, the trial court should seriously consider delaying the offer until the prosecution's rebuttal in order to ensure that the anticipated defense will in fact be raised.

709 P.2d at 506 (citations omitted).

The supreme court considered a related question in *Mullins v. State*, 608 P.2d 764 (Alaska 1980). Alaska Criminal Rule 45 excludes from computation of time before trial, the delay resulting from a continuance granted to the prosecution because of the "unavailability of evidence material to the state's case." The court construed "material" to mean "important or necessary to the prosecution's case," and not to be synonymous with "relevant." *Id.* at 767 (interpreting Evidence Rule 401). A similar analysis should lead us to conclude that evidence of a defendant's other bad acts should only be admitted when it is important or necessary to the prosecution's case. A.R.E. 403, 404(b). *See also State v. Lerchenstein*, 726 P.2d at 550 (Rabinowitz, C.J., dissenting) (in balancing prejudice against probative value, the prosecution's need for the evidence is an important consideration; if the government has a strong case on the

to corroborate her testimony that he violently assaulted her, is simply to rely on propensity evidence in violation of *Lerchenstein*.

One other issue may come up on retrial and should be addressed here. G.J. was permitted to testify that Velez told her about an incident involving his ex-girlfriend, C.S., in which Velez struck C.S. and forced himself upon her. She said he told her "he wanted her and he knew that she wanted him too." Velez allegedly told G.J. that his ex-girlfriend had accused him of rape and obtained a restraining order against him. These comments and Velez's aggressive behavior frightened G.J. This evidence was offered to explain G.J.'s motivation and fear of the defendant.

[7] Although resistance is no longer required to prove sexual assault, many jurors might disbelieve a nonresisting witness' testimony that sexual intercourse was nonconsensual. Thus, the evidence of Velez's statements to G.J. regarding C.S.'s experiences might be admissible to show that G.J. was frightened and would explain her lack of resistance and why she might engage in sexual relations without consenting to them.[13] As we stressed in *Moor*, however, evidence of other crimes or other bad acts may only be admitted when it is necessary to prove the point in issue. 709 P.2d at 506. G.J. testified that she vigorously resisted Velez's assault, and the evidence is undisputed that she was successful in this regard and that he left without engaging in sexual intercourse. Because G.J. did resist and successfully prevented sexual intercourse, there was no justification for offering evidence that would have explained her lack of resistance had she not resisted. I assume that this evidence will not come in on retrial.

CONCLUSION

It is relatively easy to demonstrate that use of other sexual assaults to rebut a consent defense cannot be reconciled with Alaska Evidence Rules 403 and 404(b). Those courts which admit such evidence in fact ignore the rule they purport to apply. To follow their lead does violence to the policy underlying the rules.[14]

disputed issue, the evidence of a prior bad act should be excluded more readily).

13. The trial court found the evidence admissible as an exception to Rule 404(b)—"proof of motive, intent, preparation, [or] plan." We addressed a similar holding in *Pletnikoff*, where we said:

> While there is some overlap in the permissible uses of other bad acts evidence, it is unlikely that evidence would ever be admissible in a given case for all the reasons mentioned in A.R.E. 404(b). *See Moor v. State*, 709 P.2d 498, 504–06 (Alaska App.1985). The trial court should therefore carefully evaluate the reasons offered for admissibility and, if it finds the evidence admissible, indicate the precise basis for its admission. A jury should not be told that certain evidence is admitted for all the purposes spelled out in A.R.E. 404(b), if most of those purposes are irrelevant to the case. *See* 22 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5240 at 479 (1978) (referring to a failure to differentiate between the various purposes permitted under Federal Rule of Evidence 404(b) as the " 'smorgasbord' approach to analysis of other crimes evidence").

Pletnikoff, 719 P.2d at 1042–43 n. 1.

14. In *State v. Willis*, 370 N.W.2d 193 (S.D.1985), the court justified admission of a prior sexual assault to rebut a consent defense and noted that when the criminal act is admitted, and innocence is claimed on the basis of some mitigating or exculpatory factor, intent becomes a material issue. *Id.* at 198 n. 6 (citing 2 J. Wigmore, *Evidence* § 307 at 207 (3d ed. 1940)). Under this rationale, whenever a defendant relies upon justification as an affirmative defense, the defendant's prior criminal history comes into evidence. *See* AS 11.81.300–.450 (general principles of justification). Thus, if the accused admits striking the victim, but claims self-defense, any prior nonprovoked assaults would be admissible to refute the defense. *See People v. Simon*, 184 Cal.App.3d 125, 228 Cal.Rptr. 855, 862–64 (1986) (Weiner, J., concurring). Alaska law would appear to be to the contrary. *See Keith v. State*, 612 P.2d 977, 984–86 & nn. 23–27 (Alaska 1980); *Lerchenstein*, 697 P.2d at 314–19.

The dissent, and to a lesser degree the concurrence, is troubled by the doctrine of chance. *See* C. Wright & K. Graham, *supra* § 5242; II J. Wigmore, *Wigmore on Evidence* § 302 (Chadbourn Rev. ed. 1974). That doctrine would appear inapplicable to this case for a number of reasons. If the defendant concedes or does not dispute all relevant conduct, but argues that the conduct and the result to which it leads occurred by accident or chance, then a significant number of other instances of identical conduct leading to identical results occurring in close proximity is relevant to disprove accident or

On the other hand, the state makes a compelling argument that problems of proof in date rape cases, coupled with the probative value of evidence of similar instances to corroborate the victim's testimony, warrant a special exception to Rule 404(b) similar to the exception recognized in *Burke* and *Soper*. I recognize the force of this argument. Considering our supreme court's consistent policy of restricting the use of other-crimes evidence, *see, e.g., Oksoktaruk v. State*, 611 P.2d 521 (Alaska 1980), I believe that this argument must be made to the supreme court, for it is that court that should adopt any exceptions to the policy established in Rules 403 and 404(b).[15]

The judgment of the superior court is REVERSED and this case REMANDED for new trial.

COATS, Judge, concurring.

I join in the decision to reverse Velez's conviction. My reasons for doing so are somewhat different from Judge Singleton's. I will therefore briefly set out my separate view of this case.

In *Lerchenstein v. State*, 697 P.2d 312 (Alaska App.1985), *aff'd*, 726 P.2d 546 (Alaska 1986), we discussed the interplay between Alaska Evidence Rules 404(b) and 403. The trial court's inquiry, we determined, in cases dealing with evidence of prior bad acts is two-fold. "First, the court must determine that the evidence sought to be admitted has relevance apart from propensity. Second, the court must determine that the nonpropensity relevance outweighs the *presumed highly prejudicial impact of the evidence.*" 697 P.2d at 315–16 (emphasis added).

Whenever a defendant defends a sexual assault case on the ground that the alleged victim consented, the defendant's intent at the time the defendant engaged in the sexual act becomes an issue in the case. In order to convict the defendant, the jury must find not only that the victim did not consent, but also that the defendant recklessly disregarded the victim's lack of consent. Therefore, Velez's attack on S.F. was relevant to show his reckless disregard of whether G.J. consented. The case involving G.J., however, really appears to be a question of whether the jury believed Velez or G.J. If the jury believed G.J., there was no question that Velez attempted to sexually assault her. If the jury believed Velez, there was no question that he did not. It is not inconceivable, of course,

chance, if common sense indicates that so many instances could not have happened coincidentally. Wigmore uses the example of three shots fired in succession in the vicinity of an individual. The first two narrowly miss; the third strongly suggests an intent to injure. *Id.* § 302 at 241. The propensity rule is not violated by the use of the evidence because the relevant results and the conduct causing those results is conceded and only the advertence or inadvertence of the accompanying conduct is in issue. For this reason Wigmore was prepared to permit evidence of similar contemporaneous events, even if the actor was anonymous. *Id.* § 303 at 247–48. When, however, the relevant conduct leading to the result in question is contested, there is a risk that the jury will use the evidence to infer propensity and infer that the defendant engaged in the prohibited conduct by committing the offense because the defendant engaged in similar conduct in the past. Such an inference is precluded by A.R.E. 404(b). In such cases, I believe that the prejudice flowing from admission of the evidence exceeds its probative value as a matter of law.

In a case of date rape when the defense is consent, part of the relevant conduct is an act of sexual intercourse which is normally conceded. As we have seen, however, although consent under Alaska law turns primarily on the respective states of mind of the alleged assailant and the alleged victim, it also includes consideration of the defendant's conduct as it might affect both parties' states of mind. In fact, in cases of alleged date rape the case will probably turn on whether the jury believes that the defendant engaged in coercive conduct because such conduct, if established, would readily permit the jury to infer that the alleged victim was, in fact, coerced and that the defendant knew or was aware of a substantial risk that the alleged victim was being coerced at the time intercourse occurred. In summary, when, as here, the only real issue is whether coercive conduct occurred, use of the law of chance to prove that such conduct occurred violates the "propensity rule." Rule 404(b).

15. There is a growing literature devoted to problems of proof in date rape cases. *See* Estrich, *Rape*, 95 Yale L.J. 1087 (1986); Note, *Culpable Mistake in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 Dick.L.Rev. 473 (1985).

that the jury might try to reconcile the two stories. They might then conclude that G.J. did not consent, but that she did not adequately convey her lack of consent to Velez. This seems unlikely, however, based on the facts of the case. G.J.'s testimony was very strong concerning her resistance and her communication of that resistance to Velez.

Balanced against this relevance is the presumed highly prejudicial effect of evidence of prior crimes. Faced with the testimony of three alleged victims, each claiming that Velez raped them, a jury would certainly tend to conclude that Velez was guilty because he stood accused by three different people. This use of the evidence to show propensity, however, is forbidden under Rule 404(b). It appears to me, therefore, that the relevance of the evidence of the two other sexual assaults was clearly outweighed by the prejudicial impact of that evidence. Accordingly, I join in the decision to reverse.[1]

BRYNER, Chief Judge, dissenting.

I am unable to agree with the majority of the court in this case. The majority's decision peremptorily overrides a sound exercise of trial court discretion and unnecessarily bars the admission of highly relevant evidence of criminal intent in a case where the issue of intent has affirmatively been placed in dispute by the defendant.

The pivotal issue in this case is the admissibility of evidence of other misconduct in a sexual assault case when the defendant affirmatively claims consent.[1] Evidence of three sexual assaults was admitted against Velez. The first occurred on October 24, 1985, when Velez raped his girlfriend, C.S. The second occurred approximately three weeks later, on November 14, 1985, when Velez attempted to rape G.J., a woman he met at an Anchorage bar. Nine days later, on November 23, 1985, the third assault occurred when Velez forcibly raped S.F., another woman he met at a bar. Velez was charged with attempted sexual assault in the first degree for the November 14 attack on G.J. and with sexual assault in the first degree for the November 23 attack on S.F.

The evidence at trial as to the first charged assault indicated that G.J. worked part-time as a dancer at a topless bar in

1. I have little difficulty distinguishing *Davis v. State*, 635 P.2d 481 (Alaska App.1981). Davis was charged with the kidnap and rape of M.M. Davis and Smith gave M.M. a ride after her car had broken down. Davis and Smith then drove M.M. off to a secluded area where Davis raped her. At trial, Davis argued consent. Smith was permitted to testify that on two prior occasions he and Davis had given women rides and Davis had sexually attacked the women. The testimony was admissible to show Davis' intent when he picked up M.M. and to show why Smith acted as he did. *Id.* at 484. The testimony placed the incident with M.M. in a context. There was little danger that the jury would convict Davis because he was being charged in three separate incidents by three separate victims because the other victims never testified. The question in *Davis* came down to whether the jury believed Smith and M.M., or believed Davis. In *Davis*, the testimony concerning the prior incidents merely tended to flesh out Smith's version of the story.

1. Although the issue is couched in terms of improper joinder, *see Stevens v. State*, 582 P.2d 621 (Alaska 1978), and *Johnson v. State*, 730 P.2d 175 (Alaska App.1986), it is clear that Velez could have suffered no prejudice from misjoinder if evidence of the two assaults with which he was charged would have been cross-admissible in separate trials and, further, if evidence of his initial, uncharged assault would have been admissible in both cases. *See, e.g., State v. York*, 50 Wash.App. 446, 749 P.2d 683, 687–88 (1987). Our holding in *Johnson* is not to the contrary. *Johnson* upholds the right of automatic severance when cases are joined solely on the basis of the similarity of the offenses charged. Implicit in the rule of automatic severance adopted in *Johnson* is the recognition that admissibility of evidence of other misconduct will often depend on the specific context in which the evidence is offered at trial, and that it may therefore frequently be difficult to predict cross-admissibility with accuracy in advance of trial. Nothing in *Johnson* purports to establish a rule of *per se* reversal in the event of improper joinder or to alter the usual rules governing harmless error. When a trial court errs in denying automatic severance and it appears, following the trial, that evidence of each of the joint charges would properly have been admissible in a separate trial on the others, the error in failing to grant an automatic severance will be harmless unless the defendant establishes some other specific prejudice stemming from the misjoinder. Here, Velez has shown no specific prejudice apart from the possible lack of cross-admissibility.