

Rule 404(b): The Requirement of Temporal Proximity

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As I noted in my last post on Rule 404(b) evidence, even when the evidence is relevant to an issue other than propensity or disposition, admissibility is “constrained by the requirements of similarity and temporal proximity.” *State v. Beckelheimer*, ___ N.C. ___, 726 S.E.2d 156, 159 (2012) (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002)). In this, my final post on Rule 404(b) evidence, I’ll explore the requirement of temporal proximity.

Temporal proximity is part of the analysis because, as a general rule, the probative value of the other crime, wrong, or act diminishes as the event becomes more remote. *See, e.g.*, *State v. Barnett*, ___ N.C. App. ___, 734 S.E.2d 130, 134 (2012). There are no bright line rules regarding temporal proximity for purposes of Rule 404(b) admissibility. *State v. Maready*, 362 N.C. 614, 623-24 (2008). *Compare, e.g.*, *State v. Jones*, 322 N.C. 585, 587–91 (1988) (in a child sex case, a seven-year gap between the last act on the witness and the first act on the victim made the event too remote to show common plan or scheme), *with State v. Carter*, 338 N.C. 569, 588–89 (1994) (in a murder case, an eight-year gap between a prior assault and the homicide at issue did not make the incident too remote for purposes of establishing identity). The North Carolina Supreme Court has instructed that remoteness must be considered in light of the specific facts of each case. *State v. Beckelheimer*, ___ N.C. ___, 726 S.E.2d 156, 160 (2012).

The proffered purpose of the 404(b) evidence affects the temporal proximity analysis. *Beckelheimer*, 726 S.E.2d at 160. For example, remoteness in time may be significant when the 404(b) evidence is introduced to show that the crime arose out of a common scheme or plan. *State v. Lloyd*, 354 N.C. 76, 91 (2001); *State v. Carter*, 338 N.C. 569, 588 (1994); *State v. Mobley*, 200 N.C. App. 570, 577 (2009). On the other hand it may be less significant when the evidence is proffered to show

- modus operandi, *Beckelheimer*, 726 S.E.2d at 160;
- state of mind, such as malice, *State v. Maready*, 362 N.C. 614, 624 (2008);
- motive, *State v. Locklear*, 363 N.C. 438, 448 (2009); *State v. Haskins*, 104 N.C. App. 675, 682 (1991); or
- lack of accident, *Locklear*, 363 N.C. at 448.

In these instances, remoteness goes to the weight of the evidence rather than to its admissibility. *Beckelheimer*, 726 S.E.2d at 160; *Locklear*, 363 N.C. at 448; *Maready*, 362 N.C. at 624.

When the 404(b) acts occurred some time ago but show a pattern of similar activity over time, courts have found that the passage of time can actually reinforce rather than undercut the value of the evidence. *State v. Shamsid-Deen*, 324 N.C. 437, 445 (1989) (prior sexual acts occurring over a 20-year period were not too remote to be considered as evidence of defendant’s common scheme to abuse the victim sexually; “[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than to disprove the existence of a plan”); *State v. Khouri*, ___ N.C. App. ___, 716 S.E.2d 1, 8-9 (2011) (in a child sex case, 404(b) evidence that the defendant sexually assaulted another child from 2001 to until she turned eighteen in 2007 was admissible where the defendant’s sexual assault on the child victim at issue began in 2007; once the defendant discontinued his acts on the first girl, he initiated contact with the victim). This rule applies with special force in second-degree murder cases where the 404(b) evidence is a pattern of prior motor vehicle offenses being offered to show malice. *State v. Maready*, 362 N.C. 614, 622-24 (2008) (no plain error occurred when the trial judge admitted 404(b) evidence of the defendant’s six

prior DWI convictions where four occurred in the sixteen years before the events at issue, including one within six months of the event at issue; the convictions “constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state”). However, that does not mean that any combination of prior motor vehicle offenses will be admissible as part of a pattern of behavior to show malice for purposes of second-degree murder. *See, e.g., State v. Davis*, 208 N.C. App. 26, 43-46 (2010) (the trial court committed prejudicial error by admitting evidence of three of the defendant’s four prior DWI convictions to show malice; three of her convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred two years prior; given the gap between the older convictions and the more recent one, there was not a clear and consistent pattern of criminality and the older convictions were too remote to be admissible).

The age of a conviction may be discounted for periods when the defendant’s activity was interrupted by, for example, a prison sentence or lack of access to victims. *See, e.g., State v. Barnett*, ___ N.C. App. ___, 734 S.E.2d 130, 134 (2012) (five year gap between incidents of rape was explained by the defendant’s lack of access to the victim for three years); *State v. Brooks*, 138 N.C. App. 185, 200 (2000) (17 year gap between incidents of assaults on his wives was explained by the defendant’s incarceration and lack of marital discord); *State v. Frazier*, 121 N.C. App. 1, 11 (1995) (gaps between the defendant’s acts of sexual abuse on children were explained by the defendant’s lack of access to victims). However, in order for a period of time to be excluded from the analysis, the proponent must introduce competent evidence of the period of the interruption. *State v. Gray*, 210 N.C. App. 493, 509 (2011) (declining to toll the time period during the defendant’s incarceration because the State failed to offer competent evidence as to the length of his incarceration); *State v. Delsanto*, 172 N.C. App. 42, 51-52 (2006) (State failed to establish interruption).