Evidence—Admitting Prior Conviction for Drug Possession in Later Prosecution for Drug Distribution is Reversible Error—*United State v. Lee*, 724 F.3d 968 (7th Cir. 2013)

In a criminal trial, Federal Rule of Evidence 404(b) (FRE 404(b)) prohibits the prosecution from using a defendant's other crimes, wrongs, or bad acts to prove the defendant's propensity to commit the charged offense.[1] Courts, in their discretion, may admit other bad acts to prove something other than propensity, such as knowledge, intent, or absence of mistake.[2] In *United States v. Lee*,[3] the United States Court of Appeals for the Seventh Circuit considered whether it was an abuse of discretion and reversible error to admit a prior drug possession conviction against a defendant in a trial for drug distribution.[4] The Seventh Circuit held that the federal district court abused its discretion by admitting a prior possession conviction because it was probative "only in the sense that it established his propensity" to commit a similar crime.[5]

In 2010, a federal grand jury indicted Eddie Lee, Darin Hurt, Anthony Clardy, and Christopher Holcomb for their roles in a drug distribution ring.[6] One of Lee's customers, a confidential informant named Roderick Pickett, led

1. *See* FED. R. EVID. 404(b)(1) (describing prohibited use of character evidence); *see also* Jason Tortora, Note, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493, 1496 (2013) ("Prior bad acts evidence is any evidence or testimony regarding acts by the defendant that is not included in the conduct which brought about the criminal charges or civil claim.").

2. *See* FED. R. EVID. 404(b)(2) (permitting certain uses of other bad acts evidence). Other bad acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* While the advisory committee notes to FRE 404(b) state that "[n]o mechanical solution is offered" in determining when to admit evidence of other bad acts, a trial judge must determine "whether the danger of undue prejudice outweighs the probative value of the evidence." FED. R. EVID. 404 advisory committee's note. That is, FRE 404(b) does not allow for automatic admission of other bad acts evidence simply because it can be used to establish something other than the defendant's propensity to commit bad acts; the evidence must still survive the Federal Rule of Evidence 402 relevancy requirement and the unfair prejudice balancing test of Federal Rule of Evidence 403. FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."); FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

3. 724 F.3d 968 (7th Cir. 2013).

4. *See id.* at 970.

5. *See id.* at 975 (agreeing evidence only relevant as proof of defendant's propensity, making it impermissible).

6. *Id.* at 970-71. Of the four defendants, Lee was the only one to go to trial. *Id.* at 971. The indictment charged Lee in count one with conspiring with Hurt to distribute and possess, with the intent to distribute, more than fifty grams of crack cocaine. *Id.* In count four, Lee faced an additional charge of possession with the intent to distribute more than fifty grams of crack cocaine. *Id.*

narcotics agents to Hurt, Holcomb, and Clardy; Lee himself was subsequently caught when a distribution-sized quantity of crack was found in the car he was driving.[7] The government alleged that Lee supplied Hurt with the distribution-sized amounts of crack cocaine.[8] In the fall of 2009, Pickett videotaped two controlled purchases of crack cocaine from Hurt.[9] The videos did not capture Lee discussing or handling the cocaine sale, and surveillance agents did not see Lee transact narcotics business with Hurt or Pickett.[10]

Then, on December 2, 2009, a sheriff's deputy pulled Lee over for a suspended registration on the car he was driving.[11] After Lee explained the car was not his, deputies searched it at the alert of a drug-detecting dog.[12] Despite a "fairly thorough" search, deputies did not find any drugs; nonetheless, deputies impounded the car for its suspended registration.[13] The same day, narcotics agents stopped Lee again, this time as part of the narcotics investigation.[14] After another unsuccessful search, agents let the men go with a warning, but not before Lee told the agents that deputies pulled him over earlier and impounded his car.[15] The agents searched the impounded car and found a black plastic bag in the trunk of the car filled with 210 grams of crack cocaine divided into distribution quantities.[16]

The government tried Lee twice; the first trial ended in a mistrial when the jury was unable to reach a verdict on both the conspiracy and possession charges.[17] Lee presented no witnesses, arguing that neither the car nor the cocaine was his and that he was, in effect, an innocent bystander.[18] At the second trial, the government moved under FRE 404(b) to admit Lee's prior

7. 724 F.3d at 970-71.

8. *Id.*

9. *Id.*

10. *See id.* at 972. Pickett's camera captured Lee sitting in the yard of a home that Hurt owned down the alley from Hurt's residence. *Id.* The video also showed Lee's car, a Ford Taurus, parked nearby. *Id.* On camera, Lee and Pickett discussed chess and home siding, however, neither mentioned cocaine. *Id.*

11. 724 F.3d at 972.

12. *Id.*

13. *Id.* The deputy that pulled Lee over, Sherriff's Deputy Jason Tuttle, described the trunk of the car as "loaded down" with "just a lot of junk, really." *Id.* Another deputy lifted the spare tire in the trunk, but did not remove it, and did not see anything underneath it. *Id.*

14. *Id.* After deputies impounded the car, Lee called Hurt to tell him he had been pulled over and to ask for a ride. *Id.* Hurt called Pickett and asked him to pick up Hurt and Lee. *Id.* Before picking them up, Pickett called drug enforcement agents and told them he would be picking up Hurt and Hurt's supplier. *Id.*

15. 724 F.3d at 972.

16. *Id.* at 973. Before searching the car, agents walked another drug-detecting dog around the car that again alerted to the scent of drugs. *Id.* The agents obtained a warrant to search the car. *Id.* The subsequent search, which took place approximately eight hours after the first traffic stop, yielded a plastic bag underneath the spare tire. *Id.* Agents later discovered a latent fingerprint on the bag matching Lee's. *Id.* Inside the bag, agents found seven smaller bags of crack cocaine and one smaller bag of powdered cocaine. *Id.* This cocaine served as the basis for the charge of possession with intent to distribute more than fifty grams of crack cocaine. *Id.*

17. *Id.*

18. *Id.* at 973.

conviction for cocaine possession.[19] The government argued that the prior conviction was probative of Lee's knowledge, intent, and absence of mistake, and that Lee had placed these matters in dispute at the first trial.[20] The district court granted the government's motion without an on-the-record evaluation of why it admitted the prior conviction against Lee.[21] The Seventh Circuit held that the district court abused its discretion by admitting the prior conviction and also held the error was not harmless, resulting in a new trial for Lee.[22]

The exclusion of a defendant's prior bad acts has a longstanding history in American law.[23] Courts and commentators justify the exclusion because they fear a jury will place too much emphasis on the defendant's past crimes or bad acts, punishing the defendant for those prior misdeeds or overestimating their probative value.[24] The tradition of excluding other bad acts, however, did not

19. 724 F.3d at 973.

20. *Id.* at 974.

21. *Id.* at 977. The district court, after hearing arguments, granted the government's motion stating only that "[t]he bottom line is that the government's motion in limine is going to be allowed and the defendant's motion in limine is going to be denied regarding the Rule of Evidence 404(b). That will be permitted." *Id.* at 974. In its opening at the second trial, the government explained to the jury that the prior conviction

> will be presented not to show that just because he did it before means he did it this time, it will be presented to you for the purpose of establishing his intent to distribute the crack cocaine that he possessed, his knowledge that that cocaine was in the trunk and not there by happenstance, and to prove that this was not just some mistake that Mr. Lee was at the wrong place at the wrong time.

Id. The district court also instructed the jury that they could use evidence of Lee's prior conviction on the issues of knowledge, intent, and absence of mistake but for no other purpose. *Id.* The government again addressed Lee's prior conviction in its closing argument, explaining to the jury that it was "relevant to show his knowledge that cocaine is a controlled substance. It is relevant to show his intent to possess cocaine at a later date. And it is surely relevant to show that he's not just some fool caught up in overzealous law enforcement." *Id.*

22. *Id.* at 983.

23. *See* United States v. Davis, 726 F.3d 434, 440 (3d Cir. 2013) (noting American courts have long excluded evidence of prior bad acts). The American case most cited for the proposition that prior bad acts evidence is generally inadmissible against a defendant is *People v. Molineux*, 61 N.E. 286 (N.Y. 1901). In that case, the court noted that "the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged." *Id.* at 293. Nineteenth century American cases also recognized a general bar to the admissibility of character evidence. *See, e.g.*, Commonwealth v. Hardy, 2 Mass. (1 Tyng) 303, 317 (1807) (recognizing exception to general bar against character evidence by allowing defendant to introduce character evidence); Darling v. Town of Westmoreland, 52 N.H. 401, 406-07 (1872) (criticizing bar against character evidence); Walker v. Commonwealth, 28 Va. (1 Leigh) 574, 576 (1829) (noting prosecution barred from using other bad acts evidence unless defendant places character in issue).

24. *See* Michelson v. United States, 335 U.S. 469, 475-76 (1948) ("The State may not show [a] defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."); *see also* Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 828 (2001) (stating risks of jury's misuse of other bad acts evidence).

result in a complete ban on other acts evidence.[25] Courts will often admit evidence of a defendant's other bad acts so long as it serves a purpose other than proving the defendant's propensity to commit the charged offense.[26]

Before Congress enacted the Federal Rules of Evidence in 1975, federal courts varied in their approach to the rule against other bad acts evidence; some courts used an inclusionary approach, while others used an exclusionary approach.[27] FRE 404(b) seemed to settle the matter, favoring a general exclusion of other bad acts evidence unless used for a specific, nonpropensity purpose.[28] Relatively uncontroversial at the time of its passage, FRE 404(b) became one of the most cited rules of evidence on appeal.[29] Much of the controversy surrounds the problem of defining what is a nonpropensity purpose.[30] Debate continues in the federal appellate courts regarding whether it is correct to admit a prior possession conviction to prove intent to distribute.[31]

25. *See* Kenneth J. Melilli, *The Character Evidence Rule Revisited,* 1998 BYU L. REV. 1547, 1560 (1998) (suggesting no change in admissibility of other bad acts evidence).

26. *See* People v. Molineux, 61 N.E. 286, 293 (N.Y. 1901) (noting exceptions to exclusion of other bad acts evidence); *see also* David Culberg, Note, *The Accused's Bad Character: Theory and Practice*, 84 NOTRE DAME L. REV. 1343, 1358-64 (2009) (listing areas where prior acts may be admitted and noting potential for abuse in each).

27. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. as Federal Rules of Evidence); United States v. Long, 574 F.2d 761, 765-66 (3d Cir. 1978) (observing division among courts admitting prior bad acts evidence); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1033 (1938) (recognizing transition from presumption of admissibility of character evidence to nineteenth century presumption of inadmissibility).

28. *See supra* notes 1-2 and accompanying text (discussing admission of other bad acts evidence); *see also* Melilli, *supra* note 25, at 1559 (observing American courts shift to exclusionary approach).

29. *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(B)*, 78 TEMP. L. REV. 201, 209-11 (2005) (recognizing FRE 404(b) as most contested Federal Rule of Evidence despite uncontroversial history); *see also Hearings Before the Special Subcomm. on Reform of the Fed. Criminal Laws of the Comm. on the Judiciary*, 93d Cong. 8343 (1973) (statement of Henry Friendly, C.J., U.S. Court of Appeals for the Second Circuit) ("Does [FRE 404(b)] adopt the 'federal rule' allowing evidence of other crimes except when offered only to show the defendant is a bad man, or the rule requiring that these crimes show some particular trait relevant to the charge? The rule seems to walk both sides of the street. It will provide a bountiful source of appeals and possible reversals on a subject where the federal law is now reasonably clear.").

30. *See* David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1175-76 (1998) (summarizing courts' trouble distinguishing between permissible and impermissible uses of other bad acts evidence); Reed, *supra* note 29, at 215 (indicating judicial treatment of other bad acts evidence "uneven at best").

31. *See* United States v. Davis, 726 F.3d 434, 445 (3d Cir. 2013) ("We join other circuits in declaring that a possession conviction is inadmissible to prove intent to distribute."); United States v. Santini, 656 F.3d 1075, 1078 (9th Cir. 2011) (holding conviction for "simple possession" not probative of later importation of marijuana charge); United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002) (explaining possession of cocaine conviction not probative of intent to distribute cocaine five months earlier), *aff'd en banc*, 75 F. App'x 474 (6th Cir. 2003); United States v. Monzon, 869 F.2d 338, 344-45 (7th Cir. 1989) (holding evidence of marijuana possession not probative of intent to distribute cocaine). *But see* United States v. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997) (holding prior possession of drug arrest admissible in later trial for intent to distribute); United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997) (holding admitting prior personal drug use to prove intent in subsequent prosecution for distribution appropriate); United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993) (holding prior conviction for possession probative in trial for conspiracy to

In one such appeal, the Seventh Circuit found in *United States v. Miller* that the district court improperly admitted a defendant's 2000 conviction for possessing cocaine with intent to distribute under FRE 404(b) in a later trial for the same offense where the defendant claimed the drugs were not his.[32] The court rejected the government's contention that the defendant somehow placed his intent at issue during trial because the defendant's argument "that the drugs were not his, has nothing to do with whether he intended to distribute them."[33] In reversing the conviction, the court stated that district courts should pay closer attention to the reasons why a prior drug conviction is offered because the "admission of prior drug crimes to prove intent to commit present drug crimes has become too routine."[34]

In *United States v. Lee*, the Seventh Circuit held that it is an abuse of discretion and reversible error to admit a prior possession conviction into evidence during trial for possession with intent to distribute when the defense argues complete innocence.[35] The court began its analysis by noting its four-part test for the admission of a defendant's uncharged bad act.[36] After reviewing its previous FRE 404(b) precedent in *Miller*, the court lamented over the trial judge's failure to engage in an on-the-record evaluation of the reasons the government offered the prior conviction, the relevance of the conviction, or the weight of the conviction's probative value balanced against its risk of unfair prejudice.[37] The circuit court noted that the trial judge's failure to do so was "unfortunate" for two distinct reasons: an on-the-record evaluation more easily facilitates appellate review of a trial court's evidentiary decisions, and it also ensures that a trial court is actually abiding by the requirements of FRE 404(b) by evaluating the relevance and risk of unfair prejudice of the other bad acts evidence.[38]

distribute).

32. *See* United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012) (holding prior drug distribution conviction improperly admitted). At trial, the defense "never argued that the bags of drugs . . . were not intended for distribution. His defense at trial was instead that, despite the proximity to his personal effects, the drugs were not in fact his and he was not staying in the room where the drugs and pistol were found." *Id.* at 696.

33. United States v. Miller, 673 F.3d 688, 698 (7th Cir. 2012) (noting defense based argument in complete innocence).

34. United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012) (stating concern regarding overuse of prior drug crimes to prove intent); *see also* Melilli, *supra* note 25, at 1563-64 (recognizing routine admission of drug crimes despite little distinction between propensity and intent to sell).

35. *See* 724 F.3d at 970.

36. *See id*. at 975 ("[E]vidence of a defendant's uncharged, wrongful act must satisfy four criteria in order to be properly admitted: (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) the evidence is sufficient to support a jury finding that the defendant committed the other act; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.").

37. *See id.* at 977 (disagreeing with district court's admission of prior conviction).

38. *See id.* (discussing district court's evidentiary analysis).

The court then dismissed the government's contention that admitting Lee's prior possession conviction was relevant and probative of his intent to distribute the cocaine or knowledge of the cocaine distribution trade.[39] The court observed that Lee's conviction five years before was for possession of crack cocaine, not possession with intent to distribute, and it was not obvious how this conviction would shed light either on Lee's knowledge the drugs were in the trunk or his intent five years later.[40] While there may have been a permissible chain of inferences the jury could use to establish Lee's intent from the prior conviction, the government never established it.[41] The Seventh Circuit then noted some instances where prior bad acts may be properly admitted when a defendant asserts an innocent-bystander defense, but it made clear that "neither the nature of a charge nor the nature of a defense automatically renders proof of a defendant's other crimes or bad acts admissible."[42]

The Seventh Circuit appropriately admonished the trial court's failure to engage in an on-the-record evaluation of why the government offered Lee's prior conviction for drug possession, the relevance of that conviction, or the weight of the prior conviction's probative value balanced against its prejudicial effect.[43] Because the potential misuse of a defendant's prior misdeed by a jury is high, and the consequences of a criminal conviction are so serious, the appellate court reasoned that the district court had overstepped its discretion and was required to articulate why the government was not using Lee's prior conviction for propensity purposes.[44] Similarly, the court was correct to address the government's failure to articulate why it was offering the prior conviction beyond reciting some of the proper purposes found in FRE 404(b).[45] By reminding the district court and prosecution of the care required when admitting other bad acts, the Seventh Circuit conveyed a valuable message:

39. *See* 724 F.3d at 979 (rejecting government's argument).

40. *See id.* at 977-78 (questioning district court's rationale); *see also* Culberg, *supra* note 26, at 1358 (observing "knowledge" often abused in trials to impermissibly admit other bad acts evidence).

41. *See* 724 F.3d at 979; *see also* United States v. Sampson, 980 F.2d 883, 887 (3d Cir. 1992) ("If the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed drug offenses before, he therefore is more likely to have committed this one.").

42. 724 F.3d at 981. ("At least some of the cases in which we have cited an innocent-bystander defense as justification for the admission of Rule 404(b) evidence may be distinguished on the ground that the evidence was indeed probative of the defendant's knowledge or intent in a non-propensity way."); *see also* United States v. Vargas, 552 F.3d 550, 555-56 (7th Cir. 2008) (holding admission of prior transportation of concealed drugs appropriate to refute innocent-bystander defense); United States v. Kreiser, 15 F.3d 635, 640-41 (7th Cir. 1994) (holding admission of prior drug transactions appropriate to establish knowledge and refute innocent-bystander defense).

43. *See* 724 F.3d at 977 (rejecting district court's analysis).

44. *See* United States v. Davis, 726 F.3d 434, 442 (3d. Cir. 2013) (indicating district court's responsibility in articulating reason for admitting other bad acts evidence).

45. *See* 724 F.3d at 979 (noting government's failure to articulate permissible use of prior drug possession).

While prior drug possession convictions may be admissible in later trials for drug distribution, it is never automatic.[46]

The court also correctly noted that even where intent is genuinely at issue, a possession conviction does not automatically imply an intent to distribute.[47] In relying on its decision in *Miller*, the court drew the appropriate distinction that possession and distribution are distinct acts: A prior possession conviction has no bearing on the defendant's intent five years later.[48] By requiring a tighter inferential link between a possession conviction and a later distribution charge, the court took the right step in preventing the prosecution from abusing FRE 404(b) when "intent" is nominally at issue.[49]

Most importantly, the Seventh Circuit correctly determined that there was actually no genuine dispute over Lee's intent, knowledge, or absence of mistake that would make his prior conviction relevant.[50] When the government wants to use a prior bad act as evidence against a defendant, it must demonstrate that it has a proper FRE 404(b) purpose by showing a specific reason why that evidence is relevant to the current prosecution.[51] The defendant stating that he is not guilty is not enough to establish that intent, knowledge, or mistake are at issue.[52] The court properly reaffirmed this standard by rejecting the idea that an innocent bystander defense will inevitably allow the prosecution to use other bad acts against a defendant who claims total innocence.[53]

In *United States v. Lee*, the Seventh Circuit examined whether it was reversible error to admit a defendant's prior drug possession conviction in a later trial for drug distribution. Despite the broad discretion district courts are

46. *See id.* at 981 (recognzing other acts evidence never automatically admissible); *see also* United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013) ("[U]se of prior-acts evidence requires care from prosecutors and judges alike."); United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012) ("Rule 404(b) does not provide a rule of automatic admission whenever bad acts evidence can be plausibly linked to 'another purpose,' such as knowledge or intent, listed in the rule.").

47. *See* 724 F.3d at 979.

48. *See id.* (noting prior conviction sheds no light on defendant's future intent); United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002) (stating subsequent possession of drugs sheds no light on intent five months earlier), *aff'd en banc*, 75 F. App'x 474 (6th Cir. 2003).

49. *See* United States v. Miller, 673 F.3d 688, 698 (7th Cir. 2012) ("[I]ntent is the exception most likely to blend with improper propensity uses.").

50. *See* 724 F.3d at 980. The court stated "Lee's defense did not specifically place his knowledge or intent in dispute by contending, for example, that he did not know anything about how the cocaine trade worked or that while he possessed the cocaine he had no intent to sell it." *Id.*

51. *See* United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013) (stating government required to show appropriate purpose for other bad acts evidence beyond propensity).

52. *See* United States v. Miller, 673 F.3d 688, 698 (7th Cir. 2012) (observing defendant's claim of innocence insufficient to put intent at issue for FRE 404(b) purposes).

53. *See* 724 F.3d at 982. The court noted that "to the extent that any of our prior cases conveyed an impression that an innocent-bystander defense necessarily opens the door to evidence of a defendant's prior bad acts, it should by now be clear that any such impression is mistaken."); *see also* United States v. Miller, 673 F.3d 688, 698 (7th Cir. 2012) (stating intent not automatically at issue under FRE 404(b) when defendant pleads not guilty).

given in admitting prior bad acts, the court properly ruled that admitting this evidence was an abuse of discretion because the district court did not sufficiently evaluate the purpose of the prior conviction or balance its probative weight against the possibility for unfair prejudice. By reversing the conviction, the Seventh Circuit provided a valuable reminder that no matter how often prior drug convictions are admitted into evidence, each instance requires that the prior bad act be evaluated to ensure its relevance, probative value, and fairness to the defendant.

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