

**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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Appeal from the Michigan Court of Appeals  
Before: Zahra., P.J., and O'Connell, and K. F. Kelly, JJ.

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**PEOPLE OF THE STATE OF MICHIGAN,**  
Plaintiff-Appellant,

**Supreme Court No. 139146**  
**Court of Appeals No. 279699**  
**31<sup>st</sup> Circuit Court No. K-07-240-FH**

VS

**FREDERICK JAMES MARDLIN,**  
Defendant-Appellee.

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**APPELLANT'S BRIEF ON APPEAL**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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## **BASIS OF JURISDICTION**

This Court's jurisdiction to hear this matter is pursuant to Const 1963, art 6, §4 and MCR 7.301(A)(2).

## **STATEMENT OF QUESTIONS PRESENTED**

Defendant claimed the instant fire was accidental. Defendant experienced four other unexplained fires in the 12 years preceding this fire. The doctrine of chances provides a non-character basis for admitting evidence of the other fires when the objective improbability of so many accidents befalling the Defendant reasonably leads to the conclusion that one or some of the incidents were not accidents.

### **DID THE TRIAL COURT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF DEFENDANT'S OTHER FIRES?**

Plaintiff-Appellant answers this question "NO."

Defendant-Appellee would answer this question "yes."

The trial court answered this question "NO."

## **STATEMENT OF FACTS**

Defendant was charged with one count of arson of a dwelling house and one count of arson of insured property.<sup>1</sup> Following a seven day jury trial, the Honorable Daniel J. Kelly presiding, he was convicted as charged on both counts.<sup>2</sup> Defendant was sentenced to concurrent terms of three to 20 years for the arson of a dwelling house and one to ten years for the arson of insured property.<sup>3</sup>

### **Limited Statement of Facts**

As noted, this case was a seven day jury trial. The trial transcript alone is almost 1500 pages long, the majority of which is testimony. This Court granted leave to appeal on a very limited question of “whether evidence provided under the ‘doctrine of chances’ may be use to establish that a fire did not have a natural or accidental cause, and whether more than the mere occurrence of other fires involving the defendant’s property is necessary for admission of such evidence.”<sup>4</sup> Accordingly, this statement of facts is limited to that portion of the record that concerns the admission of the evidence of the other fires. If the Court desires more information on the facts and circumstances surrounding the instant fire and the subsequent investigations by the State Police and Defendant’s insurance provider, more detailed statements of fact are

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<sup>1</sup>Information dated January 30, 2007.

<sup>2</sup>Appendix [hereinafter “App”] 81a-82a.

<sup>3</sup>App 83a-84a.

<sup>4</sup>Order dated September 16, 2009.

provided in the original briefs in the Court of Appeals and in the People's application for leave to appeal.

### **The Other Acts Evidence - Pretrial**

Prior to the trial date, the People filed a notice of intent to use other acts evidence pursuant to MRE 404(b). The specific acts were: the April 16, 2006, fire at Defendant's residence for which he made an insurance claim; a 1994 fire involving a 1990 Ford pick up truck for which Defendant filed an insurance claim; and a 2001 fire involving a 1989 Ford Econoline van that spread to Defendant's residence. The evidence was offered on the basis of proving Defendant's motive, scheme, and intent.<sup>5</sup> Defendant objected on the grounds that the other acts were not offered for a proper purpose under MRE 401(b) and any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury and were not relevant under MRE 401 and MRE 402.<sup>6</sup>

The People responded to Defendant's argument, noting that in the 2001 fire Defendant did not have insurance on the mobile home that was involved, but did have insurance on the vehicle that was the initial source of the fire and that an insurance claim was made and paid for damage to that vehicle. As to the 1994 fire involving the 1990 Ford pick up, Defendant had reported that his father purchased the truck for him and

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<sup>5</sup>Notice of Intent to Use Other Acts Evidence dated April 12, 2007 and exhibits attached thereto, App 21a-29a..

<sup>6</sup>Defendant's Motion In Limine and Brief in Support dated May 10, 2007, App 20a-38a..

he was making payments at the time of the fire.<sup>7</sup> The People also noted that Defendant was on probation in Macomb County at the time of the fire and owed significant restitution for a larceny by false pretenses and that his mortgage and water bill were not current at the time of the fire. Defendant was not working at the time, but was receiving workers' compensation payments.<sup>8</sup>

The People argued that the other fires, even though no investigations were done, were proof of motive and intent. There were also relevant to show Defendant's scheme, system, or plan of setting fires and making insurance claims. There were also relevant to show lack of mistake or accident in that Defendant had suffered four fires<sup>9</sup> within 12 years.<sup>10</sup>

At the hearing on Defendant's motion, the People argued that intent, as an element of the crimes charged, specifically that the three fires listed in the notice all involved insurance claims that benefitted Defendant, including the 1994 fire where, though the actual claimant was Defendant's father, Defendant was the de facto owner of the truck.<sup>11</sup> The People also argued that these three fires were evidence of a plan

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<sup>7</sup>People's Answer to Defendant's Motion In Limine dated May 18, 2007. App 39a-45a.

<sup>8</sup>Id.

<sup>9</sup>Actually, five fires, but the evidence of the fifth fire, involving a vehicle belonging to his employer at the time did not come out until trial. See below at note XX1.

<sup>10</sup>Id.

<sup>11</sup>App 49a-50a

or a scheme.<sup>12</sup> Finally, the People argued that the number of fires and the time over which they occurred went to show that the last fire was not an accident.<sup>13</sup>

In finding the evidence admissible, the trial court said,<sup>14</sup>

404(b) evidence has been the subject matter of many, many decisions over the last five years. And the general trend of the cases is simply to admit these acts if they can be shown to be logically relevant under the theory that they show a scheme, a plan, or a system. And there are theories that would tend to lend credence to this, if not credence to the fact that this was not an accidental fire.

Insurance fraud may obviously be one factor, but may also be equally plausible that it's a fire bug. That's not my call to make. The question whether or not that's the type of evidence that the jury should be allowed to at least be made aware of, and I believe under the existing law of this state, under the facts of this case, simply in light of the similarities to these facts with the cases cited by the prosecutor as *People versus Williams*,<sup>[15]</sup> it shows the four cases, that it's appropriate to present to a jury, and *they will be able to weigh all these factors, whether or not those prior fires are, were not accidental fires or not. Their existence is a factor that the jury is entitled to be at least made aware of.*

The trial court's decision was implicitly based on the doctrine of changes, that the number of Defendant's accidental fires was too many accidental fires.

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<sup>12</sup>App 50a-51a

<sup>13</sup>App 52a

<sup>14</sup>App 53a.

<sup>15</sup>Unpublished opinion per curium of the Court of Appeals issued September 21, 2004 (Docket No. 244205.) App 16a-20a.

## The Other Acts Proofs At Trial

David Stayer was the fire investigator hired by Defendant's insurance company to review the fire at his house.<sup>16</sup> At the time of the trial, he had been a fire investigator for going on 20 years, 14 with the Michigan State Police Fire Marshall and five with Kerby Bailey and Associates.<sup>17</sup>

Stayer's firm was employed by State Farm, Defendant's insurance carrier, to conduct an origin and cause investigation into the fire to determine where it started and how it started.<sup>18</sup> He met Defendant on the morning of November 20, 2006, at his brother's house, around the corner from Defendant's house.<sup>19</sup> During his initial interview, Defendant told him about the fire the previous Easter, involving a kerosene heater, and mentioned other fires he had been involved with.<sup>20</sup>

One of the fires involved a Ford F150 van where the fire started inside, near the engine cover.<sup>21</sup> Another involved his vehicle catching fire and extending to the house.<sup>22</sup> This was also discussed by Bruce Township Fire Chief Floyd Shotwell.<sup>23</sup> Stayer also counted four fires, including the November 13, 2006 fire.<sup>24</sup>

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<sup>16</sup>App 55a, 57a

<sup>17</sup>App 56a.

<sup>18</sup>App 57a.

<sup>19</sup>App 58a.

<sup>20</sup>App 59a, 73a.

<sup>21</sup>App 73a-74a.

<sup>22</sup>App 74a.

<sup>23</sup>App 60a-72a.

<sup>24</sup>App 74a.

Detective Sergeant Michael Waite of the Michigan State Police Fire Investigation Unit was the investigator assigned to Defendant's fire.<sup>25</sup> At the time of the trial, Waite was retired from the State Police.<sup>26</sup> Waite had a 25 year career with the State Police, ten and a half years as a Trooper, nine and a half years as a detective sergeant, and his final five years as a member of the Fire Marshall Unit, later renamed the Fire Investigation Unit.<sup>27</sup> On November 13, 2006, he received a call from Mussey Township Fire Chief Don Standel while the Chief was on the scene of the fire.<sup>28</sup> Waite made arrangements to go to the scene the following day, in the early afternoon.<sup>29</sup> He had worked with the Mussey Township department before, and they knew what he needed to be done. Chief Standel advised him the scene would be secured and that he would have personnel on site until that was done.<sup>30</sup>

When he arrived at the scene, he met and interviewed Defendant.<sup>31</sup> Defendant told him that a total of nine people were living in the house at that time, including himself, his wife, their three children, and his friend, Charles Early and Charles' three children.<sup>32</sup> Defendant also told Waite about fires he had before, including the Easter

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<sup>25</sup>App 75a, 77a-78a.

<sup>26</sup>App 76a.

<sup>27</sup>App 75a-76a.

<sup>28</sup>App 77a-78a.

<sup>29</sup>App 78a.

<sup>30</sup>Id.

<sup>31</sup>App 79a-80a.

<sup>32</sup>App 80a.

fire in the same house, the Ford Ranger pickup fire, the fire in the van in Romeo that set his mobile home on fire, and the work van fire.

### **Post Conviction Proceedings**

#### *The Appeal to the Court of Appeals*

Defendant perfected his appeal arguing, in addition to the issues involving his allegedly newly discovered evidence and ineffective assistance of counsel, that the trial court's failure to approve funds for an electrical engineer to testify at trial had inhibited his defense, and that the trial court had abused its discretion in admitting evidence of four other fires under MRE 404(b),.

Following briefing and oral argument, the Court of Appeals found that the trial court had abused its discretion in admitting the evidence of the other fires and that the error was not harmless beyond a reasonable doubt. The Court found it unnecessary to consider Defendant's other claims of error and reversed his convictions and remanded to the trial court for a new trial.<sup>33</sup>

#### *The Court of Appeals Opinion*

The panel, despite the People's statements, both in the pleadings and at the motion hearing, determined that the purpose for admitting the evidence was limited

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<sup>33</sup>*People v Mardlin*, Unpublished opinion per curium of the Court of Appeals issued May 5, 2009 (Docket No. 279699) App 20a.

to proving scheme, plan, or system or to show lack of accident.<sup>34</sup> They then upbraided the trial court for instructing the jury that they could use the other acts evidence on the question of motive, intent, and identity as well as absence of mistake or accident, and the existence of a scheme, plan, or system.<sup>35</sup> The panel went on to say the People had failed to establish the relevancy of the other acts for any of these purposes.<sup>36</sup>

The panel began by finding the evidence of the other fires was not logically relevant to finding a plan, scheme, or system of in doing an act.<sup>37</sup> The panel, relying on this Court's opinion in *People v Knox*,<sup>38</sup> found "the characteristics of the previous fires are not sufficiently similar to the charged fire to establish that defendant acted according to a common plan, scheme, or system in starting the charged fire."<sup>39</sup>

The panel went on to find no logical relevance on the question of lack of mistake or accident as there was no evidence offered to indicate the previous fires had not been accidental. For the same reason the panel found the prior fires irrelevant on the issue of Defendant's intent.<sup>40</sup> On the question of identity, the panel held the evidence of the prior fires did not show that Defendant had set them, or that there was some special

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<sup>34</sup>*Mardlin*, slip op p 2.App 17a.

<sup>35</sup>*Mardlin*, slip op App 17a-18a.

<sup>36</sup>*Mardlin*, slip op App 18a.

<sup>37</sup>*Id.*

<sup>38</sup>469 Mich 502 (2004).

<sup>39</sup>*Mardlin*, slip op App 19a.

<sup>40</sup>*Id.*

quality that proved Defendant's identity.<sup>41</sup> Finally, the panel found that there had been no proof that the prior fires had been set to collect insurance money, thus the prior fires were inadmissible to prove motive.<sup>42</sup>

After finding the trial court abused its discretion in allowing evidence of the other fires, the panel determined that the error was not harmless. Citing the absence of any evidence of an accelerant at the scene, the panel characterized the evidence against Defendant as "not overwhelming." The opinion goes on emphasize the use of the other acts evidence, saying, "The prosecutor relied substantially on the number of prior fires to argue that the charged fire must have been intentionally set by defendant."<sup>43</sup> Finally, the opinion states, in a conclusory manner, without analysis, that the danger of unfair prejudice substantially outweighed the probative value of the evidence.<sup>44</sup>

#### *Application for Leave to Appeal*

The People subsequently applied for leave to appeal to this Court. They now bring this appeal on leave granted.<sup>45</sup> Additional facts will be set out in the following argument as necessary.

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<sup>41</sup>Id.

<sup>42</sup>*Mardlin*, slip op App 20a.

<sup>43</sup>Id.

<sup>44</sup>Id.

<sup>45</sup>Order dated September 16, 2009.

## **SUMMARY OF ARGUMENT**

The Defendant was charged with arson for a fire involving his residence on November 13, 2006. Prior to trial, the prosecution filed notice of intent to use evidence of three previous unexplained fires involving Defendant's property, citing multiple theories of admissibility under MRE 404. One fire occurred at the same residence on April 16, 2006, one, involving a pickup truck took place in May of 1994, the third, which started in a van and jumped to his mobile home, occurred in March 2001. Defendant moved to exclude the evidence of the other fires and the trial court determined that they were admissible for a number of purposes.

Defendant appealed on the grounds that the trial court abused its discretion by admitting the evidence of the other fires. The People reiterated a number of their arguments from the trial court, emphasizing the use of the other fires under the doctrine of chances to establish the lack of accident. The Court of Appeals held the prosecution failed to demonstrate the logical relevance of any of the proffered non-character bases of admissibility and that the trial court had abused its discretion by admitting the evidence of the other fires. The Court of Appeals also held that, given the lack of overwhelming evidence against Defendant, the error was not harmless.

In this appeal, the People argue that the other fires were admissible under the doctrine of chances as evidence that the instant fire was not accidental. The doctrine of chances creates a non-character basis for the admission of evidence of other acts

involving the defendant, that are ostensibly accidental in nature, when the other acts are related to the offense charged in such a way as to make it objectively improbable that all the acts were accidental, and that one or some of them were the result of an *actus reus*. The doctrine of chances does not rely on the subjective character of the defendant to support its final conclusion. Rather, in cases such as this one, it relies on the objective improbability of so many accidental or unexplained events of a similar nature befalling one individual to suggest that one or some of the events were not accidental at all.

Anonymous acts may be used so long as the proponent shows a connection between the acts and the defendant. In the case of unexplained fires, it is sufficient that the fires all involved property owned, occupied, or controlled by the defendant.

When the other acts are offered under the doctrine of chances to suggest the charged offense was not an accident but was the result of an *actus reus*, the degree of similarity required between the other acts and the charged offense is slight. It is only necessary that the other acts be of the same general class as the charged offense. In this case, unexplained fires involving Defendant's property.

Finally, the strictures of MRE 403 apply to evidence offered under the doctrine of chances. In this case the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the evidence of the other fires.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY  
ADMITTING EVIDENCE OF DEFENDANT’S OTHER FIRES.**

**STANDARD OF REVIEW:**

Admission of other acts evidence is reviewed for an abuse of discretion.<sup>46</sup> The abuse of discretion standard applies in circumstances where there is “more than one reasonable and principled outcome,” and an abuse occurs “when the trial court chooses an outcome falling outside this principled range of outcomes.”<sup>47</sup>

**ARGUMENT:**

The Court of Appeals opinion dismisses the evidence of the prior fires as not probative of much of anything and ticks off the usual suspects as listed in MRE 404(b) as not being adequately made out. This is hardly surprising as both prior to the trial and in the post conviction proceedings the parties argued extensively about the use of the prior fires and tended to frame their arguments using the language of MRE 404(b). What the panel overlooked was the general theory offered by the prosecution, by implication at the trial court level, explicitly on appeal, that even if none of the listed purposes fit, the doctrine of chances did. The list of purposes in MRE 404(b) is not exhaustive<sup>48</sup> although it generally does encompass the theories of admissibility found in the reported cases and the listed purposes are trotted out by rote in notice after notice, just so all the bases are covered.

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<sup>46</sup>*People v Catanzarite*, 211 Mich App 573, 579 (1995).

<sup>47</sup>*People v Babcock*, 469 Mich 247, 270 (2003).

<sup>48</sup>*People v Sabin (After Remand)*, 463 Mich 43, 56 (2000).

This Court has recognized the doctrine of chances as a means of establishing the probative value of other acts evidence<sup>49</sup> as has the Court of Appeals.<sup>50</sup> The panel in this case seems to have ignored or not understood the argument on the doctrine of chances, focusing instead on the lack of any proof that the other fires were not accidental. The panel observed,<sup>51</sup> “Indeed, most of the prior fires were unexplained.” and,

[W]ithout evidence showing how the prior fires started, or suggesting that they were the result of an intentional act, or even pointing to defendant as a cause of the fires, the evidence was not relevant to show that the charged offense was not the result of some mistake or accident.

These may be correct holdings in terms of using the other fires to prove scheme, plan, or system, or absence of mistake. They are not when the other fires are considered under the doctrine of chances.

### **What is the Doctrine of Chances?**

The modern use of the doctrine of chances as a non-character basis for the introduction of other acts evidence has been traced back to the 1915 English case of *Rex v George Joseph Smith*,<sup>52</sup> more sensationally known as the brides in the bath case.<sup>53</sup> In *R v Smith*, the defendant had married three women, between 1912 and 1914. In each

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<sup>49</sup>*People v VanderVliet*, 444 Mich 52, 79 n 35 (1993), *People v Crawford*, 458 Mich 376, 393 (1998).

<sup>50</sup>*People v Johnson*, 124 Mich App 80, 86-87 (1983).

<sup>51</sup>*Mardlin*, slip op p 4.

<sup>52</sup>11 Cr App R 229; 84 LJKB 2153 (1915).

<sup>53</sup>Metropolitan Police, *The Brides in the Bath Murders*

<<http://www.met.police.uk/history/brides.htm>> (accessed November 4, 2009).

case he took out an insurance policy on his new wife and convinced her to make a will in his favor. Each of the three women was subsequently found in her bath, dead by drowning.<sup>54</sup> At Smith's trial the prosecution was allowed to introduce evidence of all three deaths over the defendant's objection that this was nothing more than bad character evidence. The appellate court agreed with Smith that it would be improper for the prosecution to use this evidence to argue his bad character as proof that he committed the charged murder. However, affirming the conviction and analyzing the actual use the evidence had been put to, the court "focused on the objective improbability of so many similar accidents befalling Smith. Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an *actus reus*."<sup>55</sup>

The seminal American case accepting the doctrine of chances as a non-character basis for admitting other acts evidence is *United States v Woods*.<sup>56</sup> The defendant in *Woods* was convicted of first degree murder and numerous other assaultive charges relating to the death of her eight month old adoptive son, Paul.<sup>57</sup> On appeal, the defendant argued, *inter alia*, that the government had improperly used evidence of other acts involving her other nine children to prove the *corpus delicti* of the murder.<sup>58</sup>

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<sup>54</sup>Id.

<sup>55</sup>Imwinkelried, *An evidentiary paradox: Defending the character evidence prohibitions by upholding a non-character theory of logical relevance, the doctrine of chances*, 40 U Rich L Rev 419, 435 (2006) (Footnotes omitted).

<sup>56</sup>484 F2d 127 (CA4, 1973).

<sup>57</sup>*Woods*, 484 F2d at 128-129.

<sup>58</sup>*Woods*, 484 F2d at 129.

In brief, the facts of *Woods* were that Paul had been in good health while in foster care during the first five months of his life. Shortly after going to live with the defendant he began to suffer incidents of breathing difficulty and cyanosis. He suffered two such incidents on August 4 and single incidents on August 8, 13, and 20. Paul responded to mouth to mouth resuscitation on each of the first four incidents. He did not respond following the August 20 incident and went into a coma until he died on September 21.<sup>59</sup>

To prove Paul's death was neither accidental nor from natural causes the government introduced the testimony of a forensic pathologist who testified that Paul's death was not suicide or accidental and that he found no evidence of natural causes. He could not, however, rule out natural death from some disease unknown to medical science.<sup>60</sup> The prosecution then produced evidence that over the course of the previous 24 years the defendant had custody or access to nine other children who, between them, suffered at least 20 episodes of cyanosis. Seven of the children died. Five others had multiple episodes of cyanosis.<sup>61</sup>

On appeal, the parties agreed that the acts were not admissible to prove the defendant was a bad person. The court found this general rule was beyond dispute.<sup>62</sup> The government pressed several non-character theories to support admission of the

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<sup>59</sup>*Id.*

<sup>60</sup>*Woods*, 484 F2d at 130.

<sup>61</sup>*Id.*

<sup>62</sup>*Woods*, 484 F2d at 133. Note, this was under the common law of evidence as *Woods* was decided before the Federal Rules of Evidence were enacted.

evidence in a list that is virtually identical to the exceptions listed in FRE/MRE 404(b). Defendant countered that none of them really fit the evidence as introduced.<sup>63</sup> Analyzing the various theories of admissibility offered by the prosecution, the court rejected all but the accident exception and the handiwork or signature exception. The court accepted the accident exception as a possibility although, under the prevailing view at the time, the accident exception was typically only available when the defendant admitted the acts but denied any criminal intent. In provisionally accepting the accident exception, the court noted an older case where it had been observed in dicta that “where several children of the same mother had died, evidence of the previous deaths might be admissible on the unlikelihood of such deaths being accidental.”<sup>64</sup> On the final ground advanced, the court held,<sup>65</sup>

The handiwork or signature exception is the one which appears most applicable, although defendant's argument that cyanosis among infants is too common to constitute an unusual and distinctive device unerringly pointing to guilt on her part would not be without force, were it not for the fact that so many children at defendant's mercy experienced this condition. *In the defendant's case, the “commonness” of the condition is outweighed by its frequency under circumstances where only defendant could have been the precipitating factor.*

That said, the court went on to note,<sup>66</sup>

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<sup>63</sup>*Id.*

<sup>64</sup>*Wood*, 484 F2d at 134.

<sup>65</sup>*Id.* (Emphasis added.)

<sup>66</sup>*Id.*

While we conclude that the evidence was admissible generally under the accident and signature exceptions, we prefer to place our decision upon a broader ground. Simply fitting evidence of this nature into an exception heretofore recognized is, to our minds, too mechanistic an approach.

Finally,<sup>67</sup>

As we stated at the outset, we think that the evidence would prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant's wrongdoing, and at the same time, would prove the identity of defendant as the wrongdoer.

The doctrine of chances, then, provides that,<sup>68</sup>

Based on ordinary common sense and mundane human experience it is unlikely that a large number of similar accidents will befall the same victim in a short period of time. Considered in isolation, the charged fire . . . may be easily explicable as an accident. However, when all similar incidents are considered collectively or in the aggregate, they amount to an extraordinary coincidence : and the doctrine of chances can create an inference of human design. The recurrence of similar incidents incrementally reduces the possibility of accident. The improbability of a coincidence of acts creates an objective probability of an actus reus.

More succinctly, when a person suffers a specific type of accident with extraordinary frequency, it is objectively probable that one or some of the incidents were not accidents.

### **Application of the Doctrine of Chances**

In this case where the doctrine is invoked to rebut the claim of accident and to show an *actus reus*.. The primary consideration here is whether there is a intermediate

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<sup>67</sup>*Woods*, 484 F2d at 135.

<sup>68</sup>*Imwinkelried*, 1 *Uncharged Misconduct* (rev ed), § 4:03 chap 4 p 17.(footnotes omitted.)

inference between the fact of the other fires, and the final conclusion that one or some of those fires were not accidental, that does not require that we make a subjective determination that Defendant was acting in conformity with his bad character.

We start with the number of unexplained fires in Defendant's past. By his own admission there are three vehicle fires and three house fires. One of the vehicle fires and one of the house fires occurred at the same time, the fire progressing from the vehicle to the house, so there are actually five unexplained fires over a span of 12 years. The intermediate inference, as advanced by the prosecution, is that it is objectively improbable that so many unexplained, accidental fires would befall one person. The final conclusion is that one or some of these fires were not accidents.

It is important to note that the final conclusion is *not* that all the fires were the product of an *actus reus*., Nor is there any reason to single out the charged fire as the product of an *actus reus*. All the doctrine does is establish that one or some of the incidents were not accidents. Indeed, the doctrine suggests that some incidents, in the normal course of events, will be accidents. Under the doctrine of chances we do not try and use the defendant's subjective character to predict his conduct. Rather,<sup>69</sup>

At trial, the litigants present the jury with at least two competing hypotheses: one that all the incidents are accidents, and the other that one or some of the incidents were not accidents. When a jury is presented with competing versions of the events, the jury is expected to use its common sense to gauge the relative plausibility of the versions.

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<sup>69</sup>Imwinkelried, *An evidentiary paradox*., 40 U Rich L Rev at 438.

This is what happened in our case. As in *Crawford*,<sup>70</sup> the prosecutor's reliance on the doctrine of chances may be inferred from her closing argument. In closing, she told the jury,<sup>71</sup>

All of you when we conversed at the beginning of this trial, only one of you was able to tell me you have had a fire in your lifetime, okay. In your lifetime.

So, when we are talking about there fires, we know we've had, we have had this Ford Ranger. Defendant is in control of it. Defendant is driving it that day. And he goes out on the ice and boy, it's on fire when he comes back. Okay. I don't have to prove to you what origin or cause of that fire was. I'm showing that you, this person has a pattern.

I am also, we are also talking about this work van. And you know, you might say, gees, he's not getting anything for that work van, why does [sic] we care about this work van? Well I care about this work van because it's in his control. And you heard from him on the stand about this work van and he said to you, gees, I had a better van that the company was letting me drive, and I was using that and somebody comes along and says, gees, I've got more seniority, you get this van rather than this nicer van. Defendant is stuck with this, what he called a piece of shit, okay. He's driving a piece of shit car and he don't like it Another fire happens when he's in control of that, okay. It's just another fire to show a pattern.

We have got a mobile home and this van down in Romeo in 2001. Again, no insurance coverage on this mobile home, and boy, you know, you might be thinking I don't know why he does that, why would he do that? I don't have to show you why he would do that crime, okay? But I do have to point out to you that here's another one, two years and this man's got a van with PLPD on that. He did get some money for that and that catches his home, mobile home and wipes out some stuff that he's

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<sup>70</sup>*Crawford*, 458 Mich at 392 n 11.

<sup>71</sup>Tr 7 pp 440-441.

got in him mobile home. Another fire pattern of activity that's been going on for less, for 12 years.

In rebuttal, she touched briefly on the prior fires in response to defense counsel's closing referring to a prosecution witness's comment that car fires were not uncommon,<sup>72</sup>

You know, there has been conversation about Chief Shotwell, and he said car fires aren't uncommon. Well, that's what he said, but think about that. We have car fires from. let's say, '94, '99, and 2001. So what are spanning six or seven years, three. Okay. And I am hitting on those prior fires, it's important that you consider that Mr. Mardlin has had five fires, because it is important to show that this person has knowledge of fires, has had a pattern of fires, and it goes to his intent.

It is not necessary for Defendant to admit setting the fires, either intentionally or by accident, for the People to invoke the doctrine of chances. In fact, Defendant *does* argue that all the fires were accidents. Accidents that he had no causal connection with, but accidents nonetheless. It seems to the People that this is precisely the sort of evidence that the doctrine contemplates. Indeed, arson is a prime example of the use of the doctrine of chances and was used by Professor Imwinkelried in his seminal treatise on the subject.<sup>73</sup>

Suppose that the defendant is charged with arson. The defendant claims that the fire was accidental. The cases routinely permit the prosecutor to show other acts of arson by the defendant and even nonarson fires at premises owned by the defendant. In these cases the courts invoke the

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<sup>72</sup>Tr 7 p 475.

<sup>73</sup>Imwinkelried, 1 Uncharged Misconduct Evidence (rev ed), § 4:01, Chap 4, p 4 (footnotes omitted.).

doctrine of objective chances. The courts reason that as the number of incidents increases, the objective probability of accident decreases. Simply stated, it is highly unlikely that a single person would be victimized by so many similar accidental fires. . . .

Defendant's character plays no part in this analysis. The jury was not asked to infer that Defendant was a bad man. The jury did not need to decide whether Defendant is the type of person who sets incendiary fires for the sake of setting fires. The question was whether it was objectively likely so many fires involving property either owned by Defendant, or in Defendant's control, could be attributed to natural causes. "It is that objective unlikelihood that tends to prove human agency, causation, and design."<sup>74</sup> It is worth noting that the *Woods* court, in accepting the underlying concept of the doctrine of chances to prove the *corpus delicti* of murder, observed that in arson cases it was common to admit evidence of other unexplained fires on the question of whether the fire in question was arson.<sup>75</sup>

In summary to this point. The doctrine of chances provides a non-character basis for the admission of other acts evidence when the other acts are related to the charged act in such a way that, viewed together, they give rise to an objective probability that one or some of the incidents were not accidents. In this case Defendant had several unexplained fires involving his vehicles and homes. Initially, the other acts, that is,

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<sup>74</sup>Imwinkelried, *Uncharged Misconduct Evidence* (rev ed), § 4:01, Chap 4, p 5 (footnotes omitted).

<sup>75</sup>*Wood*, 484 F2d 135 n 13.

the previous fires, meet the basic criteria to be admitted under the doctrine of chances to demonstrate that the instant fire was not accidental. But the other question posed by this Court in the grant of leave remains.

**Is More Than the Mere Occurrence of the Other Fires Necessary for Their Admission?**

Two questions present themselves for our consideration. First, is it necessary to prove the other fires were connected to Defendant other than through his connection to the property involved. Second, if all other requirements are met, what degree of similarity, if any, must be shown between the prior fires and the instant fire?

The answer to the first question is “no.” It is not necessary to show any relationship between Defendant and the other fires beyond his possession and/or control of the property involved. Professor Imwinkelried summed up the use of anonymous acts to prove an *actus reus* thus,<sup>76</sup>

As Dean Wigmore correctly pointed out, as a matter of logic the nature of this argument does not require that the prosecutor show that the defendant started the other fires. It is sufficient that the other fires occurred on premises owned or occupied by the defendant. Thus, anonymous acts are admissible to prove the commission of the *actus reus*. [ . . . ] Ownership of the other premises . . . make the incidents similar enough to the charge crime to trigger the doctrine of chances.

The defendant must be connected to the other incidents to that extent. A fire at another person’s premises does not affect the objective

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<sup>76</sup>Imwinkelried, 1 Uncharged Misconduct Evidence (rev ed), §4:02, chap 4 pp 14-15 (footnotes omitted.)

likelihood that a fire at the defendant's house was an accident. [. . . ] However, as previously stated, the doctrine of chances comes into play as soon as we learn that the other fires occurred at the defendant's premises . . . : the doctrine operates even absent proof that the defendant started the other fires. . . .

The remaining question then is what degree of similarity, if any, between the other fires and the instant fire is necessary?

### **The Court of Appeals Analysis**

In our case, the Court of Appeals panel relied on *People v Knox*<sup>77</sup> and its clarification of *Sabin (After Remand)*,<sup>78</sup> to support its finding the trial court abused its discretion. This reliance was misplaced insofar as the panel did not analyze the evidence under the doctrine of chances. All *Knox* did, according to the opinion itself, was correct an erroneous interpretation of *People v Hine*<sup>79</sup> by the Court of Appeals and reiterate the holding in *Sabin (After Remand)*. “*Hine* neither announced new law nor did it signify a retreat from the *VanderVliet* principles; rather, it simply rejected an interpretation of *Sabin* that would have required an impermissibly high level of similarity between the proffered other acts evidence and the charged acts.” The question the *Mardlin* panel should have asked is what is the degree of similarity required when the other acts are offered under the doctrine of objective chance? Unlike the previous question there is no simple, straightforward answer.

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<sup>77</sup>469 Mich 502 (2004).

<sup>78</sup>*People v Sabine (After Remand)*, 463 Mich 43 (2000).

<sup>79</sup>467 Mich 242 (2002),

## Similarity of Other Acts in the Case Law

The cases, following the lead of Deans McCormick and Wigmore, have set up degrees of similarity other acts evidence must display, depending on the use to which they will be put. The first, and most restrictive, is other acts to prove that a specific person committed the act in question because they committed acts that were essentially identical. What the *Woods* court called the handiwork or signature exceptions. This level of similarity requires virtual point by point identity. That is,<sup>80</sup>

[W]here the circumstances and manner in which the two crimes were committed are ‘[so] nearly identical in method as to earmark [the charged offense] as the handiwork of the accused. \* \* \* The [commonality of circumstances] must be so unusual and distinctive as to be like a signature.’

The second, and least restrictive degree of similarity is when the other acts are offered to prove intent. “When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts ‘are of the same general category.’”<sup>81</sup> The third level of similarity, falling between the first two, is used when the evidence is offered to prove a common plan, scheme of system of doing and act.

In *Sabin (After Remand)*, this Court considered the degree of similarity required when other acts are offered on a scheme, plan, or system theory. Citing to *People v*

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<sup>80</sup>*People v Golochowicz*, 413 Mich 298, 310-311 (1982) Quoting McCormick on Evidence 2d ed.

<sup>81</sup>*People v VanderVliet*, 444 Mich 52, 79-80 (1993) quoting Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 23.

*Ewoldt*,<sup>82</sup> a case from the California Supreme Court, and Dean Wigmore’s treatise, the *Sabin* Court attempted to articulate the quantum of similarity between the charged offense and the other acts necessary to support a finding that the other acts evidence yields a permissible, non-character inference.

The Court begins its analysis by saying,<sup>83</sup>

Today, we clarify that evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. [Footnote and citation omitted.]

Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.

General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.

The opinion then quotes at length from Wigmore’s treatise to the effect that the common features of the other acts and the charged act must be such as to be naturally “explained as being caused by a general plan of which they are the individual manifestations.”<sup>84</sup>

The Court also quotes Wigmore’s distinction between other acts offered to prove intent, which require not much more than proof the act happened, and other acts offered to prove the charged act itself, as part of a common design, which requires a higher degree

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<sup>82</sup>7 Cal 4<sup>th</sup> 380; 27 Cal Rptr 2d 646; 867 P2d 757 (1994).

<sup>83</sup>*Sabin*, 463 Mich at 63-64.

<sup>84</sup>*Sabin*, 463 Mich at 64, quoting 2 Wigmore (Chadbourn Rev), Evidence § 304, p 249.

of similarity.<sup>85</sup> The opinion refers to the *Ewoldt* case for the proposition that the “degree of similarity is greater than that needed to prove intent, but less than that needed to prove identity.”<sup>86</sup> Quoting from *Ewoldt*, the Court notes<sup>87</sup>

Unlike evidence of uncharged acts used to prove identity, the plan *need not be unusual or distinctive*; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.

Given the range of similarity encompassed by the foregoing cases, where do we place the similarity necessary when the other acts evidence is offered on a doctrine of chances theory?

The Court of Appeals considered this question in *People v Johnson*<sup>88</sup> and determined,

The similarity of other acts to display that the act on trial was not inadvertent, accidental, unintentional, or without guilty knowledge is not required to be as great as in instances where a common scheme, plan, or design is sought to be proved.<sup>8</sup>

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<sup>8</sup>McCormick on Evidence (2d ed), § 190, p 450, fn 42.

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See also *People v Doyle*<sup>89</sup> using the same language to approve the admission of other acts evidence on the question of motive, indicating that acts offered other than for

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<sup>85</sup>*Sabin*, 463 Mich at 65, quoting 2 Wigmore (Chadbourn Rev), Evidence § 304, pp 250-51.

<sup>86</sup>*Sabin*, 463 Mich at 65.

<sup>87</sup>*Sabin*, 463 Mich at 66, quoting from *People v Ewoldt*, 7 Cal 4<sup>th</sup> at 403; 27 Cal Rptr 2d at 646; 867 P2d at 757 (emphasis added.)

<sup>88</sup>124 Mich App 80, 87 (1983).

<sup>89</sup>129 Mich. App 145, 151 (1983).

identity or on the existence of a common scheme, plan, or system should be evaluated on the same basis as acts offered on the question of intent.

This Court addressed a narrow application of other acts evidence under the doctrine of chances in *People v Crawford, supra*. The offense at issue in *Crawford* was possession with intent to deliver 50 to 225 grams of cocaine, which had been found hidden in a secret compartment of the defendant's car following a traffic stop.. The prosecution introduced evidence of a prior conviction to prove the defendant's knowledge and intent. However, the conviction, dating some four years prior to the offense in issue, was for delivery of 225 to 650 grams of cocaine.<sup>90</sup> This Court found a single prior act of actual deliver to an undercover officer, occurring four years in the past, although of the same general class as the charged offense, was not sufficiently similar in critical details to warrant admission.<sup>91</sup> The opinion observed that the prior offense was not logically relevant to show that the defendant knew the drugs were hidden in the car and intended to deliver them. Noting that the prior conviction might be relevant to show the defendant was still a drug dealer, it was nothing more than "character evidence masquerading as evidence of 'knowledge' and 'intent.'"<sup>92</sup> The opinion also noted that even if the prior conviction *was* logically relevant on a non-

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<sup>90</sup>*Crawford*, 458 Mich at 379-380, 380 n1.

<sup>91</sup>*Crawford*, 458 Mich at 395-396.

<sup>92</sup>*Crawford*, 458 Mich at 397.

character ground it should still be excluded as more unfairly prejudicial than probative under MRE 403.<sup>93</sup>

Quoting with approval both Professor Imwinkelried and Judge Weinstein, this Court observed,<sup>94</sup>

Elaborating on the foundational requirements for triggering the doctrine of chances to prove mens rea, Imwinkelried explains that the prosecutor must “make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person.” [Footnote omitted] [Imwinkelried, *The use of evidence of an accused's uncharged misconduct to prove mens rea: The doctrines which threaten to engulf the character evidence prohibition*, 51 Ohio St L J 575 (1990)] at 602. We find this reasoning to be sound. The applicability of the doctrine of chances depends on the similarity between the defendant's prior conviction and the crime for which he stands charged. [Footnote omitted.]

The opinion then offered, in a footnote<sup>95</sup>

A simple analogy will prove the point. If the prosecutor were “offering” evidence of a prior arson conviction to prove that the defendant knowingly possessed cocaine with the intent to deliver, even the dissent would likely concede that the offer would fail the initial test of relevancy on the ground that the two acts were too dissimilar. Under this scenario, the evidence is inadmissible even though it is “offered” for a “proper purpose” under Rule 404(b), that is, to prove knowledge and intent. If, however, defendant's prior crime involved the concealment of drugs in the dashboard of his car, that evidence would likely be admissible under the doctrine of chances because of the stark similarity of the two crimes. There is, then, a continuum upon which each proffered prior act must be placed; the more similar the prior act to the charged

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<sup>93</sup>*Crawford*, 458 Mich at 397-398.

<sup>94</sup>*Crawford*, 458 Mich at 394-395.

<sup>95</sup>*Crawford*, 458 Mich at 395 n 13.

crime, the closer the evidence to the admissibility threshold. [Analysis of cases omitted.]

We now have two continua of similarity for prior acts, the main one ranging from virtually the same for proof of identity to merely the same general category to prove intent, and the *Crawford* continuum when the evidence is offered to prove. . . intent. Can we reconcile the cases and determine the degree of similarity necessary when the other acts are truly offered under the doctrine of chances? Possibly.

*Crawford* is probably better understood as not being a true doctrine of chances case but rather, as the opinion observed, a typical character/propensity case masquerading as a knowledge and intent case. This Court's holding in *Crawford* was that, while the prosecutor articulated a proper purpose under MRE 404(b), there was no logical relevance connecting the other acts evidence with the charged offense. And, even if there had been some relevance, under MRE 403 the danger of unfair prejudice outweighed the probative value. It is not clear if the prosecutor ever advanced the doctrine of chances as a theory of admissibility, either at trial, which occurred before *VanderVliet*, or on appeal. It seems something of a stretch to argue the doctrine of chances, which typically deals with multiple prior incidents, in a case with only the single prior act sought to be admitted. The Court was quite candid in stating "We infer the prosecution's reliance on the doctrine of chances. . . ." <sup>96</sup> The People suggest the

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<sup>96</sup>*Crawford*, 458 Mich at 392 n 11.

better course is to set *Crawford* aside as a typical 404(b) case and not particularly useful in sorting out the doctrine of chances.

Nor are the other cases touched on by the Court of Appeals, *Sabin (After Remand)*, *Hine*, and *Knox*, particularly helpful as they all deal with other acts offered to prove a common scheme, plan, or system. Ironically enough, *VanderVliet*, the lead case on other acts evidence under MRE 404(b), is useful in this analysis, although not considered by the Court of Appeals, because it deals with a conceptually similar situation where the other acts were offered to prove that the charged offense was not the result of accident.

In *VanderVliet* the defendant was charged in two cases with second degree criminal sexual conduct for incidents involving two clients of the service provider where he worked as a case manager.<sup>97</sup> The defendant denied any sexual contact with one victim and claimed any such contact with the second victim would have been accidental.<sup>98</sup> During the investigation a third victim was discovered.<sup>99</sup>

After the defendant was bound over, the prosecution filed a memorandum arguing the testimony of all three victims was admissible in each of the two charged cases. The trial court held that acts involving other victims would not be admissible in either of

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<sup>97</sup>*VanderVliet*, 444 Mich at 55-56.

<sup>98</sup>*VanderVliet*, 444 Mich at 58.

<sup>99</sup>*Id.*

the pending cases.<sup>100</sup> The Court of Appeals, in a split decision, affirmed the trial court.

This Court granted leave to appeal.<sup>101</sup>

In the process of analyzing MRE 404 and the prior case law on the admission of other acts evidence, this Court made a number of observations about the qualitative aspects of the other acts as they related to the charged criminal acts. Deconstructing the *Golochowicz*<sup>102</sup> test, the opinion notes,<sup>103</sup>

The second requirement in *Golochowicz*, that a special circumstance or quality exist, “refers to the relationship between the charged and uncharged offenses which supplies the link between them and assures thereby that evidence of the separate offense is probative of some fact other than the defendant’s bad character,” *id.* at 310. This language does not require a showing of distinctive similarity between other acts and the charge at issue in every instance where Rule 404(b) evidence is proffered. Where the proponents’ theory is not that the acts are so similar that they circumstantially indicate that they are the work of the accused,<sup>21</sup> similarity between charged and uncharged conduct is not required. As we recognized in [*People v*] *Engelman*, [434 Mich 204 (1990)] the special link or circumstance is simply the inference other than to character. The trial court and the Court of Appeals erroneously concluded that Rule 404(b) relevance requires a high level of similarity between the proffered other acts evidence and the act charged. This approach misreads *Golochowicz*, [footnote omitted,] *Engelman*, and other precedent of this Court. [Footnote omitted.]

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<sup>21</sup>As, for example, when the evidence is proffered to rebut innocent intent, to show motive, consciousness of wrongdoing, true plan, or knowledge.

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<sup>100</sup>*VanderVliet*, 444 Mich at 59.

<sup>101</sup>*VanderVliet*, 444 Mich at 59-60.

<sup>102</sup>*People v Golochowicz*, 413 Mich 298 (1982).

<sup>103</sup>*VanderVliet*, 444 Mich at 69-70.

Applying the new test for admissibility to the facts of the two cases, this Court found the testimony of the first victim, Steven C, was relevant in the case of the second victim, Todd F, where the defendant told the investigating officer that any contact with that victim's genital area has been accidental or inadvertent.<sup>104</sup>

The consequential fact, i.e., defendant's innocent intent, is more than a plausible or speculative defense in the Todd F case. Moreover, Steven C's testimony is sufficiently similar<sup>34</sup> to Todd F's testimony to make it objectively less probable that the defendant acted with innocent intent in the Todd F case.<sup>35</sup> When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts "are of the same general category." Imwinkelried, *Uncharged Misconduct Evidence*, § 3:11, p 23.<sup>36</sup> Evidence of both of the alleged assaults is logically relevant and probative of the defendant's intent in the Todd F case because it negates the otherwise reasonable assumption that the contact described in testimony by Todd F was accidental,<sup>37</sup> as opposed to being for the purpose of sexual gratification. Finally, evidence of the assault of Steven C is not only relevant, but highly probative of the defendant's intent in taking Todd to his brother's house. Without such evidence, the factfinder would be left with a chronological and conceptual void regarding the events surrounding Ward's directive to the defendant, *United States v Ostrowsky*, 501 F2d 318, 322 (CA 7, 1974).

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<sup>34</sup>The need for other acts to be similar to one another *in the innocent intent context* derives from the requirements of logical relevance, rather than the previous mistaken assumption that all other acts needed to be similar.

<sup>35</sup>This theory of relevance is often referred to as "the doctrine of chances," Imwinkelried, § 4:01, p 4. Also see 2 Wigmore, *Evidence* (Chadbourn rev), § 302; Imwinkelried, *The dispute over the doctrine of chances*, 7 *Crim Jus* 16 (1992), and 22 Wright & Graham, *Federal Practice and Procedure*, § 5247, pp 517-519. This theory is widely accepted although its application varies with the issue for which it is offered. Where material to the issue of mens rea, it rests on the premise that "the more often the

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<sup>104</sup>*VanderVliet*, 444 Mich at 79-81 (emphasis in original)..

defendant commits an *actus reus*, the less is the likelihood that the defendant acted accidentally or innocently,” Imwinkelried, § 3:11, pp 22-23. On the basis of the defendant's allegation that John J was one of twenty-five or thirty clients that defendant supervised at one time, we can intuitively conclude that it is objectively improbable that three out of thirty clients would coincidentally accuse defendant of sexual misconduct, *State v Craig*, 219 Neb 70, 78; 361 NW2d 206 (1985).

For a fine example of the application of the doctrine of chances to negate innocent intent, see *United States v York*, 933 F2d 1343, 1350 (CA 7, 1991), cert den 502 US 916; 112 S Ct 321; 116 L Ed 2d 262 (1991):

The man who wins the lottery once is envied; the one who wins it twice is investigated. It is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance.

<sup>36</sup>See *id.*, pp 22-23. The level of similarity required when disproving innocent intent is less than when proving *modus operandi*.

<sup>37</sup>Professors Wright and Graham explain:

The final exception listed in Rule 404(b), “absence of mistake or accident,” is simply a special form of the exception that permits the use of other crimes to prove intent. In some applications it overlaps the exception for knowledge in that proof that the defendant was aware of the nature of an act at an earlier point in time makes it

unlikely that he would have forgotten that information at the time of the charged crime. Often the absence of mistake or accident is proved on a notion of probability, i.e., how likely is it that the defendant would have made the same mistake or have been involved in the same fortuitous act on more than one occasion. The relevance of other crimes for this purpose depends very much on the nature of the act involved; one might inadvertently pass more than one counterfeit bill but two accidental shootings of the same victim seem quite unlikely.

The justification for admitting evidence of mistake or accident is the same as for the other exceptions involving proof of the defendant's state of mind. When offered for this purpose, no inference to any conduct of the defendant is required and, in addition, in many cases the evidence does not require any inference as to the character of the accused. [Wright & Graham, n 33 *supra*, § 5247, pp 517-518.]

For further examples, see Imwinkelried, *Uncharged Misconduct Evidence*, § 5:10, p 26:

There are numerous hypothetical and actual examples of the use of uncharged misconduct to disprove a claimed accident. Wigmore's hypothetical of the three shots is a leading illustration. The defendant claims that he accidentally discharged the rifle in the victim's direction on each occasion; but as the number of "accidental" discharges increases, the claim of accident becomes less believable. The courts often admit uncharged misconduct in child abuse cases when the defendant claims that he or she accidentally injured the child. If the defendant claims that he accidentally touched a child's genital organs, evidence of the defendant's similar uncharged sexual misconduct is admissible to prove the defendant's lewd intent.

If the defendant claims that she intended to merely discipline her child, evidence of uncharged misconduct may be admissible to establish the defendant's intent to injure the child. If the defendant claims that he accidentally bumped into or ran down the victim, evidence of the defendant's other assaults on the same or similar victims is admissible to show intent. In a theft case when the defendant claims that he inadvertently picked up the wrong fungible property, evidence of similar thefts is admissible to show intent to steal.

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The foregoing quotation is, admittedly, lengthy, but not unnecessarily so. Sometimes, when a fundamental legal principle has been rendered into a catch phrase, or a “buzz word” by repeated citation of the principle without reflecting on the analysis on which the principle is based, it is necessary to return to the original source for enlightenment as to what was really intended by the defining Court. Such is the case here. The People submit that, on the overall question of similarity between the other acts and the charged criminal offense, Justice Levin said it best.<sup>105</sup> “I further agree that ‘similarity between charged and uncharged conduct is not required.’ [Footnote omitted.] MRE 404(b) speaks of ‘other crimes, wrongs, or acts,’ not ‘similar’ acts.”

What can we conclude on the question of how similar the other acts must be to the charged act to be admissible on a doctrine of chances basis to prove *actus reus* and/or lack of accident? The People submit that the best answer is that the other acts

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<sup>105</sup>*VanderVliet*, 444 Mich at 91-92 (Levin, J. separate opinion).

need to be of the same general class as the charged offense and need to be connected to each other and the charged offense through the defendant.

In this case the other acts were unexplained fires involving three vehicles and two homes, one of which was the same residence involved in the final fire, owned by or under the direct control of Defendant.

Defendant had five unexplained or accidental fires involving vehicles and his residence in a 12 year period. The last two in less than a year. It simply defies belief that one person would experience so many unexplained or accidental fires involving property he controlled or possessed. The similarity was that they, like the instant fire, were unexplained fires involving Defendant's property. This is sufficient to allow admission to negate accident under the doctrine of chances.

The Court of Appeals panel correctly set out the basic similarities the People relied on, "The prior acts evidence showed that in the previous 12 years, four fires had occurred involving property that defendant either owned or possessed"<sup>106</sup> and then proceeded to apply a higher standard than called for by *VanderVliet* by ignoring the alternative theory of admissibility under the doctrine of chances in favor of the more restrictive standard for other acts offered to prove a common scheme or plan.

**Did the Danger of Unfair Prejudice Substantially Outweigh the Probative Value of the Other Acts Evidence?**

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<sup>106</sup>*Mardlin*, slip op p 4.

A final issue must be addressed. Even if the Court of Appeals was wrong when it failed to consider the doctrine of chances in its analysis of the admissibility of the other fires, and the evidence was admissible under that theory, the question remains of whether the other fires should be excluded under MRE 403. While the Court of Appeals mentions MRE 403 in passing,<sup>107</sup> the panel never really addresses this point, probably because it concluded the evidence was inadmissible as a matter of law.

**“Prejudice” defined for MRE 403 purposes.**

What is prejudice sufficient to bar otherwise relevant evidence under MRE 403? In *People v Vasher*,<sup>108</sup> this Court clarified two points regarding the standard to be applied when evaluating otherwise relevant evidence for exclusion under MRE 403.

First, the Court made it clear that prejudice, in the context of the rule (i.e. *unfair* prejudice),<sup>109</sup>

[P]rejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.

Second, the Court also noted that the danger of unfair prejudice must *substantially* outweigh the probative value of the evidence for it to be excluded. In

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<sup>107</sup>*Mardlin*, slip op p 3.

<sup>108</sup>449 Mich 494 (1995).

<sup>109</sup>*Vasher*, 449 Mich at 501.

*Vasher*, a CSC prosecution involving the defendant's four year old granddaughter, the prosecutor inquired into the defendant's beliefs regarding the acceptability of having male family members initiate young girls into sexual activity. When the defendant denied holding such views, the prosecutor produced a rebuttal witness to testify that defendant had expressed this idea in the past.<sup>110</sup> The Court of Appeals reversed defendant's convictions observing that whatever probative value the evidence had was outweighed by its potential for unfair prejudice. The Supreme Court, reversing the Court of Appeals and reinstating defendant's convictions, said the probative value of this evidence was *not* substantially outweighed by its prejudice and found no error.

In this case there is no doubt the evidence of three or four previous fires was prejudicial to Defendant's case. How could it be otherwise? The question is whether that prejudice was "unfair" and if so whether it substantially outweighed the probative value of the evidence. The People submit that it was neither.

While there was evidence that Defendant experienced an unusual number of unexplained fires, there was little offered other than the bare facts of when and where the fires occurred. What details there were tended to show the fires, up to the final two, were relatively minor and limited in the damage they did. Also, contrary to the conclusion by the Court of Appeals that the evidence was not over-

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<sup>110</sup> *Vasher*, 449 Mich at 496.

whelming, there was substantial evidence that the instant fire was and incendiary fire, set by some human agency. The evidence of Defendant's neighbors about how quickly the house became fully involved, Defendant's changing stories about when he left the house, the physical evidence pointed out by both investigators, and the jewelry box that had been opened before the fire all tend to point to a set fire. Under the doctrine of chances no claim is made that *all* Defendant's fires were set fires. Nor is it necessarily claimed that the evidence proves the instant fire was set As noted above,<sup>111</sup>

At trial, the litigants present the jury with at least two competing hypotheses: one that all the incidents are accidents, and the other that one or some of the incidents were not accidents. When a jury is presented with competing versions of the events, the jury is expected to use its common sense to gauge the relative plausibility of the versions.

The probative value of the evidence of Defendant's other fires was not substantially outweighed by the danger of unfair prejudice.

The trial court did not err when it admitted the other acts evidence and did not err when it properly gave a limiting instruction on the use of this evidence. Defendant's convictions and sentences should be affirmed. The Court of Appeals applied an incorrect, overly restrictive standard for the admission the other fires, essentially substituting its judgment for the trial court's.

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<sup>111</sup>Imwinkelried, *An evidentiary paradox*., 40 U Rich L Rev at 438.

**RELIEF REQUESTED**

WHEREFORE, for the reasons set out above, Plaintiff-Appellee prays this Honorable Court reverse and vacate the Court of Appeals order remanding this matter to the trial court for a new trial and remand the matter to the Court of Appeals to consider Defendant's other allegations of error.

Respectfully Submitted

Michael D. Wendling  
Prosecuting Attorney

BY:

Timothy K. Morris  
Chief of Appeals

Dated: November 5, 2009