

OTHER BAD ACTS BY DEFENDANT

This limiting instruction should be given at the time the evidence is admitted and in the final charge. *Commonwealth v. Linton*, 456 Mass. 534, 551 & n. 12 (2010).

Typically, this issue should be addressed prior to trial in a motion in *limine*. The judge should inquire of the Commonwealth the exact purpose for which the evidence is being offered.

I. WHEN INADMISSIBLE FOR ANY PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You heard testimony about other acts allegedly done by the defendant. I have struck that testimony from the record, and you must disregard it entirely.

You may not consider that testimony at all. Your verdict must rest upon evidence related to the charge(s) contained in the complaint and not upon the testimony I struck from the record.

II. WHEN ADMISSIBLE ONLY FOR A LIMITED PURPOSE

The defendant is not charged with committing any crime other than the charge(s) contained in the complaint. You have heard testimony about other acts allegedly done by the defendant including [describe other act(s) generally]. You may not take that testimony as proof that the defendant committed the crime(s) charged. Nor may you consider it as proof that the defendant has a bad character or a propensity to commit crimes.

You may consider that testimony solely on the issue of [the defendant's [list only the purpose(s) applicable to the case] (motive) (opportunity) (state of mind) (intent) (preparation) (plan) (pattern of operation) (relationship with the victim) (knowledge) (identity)] [the absence of a mistake] [whether there was a common scheme].

See Mass. G. Evid. §404. In *Commonwealth v. Fernandes*, 492 Mass. 469, 489 (2023), the Supreme Judicial Court held that “it is generally insufficient guidance for a trial judge simply to provide a collective list of bad act evidence and then instruct on every permissible purpose”. “[I]t is the responsibility of the trial judge to articulate the specific nonpropensity purpose(s) for which [bad act evidence] is admitted.” *Fernandes*, *supra* at n. 19, citing *Commonwealth v. Samia*, 492 Mass. 135, 148 n. 8 (2023).

You may not consider this evidence for any other purpose.

Specifically, you may not use it to conclude that if the defendant committed the other act(s), they must also have committed the offense(s) alleged in the complaint.

NOTES:

1. Admissibility. Evidence of prior or subsequent bad acts is not admissible to demonstrate the defendant's bad character or propensity to commit the crime charged but, if not too remote in time, may be admissible to show motive, opportunity, state of mind, intent, preparation, plan, pattern of operation, common scheme, relationship between a defendant and a victim, knowledge, identity, or absence of mistake or accident. See Mass. G. Evid. 4.04. See *Commonwealth v. Brusgulis*, 406 Mass. 501, 505 (1990) (admissible on modus operandi only if prior and current crime share “a special mark or distinctiveness”); *Commonwealth v. Helfant*, 398 Mass. 214, 228 n.13 (1986) (there is no bright-line test for determining temporal remoteness of evidence of prior misconduct and depends on the logical relationship between the act and the crime charged). When evidence of other bad acts is admitted, the jury must be instructed with particular care on how to use it, in order to avoid diversionary misuse of such information. *Id.* at 505-506.

To be admissible, the judge must be satisfied that a reasonable jury could find that the event took place, the evidence must be probative of a fact at issue and not be too remote in time, and the probative value outweighs any undue prejudice. See Mass. G. Evid. 4.04. See *Commonwealth v. West*, 487 Mass. 794, 805 (2021). In order for evidence to be sufficiently probative, there must be a “logical relationship” between the prior bad act and the crime charged. See *Commonwealth v. Facella*, 478 Mass. 393, 405 (2017).

The judge must articulate on the record “the precise manner in which the [bad act evidence] is relevant and material to the facts of the particular case.” *Commonwealth v. Samia*, 492 Mass. 135, 148 n. 8 (2023), quoting *Commonwealth v. Andre*, 484 Mass. 403, 415 (2020). “[T]he best practice is for the judge to consider and articulate on the record the risk that the jury will ignore the limiting instruction and make the prohibited character inference and use the evidence for an inadmissible purpose, such as propensity.” *Id.* “Once the judge articulates these considerations *on the record*, it is then within the judge's discretion to determine whether the probative value of the [bad act evidence] is outweighed by the risk of prejudicial effect on the defendant,’ taking into account the effectiveness of a proper limiting instruction.” *Id.*, quoting *Andre*, *supra*.

2. Identification of perpetrator of other act. Instruction 9.160 (Identification) is required on request if the defendant denies being the perpetrator of the asserted prior bad act, even if there is no identity issue about the charge being tried. *Commonwealth v. Delrio*, 22 Mass. App. Ct. 712, 721 (1986).

3. Other and acts to prove identity. When other act evidence is offered to prove identity, its admission is “likely to have an improper influence on the jury” and thus it is only allowed where “the prior events and the circumstances of the crime charged have such similarities as to be meaningfully distinctive... . There must be a uniqueness of technique, a distinctiveness, or a particularly distinguishing pattern of conduct common to the current and former incidents... .” *Commonwealth v. Jackson*, 417 Mass. 830, 836 (1994), quoting *Brusgulis*, 406 Mass. at 505-506. “The commonalities among the crimes, therefore, need to be so distinctive that their probative value in identifying the defendant as the perpetrator of the crime charged outweighs the substantial risk of unfair prejudice.” *Commonwealth v. Veiovis*, 477 Mass. 472, 483 (2017).

4. Act for which defendant acquitted barred by collateral estoppel. Evidence of a prior bad act for which the defendant was prosecuted and acquitted is inadmissible, as it is barred by the collateral estoppel principles of Article 12 of the Massachusetts Declaration of Rights. See *Commonwealth v. Dorazio*, 472 Mass. 535, 547-548 (2015).

5. Test for admissibility same for defendant as for Commonwealth. Where the defendant seeks to introduce other bad acts of the victim, the defendant's burden as the proponent of the evidence is the same. See *Commonwealth v. Ronchi*, 491 Mass. 284, 299 (2023).