



2018

§4.15 Prior Wrongs to Prove Specific Points

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Recommended Citation

Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §4.15 Prior Wrongs to Prove Specific Points (2018). C. Mueller, L. Kirkpatrick, & L. Richter, Evidence §4.15 (6th ed. Wolters Kluwer 2018); GWU Law School Public Law Research Paper No. 2018-56; GWU Legal Studies Research Paper No. 2018-56. Available at SSRN: <https://ssrn.com/abstract=3275023>

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§4.15 Prior Wrongs to Prove Specific Points

FRE 404(b)(1) restates the exclusionary principle of FRE 404(a)(1) that evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show conduct in conformity therewith on a particular occasion. However, FRE 404(b)(2) expressly permits evidence of prior crimes, wrongs, or acts to be introduced for other diverse purposes, including proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹ These may fairly be called “uncharged” crimes because they are not the ones for which the defendant is standing trial.

A rule of inclusion?

It is often said that FRE 404(b) takes an inclusionary rather than an exclusionary approach because it sets out a list that is exemplary rather than exhaustive: Prior acts may not be admitted to show propensity, but may be admitted for “another purpose, *such as*” those in the list (emphasis added).² Unfortunately this phrase, particularly when combined with the pro-admissibility phrasing in FRE 403 (admit relevant evidence unless probative value is “substantially outweighed” by dangers like unfair prejudice), has sounded to courts like an open invitation to be generous in admitting prior acts. Certainly courts, particularly in drug cases in the federal system, admit prior acts under FRE 404(b) routinely, and these rulings are among the most common grounds of error urged on appeal from criminal convictions.³ Everyone recognizes that the risk of prejudice in this setting is serious, not only because a jury is likely to draw the forbidden propensity inference (“if he did it before, he probably did it this time too”), but also because most prior acts are criminal in nature and are likely to provoke anger or at least antipathy (“regardless what he did this time, he ought to go to jail”), which are textbook examples of the kind of “unfair prejudice” that FRE 403 aims to prevent.⁴

Not a rule of generous admissibility

In fact FRE 404(b) is *not* a rule of generous admissibility. In criminal cases, many courts quite rightly ask prosecutors not merely to cite a list of purposes that might apply, but to identify a specific nonpropensity purpose for which a prior act is relevant,⁵ and of course the defendant is

§4.15 1. For cases admitting evidence for these limited purposes, *see* §4.17, *infra*.

2. *United States v. Watford*, 894 F.2d 665, 671 (4th Cir. 1990) (FRE 404(b) is a rule of inclusion that “allows admission of evidence of other acts relevant to an issue at trial except that which proves only criminal disposition”).

3. *See Imwinkelried, Uncharged Misconduct Evidence* 1:4 (2016); Patterson, *Evidence of Prior Bad Acts: Admissibility Under the Federal Rules*, 38 *Baylor L. Rev.* 331 (1986); Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 *Iowa L. Rev.* 579 (1985).

4. *See* the discussion of FRE 403 in §4.10, *supra*.

5. *United States v. Sampson*, 980 F.2d 883, 888 (3d Cir. 1992) (record must clearly show purpose for which prior act evidence admitted; “a mere listing of the purposes found in FRE 404(b) is insufficient”); *United States v.*

entitled to an instruction that seeks to focus the jury's attention on this point and to urge the jury not to draw other inferences.⁶ Some courts have gone further to discourage free and easy resort to FRE 404(b), by enforcing more strictly the rule against propensity reasoning (particularly in connection with using prior acts to prove intent, which often depends on a kind of propensity inference),⁷ and by discouraging use of other acts on points that are not actively contested by the defendant (the absence of contest suggesting that there is no real need to prove other acts).⁸ One of the authors of the present work has joined the Reporter to the Evidence Rules Advisory Committee in proposing that other acts offered against a criminal defendant under FRE 404(b) should be subject to the same "reverse 403" balancing standard that applies when prior convictions are offered to impeach the accused under FRE 609.⁹ This approach would go far to discard any notion that FRE 404(b) is a rule of generous admissibility by requiring exclusion unless probative worth substantially outweighs the risk of unfair prejudice. It would also bring FRE 404 and 609 into closer harmony, as both deal with the same kind of risks to criminal defendants from unfair prejudice.

"Reverse" FRE 404(b) evidence

In criminal cases, FRE 404(b) evidence is usually offered by the prosecutor. However, defendants are also entitled to introduce what is sometimes called "reverse" 404(b) evidence,¹⁰ particularly where misconduct by a third person tends to show that he, and not the defendant, was the perpetrator of the crime.¹¹ Although defense evidence offered under FRE 404(b) is also subject

Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) (government "must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence").

6. United States v. Tai, 994 F.2d 1204, 1211 (7th Cir. 1993) (trial judge instructed jury about all listed uses of FRE 404(b) evidence; instructions were in error "to the extent they informed the jury that the extrinsic act evidence could be considered for purposes other than the proper purposes for which it was admitted").

7. See United States v. Gomez, 763 F.3d 845, 853-857 (7th Cir. 2014) (court should ask not only "whether" other act is relevant, but "how" it is relevant "without relying on the propensity inference") (en banc).

8. See United States v. Caldwell, 760 F.3d 267 (3d Cir. 2014) (probative value of other acts is diminished where defense "does not contest" the point that the other act is offered to prove) (vacating conviction).

9. Daniel J. Capra & Liesa L. Richter, Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants, 118 Colum. L. Rev. ___, ___ (2018) (hereafter Capra & Richter, Character Assassination).

10. United States v. Herrera, 600 F.2d 502, 505 (5th Cir. 1979) (evidence of a "systematic campaign of threats and intimidation" by third person may be admissible under FRE 404(b) "to support a defendant's defense of duress").

11. United States v. Stevens, 935 F.2d 1380, 1401-1406 (3d Cir. 1991) (where defendant charged with aggravated sexual assault and robbery on a military base claimed mistaken identity, reversible error to exclude testimony that a different man who resembled defendant committed a similar crime on the same base under very similar

to FRE 403, the risk of prejudice is significantly less than when such evidence is offered by the prosecution because the third person is not a party and cannot be the object of an angry or vengeful verdict.¹²

Application in civil cases

Although FRE 404(b) is most frequently invoked in criminal prosecutions, it also applies in civil cases.¹³ For example, evidence of prior misconduct has been admitted in civil cases to prove improper motive,¹⁴ notice,¹⁵ a wrongful “pattern or practice,”¹⁶ and discriminatory¹⁷ or fraudulent¹⁸ intent.

Nature and timing of prior act

Prior conduct may be proved under FRE 404(b) even where it is not a crime and even where it is not wrongful.¹⁹ But courts tend to analyze the admissibility of prior conduct that is not wrongful under the more general standards of FRE 401 and 403 rather than FRE 404(b).

circumstances).

12. *United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989) (“normal risk of prejudice” is absent when defendant offers evidence of third-party misconduct).

13. *See, e.g., Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150, 154 (1st Cir. 1992) (recognizing applicability of FRE 404(b) in civil context, although here court excludes evidence).

14. *Roshan v. Fard*, 705 F.2d 102, 104-106 (4th Cir. 1983) (civil action arising out of altercation in a bar; error to exclude defense evidence that plaintiff had been convicted of a crime where defendant had acted as an informant because such evidence tended to demonstrate plaintiff’s motive to initiate assault).

15. *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986) (in negligence action against city, proper to admit evidence of prior complaints of police brutality because “such claims put City on notice that there was a possibility that its police officers had used excessive force”), *cert. denied*, 480 U.S. 922.

16. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300-1301 (9th Cir. 1981) (instances of alleged racial discrimination may be used “to establish the existence of a pattern or scheme” under FRE 404(b)).

17. *Miller v. Poretsky*, 595 F.2d 780, 784 (D.C. Cir. 1978) (prior acts of alleged racial discrimination relevant to prove “landlord’s motive”).

18. *Edgar v. Fred Jones Lincoln-Mercury, Inc.*, 524 F.2d 162, 164-167 (10th Cir. 1975) (in fraud action alleging an odometer rollback on car, error to exclude evidence of prior similar acts to show “knowledge or intent”).

19. *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) (fact that records did not show appellant’s prior conduct to be criminal “is immaterial”).

FRE 404(b) requires only that the prior act have logical relevancy, not that it necessarily be similar in nature to the charged crime.²⁰ For some uses of prior act evidence, such as showing motive, similarity is not required. For other uses, such as proving intent or knowledge similarity is generally necessary to establish probative value. When offered to prove *modus operandi*, the prior act must have a high degree of distinctive similarity in order to show that the charged offense bears the “trademark” or “signature” of the accused.²¹

The “other” crimes, wrongs, or acts admissible under FRE 404(b) need not have occurred prior to the time of the crime or other event at issue in the trial. Conduct occurring after the charged offense is sometimes relevant to prove points such as knowledge or intent.²²

“Inextricably intertwined” acts

Often the charged crime is connected with other criminal acts. Where it is hard or impossible to prove one without proving or at least mentioning another uncharged crime, courts sometimes say the various acts are “inextricably intertwined.” For example, proof that a defendant sold contraband usually requires proof that he possessed it.

Where crimes really *are* inextricably intertwined in this manner, courts sometimes say that FRE 404(b) does not apply, on the theory that the uncharged crime is not an extrinsic offense or “other” crime²³ but is instead simply part of the proof of the charged offense.²⁴ There is some confusion and imprecision on this point, however, as courts sometimes use the “inextricably intertwined” label to describe uncharged crimes that are separate in place and time and should more properly be categorized as extrinsic, but are provable in order to provide background or context that is sometimes helpful in understanding proof of the charged offense.²⁵ Even if FRE 404(b) does not

20. *See* *United States v. Vest*, 842 F.2d 1319, 1327 n.6 (1st Cir. 1988) (“‘[S]imilarity’ is not a general requirement for admissibility under Rule 404(b).”), *cert. denied*, 488 U.S. 965.

21. *See* §4.17, *infra*.

22. *United States v. Brugman*, 364 F.3d 613, 619-620 (5th Cir. 2004) (in trial of border patrol agent for deprivation of rights under color of law, admitting evidence of later instance in which defendant beat a person who was not resisting apprehension as proof of intent).

23. *United States v. Dula*, 989 F.2d 772, 777 (5th Cir. 1993) (evidence of an uncharged offense “arising out of the same transaction or series of transactions as the charged offense” is not an “extrinsic offense” within the meaning of Rule 404(b) and “is therefore not barred by the rule”).

24. *United States v. Williams*, 291 F.3d 1180, 1189 (9th Cir. 2002) (in trial for inducing women to travel interstate for prostitution, admitting proof of violent assaults; these were not elements in the crime, but were the “means by which Defendant maintained the necessary control,” so they were “necessarily part of the transactions and therefore were inextricably intertwined”); *United States v. Bettelyoun*, 892 F.2d 744, 746-747 (8th Cir. 1989) (evidence that defendant assaulted mother of his child one hour before killing his current lover admissible as an “integral part of the operative facts of the crime charged and as such is not governed by Rule 404(b)”).

25. *See, e.g., United States v. Strong*, 485 F.3d 985, 990 (7th Cir. 2007) (in felon-in-possession of firearm

apply to acts necessarily included in the charged offense, its standards and safeguards do apply to uncharged crimes of the latter sort that are more loosely connected to the charged offense. An example would be a charged robbery in which the motivating force and ultimate use of stolen money involve the purchase of drugs, where the drug offense helps make sense of the charged crime of robbery.²⁶ Some courts have rejected the “inextricably intertwined” test as inherently confusing and have limited the definition of “intrinsic” acts to those that directly prove or facilitate the commission of the charged offense.²⁷ All other acts are viewed as “extrinsic” and are subject to the requirements of FRE 404(b), including a defendant’s right to notice and a limiting instruction.

Proving prior crimes or wrongs

The most certain way of proving a prior crime under FRE 404(b) is by evidence of a criminal conviction, whether based on a verdict or guilty plea. Convictions have been held admissible under FRE 404(b) even where based on a plea of *nolo contendere*, although the better practice in such cases is to prove the underlying acts.²⁸ Juvenile adjudications may be admitted²⁹ as well as convictions in courts of foreign nations, provided the defendant was granted procedural protections essential to fundamental fairness.³⁰

prosecution, finding evidence of “contemporaneous uncharged drug trafficking” admissible under “inextricably intertwined doctrine”).

26. *United States v. Bowie*, 232 F.3d 923, 927-929 (D.C. Cir. 2000) (caution warranted, because bifurcating universe into “intrinsic” and “extrinsic” evidence is difficult, and “bypasses Rule 404(b) and its attendant notice requirement” while carrying “implicit finding that the evidence is admissible for all purposes, notwithstanding its bearing on character”). *See also* §4.18, *infra*.

27. *See United States v. Green*, 617 F.3d 233, 246-247 (3d Cir. 2010) (rejecting “inextricably intertwined” test as “vague, overbroad and prone to abuse” and a danger “to the vitality of FRE 404(b)”); *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010) (“resort to inextricable intertwining is unavailable when determining a theory of admissibility”). *See also* Capra & Richter, *Character Assassination*, 118 *Colum. L. Rev.* ____, ____ (2018) (criticizing use of the “inextricably intertwined” concept as one of the practices leading to “a permissive culture of admissibility” that “flies in the face of Rule 404(b)’s ban on other acts evidence”).

28. *United States v. Frederickson*, 601 F.2d 1358, 1368 n.10 (8th Cir. 1979) (in applying FRE 404(b) court finds “no reason to distinguish between a judgment of conviction based on a plea of *nolo contendere* and a judgment of conviction obtained in any other manner”), *cert. denied*, 444 U.S. 934. *Contra United States v. Wyatt*, 762 F.2d 908, 911 (11th Cir. 1985).

29. *United States v. Rogers*, 918 F.2d 207, 210-211 (D.C. Cir. 1990) (FRE 609(d) does not bar juvenile adjudications from being introduced under FRE 404(b)).

30. *United States v. Rodarte*, 596 F.2d 141, 146 (5th Cir. 1979) (proper to admit prior Mexican drug conviction because “foreign convictions stand on the same footing as domestic proceedings” provided that foreign jurisdiction observes necessary procedural protections). *See generally* Comment, *The Collateral Use of Foreign Convictions in*

Prior crimes may be proved under FRE 404(b) even where there has been no conviction and where prosecution would be barred by a grant of immunity or the running of the statute of limitations.³¹ The government may prove a defendant's involvement in a prior crime even if the defendant was charged with that crime in a prior case but won an acquittal. The reason is that the acquittal establishes only the presence of reasonable doubt, and does not reflect an actual determination that the defendant did not commit or was not involved in the earlier crime.³² Evidence of a prior crime resulting in an acquittal has considerable probative value in cases where a defendant claims lack of knowledge of the unlawful nature of his conduct, and the prior unsuccessful prosecution tends to rebut such a claim.³³ Nonetheless, the fact of acquittal is a factor properly considered in deciding whether prior acts evidence should be excluded under FRE 403.³⁴

Evidence of arrests or charges is generally not admissible to prove crimes or misconduct under FRE 404(b) because such evidence by itself is insufficient to establish that the underlying conduct occurred.³⁵ Also, evidence of charges raises hearsay concerns if offered to prove the underlying conduct, and evidence of arrests as such usually carries hidden hearsay if such arrests amount to official action based on reports by others.³⁶

American Criminal Trials, 47 U. Chi. L. Rev. 82 (1979).

31. *See, e.g.*, United States v. DeFiore, 720 F.2d 757, 764 (2d Cir. 1983) (no error to admit evidence of prior tax frauds even though prosecution barred by statute of limitations), *cert. denied*, 467 U.S. 1241.

32. United States v. Dowling, 493 U.S. 342, 347-354 (1990) (neither Double Jeopardy nor Due Process Clause prevents prosecutor from offering evidence of prior misconduct by accused even though he has been tried and acquitted of such misconduct; receipt of such evidence does not violate notion of "fundamental fairness" because jury remains free to weigh probative value of evidence and defendant to refute it). However, a number of states bar proof of crimes of which defendant was acquitted under their counterparts of FRE 404(b). *See, e.g.*, State v. Wakefield, 278 N.W.2d 307, 308-309 (Minn. 1979) (admission of crimes of which defendant has been acquitted "prejudices and burdens" defendant and is "fundamentally unfair"); State v. Perkins, 349 So. 2d 161, 163 (Fla. 1977) (finding it "fundamentally unfair to a defendant to admit evidence of acquitted crimes").

33. *See, e.g.*, United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (in prosecution for illegally transporting marijuana in furniture, defendant claimed lack of knowledge; court approves admission of earlier incident where defendant was prosecuted for transporting marijuana in furniture, even though he was acquitted based on his asserted lack of knowledge).

34. United States v. Day, 591 F.2d 861, 869 n.19 (D.C. Cir. 1978) (fact of acquittal is one factor to be considered in applying FRE 403 to prior act evidence).

35. F.D.I.C. v. Bakkebo, 506 F.3d 286, 296 (4th Cir. 2007) (indictment is not admissible to prove prior wrong under FRE 404(b)).

36. Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1124 (7th Cir. 2001) (neither arrest nor charges may be used to prove prior acts under FRE 404(b), because neither suffices to prove that defendant committed the acts).

Standard of proof

At one time, many federal courts required proof by clear and convincing evidence that a defendant committed the prior crime, wrong, or act before evidence thereof could be presented to the jury.³⁷ In the *Huddleston* case, however, the Supreme Court approved a significantly lower standard requiring only evidence sufficient to support a jury finding by a preponderance of the evidence that the wrongful conduct occurred.³⁸ Under *Huddleston*, the question whether the prior misconduct occurred is ultimately resolved by the jury under FRE 104(b), with the trial court retaining discretion to exclude evidence of the prior act if the evidence falls short of establishing this fact by a preponderance.³⁹

Huddleston seems wrong in viewing prior acts evidence as raising fact questions for a jury to decide under FRE 104(b) and in downplaying the danger of allowing highly prejudicial evidence of defendant's alleged misconduct to come before the jury when the prosecutor has not even persuaded the trial court that such misconduct occurred.⁴⁰ The concerns raised by the *Huddleston* standard can be mitigated in part by careful application of FRE 403. The less certainty there is that the prior misconduct occurred, or that defendant was the actor, the greater the justification for exclusion under FRE 403. States remain free to determine the required evidentiary threshold under their counterparts of FRE 404(b), and many have refused to adopt the lenient *Huddleston* standard.⁴¹

37. See, e.g., *United States v. Weber*, 818 F.2d 14, 14 (8th Cir. 1987); *United States v. Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987), *cert. denied*, 484 U.S. 914.

38. *Huddleston v. United States*, 485 U.S. 681, 685 (1988). The lower standard had been previously recognized by most federal courts. See, e.g., *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920.

39. See 485 U.S. at 689-690, *supra*. In cases where the issue is contested, the court should inform the jury that it should not consider the prior crime or act unless it finds by a preponderance of the evidence that defendant in fact committed it.

40. In January 1989, the American Bar Association passed a resolution disapproving the result in *Huddleston*. See 3 BNA Criminal Practice Manual 75 (Feb. 22, 1989) (recommending that “1. Questions of preliminary fact regarding the admissibility of evidence of extrinsic act will be determined by the court; and 2. The existence of any preliminary fact required as a precondition to the admission of evidence of the extrinsic act must be demonstrated by the proponent by clear and convincing evidence.”). See also Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135 (1989) (calling for legislative amendment to overturn result in *Huddleston*).

41. See, e.g., *State v. Cofield*, 127 N.J. 328, 605 A.2d 230, 234-235 (1992) (evidence of other crimes “must be clear and convincing”); *Daniels v. United States*, 613 A.2d 342, 347 (D.C. 1992); *Phillips v. State*, 591 So. 2d 987, 989 (Fla. 1991); *People v. Garner*, 806 P.2d 366, 370-374 (Colo. 1991) (rejecting *Huddleston* analysis and adopting preponderance standard; whether prior crime occurred is question for court under Rule 104(a)); *Pena v. State*, 780 P.2d 316 (Wyo. 1989) (one factor for determining admissibility is whether “[t]he proof of the other similar crimes is plain, clear and convincing”). *But see* *State v. Wheel*, 587 A.2d 933, 943 (Vt. 1990) (adopting *Huddleston* analysis).

Notice requirement

FRE 404(b)(2) requires that the prosecution, on request by an accused,⁴² provide pretrial notice of any evidence it intends to introduce under FRE 404(b). The notice requirement “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense.”⁴³ The time and form of notice are left undefined but must be reasonable under the circumstances of the case.⁴⁴ If the prosecutor fails to comply with the notice requirement, the offered evidence should normally be excluded.⁴⁵ The notice requirement is a continuing one that extends to newly discovered evidence.⁴⁶

Instructing jury

Particularly in criminal cases, an instruction should normally be given informing the jury of the limited purpose for which evidence has been admitted under FRE 404(b),⁴⁷ and in some circumstances failure to give such a limiting instruction may amount to plain error. It is not proper for the instruction merely to cite the litany of permissible purposes listed in FRE 404(b).⁴⁸

42. *United States v. Tuesta-Toro*, 29 F.3d 771, 774 (1st Cir. 1994) (defense request must be “sufficiently clearly and particular” to alert prosecution that defense is invoking right to pretrial notification under FRE 404(b)).

43. ACN to 1991 amendment. *See also United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994) (admitting testimony describing earlier drug deliveries by defendants; acts were inextricably intertwined with charged conspiracy so notice requirement of FRE 404(b) did not apply).

44. ACN to 1991 amendment (counsel are expected “to submit the necessary request and information in a reasonable and timely fashion,” which will “depend largely on the circumstances of each case”). *See also United States v. Perez-Tosta*, 36 F.3d 1552, 1560-1562 (11th Cir. 1994) (notice immediately before trial sufficed, where government only recently learned of potential evidence, evidence was significant, and no prejudice to defendant shown).

45. *United States v. Carrasco*, 381 F.3d 1237, 1241 (11th Cir. 2004) (reversible error to admit prior convictions on issue of intent when government failed to give proper notice and matter of intent “went to heart” of the defense).

46. *United States v. Barnes*, 49 F.3d 1144, 1148 (6th Cir. 1995) (government has continuing obligation to disclose evidence discovered after previous request was answered).

47. *United States v. Nabors*, 761 F.2d 465, 470-471 (8th Cir. 1985) (when admitting prior acts evidence, a “cautionary instruction” to the jury should be given), *cert. denied*, 474 U.S. 851.

48. *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992) (error found where jury instruction simply recited FRE 404(b) and failed to limit government to specific theories offered in support of admission of prior acts evidence).

Comparison with FRE 608(b)

FRE 404(b) must be distinguished from FRE 608(b), which permits, in the discretion of the court, impeachment or rehabilitation of a witness by inquiry into prior instances of conduct bearing on the “truthfulness” of the witness. FRE 608(b) is limited to impeachment or rehabilitation of witnesses. It cannot be used against a party who does not take the stand, and it paves the way only for questions about conduct that bears on veracity (such as prior false statements). Finally, FRE 608(b) authorizes only questions to the witness whose veracity is in issue, and it expressly prohibits extrinsic evidence of conduct (such as testimony by another witness). FRE 404(b) contains no such limitations.