

**STATE OF VERMONT
VERMONT SUPREME COURT
JULY TERM 2023**

Order Amending Rule 26(c) and (d) of the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 26(c) and (d) of the Vermont Rules of Criminal Procedure be amended as follows (new matter underlined; deleted matter struck through):

RULE 26. EVIDENCE

(c) **Other Criminal Offenses.** When the state in a criminal action intends to offer evidence of other criminal offenses under Rule 404(b) of the Vermont Rules of Evidence, or when any party in a criminal action intends to offer evidence of an offense for impeachment under Rule 609 of the Vermont Rules of Evidence, at least thirty days before the trial, or such greater time as the court may order, that party shall furnish to the other parties in the proceeding a written statement of the acts or offenses it intends to offer, articulating in the notice the permitted purpose for which the state or party intends to offer the evidence and the reasoning that supports the purpose. ~~except that the~~ The court may allow the notice to be given at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. No notice is required for evidence of offenses used in rebuttal. When evidence of other criminal offenses is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

(d) **Hearsay Statements of a Victim Who is a Child Ten Years of Age or Under or a ~~Mentally Retarded or Mentally Ill Person~~ Person with a Mental Illness, or an Intellectual or Developmental Disability.** When the state in a criminal action intends to offer hearsay statements of a victim who is a child ten years of age or under or a ~~mentally retarded or mentally ill~~ person with a mental illness, or an intellectual or developmental disability, made admissible by Rule 804a of the Vermont Rules of Evidence, the state shall furnish to the defendant a written statement of the evidence it intends to offer, including the name of each witness who will testify to the statement of the victim, at least 30 days before trial. The court may allow the notice to be given at a later date, including during trial, if it determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence results has newly arisen in the case.

Reporter's Notes—2023 Amendment

Rule 26(c) is amended to comport with the 2020 amendment of Federal Rule of Evidence 404(b) which imposed additional notice requirements on the prosecution in seeking the introduction of other crimes, wrongs, or acts evidence in a criminal case. Specifically, under F.R.E. 404(b) the prosecution must identify the evidence that it intends to offer, and also articulate the nonpropensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. Vermont Rule of Criminal Procedure 26(c) and accompanying Vermont caselaw serve much the same purpose. Although the text of Rule 26(c) itself has not required an articulation of the nonpropensity purpose for which the evidence is being offered or the basis for concluding that the evidence is relevant in light of that purpose, caselaw (and the present amendment) require the proponent seeking to admit evidence under Rule 404(b) to show precisely how the proffered evidence is relevant to the theory advanced and how the issue is related to the disputed elements in the case, and how the probative value of the evidence is not substantially outweighed by its prejudicial effect. State v. Winter, 162 Vt. 388, 393, 648 A.2d 624, 627 (1994); accord State v. McAllister, 2018 VT 129, ¶ 22, 209 Vt. 60, 202 A3d 989. The Vermont cases specify that it is the state's burden to establish that the evidence does not simply show a propensity, but instead is relevant to a genuine, separate issue in the case and that its probative value outweighs the potential for unfair prejudice. State v. Williams, 2010 VT 77, ¶ 10, 188 Vt. 405, 9 A.3d 315; State v. Lipka, 174 Vt. 377, 391, 817 A.2d 27, 38-39 (2002).

It was considered and rejected as part of the federal rules to include a requirement that the evidence relate to a matter genuinely in dispute at trial; the rejection was due to the difficulty of defining what is “genuinely in dispute” in any given case. Vermont cases, though, have repeatedly referenced the requirement. See, e.g., McAllister, 2018 VT 129, ¶ 22; State v. Lawrence, 2013 VT 55, ¶¶ 21-22, 194 Vt. 315, 80 A.3d 58; Williams, 2010 VT 77, ¶ 10; State v. Longley, 2007 VT 101, ¶¶ 14-22, 182 Vt. 452, 939 A.2d 1028; Lipka, 174 Vt. at 391, 817 A.2d at 38-39.

In contrast to F.R.E. 404(b), V.R.E. 404(b) does not set forth the advance disclosure requirement, which has been housed in V.R.Cr.P. 26(c) since 1983 amendments and is of combined application to both the state in seeking introduction of Rule 404(b) other crimes, wrongs, or acts evidence, and to both state and

defendant in seeking introduction of evidence of prior convictions under V.R.E. 609. Hence, the present amendment of Rule 26(c).

As has been the case under the existing rule, it is within the discretion of the court, on notice given at a later date, including during trial, to permit admission of “other acts” evidence subject to the specified notice of Rule 26(c) and requirements of V.R.E. 404(b), and of pertinent convictions offered in rebuttal, or for impeachment pursuant to V.R.E. 609, in circumstances first presented in the course of witness examination—“newly arisen”—in the course of trial, in the absence of requisite notice. Or, when the evidence—whether offered per Rules 404(b) or 609—is newly discovered and could not have been obtained earlier through the exercise of due diligence.

Finally, Rule 26(d) is amended to make nonsubstantive amendments as to terminology used in the present rule, to eliminate offensive language, and to comport with similar amendments made in 2020 to the referenced Vermont Rule of Evidence 804a (and to the 2023 amendment of V.R.E. 807).

2. That these amendments be prescribed and promulgated, effective October 2, 2023. The Reporter’s Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 10th day of July, 2023.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice