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**OFFICE OF THE DISTRICT ATTORNEY**

Concord Judicial Circuit

Sonnerville, Columbia

**MEMORANDUM**

TO: Andrew Solmark, Assistant District Attorney

FROM: Applicant

DATE: July 31, 2019

RE: State v. Martin

**INTRODUCTION**

You have asked me to prepare an objective appraisal of the arguments for and against admission of three specific incidents involving Bernice Martin. Each issue is discussed in full below.

**FACTS**

Bernice Martin was charged with two counts of identity theft for using the name and social security number of another person from her former job at FastCom, a cell phone company. Using this information, she tried to open charge accounts at several stores, succeeding on one occassion. Martin was arrested after the person whose information was improperly used put a fraud alert on her cards. The People now seek to offer evidence of three prior acts by Ms. Martin, which are: (1) Ms. Martin providing her sister's name and driver's license to police after being stopped for a broken tail light because her license was expired; (2) Police stopping Ms. Martin on the sidewalk for being visibly intoxicated; and (3) Ms. Martin's threats against Ms. Martinez, telling her to refrain from testifying and that she should tell the court she granted Ms. Martin permission to open the accounts. The defense is arguing that Ms. Martin made a mistake when she presented an officer with improper documentation and that the other two incidents are not probative of truthfulness. Each incident is evaluated in turn.

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## QUESTIONS PRESENTED

I. Whether Evidence of any of Ms. Martin's Three Prior Acts is Admissible Substantively Under Columbia Rule of Evidence 404(b).

II. Whether Evidence of any of Ms. Martin's Three Prior Acts is Admissible for Impeachment Purposes Under Columbia Rule of 608(b).

## ANALYSIS

I. Whether Evidence of any of Ms. Martin's Three Prior Acts is Admissible Substantively Under Columbia Rule of Evidence 404(b).

Columbia Rule of Evidence 404(b) governs the admission of evidence of certain specific acts. *State v. Landreau* (Supreme Court of Columbia 2011). Columbia Rule of Evidence 404(b) (1) prohibits the admission of prior bad acts to establish an individual's character or propensity to commit a crime. *Id.* Rule 404(b)(2) permits the admission of prior bad acts for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* This list of purposes provides a starting point for the analysis but is not exhaustive. *Id.* In determining the admissibility of evidence under Rule 404(b), the trial court must determine whether the evidence has relevance for some purpose other than as proof of propensity. *Id.* To determine whether proffered evidence has relevance for one or the other purpose, the court considers: (1) the degree of similarity to the charged crime and (2) the temporal relationship of the other acts. *Id.*

### *A. Furnishing of False Identification and Name*

It must first be determined whether Ms. Martin's furnishing of a false name and identification during a routine traffic stop is admissible for a purpose other than to prove propensity to falsify information. In *State v. Rogers*, the state allowed the admission of the prior importation of drugs to rebut the defendant's claim that he was an innocent participant in the charged importation. There, the court held that specific acts can be the basis for inferring that the defendant had a mental state that is inconsistent with innocence. *Landreau citing State v. Rodgers*. Here, Ms. Martin's furnishing of a false identification and name to a police officer when she was pulled over for a traffic stop due to a broken tail light is substantively admissible under *Rodgers* to negate a claim of innocence in the current case. Ms. Martin's falsification of identifying information to a police office can be offered to show that furnishing false evidence in the instant case was not a mistake because Ms. Martin had done it previously and was familiar with falsifying information. (Transcript)

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Ms. Martin will argue that she mistakenly gave the police her sister's name and identification, however, this argument is unlikely to hold up in court because Ms. Martin's license was found to be expired at the time of this incident, and presumably, she was aware that it was expired which is why she was carrying her sister's identification.

As such, this incident is likely to be admissible substantively to negate a mental state consistent with innocence.

*B. Public Intoxication and Verbal Altercation with Police*

Ms. Martin's instance of public intoxication is not likely to be admissible substantively at trial. Prior bad act need not be identical to the crime charges so long as it is sufficiently similar to permit a reasonable inference of knowledge or intent. Under *Landreau*, acts of violence or of intoxication are not sufficiently similar to the crime of falsifying documents to permit any inference of knowledge or intent. Here, Ms. Martin's visible intoxication and shouting at a police officer are not sufficiently similar to the crime of opening false credit accounts to permit an inference of knowledge or intent. The people may argue that the event was fairly recent, but this is not enough to show that the evidence is being offered for any other purpose than for propensity to behave irresponsibly. Thus, this incident will not be admissible substantively at trial.

*C. Threats to Ms. Martinez*

Ms. Martin's threats to Ms. Martinez may be admissible substantively to show absence of mistake because it is close in time and shows that she was not mistaken as she claims. In *State v. Vargas*, the court held that the lower court did not abuse its discretion in admitting evidence of prior fraudulent transactions to rebut the claim that defendant had been duped into joining the charged transactions. *Landreau* citing *State v. Vargas*. Here, Ms. Martin is claiming that the entire case is the result of a computer error at the two stores. However, the conversation with Ms. Martinez shows that this was no mistake. Ms. Martin's threats to Ms. Martinez to tell the court Ms. Martinez granted Ms. Martin permission directly show that this there was no error involved here.

Additionally, a prior bad act sufficiently close in time to the charges in the instant case can satisfy prior decisions. *Landreau*. Here, the conversation between Ms. Martin and Ms. Martinez took place just a couple of weeks after the fraud occurred. (Transcript). Thus, because Ms. Martin was referring to the fraud in her threats to Ms. Martinez, this conversation is admissible to show absence of mistake and is admissible substantively.

II. Whether Evidence of any of Ms. Martin's Three Prior Acts is Admissible for Impeachment

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Purposes Under Columbia Rule of 608(b).

Columbia Rule of Evidence 608 states that when a witness takes the stand and testifies, she puts her credibility in issue and thus, the opposing party is entitled to impeach the witness' credibility. *State v. Proctor* (Supreme Court of Columbia 2008). Under Rule 608(b), a witness may be asked about specific instances of conduct that are probative of a witness' character for truthfulness and untruthfulness. While prior decisions have not explained how to determine if an act is probative of truthfulness, case law has provided some examples of conduct that is or is not probative of truthfulness. *Proctor*. For example, providing false information to a police officer, intentionally failing to file tax returns, and misrepresenting financial information to obtain a loan are probative of truthfulness, while acts of violence, instances of drug use, driving under the influence of drugs, and bigamy are not probative of truthfulness. *Id.*

Here, whether any of the incidents below may be used for impeachment purposes first depends on whether Ms. Martin testifies at trial. Assuming she does, the People can proceed as follows.

*A. Furnishing of False Identification and Name*

Ms. Martin's furnishing of a false name and identification to police will be admissible for impeachment purposes. Under *Proctor*, an prior act used to impeach requires the act to have an affirmative element of false statement or deception, limiting the inquiry to acts such as perjury, false statement, criminal fraud, embezzlement, or false pretense but also permits questioning about conduct that indicates a willingness to gain a personal advantage by dishonest means, including by taking from others in violation of their rights or by encouraging dishonest behavior. Here, prior case law has held that providing false information to a police officer is probative of truthfulness. *Id.* Because Ms. Martin likely was aware that her driver's license was expired and subsequently used her sister's license, this act goes to show that she is willing to drive with an expired license for her own gain by unlawful means.

Ms. Martin may argue that she was not convicted of this offense and it was a mistake, thus it was not probative of truthfulness and is inadmissible. This argument is unlikely to hold up in court because Ms. Martin was likely aware of her expired license. As such, this incident is likely admissible for impeachment purposes, to show a willingness to gain a personal advantage by unlawful means.

*B. Public Intoxication and Verbal Altercation with Police*

Ms. Martin's incident of public intoxication is unlikely to be admissible for impeachment purposes because it is not probative of truthfulness or untruthfulness and shows no willingness

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to gain personal advantage by dishonest means. Thus, it may not be used to impeach.

*C. Threats to Ms. Martinez*

Ms. Martin's threats to Ms. Martinez are admissible to impeach because persuading a witness to lie on the stand because this conduct indicates a willingness to gain a personal advantage by dishonest means, including taking from others in violation by encouraging dishonest behavior in others. *Proctor citing State v. Vorhees* (Columbia Court of Appeal).

Here, Ms. Martin's threat to Ms. Martinez warning her to not testify at trial and telling Ms. Martinez to falsify her testimony by saying she gave Ms. Martin "permission" to open the accounts directly shows Ms. Martin's willingness to gain a personal advantage by dishonest means. Moreover, her conduct encourages dishonest behavior in others, namely, that Ms. Martinez commit perjury.

Ms. Martin argues that the prosecution seeks to offer this conversation as an attempt to paint Ms. Martin as a violent person. Should Ms. Martin take the stand and should the court find this instance admissible to impeach Ms. Martin, Ms. Martin can then rebut the evidence with evidence of her own character for peacefulness. As such, the court will likely admit this instance for impeachment purposes.

**CONCLUSION**

In sum, a court is likely to admit the instances of furnishing a false name and identification, and of the threats to Ms. Martinez both substantively and to impeach. It is unlikely that a court would allow the incident of public intoxication for either purpose.

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**END OF EXAM**