

MULTIPLE SEPARATE TRANSACTIONS OF SAME CRIME

As you are aware, the defendant is charged with committing crimes arising out of (specify number) separate incidents.

I caution you that you must not infer from the number of charged crimes that the defendant is guilty of any one or more of those crimes. Nor may you infer from a finding that the defendant committed any one or more of the alleged (name of crime, e.g. robbery/burglary) that he/she has a propensity to commit that crime and is thus guilty of the remaining alleged crimes.

Select appropriate alternative:

Alternative One:

In considering the crime(s) charged for each incident, you must therefore consider the evidence that pertains to each incident separately. A piece of evidence that pertains to one incident may, however, also pertain to another incident. In that instance, you may, of course, consider that piece of evidence as to any incident to which it pertains.

For example, suppose you needed to decide whether Mr. X visited two separate Broadway shows on two separate dates. One witness identifies Mr. X as the person she saw at the first show. A second witness identifies Mr. X as the person he saw at the second show and further testified that he overheard Mr. X tell a friend that he was at the first show. In deciding whether Mr. X was at the first show you may consider the identification evidence of the first witness and the testimony of the second witness as to what Mr. X allegedly told his friend while at the second show. In deciding whether Mr. X was at the second show you may only consider the identification of the second witness. And if you find that Mr. X was at one show, you may not infer from that finding that he must have been at the second show.

Alternative Two:¹

You are permitted to consider whether and to what extent, if any, two or more of the crimes charged comprised a pattern or

method of operation which is so distinctive, unusual, or unique that it compels the inference that the same person committed the crimes included in the distinctive pattern. If you so find, and you also find beyond a reasonable doubt that the defendant committed a (*name of crime*) included within that distinctive pattern, then you may consider that evidence in determining whether the identity of the defendant as the person who committed another (*name of crime*) included within that distinctive pattern has been proven beyond a reasonable doubt.

1. *People v. Beam*, 57 N.Y.2d 241, 251-53 (1982):

“The mere fact that similar crimes were committed in a similar manner would not particularly aid in identifying the defendant unless the similarities were unusual enough to compel the inference that the defendant committed both. Thus, the defendant's modus operandi must be sufficiently unique to make the evidence of the uncharged crimes “probative of the fact that he committed the one charged (citations omitted).

The threshold issue is whether or not identity is even an issue in the case.

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The use of the identity exception [to *Molineux*] was thus proper if it can be said that the alleged conduct was sufficiently unique to be probative on the issue of identity.

* * *

The pattern of the assault itself was also sufficiently unique to indicate that one person was responsible. It is not necessary that the pattern be ritualistic for it to be considered unique; it is sufficient that it be a pattern which is distinctive. This is not to say each element of the pattern must be in and of itself unusual; rather the pattern, when viewed as a whole, must be unique.”

People v. Dockery, 215 A.D.2d 497, 497-98 (2nd Dept. 1995) (the facts “show that the two cases were sufficiently alike to establish a modus operandi. Accordingly, the court properly instructed the jury to consider the similarities between the two incidents on the issue of identity alone, and properly limited the potentially prejudicial effect of such instruction by so restricting the jury's use of the evidence. For the same reason, it was not error for the prosecutor to draw the jury's attention to the similarities between the two cases.”).

People v. Rios, 245 A.D.2d 470, 470 (2nd Dept. 1997) (“Since the

defendant's identity was a primary issue at trial and the three robberies, all sharing the same distinctive modus operandi, were properly joined," the jury should be permitted to consider "evidence of guilt as to one robbery as evidence of guilt as to the other robberies").

People v. McRae, 276 A.D.2d 332, 332–33, 714 N.Y.S.2d 56 (1st Dept. 2000) ("Since the various robberies of which defendant was convicted shared sufficiently distinctive circumstances so that the over-all pattern tended to prove that the same person committed all of the crimes, the prosecutor was properly permitted to make such an argument in summation. The crimes were committed within a period of 72 hours in similar buildings in the same neighborhood, and there were striking similarities in the manner in which they were committed").

Cf. People v. Robinson, 68 N.Y.2d 541, 548 (1986) ("where the defense is mistaken identity and the testimony of the single eyewitness is extensively impeached, evidence of an uncharged crime is admissible, provided the modus operandi is so unique as to make the evidence highly probative").