



Admission of Prior Sex Offenses HB 1766 and SB 1114

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Study Authorization



- House Bill 1766 introduced by Delegate Robert Bell, and Senate Bill 1114 introduced by Senator Mark Herring during the 2013 Regular Session of the General Assembly, both sought to allow previous convictions to be admitted into evidence in sexual abuse cases committed against minors.
- The bills were referred to the Crime Commission for study by letter from the House Courts of Justice Committee.

Overview



- The bills specify that in felony child sexual abuse cases, the admission of the “defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is *relevant*.”
 - Both bills require a 14 day notice; and,
 - HB 1766 requires that the evidence must be subject to Virginia Rules of Evidence 2:403.

Collateral Act Evidence



- Collateral act evidence, also referred to as propensity or character evidence, is evidence about a person's traits, reputation, or even previous criminal convictions/acts that are not the subject of a current criminal prosecution.

Collateral Act Evidence



- There was a strong presumption against the use of collateral act evidence in the common law.
 - An exception under English common law existed for the crimes of fraud or forgery.
 - It was also permitted to raise issues of truthfulness during cross examination of witnesses.

Collateral Act Evidence



- The basic reason for the exclusion of such evidence is rooted in the notion that the defendant must be tried upon facts concerning what he is currently accused of, not what he has done in the past.
 - The concern was a jury would base its decision more about the defendant's character, and ignore the facts surrounding the current prosecution.

Collateral Act Evidence



- In 1901, the New York Court of Appeals decided People v. Molineux, which created a fundamental change to the exclusion of collateral act evidence.
 - This ruling was later codified into Federal Rule of Evidence 404(b).
 - Every state has a version of this rule, including Virginia [Virginia Rule of Evidence 2-404(b)].

Collateral Act Evidence



- Virginia Rule of Evidence 2-404(b):
 - “...Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any **relevant** fact pertaining to the offense charged, such as where it is *relevant* to show **motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.**”

Collateral Act Evidence



- Courts have used this exception to admit collateral act evidence in child sexual abuse cases:
 - State v. Yager, 236 Neb. 481, 483, 461 N.W.2d 741, 743 (1990) - testimony of two prior victims of defendant's fondling to refute accidental touching defense.
 - State v. Lucas, 364 S.E.2d 12, 16-17 (W. Va. 1987) - holding similar prior molestations admissible to show why victim did not resist defendant.

Collateral Act Evidence



- Williams v. State, 110 So. 2d 654 (Fla. 1959) - previous instance where the defendant waited in the backseat of a car and attempted to fondle a victim was admitted in a rape case where the defendant used a "common plan or scheme."
- State v. Sterling, 15 Or. App. 425, 427, 516 P.2d 87, 88 (1973) - two separate acts, upon different victims, was allowed to show the "signature" of the crime to prove identity of the defendant.

Lustful Disposition/Pedophile Rule



- In the years following the Molineux Rule, many courts adopted what was called the "lustful disposition" rule in cases of incest and child molestation.
 - "Provided they are not too remote in time or otherwise, such other acts are *relevant* and admissible to show the lustful disposition of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged and to corroborate the testimony of the prosecutrix as to the act." Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918).

Lustful Disposition/Pedophile Rule



- There are at least 35 states, including Virginia, that have judicially adopted the Lustful Disposition/Pedophile Rule:
 - AK, AR, AZ, CT, CO, GA, ID, IL, IA, KA, LA, ME, MD, MA, MS, MO, NE, NH, NJ, NM, NY, NC, ND, OK, OR, OH, PA, RI, SC, SD, TN, WA, WI, and WY.

Lustful Disposition/Pedophile Rule



- In Virginia, this exception has been recognized since 1923.
 - “The better doctrine, as we think, is that where, as here, the consent of the prosecutrix is immaterial, such evidence is admissible as tending to show the disposition of the defendant with respect to the particular act charged.” Stump v. Com., 137 Va. 804, 119 S.E. 72, 73 (1923).

Lustful Disposition/Pedophile Rule



- Testimony of previous acts between the minor victim and the defendant were permitted in a rape case. Waitt v. Com., 207 Va. 230, 234, 148 S.E.2d 805, 808 (1966).
- In Moore v. Com., 222 Va. 72, 75, 278 S.E.2d 822, 824 (1981), similar, subsequent acts against a third party were admitted into evidence, under the exception.

Lustful Disposition/Pedophile Rule



- The previous rape conviction of the defendant with the same victim (under 14), was allowed in a subsequent rape case. Marshall v. Com., 5 Va. App. 248, 250, 361 S.E.2d 634, 636 (1987).

Lustful Disposition/Pedophile Rule



- A more recent case illustrates how the exception is used along with 2-404(b) in a child sexual abuse case. In Ortiz v. Commonwealth, 276 Va. 705 (2008), the court allowed testimony from the victim concerning the sexual abuse committed against her by the defendant, which took place over the course of a few years. The court reasoned it was allowed because it was:
 - “...*relevant* for one or more of the following purposes: to show the conduct or attitude of Ortiz toward the child, to prove motive or method of committing the rape, to prove an element of the crime charged, or to negate the possibility of accident or mistake.”

Lustful Disposition/Pedophile Rule



- Ortiz v. Commonwealth (cont.)
 - The admission of a drug store receipt for “vaginal cream” and pornography seized from the defendant’s house was introduced and upheld because it:
 - Corroborated the victim’s testimony; and,
 - Provided evidence to negate the defendant’s explanation that the acts were an accident or mistake.

Federal and State Statutes



- In 1994, Congress passed into law Federal Rule of Evidence (FRE) 414, which essentially codified the lustful disposition/pedophile rule.
 - “In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is *relevant*.”

Federal and State Statutes



- FRE 414 also requires a 15 day notice by the prosecution, including witness statements or a summary of additional testimony.
- Although not required in the statute, it has been held in several federal circuit courts that the evidence must be subject to a balancing of the probative value versus the prejudicial effect.

Federal and State Statutes



- There are at least 14 states that have passed a statute or rule of evidence similar to FRE 414:
 - Alaska, Arizona, Colorado, Connecticut, Florida, Kansas, Illinois, Louisiana, Missouri, Texas, Utah, Oklahoma, Washington, and Wisconsin.
 - Missouri and Washington's statutes have been judicially repealed.

Federal and State Statutes



- All of these states:
 - Require notice from the prosecutor;
 - Specifically require an analysis of the probative value versus the prejudicial effect analysis before the evidence may be admitted; and,
 - Permit evidence of previous convictions, uncharged criminal activity or acts, that are *relevant* to the crime currently charged.

Federal and State Statutes



- Alaska (Alaska R. Evid. 404(b)(2)) limits the acts to those:
 - Similar to the act charged;
 - Occurring within ten years of the act charged; and,
 - Committed against a person similar to the victim.

Federal and State Statutes



- Arizona [Ariz. R. Evid. 404(c)] permits other *relevant* crimes, wrongs and acts that show the defendant has a “character trait giving rise to an aberrant sexual propensity to commit the offense charged.”
 - The probative value versus the prejudicial value analysis has defined factors for the court to review for all evidence presented under the rule.

Federal and State Statutes



- Colorado [Colo. Rev. Stat. Ann. § 16-10-301] permits the introduction of evidence of other acts of the defendant, including:
 - Refuting defenses, such as consent or recent fabrication; showing a common plan, scheme, design, or modus operandi...showing motive, opportunity, intent, preparation, including grooming of a victim, knowledge identity, or absence of mistake or accident; or for any other matter for which it is *relevant*. The prosecution may use such evidence either as proof in its case in chief or in rebuttal, including in response to evidence of the defendant's good character.

Federal and State Statutes



- Connecticut [CT R REV § 4-5] allows evidence of sexual misconduct if the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct and the:
 - Case involves aberrant and compulsive sexual misconduct; and,
 - Act or acts committed against a person similar to the victim.

Federal and State Statutes



- Louisiana [LA. CODE EVID. ANN. art. 412.2]
 - Limits admission to “sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is *relevant.*”

Summary



- Admission of collateral act evidence was disfavored in the common law.
- There has been an exception for evidence that focused on motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if it is part of a common scheme or plan.
- This exception may/has been used in child sexual abuse cases.

Summary



- The “lustful disposition” exception allows evidence of the unique nature between the defendant and victim, including uncharged criminal conduct/acts against the victim, or a third party, to corroborate the victim’s testimony.
- The lustful disposition exception is followed in Virginia.
- The Federal government and 12 states have codified a version of the “lustful disposition.”

Policy Considerations



- Should Virginia codify the lustful disposition rule?
 - In statute by endorsing HB 1766/SB 1114;
 - As part of Virginia Rules of Evidence 2-404; or,
 - Both.



Discussion