



12-1995

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Lynn McLain, *New Federal Rules in Sex Offense Cases*, 28 Md. B.J. Nov.-Dec. 1995, at 34.

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New Federal Rules In

Sex Offense Cases

BY LYNN MCLAIN

When a sexual assault occurs, it is usually committed in private. Only the victim and the attacker (or the attacker's cohorts) are present. The same can be said of consensual sexual activity (between persons old enough under the law to be considered capable of consenting). Thus, when an adult alleges that he or she has been sexually assaulted, and the accused person raises the defense of consent, the trial often comes down to a contest of "He said" vs. "She said." See, e.g., Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 Crim. L.F. 307, 316-17 (1993); David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 578 (1994).

The 1991 rape trial of William Kennedy Smith is an infamous example. She (the alleged victim) said that she met Smith at a bar, danced with him, and went with him to the Kennedy compound for a walk on the beach, when he suddenly took off

his pants, threw her down, and raped her. He (Smith) said that she consented to intercourse, but became angry when he called her the wrong name. Other accusations and insinuations later emerged as to her possibly stealing something from the house, her having had a child out of wedlock, and her father's having had some sort of rivalry with and animosity to the Kennedys.

Given this state of the evidence, the jury, instructed that the state of Florida had the burden of proving guilt beyond a reasonable doubt, would be hard pressed to return anything but a "not guilty" verdict. (United States jurisdictions do not, like Scotland, offer the jury the option of a verdict of "not proven.")

According to press reports, there were three other women who came forward and were willing to testify that Smith had engaged in conduct with them similar to that alleged by the victim. See Beale, *supra* at 308 & nn.3-4; Bryden & Park, *supra* at 530 & nn.5-8. Had the jury seen these witnesses and found them credible, it might well have credited the victim's testimony, rather than Smith's, and returned a guilty verdict. Of course, if Smith were guilty, this would have been the just course. Yet

the trial court excluded the other women's testimony, under the well-known "propensity rule." See, e.g., Fed. R. Evid. 404(a). Smith was acquitted.

When more people independently tell similar stories, each account strengthens the credibility of the other. Cf. the recent report of the Senate Ethics Committee, concluding that there was "substantial credible evidence that [Sen. Packwood] engaged in a pattern of sexual misconduct," including acts on eight specific occasions between 1969 and 1990. See Bryden & Park, *supra* at 561 ("More speculatively, one may surmise that exclusion of prior crimes evidence undermines the legitimacy and acceptability of acquittals in some criminal cases.") (footnote omitted).

Courts in some states probably would have admitted the evidence proffered against Smith, under a special exception to the propensity rule in sexual offense cases. See, e.g., Bryden & Park, *supra* at 557-59; Lynn McLain, Maryland Evidence: State and Federal §404.1, at 344 & n.27 (1987 & Supp. 1994). Other courts might have admitted the evidence in the

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Smith case, under Fed. R. Evid. 404(b) or its equivalent, as showing an intent to have sex regardless of the victim's will. But admission under 404(b) is at best an iffy proposition. See Beale, *supra* at 309-13; Bryden & Park, *supra* at 530-60; David J. Kaloyanides, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 Loy. L.A. L. Rev. 1297 (1992). In any event, admission under 404(b) historically results in "huge quantities of appellate litigation" as to the correctness of that call. Bryden & Park, *supra* at 561 & n.142.

Congressional Action

Earlier in 1991, Congress had before it a Bush administration proposal, introduced by Senators Dole and Thurmond as part of the proposed Comprehensive Violent Crime Control Act of 1991, to liberalize the rules of evidence to more freely permit evidence of other sexual misconduct by the accused offender, in both civil and criminal cases alleging either sexual assault or child molestation (of a person under the age of 14 years). Beale, *supra* at 307, 313; 137 Cong. Rec. 3192 (daily ed. Mar. 13, 1991).

The supporting analysis explained that such evidence

could be considered as evidence that the defendant has the motivation or disposition to commit sexual assaults, and a lack of effective inhibitions against acting on such impulses, and as evidence bearing on the probability or improbability that the defendant was falsely implicated in the offense of which he is presently accused.

137 Cong. Rec. at §3239 (quoted in Beale, *supra* at 314). In child molestation cases, the analysis stated that "[e]vidence of other acts of molestation indicates that the defendant has a type of desire or impulse – a sexual or sexual-sado interest in young children – that simply does not exist in normal people." *Id.* at §3240 (quoted in Beale, *supra* at 319).

In urging the bill's adoption, Senator Dole stated, "[W]hen someone is out there committing sex crime after sex crime...it is this Senator's view that this evidence should be admitted at trial, without a pro-

tracted struggle over whether the evidence has been properly admitted under rule 404(b) or some other exception." 139 Cong. Rec. §15137, §15138 (daily ed. Nov. 5, 1993).

This proposal eventually passed as part of the comprehensive crime bill of 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title XXXII, §320935(a) (Sept. 13, 1994, 108 Stat. 2135). See James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 96-97 (1994) (recounting importance of Rep. Susan Molinari (R, N.Y.)'s role). In that bill, Congress tentatively approved the adoption of three new Rules (designated Federal Rules of Evidence 413-415) under which such evidence of other sexual offenses generally would be admissible.

Under the terms of the bill as enacted, the Judicial Conference of the United States was required to evaluate the proposed Rules and to send its recommendations on them to Congress within 150 days after the enactment of the crime bill. The Judicial Conference forwarded its comments and proposed changes to Congress on the 149th day, February 9, 1995.

Congress' original proposals nonetheless would become effective 150 days after the transmittal by the Judicial Conference, unless "otherwise provided by law," *i.e.*, unless Congress took other action. Pub. L. 103-322, §320935(b)-(d). Because Congress took no further action, its original proposals became effective July 9, 1995.

The primary effect of Congress' action would seem to be in its potential influence on the states. The vast majority of sexual offense cases are tried in state courts. The federal cases arise most frequently from assaults or child molestation on military bases and American Indian reservations. But at least 38 states, including Maryland, have adopted evidence codes based on the Federal Rules of Evidence, and any changes in the Federal Rules surely will be evaluated as models for the states, and possibly adopted by them.

The Rules Adopted by Congress

New Federal Rules of Evidence 413-415, set forth in the 1994 Comprehensive

Crime Bill, and which took effect July 9, 1995, read as follows:

Rule 413, Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code.

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414, Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another of-

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fense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved –

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Questions Raised by the New Rules

Opponents of the policy decision reflected in the new Rules generally echo the traditional arguments supporting the "propensity rule" of exclusion of character evidence to prove guilt: (1) lack of probative value; (2) risk of the jury's attributing too much weight to the evidence of other wrongs, or of punishing the alleged offender for those wrongs; and (3) judicial economy. See Duane, *supra* at 107-11 (opposing the Rules' liberalization of admissibility altogether as creating "a terrible risk of unfair prejudice to inno-

cent defendants with a criminal history"). We traditionally have chosen not to have trials within trials, about other, uncharged acts. See Bryden & Park, *supra* at 565.

But the propensity rule is peculiarly Anglo-American. See Bryden & Park, *supra* at 529 & n.3; 1 Wigmore on Evidence §8C at 638 (rev. 1983); 1A *id.* §54.1; 1 *id.* §193 at 644-46 (3d ed. 1940). And a number of American scholars have criticized it. Beale, *supra* at 314 & n.23. See also Bryden & Park, *supra* note 1, at 561-65 ("On the whole, personality theory probably lends some support to the idea that character evidence is more prejudicial than informative. The research, however, has not achieved the level of acceptance that one sees, for example, in eyewitness testimony research. In addition, its applicability to legal issues is sometimes questionable.").

After all, "behavior science research... shows that, by and large, the best way to predict anybody's behavior is his behavior in the past..." Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 7 Behavioral Sci. & L. 521, 532 (1989) (quoted in Bryden & Park, *supra* at 529. Under the proposed Rules, only evidence of similar

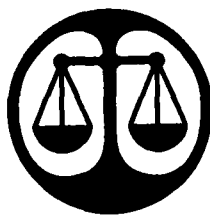
acts would be admissible as substantive proof. (The door would not be opened to proof of dissimilar acts showing bad moral character, e.g., failure to file income tax, arson, theft).

The law already finds this "other similar acts" evidence relevant and admissible in a negligent hiring or retention case. When, for example, a church is sued for transferring a priest to a new parish and keeping him in a position where he could molest young boys, the fact that the church had previously had complaints of similar assaults by the priest in his former parish is admissible to show the church's negligence. In the author's opinion, this squares with common sense.

We find the same kind of recognition by potential jurors of the probative value of a person's past acts when, let us suppose, another young woman alleges that she met Smith recently and, after going to the movies with him, invited him into her apartment for coffee, when he violently assaulted her. Is there any doubt that many observers would say, "She should have known better than to trust him. What was she thinking?"

Several leading commentators have concluded that "a strong case has been

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made for the more generous admission of prior uncharged misconduct in rape and child sex abuse cases, particularly in cases of acquaintance rape," *i.e.*, rape cases where the defense is consent. Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 12 Duke L. Magazine 4-9 (Summer 1994). See Bryden & Park, *supra* at 573-83 (differentiating "acquaintance rape," consent defense cases from "stranger rape," mistaken identity defense cases). As to "stranger rape," where the defense is an alibi, these commentators conclude that Fed. R. Evid. 404(b) is adequate, in that it permits evidence of other crimes to prove "identity," only when there is a distinctive *modus operandi*.

There are due process concerns, as well. If the other events allegedly happened long ago, can the defendant be expected to adequately defend against them? (*Cf.* the repressed memory/statute of limitations debate). If the defendant has not been tried for the other acts, he or she can take the Fifth Amendment as to them (as Patty Hearst did, without much apparent success).

How long would hearing the evidence on these matters take? Of how much help will it likely be to the jury in properly resolving the issue before it? These are the kinds of considerations that a judge ought to evaluate in making a determination whether to exclude 413-415 type evidence under Fed. R. Evid. 403. (Note also that the same questions must be asked by a court applying Rule 404(b), which also does not restrict the time frame in which other admissible acts must have been committed.)

But the proposed Rules' use of the phrase "is admissible" creates confusion. Whether the Rules as proposed by Congress would permit a court to exclude other sex crimes evidence, in the exercise of its discretion under Rule 403, is unclear. In other contexts, the "is admissible" phrase is used to mandate admissibility of evidence on a particular subject, although the manner of proof (*e.g.*, by a witness with first-hand knowledge), remains governed by other rules. See Fed. R. Evid. 410, 608(a). *Cf.* Fed. R. Evid. 612 (adverse party "is entitled... to introduce in evidence"); 705 (expert "may testify" - clearly subject to requirements of Rule 702, however). Rule 609(a)(1), however, another Rule drafted by Congress rather than the Supreme Court's advisory committee, uses the phrase "shall be admitted." This is in contrast with 609(a)(1),

which uses the phrase "shall be admitted, subject to Rule 403."

The statement in the section-by-section analysis of the 1991 bill that "the probative value of such evidence is strong, and is not outweighed by any overriding risk of prejudice" also supports the argument that Rule 403 is inapplicable. 137 Cong. Rec. §3214, §3240 (daily ed. Mar. 13, 1991). But statements made on the floor by some of the bill's sponsors support the contrary conclusion, *i.e.*, that evidence offered under Rules 413-415 would be subject to exclusion in the court's discretion under Rule 403. Bryden & Park, *supra* at 566 & n.168; Duane, *supra* at 102-03.

Because Congress did not change the language of the Rules, a court would have to resort either to this legislative history to permit application of Rule 403 (which at least Justice Scalia would be loath to do) or to Rule 402 to exclude completely irrelevant evidence. After all, the proposed Rules permit consideration by the jury only "on any matter as to which [the evidence of other acts] is relevant."

The argument has also been made that, absent amendment, the new Rules would permit use of opinion and reputation evidence, as well as evidence of specific acts. See Duane, *supra* at 120-22. This result is unlikely. The Rules refer to "evidence of the defendant's commission of *another offense or offenses* of sexual assault [or child molestation]." (emphasis added) Reputation and opinion testimony are permitted under Rule 405 only as to a pertinent character *trait*, not as to a specific act or offense. Nonetheless, these kinds of questions could and should have been answered by Congress by clarifying the proposed Rules in response to the comments received from the Judicial Conference.

Response by the Judicial Conference

The Judicial Conference of the United States referred Proposed Federal Rules of Evidence 413-415 to its Advisory Committee on Evidence Rules for its consideration. After studying the proposed Rules, the Advisory Committee on Evidence concluded that it opposed their adoption.

The committee members "did not believe, however, that it was their role to prepare alternative rules that dilute the policies articulated by Congress." Letter from Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United

States, to author, December 2, 1994. Therefore, the committee merely drafted "alternative amendments to Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in Rules 413-415 and remain consistent with congressional intent." *Id.*

The committee's report was nearly unanimous; the one dissenting vote was that of the representative of the Department of Justice. Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, February 9, 1995, at 2 (sent with transmittal cover letter from L. Ralph Mecham to the Hon. Newt Gingrich, February 9, 1995) (hereinafter cited as "Judicial Conference Report").

The Advisory Committee on Evidence Rules' report was submitted to the Judicial Conference Committee on Rules of Practice and Procedure ("the Standing Committee"). The Standing Committee reviewed that report and considered, as well, the fact that the Advisory Committees on Criminal and Civil Rules also opposed Rules 413-415, on the grounds that "the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs." *Id.* at 3. Again, the representatives of the Department of Justice to those Advisory Committees dissented.

The same result held in the Standing Committee. Over the dissent of its representative of the Department of Justice, the Standing Committee recommended that Congress "reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415." *Id.* If, however, Congress chose not to so reconsider, then the Standing Committee recommended that Congress instead adopt the Advisory Committee on Evidence Rules' drafted amendments to Rules 404 and 405. *Id.* The Judicial Conference concurred with the Standing Committee. *Id.* at 4.

The only differences between the changes proposed in the Judicial Conference's report and those proposed by the Advisory Committee were minor changes of style. For example, the Advisory Committee's proposal as to Fed. R. Evid. 404(a)(4) began with the dependent clause; the Judicial Conference's proposal began with the independent clause and moved the dependent clause to the end of the sentence in that subpart. See proposals by Judicial Conference Advisory Committee on Evidence Rules, attachment to letter from Peter G.

McCabe, *supra*.

The report submitted by the Judicial Conference to Congress on February 9, 1995, summarized as follows the changes from proposed Rules 413-415 that the alternative draft would have made. The Committee's draft would:

(1) expressly apply the other rules of evidence to evidence offered under the new rules [by adding the phrase, "if...otherwise admissible under these rules" and making Rule 403 expressly applicable];

(2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal [including evidence of a third person's prior sexual acts, offered to prove that that person, rather than the accused, committed the alleged act];

(3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination [proximity in time; similarity, frequency, and surrounding circumstances; relevant intervening events, such as extensive medical treatment of the accused; other relevant similarities or differences; and, under the Advisory Committee Note to Rule 403, the "availability of the other means of proof," as well as those factors stated generally in Rule 403 itself];

(4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;

(5) eliminate the special notice provisions of Rules 413-415 in civil cases to that notice will be required as provided in the Federal Rules of Civil Procedure [according to the usual time table for disclosure and discovery]; and

(6) permit reputation or opinion [including expert testimony if otherwise admissible] evidence [only] after such evidence is offered by the accused or defendant.

Judicial Conference Report, *supra* at 3-4. This draft also would have included conduct committed outside the United States.

The Committee's draft would have deleted Proposed Rules 413-415 and instead have added a Fed. R. Evid. 404(a)(4), amended 404(b) and 405(a), and added a 405(c), as indicated below:

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions Other Crimes

(a) Character Evidence Generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(4) **Character in sexual misconduct cases.** Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

(A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:

(i) proximity in time to the charged or predicate misconduct;

(ii) similarity to the charged or predicate misconduct;

(iii) frequency of the other acts;

(iv) surrounding circumstances;

(v) relevant intervening events; and

(vi) other relevant similarities or differences.

(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(C) For purposes of this subdivision.

(i) "sexual assault" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 109A of title 18, United States Code, or conduct that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person irrespective of the age of the victim – regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(ii) "child molestation" means conduct – or an attempt or conspiracy to engage in conduct – of the type proscribed by chapter 110 of title 18, United States Code, or conduct, committed in relation to a child below the age of 14 years, either of the type pro-

scribed by chapter 109A of title 18, United States Code, or that involved deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person – regardless of whether that conduct would have subjected the actor to federal jurisdiction.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided in subdivision (a). It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 405. Methods Of Proving Character

(a) **Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion except as provided in subdivision (c) of this rule. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(c) **Proof in sexual misconduct cases.** In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

Attachment to Judicial Conference Report, *supra*.

In each of its changes from Congress' proposals, the Committee draft was a significant improvement. Although Congress was bold enough to stay the course in terms of policy – as this writer hoped – it is unfortunate that it did not take the necessary action to accept the Committee's amendments.

