

# My Case Stinks, or Does It? Confronting “Other Acts” Evidence.

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Defending the Unthinkable: Zealous Advocacy in Sexual Assault & Child Victims Cases

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## **The Problem:** Prior Act Evidence, or, Fighting Propensity.

⇒ Propensity - What does it mean:

*Propensity* - Merriam-Webster def. 1: *an often intense natural inclination or preference.*

*Propensity* - prosecution: He Did It Before, He Did It Here, And He'll Do It Again.

⇒ In Wisconsin:

The Greater Latitude Rule for admitting other act evidence in child sexual assault cases:

“Child exploiters take advantage of a child's physical and emotional vulnerability in order to give gratification to their warped and perverted “propensities” and “leanings.” It is this scheme or plan to achieve sexual stimulation or gratification from the young, the most sexually vulnerable in our society, that allows trial courts in the exercise of discretion to admit evidence of past similar acts to show scheme or plan to exploit children.”

*State v. Friedrich*, 135 Wis. 2d 1, 29, 398 N.W.2d 763, 775-76 (Wis. S.Ct. 1987).

⇒ In Georgia: “Bent of Mind.” (pre-2013):

Because he did it before shows the defendant's bent of mind.

⇒ General Legal Rule: All jurisdictions: prior acts are not admissible to show propensity, subject to exceptions.

⇒ General Practice Rule: Bad stuff comes in to show your client is bad. Prior acts come in to show propensity. In sexual assault of a child cases, even more so: “Once a molester, always a molester.”

⇒ Challenge: How do we get a jury to avoid a propensity conclusion? How do we get the moral shock and fear of the molester out of our case?

⇒ The Good Prosecutor rule: If you need the prior bad act, it's a bad case – don't pursue it.

But, since most prosecutors and judges don't follow this rule, how do we help a jury to accept the good prosecutor rule? How do we deal with propensity in front of a jury?

⇒ The Jurors An important consideration: your jurors are not your judge – they can be more impartial, unbiased, and fair – they may accept arguments your judge won't.

We typically fear bad information coming before the jury, and we are right to have this reaction. Our obligations as defense counsel require us to think this way, to object to admission of this evidence. This can cause us to think all is lost, or that our case stinks, once the judge admits the evidence. But once it's in, we have to suspend that thought, and expose the prosecution's reliance on other act evidence as evidence of their weak case.

### **The Strategy:**

- ⇒ **Pre-Trial:** Run away from the prior act evidence, because this is what you must do. Out-manuever during investigation, move to exclude, or stipulate the issue away.
- ⇒ **Trial:** Can't avoid it. Run *at* it, and neutralize it – make it not count, because this is what you must do.
- Expose the prosecutor's attempt to cloud the issue of whether there is sufficient evidence to prove guilt beyond a reasonable doubt on *this* charge.
  - Bring the narrative back to your defense.
  - Flip the prior act evidence, or at least fold it in to your defense.
  - Let the jury know that the prosecutor is being unfair, and the judge is letting him.

### **The Potential Tactics:**

#### **Pre-Trial:**

##### Out of Court

Investigate. Both for the current allegation and the prior act.

- Once the compliant is filed, the prosecutor is *done*. Now it is our turn to create. Focus on what the police investigation did not do, and then go do it. Get the school or other records that they didn't bother to get, talk to the witnesses they didn't talk to, review the email or online accounts they didn't look at, do something, anything really, that they didn't do and that involves relevant evidence in your case. Jurors really appreciate this hard work when they are being asked to do a critical task. Bring this mentality to every stage of the investigation process.
- Client's record, social history, releases & confidential information, prior orders, abuse investigations, and also all pro-social activity regarding parenting, employment, etc.
- Client's version of the relationships involved and the context or origin in which this allegation and/or any other prior allegation was made.
- To client: who's going to say something bad about you? Who has ever said you did something? Who should we interview or talk to?
- Let the client assist the investigation: obtain access to their social media accounts and passwords, email, etc. Look at it all.
- Site inspection. Physical inspection of place and objects central to prosecution.
- Background on the accuser(s), mental health, school, activity and employment records, FB, Instagram, Twitter, etc.
- Work the social workers and police. Call them, talk to them in the hallway and at court proceedings. Perhaps they think there is a flaw in the investigation or that this sexual assault "wasn't so bad," as only criminal justice practitioners can put it. Discuss their training, experience, seminars, materials, protocol (particularly in interviewing and avoiding suggestive methods or circumstances).

- Start to formulate your theory of prosecution and defense for both the current allegation and the prior act.
  - ⇒ *Avoid reacting solely to the allegation.* Do not settle on theory of defense during this stage. Engage extensive “talk therapy” with client. At first, keep client from settling on a firm explanation of the allegation. Talk about that, but through all other facets of the case without first starting off with a conclusion, such as “she’s lying”, “I didn’t do it”, or “she’s lying.” Give client time and ability to become comfortable revealing things to you. We often accuse police and prosecutors of having tunnel vision, but sometimes it is hard to avoid ourselves. When we start with the conclusion, we risk doing the same thing, making all evidence fit our theory, and ignoring evidence that doesn’t.
- What is the origin of the allegation and any coinciding events, revelations, relationship occurrences, difficulties, or anything providing motive?
- Discuss feelings, details of surrounding events or life occurrences. For jurors, the truth is often in the details, sometimes even the seemingly innocuous details surrounding an event, rather than the event itself.

#### In Court

- Demand any prior conduct evidence, wait for the State, then oppose motion to admit, or move to exclude. Bring research, but also the ability to factually distinguish the prior act from the current allegation, and the ability to discuss the actual facts of the precedent cases.
- Scare the judge with what (s)he really cares about: proof issues/trial within a trial, lots of extra witnesses, court time, testimony, objections to form of evidence on the prior allegation.
- Don’t pitch prejudice as unfair – pitch it as grounds to be overturned.
  - e.g.*, Judge, my client will get convicted on this = good to judge.
  - e.g.*, Judge, you’ll get overturned on this = bad to judge.
- Consider a strategic stipulation to the particular exception on which the prosecution’s motion to admit rests, *e.g.*, mistake, identity, etc. “This did not happen, but if it did, it would not have been a mistake or unintentional touching.”

#### Once we lose, how do we deal with it if admitted?

- Refer to investigation & theory of defense above; this process does not stop at any point pre-trial.
- There are no consistent magic tricks here – this is hard. We now have two allegations (or sets of allegations) to deal with. At some point, we have to work up and focus on our theory of defense incorporating the prior act. The investigation process should assist in providing the angle.

- Focus on relevant inquiries:
  - Are the current and prior allegations related?
  - Are they being made by the same person(s)? If so, is there a motive or scheme among the accusers?
  - Does the prior allegation provide evidence of a motive, plan or intent for the other?
  - If the prior allegation involved a different accuser, what are the differences in allegation, time, age, circumstances, etc.
- Examine every facet of the prior allegation's resolution. Was it uncharged? Charged, convicted, dismissed,? Why? Who and what was involved in that determination?

## **Trial:**

### Evidence Presentation Considerations:

- Don't be so mad at the pre-trial ruling that you lose sight of how the evidence comes in.
- Even though defense lost in opposing the admission of the prior act, the judge is empowered to streamline the testimony and minimize unfair prejudice. This pruning process may take the form of limiting the number of witnesses and restricting their testimony by excluding inflammatory details. Argue for these limitations at every step. If the prosecution presentation on the prior act is limited sufficiently, their presentation can seem anemic, random, or desperate to the jurors.
- Other act evidence must be accompanied by a limiting instruction or an admonitory instruction, since it is being offered for a limited purpose. Instructions should be tailored specifically to the purpose – and only that purpose – for which the evidence is offered. Police this, and adherence to the law during opening and closing arguments, carefully. Watch the witness presentations for back-door references. Ask the judge to remind the prior act witnesses and counsel, outside the presence of the jury, of the limited nature of the testimony.
- Don't give up once the evidence is ruled admissible – control it.
- What is the burden of proof for the jury to consider the prior act? How does the instruction on that issue instruct the jury? Is there a need for a special or tailored instruction?

### Potential trial themes/theories:

- *The prior allegation is false.* Prior accuser is lying, mistaken, piling on late, not credible.
- *The prior allegation has nothing to do with the present allegation.* (The more the prior alleged act is different than the present alleged act, or remote in time, the better this theme works.)
- *Turn propensity conclusion on its head:* does the prior allegation make your client an easier target for the current allegation? If this fits the defense theory of certain witnesses, consider it.
- *The prior allegation is a product of the current prosecution,* which we will demonstrate is flawed during our defense. In other words, this prior allegation, long forgotten or resolved, became the focus of tunnel vision police and prosecutors conducting a flawed investigation.

- 1) Voir Dire: Find the people on the venire who can't get over it now. Get them off now. Give the jury what you expect: disclosure, bonding, candor, and questions.

*Disclosure:* What is your fear? How do you get over it?  
I fear that we don't really believe in what we say is fair – that the defendant deserves a fair trial on this allegation, rather than on what someone said in the past, or about him.  
That when we hear someone say, well, he's been accused before, so he's guilty now, that we agree. Who else agrees with that?

*Bonding:* We all agree that no one, including children, should be a victim. None of us, myself included, wants to believe that children lie.

*Candor:* I have these fears. I worry about this. I believe children shouldn't be victims and that most don't lie. These are my biases.

*Questions:* So my question is, we are biased in favor of children to begin with, and you believe, as I do, that most children are honest, but this is a case where that will be questioned, so can you make room for the possibility that there are children who don't fit that mold? How many of you could make room for that possibility? Why? Why not?

You're going to hear (insert prior act). When I heard that, I have to be honest, it made me feel (insert particular shock, prejudice, etc. here) toward Mr. Client. How do you feel about that? Did it cause a reaction in any of you? What? How make you feel? Feel strongly? Why? Fair to say that reaction you had was formed prior to coming to court today? Strongly held belief? One you couldn't put aside? Even if the judge told you so?

- 2) Opening:

Make a decision about whether you wish to address the prosecutor's prior act allegation at opening. Ascertain whether your prosecutor will so do, and how they will do so. Then, focus on your statements about the allegation. Try to cut right to the heart of the prior act allegation and characterize it right away – false, mistaken, non-issue, a distraction, part of the flawed prosecution scheme, etc. Re-characterize it consistently at subsequent stages.

Introduce the prosecutor's reliance on the prior allegation – what can you say about it? Why is it a distraction? Why is it unfair? Why is the prosecutor wasting your time and energy by asking you to focus on it? Don't react, act: what does his reliance on an allegation that was resolved (one way or the other) say about the prosecutor's current case? Is he trying to appeal to your (our) fear, or prejudice, rather than to your duty as jurors to consider evidence of the current allegation?

⇒ *One "out there" possibility*: Don't be bound by the propensity rule. Tell them what the prosecution is doing. Tell them why the Judge let it in. Tell them your fear that they will use the evidence as propensity.

3) Crossing Witnesses:

All witnesses are either witnesses to the prior alleged conduct, or they're not.  
Those who aren't: What can we get out of them?

Who doesn't know about this, who had access to the prior complainant? Expose this. And the details of it. Who never heard about this who should have, due to access to the defendant or the current or prior complainant? What details surround these people and these allegations that tend to refute the conclusion that the allegation(s) are truthful?

Those who are: How do we attack, define, marginalize, or neutralize them? What battles do we want to win with them? What goals can we accomplish? Do it, and get out.

All witnesses - Don't lose our regular cross techniques.  
Keep control. Expose inconsistencies. Address prior inconsistent or relevant statements. Examine bias. Take advantage of opportunities to bring forth evidence corroborating any facet of defense, including our characterization of the prior act evidence.

Carefully select mode of confrontation and tone, for each witness. What adverse witnesses are adverse through no fault of their own? What adverse witnesses have a more malevolent intent? Why? Can we attack this?

4) Direct of the Client:

What is the thing the jury wants to hear most? Address that right away.  
Where do we deal with the prior act?

One possibility for placement: After denial of the current allegation, after telling the client's story and establishing trust, and before wrapping up. This is important enough that we must of course address it, but not central to the defense (or relevant to the current allegation).

What is the emotional crisis or prevalence for the client? How do we communicate that? Is the client the best person to do this, or someone else? Or both? What demonstrates that, rather than just reciting it, *i.e.*, what evidence shows your client's emotional state or toll, rather than (s)he just saying what it is?

Don't ignore prior consistent statements on redirect.

5) Direct of Other Witnesses:

How do we use propensity evidence for us? Who has had any prior dealings or been subject to any prior acts of the client that say something good about the client. Find them, and get them in front of the jury to show that the client has *a propensity to do good*.  
Use the judge's ruling on the other act admission for leeway here.

Who is close to or trusts the client? Character witnesses. Occurrence witnesses of any potentially relevant circumstance regarding the prior allegation (I worked with him at the time and this never came up, he never acted in a way consistent with the prior allegation, etc.)

6) Closing:

Address the strong points again, but within your overall theme of defense. Reference your consistent characterization of the prior alleged act.

Ask the jury to ask the prosecutor very particular “winning” questions about the prior act, and its lack of relevance to the current allegation, why there was no prosecution/arrest/conviction, why it was not brought up sooner, why, if the prosecution case was strong, it is asking the jury to consider a separate act from x years ago, etc. *Be careful here – either know that the prosecutor can’t answer the questions you pose, or know that you like the answers that you will get.*

Hammer away at putting the prosecutor on the defense about their flawed attempt at proving their case. Ask/tell the jurors to be more fair than the prosecutor.

Other Trial Considerations:

Placement: Don’t make neutralizing the prior act central to your defense.

Timing and placement of addressing the prior allegation within all areas and witnesses in the case must be addressed. Don’t over-emphasize it.

## **The Law:**

### **Federal**

#### FRE 404, Character Evidence; Crimes or Other Acts

(a) **Character Evidence.**

- (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

...

(b) **Crimes, Wrongs, or Other Acts.**

- (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

#### FRE 413, Similar Crimes in Sexual-Assault Cases

(a) **Permitted Uses.** In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

(d) **Definition of "Sexual Assault."** In this rule and Rule 415, "sexual assault" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;
- (2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;
- (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
- (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).



FRE 414, Similar Crimes in Child Molestation Cases

- (a) **Permitted Uses.** 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.
- (b) **Disclosure to the Defendant.** If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.
- (c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.
- (d) **Definition of "Child" and "Child Molestation."** In this rule and Rule 415:
  - (1) "child" means a person below the age of 14; and
  - (2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:
    - (A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
    - (B) any conduct prohibited by 18 U.S.C. chapter 110;
    - (C) contact between any part of the defendant's body — or an object — and a child's genitals or anus;
    - (D) contact between the defendant's genitals or anus and any part of a child's body;
    - (E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
    - (F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)–(E).

FRE 415, Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

- (a) **Permitted Uses.** In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
- (b) **Disclosure to the Opponent.** If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
- (c) **Effect on Other Rules.** This rule does not limit the admission or consideration of evidence under any other rule.

## Georgia

### O.C.G.A § 24-4-404(b)

(b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim.

### 11<sup>th</sup> Circuit's 3-Part Test: *U.S. v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007)

For evidence of other crimes or acts to be admissible under Rule 404(b),

- (1) it must be relevant to an issue other than defendant's character;
- (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and
- (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy Rule 403.

## Wisconsin

### Wis. Stat. § 904.04, Character evidence not admissible to prove conduct; exceptions; other crimes

- (1) **Character Evidence Generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except: . . .
- (2) **Other Crimes, Wrongs, or Acts.**
  - (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
  - (b) In a criminal proceeding alleging a violation of s. 940.225(1) [first-degree sexual assault] or 948.02(1), sub. (1) and par. (a) [first- and second-degree sexual assault of a child] do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) [first-degree sexual assault] or 948.02(1) [first- and second-degree sexual assault of a child] or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

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