

DEFENDING AGAINST CHARACTER EVIDENCE: THE WEAPON OF CHOICE FOR PROSECUTORS

What is character but the determination of incident?

What is incident but the illustration of character?

Henry James, Prefaces 1909

I Introduction

Until recently the rules of evidence precluded the use of character evidence to determine the incident. Character evidence is so central in shaping our opinions as to whether someone did or did not do something that the law long excluded it. The basis for its exclusion was not legal not logical relevance: the introduction of such evidence tended to swallow all contrary facts.

Prosecutors want character evidence admitted against your client for the reason you should want it precluded: if it comes in your client generally loses. The stuff is that powerful. Jurors get a very limited view of the defendant and they constantly look for clues about who he or she really is. A prior bad act of a kind not found in the jurors past signals to the juror that she is not dealing with one of her own, someone with whom she can identify and, thus, should perhaps protect. A prior bad act flags your client's criminal inclinations and effectively diminishes and may even shift the burden of proof.

Courts and commentators have long recognized the highly prejudicial nature of propensity evidence. See e.g. Huddleston v. United States, 485 U.S. 681, 685 (1988). Many courts, reasoning that jurors may convict an accused because he is a bad person, have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally man-

dated presumption of innocence. See e.g. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977). The jury, repulsed by evidence of “prior bad acts” may overlook weaknesses in the state’s case in order to punish the accused for the prior offense. Imwinkelreid, Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot, 22 Fordham Urb. L.J. 285, 288 (1995).

The prohibition against using prior acts of misconduct to prove the charged offense has existed in some form in Anglo-American law for nearly 300 years. However, common law jurisdictions besides the United States have begun to relax the rigid rule prohibiting such evidence. In England the House of Lords held in R. v. Boardman (1975 A.C. 421) that the admissibility of evidence of an accused’s uncharged misconduct should turn on its cogency rather than its category: if evidence has great probative value on a character theory of logical relevance, the evidence should not be reflexively excluded “by characterization”.

There are many in the United States who wish to follow the British example and abolish the character prohibition in all types of cases. According to Imwinkelreid, they have modern psychological theory on their side:

...although at one time it was assumed that a person’s character traits are weak predictors of the person’s conduct, that assumption is being reassessed. At the time the Federal Rules of Evidence were being drafted, the dominant personality theory was situationism. Situationists believed that environmental factors largely determine a person’s conduct. In contrast, the person’s supposed character traits or disposition had little predictive value. However, a new theory—interactionism—has emerged. According to that theory, when there is a sufficiently large sample of the person’s conduct in similar situation, on the average, the person’s behavior in analogous settings can be forecast.

Imwinkelreid, *ibid* p. 286.

This shifting in the prevailing psychological theory concerning the ability to predict behavior based on past conduct underlies the movement in this country toward expanding the use of character evidence. Since the probative value of such evidence is now deemed great, it has been easier for courts to balance relevance and prejudice and to opt for admissibility. This is especially true in the case of two recognized exceptions to the general character rule: *modus operandi* and its cousin, emotional propensity to commit deviant sexual acts.

II. Modus Operandi Exception

The Latin phrase “*modus operandi*” means literally “the method or means of operating”. It is an exception designed to prove identity. The theory is that an unrelated bad act with a similar *modus operandi* may be used by the prosecution to prove that the defendant committed the crime for which he is charged. State v. Moore, 108 Ariz. 215, 495 P.2d 445 (1972). For the exception to apply, however, the court must determine that there are “similarities between the offenses...in those important aspects where normally there could be expected to be found differences.” State v. Akins, 94 Ariz. 263, 383 P.2d, 180 (1963). Thus, in State v. Jackson, 124 Ariz. 202, 603 P.2d 94 (1979) the court held that despite basic similarities between 1974 incidents and an unrelated 1976 incident, all of which occurred in the daytime in apartment complexes located in the same general area, and in each of which the perpetrator entered the woman’s unlocked apartment shortly after he had the opportunity to observe the woman enter or leave the apartment alone, the differences between the acts precluded the admission of

the proffered bad act. The court noted that the charged acts each involved the use of force and some form of overt sexual act, while in the uncharged act the perpetrator did not assault his victim and allowed her to flee.

Prosecutors will attempt to prove the modus operandi exception by charting the similarities between the charged and uncharged acts. This approach which focuses on the sheer number of similarities should be challenged by the defense attorney. It is possible, indeed common, for there to be numerous similarities between the acts without the list proving that there are any “peculiar” (People v. Wein, 69 Cal. App. 3d.79, 137 Cal. Rptr. 813 (1977)) or “unique” (Hirst v. Gertzen, 676 F.2d 1252 (9th Cir 1982)) facts. The modus operandi must be the criminal’s “signature” or “trademark”. Thus, merely charting similarities misses the point if those similarities do not contain idiosyncratic facts showing that one person, and in all likelihood only one person, committed both crimes. (Note: The uncharged act need not be a crime which was prosecuted. Furthermore, acquittal of the prior act if it was charged was not at common law sufficient to preclude its admission.)

The modus operandi exception when used to prove identity makes sense logically. It makes less sense when offered to prove a common plan or scheme and identity is not an issue in the case. However, the Arizona courts have held that a separate act with similar modus operandi may indicate that the defendant, in the act for which he is on trial, was carrying out a common plan or scheme. State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974) cert denied 420 US 935, 95 S.Ct. 1143, 43 L.Ed 2d 411 (1975). The rationale for admitting the evidence under the common plan or scheme exception is that it proves motive. Thus, in State. Huey, 145 Ariz. 59, 699 P.2d 1290 (1985) where the defendant was charged with kidnapping and sexual assault and

admitted both the charged and uncharged acts but claimed they were consensual, the court looked at the similarities between the acts and concluded the prior incident was admissible to prove a common scheme or plan on the part of the defendant to kidnap women against their will and then degrade and control them through sexual abuse. From this the court concluded the jury could infer that the defendant's motive was the same for both incidents. What is flawed in this analysis is that the motive was really sexual gratification which the defendant conceded. The court in Huey was really using the common plan or scheme exception in place of the sexual propensity exception which in 1985 was not sufficiently developed to have been applicable to the facts of the case.

III. Emotional Propensity to Commit Sexual Crimes

This exception to the character evidence rule is now so important to the everyday practice of criminal law that a short history of its evolution is in order. The exception began with the case of State v. Taylor, 97 P.2d 543 (Ariz. 1940). In Taylor the defendant was charged with the statutory rape of a 14 year-old girl. The trial court allowed the prosecution to introduce the testimony of 4 other females who had had sex with the defendant. The Supreme Court held that the uncharged acts were admissible under the common plan or scheme exception to the character rule. However, for the first time the court noted that such misconduct was "competent to show the lustful disposition of the defendant and the system used by him in taking indecent liberties with young girls." It was at this point that the common plan or scheme exception began its transformation into the emotional propensity exception now applied in sex cases.

However, the lustful disposition exception lay dormant for 16 years. Then, in State v. McDaniel, 298 P.2d 798 (Ariz. 1956) the Arizona Supreme Court for the first time adopted a broad use of the lustful disposition exception mentioned in Taylor. The court said that certain crimes were recognized as arising from an emotional propensity for sexual aberration and that the defendant's prior unnatural acts had a direct bearing on the issue being tried.

McDaniel, then, created in Arizona the emotional propensity exception to the character rule. Unfortunately, the court's conclusion that certain crimes were recognized as stemming from a specific emotional propensity for sexual aberration was not supported by any legitimate scientific studies. (Nor is it now. In fact, sex offenders when compared to other categories of criminal offenders have a relatively low recidivism rate. See Thomas J. Reid, Reading Gaol Revisited: Admission of Uncharged Misconduct in Sex Offender Cases: 21 Amer. J. Crim. L. 127 (1993); David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offender Cases, 78 Minn. L. Rev. 529 (1994). The statistics published in these articles show that sex offenders have the second lowest recidivism rate. The rate for burglars was over four times higher. Bryden & Park at 572. However, it has become axiomatic in the child saving industry that sex offenders are "different" from other offenders and thus deserve special treatment. And it is this industry which has been writing the rules since 1974.)

The next important case in the evolution of the emotional propensity exception was State v. McFarlin, 571 P.2d 87 (Ariz. 1973). McFarlin acknowledged that the emotional propensity rule had caused considerable controversy in the country and that in Arizona the decisions as to its use had

been inconsistent. The following language in McFarlin determined the use of the exception for the next two decades:

In those instances in which the offense charged involves the elements of abnormal sex acts such as sodomy, child molesting, lewd and lascivious, etc., there is sufficient basis to accept proof of similar acts near in kind to the offense charged as evidence of the accused's propensity to commit such perverted acts. The emotional propensity exception is limited to those cases involving sexual aberration, but this is not to say that the other usual exceptions to the exclusionary rule cannot be used. It simply means that in addition to the usual exception there is in cases involving the charge of sexual aberration the additional exception of emotional propensity.

Thus, McFarlin engrafted upon the character rule an additional exception which applied only in the case of deviant sexual conduct.

The case that first introduced experts into the process was State v. Treadaway, 558 P.2d 1061 (Ariz. 1997). In footnote 2 the court noted that dissimilarity in type of acts or distance in time between them would preclude the admissibility of a prior bad act under the emotional propensity exception:

A prior separate sex offense, particularly a dissimilar one with a different victim as remote as 3 years earlier, is almost never admissible and especially not for the purpose of showing only defendant's propensity to commit the crime charged.

The Treadaway court ruled, however, that these problems could be overcome by the use of expert testimony. The Court noted that the area of emotional propensity involved "complicated questions of sexual deviancy in a sophisticated area of medical and scientific knowledge" which the Court was not prepared to address without the help of an expert. The Court noted that "unless and until there is reliable expert medical testimony that such a prior act three years earlier tends to show a continuing emotional propensity to commit the act charged" its admission will be erroneous.

Treadaway created a cottage industry for psychologists willing to accommodate prosecutors in an area where there was little or any peer reviewed research or studies. Usually without talking to the defendant and knowing little or nothing about his past, the psychologist would examine police reports and then come to court prepared to testify that in her professional opinion the defendant had a continuing emotional propensity for deviant sexual conduct sufficient to warrant the admission of the prior bad act. This approach was chilled in 1994 when 2 Arizona psychologists were subjected to formal inquiry by the Arizona Board of Psychologist Examiners for giving emotion propensity testimony. Thereafter, prosecutors in Arizona went through a short period during which they could find very few psychologists willing to provide expert testimony as required by Treadaway.

To solve this problem prosecutors in 1996 convinced the Arizona legislature to enact A.R.S. §13-1419. This statute purported to authorize the admission of past acts in sex cases but was so clearly unconstitutional that few prosecutors chose to use it. Instead, they awaited the arrival of Rule 404(c) which became effective December 1, 1997. The rule reads in pertinent part as follows:

(c) Character evidence in sexual misconduct cases.

In a criminal case in which a defendant is charged with having committed a sexual offense, evidence of other crimes, wrong, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

(D) The Court shall make specific findings with respect to each of (A), (B), and (C) of Rule 401(c)(1).

IV. Practice Pointers in Litigating a 404(c) Act

A. There Must Be An Aberrant Sexual Propensity

The express language of the rule limits its applicability to prior acts “relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.” Thus, if the defendant is charged with sexually assaulting an adult female and the state wishes to introduce evidence that a year earlier he was convicted of putting his hand up a college student’s skirt and touching her thigh, your argument is “that touching the thigh of a woman under the influence of alcohol (cannot) be

classified as aberrational.” State v. Cuen, 153 Ariz. 382, 736 P.2d 1194 (C.A. Div. I, 1987).

When the alleged victim is a child, the Arizona courts will usually find the conduct aberrant. State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996). This is not necessarily true, however, when the defendant is also a child. Thus, if a 16 year old is charged with having consensual sexual relations with a 13 year old and the state wishes to introduce a similar act with another 12 year old, the exception should not apply. While the defendant’s acts are illegal, they are not aberrant as contemplated by 404(c). (Support for this portion is found in the definition of “pedophilia” in the DSM-IV which expressly excludes this situation.)

B. There Must Be Proof After Hearing That The Defendant Committed The Prior Act

In State v. Terrazas, 189 Ariz. 580, 944 P.2d 1194 (1997) the Arizona Supreme Court held that a prior bad act may not be introduced as evidence pursuant to Rule 404 unless the act has been established by clear and convincing evidence. In so holding, the court affirmed its previous holding in State v. Hughes, 102 Ariz. 118, 426 P.2d 386 (1967) that a prior bad act is inadmissible unless it has been established by “substantial evidence sufficient to take the case to a jury”. Terrazas, 944 P.2d at 1195-9.

The rule set forth in Terrazas provides greater protection for the defendant than its federal counterpart, Huddleston v. United States, 485 US 681, 108 S.Ct. 1496, 99 L.Ed. 2d 771 (1988). Terrazas states the Arizona law as follows:

...we adhere to Hughes and clarify that for prior bad acts to be admissible in a criminal case, the profferer must prove by clear and convincing

evidence that the prior bad acts were committed and that the defendant committed the acts. Terrazas 198 Ariz. at 582.

...We believe there are important reasons to apply a clear and convincing standard, rather than some lesser standard, to evidence of prior bad acts. Such evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge. *Ibid* at 583.

...Because of the high probability of prejudice from the admission of prior bad acts, the court must ensure that the evidence against the defendant directly establishes "that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon highly circumstantial inferences." *Ibid* at 583.

...Therefore, before admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act. *Ibid* at 584.

The government frequently argues that the critical issue of admitting prior bad act evidence under Rule 404(B) or 404(C) can be decided by the court on police reports and interviews. The government will often attach these documents to a motion arguing to admit the prior bad act evidence apparently hoping that the court will reach its decision on the merits prior to and independent of a hearing on the evidence. This is improper.

An essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. Of Ed. V. Loudermill, 470 U.S. 532m 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Argue that the court's decision on the issue of the admissibility of emotional propensity evidence in

your case carries grave consequences for the liberty interests of the defendant. For the government to argue that hearsay documents attached to a memorandum are sufficient to satisfy due process is misguided. The defendant, given the grave nature of the issue to his liberty interests, is entitled to a hearing with witnesses testifying under oath. You should argue that for the government to ask the court to make a finding by clear and convincing evidence based on tendered documents shows either a misunderstanding of or disdain for the dictates of due process.

C. There Must Be A Reasonable Basis To Infer The Character Trait

404(c) is based upon the assumption that certain kinds of behavior are more likely to reoccur than others. This by no means accepted throughout the psychological community. If the state is arguing that a 1983 conviction for sexual conduct with a minor gives rise to the inference of a character trait probative of a 1998 charge of sexual conduct with a minor, call an expert to show that an isolated event distant in time does not prove a character trait. (Make sure you find an expert who has not signed on with the child saving industry and who is familiar with the literature and research.) The factors set forth in 404(c)(1)(C) can guide you through an examination of your expert as you attempt to convince the court that the earlier act is not sufficiently probative to outweigh its devastating prejudice.

D. If All Else Fails, Make a Record On The Rule's Unconstitutionality

Rule 404(c) states in mandatory language that evidence of other sexual misdeeds is admissible. Because of the mandatory nature of the rule, the general prohibition on the admission of character evidence to show criminal

predisposition does not apply. This raises the following constitutional questions:

1. Is it a violation of due process for a rule to contravene a principle firmly embedded in traditional notions of fairness?
2. Does the rule violate due process by requiring irrational and arbitrary inferences about the defendant and his behavior?

V. Conclusion

It is important to know that judges are taught about sex cases by representatives of the child saving industry who present as neutral experts at judicial colleges and seminars. They are schooled in the language the prosecutor uses and the concepts she assumes true. It is, therefore, very difficult to convince a judge that a prior bad act should be precluded when there is a special rule written to permit its admission and the judge has come to believe that sex offenders are somehow “different”. It is perhaps useful, then, to take a page from death penalty mitigation. No matter what the statute says about mitigators, any attorney knows the surest way to save the death-eligible client is to create residual doubt in the judge’s mind concerning the conviction itself. If you can keep that doubt alive, you can keep your client alive. The same holds true in cases involving prior bad acts being offered to show emotional propensity. If you can create real doubt that the prior act occurred, you have undermined the entire process. Remind the judge that his decision will effectively determine if your client spends the rest of his life in prison and that an allegation arising from a 10 year old custody dispute is not sufficiently reliable given what is at stake. Some judges will respond favorable to your motion to preclude such evidence where the issue is so framed.