

PRIOR ACTS OF MISCONDUCT IN SEX CASES

I. Introduction

“You don’t have any evidence my client is guilty.”

“I don’t need any-I’ve got his prior acts.”

Paraphrase of a recent conversation between the author and a Pima County prosecutor concerning a sex case.

The bravado of this prosecutor is understandable. Armed with A.R.S. §13-1420 which took effect in 1996, the state is virtually assured of convictions in sex cases where there is evidence of prior bad acts. Such evidence is outcome determinative, “nearly dispositive, making the guilty verdict almost a formality.” State v. Treadaway, 568 P.2d 1061, 1065 (Ariz. 1977).

Passed by the Arizona Legislature at the behest of Arizona prosecutors, A.R.S. §13-1420 reads as follows:

A. If the defendant is charged with a violation of a sexual offense, the court may admit evidence that the defendant has committed past acts which would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant.

B. This section does not limit the admissibility of consideration of evidence under any court rule.

C. For purposes of this section, sexual offense means any of the following: 1) sexual abuse in violation of §13-1404; 2) sexual conduct with a minor in violation of §13-1405; 3) sexual assault in violation of §13-1406; 4) sexual assault of a spouse, in violation of §13-1406.01; 5) molestation of a child, in violation of §13-1410; 6) continuous sexual abuse of a child, in violation of §13-1417; 7) sexual misconduct by a behavioral health professional, in violation of §13-1418; 8) commercial sexual exploitation of a minor, in violation of §13-3552; 9) sexual exploitation of a minor, in violation of §13-3553.

The enactment of this statute raises serious questions:

1. Can the legislature cause a fundamental change in the rules of evidence without offending the principle of separation of powers?

2. Can the legislature summarily override 56 years of judicial efforts to strike a balance between the demands of society to be protected from sex offenders and the rights of its citizens to a fair trial when charged with such crimes?

3. Does the relevant literature support different rules for the prosecution of sex offenders and other offenders, or does the enactment of A.R.S. §13-1419 presage the end of the uncharged acts rule in all cases?

This memorandum will address these questions and raise others. But ultimately the important question is whether the courts are willing to abandon one of the oldest fixtures in American Evidence Law in the face of the demands of democratic crime control. Polls reflect that curbing crime is the most pressing problem facing the United States. A September, 1994 Roper poll found that 62% of the over 1000 respondents personally knew a crime victim. In a Yankelovich Partners poll released October 19, 1994, 86% of the 800 adults responding answered that the crime problem has “become worse in the past few years.” Cited in “Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot”, Edward Imwinkelreid, 22 *Fordham Urb. L.J.* 285 (Winter 1995).

There is no question, then, that politicians are being pressured to get “criminal off the streets.” But the risk is that in their haste they will write laws, like A.R.S. §13-1420, which will convict innocent people. As Imwinkelreid notes:

“The risk of misdecision is greatest when the jury is likely to find the character of the accused’s uncharged misconduct repugnant or revolting. The admission of testimony about that type of misconduct can poison the juror’s minds and generate an overmastering hostility against the accused.”

Thus, it is in the case of sex offenses that the risk of unfair prejudice is greatest. It could be argued that this risk is worth taking if the kind of evidence rendered admissible by S.R.S. §13-1420 was particularly probative as predictors of conduct. However, as the memorandum will demonstrate, it is history of the failure of such evidence to predict conduct which led to the codification of its use.

II. Brief History of “Emotional Propensity Exception” in Arizona.

Arizona has adhered to the general rule that evidence of prior bad acts is not admissible to prove guilty of another crime. In State v. Gomez, 696 P.2d 1327 (Ariz. 1985), the court said that evidence of this nature if excluded in part to avoid confusing the jury and to prevent its attention from being distracted from the real issues of the case. The rule is based on the fact that the jury will think the defendant is an evil person and will convict him on lesser evidence than might ordinarily be necessary to support a conviction. 696 P.2d at 1328.

However, in 1940 in the case of Taylor v. State, 97 P.2d 543 (Ariz. 1940), the Arizona Supreme Court held that the express exceptions of Rule 404 (b) which allowed for similar offenses to show a system, plan or scheme on the part of the defendant was broad enough to admit prior sexual acts to show the lustful disposition of the defendant. This case was the beginning of what came to be known as the emotional propensity exception in Arizona.

In 1956, the Arizona Supreme Court in State v. McDaniel, 298 P.2d 798 (Ariz. 1956), held that the emotional propensity/lustful disposition

exception was not limited to prior bad acts directed at the same victim. The court held that prior acts involving unnatural proclivities had a direct bearing on whether or not the defendant was guilty of a particular “unnatural act of passion”. 298 P.2d at 802. The court noted, however, that the exception would be subject to the limitation of relevant nearness in time. Id. At 802.

The emotional propensity exception in Arizona was inchoate until the case of State v. McFarlin, 517 P.2d 87 (Ariz. 1973). In that case the court said that prior bad sex acts could be admitted if they were similar and near in time to the charged acts and involved conduct of a sexually aberrant nature similar to that charged. McFarlin then was concerned with the question of whether or not the prior bad sex acts were relevant in the sense that they had probative value separate and apart from that of showing the bad character of the accused.

The problem of relevance was finally addressed by the Arizona Supreme Court in State v. Treadaway, 568 P.2d 1061 (Ariz. 1977). In Treadaway the court held that the area of emotional propensity evidence involved “complication questions of sexual deviancy in sophisticated areas of medical and scientific knowledge” in that the court was not prepared to find the uncharged misconduct in that case relevant without the assistance of an expert. In fn. 2 at p. 1064 the court held:

“A prior separate sex offense (particular dissimilar one) with a different victim (possibly accepting a similar relationship between defendant and the victim such as father/daughter) as remote as three years earlier is almost never admissible and especially not for the purpose of showing only the defendant’s propensity to commit the crime charged.”

The court noted in Treadaway that it was concerned that the emotional propensity rule as discussed in McFarlin had been extended to questionable

lengths in its application to all sex crimes has been sharply criticized. 568 P.2d at 1065.

Prior to Treadaway emotion propensity evidence had to be similar in type and near in time to the charged offense. After Treadaway, problems of dissimilarity and remoteness could be cured by the testimony of expert witnesses.

The history of expert participation in emotional propensity cases after Treadaway has been a troubled one. In one case, State v. Varela, 873 P.2d at 660, the court rejected an expert whose credentials it considered insufficient. This expert was rejected after he had rendered seven years of service as an emotional propensity expert, testified more than 30 times and found crimes probative of such propensity in each and every case. State v. Salazar, 887 P.2d at 620.

The difficulty the court had in responding to Treadaway's requirement for "reliable medical expert testimony", is that it was never able to determine what such testimony was. The basis for the expert testimony in emotional propensity cases has never been found to be admissible under the Frye test. United States v. Frye, 293 F. 1013 (D.C. Cir., 1923). Furthermore, it has never satisfied the alternative test articulated in State v. Moran, 728 P.2d 248 (Ariz. 1986). In Frye the test is one of general acceptance in the particular field in which it belongs. In Moran the focus is on whether or not the expert testimony submitted is reliable.

Ultimately the real problem that experts had in establishing a basis for their emotional propensity evidence is that the real purpose of their testimony was to predict behavior. While many experts danced around this issue and denied that predictions were a part of their role, the Arizona Board of Psychologists Examiners in 1994 responded to two complaints against

Doctors Harrison and Gray for unprofessional conduct arising out of their testimony as emotional propensity experts in Arizona courts. By the time of the Board of Psychologists Examiners investigation, Doctors Harrison, Gray and Emerick (the doctor specifically criticized in State v. Salazar) had become the three experts ready and willing to provide expert testimony for the prosecution in any Arizona courtroom.

While the results of the Harrison and Gray proceedings before the Board of Psychologists Examiners are irrelevant to the issues in this memorandum, suffice it to say that the institution of these proceedings made it difficult if not impossible for the prosecution to find experts to testify thereafter in emotional propensity cases. Attached hereto as Exhibit A is a transcript of an interview with Dr. Todd Flynn taken on January 11, 1996 in an unrelated case. This transcript with Dr. Flynn shows the contortions the state's experts were going through in an effort to present emotional propensity evidence without running afoul of the Board of Psychologists Examiners.

It is worth noting that in 1994, at the time of the proceedings against Doctors Harrison and Gray, attorney Stephen Neely, Pima County Attorney, realized the seriousness of these proceedings insofar as its future effect on his ability to produce experts on emotional propensity cases. Neely filed an action against the Board of Psychologists Examiners in special action 1CA-5A940240 which specifically addressed his concerns with the impact of the proceedings on future expert testimony. However, being unable to stop the proceedings involving his experts before the Board of Psychologists Examiners, Neely and his colleagues then decided to address the issue head on. The result of this effort was A.R.S. §13-1420 which would appear to

be an effort to eliminate the need for expert testimony in the area of emotional propensity evidence.

III. A.R.S. §13-1420 is Unconstitutional Because it Violates the Doctrine of Separation of Powers by Impinging on the Court's Rule Making Authority.

Article 6, §5(5) of the Arizona Constitution gives the Supreme Court the power to make rules relative to all procedural matters in any court. Rules of evidence are promulgated under this constitutional grant of power and are ordinarily considered procedural in nature. State ex rel. Collins v. Seidel, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984). The doctrine of separation of powers prevents the legislature from assuming judicial functions. Id.

In the case of Readenour v. Marion Power Shovel, 149 Ariz. 442, 719 P.2d 1058 (1986), the Arizona Supreme Court affirmed the holding of Seidel to recognize statutory evidentiary rules when they are “reasonable and workable”, supplementing rather than contradicting the rule which the court has promulgated.

Constitutional considerations in criminal cases severely limit the legislature's authority to manipulate the rules of evidence. State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987). Robinson involved a legislative change in the hearsay rules. The court held that such rules are at the core of the judicial function: defining what is reliable evidence and establishing judicial processes to test reliability. 153 Ariz. at 196. A statute which changes such rules “is subject to exacting scrutiny and is constitutional only if it can be interpreted as consistent, in letter and spirit, with the rule of evidence.” 153 Ariz. at 196. The statute is unconstitutional if it conflicts with or “tends to engulf the rules of evidence... Under our

constitution, the legislature cannot repeal the rules of evidence.” 153 Ariz. at 196.

IV. Conclusion

A.R.S. §13-1420 is a legislative attempt to impose a rule of evidence on the court which conflicts with cases which span 56 years. As previously discussed, the courts attempted to strike a balance between the relevance of prior bad acts in sex cases and the danger of unfair prejudice to defendants. Treadaway and its progeny were a judicial effort to determine the relevance of prior bad acts through the use of reliable expert testimony. When it became obvious that such testimony was unreliable and, by 1996 unavailable, the legislature stepped in and by an act of legislative fiat made unreliable evidence reliable. Under Robinson, the heart of the judicial function is defining what is reliable evidence and establishing judicial processes to test that reliability. A.R.S. §13-1420 unconstitutionally encroaches on that function.