

KACDL FIGHTING FOR MEMBERS AND THE ACCUSED BEFORE THE KENTUCKY SUPREME COURT

[Editor's Note: One of the most frequently asked questions by criminal defense attorneys across the state when they are solicited for membership in the KACDL is, "What do I get out of being a member?" One of the many benefits of membership in this statewide organization of the public and private criminal defense bars is that it enables the putative member's voice to be heard at the highest levels of our state government on issues which range from the re-writing of the Penal Code to the adoption of new evidentiary and procedural rules.

One of the significant success stories of the KACDL is the refusal, in 2002, of the Kentucky Supreme Court to adopt Evidence Rules 413, 414, and 415 which provided for a more liberal admission of prior acts evidence against a citizen accused of committing a sex crime. Despite the support of more well-funded organizations, as well as the chief lobbyist on women's issues on behalf of former Governor Patton, the KACDL position was, ultimately, embraced and the proposed rules were not adopted by the Court.

What follows is the KACDL's position paper, which was written, and presented to the Court at the 2002 Annual Meeting of the KBA, by former KACDL President Mark Stanziano. It is reprinted in its entirety so that you can see the size and shape of the demon we were able to destroy before it began to ravage the lives of our clients. This is what we do at the KACDL and just one of the many benefits of membership.]

APOLITICIZING THE KENTUCKY RULES OF EVIDENCE

A POSITION PAPER BY THE KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN OPPOSITION TO THE KENTUCKY SUPREME COURT'S PROPOSAL TO ADD EVIDENCE RULES 413, 414 AND 415.

Proposal

Despite the lack of a recommendation by the Evidence Rules Commission, the Kentucky Supreme Court is considering the adoption of the equivalent of Federal Rules of Evidence 413, 414 and 415 for the Kentucky Evidence Code. The Court is now soliciting opinions from the Kentucky Bar regarding the proposed adoption of these evidentiary Rules. In essence, the proposed Rule 413 provides for more liberal admissibility in cases involving sexual assault where the accused has committed a prior act or acts of sexual assault. Rules 414 and 415 are substantively identical but applicable to different types of cases. **The KACDL opposes the adoption of all of these rules.**

Procedural Background of Similar Federal Rules

Congress approved passage of three new Rules of Evidence, identical to the ones proposed by the Kentucky Supreme Court, as part of a larger Crime Bill¹ package but, it bypassed the ordinary rule-making process in doing so.² Following the passage of the Crime Bill, the floor amendment to add the new evidence rules drew substantial criticism.³

As a matter of procedural history regarding the adoption of the federal rules, one provision of the Crime Bill invited the Judicial Conference of the United States to submit, within 150 days (before February 10, 1995), a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation.⁴

After a careful study, the Judicial Conference opposed enactment of the new evidence rules and urged Congress to reconsider its decision on the policy questions underlying the new rules. If Congress would not reconsider, the Judicial Conference recommended incorporation of the provisions of Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence. The amendments would not have changed the substance of the congressional enactments but would have, instead, clarified drafting ambiguities and eliminated possible constitutional infirmities.

The Judicial Conference took the positions, set out above, after meetings of the Advisory

¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994).

² See, 113 Cong. Rec. H5439 (Statement of Rep. Hughes), noting that the existing rule-making process involves a minimum of six levels of scrutiny or stages of formal review. This has gone through none. This is an amendment offered on the floor of the Senate after about 20 minutes of debate, without very much thought, and it is procedurally and substantively flawed.⁵

³ See, Aiken, *Sexual Character Evidence in Civil Actions: Refining the Propensity Rule*, 1997 Wis. L. Rev. 1221, 1236 (noting that Rules 413, 414 and 415 are an example of the politicization of the Federal Rules of Evidence⁶).

Committee on Evidence Rules in October of 1994. At these meetings, the Advisory Committee considered 84 written comments representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414 and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee presented its report to the Judicial Conference's standing Committee on Rules of Practice and Procedure in January, 1995. The Advisory Committee's report B which was unanimous except for a dissenting vote by the Dept. of Justice representative B expressed the Committee's belief that the then-existing Rules of Evidence (especially Rule 404) adequately and sufficiently addressed the concerns embodied in Rules 413-415.

Furthermore, the Advisory Committee warned that the new rules were not supported by empirical evidence and could significantly diminish the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections, said the Advisory Committee, form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A pivotal concern identified by the Committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for simply being a bad person (as evidence by his or her prior problems with the law).

The Advisory Committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence.

The Advisory Committees on Criminal and Civil Rules unanimously B again, except for the DOJ representatives thereon B also opposed the new rules. Those committees also concluded 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.

After the Advisory Committee reported, the Standing Committee on Rules of Practice and Procedure concluded unanimously B again, except for the DOJ members B and agreed with the Advisory Committee view.⁴ The Standing Committee opposed the adoption of the new rules.

Problems with the Existing Federal Rules 413-415

At a root level, these Rules appear to be attempts to create various exceptions to Rule 404(b) in sexual assault cases, where the prosecution wishes to offer a previous act of sexual assault committed by the accused.⁵ If Rule 404(b) were applicable, the prosecution would have to articulate a *not-for-character* purpose for a prior act of sexual assault; such as intent, motive or lack of mistake. The prosecution would be prohibited by Rule 404(b) from offering the prior sexual assault simply to prove that the accused has a propensity to commit sex crimes.

⁴ It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees. The Committees are composed of over 40 judges, practicing lawyers and academicians. Indeed, the only supporters of the Rules were the representatives of the Dept. of Justice.

⁵ See, 113 Cong. Rec. S15072 (Statement of Sen. Biden), [W]hat the Republican leader is doing is changing 404(b) of the Federal Rules of [Evidence]Right now the rule in a courtroom in a federal court is you go in and, if you wish to introduce evidence of a similar crimeyou can only do it under very limited circumstancesas proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. These are the only circumstances in which you can offer this as evidence. . . .There is a reason for that. These rules of relevancy . . .it took essentially 800 years to develop the rules of evidence under our English jurisprudence system. . . . We found out from 800 years of experience that [the evidence of past crimes] tends to blind people [and keep them from] looking at the real facts before them and making an independent judgment, at this time, at this circumstance, at this situation, that the defendant did [this] thing. (Emphasis added)

However, under Rule 413 the prosecution can offer a prior act of sexual assault explicitly to prove the accused's bad character.⁶ A limiting instruction is not necessary because the jury is free to use the prior act of sexual assault as evidence that the accused has a propensity to commit sex crimes. This is what the Federal Rule means when it says that a prior sexual assault may be considered for its bearing on any matter to which it is relevant.[@] A propensity to commit sex crimes would assuredly be relevant regarding the issue of whether the accused committed the sex act with which he is charged.

The creation of the Federal Rules also results in the following federal anomaly: In a prosecution for a rape-murder where the accused has two prior convictions B one for rape and one for murder B the prior rape could be admitted even if it was offered solely as proof of the accused's propensity to commit such crimes. However, the murder could not be admitted without the articulation of a not-for-propensity purpose.

⁶ See, *United States v Withorn*, 204 F.3d 790 (8th Cir. 2000)(stating that Courts must consider probative value of sexual misconduct evidence in light of Congress's policy judgment that such evidence is exceptionally probative[@] of a propensity to commit sexual assaults.

Proponents of Rules 413, 414 and 415 claim that the main reason for the distinction is that sexual assault crimes usually present atypical difficulties of proof. The cases, very often, involve no physical evidence that ties the accused to the crime and juries are often called upon to make a credibility determination between the accuser and the accused. The argument continues that, in such circumstances, if the accused has committed similar acts in the past, the claims of the accuser are more likely to be considered truthful if there is substantiation of the other acts.⁷ Indeed, the proponents of the adoption of these Rules in Kentucky claim that such Rules are necessary in order to make prosecution of these cases easier.⁸

Of course, the flip side of the coin merits discussion, as well. If Rule 413 is merely an exception to Rule 404, the necessity for the Rule is utterly suspect. In the, comparatively, few sex crime cases that have been brought in the federal trial courts, the prosecutors have had relatively little problem in enunciating a not-for-character purpose for a prior act of sexual assault. Generally speaking, the Courts have looked upon Rule 404(b) as a rule of inclusion, and any colorable claim that the prior acts evidence is necessary to show one of the not-for-propensity purposes listed in 404(b) has been held, by the Courts, to satisfy the Rule. Thereafter, the Courts proceed to the analysis of the evidence under Rule 403's *probative value vs. prejudice* standard. In truth, there was never any need for an exception to Rule 404(b) in cases involving sexual assault crimes.⁹

⁷ See, 133 Cong. Rec. H5439 (Statement of Rep. Kyl).

⁸ Though, no statistics are offered that such prosecutions are being dismissed for lack of proof, or that defendants are being acquitted by juries in the face of prosecutorial presentations of proof beyond a reasonable doubt.

⁹ Further, no reliable statistical information even exists which suggests that Kentucky judges are loathe to admit prior acts evidence in the face of prosecutorial arguments in favor of admitting prior acts evidence under KRE 404(b). In fact, given some of the case law of the last 15 years, it may be that Kentucky judges may have been too much in favor of the admission of such evidence.

Further, the relationship of proposed Rules 413, 414, and 415 to the Rule 403 balancing test remains unclear in the Federal Courts. The legislative history indicates that the new Rules would not supplant Rule 403.¹⁰ On the other hand, when the Advisory Committee received comments about Rule 413-415, many of the commentators were of the opinion that the supplanting of Rule 403 was, at least, arguable because of the language in Rules 413-415 declaring, without qualification, that such evidence is admissible.

The ambiguity has been addressed by trial judges in the Federal Courts. In fact, every Court to decide the issue has held that Rules 413, 414 and 415 remain subservient to a Rule 403 analysis. Some of the Courts to decide the issue have indicated that Rules 413-415 might be unconstitutional if Rule 403 did not still give trial judges the power to exclude evidence of an accused's prior sexual misconduct. So, those Courts have read Rule 403 into the Rules as a kind of saving clause.¹¹ Of course, the parameters of such a saving clause are not defined and, as such, provide no guidance to the trial bar regarding the admissibility of prior acts evidence.¹²

¹⁰ See, 140 Cong. Rec. S12990 (September 20, 1994)(statement of Senator Dole: evidence of past sexual misconduct will still be governed by the rules of evidence, including the restrictions on hearsay evidence and the court's authority under Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect). See, also, 140 Cong. Rec. H8968-01 (August 21, 1994) (statement of Rep. Molinari, indicating that the Rule was drafted with the intent to permit the Trial Court to exclude prior acts of sexual misconduct under Rule 403).

¹¹ See, *United States v Enjady*, 134 F.3d 1427 (10th Cir. 1998): The Court recognized that Rule 413 raises a serious constitutional due process issue because it creates a danger that the defendant will be convicted because he is a bad person, not because he committed the crime charged. The Court stated that without the safeguards embodied in Rule 403, we would hold [Rule 413] to be unconstitutional.

¹² For example, does dissimilarity in the prior act and the charged act keep the prior act out of evidence? What about time? Does a long period of law-abiding behavior in between the prior act and the charged act keep the prior act from being admitted? What about if remoteness and dissimilarity are combined? In any event, dissimilar and remote events are prejudicial independent from any propensity inference & such evidence encourages a jury to convict the accused, not because he has a propensity to commit such crimes, but simply because he is a bad person. And, the use of prior acts evidence in that fashion is prohibited; even under Rules 413-

A final problem is that the adoption of Rules 413, 414 and 415 predicate the admissibility of prior acts of sexual assault, or sexual misconduct, upon proof that the accused actually committed the acts attributed to him. However, this does not require a conviction under Rules 413-415. Indeed, under Rule 104(b), evidence of prior sexual assaults is admissible under Rules 413-415 B subject only to a Rule 403 analysis B when the prosecution presents sufficient evidence to support a finding, by a preponderance of the evidence, that the accused committed the prior act.¹³

Position of the Kentucky Association of Criminal Defense Lawyers

Not surprisingly, the KACDL opposes the adoption of Rules 413, 414 and 415. It does so for all of the reasons already stated; especially relying upon the findings of the Advisory Committee on Evidence Rules and the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. None of the KACDL-s membership supports the adoption of these new rules. This includes, the entire Board of Directors, all of the Officers, and those past presidents who remain active in the Association, as well as the rank and file membership across the entire Commonwealth.

If the Court were to adopt these rules, it would have to un-do decades of case law regarding propensity evidence, the admissibility of prior bad acts, and character evidence. The dismantling of so significant a portion of the existing law in this state would result in uncertainty among members of the bar regarding the state of the law and the scope of the new rules and years of litigation to establish the new parameters of the law *vis* these new rules. Furthermore, the ever-present danger of convicting an innocent person will be multiplied because of the, soon to be widespread, new prosecutorial use, and

415.

¹³ See, *United States v Mann*, 193 F.3d 1172 (10th Cir. 1999) (construing Rule 414: prior sexual assault of a child was properly admitted; the testimony of the child-victim provided enough information for a reasonable juror to believe by a preponderance of the evidence that the defendant committed the prior sexual assault).

juror misuse, of the new rules in trial.

Trials in sexual assault cases will take significantly longer to try because of the mini-trials which will take place within the main body of the case. Court time, already in short supply, will be cut even further because, besides the in-trial mini-trials, the courts will be forced to hold hearings under KRE 104(b) to determine if there is sufficient evidence from which a jury could determine that an accused committed a prior act and, under KRE 403 (assuming such an analysis is proper under the new rules), whether the prejudice of such evidence is outweighed by the probative nature of the proof.¹⁴

The KACDL urges the Court to evaluate its position carefully regarding the adoption of these proposed rules of evidence. The rules are not necessary to convict in cases where there exists proof beyond a reasonable doubt. And, in cases, where the quantum of proof of the charged act(s) falls below a beyond a reasonable doubt, convictions are not allowed under our system of jurisprudence. By adopting these new rules, the Court throws caution to wind and risks lessening the constitutional protections for an accused with regard to both the presumption of innocence and the requirement that the Commonwealth prove the guilt of the accused in the offense charged beyond a reasonable doubt.

Charges of sexual abuse, sexual misconduct, rape, sodomy, incest, etc., are easy to make and, once made, lives are destroyed by the mere allegation. People, especially the validators who are assigned by the Commonwealth to investigate these allegations, are biased in favor of such claims and conduct their investigations with a view only toward developing proof of the allegation and

¹⁴ It would be the position of the KACDL that the failure to ask a court to hold such a pretrial hearing would be actionable as negligence, or as the rendering of ineffective assistance of counsel under R.Cr. 11.42.

discounting every other plausible and reasonable explanation for the accusation. ASubstantiation@of abuse results in the Aperp@ being placed on the Cabinet=s registry of offenders even though the substantiation standard is less than probable cause and can be based solely upon the word of a child.

The conviction of a person for a felony offense involving sex abuse (or worse) results in a 10-life requirement of registering as a sex offender and may result in a person serving a life sentence in prison or on the run from his or her past; without any ability to re-establish their life or their ties to family and friends. People who are convicted frequently live as outcasts in a society to which they have already paid their debt.

These cases do not need to be made easier to prosecute. The penalties are so harsh, already. The proposed rules are weighted terribly in favor of simpler prosecutions and benefit prosecutors who want to obtain convictions based simply upon the bad character of an accused and the accused=s past actions which, in their own time, were not sufficient to warrant either prosecutions or convictions.

The Supreme Court ought not to politicize the Kentucky Rules of Evidence in the same manner as the United States Congress has chosen to do. In the face of strenuous opposition, which includes judges, lawyers and academicians, the Court should do what is right and just with regard to this volatile and potentially-divisive issue: vote against the proposed rules. Any other vote is a vote for the political expediency of the moment, and against years of sound legal analysis and thinking.

Conclusion

The Kentucky Association of Criminal Defense Lawyers urges the Court to continue to give the citizens of this Commonwealth more constitutional protections under the state constitution than they are afforded under the federal constitution. The KACDL urges the Court, in its vote on this issue, to vote against the adoption of the proposed evidence rules 413, 414 and 415.

Respectfully submitted,

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