

**STORAGE NAME:** h3867.cp

**DATE:** April 9, 1998

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
CRIME AND PUNISHMENT  
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

**BILL #:** HB 3867

**RELATING TO:** Evidence of other crimes, wrongs, or acts

**SPONSOR(S):** Rep. Argenziano

**COMPANION BILL(S):** SB 1822

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**

- (1) CRIME AND PUNISHMENT
  - (2)
  - (3)
  - (4)
  - (5)
- 

**I. SUMMARY:**

The bill adds a paragraph to the rules of evidence which provides that prior bad acts that are inseparable from, or inextricably intertwined with, the crime charged are admissible if the evidence tends to assist the jury in understanding the criminal conduct alleged, or if the act is relevant to prove motive, opportunity, intent, knowledge identity, preparation, plan, or absence of mistake.

The bill provides that when a defendant is charged with domestic violence, then evidence of the defendant's commission of other acts of domestic violence, is admissible for any matter to which the evidence is relevant. The bill further provides for the introduction of prior acts of sexual battery if the defendant is charged with sexual battery. Thus, for sexual battery and domestic violence, the evidence may be relevant solely to prove bad character or propensity to commit a particular type of crime, and it will not be necessary that evidence of prior sexual misconduct or domestic violence prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake in order to be heard by the jury.

The bill also provides that evidence of prior sexual misconduct is admissible, regardless of Section 90.403, which requires that the probative value of the evidence outweigh the risk of unfair prejudice.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

**Similar Fact Evidence**

Section 90.404(2)(a) provides for the limited situations when prior bad acts or crimes are permitted into evidence:

Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant fact in issue, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character.

Section 90.404(2)(a) tracks the Federal Rules of Evidence, Rule 404(3)(b), except that the Federal Rule refers only to "evidence of other crimes, wrongs or acts" instead of "similar fact evidence." While the statute refers to "similar fact evidence" the courts only require that the prior bad acts be similar to the pending case when the evidence is used to corroborate the testimony of a child victim of a sexual battery **or** when identification is at issue. For example, if an issue in a burglary case is whether the defendant was the person who committed the crime, then prior acts of burglary would only be admissible into evidence if the prior burglaries show a "signature crime" with the same particular characteristics, as the case before the court. On the other hand, if the prior bad act proves intent, motive, absence of mistake, etc., to commit the offense, and if identification is not an issue, then the prior bad act does not need to be so related that it demonstrates a "signature crime," or the same "modus operandi." For example, if a person charged with aggravated battery claims he was acting in self-defense, then identification would not be an issue and evidence of prior aggravated batteries could be admitted into evidence to show the intent and motive of the defendant. Other prior bad acts, such as a lie made by the defendant in the past, would not be admissible because it does not prove intent, motive, identity, etc.

**Sexual Battery Against Children**

The Florida Supreme Court has held that in sexual battery cases against children when identification is not an issue, the evidence of prior instances of this offense may be used to buttress the credibility of the child victim, even though evidence of the prior bad acts does not prove one of the statutory reasons for allowing the evidence such as intent, motive or lack of mistake. The court has held that under this court created basis for the admission of prior bad acts, the prior acts must be strikingly similar, and the general rule, that prior bad acts need not be similar when identification is not the issue, does not apply. In Heuring v. State, 513 so.2d 122 (1987) the Florida Supreme Court held that in a case where the defendant was charged with sexual battery against his stepdaughter, evidence could not be introduced of the defendant's sexual battery against his daughter even though both were of a similar age when the offenses occurred. The court held that the "offenses must not only be strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses."

### **Balancing Test**

Section 90.404(2), F.S., is among the most complicated of all the rules of evidence. One reason the rule is difficult for the courts to apply is because any act admissible pursuant to 90.404(2), F.S. is still not admissible until the court conducts a balancing test that is required by another portion of the evidence rules. Section 90.403, F.S., provides:

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

This provision often excludes prior bad acts from being heard by the jury because evidence of prior bad acts is considered to be extremely inflammatory. To overcome the inflammatory nature of prior bad act, evidence must be very probative in order for the courts to be willing to allow the jury to hear the evidence.

### **Federal Rules**

In addition to the general rule about the admissibility of prior bad acts, the federal rules of evidence have provisions for sexual assault and child molestation that are not provided for in the Florida rules of evidence:

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

Rule 413 and Rule 414 of the Federal Rules of Evidence.

#### **B. EFFECT OF PROPOSED CHANGES:**

The bill makes Section 90.404(2) closer to federal law by removing the words "similar fact" so that the Rule reads: "~~Similar fact~~ Evidence of other crimes, wrongs, or acts is admissible when relevant to prove ...."

The bill adds another paragraph to the rules of evidence which provides that prior bad acts that are inseparable from or inextricably intertwined with the crime charged are admissible if the evidence tends to assist the jury in understanding the criminal conduct alleged, or if the act is relevant to prove motive, opportunity, intent, knowledge identity, preparation, plan, or absence of mistake.

The bill provides that when a defendant is charged with domestic violence, then evidence of the defendant's commission of other acts of domestic violence, is admissible for any matter to which the evidence is relevant. The bill further provides for the introduction of prior acts of sexual battery if the defendant is charged with sexual battery. Thus, for sexual battery and domestic violence, the evidence may be relevant solely to prove bad character or propensity to commit a particular type of crime, and it will not be necessary that evidence of prior sexual misconduct or domestic violence prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake in order to be heard by the jury. The federal rules, in a similar manner, permit the introduction of prior instances of sexual battery if a defendant is charged with sexual battery and the introduction of child molesting if the defendant is charged with child molesting regardless of whether the evidence is offered to prove that the defendant acted in conformity with the prior bad act and has a propensity to commit that particular crime.

The bill also provides that evidence of prior sexual misconduct is admissible, regardless of Section 90.403, which requires that probative value of the evidence outweigh the unfair prejudice.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 90.403 and 90.404, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. See Effects of Proposed Changes

Section 2. Creates effective date of July 1 of the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not yet determined the fiscal impact of the bill, but it is anticipated that the bill's fiscal impact will be minimal or insignificant.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not impose a mandate on local government.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce any authority to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties and municipalities.



V. COMMENTS:

The bill is broader than the federal rules of evidence in two ways: 1.) The related federal rules of evidence do not have a specific provision for domestic violence. 2.) The federal rules never limit application of the general rule that the probative value must outweigh the risk of unfair prejudice.

There is a debate about the constitutionality of the new federal rules (enacted in 1994) which allows evidence of prior sexual assault or child molesting to be shown to the jury if the defendant is charged with the same charge. The federal rules (like the changes proposed by the bill) state that this evidence "may be considered for its bearing on any matter to which it is relevant." Thus it appears that the evidence would be admissible even if the evidence is only relevant to prove that the defendant had the propensity to commit the offense. Propensity evidence is particularly dangerous when the identity of the defendant is an issue because sexual offenders are the first ones suspected and photos of sexual offenders may be shown to the victim. Propensity evidence can be very relevant because the improbability of the coincidence that the accused happens to be a rapist is very probative. However, if the fact that a person is a rapist narrows the pool of people that were investigated, then coincidence that the person is charged with a new rape is not as great.

There is not much case law about the constitutionality of evidence which is used only to show the propensity of the defendant to commit the offense. One reason for the lack of case law on this issue is that the federal courts have a safety valve in Rule 403 which allows the exclusion of evidence if the unfair prejudice that would be caused by the evidence outweighs the probative relevant value of the evidence. The bill provides that prior acts of sexual battery be admitted regardless of Florida's rule that unfair prejudice not outweigh probative value. Without this safety valve the Florida courts will have to decide if propensity evidence violates the Due Process Clause of the state and federal constitutions.

Despite these concerns, the United States Supreme Court has been very reluctant to interfere with the States rules of evidence:

Preventing and dealing with crime is much more the business of the States than it is of the Federal Government, ...[I]t is normally within the power of the State to regulate procedures under which its laws are carried out,... and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Montana v. Egelhoff, 116 S.Ct. 2013 (1996); See also Marshall v. Lonberger, 458 U.S. 438, (1983)( the due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules).

**STORAGE NAME:** h3867.cp

**DATE:** April 9, 1998

**PAGE 10**

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Legislative Research Director:

---

J. Willis Renuart

---

J. Willis Renuart