STORAGE NAME: h0887.cp
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HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
ANALYSIS

BILL #: HB 887 (PCB CP 00-02)

RELATING TO: Similar Fact Evidence

SPONSOR(S): Committee on Crime & Punishment and Representative Ball

TIED BILL(S): None

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

(1) CRIME AND PUNISHMENT YEAS 7 NAYS 0
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I. SUMMARY:

Many cases of child sexual abuse are very difficult for prosecutors to prove because the crime consisted of lewd fondling, digital penetration, or the child being forced to perform sex acts upon the assailant, and there is no physical evidence left by the commission of the crime. Frequently, these are crimes of opportunity, taking place when the child is alone with the assailant. In such cases, the child's testimony is the only evidence of the crime, and the child's credibility becomes the pivotal factor in the case. Evidence that the defendant has also sexually abused children at other times ("collateral crime evidence") can be a powerful tool to assist juries in weighing the credibility of child victims.

Section 90.404(2)(a) governs the admissibility of collateral crime evidence in criminal trials. Beginning in 1987 with the case of Heuring v. State, 513 So.2d 122 (Fla. 1987), increasingly stringent rules for admitting this type of evidence in cases of child sexual abuse have been grafted onto s. 90.404(2)(a). Through the combined effect of Heuring and the subsequent Florida Supreme Court cases of Rawls v. State, 649 So.2d 1350 (Fla. 1994) and Saffor v. State, 660 So.2d 668 (Fla. 1995), the use of such evidence in cases of child sexual abuse has been substantially restricted. Heuring and its progeny have effectively supplanted s. 90.404(2)(a) as it pertains to cases of child sexual abuse. Cases of child sexual abuse are the only type of criminal case which have been carved out of the requirements s. 90.404(2)(a) and subjected to these heightened standards of admissibility.

HB 887 adds a specific provision to s. 90.404(2) to admit collateral crime evidence of the defendant's other acts of "child molestation" in cases where the defendant is charged with an act of "child molestation." The bill also clarifies that evidence of the defendant's other acts of child molestation is admissible as long as, in the court's discretion, it does not become a feature of the trial.

HB 887 also deletes the reference to "similar fact" evidence in s. 90.404(2)(a). In addition, the bill allows notice of the state's intention to use evidence of other crimes to be given to the defendant or the defendant's counsel to satisfy the statutory notification requirement.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Prosecution of Cases of Child Sexual Abuse

Many cases of child sexual abuse are very difficult for prosecutors to prove because the crime consisted of lewd fondling, digital penetration, or the child being forced to perform sex acts upon the assailant, and there is no physical evidence left by the commission of the crime. Frequently, these are crimes of opportunity, taking place when the child is alone with the assailant. In such cases, the child's testimony is the only evidence of the crime, and the child's credibility becomes the pivotal factor in the case.[1]

In cases such as these, evidence that the defendant has also sexually abused children at other times can be a powerful tool to assist juries in weighing the credibility of child victims. It is one thing to judge the veracity of a single child's testimony against adamant the denials of the accused. It is entirely different, however, when two, three, or more children testify to other times when the accused has molested them as well. The knowledge that a defendant has sexually assaulted other children can be the deciding factor in the mind of a juror on whether to believe or disbelieve the testimony of a child victim.[2]

A study of 561 sex offenders revealed that pedophiles who targeted young boys outside the home averaged approximately 281 sex acts with more than 150 victims. In contrast, those offenders who targeted girls within the family averaged more than 81 sex acts with 1.8 victims.[3]

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1 *See*, D. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, New York Law School Journal of Human Rights, Vol. 15, Part 3, 449-481 (Spring 1999).

2 Id.

3 G. Abel, et al., *Multiple Paraphilic Diagnoses Among Sex Offenders*, Bulletin of the American Academy of Psychiatry and Law, 16, No. 2, 153-168 (1988).

Fact patterns of sex crimes committed against children will vary depending on the circumstances, and whether the offender is a "situational child molester" or a "preferential child molester." *Situational Child Molesters* commit sex crimes against children for a variety of reasons. They do not have a "true preference" for children as sex objects. *Preferential child molesters* have a clear sexual preference for children. Most child molesters have particular age and gender preferences for their victims. However, age preferences for different offenders can vary. While one child molester will prefer children between ages six and eight, another will prefer children between ages five and eleven. Some child molesters will molest boys or girls indiscriminately.[4]

Similar Fact/Collateral Crime Evidence

Section 90.404(2)(a) currently provides:

> (2) OTHER CRIMES, WRONGS, OR ACTS.--
>
> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material 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 or propensity. (Emphasis added)

Under this provision, evidence of other crimes or actions (also called “collateral crime” or “similar fact” evidence) is admissible when it is relevant to a matter that is at issue in a trial. Such evidence cannot be admitted, however, if it is **only** relevant to show the defendant’s propensity to commit such crimes or other wrongful acts. In other words, if the evidence shows a defendant’s propensity to commit such crimes, **and** it is relevant to prove things such as the defendant’s motive, plan, intention, or opportunity to commit the crime, the evidence is admissible under this section. *See*, Williams v. State, 110 So.2d 654 (Fla. 1959).

Section 90.404(2)(a) is the codification of the rule regarding the admissibility of collateral crime evidence as announced in the case of Williams v. State, 110 So.2d 654 (Fla. 1959). In Williams, the Florida Supreme Court upheld the admission of the similar fact evidence and expressed the rule both in terms of when such evidence is admissible, and when it is not:

> Our view of the proper rule simply is that relevant evidence will not be excluded merely because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissability is a lack of relevancy (emphasis supplied) . . .

Id. at 659 & 660.

The Court further stated:

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[4] K. Lanning, *Child Molesters: a Behavioral Analysis For Law Enforcement Officers Investigating Cases of Child Sexual Exploitation* 15 (December 1992), (Available from the National Center for Missing and Exploited Children). Prepared in cooperation with the Federal Bureau of Investigation.

> As we did in Talley v. State we emphasize that the question of relevancy of this type of evidence should be cautiously scrutinized before it is determined to be admissible. **Nonetheless, relevancy is the test.** If found to be relevant for any purpose save that of showing bad character or propensity, then it should be admitted. (Emphasis added).

Id. at 662.

Similarity of detail or uniqueness, is not required for the admission of similar fact evidence of other crimes, wrongs or acts.[5] Professor Charles Ehrhardt points out: "Thus it can be misleading to refer to this evidence as 'similar fact' evidence because similarity of the facts involved in the collateral act or crime does not insure relevance for admissibility. Similarly, evidence of collateral crimes may be relevant and admissible even if it is not similar."[6]

Beginning in 1987 with the case of Heuring v. State, 513 So.2d 122 (Fla. 1987), increasingly stringent rules for admitting collateral crime evidence in cases of child sexual abuse have been grafted onto s. 90.404(2)(a).[7] Through the combined effect of Heuring and the subsequent Florida Supreme Court cases of Rawls v. State, 649 So.2d 1350 (Fla. 1994) and Saffor v. State, 660 So.2d 668 (Fla. 1995), the use of this type of evidence in cases of child sexual abuse has been substantially restricted.

The three cases noted above have generated two standards for admitting collateral crime evidence in cases of child sexual abuse. A "strict similarity" standard which applies to cases of child sexual abuse when there **is no** familial relationship between the defendant and the victim. And a "relaxed similarity" standard for cases when there **is** a familial relationship between the defendant and the victim. *See*, Saffor v. State, 660 So.2d 668 (Fla. 1995). The basis for the different standards for cases occurring inside versus outside the familial relationship is unclear.

In Saffor v. State, 625 So.2d 31 (Fla. 1st DCA, 1993), the defendant was convicted of sexual battery of his girlfriend's ten-year-old son. Saffor was living in the same home as the victim at the time of the offense, and had fathered two other children with the victim's mother. Saffor and the victim were sleeping in the same bed when Saffor pulled down the victim's pants and sodomized him. Similar fact evidence was introduced regarding a prior conviction of attempted lewd assault on Saffor's twelve-year-old niece that occurred four years earlier. The incident place took when she spent the night at "her aunt's house" (presumably Saffor's home too). Saffor entered her room while she was sleeping, put his hand down her pajamas and started rubbing her vagina. Saffor withdrew his hand when she told him to leave. The First District Court of Appeal found that the evidence was sufficiently similar, and upheld the admission of the evidence.

The Florida Supreme Court in Saffor v. State, 660 So.2d 668 (Fla. 1995) vacated Saffor's conviction on the ground that the crime charged and the collateral crime "bore little resemblance to each other." The Court found that the similarities were not sufficient to

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[5] See, Williams v. State, 621 So.2d 413, at 414 (Fla. 1993); Bryan v. State, 533 So.2d 744, 746 (Fla. 1988), *cert. denied*, 490 U.S. 1028, 104 L.Ed.2d 200, 109 S.Ct. 1765 (1989);

[6] C. Ehrhardt, Florida Evidence, Section 404.09, at 174 (1999 Edition).

[7] Id.

admit the evidence even under the "relaxed" standard. In both instances, however, the child victims were in a familial relationship with the defendant, both incidents took place while the victims were in bed sleeping, one victim was ten years old and the other twelve, and Saffor was attracted only to each child's lower bodily orifices. In making their ruling the Florida Supreme Court attached great weight to facts such as that one victim was male and the other female, that the victims were not exactly the same age, that the offenses occurred at different locations and "different times of the day," and that they took place at "different time frames."

Another example is the case of Paul v. State, 660 So.2d 752 (Fla. 1st DCA 1995). In Paul, the defendant was convicted on four counts of lewd assault on a child. Two of the counts involved digital penetration of the victim's vagina, while the other counts involved lewd fondling. In addition to the details of the incidents themselves, evidence was introduced that the defendant first met the victim when she was in the third grade, that he paid attention to her at school, that he gave her roses and a card on Valentines Day, and that he bought her candy. The victim also testified that the defendant had touched her "in a way she didn't like," kissed her on the lips, and rubbed her stomach while she sat in his lap. Similar fact evidence was also admitted concerning the defendant's involvement with another young girl. The similar fact witness (P.B.) testified that she met the defendant, who was a volunteer at her school, while she was in the fifth grade, and that the defendant showed her a lot of attention. In addition, she testified that he carried her books, hugged her "in front real tight," rubbed her back, patted her on the buttocks, sent her flowers three times with cards, and gave her $10 every three weeks. She further testified that her mother complained to the school board after the defendant sent her roses on Valentines Day. On appeal, the First District Court of Appeal found that the similar facts were not relevant to show any alleged common plan, scheme, or even a similar modus operandi (method of operation). The case was reversed and remanded for a new trial.

Heuring and its progeny have effectively supplanted s. 90.404(2)(a) as it pertains to cases of child sexual abuse.[8] Some court opinions fail to even mention s. 90.404(2)(a) as having any bearing on the admissibility of collateral crime evidence in these cases.[9] Cases of child sexual abuse are the only type of criminal case which have been carved out of the requirements of s. 90.404(2)(a) and subjected to these heightened standards of admissibility.

The First District Court of Appeals made the following comment regarding the current standard:

> The standard that has been crafted is unfortunately extremely unwieldy to apply. Our trial judges are being called upon on a case by case basis to determine whether certain alleged sex acts performed by an adult upon one child are sufficiently similar to other sex acts allegedly performed upon another child to meet the standard of admissibility. Hardly an enviable task.

Rowland v. State, 680 So.2d 502, 504 (Fla. 1st DCA 1996).

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[8] Id. at 473.

[9] *See*, Paul v. State, 660 So.2d 752 (Fla. 1st DCA 1995); Graves v. State, 704 So.2d 147 (Fla. 1st DCA 1997); Sheppard v. State, 659 So.2d 457 (Fla. 5th DCA 1995).

C. EFFECT OF PROPOSED CHANGES:

HB 887 adds a specific provision to s. 90.404(2) to admit collateral crime evidence of the defendant's other acts of "child molestation" in cases where the defendant is charged with an act of "child molestation."

The term "child molestation" is defined as conduct proscribed by s. 794.011 and s. 800.04 when the act is committed against a victim 16 years of age or younger. The conduct proscribed under these sections is the following:

1. Sexual Battery under s. 794.011,
2. Lewd or Lascivious Battery under s. 800.04(4),
3. Lewd or Lascivious Molestation under s. 800.04(5),
4. Lewd or Lascivious Conduct under s. 800.04(6), or
5. Lewd or Lascivious Exhibition under s. 800.04(7).

Evidence admitted under the bill's newly created section could be considered "for its bearing on any matter to which it is relevant."[10]

Currently, *all* forms of relevant evidence are also scrutinized under s. 90.403 which precludes the admission of relevant evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice" (also known as a "403 balancing test"). An argument could be made that evidence of the defendant's other acts of child molestation is, by its very nature, too prejudicial to be admitted and should, therefore, be excluded under s. 90.403. As applied by the courts, however, the "403 balancing test" requires the exclusion of "similar fact" evidence when it becomes a "feature of the trial."[11] HB 887 clarifies that evidence of the defendant's other acts of child molestation is admissible as long as, in the court's discretion, it does not become a feature of the trial. The simple fact that the evidence is "too prejudicial" will not become an arguable basis to exclude such evidence.

The bill also deletes the reference to "similar fact" evidence in s. 90.404(2)(a). In addition, the bill allows notice of the state's intention to use evidence of other crimes to be given to the defendant or the defendant's counsel to satisfy the statutory notification requirement.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

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[10] The standard allowing evidence to be considered "for its bearing on any matter to which it is relevant" is derived from Federal Rule 414 regarding "Evidence of Similar Crimes in Child Molestation Cases."

[11] *See*, Fernandez v. State, 730 So.2d 277 (Fla. 1999), Bush v. State, 690 So.2d 670 (Fla. 1st DCA, 1997), Travers v. State, 578 So.2d 793 (Fla. 1st DCA 1991), State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993).

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill expands the admissibility of evidence of collateral crimes in cases of child sexual abuse to consideration "on any matter to which it is relevant." This expansion tracks the federal standard with the exception that the federal standard has not restated its "403 balancing test" with regard to these cases.

Opponents of such an expansion could argue that the admissibility of similar fact evidence in this manner would violate the "fundamental fairness" component of the due process clause of the constitution.[12] The argument is essentially that the admission of such evidence would permit a jury to convict the defendant as punishment for his other bad acts, rather than for his charged crime. Such arguments, however, have generally been rejected in federal court (where there is a presumption in favor of admission) in challenges made to the federal rules.[13] In addition, similar arguments have been raised in opposition to a comparable California provision, and have been defeated.[14]

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

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[12] *See*, e.g., L. Natali & R. Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loy. U. Chi. L.J. 1 (1996).

[13] *See*, U.S. v. Enjady, 134 F.3d 1427 (10th Circuit Court of Appeals, 1996); U.S. v. Lecompte, 131 F.3d 767 (8th Circuit Court of Appeals, 1997). *See contra*, U.S. v. Guardia, 135 F.3d 1326 (10th Circuit Court of Appeals, 1997).

[14] People v. Fitch, 63 Cal.Rptr.2d 753, 760 (3rd DCA 1997) "Since Evidence Code section 1108 does not implicate any of the guarantees of the Bill of Rights and it does not offend a fundamental principle of justice rooted in traditions and conscience of our people, we find that Evidence Code section 1108 on its face does not violate the Due Process Clause. (Dowling v. United States, 493 U.S. 342, 352-353, 110 S.Ct. 668, 674-675, 107 L.Ed.2d 708, 720)."

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:	Staff Director:
David M. De La Paz	David M. De La Paz