

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Kurtis T. Wilder, P.J., and Mark J. Cavanagh and Michael J. Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

LINCOLN ANDERSON WATKINS,

Defendant-Appellant.

Supreme Court No. 142031

Court of Appeals No. 291841

Circuit Court No. 06-008116 FC

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

GAIL RODWAN (P28597)
Attorney for Defendant-Appellant
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833



TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF JURISDICTION..... v

STATEMENT OF QUESTIONS PRESENTED vi

SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS 2

I. MCL 768.27A CONFLICTS WITH MRE 404(B), VIOLATES THE
FUNDAMENTAL RIGHT OF PRESUMPTION OF INNOCENCE AND
UNCONSTITUTIONALLY INFRINGES ON THIS COURT’S AUTHORITY TO
CREATE RULES TO PROTECT DUE PROCESS RIGHTS. BECAUSE MRE
404(B) IS A RULE INTENDED TO ENSURE A CRIMINAL DEFENDANT A
FAIR TRIAL BY BARRING PROPENSITY EVIDENCE, IT TAKES
PRECEDENCE OVER MCL 768.27A, WHICH LIMITS THE FAIR TRIAL
RIGHT BY ADMITTING PROPENSITY EVIDENCE AND OMITTING THE
MRE 403 BALANCING TEST..... 7

A. MCL 768.27A AND MRE 404(B) CONFLICT IRRECONCILABLY..... 8

B. MCL 768.27A CANNOT PREVAIL OVER MRE 404(B) BECAUSE THE
STATUTE UNCONSTITUTIONALLY INFRINGES ON THIS COURT’S
AUTHORITY UNDER CONST 1963, ART 6, § 5, TO REGULATE
PRACTICE AND PROCEDURE IN ALL COURTS OF THIS STATE
WHERE THIS COURT IS PROTECTING A CRIMINAL DEFENDANT’S
FUNDAMENTAL RIGHTS..... 10

C. MCL 768.27A CANNOT PREVAIL OVER MRE 404(B) BECAUSE THE
STATUTE UNCONSTITUTIONALLY INFRINGES ON THE
EXCLUSIVE POWER VESTED IN THE COURTS UNDER CONST
1963, ART 6, § 1, TO ENSURE THAT A CRIMINAL DEFENDANT
RECEIVES A FAIR TRIAL, WHICH THIS COURT HAS EXERCISED
BY PROHIBITING THE INTRODUCTION OF PROPENSITY
EVIDENCE AGAINST AN ACCUSED..... 14

D. IN ORDER TO PROTECT DEFENDANT’S DUE PROCESS RIGHT TO
A FAIR TRIAL, MCL 769.29A SHOULD BE INTERPRETED TO
INCLUDE BALANCING UNDER MRE 403, CONSISTENT WITH
JUDICIAL INTERPRETATION OF THE ANALOGOUS FEDERAL
RULES OF EVIDENCE..... 17

SUMMARY AND RELIEF 23

TABLE OF AUTHORITIES

CASES

<i>Blind-Doan v Sanders</i> , 291 F3d 1079 (CA 9, 2002).....	18
<i>Cardinal Mooney High School v Michigan High School Athletic Association</i> , 347 Mich 75 (1991)	6
<i>Coffin v United States</i> , 156 US 432 (1895).....	13
<i>Dickerson v United States</i> , 530 US 428 (2000)	12, 13
<i>Fahy v Connecticut</i> , 375 US 85 (1963)	6
<i>Haberkorn v Chrysler Corp</i> , 210 Mich App 354 (1995), <i>lv den</i> 453 Mich 961 (1996)	20
<i>In re Winship</i> , 397 US 358 (1970)	6
<i>Johnson v Kramer Bros Freight Lines, Inc</i> , 357 Mich 254 (1959).....	13
<i>Lisenba v California</i> , 314 US 219 (1941).....	6
<i>Martinez v Hongyi Cui</i> , 608 F3d 54 (CA 1, 2010)	18
<i>McDougall v Schanz</i> , 461 Mich 15 (1999)	2, 9, 10, 11
<i>Miranda v Arizona</i> , 384 US 436 (1966)	12
<i>People v Allen</i> , 429 Mich 558; 420 NW2d 499 (1988)	14
<i>People v Banks</i> , 249 Mich App 247 (2002)	7
<i>People v Breidenback</i> , ___ Mich ___; 2011 Mich Lexis 757 (2011).....	15
<i>People v Conat</i> , 238 Mich App 134 (1999).....	11
<i>People v Crawford</i> , 458 Mich 376 (1998).....	8, 14, 15
<i>People v Duncan</i> , 446 Mich 409 (1978).....	7
<i>People v Kahley</i> , 277 Mich App 182 (2007)	15
<i>People v McMurchy</i> , 249 Mich 147 (1930)	13

<i>People v Monaco</i> , 474 Mich 48 (2006)	16
<i>People v Pattison</i> , 276 Mich App 613 (2007)	7
<i>People v Robinson</i> , 417 Mich 661 (1983)	15
<i>People v Sabin (After Remand)</i> , 463 Mich 43 (2000).....	15
<i>People v Starr</i> , 457 Mich 490 (1998)	15
<i>People v Strong</i> , 213 Mich App 107 (1995).....	9
<i>People v VanderVliet</i> , 444 Mich 52 (1993)	17
<i>People v Williams</i> , 475 Mich 245 (2006)	11
<i>People v Zackowitz</i> , 254 NY 192; 172 NE 466 (1930).....	8
<i>Richardson v Hare</i> , 381 Mich 304 (1968).....	13
<i>Seeley v Chase</i> , 443 F3d 1290 (CA 10; 2006).....	18
<i>Taylor v Kentucky</i> , 436 US 478 (1978)	6, 13
<i>United States v Enjady</i> , 134 F3d 1427 (1998)	19
<i>United States v Guardia</i> , 135 F3d 1326 (CA 10, 1998)	18
<i>United States v Julian</i> , 427 F3d 471 (CA 7, 2005).....	19
<i>United States v Kelly</i> , 510 F3d 433 (CA 4, 2007)	18
<i>United States v Larson</i> , 112 F3d 600 (CA 2, 1997).....	18, 19
<i>United States v Lawrence</i> , No 97-4480; 187 F3d 638; 1999 WL 551358 [2] (CA 6, July 19, 1999)	18
<i>United States v LeMay</i> , 260 F3d 1018 (CA 9, 2001).....	18, 19, 20
<i>United States v Sumner</i> , 119 F3d 658 (CA 8, 1997).....	19

CONSTITUTIONS, STATUTES, COURT RULES

Const 1963, art 1, § 17	6
Const 1963, art 6, § 1	passim
Const 1963, art 6, § 5	2, 7, 9, 13
US Const, Am V	6
US Const, Am XIV	6
MCL 750.520	1
MCL 768.27	passim
MCL 769.1(1)	11
MCL 769.12	1
MCL 769.27	2, 16, 17
MCL 769.29A	16
MCL 780.131	11
FRE 403	18
FRE 404(b).....	17
FRE 413	17
FRE 414	17
FRE 415	17
MCR 6.004(D)	11
MCR 6.931	11
MCR 768.27a	14
MRE 102	15
MRE 403	passim

MRE 404(b) passim

MRE 768.27a 16

18 USC § 3501 12

MISCELLANEOUS

Cavallaro, *Federal rules of evidence 413-415 and the struggle for rulemaking preeminence*, 98 J of Criminal Law and Criminology, Northwestern University School of Law 31 (Fall 2007) 21

Natali and 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, 9-35 (Fall 1996) 17

Pickett, *The presumption of innocence imperiled: the new federal rules of evidence 413-415 and the use of other sexual offense evidence in Washington*, 70 Wash Law R 883 (July 1995) 17

Thompson, *Character evidence and sex crimes in the federal courts: recent developments*, 21 U Ark Little Rock L Rev, 241 (Winter 1999) 17

Weinstein & Berger, *Weinstein's Federal Evidence*, §415.04[2], at 415-12 18

STATEMENT OF JURISDICTION

Defendant-Appellant Lincoln Watkins was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on March 26, 2009. A Claim of Appeal was filed on May 4, 2009 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated April 28, 2009, as authorized by MCR 6.425(F)(3). Defendant-Appellant appealed as of right to the Court of Appeals, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). On October 5, 2010, Court of Appeals issued an unpublished opinion affirming Defendant-Appellant's convictions. On November 8, 2010, Defendant-Appellant filed an application for leave to appeal in this Court because the Court of Appeals decision was clearly erroneous and would cause material injustice, MCR 7.302(B)(5). On March 30, 2011, this Court granted Defendant-Appellant's application for leave to appeal. This Court has jurisdiction to hear the matter pursuant to MCR 7.301(A)(2) and MCR 7.302(G)(3).

STATEMENT OF QUESTIONS PRESENTED

- I. DOES MCL 768.27A CONFLICT WITH MRE 404(B), VIOLATE THE FUNDAMENTAL RIGHT OF PRESUMPTION OF INNOCENCE AND UNCONSTITUTIONALLY INFRINGES ON THIS COURT'S AUTHORITY TO CREATE RULES TO PROTECT DUE PROCESS RIGHTS? BECAUSE MRE 404(B) IS A RULE INTENDED TO ENSURE A CRIMINAL DEFENDANT A FAIR TRIAL BY BARRING PROPENSITY EVIDENCE, DOES IT TAKE PRECEDENCE OVER MCL 768.27A, WHICH LIMITS THE FAIR TRIAL RIGHT BY ADMITTING PROPENSITY EVIDENCE AND OMITTING THE MRE 403 BALANCING TEST?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

SUMMARY OF ARGUMENT

Because MCL 768.27a infringes on the exclusive power vested in this Court under Const 1963, art 6, § 1, to ensure that a criminal defendant has a fair trial, it cannot prevail over MRE 404(b).

The presumption of innocence is a basic component of the fair trial guarantee. Consistent with that guarantee, and deeply rooted in Michigan jurisprudence, is MRE 404(b)'s prohibition against character evidence to show a propensity for crime. MCL 768.27a, which frees jurors to conclude that an accused is *not* innocent for reasons unrelated to the facts of a particular case, conflicts irreconcilably with MRE 404(b).

Both MCL 768.27a and MRE 404(b) are evidentiary rules governing practice and procedure. MCL 768.27a includes a substantive policy component in that it permits consideration of a defendant's sexual history as proof of guilt in cases involving charged sexual acts against children, ostensibly for the purpose of providing more protection for children by providing less protection for the criminally accused. However, even under a *McDougall v Schanz*, 461 Mich 15 (1999) analysis, the court rule must prevail over the statute because it is beyond the power of our Legislature to deprive this Court of its mandate to protect due process. *McDougall* was not intended, and cannot be read, to suggest otherwise.

If propensity evidence *were* admissible under Const 1963, art 1, § 17, the unconstitutional statute might well be rendered constitutional by the application of MRE 403. The MRE 403 balancing test applies to *all* evidence, and the Legislature has no authority to put MCL 768.27a beyond its reach. While application of MRE 403 to MCL 768.27a would prevent the *unfettered* consideration of propensity evidence, it would not cure the constitutional defect because propensity evidence would still be admissible for its bearing on any matter deemed relevant.

STATEMENT OF FACTS

In a March 2009 jury trial before Judge Carole Youngblood in Wayne County Circuit Court, Defendant-Appellant Lincoln Watkins was convicted of four counts of criminal sexual conduct in the first-degree, MCL 750.520b(1)(a), and one count of criminal sexual conduct in the second-degree, MCL 750.520c(1)(a). The court sentenced Mr. Watkins as a fourth felony offender under MCL 769.12 to prison terms of 25-40 years and 10-15 years. This was the third trial of the case.

The prosecution said that over a period of weeks in 2006, Lincoln Watkins engaged in the charged sexual acts with Tifny McClore, a child under the age of 13. Tifny McClore lived next door to Mr. Watkins and his family and sometimes babysat for one of the Watkins children. The defense denied that the sexual acts occurred.

PROCEDURAL HISTORY

On December 15, 2006, prior to the first trial, the prosecution moved under MRE 404(b) to introduce the testimony of two similar acts witnesses to establish modus operandi. The prosecutor said that Tifny McClore and the two similar acts witnesses had the following in common: all three were young African American females, had a close relationship with Kalinda Watkins, the wife of Lincoln Watkins, and engaged in acts of vaginal-penile penetration with Mr. Watkins in his Winthrop Street home. (14a.) The court granted the prosecution motion over defense objection. (15a, 16a.)

The first trial ended in a mistrial on February 2, 2007, after the jury was unable to reach a verdict. On the day the second trial was to begin, defense counsel moved the court to reconsider its prior holding and disallow the MRE 404(b) evidence. The court granted that motion, and the prosecutor filed an interlocutory appeal. (17a, 18a.) The second trial ended in a mistrial on May

15, 2007, after a prosecutor talked on an elevator about the case in the presence of one of the jurors. (20a, 21a.) Just one day earlier, the Court of Appeals entered an order that testimony of Ekemini Williams was admissible under MCL 768.27a “to the extent it is evidence that defendant committed a listed offense, as defined in MCL 28.722, against her while she was a minor.” The Court of Appeals directed the trial court to make a determination on that question. (19a.) After the mistrial, the trial court agreed that the defense could file an Application for Leave to Appeal in this Court. (22a.) On July 20, 2007, this Court vacated the May 14, 2007, order of the Court of Appeals and remanded to the Court of Appeals to consider whether MCL 768.27a conflicts with MRE 404(b), and, if it does, whether the statute prevails over the court rule. (23a.)

On December 13, 2007, the Court of Appeals issued an opinion holding that the statute was controlling and remanding for a determination of which aspects of Ekemini Williams’s testimony related to the commission of listed offenses under MCL 768.27a. (See 24a-27a.)

On April 23, 2008, this Court granted leave to appeal, and instructed the parties to brief the following issues: (1) whether MCL 769.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, § 1 and § 5; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that propensity evidence “is admissible for any purpose for which it is relevant,” violated defendant’s due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1. (28a.)

On December 17, 2008, after considering briefs and oral arguments of the parties, this Court vacated its order granting leave, stating that it was no longer persuaded that the question presented should be reviewed by the Court. (29a-32a.)

The third trial began on March 5, 2009 before Judge Youngblood with the defense preserving all previous constitutional challenges to MCL 768.27a made in the Court of Appeals and this Court. (33a.)

THE THIRD TRIAL

Fifteen-year-old complainant Tifny McClore testified that on Memorial Day in 2006, when she was twelve-years-old, next-door-neighbor Lincoln Watkins showed her some “dirty pictures” on his cell phone. (34a-35a.) On the following Tuesday, Tifny went to the Watkins house to babysit, and Mr. Watkins touched her breasts. (36a-37a.) The next day, she went to the house to babysit again, and Mr. Watkins penetrated her vaginally, as he did on the following two days. (38a-39a.) A week or two later, Tifny returned to the home, where Mr. Watkins penetrated her two more times. (40a-41a.) Tifny told her mother, and her mother contacted the police. (42a-43a.)

Tifny testified that at the time these acts occurred, she liked Mr. Watkins and considered him a boyfriend. She also testified that she had been sexually active since the age of eleven with an unnamed person and that her mother knew about that unnamed person. (42a, 43-53a.)

Tifny’s mother, Beverly McClore, testified that in June of 2006, when her daughter told her about the sexual acts, Tifny said she did not want to get Lincoln Watkins in trouble. (54a-56a.)

Tifny’s father, Larry McClore, testified that on the day of the preliminary examination in this case, Defendant Watkins asked him to drop the charges and said he would pay Mr. McClore

\$5,000. Mr. McClore told Mr. Watkins that he just wanted to know the truth, and Mr. Watkins admitted that he had engaged in sexual conduct with Tifny. (57a-59a.)

Detroit police officer Robin Winton testified that she interviewed similar acts witness Ekemini Williams in November of 2004, and Ms. Williams informed her that she had been sexually assaulted by Lincoln Watkins. (60a-62a.)

Twenty-seven-year-old Ekemini Williams said that when she was fifteen, Defendant was married to Ms. Williams's cousin, Kalinda Watkins, and Ms. Williams would babysit for the Watkins children. She began a sexual relationship with Mr. Watkins, which continued until she was seventeen. She considered him to be her boyfriend. Ms. Williams was twenty-three when she reported the relationship to the police. (63a-66a.)

The court instructed the jury that it could consider this evidence of other sexual conduct "in deciding if the defendant committed the offenses for which he is now on trial." (67a.)

The jury found Mr. Watkins guilty of four of the five charged counts of first-degree criminal sexual conduct and guilty of the one charged count of second-degree criminal sexual conduct. (68a-69a.)

On March 26, 2009, the court sentenced Mr. Watkins to prison terms of 25-40 and 10-15 years. (70a-71a, 72a.)

Lincoln Watkins appealed of right, and in an unpublished, per curiam decision of October 5, 2010, the Court of Appeals affirmed the convictions. (73a-80a.)

Mr. Watkins filed an application for leave to appeal, which this Court granted in an order of March 30, 2011. The Court ordered the parties to brief the following four questions: "(1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, §1 and

§ 5; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27(b)(1)), while mandating that evidence of other offenses ‘is admissible for any purpose for which it is relevant,’ would violate a defendant’s due process right to a fair trial; and (4) whether MCL 769.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, § 1.” (81a.)

- I. **MCL 768.27A CONFLICTS WITH MRE 404(B), VIOLATES THE FUNDAMENTAL RIGHT OF PRESUMPTION OF INNOCENCE AND UNCONSTITUTIONALLY INFRINGES ON THIS COURT'S AUTHORITY TO CREATE RULES TO PROTECT DUE PROCESS RIGHTS. BECAUSE MRE 404(B) IS A RULE INTENDED TO ENSURE A CRIMINAL DEFENDANT A FAIR TRIAL BY BARRING PROPENSITY EVIDENCE, IT TAKES PRECEDENCE OVER MCL 768.27A, WHICH LIMITS THE FAIR TRIAL RIGHT BY ADMITTING PROPENSITY EVIDENCE AND OMITTING THE MRE 403 BALANCING TEST.**

Standard of Review and Issue Preservation

The constitutionality of a statute presents a question of law and is reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Association*, 347 Mich 75, 80 (1991). The question of the constitutionality of MCL 768.27a was raised in the Court of Appeals in an interlocutory appeal, and an appeal of right, and the specific constitutional questions raised in this brief were framed by this Court in its April 23, 2008, order granting leave to appeal, as well as its more recent March 30, 2011, order granting leave to appeal.

Analysis

Due process requires fundamental fairness in the use of evidence against a criminal defendant. *Lisenba v California*, 314 US 219, 236 (1941); US Const, Ams V, XIV; Const 1963, art 1, § 17. A defendant's due process right to a fair trial is violated when there is a reasonable possibility that inadmissible evidence may have contributed to the conviction. *Fahy v Connecticut*, 375 US 85, 87-88 (1963).

The presumption of innocence, while not specifically articulated in the Constitution, has been held by the United States Supreme Court to be a basic component of the due process guarantee of a fair trial under the Fourteenth Amendment. *Taylor v Kentucky*, 436 US 478, 479 (1978). It is essential to the foundation of our adversarial system of criminal justice. *In re*

Winship, 397 US 358, 363 (1970). *Accord*, *People v Duncan*, 446 Mich 409, 425 n 26 (1978); *People v Banks*, 249 Mich App 247, 256 (2002).

Judicial powers, which include the power to ensure that a criminal defendant receives a fair trial, rest exclusively with the courts and cannot be usurped by the Legislature. Article 6, § 1 of Const 1963 states: “The judicial power of the state is vested exclusively in one court of justice”

The power to establish rules of practice and procedure rests exclusively with this Court under Article 6, § 5, which states: “The supreme court shall by general rules establish, modify amend and simplify the practice and procedure in all courts of this state”

Today, the Michigan Bench and Bar are bound by the erroneous decision in *People v Pattison*, 276 Mich App 613, 619-620 (2007), where the Court of Appeals upheld the constitutionality of MCL 768.27a and found that while the Legislature may not constitutionally enact a purely procedural rule, MCL 768.27a is not a procedural rule, but rather a substantive rule of law, because it reflects the Legislature’s policy decision that, in some kinds of cases, juries should be allowed “to weigh a defendant’s behavioral history and view the case’s facts in the larger context that the defendant’s background affords”¹

A. MCL 768.27A AND MRE 404(B) CONFLICT IRRECONCILABLY.

Under its constitutional authority to establish rules of practice and procedure in all courts of this state, this Court created MRE 404(b)(1), which provides:

(B) Other crimes, wrongs or acts.

¹ It is noteworthy, however, that while *Pattison* ruled that propensity evidence is admissible, it also cautioned trial courts to “take seriously their responsibility” to apply the balancing test of MRE 403. *Id.* at 621. See Section D of this brief, *infra*.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. (See Attachment A.)

MRE 404(b)(1) codified the prohibition against character evidence deeply rooted in Michigan jurisprudence. The rule reflects and gives meaning to the fundamental precept of the criminal justice system -- the presumption of innocence. *People v Crawford*, 458 Mich 376, 384 (1998). “Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.” *Id.* at 384, citing *People v Zackowitz*, 254 NY 192, 197; 172 NE 466 (1930). Evidence of extrinsic bad acts thus carries the risk of prejudice, for it negates the concept that “a defendant starts his life afresh when he stands before a jury” *Id.*

Notwithstanding this procedural due process protection against the use of propensity evidence to prove that a defendant committed the charged offense, the Michigan Legislature enacted MCL 768.27a, which provides in pertinent part:

Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense² against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant (See Attachment B.)

There is a direct contradiction between MRE 404(b)(1) and MCL 768.27a(1). MRE 404(b)(1) expressly prohibits the admission of “bad acts” evidence to prove the propensity of the

² The term “listed offense” is defined in MCL 768.27a(2)(a). Under the statutory provision, “listed offense” means that term as defined in section 2 of the Sex Offenders Registration Act.

defendant to commit the charged offense. MCL 768.27a(1) expressly allows “bad acts” evidence “to be considered for its bearing on any matter to which it is relevant.”

B. MCL 768.27A CANNOT PREVAIL OVER MRE 404(B) BECAUSE THE STATUTE UNCONSTITUTIONALLY INFRINGES ON THIS COURT’S AUTHORITY UNDER CONST 1963, ART 6, § 5, TO REGULATE PRACTICE AND PROCEDURE IN ALL COURTS OF THIS STATE WHERE THIS COURT IS PROTECTING A CRIMINAL DEFENDANT’S FUNDAMENTAL RIGHTS.

Even prior to *McDougall v Schanz*, it was the general rule that when there was a conflict between a statute and a court rule, the court rule would prevail if it governed practice and procedure. See *People v Strong*, 213 Mich App 107, 112 (1995).

In *McDougall v Schanz*, 461 Mich 15 (1999), this Court said that while it has exclusive authority to determine rules of practice and procedure, that authority does not extend to questions of substantive law. *Id.* at 27. This Court addressed the distinction between substantive and procedural rules and concluded that evidentiary rules are not the exclusive province of this Court. The Legislature, as well as this Court, may enact rules of evidence. Statutory rules of evidence will violate Const 1963, art 6, § 5, “only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . [.]” *Id.* at 30-31. Because a statute with a substantive policy component looks beyond concern for “the orderly dispatch of judicial business,” it does not infringe on this Court’s rulemaking authority. *Id.*

The Court, however, rejected the creation of a bright-line test and found that the determination whether a rule is procedural or substantive must be decided on a case-by-case basis. *Id.* at 36. The Court acknowledged that the case-by-case determination will be a difficult one in many cases. It is made no less difficult by the fact that court rules, like statutes, may include policy considerations. This is hardly surprising. Given that the judiciary’s primary

responsibility is to safeguard the fundamental rights of the parties that come before the courts, policy considerations inevitably will underlie questions of practice and procedure and “the orderly dispatch of judicial business.” Thus even under *McDougall*, a statutory rule does not necessarily prevail over a court-promulgated rule of evidence simply because policy considerations are involved.

In *McDougall*, this Court treated as an open question whether our Legislature is free to change a policy determination of this Court, stating that while judicially created court rules often embody policy considerations, it is “at least a debatable proposition that a court-enacted rule of evidence embodying a public policy affecting broad social and commercial interests is . . . immune from legislative change.” *Id.* at 31 n16.

But even if one accepts the premise that our Legislature is free to change the policy that underlies a judicially created court rule, that policy change must occur within a constitutional framework. The policy interest in public protection by permitting consideration of a criminally accused person’s other acts is not all that different in MRE 404(b) and MCL 768.27a. Where the two diverge is that the court rule imposed constraints to protect the presumption of innocence, while the statute did not.

In *McDougall*, this Court concluded that a statute that provides strict requirements for the introduction of expert testimony in medical malpractice cases prevailed over a conflicting rule of evidence. *Id.* at 37. The Court noted that the statute was a result of the Legislature’s public policy consideration; specifically, the Legislature’s dissatisfaction with the way in which courts were exercising their discretion regarding expert testimony. *Id.* at 31. Thus, the statutory rule of evidence addressed an issue of substantive law, rather than one of practice and procedure.

The Court of Appeals similarly considered the substantive/procedural dichotomy in *People v Conat*, 238 Mich App 134 (1999). *Conat* involved the conflict between MCR 6.931 and MCL 769.1(1). The court rule provided that when a juvenile is convicted in the circuit court a separate hearing is required to determine whether to sentence the offender as an adult or as a juvenile. *Id.* MCL 769.1(1) required that circuit courts sentence juveniles as adults if they were convicted of certain offenses. *Id.* at 141-142. The court stated that the statute prevailed because it addressed a matter involving substantive policy considerations and therefore did not “impermissibly infringe” on this Court’s rulemaking authority. The Legislature intended to impose an automatic waiver as a more severe punishment for juveniles who committed serious crimes. *Id.* at 163.

Likewise, in *People v Williams*, 475 Mich 245, 260 (2006), this Court decided that MCL 780.131 trumped MCR 6.004(D) in determining what facts trigger the running of the 180-day deadline for untried charges against an inmate.

The instant case is distinguishable from *McDougall*, *Conat* and *Williams*. Rules dealing with the qualifications necessary to testify as an expert, whether to sentence a juvenile as an adult, or a statute of limitations for untried charges against an inmate, involve very different policy considerations than a rule concerning the protection of the fundamental right of the presumption of innocence.

Accordingly, when a court rule is promulgated to protect a fundamental right and procedural due process for the accused, the statute must be viewed with a higher level of scrutiny, and the *McDougall* “dispatch of judicial business” test does not provide the necessary framework for evaluating a conflict between the statute and the court rule. In the instant case, the legislative “policy” denies the presumption of innocence to persons who allegedly have

participated in any sexual acts described under the statute in order to prove a greater likelihood that the defendant committed the charged offense or offenses. It constitutes an impermissible intrusion on this Court's power to safeguard the fundamental rights of those who come before our courts.

The United States Supreme Court made a similar determination in *Dickerson v United States*, 530 US 428 (2000), where the court recognized that a judicial rule imposed to protect a fundamental right is a matter of practice and procedure and takes precedence over an attempt by the Legislature to limit such a right. The United States Congress enacted 18 USC § 3501,³ intending to supersede *Miranda v Arizona*, 384 US 436 (1966), which protects the rights of the accused against self-incrimination. However, the United States Supreme Court stated that because *Miranda* is a constitutionally based decision it may not be overruled by an Act of Congress. *Id.* at 437. The court further found that it had supervisory authority over federal courts to prescribe binding rules of evidence and procedure. *Id.* The court recognized that although Congress may modify and set aside rules not required under the United States Constitution, it may not supersede the court's decisions interpreting or applying fundamental rights engrained in the Constitution. *Id.*

Following the rationale of *Dickerson*, a legislative body lacks the authority to supersede or modify rules that provide procedural protections for rights such as the presumption of innocence. Protection of this fundamental right falls within the legitimate scope of judicial authority, and thus is a matter upon which the Legislature may not intrude.

³ Essentially, 18 USC § 3501 allowed the admission of statements made during custodial interrogation as long as the statements were made voluntarily.

Because MCL 768.27a infringes on this Court's authority to regulate practice and procedure, it violates Const 1963, art 6, § 5. Both the statute and the court rule are procedural rules governing the admission of other acts evidence, and both have policy underpinnings. However, even given that the statute includes a substantive declaration of policy,⁴ it cannot prevail over MRE 404(b) because MRE 404(b) alone protects a fundamental right.

C. MCL 768.27A CANNOT PREVAIL OVER MRE 404(B) BECAUSE THE STATUTE UNCONSTITUTIONALLY INFRINGES ON THE EXCLUSIVE POWER VESTED IN THE COURTS UNDER CONST 1963, ART 6, § 1, TO ENSURE THAT A CRIMINAL DEFENDANT RECEIVES A FAIR TRIAL, WHICH THIS COURT HAS EXERCISED BY PROHIBITING THE INTRODUCTION OF PROPENSITY EVIDENCE AGAINST AN ACCUSED.

Consistent with *Dickerson v United States*, and Const 1963, art 6, § 1, the appellate courts of Michigan have long held that the Constitution may not be interpreted by any branch of government other than the judicial branch, *Richardson v Hare*, 381 Mich 304, 309 (1968), and that among the powers of the judiciary is the power to protect the rights of parties and prevent injustices. *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258 (1959). It is beyond the power of our Legislature to deprive this Court of those judicial powers. *Id*; *People v McMurchy*, 249 Mich 147, 156 (1930).

Because the presumption of innocence is “axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law,” *Taylor v Kentucky, supra* at 483, quoting *Coffin v United States*, 156 US 432, 453 (1895), the Legislature may not enact a statute that wrests from this Court the authority vested exclusively in the judiciary to ensure a criminal

⁴ The House Fiscal Agency Legislative Analysis of Public Act 135 of 2005 uses the most general of terms to describe this law, calling it part of a multi-package of bills intended “to protect children from persons convicted of certain crimes.” As noted above, this purpose to protect also describes MRE 404(b).

defendant's right to the presumption of innocence. There is no doubt that ensuring that right is what this Court was thinking about when it adopted MRE 404(b) and what is entirely lacking in MCR 768.27a.

In fact, as this Court stated in *People v Crawford, supra* at 383-384, MRE 404(b) was written specifically to preclude the admission of evidence of other acts as indicative of character in recognition that the prohibition against character evidence "is deeply rooted in our jurisprudence" for the purpose of giving meaning to the presumption of innocence.

This Court said in *Crawford* that the "fundamental principle of exclusion, codified by MRE 404(b)" is based on the following:

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching a verdict. See *United States v Mitchell*, 2 US (2 Dall) 348, 357; 1 L Ed 410 (1795). [*People v Allen*, 429 Mich 558, 566-567; 420 NW2d 499 (1988).] *Id.*

The Court acknowledged that if jurors are permitted to focus on a defendant's character, there is a very real danger that they will be tempted to punish a defendant for uncharged conduct and conclude that because of his or her propensity the defendant undoubtedly is guilty in the case charged. *Id.* at 392 n10.

The prohibition against introducing propensity evidence is "deeply rooted" and "woven into" the fabric of Michigan jurisprudence,⁵ not only in the current court rule but in the statute that preceded it. MCL 768.27 took effect in 1927 and contains language that is mirrored in the language of MRE 404(b). MRE 404(b) took effect in 1978, and has been amended many times since, but it has consistently retained the requirement that other acts evidence not be used to

⁵ See *People v Crawford, supra* at 384.

prove propensity. This Court has made clear that it has kept the prohibition against propensity evidence because it would be fundamentally unfair to do otherwise. See, for example, *People v Crawford*, *supra* at 383-384 (“The character evidence prohibition . . . gives meaning to the central precept of our system of criminal justice, the presumption of innocence”); *Id.* at 387 (“to ensure the defendant’s right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else”); *People v Starr*, 457 Mich 490, 500 (1998) (“The danger the rule seeks to avoid is that of unfair prejudice”); *People v Robinson*, 417 Mich 661, 664-665 (1983) (“This rule of law guards against convicting an accused person because he is a bad man,”); see also, *People v Kahley*, 277 Mich App 182, 185 (2007) (The limiting instruction that informs a jury that it may not consider other acts as evidence of propensity exists to protect a defendant’s right to a fair trial).

Further proof that the propensity evidence prohibition is deeply rooted in our jurisprudence is the fact that Michigan has never chosen to adopt the so-called “lustful disposition” rule, which allows use of other acts evidence to show propensity in sexual offense cases. See *People v Sabin (After Remand)*, 463 Mich 43, 60-61 (2000).⁶

Also, MRE 102, describing not only MRE 404(b), but all of Michigan’s evidence rules, states, “These rules are intended to secure fairness . . . and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”

It surely is no exaggeration to say that this Court and the Court of Appeals have been asked thousands of times over the years to decide this one question: Was the defendant denied a fair trial by the improper admission of propensity evidence? And in thousands of opinions our

⁶ This Court very recently reaffirmed the propensity evidence prohibition in *People v Breidenback*, ___ Mich ___; 2011 Mich Lexis 757 (2011), in relation to both MRE 404(b) and the doctrine of chances. (See slip opinion at 10, n22, n23.)

appellate judges have engaged in careful analysis to make sure that other acts evidence was admitted for a proper, non-propensity, purpose. Given this jurisprudential history, the Legislature exceeded the scope of its authority when it usurped the power of this Court and suddenly decided that propensity evidence is lawful. If the question of the constitutionality of propensity evidence in Michigan is to be revisited, it must be revisited by this Court, and not by the Legislature.

D. IN ORDER TO PROTECT DEFENDANT’S DUE PROCESS RIGHT TO A FAIR TRIAL, MCL 769.29A SHOULD BE INTERPRETED TO INCLUDE BALANCING UNDER MRE 403, CONSISTENT WITH JUDICIAL INTERPRETATION OF THE ANALOGOUS FEDERAL RULES OF EVIDENCE.

While MCL 769.27b(1), the domestic violence statute and companion to MCL 769.27a, permits admission of evidence of a defendant’s other acts of domestic violence for any purpose for which it is relevant, it does so only if the evidence “is not otherwise excluded under Michigan rule of evidence 403.” MRE 768.27a, on the other hand, contains no reference to MRE 403. Thus while a trial judge must exercise discretion to determine whether other acts of domestic violence are more probative than unfairly prejudicial under MRE 403, the judge is relieved of that responsibility under MCL 768.27a, where the judge need determine only that evidence of other acts of child sexual abuse is relevant. Such unfettered admissibility of propensity evidence violates a defendant’s due process right to a fair trial.⁷

⁷ Defendant has found no explanation, even in Michigan Legislative History, for why MCL 769.27b specifically requires application of the MRE 403 balancing test, while MCL 769.27a does not. This Court has said that the omission of a provision in one statute that is included in another should be construed as intentional. *People v Monaco*, 474 Mich 48, 58 (2006). Defendant notes that while one might expect that these two statutes were enacted as part of a package, they, in fact, were not. Public Act 135 was introduced as a House Bill in 2005, while Public Act 78 was introduced as a Senate Bill in 2006.

Consistent with the concerns expressed in *People v Crawford* about the dangers of the potential for jury misuse of character or propensity evidence, MRE 403 *excludes* evidence that is relevant but unfairly prejudicial:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (See Attachment A.)

Even if this Court does not find that MCL 769.27a otherwise infringes on its authority to regulate practice and procedure, it must find the statute violative of the due process prohibition against the unfettered admission of propensity evidence, unless this Court makes the statute subject to MRE 403. Such an interpretation is consistent with a long line of federal cases addressing the corresponding federal rules.⁸

Prior to 1994, propensity evidence was generally barred under FRE 404(b), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, in 1994, Congress enacted FRE 413, 414 and 415⁹ to establish special rules for sexual assault and child molestation cases.

⁸ In interpreting the Michigan Rules of Evidence, this Court has been guided by federal court interpretation of the analogous Federal Rules of Evidence. See, e.g., *People v VanderVliet*, 444 Mich 52, 60 n7 (1993) (“Because the Michigan Rules of Evidence in general parallel the text of the federal rules on which the state committee’s product was based, we find helpful and, in some instances, persuasive, commentary and case law that refers to the Federal Rules of Evidence.”)

⁹ This Court is well-aware that the adoption of FRE 413-415 has met with “widespread attacks within the legal community,” with legal scholars charging that these rules have changed at least “two hundred years of evidentiary jurisprudence.” Pickett, *The presumption of innocence imperiled: the new federal rules of evidence 413-415 and the use of other sexual offense evidence in Washington*, 70 Wash Law R 883, 884 (July 1995); see also, Thompson, *Character evidence and sex crimes in the federal courts: recent developments*, 21 U Ark Little Rock L Rev, 241, 243 (Winter 1999), and Natali and 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, 9-35 (Fall 1996).

The United States Supreme Court has not yet addressed the constitutionality of these rules.

(See Attachment C for copies of the three rules.) Courts initially questioned whether these new rules were subject to the balancing test of FRE 403, since not one of the three rules refers to FRE 403. Federal Circuits around the country have been nearly unanimous in concluding that FRE 403 not only does apply but *must* apply in order to safeguard due process protections.

In *Martinez v Hongyi Cui*, 608 F3d 54, 60-61 (CA 1, 2010), the First Circuit Court of Appeals held that while Congress has found that it is not improper to infer that a defendant committed a particular sexual offense because of a propensity, Rule 403 analysis nonetheless applies. The First Circuit Court of Appeals stated: “We agree with the conclusion, universal among the courts of appeals, that nothing in Rule 415 removes evidence admissible under that rule from Rule 403 scrutiny,” and cited *Seeley v Chase*, 443 F3d 1290, 1294-1295 (CA 10, 2006); *United States v Guardia*, 135 F3d 1326, 1330 (CA 10, 1998); *Blind-Doan v Sanders*, 291 F3d 1079, 1082-1083 (CA 9, 2002); and Weinstein & Berger, *Weinstein’s Federal Evidence*, §415.04[2], at 415-12.

Other circuits that have found that these federal rules require a Rule 403 analysis include the Second Circuit Court of Appeals in *United States v Larson*, 112 F3d 600, 604-605 (CA 2, 1997); the Ninth Circuit in *United States v LeMay*, 260 F3d 1018,1022 (CA 9, 2001), where the court stated that a rule permitting admission of evidence of similar crimes “is not a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant;” and the Fourth Circuit in *United States v Kelly*, 510 F3d 433, 437 (CA 4, 2007), where the court stated that, “as is true of all admissible evidence, evidence admitted under Rule 414 is subject to Rule 403’s balancing test.”

The Sixth Circuit reached the same conclusion in an unpublished opinion, *United States v Lawrence*, No 97-4480, 187 F3d 638; 1999 WL 551358 at [*2] (CA 6, July 19, 1999), citing

United States v Larson, supra (see Attachment D for copy of unpublished opinion), as did the Seventh Circuit in *United States v Julian*, 427 F3d 471, 487 (CA 7, 2005).

The Eighth Circuit Court of Appeals was in accord in *United States v Sumner*, 119 F3d 658, 661-662 (CA 8, 1997), as was the Tenth Circuit in *United States v Enjady*, 134 F3d 1427, 1433 (1998), concluding that “[w]ithout the safeguards embodied in Rule 403 we would hold the rule unconstitutional.”

In *United States v LeMay, supra*, the court cited the following factors to consider in determining admissibility of other acts: (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial. *Id.* at 1027. Additionally, the court noted that the possibility of extreme prejudice will always be present in cases involving a defendant’s sexual conduct, and, therefore, trial courts must “conduct inquiry in which probative value of such evidence is balanced against danger of unfair prejudice in a careful, conscientious manner that allows for meaningful appellate review of their decisions.” *Id.* at 1031.

Had the trial court engaged in such a balancing test before Mr. Watkins’s third trial in 2009, it would have concluded that the probative value of the testimony of Ekemini Williams about her extended sexual relationship with Defendant Watkins, which began when she was fifteen years old, was far outweighed by the danger of unfair prejudice to Lincoln Watkins. It merits repeating that in 2007 Judge Youngblood disallowed the testimony of Ekemini Williams under MRE 404(b). Ekemini Williams’s testimony was admitted only after an interlocutory appeal in which the Court of Appeals found the testimony admissible under MCL 768.27a and directed the trial court to so find.

In the course of exercising discretion to determine whether evidence should be admitted under MRE 403, Michigan trial courts must balance many of the same factors discussed in *United States v Le May, supra*, including how directly the evidence tends to prove the facts in support of which it is offered, how important those facts are in the context of the particular case, whether those facts can be proved another way involving fewer harmful collateral effects and whether the evidence is cumulative. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362 (1995), *lv den* 453 Mich 961 (1996).

CONCLUSION

Even if this Court rules that MRE 403 is applicable to MCL 768.27a, it will not cure the constitutional defect in this statute. There will be a balancing test, but it will be a very different balancing test than the test traditionally applied under MRE 404(b). While trial courts will be asked to weigh the probative value of evidence of other sexual acts against the unfair prejudice of the evidence, they will do so in the context of considering the probative value in establishing a defendant's *propensity* to commit the charged act. It is reasonable to suspect that, even with MRE 403, propensity evidence will be admitted in the vast majority of child sexual abuse cases, and jurors will be entirely free to infer, as they are free to infer today, that an accused committed a sexual offense because he or she had the propensity to do so. And therein lies the problem.

Rules that invite the fact-finder to punish an offender for conduct unrelated to the crime charged raise due process concerns that are best left to the protection of our courts. In Michigan, those concerns have been left to the protection of *this* Court, which addressed them through enactment of MRE 404(b). The Michigan Legislature cannot now direct this Court to reduce the level of judicial scrutiny this Court created through enactment of the procedural rule.

In order for this Court to conclude that MCL 768.27a prevails over MRE 404(b), it will have to repudiate decades of jurisprudence to find that propensity evidence is admissible to prove character *and* that the substantive component of the statute overrides both the substantive and procedural components of MRE 404(b).

In Cavallaro, *Federal rules of evidence 413-415 and the struggle for rulemaking preeminence*, 98 J of Criminal Law and Criminology, Northwestern University School of Law 31 (Fall 2007), the author explained precisely why the due process concerns engendered by the admission of propensity evidence must be left to the protection of the courts:

Each such situation is factually unique, and the process of weighing the relative value of evidence of a particular prior bad act against its potential to tempt a jury to punish for the act rather than the crime charged can hardly be done prospectively by a legislature. *Id* at 62.

In enacting MCL 768.27a, the Michigan Legislature stripped the accused in a child criminal sexual conduct case of the most fundamental protection and interfered with this Court's power under Const 1963, art 6, § 1, to ensure that a criminal defendant is afforded his or her due process right to a fair trial. Lincoln Watkins asks this Court to hold that MCL 768.27a is unconstitutional, that the court rule prevails over the statute and that Mr. Watkins's convictions must be reversed. If this Court upholds MCL 768.27a, but mandates application of the MRE 403 balancing test to the statute, Mr. Watkins asks this Court to remand his case to the trial court for application of that test.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant Watkins asks this Court to reverse his convictions.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 
GAIL RODWAN (P28597)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: May 24, 2011

ATTACHMENT A

MRE 403

MRE 404

Custom ID : - No Description - ▼ | Switch Client | Preferences | Help | LiveSupport | Sign Out

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within Original Results (1 - 14)  [View Tutorial](#)

Advanced...
 Source: **Legal > / ... / > MI - Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined** 

TOC: Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined > MICHIGAN RULES OF EVIDENCE > **Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.**

Terms: **MRE 403** (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

MRE 403

MICHIGAN COURT RULES

* THIS RULE IS UPDATED THROUGH MICHIGAN SUPREME COURT ORDERS ISSUED 12/29/10 *

MICHIGAN RULES OF EVIDENCE

MRE 403 (2011)

Review Court Orders which may amend this Rule.

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

NOTES:

NOTES

MRE 403 is identical with Rule 403 of the Federal Rules of Evidence.

Michigan Digest references:

- Appeal and Error §§ 427, 460
- Assault and Battery § 29
- Automobiles and Motor Vehicles § 190.200
- Criminal Law and Procedure §§ 15, 301, 301.01, 314, 315.02, 315.09, 318, 320.30, 324-326, 326.47, 326.75, 344, 345, 350.75, 409, 409.05, 409.25, 426, 489, 516, 561, 709, 787.15, 825, 837.40, 837.45, 838, 957.55
- Eminent Domain §§ 84, 102, 168, 170
- Evidence §§ 101, 106, 106.50, 107, 107.30, 107.50, 107.60, 121, 134, 324, 368, 368.50, 371, 375, 394, 411, 643
- Homicide §§ 85, 89
- Insurance § 495
- Judgments § 23
- Juvenile Proceedings § 90
- Medicine and Surgery § 85
- Paternity § 42
- Torts § 12

Custom ID : - No Description - ▼ | Switch Client | Preferences |
Help | LiveSupport | Sign Out

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within Original Results (1 - 15)  [View Tutorial](#)

Advanced...

Source: **Legal > / ... / > MI - Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined** 

TOC: Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined > MICHIGAN RULES OF EVIDENCE > **Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.**

Terms: **MRE 404(b)** (Edit Search | Suggest Terms for My Search)

 Select for FOCUS™ or Delivery

MRE 404

MICHIGAN COURT RULES

* THIS RULE IS UPDATED THROUGH MICHIGAN SUPREME COURT ORDERS ISSUED 12/29/10 *

MICHIGAN RULES OF EVIDENCE

MRE 404 (2011)

Review Court Orders which may amend this Rule.

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;

(2) Character of alleged victim of homicide. When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor;

(3) Character of alleged victim of sexual conduct crime. In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease;

(4) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

NOTES:**NOTES**

MRE 404(a) is identical with Rule 404(a) of the Federal Rules of Evidence except for the addition of MRE 404(a)(3), and language changes incident thereto, regarding evidence of the character of the victim in a case charging criminal sexual conduct. **MRE 404(b)** is identical with Rule 404(b) of the Federal Rules of Evidence except that the word "plan" is replaced by the phrase "scheme, plan, or system in doing an act", and there is added the phrase "when the same is material, whether such other crime, wrongs, or acts are contemporaneous with, or prior or subsequent to the crime charged".

History:

Rule 404(b) repealed and replaced December 17, 1990, eff March 1, 1991; Rule 404(b) amended imd eff June 24, 1994; Rule 404(b)(2) amended November 10, 1994, eff January 1, 1995; Rule 404 amended May 1, 1995, eff June 1, 1995; Rule 404(a) amended eff September 1, 2001.

Staff Comment:

The 1991 amendment deleted "the crime charged" and substituted "the conduct at issue in the case" in subrule (b). The rule applies in civil cases even though it is used more often in criminal cases.

The June 24, 1994 amendment [adding paragraph (2) to subsection (b)] codifies *People v VanderVliet* (1993) 444 Mich 52, 89, 508 NW2d 114.

A proposal to amend the rule further, and a somewhat related proposal in Administrative File 94-28 for a new MCR 6.201 governing discovery in criminal cases, post, pp 1231-1232 are being published for comment today [June 24, 1994].

The September 1, 2001 amendment of subrule (a)(1) allows the prosecution to introduce evidence of the defendant's aggressive character if the defendant has introduced similar evidence about the alleged victim to support a self-defense theory. This change is similar to an amendment to FRE 404(a)(1) that became effective on December 1, 2000.

The September 1, 2001 amendment of subrule (a)(2) limits the accused's use of evidence of the alleged victim's character to a character trait for aggression in a homicide case in which self-defense is an issue. These limitations mark differences between the Michigan and Federal versions of subrule (a)(2).

The September 1, 2001 amendments of subrules (a)(2) and (3) substituted "alleged victim" for "victim". The change conforms MRE 404(a) to FRE 404(a) as amended effective December 1, 2000.

Note to amendments:

The January 1, 1995, amendment added the requirement that the prosecution specify its rationale for admitting the evidence.

As of 1995, the Michigan Court Rules, Michigan Rules of Professional Conduct, Michigan Code of Judicial Conduct, and other codes produced by the Michigan Supreme Court were all phrased in gender-neutral language. However, the Michigan Rules of Evidence retained the masculine pronouns found in the original Federal Rules of Evidence, from which the Michigan rules were adapted. The [May 1,] 1995 amendments rephrased the Michigan Rules of Evidence in gender-neutral language. No substantive change was made.

Cavanagh and Kelly, JJ., dissent in part and state as follows:

We would amend MRE 404(a)(2) as recommended by the Advisory Committee majority, making the rule applicable to all cases in which self-defense is an issue, not just to homicide cases.

ATTACHMENT B

MCL 768.27a

MCL 768.27b

Custom ID : - No Description - ▼ | Switch Client | Preferences | Help | LiveSupport | Sign Out

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within  [View Tutorial](#)
 Advanced...

Source: **Legal > / . . . / > MI - Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined** 

TOC: Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined > / . . . / > CHAPTER VIII. TRIALS > **§ 768.27a. Evidence that defendant committed another listed offense against minor; admissibility; disclosure of evidence to defendant; definitions.**

Terms: **MCL 768.27A** (Edit Search | Suggest Terms for My Search)

 Select for FOCUS™ or Delivery

MCLS § 768.27a

MICHIGAN COMPILED LAWS SERVICE
 Copyright © 2011 Matthew Bender & Company, Inc.
 a member of the LexisNexis Group.
 All rights reserved.

* THIS DOCUMENT IS CURRENT THROUGH 2011 P.A. 13 *

CHAPTER 760-777 CODE OF CRIMINAL PROCEDURE
 THE CODE OF CRIMINAL PROCEDURE
 CHAPTER VIII. TRIALS

Go to the Michigan Code Archive Directory

MCLS § 768.27a (2011)

MCL § 768.27a

§ 768.27a. Evidence that defendant committed another listed offense against minor; admissibility; disclosure of evidence to defendant; definitions.

Sec. 27a. (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

- (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
- (b) "Minor" means an individual less than 18 years of age.

HISTORY: Act 175, 1927, p 281; eff September 5, 1927.

Custom ID : - No Description - ▼ | Switch Client | Preferences | Help | LiveSupport | Sign Out

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within  [View Tutorial](#)

Advanced...

Source: **Legal > / . . . / > MI - Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined** 

TOC: Michigan Compiled Laws Service, Constitution, Court Rules & ALS, Combined > / . . . / > CHAPTER VIII. TRIALS > § 768.27b. Domestic violence offense; commission of other domestic violence acts; admissibility; disclosure; definitions; applicability of section.

Terms: **MCL 768.27B** (Edit Search | Suggest Terms for My Search)

 Select for FOCUS™ or Delivery

MCLS § 768.27b

MICHIGAN COMPILED LAWS SERVICE
 Copyright © 2011 Matthew Bender & Company, Inc.
 a member of the LexisNexis Group.
 All rights reserved.

* THIS DOCUMENT IS CURRENT THROUGH 2011 P.A. 13 *

CHAPTER 760-777 CODE OF CRIMINAL PROCEDURE
 THE CODE OF CRIMINAL PROCEDURE
 CHAPTER VIII. TRIALS

Go to the Michigan Code Archive Directory

MCLS § 768.27b (2011)

MCL § 768.27b

§ 768.27b. Domestic violence offense; commission of other domestic violence acts; admissibility; disclosure; definitions; applicability of section.

Sec. 27b. (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

(2) If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

(3) This section does not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.

(4) Evidence of an act occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that admitting this evidence is in the interest of justice.

(5) As used in this section:

(a) "Domestic violence" or "offense involving domestic violence" means an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

(i) Causing or attempting to cause physical or mental harm to a family or household member.

(ii) Placing a family or household member in fear of physical or mental harm.

(iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(b) "Family or household member" means any of the following:

(i) A spouse or former spouse.

(ii) An individual with whom the person resides or has resided.

(iii) An individual with whom the person has or has had a child in common.

(iv) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, "dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context.

(6) This section applies to trials and evidentiary hearings commenced or in progress on or after May 1, 2006.

HISTORY: Act 175, 1927, p 281; eff September 5, 1927.

Pub Acts 1927, No. 175, Ch. VIII, § 27b, as added by Pub Acts 2006, No. 78, imd eff March 24, 2006.

NOTES:

Michigan Digest references:

Criminal Law and Procedure § 315.10

LEXIS Publishing Michigan analytical references:

Michigan Law and Practice, Criminal Law and Procedure § 392

CASE NOTES

MCL 768.27b was not an invalid ex post facto law because the statute affected only the admissibility of a type of evidence, and its enactment did not turn otherwise innocent behavior into a criminal act. Moreover, **MCL 768.27b** did not interfere with the Michigan Supreme Court's constitutional authority to make rules that govern the administration of the judiciary because the statute did not impose a burden upon the administration of the courts, but rather, it reflected a policy decision that, in certain cases, juries should have an opportunity to weigh a defendant's behavioral history and view a case's facts in the larger context that knowledge of a defendant's background would afford. *People v Schultz* (2008) 278 Mich App 776, 754 NW2d 925.

Appellate court overruled defendant's assertion that the trial court erred by allowing the prosecutor to introduce evidence of defendant's alleged sexual assaults against his ex-fiancee under MRE 404, because the evidence was more probative than prejudicial and the ex-fiancee's testimony was admissible under **MCL 768.27b**, when the evidence that defendant accomplished first-degree criminal sexual conduct against his ex-fiancee in part by controlling her money and their child was probative of whether he used those same tactics to gain sexual favors from his daughter. *People v Pattison* (2007) 276 Mich App 613, 741 NW2d 558.

ATTACHMENT C

USCS FRE 413

USCS FRE 414

USCS FRE 415

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within  [View Tutorial](#)
 Advanced...

Service: **Get by LEXSTAT®**
 TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / >
 ARTICLE IV. RELEVANCY AND ITS LIMITS > **Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**
 Citation: **USCS Fed Rules Evid R 413**

USCS Fed Rules Evid R 413

UNITED STATES CODE SERVICE
 Copyright © 2011 Matthew Bender & Company, Inc.
 a member of the LexisNexis Group (TM)
 All rights reserved

*** CURRENT THROUGH CHANGES RECEIVED MARCH 29,
 2011 ***

FEDERAL RULES OF EVIDENCE
 ARTICLE IV. RELEVANCY AND ITS LIMITS

Go to the United States Code Service Archive Directory

USCS Fed Rules Evid R 413

🔍 NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy

Review Court Orders which may amend this Rule.

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

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

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Practitioner's Toolbox  

- 📄 **History**
- 📄 **Interpretive Notes and Decisions**
- 📄 **History; Ancillary Laws and Directives**

Resources & Practice Tools

- 🔍 **NITA Commentary**
- 🔍 **Research Guide**
- Federal Procedure:
 - > 2 Federal Rules of Evidence Manual (Matthew Bender) §§ 413.02, 413.03, 414.02, 415.02.
 - > 1 Federal Rules of Evidence Manual (Matthew Bender) § 404.02.
- Law Review Articles:
 - > King. Rules of Evidence 413 and 414: where do we go from here? 2000 Army Law. 4, August 2000.
 - > Orenstein. Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403. 90 Cornell Law Rev 1487, September 2005.
 - > Baker. A wigmorean defense of feminist method [Discussion of No bad men!: A feminist analysis of character evidence in rape trials. A. Orenstein. 49 Hastings L. J. 663-716 Mr '98]. 49 Hastings LJ 861, March 1998.

 [More...](#)

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

🔍 History:

(Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320935(a), 108 Stat. 2136.)

🔍 History; Ancillary Laws and Directives:

1. Effective date of section
2. Other provisions

🔍 1. Effective date of section:

This rule became effective July 9, 1995, pursuant to § 320935(d) of Act Sept. 13, 1994, P.L. 103-322, which appears as a note to this rule.

🔍 2. Other provisions:

Effectiveness, implementation, recommendations, and application. Act Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320935(b)-(e), 108 Stat. 2137; Sept. 30, 1996, P.L. 104-208, Div A, Title I, § 101(a) [Title I, § 120], 110 Stat. 3009-25, provide:

"(b) Implementation. The amendments made by subsection (a) [adding Rules 413-415] shall become effective pursuant to subsection (d).

"(c) Recommendations by Judicial Conference. Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress 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 and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

"(d) Congressional action.

(1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a) [adding Rules 413-415], then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

"(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a) [adding Rules 413-415], the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

"(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) [adding Rules 413-415] shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

"(e) Application. The amendments made by subsection (a) [adding Rules 413-415] shall apply to proceedings commenced on or after the effective date of such amendments, including all trials commenced on or after the effective date of such amendments."

[The report submitted to Congress on Feb. 9, 1995 (note to this rule) pursuant to subsec. (c) of this note contained recommendations different from the amendments made by § 320935(a) of Act Sept. 13, 1994, P.L. 103-322, adding FRE 413 through 415, thus delaying the effective date

Custom ID : - No Description - ▼ | Switch Client | Preferences | Help | LiveSupport | Sign Out

Search	Get a Document	Shepard's®	More	History	Alerts
---------------	-----------------------	-------------------	-------------	----------------	---------------

FOCUS™ Terms Search Within Original Results (1 - 1)  [View Tutorial](#)

Service: **Get by LEXSTAT®**
 TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / >
 ARTICLE IV. RELEVANCY AND ITS LIMITS > **Rule 414. Evidence of Similar Crimes in Child Molestation Cases**
 Citation: **FRE 414**

USCS Fed Rules Evid R 414

UNITED STATES CODE SERVICE
 Copyright © 2011 Matthew Bender & Company, Inc.
 a member of the LexisNexis Group (TM)
 All rights reserved

*** CURRENT THROUGH CHANGES RECEIVED MARCH 29, 2011 ***

FEDERAL RULES OF EVIDENCE
 ARTICLE IV. RELEVANCY AND ITS LIMITS

Go to the United States Code Service Archive Directory

USCS Fed Rules Evid R 414

🔍 NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy following Rule 413.

Review Court Orders which may amend this Rule.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

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

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

4 Practitioner's Toolbox  

- 📄 **History**
- 📄 **Interpretive Notes and Decisions**
- 📄 **History; Ancillary Laws and Directives**

Resources & Practice Tools

- 📄 **NITA Commentary**
- 📄 **Research Guide**
- Federal Procedure:
 - > 2 Federal Rules of Evidence Manual (Matthew Bender) §§ 413.02, 414.02, 414.03, 415.02.
 - > 1 Federal Rules of Evidence Manual (Matthew Bender) § 404.02.
- Law Review Articles:
 - > King. Rules of Evidence 413 and 414: where do we go from here? 2000 Army Law 4, August 2000.
 - > Orenstein. Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403. 90 Cornell Law Rev 1487, September 2005.
 - > Baker. A wigmorean defense of feminist method [Discussion of No bad men!: A feminist analysis of character evidence in rape trials. A. Orenstein. 49 Hastings L. J. 663-716 Mr '98]. 49 Hastings L J 861, March 1998.

📄 More...

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

- (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
- (2) any conduct proscribed by chapter 110 of title 18, United States Code;
- (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
- (4) contact between the genitals or anus of the defendant and any part of the body of a child;
- (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
- (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

History:

(Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320935(a), 108 Stat. 2136.)

History; Ancillary Laws and Directives:

Effective date of section

This rule became effective July 9, 1995, pursuant to § 320935(d) of Act Sept. 13, 1994, P.L. 103-322, which appears as a note to Rule 413.

COMMENTARY

Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin

Background of the Rule

Rule 414 is intended to provide for more liberal admissibility in criminal cases of child molestation where the defendant has committed a prior act or acts of child molestation. Congress passed this Rule, together with Rules 413 and 415 (which are substantively identical but applicable to different types of cases), as part of a general Crime Bill package, and bypassed the ordinary rulemaking process in doing so. As a compromise, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rule embodied bad policy, and recommended its reconsideration; Congress refused to do so.

As an alternative, the Advisory Committee drafted amendments to Rules 404 and 405, that would "both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415, and yet still effectuate Congressional intent." This proposal is discussed in the Comment to Rule 413. Congress did not adopt any of these proposed changes, and as a result, Rules 413-415, as originally enacted by Congress, became effective on July 9, 1995.

Scope of the Rule

Rule 414 is essentially identical to Rule 413, with the exception that the term "child molestation" is substituted for the term "sexual assault." As such, the questions of scope considered under Rule 413 are equally applicable to Rule 414. To summarize:

1. Rule 414 does not apply unless the defendant is charged with child molestation and the prior act offered is one of child molestation.

Search	Get a Document	Shepard's®	More	History	Alerts
------------------------	--------------------------------	----------------------------	----------------------	-------------------------	------------------------

FOCUS™ Terms Search Within Original Results (1 - 1) [View Tutorial](#)

Service: **Get by LEXSTAT®**
 TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > / . . . / >
 ARTICLE IV. RELEVANCY AND ITS LIMITS > **Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**
 Citation: **USCS Fed Rules Evid R 415**

USCS Fed Rules Evid R 415

UNITED STATES CODE SERVICE
 Copyright © 2011 Matthew Bender & Company, Inc.
 a member of the LexisNexis Group (TM)
 All rights reserved

*** CURRENT THROUGH CHANGES RECEIVED MARCH 29, 2011 ***

FEDERAL RULES OF EVIDENCE
 ARTICLE IV. RELEVANCY AND ITS LIMITS

Go to the United States Code Service Archive Directory

USCS Fed Rules Evid R 415

NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy following Rule 413.

Review Court Orders which may amend this Rule.

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such

Practitioner's Toolbox  

-  [History](#)
-  [Interpretive Notes and Decisions](#)
-  [History; Ancillary Laws and Directives](#)

Resources & Practice Tools

-  [NITA Commentary](#)
-  [Research Guide](#)
- Federal Procedure:
 - > 2 Federal Rules of Evidence Manual (Matthew Bender) §§ 413.02, 414.02, 415.02, 415.03.
 - > 1 Federal Rules of Evidence Manual (Matthew Bender) § 404.02.
- Labor and Employment:
 - > 3 Labor and Employment Law (Matthew Bender), ch 73, Sexual Harassment § 73.08.
- Law Review Articles:
 - > Baker. A wigmorian defense of feminist method [Discussion of No bad men!: A feminist analysis of character evidence in rape trials. A. Orenstein. 49 Hastings L. J. 663-716 Mr '98]. 49 Hastings L J 861, March 1998.
 - > Thompson. Character evidence and sex crimes in the federal courts: recent developments. 21 U Ark Little Rock L Rev 241, Winter 1999.
 - > Presumption of Innocence Imperiled: New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence. 70 Wash L Rev 883, 1995.

 [More...](#)

later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

✦ History:

(Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320935(a), 108 Stat. 2137.)

✦ History; Ancillary Laws and Directives:

Effective date of section

This rule became effective July 9, 1995, pursuant to § 320935(d) of Act Sept. 13, 1994, P.L. 103-322, which appears as a note to Rule 413.

COMMENTARY

Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin

Background of the Rule

Rule 415 is intended to provide for more liberal admissibility in civil cases concerning child molestation or sexual assault, where a party (usually the defendant) has committed a prior act or acts of child molestation or sexual assault. Congress passed this Rule, together with Rules 413 and 414 (which are substantively identical but applicable to different types of cases), as part of a general Crime Bill package, and bypassed the ordinary rulemaking process in doing so. As a compromise, Congress provided for the possibility of reconsideration should the Judicial Conference make a timely objection to the new Rules. The Judicial Conference Advisory Committee on Evidence Rules, and subsequently the Standing Committee on Rules of Practice and Procedure and the Judicial Conference itself, concluded that the Rule embodied bad policy, and recommended its reconsideration; Congress refused to do so.

As an alternative, the Advisory Committee drafted amendments to Rules 404 and 405, that would "both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415, and yet still effectuate Congressional intent." This proposal is discussed in the Comment to Rule 415. Congress did not adopt any of these proposed changes, and as a result, Rules 413-415, as originally enacted by Congress, became effective on July 9, 1995.

Scope of the Rule

Rule 415 simply applies the admissibility principle of Rules 413 and 414 to civil cases involving sexual assault or child molestation. As such, the questions of scope considered under Rules 413 and 414 are equally applicable to Rule 415. To summarize:

1. Rule 415 does not apply unless relief is predicated on a party's commission of sexual assault or child molestation. It does not apply to sexual discrimination or sexual harassment that does not involve sexual assault, as that term is defined in Rule 413. Moreover, the only bad acts admitted under the Rule are those involving sexual assault or child molestation (as defined in Rules 413 and 414). Other bad acts are not covered by the Rule, even if they would be probative to prove a claim of sexual assault or child molestation.

2. Rule 415 (by way of incorporating Rules 413 and 414) provides an exception to the limitation on character evidence set forth in Rule 404(b). A prior act of sexual assault or child molestation can be admitted explicitly to prove the propensity of the party to commit the act alleged by the offering party.

3. It is unclear whether the Trial Judge can use Rule 403 to exclude a prior act of child molestation or sexual assault on the ground that its probative value is substantially outweighed by its prejudicial effect. A fair reading of the Rule, and consideration of some statements by its

ATTACHMENT D

- *UNITED STATES V LAWRENCE*, NO 97-4480, 187 F3D 638;
1999 WL 551358 (CA 6, JULY 19, 1999)

187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio))
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
 UNITED STATES OF AMERICA, Plaintiff-Appellee,
 v.
 Scott Charles LAWRENCE, Defendant-Appellant.

No. 97-4480.
 July 19, 1999.

On Appeal from the United States District Court for the Northern District of Ohio.

Before WELLFORD, NELSON, and GILMAN, Circuit Judges.

NELSON, Circuit Judge.

*1 This is an appeal from a conviction and sentence of imprisonment for the offenses of (1) interstate transportation of a minor with intent to engage in criminal sexual activity and (2) possession of a firearm by a convicted felon. We shall affirm the challenged judgment in all respects.

I

In 1995 the defendant, Scott C. Lawrence, was hired to drive a truck owned by the parents of a 13-year-old boy who was identified at trial by the pseudonym "Joey Smith." Mr. Lawrence ingratiated himself with the "Smith" family, and he was invited to stay in their home in Ohio between trips. At Mr. Lawrence's urging, Joey began to accompany the man when he drove the truck to destinations out of state.

During these trips, in the summer and fall of 1996, Mr. Lawrence engaged in criminal sexual activity with the boy. Joey ultimately disclosed the sexual abuse to his mother when she confronted him about his moodiness and academic problems at school. Mr. Lawrence was then arrested. At the time of his arrest, Lawrence - a previously convicted felon - admitted that he had a loaded pistol under the seat of the vehicle he was driving.

Mr. Lawrence was indicted on four counts of transportation of a minor with intent to engage in criminal sexual activity, a violation of 18 U.S.C. § 2423(a), and one count of being a felon in possession of a firearm, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). He pleaded guilty to the firearm possession count and proceeded to trial on the remaining four counts. A jury found him guilty on all of these counts, and he was sentenced to prison for 262 months. A timely appeal followed.

II

A

On appeal, Mr. Lawrence contends that the district court erred in admitting (1) evidence about a trip to Michigan that Lawrence took with Joey in May of 1996, when Joey looked at pornographic magazines in Lawrence's truck but no sexual activity was alleged, and (2) evidence of sexual activity that did not constitute a violation of federal law, which activity occurred during an overnight stay by Lawrence and Joey at a Comfort Inn in Seville, Ohio. There was no contemporaneous objection to the admission of this evidence, for the most part.
 FN1

FN1. The district court *sua sponte* registered its concern about the admissibility of testimony regarding the Comfort Inn stay, but defense counsel did not make an objection. Defense counsel did object to admission of the pornographic magazines as exhibits.

187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio)))

Mr. Lawrence does not dispute the factual details of the Michigan trip and does not deny that these details provided relevant evidence of intent. Instead he argues briefly, and without caselaw support, that the evidence was unfairly prejudicial. Unpersuaded, we conclude that it was not plain error for the district court to allow testimony on the Michigan trip under Fed.R.Evid. 404(b). Neither are we persuaded that it was an abuse of discretion for the district court to admit the pornographic magazines as evidence.

Evidence about the Comfort Inn stay was admitted under Fed.R.Evid. 414, which provides in relevant part as follows:

“(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.”

*2 The defendant contends that before admitting evidence under Rule 414, the district court must first decide whether the evidence is admissible under Rule 404(b). We disagree. No Rule 404(b) analysis is required where evidence is admissible under Rule 414. However, Rule 403, which requires the district court to determine whether the probative value of the evidence is substantially outweighed by any potential for unfair prejudice, is applicable in the Rule 414 context. See *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir.1997), *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir.1997), and *United States v. Meacham*, 115 F.3d 1488, 1491-92 (10th Cir.1997).

By the terms of Rule 414, the evidence of the Comfort Inn stay was clearly admissible. The district court's Rule 403 balancing is normally reviewed for abuse of discretion; here, because there was no objection, it is reviewed for plain error. The government was required to prove that one of the defendant's primary purposes for taking Joey on the trips was to engage in sexual activity; the evidence

of the Comfort Inn stay was relevant to establishing Mr. Lawrence's intent, and we cannot say it was unfairly prejudicial. We do not find any error here, plain or otherwise.

B

Mr. Lawrence submits that the district court abused its discretion in failing to exclude allegedly prejudicial and irrelevant comments in the government's opening statement and closing argument and in the testimony of various witnesses, including Joey's parents, his sister, the manager of the Comfort Inn, and Troy Eagle and Alisa Jenkins, who were acquaintances of Mr. Lawrence. The cumulative effect, he says, warrants reversal.

The government's opening statement characterized Mr. Lawrence in negative terms and referred to the Smiths as victims. Mrs. Smith, in her testimony, gave background information on the Smith family and their trucking business and Mr. Lawrence's relationship with the family. Specifically challenged are references by Mrs. Smith to “pornography,” Joey's trip with Mr. Lawrence to the Comfort Inn, his behavioral changes, the circumstances surrounding Joey's disclosure of the abuse to her, and the family's reaction to the abuse. Mr. Smith and his daughter testified to similar matters. The Comfort Inn manager's testimony included information regarding the renting of x-rated videotapes at the motel. Mr. Eagle testified that he sold a gun to Mr. Lawrence in October 1996. Ms. Jenkins testified that she knew about the gun sale, which occurred at her house, and that Mr. Lawrence had brought Joey to her house during the summer of 1996 and introduced him as his son. In its closing arguments the government mentioned “little things that this boy exhibited, the classic symptoms of a child who has been abused,” and spoke in positive terms about the family's values.

No objection was made to any of this testimony or argument, although counsel did object to the admission of the gun as an exhibit. Upon review of the record, we are satisfied that the district court did not commit plain error in allowing the testi-

187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio))
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio)))

mony and argument to proceed.

*3 Finally, while it is true that “[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair,” see *United States v. Ashworth*, 836 F.2d 260, 267 (6th Cir.1988) (citation omitted), there is no showing on the record in this case that Mr. Lawrence was denied a fundamentally fair trial.

C

Claiming before the district court that the evidence was insufficient to sustain a conviction on the four counts alleging violations of § 2423(a), Mr. Lawrence moved for a judgment of acquittal on these counts pursuant to Fed.R.Crim.P. 29. The district court denied the motion, and Mr. Lawrence argues that the court erred in doing so.

Section 2423(a) provides as follows:

“(a) Transportation with intent to engage in criminal sexual activity.-A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.”

Mr. Lawrence maintains that the government did not show that his purpose in taking Joey with him was to engage in criminal sexual activity. Mr. Lawrence also argues with respect to count four that there was no testimony of any oral contact of the sort specified in 18 U.S.C. § 2246(2)(B). (Count four - in contrast to counts one through three - charged Mr. Lawrence with transporting Joey in interstate commerce with the intent to engage in sexual activity as defined in § 2246(2)(B). Section 2246(2)(B) defines “sexual act” as including “contact between the mouth and the penis.”)

The test to be applied in this situation “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). See also *United States v. Ferguson*, 23 F.3d 135 (6th Cir.), cert. denied, 513 U.S. 900 (1994). The case against Mr. Lawrence clearly passes muster under this test. Joey’s testimony, with corroborating evidence - testimony from members of his family and physical evidence - regarding the circumstances of the trips on which he joined Mr. Lawrence, was sufficient for the jury to find the requisite intent and the requisite oral contact.

D

Mr. Lawrence contends here, as he did in the district court, that the court’s instructions to the jury were erroneous insofar as they defined “sexual activity” in the specific terms set forth in 18 U.S.C. §§ 2246(2)(D) and (3), notwithstanding that there is no reference to § 2246 in the statute under which he was charged. The latter statute, § 2423(a), defines “sexual activity” as that “for which any person can be charged with a criminal offense.”

*4 If there was error here, it did not prejudice the defendant. The definition of sexual activity in § 2246 relates to sexual abuse of a minor or ward, an offense under 18 U.S.C. § 2243. Although the government could have made its case by proving “sexual activity for which any person can be charged with a criminal offense,” a broader category, the government was limited by the instruction to proving activity of a sort coming within the narrower definition of § 2246.

Mr. Lawrence also challenges the following two consecutive instructions:

“It is a violation of federal criminal law to knowingly engage in a sexual act, as defined by federal criminal law, or engage in such an act, with a minor who has attained the age of 12 years but has not attained the age of 16 years and as is

187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio)))

[sic] at least four years younger than the offender. It is not necessary for the government to prove that the offender knew the age of the victim or that he knew that the requisite age difference existed between the offender and the victim.”

“The government does not have to prove that any criminal sexual activity actually occurred. It is sufficient for the government to establish that the defendant transported the minor in interstate commerce for the purpose of, or with the intent to, engage in criminal sexual activity.”

The first instruction is from 18 U.S.C. § 2243. The second is a correct statement of the law. There was no error in either instruction.

E

With regard to his sentence, Mr. Lawrence challenges the district court's application of a cross-reference to USSG § 2A3.1 in the edition of the guidelines manual used by the district court.^{FN2} For violations of 18 U.S.C. § 2423(a), the appropriate guideline is USSG § 2G1.1. Section 2G1.1(c)(2) states:

FN2. The court used an edition of the manual that contained USSG § 2G1.2, a section deleted effective November 1, 1996. But as § 2G1.2 was consolidated with USSG § 2G1.1 in the edition that should have been used, the sentence would have been the same had the later version been employed.

“If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply § 2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse).”

In view of the explicit instruction to apply § 2A3.1, the district court did not err in applying that section. See *United States v. Dolloph*, 75 F.3d 35, 38-40 (1st Cir.), *cert. denied*, 517 U.S. 1228 (1996)

Mr. Lawrence also challenges the district court's refusal to “group” counts one through four pursuant to USSG § 3D1.2. Specifically excluded from the grouping requirement, however, are USSG § 2G1.1 and “all offenses in Chapter Two, Part A.” The exclusion clearly applies here.

Mr. Lawrence's final argument, that the district court erred in imposing consecutive sentences for counts 1-2 and 3-4, is similarly unavailing. See USSG § 5G1.2(d) (stating that sentences shall be imposed consecutively to the extent necessary to produce a combined sentence equal to the “total punishment” determined by the USSG).

As Mr. Lawrence's “sentence ... was [not] imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, ... and is [not] unreasonable,” his sentence will be affirmed. See 18 U.S.C. § 3742(f).

***5 Both the conviction and the sentence are AFFIRMED.**

C.A.6 (Ohio),1999.
 U.S. v. Lawrence
 187 F.3d 638, 1999 WL 551358 (C.A.6 (Ohio))

END OF DOCUMENT