

Objecting to Evidence in Sex Cases

December 3, 2021

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1. Rule 404(b) & the Doctrine of Chances

- **Key cases:**

- *State v. Verde*, 2012 UT 60, 296 P.3d 673
- *State v. Richins*, 2021 UT 50, 496 P.3d 158
- *State v. Murphy*, 2019 UT App 64, 441 P.3d 787 (concurrency)
- *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986)

- **Key Problem with the Doctrine of Chances**

- No proper inference can be drawn from the evidence. It's either:
 - A proxy for propensity reasoning, or
 - A probability basis for guilt that is improper under *Rammel*.

- ***Verde's* Four Foundational Requirements:**

- Materiality
- Similarity
- Independence
- Frequency

- **Materiality**

- Need for “focused attention” on “true purpose” of the evidence and whether the “true purpose” is “one rule 404(b) renders improper”
 - The evidence is not material to any proper purpose.
 - Is the point for which the evidence is being offered in dispute?

- **Similarity**

- Similarity *increases* the risk of prejudice:
 - Increases likelihood of confusion between charged and other acts
 - Increases the likelihood of propensity reasoning.

- **Independence**

- Communication or collusion
- Anything that might prompt allegations or taint probability inference.
- “[B]e on the lookout for those factors that show that the random events a party wants to admit aren’t actually random.” *Richins*, ¶¶ 88 – 89.

- **Frequency**

- Foundation for the probability reasoning
- Immateriality of the frequency
- Prejudice from the frequency
 - Number of accusers
 - Volume of other-acts evidence

2. Rule 403

• Weighing Inferences:

- “If our jurisprudence is to embrace the use of the doctrine of chances, courts will need to perform a rule 403 inquiry that includes a weighing of the permissible and impermissible inferences the jury could take from prior acts evidence.” *Richins* n.14.

• Probative Value:

- Not material to anything in dispute
- No legitimate inference can be drawn from the evidence

• Unfair Prejudice:

- Weighing inferences
 - Propensity inference at least as strong as probability inference
 - Probability inference is also improper
- Multiple Accusers
 - Number of other accusers increases the risk of prejudice
 - Volume of other-acts evidence increases the risk of prejudice

3. Other Issues of Note in Sex-Crime Cases

- Objecting to admission of experts
- Using competing experts before and during trial
- Objecting to hearsay, anecdotal testimony, or exceeding scope of expertise
- Constitutional arguments related to rule 412 and 404(c)
- Objecting to exhibits going back to the jury - *Wyatt*, 2021 UT 32, ¶¶ 19, 21
- Requesting a unanimity instruction - *Alires*, 2019 UT App 206, ¶¶ 22, 25,