Evidence in Sex Crime Cases
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Other-Acts Evidence

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Preserving Arguments for Appeal

To preserve an argument

- "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." *State v. Johnson*, 2017 UT 76, ¶ 15
- Not waived, conceded, or abandoned

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Rule 404(b)

- **Rule 404(b)(1):** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character."
- **Rule 404(b)(2):** "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

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The Doctrine of Chances

State v. Verde, 2012 UT 60, ¶ 47

- "[A] theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over."

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The Doctrine of Chances

State v. Richins, 2021 UT 50, ¶¶ 54-55

- The Utah Supreme Court has not yet been asked to overturn *Verde*
- It "leave[s] open the possibility that, in an appropriate case, a party could employ the doctrine of chances to rebut a claim of fabrication."
- "[I]f the doctrine is to remain part of our jurisprudence, it needs to be employed in a more disciplined fashion…"
- "We explain the increased rigor we direct the courts to apply…."

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The Doctrine of Chances

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Problems with the Doctrine of Chances

- No proper inference can be drawn under this theory in this context.
- The evidence is either:
  - A proxy for propensity evidence
  - Asking the jury to convict based on an improper probability basis

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Problems with the Doctrine of Chances

- **Proxy for propensity:** "If one assumes that the accusations are true, and that the defendant actually committed the previous sexual assaults, it becomes extremely difficult to distinguish such evidence from straight-up propensity evidence." *Murphy*, ¶ 59 (concurrence); *Richins*, ¶ 56.
- **Improper probability basis for guilt:** "I cannot see a principled way to reconcile *Rammel's* rule forbidding the introduction of probability-based evidence in this context with Verde's application of the Doctrine to allow it." *Murphy*, ¶ 63 (concurrence).

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Problems with the Doctrine of Chances

State v. Rammel, 721 P.2d 498, 501 (Utah 1986)

- "[C]ourts have routinely excluded [probability evidence] when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies."
- "Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts 'not susceptible to quantitative analysis,' such as whether a particular individual is telling the truth at any given time."

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Verde's Foundational Factors

- Materiality
- Similarity
- Independence
- Frequency

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Materiality

<u>The true purpose:</u>

- "[F]idelity to the integrity of the rule requires a careful evaluation of the true—and predominant—purpose of any evidence proffered under rule 404(b)." *Verde*, ¶ 22.
- "We . . . highlighted the need for focused attention on the purpose for which the evidence would be admitted. We recognized that focus could help a court discern whether the true purpose of the evidence would be one rule 404(b) renders improper." *Richins*, ¶ 61.

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Similarity

Prejudicial:

- "Richins argues that 'the similarity between the other-acts and the charged conduct increased the other-acts' risk for unfair prejudice,' rather than reducing its risk of unfair prejudice." *Richins*, ¶ 97 n.12.
  - Increases likelihood of confusion
  - Increases likelihood of propensity reasoning

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Independence

Richins, 2021 UT 50, ¶¶ 88 – 89

- "[C]ollusion between witnesses demonstrates a lack of independence. But collusion is not the only way to show a lack of independence."
- See FN 10 (Mother warned Daughter to stay away from Richins).
- "[B]e on the lookout for those factors that show that the random events . . .. aren't actually random."
- "[T]he party seeking admission of the evidence [must] foreclose the possibility that something other than random chance or the probability-based inference" explains the occurrences

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Frequency

Foundation

- "[T]o evaluate the frequency of a 'rare misfortune,' a court must ascertain some benchmark for the 'typical person['s]' endurance of the crime or unusual loss…." *Richins*, ¶ 75.
- Is the foundation based on the likelihood of being arrested?
  - If the is being asked to treat the fact that a defendant was arrested and charged as evidence of his guilt, that brings additional arguments into play.

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Frequency

Immateriality:

- "[T]he odds of being arrested for a crime in Salt Lake County are so low that being accused of a crime just once is already atypical. . . . a criminal defendant will always have been accused of a particular crime more times than the typical person—negating the purpose of our frequency prong." *Richins*, ¶ 83.

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Frequency

Prejudice:

- Higher frequency increases prejudice because it compounds the likelihood of improper propensity or probability inferences.
  - **Number:** The jury focuses on the *number* of accusers rather than the evidence, particularly of the charged crime.
  - **Trials within a trial:** Because the State must present enough evidence to prove the other incidences occurred, which results in trials within a trial, in which a significant portion of the evidence has nothing to do with the charged crime.

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Rule 403

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Rule 403

Probative Value

- Not material to anything in dispute
- No legitimate inference can be drawn from the evidence
- Richins argues that "the other-acts evidence—even if admissible under the doctrine of chances—should have been excluded as impermissible statistical evidence"—e.g., under *Rammel*. *Richins*, ¶ 97 n.12.

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Rule 403

Unfair Prejudice & the Like

- Weighing inferences
  - Propensity inference is at least as strong as probability inference
  - Probability inference is also improper
- Argue other 403 considerations (waste of time, delay, confusion, misleading the jury)

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Rule 403

Unfair Prejudice & the Like

- "Notions of unfair prejudice and issue confusion, as well as conventional assessments of probative value, are still fair game in the doctrine of chances context. But a district court will necessarily err if it fails to balance the permissible and impermissible inferences because a district court abuses its discretion when it misapplies the law." *Richins,* n.15

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Rule 403

Multiple Accusers

- *Number* of other *accusers* increases the risk of prejudice
- *Volume* of other-acts *evidence* increases the risk of prejudice

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Other Issues of Note

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Other Issues of Note

- Objecting to admission of experts
- Using competing experts before and during trial
- Objecting to experts (pseudo-experts) giving hearsay narratives or exceeding the scope of their expertise
- Constitutional arguments
- Objecting to exhibits going back to the jury
- Requesting a unanimity instruction

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Objecting to Admission of Experts

Rule 403 & "rape myth" experts

- Could a plaintiff in a personal injury case present an expert to opine generally about "driving myths" that may or may not apply to the particular car accident at hand?
- Generally, in a personal injury case, the expert testimony would be on a particular point in dispute – e.g., how rain effects braking distance
- Is the evidence probative?
  - Would the lack of such evidence be probative of the opposite?

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Competing Experts Before & During Trial

- Consider when you can dovetail your arguments to push the court to either keep the State's expert out or let the defense present a contrasting expert the court might otherwise be inclined to exclude.

- Before trial:
  - In support of motions to suppress, motions in limine

- At trial:
  - To educate the jury on the weight (lack of weight) to give the evidence

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Objecting to Experts' Testimony at Trial

- Is the witness testifying based on training and expertise?
- Has the State established that the witness is qualified?
- Has the State established the reliability of the methodology?
- **Anecdotal testimony:** The "'foundation' for the detective's testimony 'was utterly lacking,' because "[t]here was no showing that the anecdotal data from which the detective drew his conclusions had any statistical validity. *State v. Burnett*, 2018 UT App 80, ¶ 35 (discussing *Rammel*)

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Objecting to Experts' Testimony at Trial

State v. Valdez, 2021 UT App 13, 482 P.3d 861

- "[W]e are troubled by certain aspects of how the trial proceeded"
- ¶55 Principles against vouching for a witness would also apply to the Detective's "claims regarding his status as a sort of human lie detector, including his description of the techniques he employed in his efforts to ferret out lies."

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Objecting to Experts' Testimony at Trial

State v. Valdez, 2021 UT App 13, 482 P.3d 861

- ¶56 "In addition, we are concerned about the State's—and the trial court's—conception of the scope of the so-called "police investigation exception" to the usual ban on hearsay testimony
- "[I]t is our view that the entirety of First Detective's lengthy narrative testimony about what Ex-Girlfriend told him was not admissible under that exception."

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Constitutional Arguments

Rule 412(b)(3), (c) – at least 14 days before trial

State v. Thornton, 2017 UT 9, ¶¶ 74, 78-81

- "[W]here rules of evidence or procedure foreclose any meaningful avenue for presenting a defendant's fundamental defense to charges against him, the U.S. Supreme Court has found a Sixth Amendment violation. And it has deemed the Sixth Amendment to override rules of evidence or procedure.
- The defendant must present "at a minimum, proof that the evidence in question is essential to the presentation of a defense" or that its absence "significantly undermine[s] fundamental elements of the defendant's defense."
- *State v. Barela*, 2015 UT 22, ¶ 39 – "context"

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Constitutional Arguments

Rule 403(c):

- "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged."

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Exhibits Going Back to the Jury

Utah R. Crim. P. 17(k)

- "[T]he jury may take with them . . . all exhibits which have been received as evidence except exhibits that should not, in the opinion of the court, be in the possession of the jury"

Wyatt v. State, 2021 UT 32, ¶¶ 19, 21

- "[N]othing in the language of the rule purports to bar testimonial exhibits from going back with the jury."
- "[R]ule 17(k) expressly authorizes all exhibits to go back with the jury subject to the court's broad discretion....[A]ny exception to the rule is left to the sound discretion of the district court."

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Unanimity Instruction

State v. Alires, 2019 UT App 206, ¶¶ 22, 25, 455 P.3d 636

- "[T]he governing law . . . required the court to instruct the jury that it must agree on the specific criminal act for each charge in order to convict."
- "Once the State failed to elect which act supported each charge, the jury should have been instructed to agree on a specific criminal act for each charge in order to convict."

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