

PRIOR BAD ACTS IN SEXUAL ABUSE CASES

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*****All opinions expressed are only those of the presenters, not the official position of the State Appellate Defender or the Attorney General of Iowa. *****

I. Iowa Rule of Evidence 5.404 (b)

Rule 5.404 Character evidence not admissible to prove conduct; exceptions; other crimes.

b. *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Note: The Iowa Rules of Evidence were enacted by 1983 Iowa Acts, ch. 219. Prior to 1983, the Court employed the same or similar analysis in the cases.

A. Sexual abuse

1. State v. Trusty, 122 Iowa 82, 97 N.W. 989 (1904) (same victim; affirmed)
2. State v. Crouch, 130 Iowa 478, 107 N.W. 173 (1906) (same victim; affirmed)
3. State v. Neubauer, 145 Iowa 337, 124 N.W. 312 (1910) (same victim; affirmed)
4. State v. Kinkade, 241 Iowa 1259, 43 N.W.2d 736 (1950) (same victim; affirmed)
5. State v. Rankin, 181 N.W.2d 169 (Iowa 1970) (same victim; affirmed)
6. State v. Maestas, 224 N.W.2d 248 (Iowa 1974) (different victims; affirmed)
*** Victim's sisters testified that defendant (their father) had similarly abused them 6-10 years prior. Court held that the facts, particularly the intrafamilial nature, compelled the conclusion the prior acts were not too remote. The testimony had strong probative force establishing defendant's lewd disposition and common scheme to exploit his daughters.
7. State v. Folkens, 281 N.W.2d 1 (Iowa 1979) (same victim; affirmed)
8. State v. Cott, 283 N.W.2d 324 (Iowa 1979) (different victim; admitted to prove identity of defendant; affirmed)
*** This case has good discussion regarding the history of the admissibility of evidence for the purpose of showing the "lewd disposition" of the defendant.
9. State v. Spaulding, 313 N.W.2d 878 (Iowa 1981) (same & different victims; affirmed)
*** Victim testified to other acts. Court held the testimony of victim was important in the view of the defense that she dreamed the act. Victim's sister was allowed to testify to acts occurring between the two charged offenses. Court held the sister's testimony showed the common circumstances of the acts. The evidence gave considerable credence to victim's story and contradicted defendant's claim that victim dreamed the

occurrence.

10. State v. Munz, 355 N.W.2d 576 (Iowa 1984) (same victim; affirmed)

11. State v. Spargo, 364 N.W.2d 203 (Iowa 1985) (different victims; affirmed)

*** Testimony was admitted to show intent. Clear proof does not require the commission of prior acts to be established beyond a reasonable doubt. The purpose of the rule is to prevent the jury from engaging in speculation or drawing inferences based on mere suspicion.

12. State v. Tharp, 372 N.W.2d 280, 281 (Iowa Ct. App. 1985) (same victim; admissibility consistent with Rule 404(b); affirmed).

13. State v. Plaster, 424 N.W.2d 226 (Iowa 1988) (different victim; affirmed)

*** Allowed evidence of defendant's prior sex act with a person other than the victim as relevant toward establishing the victim's lack of consent. In the later case of State v. Mitchell, noted below, the Court stated that "the future applicability of Plaster in a factual situation similar to the one in that case now remains an open question." State v. Mitchell, 633 N.W.2d 295, 299 (2001). However, the Court recently cited Plaster with approval in State v. Elston, 735 N.W.2d 196 (Iowa 2007) with no mention of Mitchell.

14. State v. Seevanhsa, 495 N.W.2d 354, 358 (Iowa Ct. App. 1992) (same victim; affirmed)

15. State v. Schaffer, 524 N.W.2d 453 (Iowa Ct. App. 1992) (different victim; affirmed)

*** Evidence of defendant's abuse of different victim held not relevant to prove defendant's common plan, scheme, design, and motive to commit sexual abuse against present victim, but error did not prejudice defendant to require reversal.

16. State v. Query, 594 N.W.2d 438 (Iowa Ct. App. 1999) (same victim; affirmed)

*** Prior acts consisted of showering with victim, defendant was sometimes nude around family members, and he was a very controlling person. Court found the challenged evidence made the inference of intent more probable than it would be without the evidence.

17. State v. Castaneda, 621 N.W.2d 435 (Iowa 2001) (Sex acts with one other than the victim; reversed)

*** Error to admit testimony that former wife performed sex acts on defendant while he was observing children.

18. State v. Mitchell, 633 N.W.2d 295 (Iowa 2001) (different victims; reversed)

*** Testimony from two other girls "spoke to no legitimate fact besides Mitchell's propensity to abuse young girls."

B. Offenses other than sexual abuse

1. State v. Rodriguez, 636 N.W.2d 234 (Iowa 2001) (same victim; affirmed)
*** Relevant to show intent in domestic abuse case.
2. State v. White, 668 N.W.2d 850 (Iowa 2003) (same victim; affirmed)
*** Relevant to show specific intent in first-degree kidnapping and first-degree burglary case.
3. State v. Taylor, 689 N.W.2d 116 (Iowa 2004) (same victim; affirmed)
*** Upheld the use of prior bad acts evidence by the defendant (husband) against the victim (wife), in proving his intent when he forcibly removed her from a vehicle through a window that he broke. The Court found the prior acts relevant as reflecting an emotional relationship between the defendant and the victim and is highly probative of the defendant's probable motivation and intent in subsequent situations.
4. State v. Sullivan, 679 N.W.2d 19 (Iowa 2004) (Prior possession with intent conviction; reversed)
*** This case has a good discussion of prior bad acts case law.

In general, the Court often allows the use of prior bad acts evidence in domestic abuse cases, while frequently disapproving of the use of 404(b) evidence in drug cases. See State v. Sullivan, id., and State v. Henderson, 696 N.W.2d 5,10-13 (Iowa 2005).

II. Iowa Code Section 701.11

701.11 Evidence of similar offenses - Sexual Abuse

1. In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence 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. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.
2. If the prosecution intends to offer evidence pursuant to this section, the prosecution shall disclose such evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, ten days prior to the scheduled date of trial. The court may for good cause shown permit disclosure less than ten days prior to the scheduled date of trial.

3. For purposes of this section, “sexual abuse” means any commission of or conviction for a crime defined in chapter 709. “Sexual abuse” also means any commission of or conviction for a crime in another jurisdiction under a statute that is substantially similar to any crime defined in chapter 709.

2003 Iowa Acts, ch. 132 § 1

A. Applicability

1. Evidentiary rulings are governed by the law as it exists at the time of trial. See State ex rel Buechler v. Visand, 318 N.W.2d 208, 210 (Iowa 1982).

2. The Iowa legislature’s enactment of Iowa Code section 701.11 supercedes Iowa Rule of Evidence 5.404(b) in sexual abuse cases. Iowa Code § 602.4202.

B. State v. Reyes, 744 N.W.2d 95 (Iowa 2008)

Factual Background: Defendant’s 12-year-old niece, AG, alleged he had sexual intercourse with her at her grandparents’ home in Council Bluffs in 2003. AG did not tell anyone of the alleged abuse until approximately one year later. Prior to trial, defense counsel moved to exclude testimony from AG that Reyes had previously sexually abused her. The oral motion was made pursuant to Iowa Rule of Evidence 5.404(b). The State argued the prior bad acts evidence was being offered to show “pattern.” The district court ruled the evidence was admissible.

During the trial, AG testified regarding the previous assault. She asserted this assault occurred in Lincoln, Nebraska, more than a year prior to the charged assault in Iowa. AG admitted she had not told anyone of her allegations, including the police, when specifically asked about any prior incidents.

Prior to the submission of the case, the court instructed the jury regarding the proper use of the prior sexual abuse. The instruction was identical to Iowa Criminal Jury Instruction 900.11

Procedural Background: The case was transferred to the Court of Appeals, which held the prior sexual assault was properly admitted under Iowa Rule of Evidence 5.404(b). The Iowa Supreme Court granted Reyes’ application for further review. The Court granted oral argument and the case was submitted.

After submission, the Court requested supplemental briefing. Specifically, the Court directed the parties to brief the issues (1) Whether the Court may consider the admissibility of the challenged evidence under Iowa Code section 701.11(1) pursuant to the error preservation exception for evidentiary matters discussed in DeVoss v. State, 648 N.W.2d 56 (Iowa 2002), notwithstanding the State’s failure to rely on this statute at trial and in its appellate brief; and (2) Whether, aside from the failure to preserve error,

there is any other reason, in law or in fact, why Iowa Code section 701.11(1) is not a basis for the admission of the challenged evidence in this case.

Holdings:

(1) Procedural: The Court concluded any inadequate notice required under Iowa Code section 701.11(2) was not shown to be prejudicial to Reyes. The Court concluded, “In light of this lack of prejudice, there is little reason to require a retrial if the prior bad acts evidence, though arguably not admissible under Iowa Rule of Evidence 5.404(b), is admissible on retrial under Iowa Code section 701.11.” The real issue, the Court stated, is not what kind of notice occurred at trial, but instead it is whether the State could meet the statutorily established notice requirements should there be a retrial. The Court determined that clearly at a putative retrial, the State would meet the ten-day notice requirement.

The Court further rejected Reyes’ contention the district court did not engage in balancing the probative value of the evidence against the prejudice to the defendant. The Court ruled the evidence would be admissible under Iowa Code section 701.11(1). The evidence elicited regarding the prior assault was concise, direct, and noninflammatory, and of a nature similar to that in the underlying charge. Thus, it was not subject to exclusion under section 701.11(1) on the grounds its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

The Court ruled that direct testimony from the victim of a prior alleged assault, as a matter of law, is sufficient clear proof to meet the code requirement.

(2) Due Process Challenge to the Constitutionality of Iowa Code section 701.11: The United States Supreme Court has left open the question whether a state law permitting admission of propensity evidence violates due process under the United States Constitution. Federal courts have generally upheld the admission of propensity evidence under Federal Rules of Evidence 413 and 414. When evaluating the constitutionality of rules of evidence, the traditional approach has been to invalidate the rule only if it “violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ which define ‘the community’s sense of fair play and decency.’”

The Iowa Supreme Court reviewed the historical practice, a relevant factor in determining the above standard. The Court stated that in Iowa, the approach to the admissibility of prior acts of sexual abuse has evolved over time. The Court concluded that Iowa case law demonstrates the rule announced in Iowa Code section 701.11, to the extent it applies to prior sexual abuse of the same victim, conforms to historical practice.

The Court stated:

The existence of prior sexual abuse involving the same alleged perpetrator and victim, however, has relevance on the underlying criminal charge because it shows the nature of the relationship between the alleged perpetrator and the victim. Further, the potential of undue prejudice where prior sexual abuse evidence is admitted in cases involving the same alleged perpetrator and victim is far less than in cases where the prior bad acts involve other alleged victims. We hold that a defendant's fundamental right to a fair trial is not jeopardized by the admission of such evidence.

State v. Reyes, 744 N.W.2d at 102.

In a footnote, the Court expressed "no view" regarding the constitutionality of Iowa Code section 701.11 where the prior acts of sexual abuse involve persons other than the current alleged victim. Id.

The Court further stated:

We hold that in this case, admission of prior sexual abuse involving the same victim does not amount to a constitutional violation of due process. The evidence was thus not offered to show a *general propensity* to be attracted sexually to young girls, but instead to demonstrate the nature of the defendant's relationship and feelings toward a *specific* individual.

* * *

The admission of the evidence of prior acts of sexual abuse involving the same alleged perpetrator and alleged victim is therefore consistent with Iowa Code section 701.11 and with the due process guarantee under the Iowa constitution.

Id. at 103 (emphasis in original).

C. Uniform Jury Instruction – Prior Sexual Conduct

900.11 Evidence Of Similar Acts. *You have heard evidence that the defendant allegedly committed other acts with (victim) [before] [after] (date of offense charged). If you decide the defendant committed these other acts, you may consider those acts only to determine whether the defendant has a sexual passion or desire for (victim). You may not consider them as proving that the defendant actually committed the act charged in this case.*

In Reyes, the Court concluded that trial counsel was not ineffective in failing to object to the submission of the uniform instruction. The Court noted that “while the phrasing could have been more elaborate,” the instruction was “generally accurate.” State v. Reyes, 744 N.W.2d at 103.

D. Other cases applying Iowa Code section 701.11

1. State v. Green, No. 04-0339, 2005 WL 1629993 (Iowa Ct. App. July 13, 2005) (different victim; affirmed)
2. State v. Roby, No. 05-0630, 2006 WL 2706124 (Iowa Ct. App. Sept. 21, 2006) (same victim; affirmed)
3. State v. Davis, No. 06-1496, 2007 WL 4553477 (Iowa Ct. App. Dec. 12, 2007) (same victim; affirmed)
4. State v. Paulson, No. 06-0141, 2007 WL 461323 (Iowa Ct. App. Feb. 14, 2007) (different victim; affirmed)
5. State v. Puffingbarger, No. 06-0779, 2008 WL 508404 (Iowa Ct. App. Feb. 27, 2008) (same victim; affirmed)
6. State v. Mosley, No. 07-0138, 2008 WL 373628 (Iowa Ct. App. Feb. 13, 2008) (testimony from different “victim” was not admissible under Iowa R. Evid. 5.404(b) or § 701.11; reversed).

E. Federal cases of interest

Iowa Code § 701.11 mirrors Federal Rule of Evidence 413 (“Evidence of Similar Crimes in Sexual Assault Cases”) and Rule 414 (“Evidence of Similar Crimes in Child Molestation Cases”)

1. United States v. Mound, 149 F.3d 799 (8th Cir. 1998) (rejecting equal protection challenge to Rule 413).
2. United States v. Castillo, 140 F.3d 874 (10th Cir. 1998) (rejecting equal protection challenge to Rule 414)
3. United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998) (subject to Rule 403, Rule 413 does not violate Due Process).
4. United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998) (court upheld exclusion of testimony of other victims in a case against a doctor where patient alleged he sexually abused them doing gynecological exams.)
5. United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (admission of evidence

that defendant had previously molested his stepdaughters (not current victims) was not an abuse of discretion.)

6. United States v. Carter, 410 F.3d 1017 (11th Cir. 2005) (no abuse of discretion in admitting testimony of 3 witnesses other than complaining witness about sexual offenses defendant allegedly committed against them.)

7. United States v. Julian, 427 F.3d 471 (7th Cir. 2005) (no abuse of discretion in admitting evidence of defendant's prior conviction for sexually assaulting his 11- year- old stepson.)

F. California cases of interest

California, along with other states, has expanded the rule or statute to include other offenses. See California Evidence Code § 1109 (domestic abuse, dependent/elder abuse, and child abuse)

1. People v. Falsetta, 986 P.2d 182, 194 (Cal. 1999) (statute that permits admission of prior sexual offenses as propensity evidence in sex crimes prosecution does not violate due process.)

2. People v. James, 96 Cal.Rptr.2d 823 (Cal. Ct. App. 2000) (prosecution's burden was unconstitutionally reduced by instructions regarding prior offenses admitted as propensity evidence, but the instructional error was harmless.)

*** Both cases are helpful regarding jury instructions.