

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 1042

(Senators Brochin and Stone)

Judicial Proceedings

Evidence - Separate Act of Sexual Misconduct Involving a Minor - Admissibility

This bill allows evidence of prior acts of sexual misconduct involving a minor to be admitted into evidence in the trial of a defendant charged with an act of sexual misconduct involving a minor if the court finds, or if a reasonable jury could find by clear and convincing evidence that the defendant committed the separate act, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice against the defendant, and certain other conditions are met.

The bill applies prospectively to a prosecution commenced on or after the bill's October 1, 2010 effective date.

Fiscal Summary

State Effect: None. The bill is procedural in nature and is not expected to materially affect State finances.

Local Effect: None. The bill is procedural in nature and is not expected to materially affect local finances.

Small Business Effect: None.

Analysis

Bill Summary: The State's Attorney must disclose the evidence sought to be admitted to the defendant at least 15 days prior to trial, unless the court makes an exception for good cause. The evidence may not be referred to in a statement to a jury or introduced in a trial unless the court has held a closed hearing and found it to be admissible.

“Act of sexual misconduct involving a minor” means sexual abuse of a minor and any other sexual offense in which the victim is a minor, including first and second degree rape; a first, second, third, or fourth degree sexual offense; attempted first or second degree rape or an attempted first or second degree sexual offense; sexual conduct between a correctional or Department of Juvenile Justice employee and an inmate or confined child; continuing course of conduct with a child; unnatural or perverted sexual practice; sodomy; and incest.

Current Law: The Maryland Rules generally follow the Federal Rules of Evidence (FRE). Maryland Rule 5-404(b), which is identical to FRE 404(b), excludes from trial evidence of a defendant’s prior crimes, wrongs, or acts, where this evidence is offered to show action that conforms to these prior actions. Such evidence is admissible only for the limited purpose of showing motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Background: The common law “propensity rule,” which dates back to the seventeenth century, prohibits the use of character evidence to show a person’s propensity to act in accordance with his or her character traits or prior acts. Its proponents reason that the rule is necessary to ensure that a defendant receives a fair trial because, if the evidence is admitted, juries may overvalue the probative force of the prior conduct or may punish for a prior act rather than for the charged crime. There is substantial support in Maryland case law for the propensity rule. See, e.g., *Behrel v. State*, 151 Md.App. 64 (2003); *Weiland v. State*, 101 Md. App. 1 (1994); *Acuna v. Maryland*, 332 Md. 65 (1993).

However, Maryland courts have also accepted a “sexual propensity” exception to the general rule against admission of evidence of prior bad acts when a defendant is being prosecuted for a sexual crime and “...the prior illicit sexual acts [of the defendant] are similar to the offense for which the accused is being tried and involve the same victim.” *Vogel v. State*, 315 Md. 458, 466, 554 A.2d 1231, 1234 (1989). See also *State v. Westpoint*, 404 Md. 455, 947 A.2d 519 (2009) (evidence of defendant’s prior bad acts which resulted in defendant being convicted of third degree sexual offense were admissible under the sexual propensity exception to Rule 5-404(b) since the acts were similar and the victim was the same).

This bill is based on FRE 413 and 414, which were included in the federal Violent Crime Control and Law Enforcement Act of 1994. Rule 413 admits evidence of similar crimes in sexual assault cases, while Rule 414 covers child molestation actions.

State Fiscal Effect: The Office of the Public Defender (OPD) advises that the increased OPD workload as a result of the bill will require the office to hire 2.7 additional attorney positions, at an estimated cost of \$193,900 in fiscal 2011. This estimate is based on the following assumptions: (1) 20% of the 1,850 sex offense cases OPD handled in 2009

would be affected by this bill; (2) each closed evidentiary hearing would require 10 additional hours of case preparation; (3) each assistant public defender spends 1,378 hours per year on case-related tasks (base on the Case Weighting Study by the National Center for State Courts); and (4) caseloads remain consistent.

Legislative Services disagrees with this estimate. The bill only applies to evidence of a separate act of sexual misconduct involving a *minor*, which would limit the number of applicable OPD cases. Also, any such evidentiary hearing is in addition to any other evidentiary or procedural hearing that may take place in the normal course of a trial – case-related tasks already covered in OPD’s normal course of business.

Additional Information

Prior Introductions: SB 159 of 2006 passed the Senate with amendments but received an unfavorable report from the House Judiciary Committee. HB 401 of 2004, an identical bill to SB 159 as introduced, received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Office of the Public Defender, Department of Legislative Services

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mam/kdm

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