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## §4.35 Evidence of Similar Offenses in Sexual Assault and Child Molestation Cases

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### **§4.35 Evidence of Similar Offenses in Sexual Assault and Child Molestation Cases**

New Rules enacted by Congress in 1994 mark a significant erosion in the long-established doctrine prohibiting the use of character evidence against a defendant in a criminal case.<sup>1</sup> Under FRE 413, evidence of the defendant's commission of another offense of sexual assault is now admissible in a criminal case where the defendant is accused of sexual assault. FRE 414 similarly allows evidence of the defendant's commission of a prior offense of child molestation in a case where the defendant is accused of child molestation.<sup>2</sup> FRE 415, which is discussed in the following section, provides that such evidence is also admissible in civil cases for damages or other relief predicated on a party's commission of an offense of sexual assault or child molestation.

#### **Any relevant purpose**

These Rules provide that evidence of the earlier offense may be considered “on any matter to which it is relevant.” Thus evidence may be admitted under these Rules to show the defendant's propensity toward committing such offenses. Such use of character evidence conflicts with the policy of FRE 404(a)(1), which generally prohibits the use of character evidence “to prove that on a particular occasion the person acted in accordance with the character or trait.”<sup>3</sup> Such use also extends beyond FRE 404(b), which permits evidence of prior offenses only to prove narrow points such as the actor's motive, intent, or plan but not to prove his character in order to show action in conformity therewith. FRE 413-415 thus amount to an implicit amendment of FRE 404.<sup>4</sup>

#### **Strong opposition**

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**§4.35** 1. FRE 413-415 were enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.

2. It was probably unnecessary to enact FRE 413 and FRE 414 as separate rules, given that they accomplish essentially the same purpose. Moreover, there is overlap between them with respect to the offenses covered. Some acts of sexual assault as defined under FRE 413(d) qualify as acts of child molestation under FRE 414(d) if committed against a child under the age of 14.

3. *See* *United States v. Schaffer*, 851 F.3d 166, 176-177 (2d Cir. 2017) (FRE 413 lets prosecutor “show that a defendant has a pattern or propensity for committing sexual assault”) (rejecting constitutional challenge because trial court can exclude under FRE 403).

4. This point was clearly recognized by the Judicial Conference, which in submitting an alternative version of FRE 413-415 to Congress drafted it as a new exception to FRE 404(a). *See* 159 F.R.D. 51 (1995).

FRE 413-415 provoked strong opposition from the Judicial Conference,<sup>5</sup> the organized bar,<sup>6</sup> and the academic community,<sup>7</sup> although there has also been approving commentary.<sup>8</sup> A primary concern is that the new Rules may encourage juries to judge a defendant on the basis of his past behavior rather than the evidence against him in the current case, thereby undermining the presumption of innocence and depriving him of a fair trial.<sup>9</sup> Although such prosecutions understandably draw public compassion and concern, critics of the new Rules contend that Congress acted without a sufficient showing of empirical evidence that a defendant's past conduct has higher probative value in these types of prosecutions than in other prosecutions where such evidence is not allowed.<sup>10</sup> Many also contend that FRE 404(b) already provides an adequate basis for admitting prior crimes evidence in those cases where it is most needed, such as to establish motive, intent, preparation, plan, absence of mistake, and similar points.<sup>11</sup> Certainly it cannot be argued that evidence that a defendant has committed prior sexual assaults or child molestations has *less* prejudicial effect than evidence of other misconduct. It is likely to provoke substantially *more* jury antipathy against the defendant than other types of misbehavior. Some critics have objected that it is unfair to open the door to evidence bearing on the past sexual behavior of the

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5. Pursuant to a unique proviso sending FRE 413-415 to the Judicial Conference for review prior to its effective date, the Judicial Conference proposed an alternative rule (which Congress did not adopt) and urged Congress to reconsider FRE 413-415, noting the "highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers and academicians" in opposing the proposed rules. *Id.*

6. In February 1995 the ABA House of Delegates adopted a resolution opposing FRE 413-415.

7. *See, e.g.*, Duane, The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea, 157 F.R.D. 95 (1994); Sheft, Federal Rule of Evidence 413: A Dangerous New Frontier, 33 Am. Crim. L. Rev. 57 (1995).

8. Park, The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases, 22 Fordham Urb. L.J. 271 (1994) (supporting FRE 413-415 in sex crime prosecutions where a consent defense is asserted); Danna, The New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense?, 41 St. Louis U. L.J. 277 (1996). *See also* Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Chi.-Kent L. Rev. 15 (1994) (statement by principal draftsman of FRE 413-415 that has been incorporated as part of legislative history of Rules—*see* 140 Cong. Rec. H8991-92 (Aug. 21, 1994)).

9. Sheft, Federal Rule of Evidence 413: A Dangerous New Frontier, 33 Am. Crim. L. Rev. 57, 74 (1995) (evidence of prior offenses may dilute "beyond reasonable doubt" standard by lowering jurors' regret threshold about a wrongful conviction).

10. Recidivism rates vary greatly depending on the type of sexual crime, and many crimes of a nonsexual nature have even higher recidivism rates. *See* E. Imwinkelried, Uncharged Misconduct Evidence §4.16 (2002 cumulative supplement).

11. *See* §§4.15-4.18, *supra*.

defendant when the complainant's sexual history is shielded by FRE 412.<sup>12</sup> Many states, although fewer than a majority, have adopted similar rules or statutes.<sup>13</sup>

One point of initial uncertainty was whether evidence admissible under FRE 413-415 could be excluded under FRE 403 in cases where its probative value was substantially outweighed by the dangers of unfair prejudice, jury confusion, or undue consumption of time. The legislative history makes clear that FRE 403 was intended to apply,<sup>14</sup> and courts construing FRE 413-415 have uniformly held that their authority to exclude under FRE 403 has not been preempted.<sup>15</sup> Some courts have gone so far as to hold that if FRE 403 did not apply they would be required to declare the new Rules unconstitutional.<sup>16</sup>

In conducting the balancing required by FRE 403, courts should consider the following factors:

(1) *Similarity to charged offense.* A salient factor in assessing probative worth is the extent to which prior incidents are similar to the charged offense. What counts is not only the physical nature of the offense, but any relationship between the victims and the defendant and the strategy followed by the defendant in committing the offenses. The greater the similarity, the stronger the claim of relevance.<sup>17</sup>

(2) *Specificity of the inference.* If the prior offense tends to support a specific inference, such as knowledge, plan, modus operandi, or absence of accident, it may be admissible under FRE 404(b).

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12. *But see* Bryden & Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529 (1994) (supporting FRE 413-415 in "date rape" prosecutions and rejecting argument that FRE 413 and FRE 412 are in conflict because commission of prior sexual crimes by a defendant generally has more probative value than evidence that an alleged victim has previously consented to sexual relations with others).

13. *See* Bryan C. Hathorn, Federal Rules of Evidence 413, 414, and 415: Fifteen Years of Hindsight and Where the Law Should Go from Here, 7 Tenn. J.L. & Poly. 21, 69 (2014) (citing similar provisions in Alaska, Arizona, California, Colorado, Illinois, Iowa, Louisiana, Michigan, Nebraska, Oklahoma, Tennessee, Texas, Utah, and Washington, and a pending enactment in Kansas).

14. *See, e.g.,* 140 Cong. Rec. H5438 (June 29, 1994) (remarks of Representative Kyl (Ariz.) that courts retain "total discretion to exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice"); 140 Cong. Rec. H8991-92 (Aug. 21, 1994) (FRE 403 "will continue to apply").

15. *Johnson v. Elk Lake School Dist.*, 283 F.3d 138, 152-153 (3d Cir. 2002) (evidence satisfying FRE 413 or 415 may still be excluded under FRE 403 if probative value is substantially outweighed by danger of unfair prejudice); *United States v. Velarde*, 214 F.3d 1204, 1212 (10th Cir. 2000) (error not to balance under FRE 403).

16. *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) ("without the safeguards embodied in Rule 403 we would hold the rule [FRE 413] unconstitutional"); *United States v. Castillo*, 140 F.3d 874, 882 (10th Cir. 1998) ("most significant factor favoring Rule 414's constitutionality" is procedural protections of Rule 403).

17. *United States v. Willis*, 826 F.3d 1265 (10th Cir. 2016) (admitting prior acts of sexual abuse, and stressing that they were "quite similar" to charged offense); *United States v. Rodriguez*, 581 F.3d 775, 794 (8th Cir. 2009) (FRE 413 paves the way to prove "relevant" prior sexual assaults, which means one "committed in a manner similar to the charged offense").

When evidence of a prior offense satisfies FRE 404(b), it is likely to be admissible under the more generalized requirements of FRE 413-415 as well.<sup>18</sup>

(3) *Wrongfulness and emotional impact of the act.* The most important single factor bearing on prejudice is the degree to which evidence of the prior offense is likely to have an unfair emotional impact on the jury.<sup>19</sup> Sexual offenses vary in the degree to which they trigger emotional responses and the degree to which they distract juries from more particular evidence or tempt juries to punish the defendant for the past conduct or for simply being a bad person. When the prior offense was particularly egregious, such as where it involved violence, humiliation, or serious physical or psychological injuries, the incident is more likely to be shocking and explosive, and these factors weigh more heavily in the calculus.<sup>20</sup> Such evidence may make it hard for the jury to maintain its commitment to the presumption of innocence and the requirement of proof beyond a reasonable doubt.

(4) *Proximity in time and intervening circumstances.* Although FRE 413-415 do not contain any particular time limitations,<sup>21</sup> the time elapsed between the prior conduct and the charged offense bears on its probative worth.<sup>22</sup> Probative value is less if the earlier incident appears to be a remote and isolated event. On the other hand, intervening circumstances, such as commission by the defendant of additional offenses of the same nature, may increase the probative value of an earlier crime. Offenses committed *subsequent* to the charged crime are admissible under these Rules,<sup>23</sup>

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18. *United States v. Lewis*, 796 F.3d 543, 547-548 (5th Cir. 2015) (admitting proof that defendant had sex with other underage girls, to show modus operandi; every victim was a member of choir group; the proof showed how he gained access; victims were all about the same age, and acts were the same).

19. However, the sole fact that the evidence will be considered for a propensity purpose is not necessarily “unfair” prejudice because that is the purpose of the Rule. *See United States v. Benais*, 460 F.3d 1059, 1063 (8th Cir. 2006) (FRE 403 must be applied in a manner that permits FRE 413 and 414 to have their “intended effect,” which is to let jury “consider a defendant’s prior bad acts” on issue of propensity).

20. *United States v. Peters*, 133 F.3d 933 (10th Cir. 1998) (evidence excluded of victim’s physical injuries); *People v. Harris*, 60 Cal. App. 4th 727, 70 Cal. Rptr. 2d 689, 697 (3d Dist. 1998) (error to admit evidence of prior rape; graphic evidence was inflammatory and circumstances differed from charged offense; applying state statute similar to FRE 413).

21. *United States v. Velarde*, 214 F.3d 1204, 1212 (10th Cir. 2000) (admitting evidence of child molestation 20 years earlier); *United States v. Larson*, 112 F.3d 600, 605 (2d Cir. 1997) (admitting prior sexual molestation of others 16-20 years earlier since they were committed under similar circumstances).

22. *United States v. Julian*, 427 F.3d 471 (7th Cir. 2005) (date of prior offense is a proper factor for court to consider); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258 (9th Cir. 2000) (no error in excluding evidence of prior sexual misconduct when there was significant time lapse between that event and charged offense and no evidence of sexual misconduct in the interim, and circumstances were not similar; applying FRE 415).

23. *United States v. Sioux*, 362 F.3d 1241, 1244-1247 (9th Cir. 2004) (FRE 413 “unambiguously allows for the admission of subsequent acts” as well as prior acts).

just as they are under FRE 404(b).<sup>24</sup>

(5) *Certainty that prior offense occurred.* FRE 413-415 do not require that the prior offense has resulted in a conviction.<sup>25</sup> Nonetheless, a judgment of conviction has higher probative value and can be more efficiently proven at trial. Proving prior offenses not resulting in a conviction can lead to trials within trials that are peculiarly distracting. Proving the prior offense may take as much time as proving the charged offense itself, at least where defendant contests the issue. It can be unfairly burdensome to a defendant to defend against the charged crime and at the same time against allegations of past offenses that have never been prosecuted and perhaps never even previously reported. Jurors may be distracted and confused about the basis upon which they are to judge the defendant. If the jury concludes that he committed a prior uncharged offense, this fact may actually be more prejudicial than evidence of a prior conviction, which at least suggests he has paid his debt to society. If the defendant was not convicted of his earlier offense, the jury may be more inclined to punish him for the prior acts regardless of what it thinks about the charged offense.

### **Balancing factors**

(6) *Possibility of minimizing prejudice.* The decision whether to admit proof of prior sexual assaults should take into account the possibility of controlling and minimizing the risk of prejudice. It is appropriate to limit the number of offenses than can be proved, and particularly to limit the details that can be proved, particularly where shocking or heinous elements are not themselves important and can safely be omitted from accounts of prior offenses without undermining probative worth.<sup>26</sup> Courts sometimes require prior offenses to be proved without inviting emotionally charged testimony by victims.<sup>27</sup> It may also be possible to accept defense stipulations that the prior offenses occurred, although courts are not required to do so.

(7) *Other factors.* Other factors that count are the degree to which the point to be proved is important, whether it is contested, and the availability of other less prejudicial forms of proof.<sup>28</sup>

While courts should not give FRE 413-415 an overly narrow construction, one court has

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24. See §4.15, *supra*.

25. *United States v. Guidry*, 456 F.3d 493, 502-503 n.4 (5th Cir. 2006) (prior sexual misconduct need not have led to conviction because “crime” and “offense” in FRE 413 merely describe “harm that may be punishable by law”).

26. *United States v. Peters*, 133 F.3d 933 (10th Cir. 1998) (noting that potential prejudice was reduced by “excluding details that would most likely inflame a jury, such as information about a victim’s physical injuries”); *United States v. McHorse*, 179 F.3d 889, 894-899 (10th Cir. 1999) (excluding evidence relating to abuse of half-sister of accused on ground that it was too dissimilar, remote, and potentially confusing).

27. *United States v. Granbois*, 119 Fed. Appx. 35, 38 (9th Cir. 2004) (noting that prior acts were not proved by “emotional and highly charged testimony” of victim or her relative, but by testimony of criminal investigator).

28. *People v. Falsetta*, 986 P.2d 182, 190 (Cal. 1999) (consider “availability of less prejudicial alternatives,” and excluding “inflammatory details”).

observed that there is no language in the Rules “that supports an especially lenient application of FRE 403.”<sup>29</sup>

### **Other rules apply**

Other evidentiary rules, such as the restrictions of the hearsay doctrine, privileges, authentication and best evidence requirements, as well as the opinion and expert testimony rules, continue to apply to proof of prior offenses under FRE 413-415.<sup>30</sup>

### **Roles of judge and jury**

The evidence must be sufficient to support a finding by a preponderance of the commission of a qualifying criminal offense under the law of the jurisdiction where the prior conduct occurred, and a preliminary hearing on this matter may be required.<sup>31</sup> Whether such a criminal offense exists in that jurisdiction and whether the proffered evidence, if believed, would satisfy the elements of such an offense are questions for the court. As under FRE 404(b), courts generally assign to the jury under FRE 104(b) the ultimate question of whether the prior offense was in fact committed and require only evidence sufficient to support a jury finding by a preponderance.<sup>32</sup> But since evidence under FRE 413-415 is admitted to show a defendant’s propensity (which FRE 404(b) expressly forbids), more safeguards are arguably needed and the determination should be one for the court under FRE 104(a).

Notice must be given to the defendant at least 15 days prior to trial (unless a later time is allowed for good cause) of evidence that is expected to be offered under these Rules, including witness statements or a summary of the substance of any testimony.<sup>33</sup>

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29. *United States v. Guardia*, 135 F.3d 1326, 1331 (10th Cir. 1998) (trial court “should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice”; in applying FRE 403 to FRE 413 evidence, it is particularly important that the court “make a clear record of the reasoning behind its findings”).

30. *See* 140 Cong. Rec. H8991-92 (Aug. 21, 1994) (general standards of rules of evidence, including hearsay doctrine, continue to apply to FRE 413-415).

31. *United States v. Enjady*, 134 F.3d 1427, 1434 (10th Cir. 1998) (trial court should ensure “that jury does not hear evidence of similar acts that likely did not occur”; failure to hold hearing could be abuse of discretion, but not here; alleged victim had filed a contemporaneous police report).

32. *See, e.g., United States v. Norris*, 428 F.3d 907, 913-914 (9th Cir. 2005) (under FRE 413-415, trial court need not make preliminary determination that defendant committed prior act; court examines the evidence and decides whether jury could reasonably find that fact by a preponderance). *See also Huddleston v. United States*, 485 U.S. 681 (1988) (under FRE 404(b), whether prior crime committed is FRE 104(b) question for jury), discussed in §4.15, *supra*.

33. *United States v. Guidry*, 456 F.3d 493, 504 (5th Cir. 2006) (good cause shown where evidence of prior sexual assault not discovered until after trial began and defendant was given time to challenge it). *Cf. Johnson v. Elk Lake School Dist.*, 283 F.3d 138, 152-153 (3d Cir. 2002) (under FRE 415, plaintiff did not need to provide notice of intent to offer evidence of similar sexual assaults where defense counsel was present at deposition of witness who was

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proffered to testify about alleged prior assault).