

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 933

(Senator Cassilly)

Judicial Proceedings

Courts - Evidence of Prior Sexual Offense - Admissibility

This bill prohibits a court from barring the introduction of otherwise admissible evidence that a defendant committed a prior “sexual offense” in a prosecution of the defendant for a sexual offense. The court may not bar the introduction of this evidence on the ground that the evidence is unfairly prejudicial unless the court makes a specific finding on the record describing the reasons the evidence would be unfairly prejudicial. A State’s Attorney may not introduce this evidence unless the evidence has been disclosed to the defendant at least 30 days before the trial or at a later time if authorized by the court for good cause shown. The bill also establishes procedural requirements for the disclosure of this evidence to a jury or introduction of this evidence at trial.

“Sexual offense” means an act that would constitute a violation of (1) Title 3, Subtitle 3 or § 3-602 of the Criminal Law Article; (2) 18 U.S.C. Chapter 109A (federal sexual abuse crimes); (3) sexual abuse of a vulnerable adult; or (4) a law of another state, the United States, or a foreign country that is equivalent to any of the aforementioned offenses.

The bill’s provisions do not limit the admission or consideration of evidence under any Maryland Rule or other provision of law.

Fiscal Summary

State Effect: The bill is procedural and does not materially affect State finances.

Local Effect: The bill is procedural and does not materially affect local finances.

Small Business Effect: None.

Analysis

Bill Summary: Evidence of a defendant's prior commission of a sexual offense may not be disclosed to a jury or introduced at trial unless the court has first held a closed hearing and determined that (1) the evidence of a prior sexual offense was proven by clear and convincing evidence; (2) the court has used the balancing test required under Maryland Rule 5-403; and (3) the court has considered the similarity between the prior sexual offense and the sexual offense for which the defendant is on trial, the closeness in time of the prior sexual offense and the sexual offense for which the defendant is on trial, the presence or lack of intervening events between the prior sexual offense and the sexual offense for which the defendant is on trial, the need for the evidence, and any other factor the court deems relevant. At the conclusion of this evidentiary hearing, the court must state the reasons for its decision on the record in open court outside the presence of the jury.

Current Law: Title 3, Subtitle 3 and § 3-602 of the Criminal Law Article contain the following offenses: (1) sexual abuse of a minor; (2) first- and second-degree rape; (3) first-, second-, third-, and fourth-degree sexual offense; (4) first- and second-degree attempted rape; (5) attempted first- and second-degree sexual offense; (6) continuing course of conduct with a child; (7) sexual contact between a Department of Juvenile Services employee and an individual confined in a child care institution; (8) sodomy; (9) unnatural or perverted sexual practice; (10) incest; and (11) sexual solicitation of a minor.

The Maryland Rules generally follow the Federal Rules of Evidence (FRE). Generally, evidence of a person's character or character trait is not admissible to prove that a person acted in accordance with the character trait on a particular occasion. Under Maryland Rule 404(b), which is identical to FRE 404(b), the evidence of a defendant's other crimes, wrongs, or acts is not admissible when the evidence is offered to show action that conforms to those 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.

Except as otherwise specified, all relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Although relevant, evidence may be excluded under Maryland Rule 5-403 if its probative value 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.

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 (1989). See also *State v. Westpoint*, 404 Md. 455 (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 Maryland Rule 5-404(b) since the acts were similar and the victim was the same).

Local Fiscal Effect: The State’s Attorneys’ Association advises that the bill does not have a fiscal effect on prosecutors.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): State’s Attorneys’ Association, Department of Legislative Services

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md/kdm

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