

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 235

(Senator Brochin, *et al.*)

Judicial Proceedings

Rules and Executive Nominations

Courts - Evidence of Sexually Assaultive Behavior - Admissibility

This bill authorizes a court, in a prosecution for specified sexual offenses, to admit evidence of “sexually assaultive behavior” by the defendant that occurred before or after the offense for which the defendant is on trial. The bill establishes procedural requirements for the introduction of such evidence by a State’s Attorney and hearings by a court on the admissibility of the evidence. The bill also establishes provisions governing the admission of such evidence by a court.

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’s changes can be implemented with existing resources. No effect on revenues.

Local Effect: The bill’s changes can be implemented with existing resources. No effect on revenues.

Small Business Effect: None.

Analysis

Bill Summary: The bill defines “sexually assaultive behavior” as an act that would constitute (1) a sexual crime under Title 3, Subtitle 3 of the Criminal Law Article; (2) sexual abuse of a minor; (3) sexual abuse of a vulnerable adult; (4) a violation of 18

U.S.C. Chapter 109A (federal sexual abuse statutes); or (5) a violation of a law of another state, the United States, or a foreign country that is equivalent to these offenses.

The State must file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause. The motion must include a description of the evidence. The State must provide a copy of the motion to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.

The court must hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.

The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that (1) the evidence is being offered to prove lack of consent or rebut an express or implied allegation that a minor victim fabricated the sexual offense; (2) the sexually assaultive behavior was proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Before making these findings, the court must consider (1) whether the issue for which the evidence of the sexually assaultive behavior is being offered is in dispute; (2) the similarity between the sexually assaultive behavior and the sexual offense for which the defendant is on trial; (3) the closeness in time of the sexually assaultive behavior and the sexual offense for which the defendant is on trial; and (4) the independence of the sexually assaultive behavior from the sexual offense for which the defendant is on trial.

Current Law: 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).

Under Maryland Rule 5-404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with those prior acts. However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Under Maryland Rule 5-403, although relevant, evidence may be excluded 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.

Maryland Rule 4-262 governs discovery and inspection in the District Court. Discovery is available in the District Court in actions that are punishable by imprisonment. Maryland Rule 4-263 governs discovery and inspection in a circuit court. Maryland Rule 4-262 contains an extensive list of information and/or material a State's Attorney must provide to the defense either without a request or upon request. Maryland Rule 4-263 contains an extensive list of information and/or material a State's Attorney must provide to the defense without the necessity of a request.

Additional Information

Prior Introductions: None.

Cross File: None.

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

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