

SUBJECT: Prior offense evidence in sexual assault and child molestation cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Keel, Pena, Denny, Escobar, Hodge, Raymond, Reyna

0 nays

2 absent — Riddle, P. Moreno

WITNESSES: For — Amy Collum, Tarrant County District Attorney

Against — None

BACKGROUND: Under Rule 402 of the Texas Rules of Evidence, evidence that is relevant is admissible unless another rule specifically makes it inadmissible. Under Rule 403, evidence may be excluded if its value in proving something important in the trial is substantially outweighed by the danger of unfair prejudice.

Rule 404(a) bans evidence of the defendant's character introduced to prove the defendant acted in conformity with his or her character. Rule 404(b) reiterates that character evidence may not be used to show a defendant acted in conformity with his or her character but may be introduced for certain other purposes, including proof of motive or knowledge.

Article 38.37 of the Code of Criminal Procedure currently applies to child molestation cases and allows evidence of the defendant's prior bad acts against the alleged child victim of the case to be admitted to show the state of mind of the defendant and the child, as well as the relationship between the defendant and the child.

DIGEST: HB 1367 would amend Code of Criminal Procedure Art. 38.37 to allow evidence of the defendant's prior offenses in certain circumstances.

In a criminal case of sexual assault (or an attempt or conspiracy to commit sexual assault), evidence that the defendant had committed other similar offenses would be admissible if the evidence related to relevant matters,

including if the evidence tended to prove the defendant's character and that the defendant acted in conformity with his character in committing the charged offense.

In a criminal case involving sexual acts with a child or possession of child pornography (or an attempt or conspiracy to commit those offenses), evidence that the defendant had committed other similar offenses would be admissible if the evidence related to relevant matters, including if the evidence tended to prove the defendant's character and that the defendant acted in conformity with his character in committing the charged offense.

The bill would take effect September 1, 2005, and apply only to criminal proceedings commencing on or after that date.

**SUPPORTERS
SAY:**

HB 1367 appropriately would allow evidence of prior offenses to be introduced under limited circumstances to show the defendant's character or acts in conformity with the defendant's character. Currently, it can be very difficult to get a conviction in cases involving sexual acts with a child, including indecency with a child, sexual assault of a child, and aggravated sexual assault of a child, for multiple reasons. Offenders often target children they believe would be unlikely to report the abuse, so many crimes of this sort are not reported. Also, these cases tend to have no physical evidence because children often do not report abuse immediately, so it comes down to the victim's word against the defendant's. Offenders also deliberately choose remote or secluded areas, so witnesses are rare.

The concern that HB 1367 would lead to unfair prejudice against defendants is unfounded. Rule 403 of the Texas Rules of Evidence says relevant evidence may be excluded if the likelihood that it would prove something important in the trial is outweighed by the danger of unfair prejudice if the jury learned about the evidence. If a jury would be swayed that a defendant committed the crime for which that defendant is being tried based solely on the fact that the same defendant may have committed similar offenses in the past, then the evidence should be barred. This fear that a jury would convict a defendant only because it believed the defendant to be a bad person is prevented by Rule 403.

The Federal Rules of Evidence were amended more than 10 years ago to allow evidence of similar offenses committed by the defendant in both sexual assault cases (Federal Rule 413) and in child molestation cases

(Federal Rule 414). HB 1367 simply would bring the Texas Rules of Evidence in line with the federal rules.

OPPONENTS
SAY:

HB 1367 would significantly diminish the protections that have traditionally safeguarded criminal defendants against unfair prejudice. Allowing evidence of a defendant's prior offenses likely would lead to the jury convicting the defendant based on past activity rather than the charged offense. Allowing such evidence also would lead to mini-trials within trials where the prosecution would present such evidence and the defendant would have to defend himself against the claims. Finally, HB 1367 would allow evidence to be admitted that could be unreliable and most certainly would be highly prejudicial.

The Texas Court of Criminal Appeals – the highest criminal court in the state – has held on more than one occasion that character evidence introduced for no other purpose than to show that the defendant acted in conformity with his character is inadmissible under Rule 404(b). The court likewise has held that evidence of a defendant's prior bad acts is inadmissible if it distracts the jury from the present charges and instead encourages them to convict on an emotional basis rather than based on the facts of the present case.

HB 1367 would go against well accepted case law established by the Court of Criminal Appeals by allowing evidence of prior bad acts when such evidence tended only to show that the defendant acted in conformity with his character. When Congress enacted a similar change in the Federal Rules of Evidence, judicial opposition to the changes was nearly unanimous. Texas should not adopt these highly controversial changes, but rather should maintain the current rules, ensuring that a person is tried for what the person did, not for his or her bad character.

NOTES:

The companion bill, SB 685 by Carona, has been referred to the Senate Criminal Justice Committee.