

# Using the Doctrine of Chances in your Sexual Assault Prosecution



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## Rex v. Smith (1912)

- Brides in the bath case
- Landmark English case on Doctrine of Chances



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## Rex v. Smith

- Defendant's new bride, Bessie, inherits a large sum of money
- Bessie is discovered drowned in her bathtub
- Defendant claims it was an accident, says he had no involvement in her death



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## Rex v. Smith

- Trial court allows prosecution to introduce evidence that defendant had 2 previous wives who also drowned in bathtub during marriage to defendant
- Evidence admitted to allow prosecution to rebut defendant's claim that Bessie's drowning was an accident




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## Rex v. Smith

- Defendant appeals
- Appellate court upholds conviction
- Court holds that prosecution offered uncharged misconduct evidence, not to show the defendant was a bad guy, but to shed light on the question of whether Bessie's drowning was an accident or a murder




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## Rex v. Smith

- Defendant was either the unluckiest guy in the world, or one or some of his wives' drownings had not been accidental
- The jury could consider the evidence and decide




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## How can the Doctrine of Chances help me prosecute sex crimes?

- You can admit evidence of defendant’s uncharged misconduct to:
  1. rebut the defendant’s theory that the victim **fabricated the allegation**. *State v. Verde, 2012 UT 60 P47*
  2. rebut the defendant’s theory that he simply acted by **mistake**. *State v. Labrum, 2014 UT App 5, P29*
  3. rebut the defendant’s theory that he acted in **self-defense**. *Labrum at P29*

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## How much Utah caselaw is there on the Doctrine of Chances?

- DOC first mentioned by name in Utah Supreme Court’s decision in *State v. Verde, 2012 UT 60*
- Reasoning underlying DOC was previously discussed in:
  - *State v. Bradley, 2002 UT App 348*
  - *State v. Nelson-Waggoner, 2000 UT 59*
- DOC was recently addressed by Utah Court of Appeals in *State v. Labrum, 2014 UT App 5*

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## State v. Verde, Utah’s landmark DOC case

- Verde charged with sexually abusing a 12 year-old boy
- Trial court allowed State to present testimony of 2 404(b) witnesses to demonstrate defendant’s “specific intent” and “pattern of behavior”
- State argued for admission of 404(b) evidence based on several other non-character reasons too
- Jury finds Verde guilty

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## State v. Verde, cont.

- Verde appeals his conviction
- Court of Appeals affirms
- Holds that 404(b) evidence was properly admitted to establish Verde’s “specific intent” and **to rebut Verde’s theory that victim had fabricated his story**

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## State v. Verde, cont.

- Supreme Court reverses; says 404(b) evidence not admissible to prove Verde’s intent
- Case remanded to District Court for new trial
- Supreme Court leaves open possibility that trial court could determine that uncharged misconduct evidence was admissible under DOC **as proof that victim did not fabricate his allegation of abuse.**

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## What exactly is the Doctrine of Chances?

- A theory of logical relevance
- It’s improbable that the same rare misfortune will befall someone over and over.
- “[M]ay ‘tend[] to corroborate on a probability theory’ that a witness to a charged crime has not fabricated testimony, because it is **‘unlikely... that [several] independent witnesses would...concoct similar accusations.’** *Verde* at P47

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## Logic behind DOC theory

- “When one person claims rape, the unusual and abnormal element of lying by the complaining witness may be present. But when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story.” *Verde* at P48

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## How should a jury weigh uncharged misconduct evidence pursuant to the DOC?

- The question for the jury is **not** whether the defendant is the type of person who sexually assaults women or molests children...
- **The question is whether it is objectively likely that multiple accusers would fabricate similar allegations of abuse.**

*Verde* at P50

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## 4 Foundational Requirements

- *Verde* sets forth 4 requirements that must be present before uncharged misconduct evidence is admissible under DOC.
- 4 requirements “should be considered within the context of a rule 403 balancing analysis.” *Verde* at P57

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## Requirement 1: Materiality

- “The issue for which the uncharged misconduct evidence is offered ‘*must be in bona fide dispute.*’” *Verde* at P.57
- I.e., victim is alleging sexual assault and defendant is claiming accuser is lying, or that he was acting in self defense, or that it was a mistake.




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## Requirement 2: Similarity

- “Each uncharged incident must be **roughly similar** to the charged crime.” *Verde* at P58
- “Must be **some significant similarity** between the charged and uncharged incidents.” *Verde* at P58
- “All of the incidents must at least **fall into the same general category.**” *Verde* at P59




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## Requirement 3: Independence

- “[E]ach accusation must be independent of the others.” *Verde* at P60
- Because “the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event.” *Verde* at P60




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### Requirement 4: Frequency

- “The defendant must have been accused of the crime...*more frequently than the typical person.*” *Verde* at P61




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### Requirement 4: Frequency

- “Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the **probability that the same innocent person will be the object of multiple false accusations is extremely low.**” *Verde* at P61.

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### Rule 403 Analysis

- The Court considers 4 requirements within context of Rule 403 balancing analysis.
- Rule 403 states: “The court may exclude relevant evidence if its probative value is **substantially outweighed** by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

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### Rule 403 Analysis

- Supreme Court in *Verde* adopted the 4 foundational requirements from a law review article by Imwinkelried. See *Verde* at P57, footnote 28
- Imwinkelried highlights the fact that the Advisory Committee Note to Federal Rule 403 points out that “the judge ought to consider whether the proponent has a bona fide **need** to introduce that item.” [51 Ohio St. L.J. 575, 592](#)

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### State v. Labrum

- The 403 analysis under the DOC is still developing
- Utah Court of Appeals in *Labrum* interprets *Verde* as having displaced the *Shickles* factors for 403 analysis of DOC evidence. *Labrum* at P28

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### State v. Murphy

- Defendant is charged with sexually assaulting and kidnapping T.M.
- Defendant was intoxicated
- T.M. alleges defendant strangled her multiple times to point of unconsciousness
- Threatens to kill her
- Forced T.M. to perform oral sex on him
- Detained T.M. for hours, physically assaulting/demeaning her
- T.M. escapes after defendant falls over drunk

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## 1997 Florida Evidence

- Defendant arrested for sexually assaulting G.M. at knifepoint.
- Defendant is intoxicated
- G.M. alleges he detained/restrained her for hours
- Put hand over her mouth, applied pressure to her neck when she screamed for help
- Raped G.M., forced her to perform oral sex, attempted anal sex
- State of FL does not initially file charges, no physical evidence

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## 1997 Florida Evidence cont.

- G.M. gets protective order
- 2 months later defendant breaks into G.M.'s home in middle of night
- Defendant is armed with boxcutter and screwdriver
- Wakes G.M. up in bed and threatens to kidnap the children
- G.M. retrieves pistol from under pillow and shoots defendant 5 times
- Defendant doesn't die, is arrested
- Charged with sexual assault and aggravated burglary, pleads no contest to burglary, sentenced to 1 year in prison

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## 2001 Kentucky Evidence

- Defendant is intoxicated at friend's house
- Friend has teenage daughter, A.R.
- Defendant pretends to leave, but reenters home
- A.R. alleges defendant lays on top of her in bed and fondles her
- Defendant tells A.R. he will kill her if she screams
- A.R. screams and defendant covers her mouth so she can't breathe, chokes her
- A.R.'s dad hears screams and pulls defendant off

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## 2001 Kentucky Evidence cont.

- A.R. escapes and goes to neighbor's house
- Neighbors observe red handprint over her face, she is crying hysterically
- Defendant gets in altercation w/ neighbor and chokes him
- Defendant is charged with burglary, sexual assault, assault on neighbor
- Jury finds defendant guilty of assault on neighbor, not guilty of burglary, hung jury on sexual assault

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## 2003 Kentucky evidence

- Defendant buys alcohol and takes A.R. for drive
- A.R. is drunk, passes out in his truck
- A.R. alleges she wakes up and defendant has taken her clothes off, parked in secluded wooded area
- Defendant rapes A.R., forces her to perform oral sex, attempts anal sex
- Defendant restrains A.R., burns her with cigarette, hits her, threatens to drown her
- Returns A.R. home next morning to her mother

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## 2003 Kentucky evidence cont.

- Sexual Assault is immediately reported
- Police investigate, never even find defendant to interview him or arrest him
- Charges are never filed

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## 2013 WVC evidence

- Defendant is out on bail
- 1 week before his jury trial in Logan, he is arrested in WVC
- Defendant has been drinking beer
- Meets “erotic masseuse,” M.M. at hotel room
- Defendant wants sex, M.M. refuses to go that far
- M.M. alleges defendant pushes her off bed and pins her on floor where he strangles her, she sees stars
- When she screams he puts his thumbs in her mouth

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## 2013 WVC evidence

- Hotel patron says it sounded like a “herd of elephants,” hears woman’s blood curdling scream
- Hotel employee checks on room, defendant says everything’s fine, but M.M. runs out naked, has fresh injuries, red hand prints on her neck
- Defendant says nothing happened

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## Defendant’s trial theory

- Defendant will argue that T.M. fabricated her allegation
- He explains T.M.’s injuries by claiming he acted in self defense after she attacked him with a knife
- Says nothing sexual happened

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### 4 Foundational Requirements

1. There is a *bona fide* dispute  
T.M. says she was physically and sexually assaulted, defendant says nothing sexual took place, he acted in self-defense
2. Uncharged misconduct evidence is similar  
Defendant is intoxicated, restrains/detains victims, threatens to kill by word or action, usually strangles/covers mouth, sexually assaults victims or attempts to, assaults happen over extended period of time unless interrupted by third party

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### 4 Foundational Requirements

3. Independence  
T.M. did not know other 4 women, none of the other women know each other (FL, KY, UT)
4. Frequency  
Being accused of sexual assault 5x is more frequent than the average person. Twice is enough!

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### 403 analysis

- Need for evidence is great
- He said/she said case, no eyewitnesses
- State's expert says T.M.'s injuries consistent w/ strangulation, defense expert disagrees
- Defense expert says lack of blood spatter, DNA, demonstrates T.M.'s account is false

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## 403 Analysis, cont.

- Utah Supreme Court in *Bradley* held that where there were no eyewitnesses and just 2 children's word against one defendant, there was insufficient alternative proof/need for evidence. *Bradley* at P35
- "It is appropriate to give considerable deference to a party's assessment of its need for specific evidence." *Bradley* at P35.

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## Contact Information

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