**2.11 Similar Acts in Sexual Assault and Child**

**Molestation Cases (Fed. R. Evid. 413 and 414)**

You are about to hear evidence that the defendant [may have committed] [was convicted of] a similar offense of [sexual assault] [child molestation].

You may use this evidence to decide whether the defendant committed the act charged in the indictment. You may not convict the defendant simply because he [may have committed] [was convicted of] other unlawful acts. You may give this evidence such weight as you think it should receive or no weight.

[You may not use this evidence, however, to decide whether the defendant [*insert improper purpose, e.g., made a statement in this case or destroyed evidence in this case*].]

**Comment**

This instruction is based on Fed. R. Evid. 413 and 414. *See also United States v. Mound*, 149 F.3d 799, 802 (8th Cir. 1998); Eighth Cir. Jury Instr. (Crim.) 2.08A.

Federal Rules of Evidence 413 and 414 permit introduction of evidence the defendant committed a similar act of sexual assault or child molestation “for its bearing on any matter to which it is relevant,” including the defendant’s propensity to commit the crime charged. The prosecution is not required to prove the defendant was charged with or convicted of a crime, to prove the other act beyond reasonable doubt, or to corroborate a percipient witness’s testimony that the other act occurred. In addition, the evidence is frequently “emotional and highly charged.” *United States v. Lemay*, 260 F.3d 1018, 1030 (9th Cir. 2001). For these reasons, it is appropriate to remind the jury that it decides how to weigh the evidence and may not convict the defendant for acts not charged in the indictment.

The instruction should be considered before the evidence is admitted and again in the final instructions. For factors to consider in determining the admissibility of the evidence, *see Lemay*, 260 F.3d at 1027-28.

Rule 413 or 414 evidence is not admissible to show any other propensity, such as propensity to confess or propensity to destroy evidence. *See, e.g.*, *United States v. Redlightning*, 624 F.3d 1090, 1119-22 (9th Cir. 2010). Where the evidence presented at trial poses the prospect of impermissible use of the propensity evidence, the further limiting instruction provided in the third paragraph may be necessary. But if confession or evidence destruction is part of the defendant’s alleged modus operandi, the further limitation would not be necessary.

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