

10-23-2017

Is a Change in Admissibility the Answer? Mo. Art. I § 18(c)

Edward Radetic

Follow this and additional works at: <https://scholarship.law.slu.edu/lawjournalonline>

 Part of the [Law Commons](#)

Is a Change in Admissibility the Answer? Mo. Art. I § 18(c)

By Edward Radetic*

Introduction

The Missouri Rules of Evidence have historically banned propensity character evidence. However, Missouri recently joined a host of other states and the Federal Government in implementing laws or evidentiary standards which allow propensity character evidence in the realm of child sex crimes.¹ In November of 2014, Missouri adopted an amendment to its Constitution.² The relevant section of the Missouri Constitution is Art. I, § 18(c), which governs the admissibility of evidence in criminal proceedings. The Section reads, “[I]n prosecutions for crimes of a sexual nature involving a victim under eighteen years of age, relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim’s testimony or demonstrating the defendant’s propensity to commit the crime . . . charged.”³

In adopting this amendment Missouri departed from its previous standard of admissibility regarding character propensity evidence. However, this is not the first time Missouri has attempted to do so.⁴ Twice the Missouri legislature has attempted to pass statutes allowing similar types of character evidence, and twice the Missouri Supreme Court has struck down those statutes, ruling the laws unconstitutional.⁵ Now that the citizens of Missouri have amended their Constitution, what does this mean for the criminal justice system in Missouri? How has, and how will this evidentiary standard be applied?

How Has Article I Sec. 18(c) Been Applied?

* J.D. Candidate, 2019, Saint Louis University School of Law

¹ William E Marcantel, *Protecting the Predator or the Prey? The Missouri Supreme Court’s Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 Missouri Law Review, 211, 211. (2009); Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 322 (2015).

² *State Ex. Rel. Tipler v. Gardner*, 506, S.W.3d 922, 924 (Mo. 2017).

³ Mo. Const. Art. I, § 18(c).

⁴ Author, *Supra* Note 1, at 212.

⁵ *Id.*

The flagship case on this issue is *State v. Kendrick Tipler*. The defendant Kendrick Tipler (“Tipler”), was charged with one count of attempted statutory sodomy.⁶ The initial trial ended in a mistrial.⁷ In the wake of the mistrial, a second trial was scheduled for May of 2016.⁸ In February of 2016, Tipler filed a “Motion in Limine to Exclude Propensity Evidence, Evidence of Prior Crimes, and Evidence of Prior Bad Acts.”⁹ The State responded by filing its motion stating its intent to offer evidence of Tipler’s prior criminal acts at trial under Article I Section 18(c).¹⁰ The court, after hearing argument on both motions, granted the State’s Motion to Produce “Prior Criminal Acts” in the State’s Case-in-Chief.¹¹ The Court in granting the State’s motion stated, “[T]he Defendant’s certified prior conviction for Endangering the Welfare of a Child in the First Degree, which includes the language “by having sexual relations with the child” is relevant for the purpose of corroborating the alleged victim’s testimony or demonstrating the Defendant’s alleged propensity to commit the crime . . .”¹² Tipler responded by filing a motion to reconsider which was subsequently denied.¹³ Tipler then petitioned the Missouri Supreme Court for a writ of prohibition.¹⁴ The Court granted certiorari.¹⁵ Tipler argued that the trial court did not error in its application of Art. I § 18(c), but rather that it lacked the authority to even apply the Section in the instant case.¹⁶ Tipler’s argument relied on the fact that the alleged criminal conduct had occurred prior to the effective date of the amendment, and as such, application of the amendment would be retrospective.¹⁷ As there is a general bar on retroactivity, this would be illegal.¹⁸ The Court disagreed stating that the retroactivity ban was not in

⁶ *Tipler*, 506 S.W.3d at 923.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Tipler*, 506 S.W.3d at 923. It is worth noting, that this language, “having sexual relations with the child”, is the statutory language and subsection under which Tipler was previously convicted.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 924.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See Welch v. US* 136 S. Ct. 1257, 1246 (2016).

issue in the case at bar, as the constitutional amendment dealt solely with evidentiary standards at trial and not the crime or crimes with which he was accused.¹⁹ The Court quashed the preliminary writ of prohibition, and the case was remanded to the trial court for further proceedings consistent with their rule.²⁰ At the time of this article, the case is currently pending and is scheduled for jury trial on October 11, 2017.²¹

Since *State Ex. Rel. Tipler*, the application of Art. I § 18(c) has been appealed multiple times, citing various errors at the trial court level. In *State v. Rucker*, the defendant appealed his conviction stating that the trial court erred in admitting evidence of the defendant's prior sexual offenses as the probative value did not outweigh its prejudicial nature.²² The Eastern District rejected this argument, stating that language of the amendment states, "may exclude", meaning that the court was not required to exclude prejudicial evidence, whether or not prejudice outweighed probative value.²³

In *State v. Hood*, the defendant was convicted of five counts of statutory rape in the first degree, one count of statutory sodomy in the first degree, and one count of statutory rape in the second degree.²⁴ The Defendant appealed stating the Court erred in allowing the testimony of various family members as to misconduct that occurred while he was a juvenile.²⁵ In *Hood* the Court rejected this argument, stating that the testimony was admissible because it neither referenced nor relied on previous juvenile records or adjudication.²⁶ Moreover, the court went on to state that even if it had, Hood's assertion that the actions or conduct giving rise to those adjudications would be inadmissible was faulty under the standard laid out in Art. I, § 18(c).²⁷

¹⁹ *Tipler*, 506 S.W.3d at 925.

²⁰ *Id.* at 928.

²¹ Interview with Julie Koester, Assistant Prosecuting Attorney Cape Girardeau County Missouri, October 5, 2017.

²² *State v. Rucker*, 512 S.W.3d 63, 67-69 (Mo. App. E.D. 2017).

²³ *Id.* at 69.

²⁴ *State v. Hood*, 521 S.W. 3d 680, 682 (Mo. App. S.D. 2017).

²⁵ *Id.* at 683.

²⁶ *Id.* at 687.

²⁷ *Id.*

In *State v. Jones*, the defendant was convicted on two counts of first-degree statutory sodomy.²⁸ His argument on appeal was that application of the amendment was retrospective, and as such violated the constitutional prohibition on ex post facto laws.²⁹ He also argued that the trial court erred in allowing the character propensity evidence, as they failed to perform a balancing test with regard to prejudice created by its admission and the evidence's probative value.³⁰ The court rejected both arguments stating that Art. I, Sec. 18(c) does not require the application of a balancing test.³¹ Additionally, the court relied on *Tipler*, stating that the application of the amendment was not ex post facto law, but rather prospective application of a procedural or evidentiary rule to a trial occurring after the effective date.³²

In *State v. Prince*, the Missouri Supreme Court laid finally laid down a relevancy test with regard to admissibility of evidence proffered under the Section.³³ In *Prince*, the question was whether or not the trial court's admission of a juvenile record for the purposes of proving propensity was in error.³⁴ The intermediate level appeal reversed the trial court's decision citing a conflict of law;³⁵ however, the appellate court referred the case to the Missouri Supreme Court as the case dealt with an issue of first impression.³⁶ The Missouri Supreme Court, after reviewing the facts of the case and the points on appeal, affirmed the trial court and laid down a relevancy test that hinged on three factors.³⁷ Those factors were temporal relevance, similarity in conduct, and similarity in victimology.³⁸ The Court ultimately decided the evidence adduced was relevant pursuant to Missouri relevant standards.³⁹

Unresolved Issues

²⁸ *State v. Jones*, No. ED 104796, 2017 WL 3864009, at *1 (E.D.M.O. Sept. 5, 2017).

²⁹ *Id.* at *3-*5.

³⁰ *Id.* at *3.

³¹ *Id.* at *5.

³² *Id.* at *5.

³³ 534 S.W.3d 813, 817-21 (MO. 2017).

³⁴ *Id.*

³⁵ *Id.* at 817.

³⁶ *Id.*

³⁷ *Id.* at 818-21.

³⁸ *Id.*

³⁹ *Id.* at 21.

Since *Tipler*, subsequent cases applying Art. I, § 18(c) have wrestled with the issue of whether a balancing test is required under the Constitution, or more generally how to balance competing public policy issues of prosecuting sex offenders and protecting defendant's rights. The specific question is whether trial courts are required to apply the traditional character evidence balancing test—probative value v. prejudicial effect—when considering admissibility of this type of evidence. Put another way, has Art. I, § 18(c) created a new class of character evidence which eliminates the trial court's obligation to consider the prejudicial impact of this class of evidence? With the Missouri Supreme Court's decision in *State v. Prince*, it seems that question is answered—relevance is key, and prejudice comes second. How will this Section be applied moving forward?

Edited by Luke Jackson