YOURCONTENT

December 3, 2020

Correcting the Injustice in the Bill Cosby Trial

By Norm Pattis » for Your Content

Suppose you were suddenly accused of sexual assault. Your accuser claims that one night, a dozen or more years ago, you crossed a line.

You're arrested, and now publicly accused of rape. In an instant, your reputation is destroyed.

Assume for the moment you even remember who the alleged victim is. Assume further you don't recall much else about the evening.

Who, after all, can account for where they were on a random night in the distant past?

It's hard to present an alibi when you can't recall anything about the day in question.

> *Just ask Bill Cosby,* now serving a sentence of three to 10 years after conviction at a trial in 2018 over an event that allegedly took place in 2004. It took two trials to convict him, itself an outrage, but we addressed to successive trial problem in a post yesterday.
>
> **Norm Pattis**
> Constitutional Rights Attorney

Continued on next page

Continued from previous page

Your best defense in such a case, a case in which there is no forensic evidence—no DNA, no fingerprints, no photographs—and no witness other than your accuser, is to demand trial.

Make your accuser testify under oath about why it took forever to come forward. Let a jury decide whether the explanation for delay is credible, or, perhaps, a sign of some secondary motive, such as becoming a heroine for the #MeToo groupies.

In such a classic "he said/she said" case, your lawyer might tell you there is no need to testify.

Yes, the testimony of a single witness, if believed, is sufficient to convict. But the odds favor you in such a case.

But the state, and that includes the Commonwealth of Pennsylvania, cannot abide a level playing field, so it creates special rules of evidence for sex assault cases, the better to convict you.

Just ask Bill Cosby, now serving a sentence of three to 10 years after conviction at a trial in 2018 over an event that allegedly took place in 2004.

It took two trials to convict him, itself an outrage, but we addressed to successive trial problem in a post yesterday.

Today I focus on the abandonment of due process in sex cases. And I suggest a way in which the Pennsylvania Supreme Court can do justice in the Cosby case.

In Mr. Cosby's first trial, in 2017, jurors could not unanimously agree on a verdict.

The trial court declared a mistrial, rather than justly dismissing the case because the Commonwealth had failed to satisfy its burden of proof. Mr. Cosby was tried again.

But the second jury did not hear the same evidence as the first jury. No, the Commonwealth got the benefit of its failure and learned by experience what weaknesses required shoring up for the retrial.

Alleged victims are typically required to testify in a criminal case. It's hard to prove a case without them. Other witnesses, so-called fact witnesses, can offer testimony about their observations. Experts can be called to explain things ordinary people don't know.

But the state never gets to call character witnesses in their case in chief. Only the defendant reserves the right to put his character into evidence, and the rules for doing so are strict.

That is because due process requires that a defendant be put to trial for his conduct not for his character; we tried the crime, not the man, the saying goes.

Lawyers know this as the bar on propensity evidence. You cannot prove that a person is guilty of bank robbery by showing that he is a criminal who had previously molested children.

Yes, the latter act is deplorable, but it is irrelevant and sheds no light on whether the man robbed a bank. It is unfair to place people on trial in a criminal case for their character.

But, as with almost every rule in the law, the bar on propensity evidence has exceptions.

Thus, a prosecutor can offer evidence of so-called uncharged misconduct, behavior factually distinct from the crimes charged, to show than an accused acted with the requisite knowledge, intent, planning, preparation, opportunity, motive, absence of mistake, or modus operandi – that is "signature"– in a prior, unrelated instance. A party offering this evidence has to persuade a trial judge that the uncharged misconduct evidence is relevant to one of these narrow purposes, and then that admission of the evidence is not more prejudicial and probative.

In Mr. Cosby's trial, Ms. Constand testified in the first trial. The Court permitted the Commonwealth to offer one uncharged misconduct witness to show that Mr. Cosby had previously engaged in similar misconduct.

Continued on next page

Continued from previous page

Why is this not propensity evidence?

Because, the courts reason, the evidence isn't to show bad character, but common characteristics between charged and uncharged misconduct. (Don't worry if this doesn't sound like it makes sense. It takes lawyers years to become twisted enough to "see" the logic in this.)

But here's the rub in Mr. Cosby's case.

After hearing from Ms. Constand and one uncharged misconduct witness, the jury could not convict. It wasn't persuasive enough.

So at the second trial, the Commonwealth called Ms. Constand and five uncharged misconduct witnesses.

Sure, some jurors in the first case had reasons to doubt Ms. Constand and the lone misconduct witnesses. But the second jury overcame those doubts when it heard from Ms. Constand and her five-member chorus of the aggrieved.

Here is where it gets tricky with lay jurors: They were told Mr. Cosby was only on trial for the rape of Ms. Constand, and that the other five women who claimed they were raped weren't on trial. The testimony of the fabulous five was offered simply to show common characteristics between their rapes and Ms. Constands'. I doubt jurors get the logic of this.

But here's the rub in Mr. Cosby's case. After hearing from Ms. Constand and one uncharged misconduct witness, the jury could not convict. It wasn't persuasive enough.

In sex cases, the rules permitting such testimony are relaxed in favor of the state.

Why? Sex cases are hard to prove.

That's an asinine justification. Criminal cases aren't supposed to be easy to prove. Ever.

Thread that needle anyway you like, but you'll never stitch anything other than a fabric of deceit.

At oral argument before the Pennsylvania Supreme Court this week some justices seemed to understand just how impossible the bind this placed Mr. Cosby in, a man cloaked in the presumption of innocence.

Sure, pit your word about ancient events against one witness; but against six, five of whose allegations of rape have not even been charged?

I don't know whether Andrea Constand was raped or not, but Lady Justice sure as hell was.

There are at least two ways Pennsylvania can correct this injustice. (A third, dispensing with the rule permitting uncharged misconduct evidence is too much to hope for.)

First, the Court can announce a rule that in cases in which the state fails to meet its burden of proof and a mistrial is declared, the state cannot produce new evidence in subsequent trials. Everyone knows juries are quirky. A failure to reach a verdict may be an isolated bit of irrationality. Fine. Let the state try the same case a second time. Permitting a prosecutor to improve his case after failure is fundamentally unfair. In this case, the Commonwealth should have been permitted to call Ms. Constand and the same uncharged misconduct witness it called in the first case. No more.

In the alternative, the Supreme Court can avoid a categorical rule and simply conclude that the trial court abused its discretion in permitting five uncharged misconduct witnesses.

The conduct at issue was neither novel nor bizarre: It was as common as your local courthouse. Calling five uncharged misconduct witnesses was per se prejudicial.

Either option assumes the Supreme Court is seeking justice; both would require a new trial for Mr. Cosby. Some observers question whether that is possible to obtain and whisper that the fix is in for Mr. Cosby. I hope the whisperers are wrong.

Continued on next page

Continued from previous page

As I said yesterday, Bill Cosby got screwed, and I am not talking about whatever happened the night Ms. Constand claims she was raped.