

# FINAL BILL REPORT

## SSB 6933

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Synopsis as Enacted

**Brief Description:** Changing rules concerning admissibility of evidence in sex offense cases.

**Sponsors:** Senate Committee on Judiciary (originally sponsored by Senators Marr, Hargrove, Hewitt, Franklin, Pflug, Carrell, Berkey, Kauffman, Haugen, McCaslin, Rockefeller, Fraser and Kilmer).

**Senate Committee on Judiciary**

**House Committee on Judiciary**

**Background:** Washington Evidence Rule (ER) 404(b) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Washington courts have held that this list of permissible purposes is not exclusive.

The restrictions on the use of other, usually prior, bad acts is part of the general restriction on the use of evidence that has probative value mainly because a juror would tend to infer from the evidence that the defendant has a propensity to commit crime, or to commit the type of crime that the defendant is charged with at trial, and then further infer that, therefore, the defendant must have committed the crime charged at trial. Even though propensity evidence has probative value, it has been restricted by ER 404(b) out of concern that the jury will be distracted by these inferences and will not focus on the facts regarding the particular charge for which the defendant is on trial and which it is the juror's responsibility to carefully decide.

In Washington, courts have held that evidence of the defendant's sexual prior misconduct is admissible under ER 404(b) when the victim of the alleged prior sexual misconduct is the same person as the victim of the sex offense charged at trial. In 2003 the Washington Supreme Court, in *State v. Devincentis*, ruled admissible under ER 404(b) evidence of prior sexual misconduct by the defendant involving a victim other than the victim of the sex offense charged at trial, where the features of the prior misconduct were substantially similar to those underlying the charged offense.

In 1994 the U.S. Congress created two new Federal Rules of Evidence (FER), 413 and 414. These rules, instead of ER 404(b), now govern the admissibility of prior-sexual-assault and child-molestation evidence in sexual assault and child molestation cases, respectively. There are at present some federal circuit court decisions construing and applying these relatively new rules.

The Washington Supreme Court has held that rules of evidence are substantive law, and that the Legislature has authority to enact such rules.

**Summary:** Washington Superior Court Evidence Rule 404(b) is changed through an amendment to RCW Chapter 10.58. In a criminal action charging a sex offense, evidence of the defendant's commission of other sex offenses is admissible, notwithstanding Washington's Evidence Rule (ER) 404(b), if relevant to any fact in issue, if the evidence is not inadmissible under ER 403.

The prosecutor is required to disclose such prior-sex-offense evidence to the defendant at least 15 days before trial, including statements of witnesses or summaries of the substance of any testimony expected to be offered. For purposes of this exception to ER 404(b), the term "sex offense" is defined. Factors for the trial judge to consider when making the ER 403 balancing test are included in the act.

**Votes on Final Passage:**

Senate	49	0	
House	91	5	(House amended)
Senate	47	0	(Senate concurred)

**Effective:** June 12, 2008