SENATE BILL REPORT
SSB 6933

As Amended by House, March 5, 2008

Title: An act relating to admissibility of evidence in sex offense cases.

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).

Brief History:
Committee Activity: Judiciary: 2/8/08 [DPS].
Passed Senate: 2/19/08, 49-0.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 6933 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, McDermott, Roach and Weinstein.

Staff: Robert Kay (786-7405)

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

---

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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 FER 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 of Substitute Bill: 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 bill.

Appropriation: None.

Fiscal Note: Requested on February 8, 2008.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: Under Evidence Rule (ER) 404(b) there is a presumption against admission of prior bad acts into evidence, and judges are often leery of admitting such evidence. The changes to ER 404(b) proposed in this bill would end the presumption against admitting such evidence, and allow the judge under ER 403, out of the presence of the jury, to review and consider the details of a prior sex offense, to assess its relevance and probative value, and the danger of unfair prejudice to the defendant if admitted. The state and the defense will have the opportunity to argue under ER 403 regarding the probative value of the evidence and the danger of undue prejudice to the defendant by the admission of the evidence. The ER 403 test ensures that, if such evidence is admitted, it has significant probative value when weighed against the danger of unfair prejudice to the defendant. Jurors are able to fairly assess the defendant's guilt in a trial where the prior sex offenses of the defendant are admitted. Jurors are sophisticated enough to focus on the facts offered to prove that the defendant committed the crime charged, without prejudging the defendant as a bad person due to the admission of the evidence of the prior sexual misconduct.

It is true that for some years Washington judges have been admitting, in trials of sex offenses, evidence of a defendant's prior sexual misconduct where that misconduct was committed against the victim of the charged offense, on the grounds that it is relevant to show that the defendant had a lustful disposition toward the victim. However, lustful disposition exception to ER 404(b) is a narrow exception, and applies only where the victim of the prior and current offenses is the same person. Also, Washington judges have been admitting evidence of prior sexual misconduct in sex offense trials where the victim of the prior act is different from the victim of the charged crime, but only where the nature of the prior misconduct is substantially similar to that of the charged crime. This evidence has been admitted as relevant to show that the defendant is engaged in a common scheme or plan, of which the charged crime is a part. Trial judges have applied this exception narrowly, and often require that the state demonstrate some kind of signature of the defendant with respect to both the prior and current misconduct. In the recent trial in King County of *State v. Darboe*, the jury could not reach a verdict after in a trial where the judge, under ER 404(b), excluded evidence of prior sexual misconduct that was similar to that for which he was charged. This is an example of why ER 404(b) should be changed as it applies to trials of sex offenses.

CON: The merits of the bill aside, the judiciary is opposed to the Legislature making this change to ER 404(b), and feels that the proper forum and procedure for consideration of such an important and consequential change in the evidence rules is the court rule-making process. There is not enough time at the end of this short legislative session for adequate discussion and debate about such an important change in our criminal justice system. The court's rule-making process allows for public comment and debate and more careful discussion.

There is a common perception, without a solid scientific basis, that the propensity to commit sexual misconduct, if it exists in a person, is of the most powerful kind. Our sex offender registration requirements and our civil commitment laws attest to this common belief. This perception exists in the minds of most jurors. If the requirements for the admission of evidence of prior sex offenses are relaxed, it will be the kiss of death for the possibility of fair trials of sex offense charges in Washington State. It is hard to imagine a more inflammatory type of evidence that evidence of the prior sexual misconduct of a defendant when that defendant is on trial for the commission of a sex offense. The current procedure, utilizing a combination of ER 404(b) and ER 403 to scrutinize the evidence, strikes the right balance. Without the protections afforded by ER 404(b), judges are less likely to bar evidence of prior sexual misconduct after an ER 403 balancing test. The legislature should not pass this bill.

Persons Testifying: PRO: Tom McBride, Washington Association of Prosecuting Attorneys; Lisa Johnson, King County Prosecutor's Office; Jon Tuleim, Thurston County Prosecutor's Office.

CON: Mellani McAleenan, Board for Judicial Administration; Amy Muth, Washington Association of Criminal Defense Attorneys and Washington Defender Association.

House Amendment(s): The factors listed in Section 2(6) that a trial court must consider in determining whether to exclude evidence offered under the rule are augmented to include the balancing test of Evidence Rule 403. The court must determine whether the probative value of the evidence offered under the rule is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury; or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Section 3, a statement that the provisions of the bill are based on Federal Rules 413 and 414, and federal appellate cases construing those rules, is deleted.