HOUSE BILL REPORT
SSB 6933

As Passed House - Amended:
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: By 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: 2/27/08, 2/28/08 [DPA].
Floor Activity:
Passed House - Amended: 3/5/08, 91-5.

Brief Summary of Substitute Bill
(As Amended by House)

- Allows, in a criminal prosecution for a sex offense, admission of evidence of the defendant's commission of any other sex offenses, whether charged or uncharged, unless the probative value of the evidence is outweighed by the danger of unfair prejudice.
- Requires a prosecutor to disclose evidence intended to be offered under this rule at least 15 days before trial, or later as the court allows for good cause.
- Provides factors which the trial judge must consider in evaluating whether evidence offered under the rule should be excluded.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 10 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Ahern, Kirby, Moeller, Pedersen, Ross and Williams.

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.

Minority Report: Do not pass. Signed by 1 member: Representative Flannigan.

Staff: Lara Zarowsky (786-7123).

Background:

Admissibility of Evidence
The rules of evidence bar the admission of any information or item into evidence that is not relevant to resolve the controversy at hand. Evidence that is relevant is admissible, unless otherwise barred by statute, the Constitution, court rule, or the rules of evidence.

Relevance and Materiality
Evidence is relevant if it has *any* tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. The strength or weakness of this tendency is referred to as the "probative value" of the evidence.

Evidence is material if it is offered to prove or disprove an element of a legally cognizable claim included in the pleadings submitted to the court by the parties.

Prejudice and Probative Value
Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice in this context is an undue tendency to suggest decision on an emotional or otherwise improper basis. One purpose of the bar on unfairly prejudicial evidence is to prevent a jury from overvaluing a particular piece of evidence by giving it more weight than is appropriate. In determining whether a piece of relevant evidence will be admitted, the court conducts a balancing test to weigh the probative value against the prejudicial impact.

Character Evidence
Evidence Rule 404 addresses character evidence, providing that evidence of a person's character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, with two exceptions. First, an accused may introduce evidence of his or her good character. This "opens the door" for the prosecution to rebut by introducing evidence of the accused's bad character. Second, an accused may introduce evidence of the character of the victim, for example to prove that the victim was the first aggressor. This "opens the door" for the prosecution to rebut the evidence by introducing contrary evidence of the victim's character.

Evidence Rule 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts" to show the character of a person in order to prove action in conformity with that character. However, such evidence may be admissible for other purposes, for example to provide proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Thus, evidence of other crimes or acts is barred *only* if its relevance is based on an inference that the other conduct establishes a propensity to engage in the conduct and to conclude that the accused did engage in such conduct on the occasion at issue.

Sexual Assault and Child Molestation Cases
Federal rules 413 and 414, effective in 1995, provide that evidence of a defendant's commission of other offenses of sexual assault or child molestation is admissible in a criminal case in which the defendant is accused of sexual assault or child molestation respectively, and may be considered for its bearing on any matter to which it is relevant.

Federal Evidence Rules 413 and 414 have not been incorporated into the rules of evidence governing civil and criminal proceedings in Washington.

Summary of Amended Bill:

Allows, in a criminal action in which the defendant is accused of a sex offense, the admission of evidence of the defendant's commission of any other sex offense, notwithstanding the bar on evidence of other crimes to prove the defendant's character in Evidence Rule 404(b), as long as the probative value of such evidence is not outweighed by its prejudicial impact.

A "sex offense" is any charged or uncharged conduct that, if charged, would constitute:
- an offense for which the offender must register as a sex offender under RCW 9A.44.130;
- sexual misconduct with a minor in the second degree; or
- communication with a minor for immoral purposes.

A prosecuting attorney offering evidence under this rule must disclose the evidence that will be offered to the defendant at least 15 days before the date of trial, or later in the court's upon a court finding of good cause.

In evaluating whether evidence offered for admission under this rule should be excluding pursuant to Rule 403, the trial judge must consider: the similarity of the prior acts to the acts charged; the length of time between the prior acts and the acts charged; the frequency of the prior acts; the presence or lack of intervening circumstances; the need for the evidence given the testimonies already offered at trial; whether the prior act was a criminal conviction; whether the probative value of the evidence 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; and other facts and circumstances.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In Support) Under this bill, the court retains its authority to balance the probative value and prejudicial effects. This does not blaze new trails since there are similar federal rules. We need to allow for admission of evidence that did not result in a conviction because the nature of these offenses often result in no charges being filed and no convictions. The balancing test in the bill takes into account whether there was a conviction. This could be one of the more important pieces of sex offender legislation we could pass this year. Rule 404(b) and its exceptions doesn't distinguish whether the prior conduct results in a conviction or not. When the state Supreme Court created the exception for lustful disposition evidence of the same victim, it did not distinguish between charged and uncharged conduct. This is because the trial is a fact-finding procedure, not a sentencing procedure where there is concern for counting the number of convictions. The bill provides that no other evidence rules are limited due to this bill.

The courts of appeal in every federal circuit has upheld the federal rules. We know how this will be implemented because there is guidance from the federal decisions. Our own state Supreme Court, in allowing for the child hearsay rule, said that the Legislature can pass evidence rules, and then the Court reviews them. It should be left to courts to decide whether this kind of evidence should be allowed in and for the jury to decide how much weight it deserves. Rule 413 levels the playing field and allows the court to decide whether the jury should hear this evidence, and also serves to rebut the assertion that there is no corroborative evidence. Because of the presumption under 404(b) that propensity evidence is not admissible, it has been interpreted very narrowly by the courts to require almost a "signature" kind of crime.

(Opposed) For every story from the prosecutors that a person got away because of the bar on propensity evidence, there is another about a person who was innocent who got convicted. The fact is, this is one area of the law where false accusations are often made. Prosecutors and law enforcement dealing with these kinds of cases will tell you that they see a lot of false accusations made, but they are not charged because they are screened out in deciding whether to start the charging process. In this political climate, given the nature of these offenses and with our knowledge that both children and adults make false accusations in this area, the Legislature should tread very lightly before overruling hundreds of years of common law barring the admission of propensity evidence that suggests if a person did something before, they must have done it again.

What we cannot know is how many people got away because of the propensity evidence bar, or whether or not this is a systemic problem. This is a relatively small problem that is getting quick attention without a real deliberative process. The comparison to the federal rules is inapplicable because this is not the same rule as the federal rules, nor is it he same rule passed in other states. Under this bill, there is no need for similarity between the charged sex offenses and other acts that may be brought in. The 404 determination is a completely subjective one that, as any prosecutor or defense attorney will tell you, could go either way. The state Supreme Court does review the rules on appeal. If this bill is passed, the application of this rule is certain to be appealed, and this is going to be an unsettled area of the law until the entire appeals process is finished. The Supreme Court has a more deliberative rule-making

process that includes input from the public and the courts about what the proper language of the rule should be and whether it is appropriate at all. Absent some evidence that there is a pressing issue right now, the court's rule-making procedure is the proper approach.

The notion "if someone did it before, they must have done it again" is a powerful argument. A jury will believe that "the tide goes to the history," and instead of the requirement that there be proof beyond a reasonable doubt, if it's a close call and there is a history, he or she will be convicted. If you pass this bill, more innocent people will be convicted. Our criminal justice is not improved by this rule in that it is more likely to arrive at the truth. What we will only see is more convictions with no guarantees that conviction should have occurred.

An important principle underlying our criminal justice system is that your prior behavior is not admissible to prove you did something on a particular occasion. For reasons of fairness, our system rejects the concept that if you did it once, you must have done it again. Jurors have not been trustworthy in properly weighing this kind of evidence, and this is not the appropriate forum for such a sweeping change in the rules. The Legislature changed a rule of evidence in enacting the rape shield law. Due to that change, jurors are asked to evaluate a situation of sexual contact but the rule says that the prior sexual behavior of one of those parties is not relevant. In this case, exactly those arguments are being brought to support the opposite position. There will be wildly diverse results as this rule is applied.

This matter is appropriately before the Legislature, but the General Rule 9 rule-making process, which is not an internal review process, should first be pursued in order to get a better written bill. The rule would have a chance to be vetted by the public, the bar association, and the courts. This would allow for broader viewpoints and the perspectives of the prosecutors which is very important. There are strong feelings, but there are also experts out there who understand the likely consequences. The rule-making process shouldn't be bypassed.

Persons Testifying: (In support) Senator Marr, prime sponsor; Tom McBride, Washington Association of Prosecuting Attorneys; Lisa Johnson, King Country Prosecutor's Office; Jon Tunheim, Thurston County Prosecutor's Office; Don Pierce, Washington Association of Sheriffs and Police Chiefs; Evelyn Larsen, Washington Coalition of Sexual Assault Programs; and Seth Dawson, Washington State Association of Children's Advocacy Centers.

(Opposed) Brad Maryhew and Kim Gordon, Washington Association of Criminal Defense Lawyers; and Eric C. de los Santos, Washington Bar Association.

Persons Signed In To Testify But Not Testifying: None.