S-3935.1

SENATE BILL 6363

State of Washington 60th Legislature 2008 Regular Session

By Senators Marr, Hargrove, Stevens, Kilmer, Oemig, Franklin, Berkey, Fairley, Brandland, Kastama, Rockefeller, Carrell, Regala, Haugen, Benton, Fraser, Morton, Rasmussen, Swecker, Murray, Honeyford, Kauffman, Hewitt, McCaslin, Delvin, Sheldon, Schoesler, Pflug, Roach, Tom, Shin, and Holmquist

Read first time 01/16/08. Referred to Committee on Human Services & Corrections.

AN ACT Relating to admissibility of evidence in sex offense cases; amending RCW 2.04.200; adding a new section to chapter 10.58 RCW; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** In Washington, the legislature and the courts share the responsibility for enacting rules of evidence. The court's authority for enacting rules of evidence arises from a statutory delegation of that responsibility to the court and from Article IV, section 1 of the state Constitution. *State v. Fields,* 85 Wn.2d 126, 129, 530 P.2d 284 (1975).

The legislature's authority for enacting rules of evidence arises from the Washington supreme court's prior classification of such rules as substantive law. See *State v. Sears,* 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich,* 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantiative law"). The Washington supreme court's recognition of the legislature's power in this area is consistent with decisions from other jurisdictions that have comparable provisions to the Washington state Constitution. See, e.g., *State v.*

Lewis, 67 Mont. 447, 216 P. 337, 339 (1923) ("there can be no doubt respecting the general power of the Legislature to prescribe rules of evidence to be observed in judicial tribunals, it being restricted only by constitutional limitations and guaranties"); Mont. Const. Art. VIII, § 1 (1889). Prior to 1979, the only codified rules of evidence in Washington could be found in legislatively enacted statutes.

Our current rules of evidence were drafted by a judicial council task force that was appointed by the Honorable Charles F. Stafford in February of 1976. The task force membership included representatives of both the legislature and judiciary. One of the issues considered by the task force was the mode of adoption of a system of rules of evidence. The ultimate conclusion was that court rules would be preferable in terms of the relatively simple procedure of promulgation and amendment. L. Orland, Chairman's Introduction to the Washington Rules of Evidence, reproduced in 5 K. Tegland, Wash. Prac., *Evidence Law and Practice,* at v-xi (2nd ed. 1982). The task force, however, never expressed a belief that the legislature lacked the authority or power to adopt the rules by statute.

It is now apparent that with respect to substantive rules of evidence related to criminal proceedings, the legislative process is better suited to address concerns raised by the general public than is the court rule process. Nonlawyer advocates of vulnerable adults and children, crime victims, the falsely accused, treatment professionals, and other concerned citizens are all represented in the legislative process. The rule-making procedure adopted by the Washington supreme court presents less opportunity for nonlawyer participation. See generally Rules of General Application 9. The court rule process is, however, well-suited to address matters of procedure, because on procedural matters, input is needed primarily from lawyers.

The legislature, consistent with its responsibility for defining crimes and for establishing penalties for violations of criminal laws, enacted rules related to the admission of evidence in criminal prosecutions for sex offenses. See, e.g., RCW 9A.44.020 (rape shield law); RCW 9A.44.120 (child hearsay rule). The Washington supreme court upheld these laws as a proper exercise of legislative authority. See generally *State v. Ryan,* 103 Wn.2d 165, 178, 691 P.2d 197 (1984) (upholding the legislature's enactment of a child hearsay statute);

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) (upholding the legislature's enactment of a rape shield statute).

The legislature finds that in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any independent witnesses. In addition, because of the unusually aberrant and pathological nature of the crime of child molestation, prior acts of similar misconduct, as opposed to other types of misconduct, are deemed to be highly probative because they tend to establish a motive or explanation for an otherwise inexplicably horrible crime, and may also assist the jury in assessing the probability that a defendant has been falsely accused of such shocking behavior.

Adult-victim sexual assault cases are also distinctive, and often turn on difficult credibility determinations. Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes, but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches.

These findings resulted in the adoption of rules 413 through 415 of the Federal Rules of Evidence as part of the Violent Crime Control and Law Enforcement Act of 1994. P.L. 103-322, 108 Stat. 1796. See 140 Cong. Rec. S12990, daily ed. Sept 20, 1994 (remarks of Senator Robert Dole); 140 Cong. Rec. H8991, daily ed., August 21, 1994 (remarks of Representative Molinari). The practical effect of the new federal rules of evidence was to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule.

Since 1994, eight states enacted similar rules to protect the public from rapists and child molesters. See Arizona Evidence Rule 404(c); Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill. Comp. Stat. Ann. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. Ann. Art. 412.2; Ore. Evid. Code Rule 404(4); Tex. Code Crim. Proc. Art. 38.37. Courts have found the federal rules and the similar state statutes and rules to be constitutional as applied. Even a court from

a jurisdiction whose constitution places the sole authority to adopt evidence rules with the judiciary has, as a matter of comity, approved a similar statutory exception to their judicially adopted Evidence Rule 404. See *State v. McCoy,* 682 N.W.2d 153, 159-160 (Minn. 2004).

The legislature adopts this exception to Evidence Rule 404(b) to ensure that juries receive the necessary evidence to reach a just and fair verdict.

NEW SECTION. **Sec. 2.** A new section is added to chapter 10.58 RCW to read as follows:

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(d) Any federal or out-of-state conviction for an offense involving behavior that under the laws of this state would be defined as a sex offense under this subsection; and

(e) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) For purposes of this section, "defendant" includes a juvenile offender as defined by RCW 13.40.020.

(7) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial; and

(f) Other facts and circumstances.

(8) The inflammatory potential inherent in the sexual nature of prior sex offenses cannot be considered in evaluating the admissibility of evidence under this section.

NEW SECTION. **Sec. 3.** (1) Section 2 of this act is based upon Federal Rules of Evidence Rules 413 and 414, and federal appellate court cases construing those rules.

(2) Section 2 of this act applies to any case that is tried on or after its adoption.

Sec. 4. RCW 2.04.200 and 1925 ex.s. c 118 s 2 are each amended to read as follows:

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect unless the law in conflict expressly states an intent to supersede a rule of court.

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