
HOUSE BILL 2622

State of Washington 60th Legislature 2008 Regular Session

By Representatives Hurst, Morrell, Roach, VanDeWege, Barlow, and Kelley

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

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

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

11 The legislature's authority for enacting rules of evidence arises
12 from the Washington supreme court's prior classification of such rules
13 as substantive law. See *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337
14 (1940) (the legislature has the power to enact laws which create rules
15 of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929)
16 ("rules of evidence are substantiative law"). The Washington supreme
17 court's recognition of the legislature's power in this area is
18 consistent with decisions from other jurisdictions that have comparable
19 provisions to the Washington state Constitution. See, e.g., *State v.*

1 Lewis, 67 Mont. 447, 216 P. 337, 339 (1923) ("there can be no doubt
2 respecting the general power of the Legislature to prescribe rules of
3 evidence to be observed in judicial tribunals, it being restricted only
4 by constitutional limitations and guaranties"); Mont. Const. Art. VIII,
5 § 1 (1889). Prior to 1979, the only codified rules of evidence in
6 Washington could be found in legislatively enacted statutes.

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

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

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

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

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

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

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

32 Since 1994, eight states enacted similar rules to protect the
33 public from rapists and child molesters. See Arizona Evidence Rule
34 404(c); Cal. Evid. Code § 1108; Fla. Stat. § 90.404(2)(b); 725 Ill.
35 Comp. Stat. Ann. 5/115-7.3; Iowa Code § 701.11; La. Code Evid. Ann.
36 Art. 412.2; Ore. Evid. Code Rule 404(4); Tex. Code Crim. Proc. Art.
37 38.37. Courts have found the federal rules and the similar state
38 statutes and rules to be constitutional as applied. Even a court from

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

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

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

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

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

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

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

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

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

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

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

31 (e) Any gross misdemeanor that is, under chapter 9A.28 RCW, a
32 criminal attempt, criminal solicitation, or criminal conspiracy to
33 commit an offense that is classified as a sex offense under RCW
34 9.94A.030 or this subsection.

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

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

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

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

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

9 (c) The frequency of the prior acts;

10 (d) The presence or lack of intervening circumstances;

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

13 (f) Other facts and circumstances.

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

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

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

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

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

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