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CSC: REVISE DEFINITION OF SEXUAL CONTACT

House Bill 4359 with House committee amendments First Analysis (3-18-99)

Sponsor: Rep. Jennifer Faunce
**Committee: Criminal Law and
Corrections**

THE APPARENT PROBLEM:

Under the Michigan Penal Code, criminal sexual conduct (CSC) can involve either "sexual penetration" (an element in first- or third-degree CSC) or "sexual contact" (an element in second- or fourth-degree CSC). "Sexual contact" involves the "intentional touching" of someone's "intimate parts" (or of the clothing covering the "immediate area" of the person's intimate parts), "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." (Under the penal code, "intimate parts" include "the primary genital area, groin, inner thigh, buttock, or breast of a human being.")

According to a Senate Fiscal Agency analysis of a similar bill passed by the Senate last year (see BACKGROUND INFORMATION), there have been criminal sexual conduct cases where defendants have been acquitted -- or where simple assault was charged -- because of the difficulty in proving that the intentional touching of someone's "intimate parts" could reasonably be construed as being for the purpose of sexual arousal or gratification. Thus, for example, a jury in a Macomb County case acquitted a young man of criminal sexual conduct charges because the jury reportedly viewed the incident as "horseplay that got out of hand," and did not have "something sexual" that was required for a conviction on CSC charges. (In this particular case, according to a newspaper report, in December 1997 a group of three Warren high school boys allegedly ganged up on a female classmate at the home of the alleged leader after school, pinning the young woman down and performing various alleged sex acts on her with ice cubes. The alleged leader was charged with first- and second-degree criminal sexual assault, while one of the young men had charges against him dropped in return for testifying against the alleged leader of the assault, and the third young man pleaded guilty to second-degree criminal sexual assault.)

The Michigan Court of Appeals ruled in 1977 (*People v Fisher*, 77 Mich App 6) that a jury may find that "sexual contact" occurred within the meaning of the penal code's criminal sexual conduct provisions, even though the defendant's actual purpose was other than sexual gratification or arousal. However, some people believe that the definition of "sexual contact" in the penal code needs to be changed in order to ensure that juries properly understand the elements of second- and fourth-degree CSC and that people charged with a CSC offense involving "sexual contact" are subject to appropriate penalties.

THE CONTENT OF THE BILL:

The bill would amend the definition of "sexual contact" in the Michigan Penal Code's criminal sexual conduct (CSC) provisions to eliminate the reference to sexual arousal or gratification and to instead refer to "sexual purpose" or "in a sexual manner for revenge, to inflict humiliation or out of anger."

More specifically, "sexual contact" currently "includes the intentional touching of the victim's or actor's [that is, the person accused of criminal sexual conduct] intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." The bill would amend this to say, instead, that "sexual contact" included "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching c[ould] reasonably be construed as being *done for a sexual purpose or in a sexual manner for revenge, to inflict humiliation or out of anger.*"

The bill, if enacted, would take effect on July 1, 1999.

MCL 750.520a

BACKGROUND INFORMATION:

For further information, see the Senate Fiscal Agency analysis, dated 11-20-98, of Senate Bill 1071 (Substitute S-1) of 1997.

FISCAL IMPLICATIONS:

According to a House Fiscal Agency analysis on the bill as introduced, to the extent that the bill led to increases in incarceration for these crimes, it would increase state and local correctional costs. (3-8-99)

ARGUMENTS:

For:

Under the Michigan Penal Code, criminal sexual conduct (CSC) can involve "sexual contact," which is different than "sexual penetration." Thus, for example, grabbing someone's breasts, buttocks, or genitals could be second- or fourth-degree CSC, if the touching were intentional and could reasonably be construed to have been done for sexual arousal or gratification. Although the statutory definition of "sexual contact" refers to intentional touching "for the purpose of sexual arousal or gratification," the Michigan appeals court ruled over 20 years ago that "sexual contact," as distinguished from sexual penetration, "does not require the prosecutor to prove the defendant's purpose or specific intent." (*People v Fisher*) In *Fisher*, the court held that "the defendant's specific intent is not an essential element of the crime," and that it is sufficient to show only that the "intentional touching *can reasonably be construed as being for the purpose of sexual arousal or gratification*" (emphasis in the original). In a footnote, the court further noted that the definition of "sexual contact" must "be read as a substantial lessening of the prosecutor's burden of proof: the touching must be intentional, but the actor's purpose need not be proven to the jury." In effect, then, the current language in the sexual contact provisions of the penal code that refer to sexual arousal or gratification seems to be unnecessary. Moreover, the current language appears to have misled some juries into acquitting defendants of CSC charges because the juries did not believe that the defendant's motive was sexual arousal or gratification.

Thus, for example, if a jury believes a defendant's motive for the intentional touching of someone's intimate parts was anger or the desire for revenge or to humiliate the victim, the jury may acquit the defendant -- even though case law has said that motive need not be proved! Alternatively, and in order to avoid an outright acquittal, the prosecutor may charge a defendant with an assaultive offense that carries a less severe penalty than a CSC charge in order to maximize the likelihood of conviction.

In order to clarify to juries the elements of second- and fourth-degree CSC, and to make the definition of "sexual contact" consistent with the *Fisher* decision, the bill would change the definition of "sexual contact" in the penal code.

Against:

The bill is unnecessary under both current case law and criminal jury instructions. As has been pointed out, the 1977 *Fisher* court ruled that while the touching in sexual contact must be intentional, the defendant's specific intent is not an essential element of the crime, and the prosecutor doesn't have to prove the defendant's purpose or intent. Current criminal jury instructions (CJI 2d 20.13) further include a definition of "sexual contact" that refers to touching done for sexual purposes or that could be reasonably construed as having been done for sexual purposes. By deleting language that is clearly defined and substituting new, vaguer language referring to "sexual purpose," the bill would simply create the need for courts to define this new language.

POSITIONS:

The Department of State Police supports the bill. (3-17-99)

The Livingston County prosecuting attorney supports the bill. (3-17-99)

The Criminal Defense Attorneys of Michigan oppose the bill. (3-17-99)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.