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AMEND RULES OF EVIDENCE RE: DOMESTIC VIOLENCE

House Bill 4765 (Substitute H-2)
Sponsor: Rep. Judith Scranton

House Bill 5283 (Substitute H-2)
Sponsor: Rep. Derrick Hale

Committee: Criminal Justice
First Analysis (10-31-01)

THE APPARENT PROBLEM:

Domestic violence is a serious crime, and needs to be adjudicated accordingly. Because domestic violence is a crime of repetition, and also a crime of escalating intensity that may lead to murder, even first time offenses should be taken seriously. One problem in convicting abusers is the unavailability of victims to testify at trial. Whether the victim is unavailable due to fear of further reprisals, coercion by the defendant, or reconciliation with the defendant, domestic violence needs to be seen as what it is – a crime against society, just as all criminal offenses are treated as crimes against the state and not just the individual victim.

In the wake of Nicole Brown Simpson's murder, California adopted legislation allowing prosecutors to introduce reliable statements as evidence even when the victim is not available. Currently, under the Michigan Rules of Evidence, such statements would be likely to be inadmissible under the hearsay rules. However, considering both the seriousness and the repetitive nature of the crime, many feel that the Michigan evidence rules should be revised to allow statements meeting certain criteria to be admissible and not dismissed as hearsay. Further, it is also believed that allowing the admission of a defendant's previous history of domestic violence would go far to protect victims of domestic abuse and to hold perpetrators of such abuse accountable for their actions. As part of the larger package of bills to implement recommendations by the governor's Domestic Violence and Homicide Prevention Task Force, legislation has been offered to address the issue of revising Michigan's hearsay rules.

THE CONTENT OF THE BILLS:

House Bill 4765. Under the Michigan Rules of Evidence, hearsay is not admissible except as provided in the rules (MRE 802). The rules define

hearsay and establish a number of exceptions for various types of statements that would not be excluded under the hearsay rule. The bill would amend Chapter VIII of the Code of Criminal Procedure (MCL 768.27a and 768.27b), entitled "Trials", to establish specific conditions under which evidence of a statement by a declarant would not be made inadmissible by the hearsay rule.

Under the bill, evidence of a statement would be admissible if: the action (assault, assault and battery, aggravated assault and battery, and violation of a personal protection order) in which it was offered involved domestic violence; the statement purported to narrate, describe, or explain the infliction or threat of infliction of physical injury upon the declarant; the statement was made at or near the time of the infliction or threat of physical injury and was made within five years of the filing of the action or proceeding; the statement was made under circumstances indicating trustworthiness (the bill would establish trustworthiness criteria); and if it was made in writing, was electronically recorded, or had been made to a police official. In order to be admissible under the bill, the proponent of the statement would have to make the intention to offer the statement, and the particulars of the statement, known to the adverse party in advance of the proceedings.

House Bill 5283 would amend Chapter VIII of the Code of Criminal Procedure (MCL 768.27b), entitled "Trials", to specify that evidence of a defendant's commission of other acts of domestic violence would be admissible and not prohibited by Michigan Rules of Evidence 404. The bill's provisions would apply when a defendant was accused of committing a crime involving domestic violence or violating a personal protection order (PPO) issued as a result of domestic violence and the victim was the defendant's spouse,

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former spouse, an individual with whom he or she had a child in common, an individual with whom he or she had a dating relationship, or a resident or former resident of the same household.

The prosecution would have to disclose the evidence to the defendant and include a witness statement or a summary of the substance of testimony that was expected to be offered. The bill would not limit or preclude the court from allowing the admission of evidence under any other statute, rule of evidence, or case law. Evidence of an act that occurred more than 10 years before the charged offense would be inadmissible unless the court determined that admitting the evidence was in the interest of justice.

As used in the bill, “domestic violence” would be defined as an occurrence of one or more of the following acts that did not involve an act of self-defense:

- Causing or attempting to cause physical or mental harm to a spouse, former spouse, an individual with whom the defendant had a child in common, an individual with whom the defendant had or has had a dating relationship, or a resident or former resident of the same household as the defendant.
- Placing any of the above persons in fear of physical or mental harm.
- Causing or attempting to cause the above persons to engage in involuntary sexual activity by force, threat of force, or duress.
- Engaging the person in activity that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, neither of the bills would have direct fiscal implications for the state or local units of governments, although they could enable additional convictions to be obtained. This would tend to increase state or local correctional costs, depending on the offense in question. (10-30-01)

ARGUMENTS:

For:

Too often a victim of domestic violence recants at trial her statements told to police at the time of an incident. Even worse, a victim may be murdered before she or he can testify. Under current state evidentiary rules regarding hearsay, such statements

made by victims against the defendant are inadmissible. House Bill 4765 would craft specific criteria under which statements made in a trustworthy manner could be admissible as evidence, regardless of the victim’s cooperation in the trial. Further, House Bill 5283 would allow evidence of a defendant’s other acts of domestic violence to be considered. This is important for two reasons: 1) less than half of domestic violence actions are successfully tried; and 2) domestic violence is a crime that repeats, often with increasing degrees of physical trauma. With over 100 domestic violence-related homicides in the state in 1999 alone, domestic violence must be seen as the dangerous crime that it is. Abusers must not be allowed to “get away” unscathed, especially when chances are high that without intervention (such as incarceration and court-ordered counseling for batterers) they will abuse someone again.

Response:

House Bills 4765 and 5283 are modeled after a California statute enacted after Nicole Brown Simpson’s murder. However, unlike California, Michigan does not have an evidence code governing rules of evidence. Historically, establishment of the rules of evidence has been seen as the purview of the Michigan Supreme Court. Changes to the Michigan Rules of Evidence are generally done in order to comply with supreme court decisions. Therefore, at this time, it is unclear if the legislature has the necessary authority to make such changes in the hearsay rule. This issue requires further study.

Rebuttal:

The supreme court recently ruled in a case that involved legislation establishing criteria for medical experts in malpractice actions that the legislature did not overstep its authority because the changes were substantive, as opposed to affecting the procedures and practices of the court. Following the precedent set in that case, it could be argued that amending the hearsay rules as House Bills 4765 and 5283 would do would not affect the practices and procedures of the court and so should be allowable.

Against:

Though proponents of the bills assert that enough safeguards are built into the bills and also currently exist in the criminal justice system, the bills would allow for possible erosion of the rights of the accused. House Bill 5283 is particularly troubling, as information pertaining to a defendant’s “other acts of domestic violence” could be introduced at trial. These “other acts” could include unconfirmed allegations, not just actual convictions. Though a judge would have the discretion to disallow such evidence if considered too prejudicial, or to instruct a jury that such “evidence” would first have to be

deemed reliable and to relate to the current charge, a defendant could still be seriously affected by unsubstantiated claims from out of his or her past. Basically, this assumes that no one would ever be falsely accused of domestic abuse. Under the bill, a defendant might have to prove his or her innocence of some past allegation, in addition to mounting a defense on the current charge.

Domestic violence is a serious offense, but it is not uncommon for one party in a current or past relationship who feels hurt or slighted by the actions of the other to make false statements out of anger or desire for revenge. The current evidentiary rules have been constructed so as to protect defendants from such false claims. Notwithstanding the claims of proponents that judges and juries would accurately decide on the relevance and truth of such information, the bills would allow a subjective interpretation about allegations of past events to be mixed with elements of a current incident.

Response:

Some believe that since testimony about past incidents is allowed in criminal sexual assault cases involving children that a precedent for allowing evidence of past incidents has been set, and that it should be expanded to cover past acts of someone accused of domestic violence.

POSITIONS:

The Prosecuting Attorneys Association of Michigan (PAAM) supports the bills. (10-30-01)

The Michigan Coalition on Domestic and Sexual Violence is in strong support of the concept of the bills. (10-30-01)

The National Organization for Women/Michigan Chapter does not have a position at this time as it has not had an opportunity to review the amended bills. (10-30-01)

The Michigan Advocacy Project does not have a position at this time as it has not had an opportunity to review the amended bills. (10-30-01)

The Office of the Governor is neutral on the bills. (10-30-01)

Analyst: S. Stutzky

■ 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.