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BILL ANALYSIS

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Senate Bill 120 (Substitute S-4 as passed by the Senate)
Senate Bill 263 (Substitute S-6 as passed by the Senate)
Sponsor: Senator Shirley Johnson (S.B. 120)
Senator Bev Hammerstrom (S.B. 263)
Committee: Judiciary

Date Completed: 2-9-06

RATIONALE

Police and prosecutors often find that a defendant being charged with a domestic violence offense has committed similar acts of abuse in the past. The rules of evidence in criminal proceedings, however, limit the introduction of evidence of past crimes or acts, and jurors often hear of only the incident charged. Under Michigan Rule of Evidence (MRE) 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Although MRE 404(b) does allow the admission of this evidence "for other purposes, such as proof of motive, opportunity, [or] intent...", prosecutors contend that it is difficult to introduce relevant information about prior bad acts because judges interpret the rule and its exceptions inconsistently.

Similarly, MRE 801 through 806 govern the use of "hearsay" evidence. Rule 801 defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted", and MRE 802 provides that hearsay is inadmissible except as provided in the rules. Evidently, it is common that a domestic violence victim will make a statement to a police officer or other emergency responder but later may be unwilling to testify in court against the abuser. Some people believe that such a statement should be admissible as evidence of the wrongdoing, regardless of the victim's willingness to testify.

CONTENT

Senate Bills 120 (S-4) and 263 (S-6) would amend the Code of Criminal Procedure to do both of the following:

-- Provide for the admissibility of evidence of prior acts of domestic violence when a person was accused of an "offense involving domestic violence".
-- Specify that evidence of a statement by a declarant would be admissible in an offense involving domestic violence under certain circumstances.

If the prosecuting attorney intended to offer evidence under either bill, he or she would have to disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that was expected to be offered, to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

Under both bills, "domestic violence" or "offense involving domestic violence" would mean an occurrence of one or more of the following acts that was not an act of self-defense:

-- Causing or attempting to cause physical or mental harm to a family or household member.
-- Placing a family or household member in fear of physical or mental harm.
-- Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

-- Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

"Family or household member" would mean any of the following:

-- A spouse or former spouse.
-- An individual with whom the person resides or has resided.
-- An individual with whom the person has or has had a child in common.
-- An individual with whom the person has or has had a dating relationship.

("Dating relationship" would mean frequent, intimate associations primarily characterized by the expectation of affectional involvement; it would not include a casual relationship or an ordinary fraternization between two individuals in a business or social context.)

Senate Bill 120 (S-4)

The bill specifies that, in a criminal action in which the defendant was accused of an offense involving domestic violence, evidence of his or her commission of other acts of domestic violence would be admissible for any purpose for which it was relevant, if the evidence were not otherwise excluded under MRE 403 (described below). Evidence of an act occurring more than 10 years before the charged offense would be inadmissible, however, unless the court determined that admitting the evidence was in the interest of justice.

The bill specifies that it would not limit or preclude the admission or consideration of evidence under any other statute, rule of evidence, or case law.

Michigan Rule of Evidence 403 states: "Although 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Senate Bill 263 (S-6)

Under the bill, evidence of a statement by a declarant (a person who made a statement) would be admissible, if all of the following applied:

-- The statement purported to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
-- The action in which the evidence was offered was an offense involving domestic violence.
-- The statement was made at or near the time of the infliction or threat of physical injury.
-- The statement was made under circumstances that would indicate its trustworthiness.
-- The statement was made to a law enforcement officer or to a firefighter, a paramedic, or an emergency medical technician who assisted the declarant at or near the time of the infliction of physical injury or threat of physical injury.

Evidence of a statement made more than five years before the filing of the action or proceeding would be inadmissible.

Circumstances relevant to the issue of trustworthiness would include all of the following:

-- Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
-- Whether the declarant had a bias or motive for fabricating the statement, and the extent of any bias or motive.
-- Whether the statement was corroborated by evidence other than statements that would be admissible only under the bill.

The bill specifies that nothing in it could be construed to abrogate any privilege conferred by law.

Proposed MCL 768.27b (S.B. 120)
Proposed MCL 768.27b (S.B. 263)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

According to testimony before the Senate Judiciary Committee on behalf of the Prosecuting Attorneys Association of

Michigan (PAAM), prosecutors often find that people who commit acts of domestic violence have committed similar prior offenses. The PAAM representative suggested that a victim typically does not report domestic abuse until about the seventh or eighth occurrence and often will not file charges or appear to testify against the abuser in court.

Control and power issues surround the perpetration of domestic violence. Consequently, victims in effect can become prisoners of batterers. An offender's control over his or her victim typically continues through the period of arrest and prosecution, interfering with the State's ability to prosecute the case. Prosecutors continually are confronted with the victim's fear of his or her abuser, and it becomes very difficult for the victim to confront the offender and testify against him or her in court.

Because of the repetitive nature of domestic violence and the offender's ability to continue to manipulate the victim, rules of evidence regarding past actions and hearsay restrictions should not apply in domestic violence cases. The inability to introduce all evidence of domestic violence ties the hands of prosecutors. Domestic abuse does not occur in a vacuum, and the law should not limit the admissibility of evidence to a single particular incident. Doing so does not give jurors an adequate picture of what led up to that incident, and banning a presentation to the jurors of the propensity of domestic violence merely insulates the defendant from the full force of prosecution. To hold batterers accountable for their actions, the law should allow prosecutors to highlight ongoing violence as part of a large scheme.

Similarly, when a victim makes a statement about a domestic abuse incident to police, fire, or emergency medical personnel but later recants or refuses to appear in court, the testimony of the emergency responder regarding the statement made to him or her should be admissible. Otherwise, an offender, through his or her control over the victim, may have the power to determine what evidence is or is not presented to the jury.

Response: Introducing evidence of prior bad acts could lead jurors to find a defendant guilty based on past actions rather than the evidence in the case before them; MRE 404(b) protects against this possibility. Evidence presented to a jury should be limited to information about that case.

Supporting Argument

Laws, including rules of evidence, should be flexible enough to adjust to address the needs of society. Michigan has accommodated changing perceptions of and responses to domestic violence in various ways in recent years. There are mandatory arrest policies and provisions for arrest without a warrant. Some courts have expedited dockets for domestic violence cases, and some prosecutors have "no drop" policies. The State also has enhanced the availability of personal protection orders to protect victims or potential victims of domestic violence. While there may have been resistance to some of these practices and policies when they began to be implemented, they have become standard parts of the State's fight against domestic assault. Likewise, exceptions to the rules of evidence regarding past actions and hearsay should be granted to help address the problem of domestic violence.

Opposing Argument

Article VI, Section 5 of the State Constitution grants the Michigan Supreme Court the authority to "establish, modify, amend, and simplify the practice and procedure in all courts of this state" by general rules. Based on this constitutional authority, the Supreme Court has promulgated the Michigan Rules of Evidence to govern the types of evidence that may be admitted in court proceedings. Proponents of allowing evidence of prior domestic violence and hearsay into the record should pursue Supreme Court amendments to the rules rather than statutory changes.

In addition, since the Constitution gives rule-making authority to the Supreme Court, legislation prescribing what evidence is admissible may violate Article III, Section 2 of the State Constitution (the Separation of Powers), which establishes that governmental powers are divided into the legislative, executive, and judicial branches and provides that one branch may not "exercise powers properly belonging to another branch except as expressly provided" in the Constitution.

Response: In 1999, the Michigan Supreme Court addressed the

constitutionality of a statutory provision conflicting with rules of evidence in *McDougall* v *Schanz* (461 Mich 15). That case involved statutory requirements for expert witnesses in medical malpractice cases. The Court ruled that, although the requirements conflicted with MRE 702 (Testimony by Experts), they did not violate the exclusive grant to the Supreme Court of rule-making authority over court practice and procedure under Article VI, Section 5.

In *McDougall*, the Court drew a distinction between "practice and procedure" and "substantive law" and held that a statutory rule of evidence violates the Constitution only if there is no legislative policy that reflects considerations other than judicial dispatch of litigation. The Court concluded that the statute in question was an enactment of substantive law and, as such, did not impermissibly infringe on the Supreme Court's constitutional rule-making authority over practice and procedure. Similarly, Senate Bills 120 (S-4) and 263 (S-6) should be viewed as enacting substantive law rather than court practice and procedure.

In addition, providing for the admissibility of prior acts and hearsay reportedly was left out of domestic violence legislation several years ago because it was thought that the issue would be addressed in the Supreme Court's rule-making progress. The Court has not modified the rules, however.

Opposing Argument

Senate Bill 608 (which recently passed the Senate) would allow the admission of evidence of prior acts of sex-related offenses against minors. Together with that bill, these measures would establish unwelcome precedent by permitting otherwise excluded evidence to be used in the prosecution of crimes.

Response: Sexual assault against children and domestic violence have very similar dynamics and may be more deserving than other crimes of loosened admissibility standards. Both offenses tend to be repetitive in nature, are usually perpetrated in the privacy of the household, and often involve the power and control of the offender over the victim on an ongoing basis.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

To the extent that allowing the admission of certain prior convictions and statements of declarants as evidence would increase the conviction rate for additional crimes, the bill could increase local and State criminal justice costs. The State would incur the cost of felony probation at an annual average cost of $2,000, as well as the cost of incarceration in a State facility at an average annual cost of $30,000. The 2003 Michigan Uniform Crime Report reported 48,310 domestic violence offenses. According to the Department of Corrections Statistical Report, 415 of those offenses resulted in convictions.

Fiscal Analyst: Lindsay Hollander

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