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BILL ANALYSIS

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Senate Bill 263 (as introduced 3-2-05)
Sponsor: Senator Bev Hammerstrom
Committee: Judiciary

Date Completed: 10-18-05

CONTENT

The bill would amend the Code of Criminal Procedure to do both of the following:

- Specify that evidence of a statement by a declarant would not be inadmissible as hearsay in a domestic violence case under certain circumstances.**
- Provide for the admissibility of evidence of prior domestic violence when a person was accused of an "offense involving domestic violence".**

Hearsay Evidence

Under the bill, evidence of a statement by a declarant would not be inadmissible as hearsay, 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 in writing, electronically recorded, or made to a law enforcement official.

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.

A statement would be admissible under the bill only if the proponent of the statement made known to the adverse party the intention to offer the statement and its particulars a sufficient time before the proceedings to give the adverse party a fair opportunity to prepare to meet the statement.

"Declarant" would mean a person who made a statement.

"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 one 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 a child in common.

Admissibility of Prior Offenses

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 domestic violence would not be made inadmissible by Michigan Rule of Evidence (MRE) 404 regarding character evidence or evidence of other crimes, wrongs, or acts, if the evidence were not excluded under MRE 403 regarding its probative value. 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. (Please see **BACKGROUND** for a description of MRE 403 and 404.)

In an action in which evidence was offered under the bill, the prosecution would have to disclose the evidence to the defendant, including a witness statement or a summary of the substance of testimony that was expected to be offered.

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.

Proposed MCL 768.27a & 768.27b

BACKGROUND

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."

Michigan Rule of Evidence 404(a) deals with evidence of the character of the accused, the alleged victim of a homicide or a sexual conduct crime, or a witness, while MRE 404(b) addresses evidence of other crimes, wrongs, or acts.

Under MRE 404(a), evidence of a person's character or a trait of character is not admissible to prove action in conformity with the evidence on a particular occasion, except for the following:

- Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut that evidence; or, if evidence of the alleged victim's character is offered by the accused and admitted under the next provision, evidence of a trait of character for aggression of the accused offered by the prosecution.

- When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim, offered by the accused; evidence offered by the prosecution to rebut that evidence; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution to rebut evidence that the alleged victim was the first aggressor.
- In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
- Evidence of the character of a witness, as provided in other court rules.

Under 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." Such evidence may be admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case".

The rule also requires the prosecution to provide reasonable notice of the general nature of any evidence of other crimes, wrongs, or acts it intends to introduce at trial and the rationale for admitting the evidence.

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.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.