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BILL ANALYSIS



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Senate Bill 608 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator Alan L. Cropsey  
Committee: Judiciary

Date Completed: 8-12-05

### **RATIONALE**

Prosecutors often find that a defendant being prosecuted for a sexual offense against a minor has committed similar offenses in the past. The rules of evidence in State criminal proceedings, however, limit the introduction of evidence of past crimes and jurors often hear of only the incident charged. Under Michigan Rules 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 include exceptions under which evidence of other crimes, wrongs, or acts may be admitted, prosecutors contend that it is difficult to introduce relevant information about prior bad acts because judges interpret the rule and its exceptions inconsistently. On the other hand, in Federal prosecutions for child molestation offenses, "evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant" (Federal Rules of Evidence (FRE) 414(a)). Some people believe that evidence of prior sexual assaults against a minor should be similarly admissible in Michigan courts.

### **CONTENT**

The bill would amend the Code of Criminal Procedure to specify that in a criminal case in which a defendant was accused of committing a "listed offense" against a minor (an individual under 18 years old), evidence that the defendant committed another listed offense against a minor would be admissible and could be considered for its

bearing on any matter to which it was relevant.

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

"Listed offense" would mean that term as defined in the Sex Offenders Registration Act (MCL 28.722), i.e., any of the following:

- A first or subsequent conviction of accosting, enticing, or soliciting a child for immoral purposes (MCL 750.145a & 750.145b).
- Involvement in child sexually abusive activity or material (MCL 750.145c).
- Sodomy, if a victim is under 18 (MCL 750.158).
- A third or subsequent offense of engaging in indecent or obscene conduct in a public place or indecent exposure (MCL 750.167(1)(f) or 750.335a).
- Except for a juvenile disposition or adjudication, gross indecency, if a victim is under 18 (MCL 750.338, 750.338a, or 750.338b).
- Kidnapping, if a victim is under 18 (MCL 750.349).
- Kidnapping a child under 14 (MCL 750.350).
- Soliciting, accosting, or inviting another person to commit prostitution or an immoral act, if a victim is under 18 (MCL 750.448).

- Pandering for purposes of prostitution (MCL 750.455).
- First-, second-, third-, or fourth-degree criminal sexual conduct (CSC) or assault with intent to commit CSC (MCL 750.520b-750.520e & 750.520g).
- Any other violation of a State or local law that, by its nature, constitutes a sexual offense against an individual under 18.
- An offense committed by a person who was, at the time of the offense, a "sexually delinquent person" as defined in the Michigan Penal Code (i.e., any person whose sexual behavior is characterized by repetitive or compulsive acts that indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sexual relations or by the commission of sexual aggressions against children under 16) (MCL 750.10a).
- An attempt or conspiracy to commit an offense listed above.
- An offense substantially similar to an offense listed above, under a law of the United States, any state, or any country, or under tribal or military law.

Proposed MCL 768.27a

## **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 sex offenders who commit crimes against children have committed similar prior offenses and frequently use the same *modus operandi* (distinctive criminal pattern) in committing those crimes. Since MRE 404(b) generally prohibits the introduction of evidence of other crimes, wrongs, or acts, however, jurors typically do not know of a defendant's criminal history. The PAAM representative suggested that jurors in State courts often later feel that they should have been informed of all available information regarding a defendant's history and character.

In addition, in a May 3, 2005, letter to legislative leaders, Governor Jennifer Granholm asked them to pass legislation

designed to protect Michigan children. The Governor urged the Legislature to take action on a number of issues, including allowing evidence of prior child molestation and sexual assault to be admissible in court to prove the character of the defendant.

By providing for the admissibility in State courts of evidence that a defendant previously committed a sex offense against a minor, the bill would allow a jury to consider all the relevant information in the case, including the defendant's background and character. This would help ensure that guilty defendants were convicted and children were protected from sexual predators.

**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**

The Federal courts, pursuant to FRE 414(a), and at least one other state, allow the introduction of evidence of past sex offenses against a minor when a defendant is prosecuted for a similar offense. The bill would provide some consistency between evidentiary standards in Michigan courts and those in the Federal courts regarding such matters.

### **Opposing Argument**

As introduced, the bill would have allowed evidence that a person previously had been *convicted* of a listed offense against a minor, but the Senate-passed version of the bill specifies that evidence the defendant *committed* another such offense would be admissible. A mere allegation of prior actions should not be admissible in a criminal case regarding another allegation. Moreover, if the defendant had previously been arrested and charged, but was acquitted, evidence of that prior charge should not be allowed into the trial record.

**Response:** The admission of evidence based only on a prior conviction would be an overly high standard. Often, a victim of child molestation may not report a violation until years after he or she is assaulted, by which time the statute of limitations for prosecution may have expired. Also, criminal charges may not have been pursued

for a prior offense because a child victim was too traumatized to testify. In those cases, there would be no prior conviction to consider, but there could be compelling evidence of the defendant's prior commission of an offense. In addition, admission of evidence is not a guaranty of conviction.

Moreover, the bill would not negate court rules and procedures. Before a court allowed evidence of a prior commission, the prosecutor would have to convince the judge at a pretrial evidentiary hearing that there was evidence the defendant had committed a prior offense, that it was relevant to the case at hand, and that the evidence was more probative than prejudicial.

### **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 established the MRE to govern the types of evidence that may be admitted in court proceedings. Proponents of allowing into the record evidence of prior sex offenses committed against children should pursue a Supreme Court amendment to MRE 404(b).

In addition, since the Constitution gives rule-making authority to the Supreme Court, legislative encroachment into the area of establishing 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 Bill 608 (S-1) should be viewed as enacting substantive law rather than court practice and procedure.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

To the extent that allowing the admission of certain prior convictions as evidence would increase the conviction rate for additional crimes, the bill could increase local and State criminal justice costs.

Fiscal Analyst: Bethany Wicksall

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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.