

TESTIMONY AND EVIDENCE IN CASE INVOLVING HUMAN TRAFFICKING OR PROSTITUTION

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Senate Bill 515 (S-1) as passed by the Senate
Sponsor: Sen. Rosemary Bayer

Analysis available at
<http://www.legislature.mi.gov>

Senate Bill 516 as passed by the Senate
Sponsor: Sen. Sue Shink

Senate Bill 517 (S-1) as passed by the Senate
Sponsor: Sen. Stephanie Chang

House Committee: Judiciary
Senate Committee: Civil Rights, Judiciary, and Public Safety
Complete to 11-13-24

SUMMARY:

Senate Bills 515, 516, and 517 would change guidelines for testimony and evidence in criminal prosecutions for offenses involving prostitution, human trafficking, or commercial sexual activity as follows:

- Senate Bill 515 would allow statements made to a law enforcement officer to be admissible as evidence in a criminal case involving prostitution or human trafficking under the same conditions that now apply in domestic violence cases.
- Senate Bill 516 would allow evidence of a defendant's prior acts of domestic violence, sexual assault, commercial sexual activity, human trafficking, or prostitution to be admissible as relevant in a prosecution for any of those crimes. (Currently, the law allows evidence of prior acts of domestic violence or sexual assault to be admissible as relevant in a prosecution for domestic violence or sexual assault.)
- Senate Bill 517 would provide that a witness necessary for a prosecution under the human trafficking chapter of the Michigan Penal Code cannot be excused from testifying or producing evidence on the grounds that the testimony or evidence might degrade or incriminate them. Any truthful testimony compelled from them under this provision could not be used against them, except to challenge the reliability of the testimony or evidence or in a prosecution for lying under oath or for otherwise failing to testify or produce evidence as required.

Senate Bill 515 would amend section 27c of Chapter VIII (Trials) of the Code of Criminal Procedure. Under the Michigan Rules of Evidence, *hearsay* is not admissible in court unless the rules provide otherwise in a specific exemption.¹ *Hearsay* is a written or verbal statement someone made outside of the current trial or hearing that is repeated by someone else as evidence of the truth of whatever the statement was addressing.² Section 27c provides another

¹ Michigan Rules of Evidence: <https://www.courts.michigan.gov/48eed7/siteassets/rules-instructions-administrative-orders/rules-of-evidence/michigan-rules-of-evidence.pdf> Hearsay is addressed by Rules 801 to 807.

² The Michigan Rules of Evidence define hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." In relation to the phrase "to prove the truth of the matter asserted in the statement," the website womenslaw.org provides the following example: "The same statement could be offered for two different reasons and one reason may not be hearsay. For example, if a witness testifies 'He said "The weather sure is great today!'" this might **not be hearsay** if it is admitted just to show that someone said those words to the witness when they met. In other words, if the witness wants to show that this is how he greeted her. However, if the weather on a certain day is

exception to the general prohibition against hearsay. It currently says that evidence of someone else's statement is admissible if it was made to a law enforcement officer under circumstances that would indicate its trustworthiness³ and if all of the following apply:

- The statement purports to narrate, describe, or explain the *infliction or threat of physical injury* upon the person making the statement.
- The statement was made at or near the time of the *infliction or threat of physical injury*. (Evidence of a statement made more than five years before the current action or proceeding was filed is not admissible.)
- The action in which the evidence is offered is an offense involving domestic violence.

The bill would amend the last bulleted item to allow a statement that otherwise meets the above criteria to also be admitted if the action in which the evidence is offered is an offense involving *prostitution* or *human trafficking*.

Prostitution would mean a violation of Chapter LXVII of the Michigan Penal Code (sections 448 to 462).⁴

Human trafficking would mean a violation of Chapter LXVIIA of the Michigan Penal Code (sections 462a to 462h).⁵

In addition, the bill would add parameters for the term *infliction or threat of physical injury* (italicized above), which is not currently defined in the law:

Infliction or threat of physical injury would include any of the following:

- Physically harming or restraining any individual.
- Threatening to harm or physically restrain any individual.
- Creating any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in physical, psychological, reputational, or financial harm to any individual or in the physical restraint of any individual.
- Facilitating or controlling an individual's access to a controlled substance, as defined in the Public Health Code, except for a legitimate medical purpose.

As is now the case for offenses involving domestic violence, a prosecuting attorney who intends to offer evidence under these provisions would have disclose the evidence to the defendant (including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered) at least 15 days before the scheduled trial date, unless a later time for the disclosure is allowed by the court for good cause shown.

MCL 768.27c

a major issue in the case, and the witness says 'He said "The weather sure is great today!"' as a way to prove that the weather was, in fact, great, then a statement like this **would be** hearsay." <https://www.womenslaw.org/laws/preparing-court-yourself/hearing/hearsay/what-hearsay>

³ Section 27c provides examples of circumstances relevant to trustworthiness, such as whether the statement was made with an eye toward litigation that the person making the statement has or will have a stake in, whether the person making the statement has a bias or motive for lying (and the extent of any bias or motive), and whether the statement is supported by evidence other than hearsay that is admissible only under these provisions.

⁴ <https://www.legislature.mi.gov/documents/mcl/pdf/mcl-328-1931-LXVII.pdf>

⁵ <https://www.legislature.mi.gov/documents/mcl/pdf/mcl-328-1931-LXVIIA.pdf>

Senate Bill 516 would amend section 27b of Chapter VIII of the Code of Criminal Procedure. Under the Michigan Rules of Evidence (Rule 404), evidence of other acts or crimes committed by a person is not admissible as proof of the person's character in order to show that on a particular occasion they acted in accordance with that character. In other words, evidence of previous bad acts usually cannot be admitted as evidence that the person has a predisposition to commit crimes similar to the one that is the subject of the trial. (The rule does allow evidence of past crimes or acts to show motive, opportunity, intent, or preparation, among other things.)

Section 27b provides an exception to this general prohibition. Currently under section 27b, in cases where the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts or domestic violence or sexual assault is admissible for any purpose for which it is relevant, as long as it is not otherwise excluded under Rule 403 of the Michigan Rules of Evidence.⁶

The bill would amend section 27b to provide that evidence of a defendant's commission of other acts of domestic violence, sexual assault, **commercial sexual activity**, human trafficking, or prostitution⁷ is admissible as relevant in cases where the defendant is accused of an offense involving any of those violations (as long as not otherwise excluded under Rule 403). However, as is now the case for offenses involving domestic violence or sexual assault, evidence of an act occurring more than 10 years before the charged offense would not be admissible under these provisions unless the court determines either that admitting the evidence is in the interest of justice or that the act was a sexual assault to which one or more of the following apply:

- It was reported to law enforcement within five years of the date of the sexual assault.
- A sexual assault evidence kit was collected.
- The testing of evidence connected to the assault resulted in a DNA identification profile that is associated with the defendant.

Commercial sexual activity would mean one or more of the following for which anything of value is given or received by any person:

- An act of sexual penetration (defined as meaning sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, regardless of whether there was emission of semen).
- An act of sexual contact (defined as including the 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 can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger.
- Child sexually abusive activity or material as prohibited under section 145c of the Michigan Penal Code.⁸

⁶ Rule 403 allows a court to exclude relevant evidence if its probative value (its use in proving something, its weight as evidence) is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (i.e., evidence that is repetitive because the issue has already been established by similar evidence).

⁷ *Human trafficking* and *prostitution* would have the same definitions as in Senate Bill 515.

⁸ <http://legislature.mi.gov/doc.aspx?mcl-750-145c>

- Any sexually explicit performance (defined as meaning a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse).

As is now the case for offenses involving domestic violence or sexual assault, a prosecuting attorney who intends to offer evidence under these provisions would have to disclose the evidence to the defendant (including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered) at least 15 days before the scheduled trial date, unless a later time for the disclosure is allowed by the court for good cause shown.

MCL 768.27b

Senate Bill 517 would amend section 462g of the Michigan Penal Code, which addresses testimony in a criminal prosecution for violation of Chapter LXVIIA (Human Trafficking). Section 462g now provides that the testimony of a victim is not required in a prosecution under Chapter LXVIIA, and that the testimony of a victim who does testify does not have to be corroborated. In addition, expert testimony regarding behavioral patterns of human trafficking victims and how they might diverge from the expectations of society is admissible as evidence as long as it is otherwise admissible under state law and the rules of evidence.

The bill would add that a victim, complainant, or witness necessary for the prosecution cannot be excused from attending and testifying or producing documents before a court or magistrate in an investigation, proceeding, or trial for a violation of Chapter LXVIIA on the grounds that the testimony or evidence may tend to degrade or incriminate them. Truthful testimony, evidence, or information compelled under this provision, and any information derived directly or indirectly from that truthful testimony, evidence, or information, could not be used against the witness in a criminal case, except for impeachment purposes (challenging their testimony or evidence as false or untrustworthy) or in a prosecution for perjury (lying under oath) or for otherwise failing to testify or produce evidence as required.

MCL 750.462g

BACKGROUND:

The Code of Criminal Procedure was amended in 2006 to provide that, under specified circumstances, evidence of a defendant's past crimes or statements made to a law enforcement officer are admissible as evidence in a domestic violence case. The admissibility of past crimes in sexual assault cases was added in 2018 in the wake of the Larry Nasser revelations.

FISCAL IMPACT:

A fiscal analysis is in progress.

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