

EXPERT WITNESS TESTIMONY IN HUMAN TRAFFICKING CASES

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House Bill 4211 (reported from committee w/o amendment)

Sponsor: Rep. Peter J. Lucido

Committee: Law and Justice

Complete to 3-16-17

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

BRIEF SUMMARY: The bill will allow expert witness testimony regarding behavioral patterns of a victim of human trafficking to be admissible as evidence in a criminal case.

FISCAL IMPACT: The bill would have no fiscal impact on the state or on local units of government.

THE APPARENT PROBLEM:

Knowledgeable observers say that people who are trafficked in the commercial sex trade, as domestic servants, or as laborers are typically subjected to physical and psychological abuse on a daily, or near daily, basis. This abuse takes many forms, from social isolation to physical and/or sexual abuse, but is generally designed to break a person's spirit and erode the person's self-worth and independence.

Experts say that the victims of human trafficking are kept in such a state of fearfulness and uncertainty that they come to believe they are helpless to save themselves. This "learned helplessness," as it is called, coupled with the traumatic experiences they are forced to endure, trigger survival responses that, among other things, affect memory and recall. [Dandurand, Yvon (May 25, 2014). Human Trafficking for Domestic Servitude, Patterns of Deception and Coercion and their Impact on Victims. Retrieved from http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/human-trafficking/resources/human_trafficking_for_domestic_servitude.pdf]

As a result, a human trafficking victim may not respond in the way that people think someone freed from such abuse would or should respond. For example, when testifying in a criminal case, victims may have gaps in their stories, or seem sympathetic to or friendly toward their captors. Such behavior may make a victim's testimony seem unreliable or not credible. Jurors may wonder why a victim did not make use of opportunities to escape or ask for help, as they perceive they might have done under similar circumstances, and so conclude the victim was complicit or even colluded with the trafficker. Such perceptions may unfairly influence a juror's determination of the facts of a case and whether the victim (if the victim was charged with a crime), or the person accused of being a trafficker, is guilty or innocent.

Advocates working with victims of human trafficking and those who prosecute the traffickers would like to be able to provide information during trials to educate jurors on certain behaviors that are typical of people who have been trafficked. Currently, such

information is not admissible. The types of information and evidence considered to be admissible in court is governed under state laws and the Michigan Rules of Evidence established by the Michigan Supreme Court.

In a press release dated January 21, 2016, Attorney General Bill Schuette announced that the Michigan Human Trafficking Commission had made several recommendations to the Legislature "for new laws aimed at helping victims resume their lives." One of the recommendations was to allow "expert witnesses to testify at trial in order to educate juries on the behavior pattern of human trafficking victims where that behavior deviates from what the general public would expect."

THE CONTENT OF THE BILL:

House Bill 4211 would amend the Michigan Penal Code, Chapter LXVIIA (Human Trafficking), to allow expert testimony as to the behavioral patterns of human trafficking victims, and the manner in which a human trafficking victim's behavior may deviate from societal expectations, to be admissible in court in a prosecution. This would apply only if the expert testimony is otherwise admissible under the Michigan Rules of Evidence and state laws. The bill will take effect 90 days after enactment.

MCL 750.462g

BACKGROUND INFORMATION:

The bill is identical to House Bill 5808 of the 2015-2016 Legislative Session. The bill was reported from the Criminal Justice Committee but failed to see floor action.

For more information on Human Trafficking, the work being done by the Michigan Human Trafficking Commission, and additional resources, see the Attorney General's human trafficking website at www.michigan.gov/humantrafficking.

ARGUMENTS:

For:

Experts say human traffickers use a variety of psychological and emotional control tactics to manipulate their victims. Victims are often subjected to physical and emotional abuse, and may be sexually assaulted. They are isolated from friends and family, not allowed to attend school or religious services. They are often overworked, sleep deprived, and may be fed only the leftover scraps from the trafficker's table. Those trafficked in the commercial sex trade or as laborers are often moved from one locale to another; therefore, they may not know what town or even which state they are in, let alone know where the nearest police station is. They are usually underpaid or not paid at all and may not have access to a phone. Such methods are effective in creating a state of dependency and fear.

According to the paper cited earlier, the trauma suffered by victims "overwhelms the victim's psychological and biological coping mechanisms." Their spirits broken, victims

"become convinced that they are powerless to escape and incapable of getting help." They "often become psychologically unable to make the decision to leave the situation and to carry out that decision." In order to survive, some may have been forced or felt they had no alternative than to participate in criminal activity, thus giving the appearance they colluded with their traffickers. Even if they escape or get rescued, victims tend to mistrust authorities and may be uncooperative or, because of the effect on memory connected with the trauma they endured, may find it difficult to provide answers when questioned by law enforcement or when testifying as a witness.

People who do not understand the manipulation and control victims of human trafficking are forced to live under, and the extreme to which the anxiety and physical and/or emotional stressors they are subjected to can affect their decision-making and memories, may view the victim as being complicit and therefore deserving of some punishment.

The bill will adopt one of the Legislative recommendations offered by the Michigan Commission on Human Trafficking. It simply allows an expert on human trafficking to present evidence regarding behavior patterns associated with victims of human trafficking, especially as to how those behaviors may be different from societal norms, during a criminal trial and to have that testimony be admissible. Such information would aid members of juries as they, as the finders of fact, weigh the evidence presented in a criminal case and make a determination of a defendant's guilt or innocence.

Against:

A concern has been raised that the bill conflicts with the procedural powers of the judiciary by taking over the role of deciding evidentiary rules. In addition, the bill may conflict with a federal standard known as the "Daubert Standard" that puts restraints on the use of expert witnesses. Under the standard, the trial judge acts as a gatekeeper to exclude unreliable expert testimony. The standard sets forth a checklist for the trial courts to use in assessing the reliability of scientific expert testimony, though this checklist is not all-inclusive (meaning, the court can look at other criteria in deciding if the testimony of an expert is reliable).

The concern is that by making this information admissible by statute, it may circumvent Daubert, diminish the prosecution's burden of proof, and set up a slippery slope to allow, by statute, other general characterizations to be admissible in other types of cases.

Response:

Supporters say the bill is only allowing as admissible evidence presenting general information such as "this is the range of behaviors common to victims of human trafficking," not necessarily giving an opinion regarding a specific victim in a specific case. Case law allows information regarding the characteristics of victims of domestic violence and sexual assaults to be admissible, so, in a way, the bill could be viewed as codifying that case law as it pertains to the characteristics of victims of human trafficking.

POSITIONS:

The Michigan State Police indicated support for the bill. (3-7-17)

The American Association of University Women indicated support for the bill. (3-7-17)

A representative of the Attorney General indicated support for the concept of the bill. (3-7-17)

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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.