

Testimony in Support of House Bill 4190

From Lore A. Rogers, J.D.

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Good morning. My name is Lore Rogers. I am a staff attorney for the Michigan Domestic and Sexual Violence Prevention and Treatment Board. The Board is a legislatively created Board with seven members appointed by the Governor. Thank you for the opportunity to testify on behalf of the Board in support of House Bill 4190. As noted by Representative Cox, this bill would close a gap in Michigan law and allow relevant evidence in sexual assault cases involving adult victims who are not in a domestic relationship to the offender to be admitted for any purpose, and not just for the limited purposes of Rule 404(b) of the Michigan Rules of Evidence.

In upholding MCL 768.27a in 2012, the Michigan Supreme Court in People v Watkins¹ noted that there were several substantive policy reasons that supported the legislature's decision to allow other acts evidence to be admitted for any purpose in sexual assault cases involving minor victims, including the fact that these offenders are more likely to reoffend, the assaults occur without witnesses, and the victims may not be believed. The Court also recognized the legitimate policy goals of promoting the effective prosecution of sex offenses and addressing the reliance of sex offense cases on difficult credibility determinations. These same policy reasons exist in cases of sexual assault against adults, not just minors, and justify the amendment of this statute as proposed in Representative Cox's bill.

In the last ten or 15 years, there has been increasing recognition that sexual assault crimes against adults, similar to sexual assault crimes against children and domestic violence crimes, are not like many other crimes. As in domestic violence crimes, sexual assault typically is perpetrated behind closed doors, in secret, without witnesses. Just as in sexual assault against children, sex offenders against adult victims are likely to be repeat offenders.

¹ 491 Mich 450 (2012)

Reports of sexual assault crimes have been met with a cultural history of skepticism and disbelief, fueled by deeply held beliefs in stereotypes about who sex offenders are, about what “real” rape is, and about how victims “should” behave if they didn’t consent to sexual contact. The Final Report of the Sexual Assault Kit Action Research Project in Detroit² found that these stereotypes and this culture of skepticism played a part in the accumulation of the thousands of stockpiled untested sexual assault evidence kits in Detroit. Among other things, the report notes that “[r]ape survivors were often assumed to be prostitutes and therefore what had happened to them was considered to be their own fault.”³

These stereotypes don’t only affect how law enforcement and prosecution perceive reports of these crimes. They also affect how judges and juries perceive the credibility of sexual assault victims, particularly in cases where the defendant claims that the victim consented. In these cases, for example, the claim by the defendant that a victim was a prostitute and that this was a “deal gone bad” plays right into the cultural disbelief of victims, and the belief that prostitutes by virtue of their work cannot be raped. Allowing evidence of other sexual offenses by a defendant in such a case can provide corroboration of a victim’s report and assist the trier of fact in making these difficult credibility decisions. For example, as the Michigan Court of Appeals noted in the recent published opinion in People v Kelly, “it strikes us as extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assault after engaging in consensual sex with defendant.”⁴

Research conducted in the 1990s with incarcerated sex offenders and with those who completed sex offender treatment (whether or not incarcerated) consistently revealed a high serial offense rate, with one study finding a 39% re-offense rate over 25 years and another finding a 20% re-offense rate over 4 years.

² The Detroit Sexual Assault Kit Action Research Project, Final Report, Campbell, R., et al, December 2015, retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf> on February 27, 2017.

³ *Id.*, at iv.

⁴ People v Kelly, ___ Mich App ___, 2016 WL 5329749, FN 4, Docket No. 331731, September 22, 2016. In Kelly, the defendant has asserted that the victim in the charged case was a prostitute and consented to sex. The prosecutor was seeking to introduce evidence from 7 other reported sexual assaults from four different states under MRE 404(b), which the trial court initially denied. On interlocutory appeal, the Court of Appeals reversed and remanded, directing the trial court to consider the evidence’s relevance in relation to the purposes for which it was being offered under MRE 404(b), and then to determine whether the relevance was outweighed by undue prejudice or other considerations set out in MRE 403.

Other research of incarcerated sex offenders revealed that the actual number of sex offenses committed by these men far exceeded the adjudicated charges against them.⁵

The serial nature of sexual assault is not limited to offenders who have been reported to police and successfully prosecuted. Research reported in 2002 by Lisak and Miller on “undetected” rapists (men who acknowledged in survey responses engaging in acts that would meet the definition of rape or attempted rape, but who had never been reported to police) revealed that of the 120 men who self-identified, a majority of them had committed more than one unreported rape or attempted rape. And together these 120 men were responsible for 1225 separate acts of violence, including rape, attempted rape, domestic violence, child physical abuse and child sexual abuse.⁶

The serial nature of sexual assault by some offenders has been demonstrated much closer to home. In the Final Report of the Detroit Sexual Assault Kit Action Research Project, the authors noted that of the 455 CODIS hits from the 1595 kits tested, 127 – or 28% of the hits – were to serial sexual assaults. And the report makes an important point: this CODIS data likely is an underestimate of the number of serial assaults, since these offenders could have assaulted others where no sexual assault kit was collected or, if collected, was not tested.

House Bill 4190 will help in the more effective prosecution of these serial assaults and get these offenders off the streets.

As noted in Representative Cox’s testimony, if this bill is passed, courts will continue to have the discretion to exclude evidence under MRE 403. The Michigan Supreme Court provided guidance in *People v Watkins*, instructing trial courts to consider several factors when making the determination of admissibility under MCL 768.27a, including:

- the dissimilarity between the other acts and the charged crime,
- the temporal proximity of the other acts to the charged crime,
- the infrequency of the other acts,

⁵ See *Repeat Rape and Multiple Offending Among Undetected Rapists*, Lisak, D. and Miller, P., Violence and Victims, Vol 17, No. 1, 2002.

⁶ *Id.*

- the presence of intervening acts,
- the lack of reliability of the evidence supporting the occurrence of the other acts, and
- the lack of need for evidence beyond the complainant's and the defendant's testimony.

Finally, the Michigan Model Jury Instructions provide additional protections to help jurors appropriately consider the evidence which is admitted under this statute.⁷

For all these reasons, the Michigan Domestic and Sexual Violence Prevention and Treatment Board supports the amendment to MCL 768.27a proposed by House Bill 4190. On behalf of the Board, I want to thank Representative Cox for sponsoring this important piece of legislation.

⁷ Michigan Model Criminal Jury Instruction 20.28A provides as follows:

"(1) The prosecution has introduced evidence of claimed acts of sexual misconduct by the defendant with [a minor / minors] for which [he / she] is not on trial.

(2) Before you may consider such alleged acts as evidence against the defendant, you must first find that the defendant actually committed those acts.

(3) If you find that the defendant did commit those acts, you may consider them in deciding if the defendant committed the [offense / offenses] for which [he / she] is now on trial.

(4) You must not convict the defendant here solely because you think [he / she] is guilty of other bad conduct. The evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime, or you must find [him / her] not guilty."