

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 776
(Senator Lee)
Judicial Proceedings

Criminal Procedure – Out of Court Statements – Child and Vulnerable Adult Victims

This bill authorizes a court to admit an out of court statement in a juvenile court or criminal proceeding made by a victim who is a “vulnerable adult” under specified circumstances by expanding application of an existing statutory authorization applicable to a child who is the alleged victim in a case concerning specified offenses. The bill also extends application of the authorization, as amended by the bill, to cases concerning child neglect, abuse or neglect of a vulnerable adult in the first or second degree, or a crime of violence under § 5-101 of the Public Safety Article.

Fiscal Summary

State Effect: The bill is procedural and is not anticipated to materially affect State finances or operations.

Local Effect: The bill is procedural and is not anticipated to materially affect local finances or operations.

Small Business Effect: None.

Analysis

Bill Summary/Current Law: The provision for out of court statements of child victims, sometimes referred to as the “tender years statute,” is a statutory exception to the hearsay rule, which generally prohibits the admission into evidence of an out of court statement offered to prove the truth of the matter asserted in the statement.

Admissibility of Out of Court Statements Made by Child Victims

Under § 11-304 of the Criminal Procedure Article, a court is authorized to admit into evidence in a juvenile court proceeding or in a criminal proceeding an out of court statement to prove the truth of the matter asserted in the statement made by a child victim who (1) is younger than age 13 and (2) is the alleged victim or the child alleged to need assistance in the case before the court concerning:

- child abuse or sexual abuse of a minor;
- first- or second-degree rape or a third-degree sexual offense;
- attempted rape in the first or second degree; or
- abuse or neglect in a juvenile court proceeding.

The bill extends application of this authorization to apply to an out of court statement made by a victim who is a “vulnerable adult” under the circumstances described above and subject to the requirements described below. The bill makes conforming changes to reflect this expanded application. A “vulnerable adult” is an adult who lacks the physical or mental capacity to provide for the adult’s daily needs.

The bill also expands the applicable offenses/cases to include neglect of a minor (child neglect) under § 3-602.1 of the Criminal Law Article; abuse or neglect of a vulnerable adult in the first or second degree under §§ 3-604 and 3-605 of the Criminal Law Article; and a crime of violence under § 5-101 of the Public Safety Article. The bill does not make any additional procedural changes to § 11-304, the remainder of which is described below.

“Statement” is defined as (1) an oral or written assertion or (2) nonverbal conduct intended as an assertion, including sounds, gestures, demonstrations, drawings, and similar actions.

An out of court statement made by a child victim may be admissible only if the statement was made to and is offered by specified individuals, including physicians, nurses, teachers, or social workers, while the individual was acting lawfully in the course of his/her profession.

An out of court statement by a child victim may come into evidence in a criminal proceeding or in a juvenile court proceeding other than a Child in Need of Assistance (CINA) proceeding to prove the truth of the matter asserted in the statement if the child victim testifies and if the statement is not admissible under any other hearsay exception. An out of court statement by a child victim may come into evidence in a CINA proceeding to prove the truth of the matter asserted in the statement regardless of whether the child victim testifies and if the statement is not admissible under any other hearsay exception.

If the child victim does not testify, the child victim's out of court statement is admissible only if there is corroborative evidence that the alleged offender had the opportunity to commit the alleged abuse or neglect.

The prosecuting attorney is required to serve on the defendant, child respondent, or alleged offender and the attorney for the defendant, child respondent, or alleged offender with notice of (1) the State's intention to introduce the statement and the content of the statement; (2) any audio or visual recording of the statement; and (3) if an audio or visual recording of the statement is not available, the content of the statement. The notice must be served within a reasonable amount of time before a juvenile court proceeding and at least 20 days before the criminal proceeding in which the statement is to be offered into evidence. The defendant, child respondent, or alleged offender may depose a witness who is called to testify as to the out of court statement but must file a notice of deposition at least 5 days before the date of the deposition in a criminal proceeding or within a reasonable amount of time before the date of a deposition in a juvenile court proceeding. However, an alternative notice requirement deadline may be ordered by the court or agreed to by the State and the defense.

The out of court statement of a child victim is only admissible if it has particularized guarantees of trustworthiness. To determine the trustworthiness of the statement, the court must consider multiple factors, including (1) the child victim's personal knowledge of the event; (2) the certainty that the statement was made; (3) any apparent motive to fabricate or exhibit partiality by the child victim, including interest, bias, corruption, or coercion; (4) whether the statement was spontaneous or directly responsive to questions; (5) the timing of the statement; (6) whether the child victim's young age makes it unlikely that the child victim fabricated the statement that represents a graphic, detailed account beyond the child victim's expected knowledge and experience; (7) the age appropriateness of the terminology used by the victim in the statement; (8) the nature and duration of the abuse or neglect; (9) the inner consistency and coherence of the statement; (10) whether the child victim was suffering pain or distress when making the statement; (11) whether there is extrinsic evidence to show that the defendant or child respondent had an opportunity to commit the act complained of in the statement; (12) whether the statement was suggested by the use of leading questions; and (13) the credibility of the person testifying about the statement.

The court is required to make a finding on the record regarding the trustworthiness of the statement and determine the admissibility of the statement in a hearing outside of the presence of the jury or before the juvenile court proceeding. The court is required to examine the child victim in a location not open to the public before making a determination on the admissibility of the statement. The court is not required to conduct this examination if (1) the child victim is deceased; (2) the child victim is absent from the jurisdiction for good cause shown, or the State has been unable to procure the child victim's presence by

subpoena or other reasonable means; or (3) the court determines that an audio or visual recording of the child victim's statement makes an examination of the child victim unnecessary. When the court conducts this examination, the defendant/child respondent may not be present. However, one attorney for each defendant/child respondent, one attorney for the child victim, and one prosecuting attorney may be present at the examination.

The provisions of § 11-304 do not limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence and do not prohibit the court in a juvenile proceeding from hearing testimony in the judge's chambers.

Child Neglect

A parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not neglect the minor. "Neglect" is the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor. Neglect does not include the failure to provide necessary assistance and resources when the failure is due solely to a lack of financial resources or homelessness. A violator is guilty of a misdemeanor and subject to maximum penalties of five years imprisonment and/or a \$5,000 fine. A sentence imposed under this provision must be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances unless the evidence required to prove each crime is substantially identical.

Vulnerable Adult

A vulnerable adult is an adult who lacks the physical or mental capacity to provide for the adult's daily needs. Sections 3-604 and 3-605 of the Criminal Law Article prohibit the abuse or neglect of a vulnerable adult. "Abuse" means the sustaining of physical pain or injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened. "Abuse" includes the sexual abuse of a vulnerable adult. "Abuse" does not include an accepted medical or behavioral procedure ordered by a health care provider authorized to practice under the Health Occupations Article or emergency medical personnel acting within the scope of the health care provider's practice.

A caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not cause abuse or neglect of the vulnerable adult that results in death, causes serious physical injury, or involves sexual abuse. The same prohibition applies to a household member or family member. A violator

is guilty of the felony of abuse or neglect of a vulnerable adult in the first degree and subject to maximum penalties of 10 years imprisonment and/or a fine of \$10,000.

Under the second-degree prohibition, a caregiver, a parent, or other person who has permanent or temporary care or responsibility for the supervision of a vulnerable adult may not cause abuse or neglect of the vulnerable adult or intentionally and maliciously inflict severe emotional distress on the vulnerable adult. A household member or family member is subject to the same prohibition. A violator is guilty of a misdemeanor and subject to maximum penalties of imprisonment for five years and/or a \$5,000 fine. The second-degree prohibition does not apply to sexual abuse of a vulnerable adult.

A sentence imposed under these provisions must be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances unless the evidence required to prove each crime is substantially identical.

Crimes of Violence – § 5-101 of the Public Safety Article

Section 5-101 of the Public Safety Article defines a “crime of violence” as (1) abduction; (2) arson in the first degree; (3) assault in the first or second degree; (4) burglary in the first, second, or third degree; (5) carjacking and armed carjacking; (6) escape in the first degree; (7) kidnapping; (8) voluntary manslaughter; (9) maiming; (10) mayhem; (11) murder in the first or second degree; (12) rape in the first or second degree; (13) robbery; (14) robbery with a dangerous weapon; (15) sexual offense in the first, second, or third degree; (16) home invasion; (17) felony sex trafficking and forced marriage; (18) an attempt to commit offenses (1) through (17); or (19) assault with the intent to commit offenses (1) through (17) or a crime punishable by imprisonment for more than one year.

Additional Information

Prior Introductions: HB 1076 of 2019, a similar bill, received a hearing in the House Judiciary Committee, but no further action was taken.

Designated Cross File: HB 1122 (Delegate Crutchfield) - Judiciary.

Information Source(s): Judiciary (Administrative Office of the Courts); Department of Juvenile Services; Office of the Public Defender; Department of Legislative Services

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an/jkb

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