



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

SB 177: Hearsay and the Fearful Victim Witness

Problem:

Oregon Evidence Code 804(3)(g) permits the admission of a hearsay statement if the declarant is unavailable as a witness and the party against whom admission is sought engaged in wrongful conduct intended to cause, and did in fact cause, the unavailability of the witness. This is known as the “forfeiture-by-wrongdoing” exception. In domestic violence and human trafficking cases, securing the attendance of the material witness – typically the survivor – can be especially fraught due to the nature of the offenses.

Before a court may admit hearsay evidence under any exception that depends on a declarant’s unavailability, including the above “forfeiture-by-wrongdoing” exception, the proponent has to show that they are unable to secure the declarant’s attendance by “process or other reasonable means.” Oregon Evidence Code 804(1).

In *State v Iseli*, 366 Or 151 (2020), the material witness/victim failed to appear in court after she was served with a subpoena. Prosecutors invoked the “forfeiture-by-wrongdoing” hearsay exception in OEC 804(3)(g) to introduce evidence out-of-court statements made by the victim to 9-1-1, a sheriff’s office dispatcher, and a detective at the hospital following her brutal assault by the member of a notoriously violent motorcycle gang. To demonstrate witness unavailability, prosecutors relied on the fact that the victim had expressed fear and safety concerns throughout her dealings with law enforcement and the state – namely, that she feared retaliation by the defendant and the gang based on his conduct towards her that was intended to dissuade her from cooperating or testifying.

Unfortunately, the court determined that, notwithstanding the state’s extensive efforts, the prosecution had not established its inability to procure her attendance “by process or other reasonable means” as required by OEC 804(1)(e). The court reasoned that, in addition to the subpoena, the state should have arrested the victim using to secure her attendance under either the material witness statute or the statutory scheme for remedial contempt sanctions. See generally ORS 136.608 - 136.612 (setting out procedure for seeking material witness warrant); ORS 33.055 (setting out procedure for seeking remedial contempt sanctions, which may include issuance of arrest warrant).

As a result of the court’s holding in *Iseli*, prosecutors must have victims of domestic violence or human trafficking that have failed to appear to testify arrested—which may also include being held in

jail until the victim has testified—even when the prosecution can clearly demonstrate the defendant’s wrongdoing is the only thing that kept the victim from appearing.

In addition to concerns about arresting and jailing victims of a crime in order to prosecute the perpetrator of the crime, there are concerns that the holding in *Iseli* puts the state in a difficult position of choosing between prosecuting these cases or losing federal grant monies. The state receives federal Violence Against Women Act (VAWA) grant money to investigate and prosecute domestic violence offenders and support victims of such violence. The VAWA grants expressly prohibit prosecutors from arresting a victim of domestic violence. The holding in the *Iseli* case effectively requires the state to choose between (1) dismissing domestic violence and human trafficking cases where the victim is afraid to appear, or (2) losing the state’s VAWA grant money.

Solution:

This bill ensures that victims of crime, and other witnesses, are not required to be arrested and jailed to secure their testimony, when the person against whom against they would be testifying engaged in wrongful conduct intended to cause, and did in fact cause, their unavailability.

As originally drafted, SB 177 accomplishes this by moving “forfeiture by wrongdoing” hearsay exception described above from Oregon Evidence Code 804(3)(g) to 803, which does not require a showing of unavailability. In addition, SB 177 as originally drafted moved the hearsay exception found at Oregon Evidence Code 804(3)(f) to 803. That exception applies to a “statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.”

However, after hearing concerns about shifting the evidence code in this way, we are seeking an amendment that leaves these two hearsay exceptions where they are, at Oregon Evidence Code 804(3)(f) and (g). In addition, the amendment will clarify that attempts to procure the declarant’s attendance by “process or other reasonable means” under ORS 40.465(1)(e) does not require the issuance of a material witness warrant or contempt sanctions to prove unavailability in this context.

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