

SUBJECT: Admissibility of certain hearsay statements made by a child abuse victim.

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Peña, Vaught, Riddle, Escobar, Mallory Caraway

0 nays

4 absent — Hodge, Moreno, Pierson, Talton

WITNESSES: For — John Jordan, Harris County District Attorney's Office; (*Registered, but did not testify:* Katrina Daniels, Bexar County Criminal District Attorney; James Jones, Houston Police Dept.; Hans Marticiuc, Houston Police Officers Union; Amy Mills, Tarrant County District Attorney's Office; Gary Young)

Against — David Gonzalez, Texas Criminal Defense Lawyers Assoc.; (*Registered, but did not testify:* Dominic Gonzales, Texas Criminal Justice Coalition)

On — Shannon Edmonds, Texas District & County Attorneys Assoc.

BACKGROUND: Under the Code of Criminal Procedure, art. 38.072, reports of statements of children made to an adult concerning sexual abuse are admissible hearsay evidence. The adult witnesses reporting these statements are called outcry witnesses. Art. 38.072 allows outcry witnesses who report statements of sexual abuse from children 12 and younger. The outcry witness must be the first adult the child told.

In Texas, criminal trials are conducted in two phases. The first is the guilt phase in which the jury determines if the defendant actually is guilty of the crime charged. If found guilty, a second phase occurs in which the jury hears certain pieces of additional evidence and then passes a sentence on the guilty party. Outcry witnesses can be used in both parts of the trial. During the guilt phase, an outcry witness may be allowed by the judge to give testimony regarding statements from the victim concerning the alleged offense. During the sentencing phase, an outcry witness may be allowed by the judge to give evidence about the offense but may not be used to give testimony about extraneous crimes, wrongs, or actions of a

sexual nature committed by the guilty party against other children. This additional evidence offered by the state during the sentencing phase is used for sentencing enhancements or to convince the jury of the dangerousness of the guilty party.

DIGEST:

HB 1035 would amend Code of Criminal Procedure, sec. 2(a), art. 38.072 to allow, during the sentencing phase, hearsay statements of children that described the alleged offense at issue before the court, or a crime, wrong, or act other than the alleged offense that was:

- indicative of sexual abuse and was allegedly committed by the defendant against the child who was the victim of the offense or another child younger than 14; and
- otherwise was admissible evidence under Code of Criminal Procedure, art. 38.37; Rule 404 or 405, Texas Rules of Evidence; or another law or rule of evidence of Texas.

These statements would have to have been made by the child against whom the charged offense or extraneous act allegedly was committed and to have been entered into evidence by the first adult, other than the defendant, to whom the child made a statement concerning the offense or extraneous crime, wrong, or act.

HB 1035 would amend Code of Criminal Procedure, sec. 1, art. 38.072, to make provisions governing the admission of the testimony of an outcry witness applicable to cases involving children younger than 14. The bill would allow outcry witnesses to report accounts either of attempted offenses (Penal Code, sec. 15.01) or actual offenses, including: sexual offenses (Penal Code, ch. 21.); assaultive offenses (Penal Code, ch. 22); prohibited sexual conduct (Penal Code, sec. 25.02); or sexual performance by a child (Penal Code, sec. 43.25).

The bill would take effect September 1, 2007, and would apply only to a criminal proceeding that commenced on after the effective date.

**SUPPORTERS
SAY:**

HB 1035 would target child abusers by increasing incrementally a prosecutor's ability to use outcry witnesses. Child witnesses often are unable to testify reliably in court due to poor memory, intimidation, or distraction. Outcry witnesses can be used to overcome this because they allow a court to receive evidence from children in a useful and reliable

manner. HB 1035 would do this by bringing Texas' outcry laws in line with the generally accepted practice of many other states and by making it consistent with other areas of Texas law.

The Penal Code deals with children younger than 14 years of age and HB 1035 would make the outcry law consistent with that code. In addition, HB 1035 would not create new law or exceptions but only incrementally expand the kind of evidence that a prosecutor could use against a child abuser. HB 1035 would allow evidence of attempt and the use of outcry witnesses during the sentencing phase by allowing these witnesses to give testimony of extraneous crimes.

When prosecutors wish to admit evidence of extraneous crimes during the sentencing phase, they must prove beyond a reasonable doubt that the extraneous crime occurred. Under current law, a child victim of the guilty party may give evidence of these extraneous crimes but an outcry witness is not able to do so. Thus, under current law, it is more difficult for prosecutors to prove an extraneous crime during sentencing than it is to prove the offense during the guilt phase.

HB 1035 would make the law more rational by allowing outcry witnesses to testify about both the offense at hand and extraneous crimes during the sentencing phase. This expanded use of outcry witnesses would not be misused as propensity evidence because it would come before the jury during the sentencing phase and not during the guilt phase. In addition, HB 1035 would do nothing to interfere with the gatekeeping functions of the judge who always has the discretion to allow or disallow evidence.

HB 1035 would be an acceptable expansion of the rules of hearsay because it would be analogous to other hearsay exceptions. Texas law allows witnesses on the stand to refresh their memories from a writing. Outcry witnesses are analogous in that children have made a record of the abuse by relating it to an adult. Here the outcry witness' testimony would be a stand-in for the writing used to refresh a witness's memory.

**OPPONENTS
SAY:**

HB 1035 would invite false testimony that could not be cross examined and would expand the use of hearsay evidence to imply intent to commit a crime that, because it was never completed, never even happened.

Courts prefer direct evidence, either physical or from first hand witnesses, because the defendant can examine it. Hearsay evidence is allowed only

when it has certain indications of reliability because it can be difficult if not impossible for the defendant to examine this evidence. An example of allowable hearsay is statements to doctors. It is understood that people have a strong interest in being candid with doctors so that they can receive the best possible treatment. HB 1035's expansion of hearsay would not contain the necessary indications of reliability. While the defendant could cross-examine the adult who was reporting the statements, the defendant could not actually cross-examine the child who was the supposed author of the statements. HB 1035 would undermine defendants ability to confront the witnesses against them.

HB 1035's allowance of testimony by children under age 14 would be arbitrary. A 13-year-old can be just as likely to fabricate a story as a 14-year-old.