

SUBJECT: Admitting evidence of other offenses in trials of certain child sex crimes

COMMITTEE: Criminal Procedure Reform, Select — favorable, without amendment

VOTE: 3 ayes — Riddle, Carter, Moody

0 nays

2 absent — Herrero, Parker

SENATE VOTE: On final passage, March 26 — 31-0

WITNESSES: (*On companion bill, HB 330:*)

For — Jason Sabo, Children at Risk; Justin Wood, Harris County District Attorney's Office; (*Registered, but did not testify:* Jessica Anderson, Houston Police Department; Lon Craft, Texas Municipal Police Association; Kenda Culpepper, Rockwall County Criminal District Attorney; Lauren Donder, Children's Advocacy Centers of Texas; Clifford Herberg, Bexar County Criminal District Attorney's Office; James Jones, San Antonio Police Department; Marshall Kenderdine, Texas Pediatric Society; Diana Martinez, TexProtects, The Texas Association for the Protection of Children; Corinne Smith, North Texas Citizens Lobby; Eddie Solis, City of Abilene; Glenn Stockard, Texas Association Against Sexual Assault; Barbara Harless)

Against — Kristin Etter and David Gonzalez, Texas Criminal Defense Lawyers Association; (*Registered, but did not testify:* Chris Howe)

On — Shannon Edmonds, Texas District and County Attorneys Association

BACKGROUND: Code of Criminal Procedure, art. 38.37 allows evidence of prior crimes, wrongs, or acts committed by a defendant to be admitted as evidence in a criminal trial only under limited circumstances. Allowing evidence and information about such "extraneous offenses" is permitted in trials for certain sex and assaultive offenses in which the same child is a victim in both the offense being tried and the prior offenses.

The evidence of other crimes is admitted “for its bearing on relevant matters,” including the state of mind of the defendant and the child and the previous and subsequent relationship between the defendant and the child. This evidence is admitted notwithstanding rules 404 and 405 of the Texas Rules of Evidence, which generally prohibit the admissibility of evidence of other crimes.

Admissibility of this evidence applies in cases in which there is a child victim younger than 17 years old and the offense, attempted offense, or conspiracy to commit an offense is:

- a sexual offense listed in Penal Code, ch. 21;
- an assaultive offense listed in Penal Code, ch. 22; or
- prohibited sexual conduct.

Admissibility of this evidence also applies in cases with victims younger than 18 years old if the offense, attempted offense, or conspiracy to commit an offense is:

- sexual performance by a child;
- child sex trafficking; or
- compelling prostitution of a child.

Following a defendant’s timely request, a prosecutor must give the defendant notice of the prosecutor’s intent to introduce this type of evidence.

Under Texas Rules of Evidence, rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to show that an action conforms with a person’s character. However, evidence of other crimes may be admissible for other purposes, such as proof of a motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident. Upon timely request by a defendant, reasonable notice must be given before a trial of a prosecutor’s intent to introduce this evidence.

Under Texas Rules of Evidence 405(b), in cases in which a person’s character is an essential element of a charge, proof can be made of specific instances of the person’s character.

DIGEST:

SB 12 would allow evidence that a person had committed certain previous criminal offenses with any child victim to be admitted into trials for

certain offenses with child victims. This evidence could be admitted for the bearing it would have on relevant matters, including the character of the defendant and actions that conform with the defendant's character.

Evidence that a defendant committed a previous offense listed in SB 12 could be admitted into trials for the same offenses listed in the bill. This would apply to trials for, attempts to commit, and conspiracy to commit the following offenses:

- certain sex and labor trafficking offenses against children;
- continuous sexual abuse of a young child;
- indecency with a child;
- sexual assault of a child;
- aggravated sexual assault of a child;
- online solicitation of a minor;
- sexual performance by a child; and
- possession or promotion of child pornography.

Before admitting this type of evidence, a judge would have to conduct a hearing out of the jury's presence to determine that the evidence likely to be admitted would be adequate to support a jury finding beyond a reasonable doubt that the defendant committed the other offenses.

Prosecutors would have to notify defendants at least 30 days before the trial date of their intention to introduce this type of evidence. The requirement for at least 30 days' notice also would be applied to current provisions allowing evidence of previous offenses against the same child to be admitted in trials for certain offenses with child victims.

The bill would take effect September 1, 2013, and would apply to the admissibility of evidence in proceedings that began on or after that date.

**SUPPORTERS
SAY:**

SB 12 would give prosecutors additional resources to prosecute sex crimes committed against children. This change is warranted by the nature of these heinous crimes and the importance of protecting children from sexual predators. The bill would continue the work of the Legislature in Jessica's Law and numerous other bills enacted to address these horrific offenses against children.

Prosecuting sex crimes committed against children can be difficult due to the physical and emotional trauma suffered by the victims. This can result

in long delays in reporting these crimes during which physical evidence can deteriorate or be destroyed. Often the only evidence at a trial may be the testimony of the traumatized child. Children often are targeted for these crimes, in part because they tend to make poor witnesses.

In the cases of some offenders, this leaves the jury without a full picture of the abuse until other information can be presented during the punishment phase of the trial. This incomplete picture of a defendant and a crime can unfairly affect the strength of the prosecution of a case, especially when the defendant is a person with more authority or power than a victim, such as a child. For example, jurors have reported that they believed a child's testimony but needed more evidence to make a conviction.

Allowing judges to decide whether to admit the type of evidence listed in SB 12 could help overcome the difficulties inherent with child victims of sex crimes. Prosecutors may be aware of the defendant's previous convictions or of other children who have accused the defendant of a crime. The bill would allow courts to see the full picture of the defendant.

SB 12 would create a narrowly drawn exception to requirements governing the admissibility of evidence about offenses that occurred prior to the current crime being tried. The bill would be limited only to cases with child victims. The exception would apply only in trials for the serious sex and trafficking offenses listed in SB 12 and would allow other evidence only about the same offenses. This limited applicability would be a natural extension of current law allowing some evidence of prior crimes that would respect evidence rules and balancing the rights of defendants and victims.

There would be no constitutional violations of rights in admitting the kind of evidence described by SB 12 because it would undergo the proper scrutiny. The Federal Rules of Evidence and 11 other states allow for the admissibility of this type of evidence, and a challenge to one such law was upheld.

The bill would establish significant safeguards that would help ensure that there were no violations of constitutional due process requirements, that defendants' rights were respected, and that trials were fair. Judges would act as gatekeepers as to whether evidence was admitted in a trial and in protecting defendants' rights. A judge would have to hold a hearing to consider whether to admit the evidence, and the hearing would have to

take place out of the jury's presence. The judge would have to determine that the evidence supported a finding that the defendant committed the separate offenses beyond a reasonable doubt. Judges are best positioned to determine if evidence of prior crimes is relevant or unduly prejudicial.

SB 12 would not increase the likelihood of wrongful convictions. Evidence of prior acts admitted under the bill would not become the sole basis for a conviction, but could be considered by courts in conjunction with all other evidence. Convictions for the current charge still would have to be decided by evidence beyond a reasonable doubt.

In addition, judges would be cognizant of having a fair trial when performing their gatekeeping roles, just as they are now when deciding about admitting any type of evidence. SB 12 would institute a stronger framework and more stringent requirements than under current law for judges to admit extraneous evidence, helping ensure proper convictions and guarding against reversals on appeal.

SB 12 would be fair to defendants by establishing a strong notice requirement when admitting evidence under the bill and would strengthen the requirement under current law. Notice would have to be given to a defendant at least 30 days before trial, allowing a defendant time to prepare a response.

This change would bring Texas in line with Federal Rules of Evidence 413(a). Under this rule, if a defendant is accused of sexual assault, courts are allowed to admit evidence that the defendant committed other sexual assaults. While this rule broadly applies to both adult and child victims, SB 12 would apply only to child victims.

**OPPONENTS
SAY:**

SB 12 would go too far in eliminating the use of longstanding rules of evidence for certain offenses, which would violate the constitutional requirements of due process and could increase the likelihood of wrongful convictions. While sex crimes against children are heinous, the state also has an obligation to protect the rights of criminal defendants.

The current rules are long-established and have worked well to allow the admission during trials of appropriate evidence while meeting constitutional due process requirements. By changing these rules, SB 12 would violate these requirements and could remove a presumption of innocence. The current evidence rules are designed to ensure that persons

are tried fairly and convicted only for the current offense, not for past behavior or based on evidence used to show a propensity to do bad things. SB 12 arbitrarily would set aside those rules for certain offenses and effectively would lower the burden of proof in these cases. This would call into question whether defendants had adequate safeguards when accused of one of these crimes.

Setting aside the evidence rules could increase the likelihood of wrongful convictions for the offenses listed in SB 12. This type of evidence can be very prejudicial, and jurors might be wary of not convicting a defendant after hearing of other allegations.

The consequences of wrongful convictions in these cases would be especially serious because the punishments for sex crimes are harsh, and convictions would be almost impossible to overcome if there were no physical evidence. Wrongful convictions also would harm the victim and the public because the guilty person would go unpunished, free to commit another crime.

The gatekeeping function established by the bill would be inadequate to protect defendants. A judge alone would make a decision, which could be based on the word of one person, about whether the evidence supported a finding that a separate offense was committed. This would hinder the ability of a defendant to have a fair trial.

In allowing for evidence of some extraneous offenses to be admitted, SB 12 would make a significant change from current law. Under the Code of Criminal Procedure, extraneous offenses either have to be connected to the same child victim or, under the rules of evidence, other offenses must have some link to the current offense, such as motive or opportunity.

NOTES:

The companion bill, HB 330 by Riddle, was left pending in the House Criminal Jurisprudence Committee following a public hearing on April 9.