

A Practitioner's Primer on Outcry Statements and Hearings¹

“My universe is my eyes and ears. Anything else is hearsay.”²

Hearsay was prohibited in Anglo-American courts before there were codified Rules of Evidence and codified criminal codes. Hearsay exceptions existed prior to codification, but, in our lifetimes, virtually all jurisdictions have codified rules of evidence and criminal codes. In Texas, largely matching the feds, the exceptions to hearsay are *generally* to be found in Texas

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² Douglas Adams, *The Restaurant at the End of the Universe*.

Rules of Evidence 803 and 804. One peculiar hearsay exception which is not found in the Texas

Rules of Evidence is the Outcry Statement.³

³ TRE 804 addresses hearsay exceptions when the declarant is unavailable. TRE 803 addresses hearsay exceptions regardless of declarant's availability. Texas Code of Criminal Procedure §38.072: This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age or a person with a disability:

- (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
- (2) §25.02 (Prohibited Sexual Conduct);
- (3) §43.25 (Sexual Performance by a Child);
- (4) §43.05(a)(2) (Compelling Prostitution);
- (5) §20A.02(a)(7) or (8) (Trafficking of Persons); or
- (6) §15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), or (5) of this section.

Sec. 2.

(a) [2 Versions: As amended by Acts 2009, 81st Leg., ch. 284] This article applies only to statements that describe the alleged offense that:

- (1) were made by the child or person with a disability against whom the offense was allegedly committed; and
- (2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child or person with a disability made a statement about the offense.

Sec. 2.

(a) [2 Versions: as amended by Acts 2009, 81st Leg., ch. 710] This article applies only to statements that:

- (1) describe:
 - (A) the alleged offense; or
 - (B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong or act other than the alleged offense that is:
 - (i) described by Section 1;
 - (ii) allegedly committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and
 - (iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405 of Texas Rules of Evidence, or another law or rule of evidence of this state;
- (2) were made by the child against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and
- (3) were made to the first person, 18 years of age or older, other than the defendant to whom the child made a statement about the offense or extraneous crime, wrong or act.

(b) A statement that meets the requirements of Subsection (a) is not inadmissible because of the hearsay rule if:

- (1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
 - (A) notifies the adverse party of its intention to do so;
 - (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
 - (C) provides the adverse party with a written summary of the statement;
- (2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and
- (3) the child or person with a disability testifies to is available to testify at the proceeding in court or any other manner provided by law.

For selected criminal offenses,⁴ a child's or disabled person's hearsay statement (the Outcry Statement) is admissible for the truth of the matter asserted, if the party introducing the hearsay statement meets certain predicates.

The Predicate

The statute permits the first adult,⁵ other than the defendant, to whom the child or person with a disability⁶ made a discernible⁷ statement about the offense of which the child is a victim⁸ to relate the statement to a jury.⁹ In order to admit the Outcry Statement, the party introducing it, must provide the adverse party at least 14 days notice of its intent to introduce the statement, the name of the Outcry Witness,¹⁰ and a written summary of the Outcry Statement which must describe the offense in a discernible manner.¹¹ Once the State complies with the predicate, the burden shifts to the defendant to show the inadmissibility of the Outcry Statement.¹² Ultimately,

⁴ Tx CCRP §38.072 Sec.1:

sexual offenses Tx. Penal Code §21,
 assaultive offenses Tx. Penal Code §22,
 prohibited sexual conduct Tx. Penal Code §25.02,
 sexual performance by a child §43.25,
 compelling prostitution Tx. Penal Code §43.05(a)(2),
 trafficking of persons §20A.02(a)(7) or (8),
 or criminal attempt of the foregoing offenses.

⁵ Tx. CCRP §38.072 Sec.2 (a)(2) [statement] made to the first person, 18 years of age or older, other than defendant, to whom the child or person with a disability made a statement about the offense.

⁶ Tx. CCRP §38.072 Sec. 3, "person with a disability" means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self. [Author will use the term 'child' to include a person with a disability.]

⁷ Foreman v. Texas, 995 S.W.2d 854, 859 (Tex. App.--Austin 1999)

⁸ Eldred v. Texas, 431 S.W.3d 177, 183 (Tex. App.--Texarkana 2014). This is interpreted, in effect, that the offense must have occurred when the alleged victim was less than 15 years of age.

⁹ The punishment phase outcry will be addressed later in the paper.

¹⁰ Though there may be multiple outcry witnesses. In Re C.E.S., 400 S.W.3d 187, 192 (Tex. App.--El Paso 2013), Eldred v. Texas, 431 S.W.3d 177, 181 (Tex. App.--Texarkana 2014), Lopez v. Texas, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011), Polk v. Texas, 367 S.W.3d 449, 453 (Tex. App.--Houston (14th Dist.) 2012), Purgason v. Texas, 405 S.W.3d 171, 182 (Tex. App.--Amarillo 2013), Brown v. Texas, 189 S.W.3d 382, 387 (Tex. App.--Texarkana 2006)

¹¹ Davidson v. Texas, 80 S.W.3d 132, 136 (Tex. App.--Texarkana 2002), Gay v. Texas, 981 S.W.3d 864, 866 (Tex. App.--Houston (1st Dist.) 1998), Sims v. Texas, 12 S.W.3d 499, 500 (Tex. App.--Dallas 1999), Bargas v. Texas, 252 S.W.3d 876, 894 (Tex.App.--Houston (1st Dist.) 2008). Some courts practically bend reason to allow the State's chosen Outcry Witness to testify, Shaw v. Texas, 329 S.W.3d 645, 652 (Tex. App.--Houston (14th Dist.)). Sometimes the courts will refer to discernibility as the 'who, when, where,' *Michell v. Texas*, 381 S.W.3d 554, 559 (Tex. App.--Eastland 2012).

¹² In Re Z.L.B., 102 S.W.3d 120 (Tex. 2003), Garcia v. Texas, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990)

the child must “testify or be available to testify at the proceeding or in any other manner provided by law.”¹³

Outcry Statement Summary

The purpose of the Outcry Statement summary is to prevent surprise.¹⁴ In one case, the court used the lack of an expression of surprise by the defense in its harm analysis.¹⁵ Be prepared to object to the scope of the Outcry Witness’ statement if it exceeds the summary,¹⁶ but do not be surprised if courts commit to legal gymnastics to admit the whole of the outcry statement.¹⁷

The Outcry Hearing

The Outcry Statute considers the Outcry Hearing to be a hearing to determine the *reliability*¹⁸ of the Outcry Statement. In a hearing outside the presence of the jury,¹⁹ the trial court is to determine if the intended Outcry Statement is reliable based on time, content and circumstances of the statement. The timing of the Outcry Hearing may be before trial or, even, during trial.²⁰ The courts have repeatedly provided indicia of reliability:²¹

- (1) whether the child victim testifies at trial and admits making the out-of-court statement,
- (2) whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate,
- (3) whether other evidence corroborates the statement,

¹³ Tx. CCrP 38.072 Sec. 2 (b)(2)

¹⁴ Davidson v. Texas, 80 S.W.3d 132, 136 (Tex. App.--Texarkana 2002), Gay v. Texas, 981 S.W.3d 864, 866 (Tex. App.--Houston (1st Dist.) 1998), Bargas v. Texas, 252 S.W.3d 876, 895 (Tex.App.--Houston (1st Dist.) 2008), Owens v. Texas, 381 S.W.3d 696, 705 (Tex. App.--Texarkana 2012)

¹⁵ Owens v. Texas, 381 S.W.3d 696, 705 (Tex. App.--Texarkana 2012)

¹⁶ Davidson v. Texas, 80 S.W.3d 132, 136 (Tex. App.--Texarkana 2002), Halbrook v. Texas, 322 S.W.3d 716, 720 (Tex. App.--Texarkana 2010)

¹⁷ Shaw v. Texas, 329 S.W.3d 645, 652 (Tex. App.--Houston (14th Dist.)

¹⁸ Tx. CCrP 38.072 Sec. 2 (b)(2)

¹⁹ Broderick v. Texas, 89 S.W.3d 696 (Tex. App.--Houston (1st Dist.) 2002)

²⁰ Smith v. Texas, 131 S.W.3d 928, 932 (Tex. App.--Eastland 2004)

²¹ Davidson v. Texas, 80 S.W.3d 132, 139 (Tex. App.--Texarkana 2002), Buckley v. Texas, 758 S.W.2d 339, 343 (Tex. App.--Texarkana 1988), Norris v. Texas, 788 S.W.2d 65, 71 (Tex. App.--Dallas 1990), Walker v. Texas, 461 S.W.3d 599, 609 (Tex. App.--Houston (1st Dist.) 2015), Torres v. Texas, 424 S.W.3d 245, 257 (Tex. App.--Houston (14th Dist.) 2014)

- (4) whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults,
- (5) whether the child's statement is clear and unambiguous and rises to the needed level of certainty,²²
- (6) whether the statement is consistent with other evidence,
- (7) whether the statement describes an event that a child of the victim's age could not be expected to fabricate,
- (8) whether the child behaves abnormally after the contact,
- (9) whether the child has a motive to fabricate the statement,
- (10) whether the child expects punishment because of reporting the conduct, and
- (11) whether the accused had the opportunity to commit the offense.

The Outcry Statement must be related in court by a person; a forensic video will not suffice as an outcry summary nor in lieu of testimony.²³ The Outcry Hearing has been determined to not allow effective cross-examination of the alleged victim, and, thus, fails to comport with confrontation principles.²⁴

As the Outcry Statement is event-specific, one can expect to have as many Outcry Witnesses as there are discernible offenses alleged by the child.²⁵

Objections

The Outcry Statement alone can convict²⁶--so be willing to object when there are grounds. Courts have considered a simple, timely hearsay objection to the Outcry Witness²⁷ as

²² Of course, it is a given that a child is not expected to testify with the clarity of an adult. *Allen v. Texas*, 436 S.W.3d 815, 819 (Tex. App.--Texarkana 2014)

²³ *Dunn v. Texas*, 125 S.W.3d 610, 614 (Tex. App.--Texarkana 2003), *Bays v. Texas*, 396 S.W.3d 580, 590 (Tex. Crim. App. 2013), *Divine v. Texas*, 122 S.W.3d 414, 418 (Tex. App.--Texarkana 2004), *Coronado v. Texas*, 351 S.W.3d 315, 324 (Tex. Crim. App. 2011)

²⁴ *Sanchez v. Texas*, 354 S.W.3d 476, 489 (Tex. Crim. App. 2011)

²⁵ *In Re C.E.S.*, 400 S.W.3d 187, 192 (Tex. App.--El Paso 2013), *Eldred v. Texas*, 431 S.W.3d 177, 181 (Tex. App.--Texarkana 2014), *Lopez v. Texas*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011), *Polk v. Texas*, 367 S.W.3d 449, 453 (Tex. App.--Houston (14th Dist.) 2012), *Purgason v. Texas*, 405 S.W.3d 171, 182 (Tex. App.--Amarillo 2013), *Brown v. Texas*, 189 S.W.3d 382, 387 (Tex. App.--Texarkana 2006)

²⁶ *Chavez v. Texas*, 324 S.W.3d 785, 788 (Tex. App.--Eastland 2010), *Rodriguez v. Texas*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991), *Eubanks v. Texas*, 326 S.W.3d 231, 241 (Tex. App.--Houston (1st Dist.) 2010)

²⁷ *Cordero v. Texas*, 444 S.W.3d 812, 818 (Tex. App.--Beaumont 2014), *Long v. Texas*, 800 S.W.2d 545, 548 (Tex. Crim. App. 1990), *Davidson v. Texas*, 80 S.W.3d 132, 136 (Tex. App.--Texarkana 2002)

sufficient to preserve error, but if one is challenging the reliability of the Outcry Statement, it would be best to be more specific, request a hearing on reliability if it has not been conducted, and obtain a running objection.²⁸

Standard of Appellate Review

The standard of review for admission of outcry evidence is abuse of discretion, followed by harm analysis if there is such abuse by the trial court.²⁹

If, for some reason, the appellate court conducts a sufficiency analysis, it will consider improperly admitted outcry evidence in its analysis.³⁰

Punishment Phase

The alleged offense, a crime, wrong or act other than the alleged offense, but nonetheless one of the outcry offenses,³¹ committed by defendant against the child victim *or another child under 14*, and admissible under Tx CCRP 38.37, TRE 404, TRE 405 or other law or rule of evidence, may have an Outcry Witness testify in the punishment phase.³²

²⁸ Davidson v. Texas, 80 S.W.3d 132, 136 (Tex. App.--Texarkana 2002)

²⁹ Allen v. Texas, 436 S.W.3d 815, 821 (Tex. App.--Texarkana 2014)

³⁰ Rodriguez v. Texas, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991), Villalon v. Texas, 791 S.W.2d 130, 133 (Tex. Crim. App. 1990)

³¹ Tx CCRP §38.072 Sec.1:

sexual offenses Tx. Penal Code §21,
 assaultive offenses Tx. Penal Code §22,
 prohibited sexual conduct Tx. Penal Code §25.02,
 sexual performance by a child §43.25,
 compelling prostitution Tx. Penal Code §43.05(a)(2),
 trafficking of persons §20A.02(a)(7) or (8),
 or criminal attempt of the foregoing offenses.

³² Tx. CCRP §38.072 Sec.2 (a) [As amended by Acts 2009, 81st Leg., ch. 710]