

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

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Gallego, Fletcher, Kent, Miklos, Moody, Pierson, Riddle, Vo
0 nays
3 absent — Christian, Hodge, Vaught

WITNESSES: For — Kevin Petroff, Harris County District Attorney's Office;
(*Registered, but did not testify:* Torie Camp, Texas Association Against Sexual Assault; Marc Chavez, Lubbock County District Attorney's Office; Andrew Dornburg, Fort Bend County District Attorney's Office; Andy Kahan, Houston Mayor's Crime Victims Office; Joy Rauls, Children's Advocacy Centers of Texas, Inc.; Ballard C. Shapleigh, 34th Judicial District Attorney's Office)

Against — Keith Hampton, Texas Criminal Defense Lawyers Association

BACKGROUND: Under Code of Criminal Procedure, art. 38.072, reports of statements of children made to an adult concerning sexual abuse are admissible hearsay during a trial on a charge related to that incident of sexual abuse. 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 about the sexual abuse.

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 phases 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 offenses, 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:

CSHB 2846 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.

CSHB 2846 would amend Code of Criminal Procedure, sec. 1, art. 38.072, to make provisions governing the admission of 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).

This bill would take effect on September 1, 2009, and would apply only to a criminal proceeding that commenced on or after the effective date.

**SUPPORTERS
SAY:**

CSHB 2846 would target child abusers by allowing a court to hear outcry witnesses during the sentencing phase of a trial. Child witnesses often are unable to testify reliably in court because of poor memory, intimidation, or distraction. Outcry witnesses can be used to overcome this problem because they allow a court to receive evidence from children in a useful and reliable manner. CSHB 2846 would bring Texas' outcry laws more in

line with the generally accepted practice of many other states and would make it consistent with other areas of Texas law.

The Penal Code considers a child to be someone younger than 14 years of age, and CSHB 2846 would make the outcry law consistent with that code. In addition, CSHB 2846 would not create new law or exceptions but only would expand the kind of evidence that a court could admit through an outcry witness.

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 guilty phase.

CSHB 2846 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, CSHB 2846 would do nothing to interfere with the gate-keeping functions of the judge, who always has wide discretion to allow or disallow evidence.

CSHB 2846 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' memory.

The use of outcry witnesses has withstood constitutional challenges under a defendant's right to confront witnesses against him. A court can always call a child witness, and a defendant can always cross-examine that child. A common use of outcry witnesses is to give a jury a chance to verify a child's testimony. If the use of outcry witnesses were struck down by a court, the Legislature should deal with that development when and if it comes.

OPPONENTS
SAY:

CSHB 2846 would invite false testimony that could not be cross-examined and would expand the use of hearsay evidence. 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. One example of allowable hearsay concerns statements to doctors. It is understood that people are candid with doctors so that they can receive the best possible treatment. CSHB 2846's expansion of hearsay testimony 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 cross-examine the child, who was the supposed author of the statements. CSHB 2846 would undermine a defendant's ability to confront witnesses.

CSHB 2846 would make a change to an underlying statute that may be invalid under the *Crawford v. Washington*, 541 U.S. 36 (2004). decision of the U.S. Supreme Court. *Crawford* has been read to make a defendant's right to confront witnesses against him absolute. CSHB 2846 would expand the use of outcry witnesses which, in turn, could hinder a defendant from cross-examining the author of the statement.

CSHB 2846'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.

NOTES:

The substitute differs from the bill as filed by limiting the ability of an outcry witness to testify to extraneous acts during the penalty phase of a trial only.