

ART. 38.072. HEARSAY STATEMENT OF CERTAIN ABUSE VICTIMS

Sec. 1. 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 18 years of age or a person with a disability:

- (1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);
- (2) Section 25.02 (Prohibited Sexual Conduct);
- (3) Section 43.25 (Sexual Performance by a Child);
- (4) Section 43.05(a)(2) or (3) (Compelling Prostitution);
- (5) Section 20A.02(a)(5), (6), (7), or (8) (Trafficking of Persons);
- (6) Section 20A.03 (Continuous Trafficking of Persons), if based partly or wholly on conduct that constitutes an offense under Section 20A.02(a)(5), (6), (7), or (8); or
- (7) Section 15.01 (Criminal Attempt), if the offense attempted is described by Subdivision (1), (2), (3), (4), (5), or (6) of this section.

Sec. 2. (a) 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 or person with a disability who is the victim of the offense or against another person who is a child younger than 18 [14] years of age or a person with a disability; and
 - (iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;
- (2) were made by the child or person with a disability 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 or person with a disability made a statement about the offense or extraneous crime, wrong, or act.

(a-1) The trial court shall admit more than one statement under this article at a proceeding if each statement:

- (1) meets the requirements of Subsection (a); and
- (2) describes different conduct by the defendant.

(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 or is available to testify at the proceeding in court or in any other manner provided by law.

Sec. 3. In this article, “person with a disability” has the same meaning as “disabled individual” as defined by Section 22.04, Penal Code [means a person 13 years of age or older who because of age or physical or mental disease, disability, or injury is sub-

stantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self].

Section 2 re-enacted as amended by Chapters 284 (SB 643) and 710 (HB 2846), Acts of the 81st Leg., R.S. 2009, effective Sept. 1, 2025 (HB 1778, §4.02). Addition of §2(a-1) and amendment of §3 effective Sept. 1, 2025 (HB 1778, §§4.03 & 4.04). Section 4.08 of HB 1778 provides: “The changes in law made by this article to Chapter 38, Code of Criminal Procedure, apply to a criminal proceeding that commences on or after September 1, 2025. A criminal proceeding that commences before September 1, 2025, is governed by the law in effect on the date the proceeding commenced, and the former law is continued in effect for that purpose.”

WHO IS THE OUTCRY WITNESS?

The outcry witness is “the first person, 18 years or older, to whom the child makes a statement that in some discernible manner describes the alleged offense.” *Garcia v. State*, 792 S.W.2d 88 (Tex. Crim. App. 1990); see also *Olvera v. State*, 694 S.W.3d 843 (Tex. App. — Houston [14th Dist.] 2024, no pet. h.) (child must be under 18 at the time of the outcry and witness must be 18 or older). An outcry witness is “event-specific” rather than “person-specific,” so although testimony of more than one outcry witness may be admissible, multiple outcry witnesses must testify to different facts rather than repeat the same general description of the event. *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App. — Texarkana 2000, pet. ref’d). If the defense challenges the truthfulness of the child victim’s testimony, additional outcry statements may be admissible as prior consistent statements under TEX.R.EVID. 901(e)(1)(B) or as statements made for the purpose of medical treatment under TEX.R.EVID. 803(4). *Reed v. State*, 497 S.W.3d 633 (Tex. App. — Fort Worth 2016, no pet.). The outcry exception does not necessarily attach at the child’s first opportunity to tell an adult about the abuse. *Robinson v. State*, 985 S.W.2d 584 (Tex. App. — Texarkana, 1998, pet. ref’d). Either a nurse or a doctor can testify to statements related to diagnosis and treatment. *Bautista v. State*, 189 S.W.3d 365 (Tex. App. — Fort Worth 2006, pet. ref’d).

RELEVANT AGE

The child’s age at the time of the offense, rather than the time of the outcry, is the relevant measure for purposes of the outcry statute. *Eldred v. State*, 431 S.W.3d 177 (Tex. App. — Texarkana 2014, no pet.). An otherwise-valid outcry statement made by anyone under the age of 18 is admissible under Art. 38.072. *Gutierrez v. State*, 630 S.W.3d 270 (Tex. App. — Eastland 2020, pet. ref’d).

CONFRONTATION CLAUSE

Because an Article 38.072 hearing provides a defendant with an inadequate opportunity to cross-examine an outcry witness’s credibility, admitting testimony from that hearing at a trial when the outcry witness is unavailable violates the 6th Amendment. *Sanchez v. State*, 354 S.W.3d 476 (Tex. Crim. App. 2011).

RELIABILITY HEARINGS

Art. 38.072, §2(b)(2) requires a trial judge to hold a hearing outside the jury’s presence on the reliability of an outcry statement before it can be admitted. The only issue at the hearing is the reliability of the outcry statement itself, not whether the complainant is credible. *Broderick v. State*, 89 S.W.3d 696 (Tex. App. — Houston [1st Dist.] 2002, pet. ref’d); *Hollinger v. State*, 911 S.W.2d 35, 40 (Tex. App. — Tyler 1995, pet. ref’d). The reliability referred to in Art. 38.072 is the reliability of the declaration, not the witness. *Duran v. State*, 163 S.W.3d 253 (Tex. App. — Fort Worth 2005, no pet.).

NOTICE

Untimely notice of an outcry witness is not automatic reversible error; a defendant must show harm from the late notice. *Zarco v.*