

**CLOSED-CIRCUIT ELIGIBILITY**

Art. 38.071 may be applied to other witnesses than those who strictly fall under the wording of the statute. *Marx v. State*, 987 S.W.2d 577, 580 (Tex. Crim. App. 1999) (13-year-old retarded child victim could testify via closed-circuit television even though Art. 38.071 only discusses victims under 13); see also *Gonzales v. State*, 818 S.W.2d 756 (Tex. Crim. App. 1991) (adopting *Maryland v. Craig*, 497 U.S. 836 (1990)).

**CLOSED-CIRCUIT REQUIREMENTS**

Before a trial court can allow a child victim to testify via closed-circuit television, the court must find: (1) use of the one-way closed-circuit procedure is necessary to protect the welfare of the particular child witness who wants to testify; (2) the child witness would be traumatized if the witness had to be present with the defendant; and (3) the child witness' level of emotional distress in the presence of the defendant goes beyond mere nervousness, excitement, or a reluctance to testify. *Gonzales v. State*, 818 S.W.2d 756 (Tex. Crim. App. 1991).

**"UNAVAILABLE" AFTER TESTIFYING**

A child witness may be found "unavailable" after partially testifying in a sexual assault case, if the child testifies on nonessential issues but cannot continue to testify about the acts constituting the crime. *Mitchell v. State*, 238 S.W.3d 405 (Tex. App. — Houston [1st Dist.] 2006, pet. ref'd).

**CONFRONTATION CLAUSE**

A list of written interrogatories, posed by a forensic examiner to a child in an *ex parte* interview, is not a constitutional substitute for live cross-examination and confrontation. *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011) (video procedures under Art. 38.071, §2, with written interrogatories but no cross-examination, did not satisfy *Crawford v. Washington*, 541 U.S. 36 (2004)).

**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 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.

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.). 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. *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, some of the additional outcry statements about multiple sexual acts committed over a period of time 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). For more information on outcry witnesses, see Brandy Robinson, "Will the real outcry witness please stand up?" *The Texas Prosecutor*, Vol. 51, No. 4 (July–Aug. 2021).