

TEXAS LAWYER

EXPERT OPINION

What is the role of an outcry witness in proving the continuous sexual abuse of a young child?

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The Houston Court of Appeals (First District) recently heard [Fernandez v. State](#). Its ruling provides clear definitions of what role an outcry witness can play in proving allegations of continuous sexual abuse of a young child. [Tex. Code Crim.](#)

[Pro art. 38.072, Section 2](#) has come to be known as the “outcry statute.” It creates an exception to the hearsay rule in cases involving allegations of sexual assault of a child who is younger than 14 years of age. Pursuant to that statute, a trial court may admit a child/complainant/victim’s out-of-court statements that describe the alleged offense suffered by the child, provided that such statements were made to the first adult person to whom the child made a statement regarding the offensive conduct. There may be more than one outcry witness, provided that said witnesses testify about different events. In order to qualify for the outcry witness hearsay exception, a party offering an outcry statement must provide written notice to the opposing party in which the party who intends to offer such evidence identifies the name of the outcry witness(es), including a summary of the witness(es)’ testimony. [Tex. Code Crim. Pro art. 38.072, Section 2 \(b\)\(1\)](#).

Aaron Philip Fernandez was charged with the [continuous sexual abuse](#) of his stepdaughter, who was 12 years-old, when Fernandez is alleged to have begun abusing the girl. The child victim described numerous different instances of sexual abuse by her stepfather over a period of time of thirty or more days, including specific offenses or acts of indecency with a child, between July 17, 2017 and October 31, 2017. On or about February 21, 2018, the child, identified as “K.V.” made an outcry to John Laymon, her school counselor. As a result of the information conveyed by K.V., Laymon contacted Child Protective Services and the Houston Police Department. K.V. was then interviewed at the school about her statements. In addition, K.V. was interviewed by Lisa Holcomb, who was a forensic interviewer at the Harris County Child Assessment Center (“CAC”). An [outcry witness](#) should be over the age of 18, other than the defendant, to whom [the child victim first speaks about the offensive contact](#).

As required by statute, the trial court held a hearing outside of the jury's presence to address whether K.V.'s outcry statements to forensic interviewer Holcomb "were reliable and whether Holcomb could be designated as an outcry witness." Holcomb testified that K.V. shared with her memories of being physically abused, and witnessing abuse to her siblings. The statute looks to more than one incident in order to prove up a case of continuous sexual abuse. K.V. accused Fernandez of eight such encounters, the first of which occurred in July 2017 (The reader should be warned that the language describing the allegations of sexual abuse of K.V. by her stepfather is quite graphic, even in the appellate [Court's summary format](#)):

According to Holcomb, K.V. reported that Fernandez

- (1) ordered K.V. into the kitchen where he touched her vagina,
- (2) told K.V. to bend over and then he put his fingers between her 'butt cheeks,'
- (3) took K.V. to his bedroom and forced her to stand naked while he touched her 'butt cheeks,' chest, and vagina,
- (4) forced K.V. to touch her vagina,
- (5) made K.V. touch his penis and then he touched her breasts and vagina,
- (6) put his penis against K.V.'s vagina,
- (7) touched K.V.'s vagina with his hands, and
- (8) licked K.V.'s vagina.

In addition to these eight allegations of sexual misconduct and assault, Holcomb testified that K.V. shared that Fernandez threatened to harm her, her mother, and her siblings. Fernandez allegedly threatened to shave the child's head, and to send her to juvenile detention. K.V. shared with Holcomb that her stepfather had a gun, and that he would point the gun at her mother's head, and used the gun to point at her brother's head as well. Fernandez raised no objections to this additional testimony from Holcomb. However, when asked if K.V. had explained why she

had failed to disclose the sexual abuse sooner, Holcomb testified that the child had “indicated in her own words that she was scared to tell” because of Fernandez’s threats to kill her and her family. Fernandez then objected, arguing that the testimony was “inadmissible evidence of an extraneous offense or bad act.” The trial court overruled the defendant’s objections.

There were several other witnesses who testified as to K.V. 's statements and outcries, including Dr. Reena Isaac, a pediatrician who served as medical director at the C.A.C. Dr. Isaac testified that K.V. had been examined at the C.A.C. by another physician, Dr. Lauren Burge, who was a training fellow with Baylor College of Medicine’s Child Abuse Pediatrics Program. Dr. Isaac explained in her testimony that the C.A.C. takes a comprehensive approach in order to understand what K.V. had been through. Sherry Elder, a licensed professional counselor with the C.A.C. who provides counseling to child abuse victims and their families, also provided testimony regarding her treatment of the child in 2018 and 2019, noting that she used “trauma-focused cognitive behavioral therapy” to help K.V. deal with post-traumatic stress disorder. Can there be more than one outcry witness? Yes, so long as each testifies to different incidents.

Fernandez called several family members as witnesses at the trial, including his mother, Doris Campa, and his sisters. Each affirmed that they had met K.V. when she was around four years old, described her as a happy child, and confirmed that the child had never come to them individually to tell them that she was being abused.

Fernandez tried to argue on appeal that the prosecution failed to sustain its burden of proof by setting out proof of two or more acts of sexual abuse between July 17,

2017 and October 31, 2017. [Continuous sexual abuse](#) of a child may be punished by life imprisonment, or any other term of not more than ninety-nine years nor less than twenty-five years. [Proof must be presented that in a period of 30 days or more, a person commits two or more acts of sexual abuse, and that the actor is at least 17 years old, and the victim is younger than 14 years of age.](#) Whether or not the actor is aware of the child victim's age is irrelevant.

This case illustrates why the Texas Legislature created the offense of continuous sexual abuse. Often young children are simply unable to identify the exact dates of the abuse they have endured. Specifying a date in an indictment is not necessarily about the accuracy of the date noted, but merely to show that the statute of limitations has not run. [There is no statute of limitations regarding the offense of continuous sexual abuse of a child.](#) [There is no mandate that the State prove exact dates of the occurrence\(s\),](#) but simply that there were “two or more acts of sexual abuse that occurred over a period that was thirty or more days in duration.”

Fernandez argues on appeal what he contends was improper admission of Holcomb's testimony regarding his threat to kill K.V., as well as the physicians' statements about what K.V. shared with them about her sexual abuse allegations against her stepfather. The appellate court notes that the list of purposes set out in Tex. R. Evid. 404(b) is not exhaustive. The statute mandates fair and reasonable notice before trial of witnesses and the testimony to be elicited from outcry witnesses. The appellate court concludes that “Holcomb's testimony was not offered to establish that Fernandez acted in conformity with his character. Rather, Holcomb's testimony that “K.V. was scared to tell anyone,” was in direct response to her stepfather's threats. The Houston Court of Appeals held that Holcomb's

testimony “was admissible to under Tex. R. Evid. 404(b) to explain K.V.’s delayed outcry.” Moreover, the court held that Elder’s and Dr. Isaac testimony about what K.V. shared with them during interviews and/or therapy sessions was admissible under [Tex. R. Evid. 803\(4\)](#).

Here are some takeaways:

1. Lend credence to any outcry of sexual abuse by a child.
2. Contact the appropriate authorities when confronted with an outcry of abuse by a child.
3. Allow the child space to unwrap what they have endured.
4. Do not expect an exact series of dates from a young child.
5. Learn about the impact of trauma on the brain, and the likelihood of history repeating if an abused, traumatized child does not have the benefit of therapy following abuse.

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