

Where Does an “Outcry Witness” Fit in the Child Abuse Arena?

Social workers must have a basic knowledge of how legal proceedings work, especially if they are called to be an outcry witness.

By **Elisa Reiter and Daniel Pollack** | May 14, 2021 at 08:00 PM



Social workers may not realize that hearsay statements are any out-of-court statements offered to prove the truth of the matter asserted. For instance, a prosecutor seeking to prove that X assaulted Y could not have a witness testify that “Joe told me that X assaulted Y.” The witness’s

statement would be inadmissible hearsay. Such hearsay statements are generally not admissible in criminal trials. But there are exceptions.

An **outcry witness** is the first adult to whom a child (14 years of age, or younger), or disabled person, tells about being a victim of a statutory designated offense, often a sexual offense, as described in **Article 38.072 of the Texas Code of Criminal Procedure**. The statute allows a **witness to testify** about the alleged victim's out-of-court description of the offense as an "exception" to the hearsay rule. In instances where the child has been victimized by multiple times acts of sexual assault, there may be multiple outcry witnesses; provided, however, there may be "**only one outcry witness per event.**"

In the March 2021 case of *Saunders v. State*, Germaine Saunders was charged with two **counts of aggravated sexual assault of a child**. The child was his stepdaughter, identified in the subsequent appellate opinion as "A.T." The child was 8 years old at the time of the assault. A jury found Saunders guilty, assessing his punishment at 66 years for on one count and 75 years on another count. There was also a \$10,000 fine for each count.

A.T. was 11 years old at the time of the trial. She was 8 years old or younger at the time her stepfather sexually abused her. Her testimony traced her step-father's sexual abuse of her, which apparently occurred over a period of years, when A.T. was in elementary school (spanning from her school years from first grade through third grade). A.T. provided graphic, explicit testimony at trial, describing the nature of the abuse, and of her stepfather's repeated attacks.

Saunders filed an appeal, arguing that the trial court erred by (1) allowing admission of testimony from multiple outcry witnesses, (2) violating his rights to present a full and complete defense, and (3) allowing testimony that commented improperly on his right to remain silent.

In the Saunders case, when A.T. was in third grade, she first confided that her stepfather abused her to a classmate. The classmate told her mother, and the classmate's mother called the children's teacher.

A.T.'s teacher testified at trial (first outside of the jury's presence, and again in the jury's presence). Having been informed that A.T. seemed to have some sexually explicit talk inappropriate to a child her age, the teacher spoke with A.T. the next day. The teacher testified that A.T. told him that her stepfather sometimes would engage in what was inappropriate behavior with A.T. "when her mom goes shopping." The teacher immediately notified the school's social worker. After interviewing the child, the social worker contacted Child Protective Services. At trial, the child's third-grade teacher presented testimony as an outcry witness. However, the school social worker and the forensic interviewer also testified. Saunders contended on appeal that the teacher should have been the (only) proper outcry witness, and that the trial court erred in admitting testimony from the school social worker and from the forensic interviewer.

To preserve error, Saunders should have **timely lodged** a specific motion, request or objection with the court, and obtained an adverse ruling on same. There are no magic words; however, **the party seeking to preserve objection must** "let the trial judge know what he wants, why he

thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.”

As attorney Greg Shamoun opined to Elisa Reiter, “never stop objecting.”

Saunders also asserted that he was unable to present a complete defense, as A.T. purportedly made a prior false allegation of inappropriate touching against her stepbrother in 2016. The prosecutor objected under “**rape shield,**” sustained by the trial judge. Saunders’ right to present a complete defense was **waived** by his attorney’s failure to make proper requests, objections or by filing proper motions at the trial court level. Appellant did not satisfy “**preservation-of-error**” requirements concerning his constitutional complaint because he did not raise a violation of his right to present a complete defense in any way to the trial court.”

In Saunders’ third point of error, he argued that the prosecutor commented inappropriately on the defendant’s right to remain silent by presenting testimony from the CPS child forensic social worker. The social worker testified that the stepfather was initially cooperative, then denied the allegations, then indicated that if he was going to answer any other questions, he needed to speak with his attorney. The prosecutor clarified that the stepfather refused to answer further questions without first speaking with an attorney. The social worker was passed as a witness. The appellant’s counsel asked no questions; hence, the social worker was excused from the courtroom by the trial judge. Again, Saunders’ trial counsel failed to preserve error, as the attorney failed to present a timely and specific request drawing the judge’s and jury’s attention to the fact that the defendant had the right to remain silent, and further, that the social worker’s testimony may have somehow violated that right.

A trial judge is a gatekeeper, charged with finding that a **statement of a witness** is reliable based on the time, circumstances and content of the statement. In the context of the Saunders' case, reliability relates to A.T.'s outcry statement to her teacher, not to the reliability of the teacher. In this instance, the record before the appellate court demonstrated that the trial court conducted the appropriate hearing regarding the reliability of the statement that A.T. made to her teacher. The appellate court found that appellant's conclusory argument that "the fact that A.T. made a **prior allegation of sexual abuse** against her stepbrother, which was presumably found to be false, was 'relevant, reliable evidence' which formed a vital part of appellant's defense" was without merit.

Social workers must have basic knowledge of how legal proceedings work. They may be asked to recount graphic language used by a victim. If an attorney objects to a question propounded to an outcry witness, the witness needs to understand that the objection is not launched as a personal attack, but instead as a means of trying to prevent the admission of certain testimony, or to preserve error.

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