

Protecting Your Conviction

**What you can do at trial
and on appeal**



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What you can get out of this talk

Identify Issues → Reversals

-jury charges

-outcry statute

-recantations

-election &

unanimity

-Article 38.37

What to put on the Record

What you can get out of this talk



Appellate Judges
Don't Think Like You

Pre-trial

Charging Decisions

Continuous § 21.02(c) “act of sexual abuse”



- agg kidnapping under § 20.04
- indecency w/ child under § 21.11

Lee v. State, 537 S.W.3d 924 (CCA)

Suppression Hearings

- If motion is generic, ask to narrow issue
- If didn't get notice, ask for continuance

Velasquez
539 SW3d 289

No right to notice for
trial-day suppress hrg

- Argue in the alternative
 - Request findings
- esp. if
losing party

Evidentiary Issues

Confrontation

“Testimonial statements” are inadmissible

UNLESS

OR

State calls child



- UNAVAILABLE
- Prior opportunity for cross-x

Confrontation

Outcry to forensic interviewer

“Testimonial statements”

→ Violated Confrontation



Where **Defense** had to call child

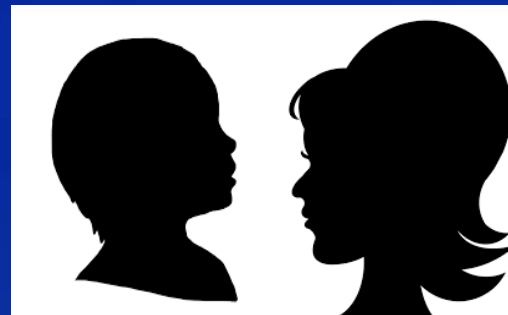
Matter of PM, 2018 WL 388006
(El Paso)

Outcry Witness

Who is Proper Outcry Witness

- Event-specific
 - **Multiple Outcry Witnesses**

One or two events?



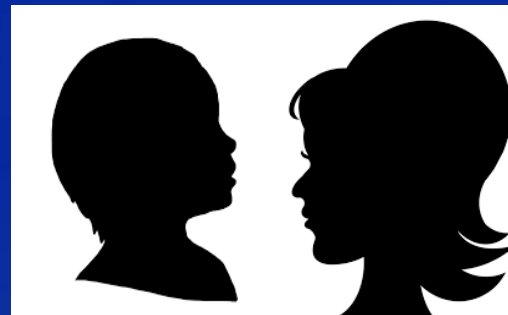
Outcry Witness

Who is Proper Outcry Witness

Earlier Outcry?

More than “General Allusion”

Did you tell
Mom?



Outcry Witness

- Who is Proper Outcry Witness

~~Uncooperative/Adverse~~

- For Victims <14 / disabled
- Have a Hearing

Art. 38.072, Sec. 2(b)(2)

where any debate over multiple
vs. one outcry or who is
proper

Article 38.37, § 2

- Extraneous-victim sex offenses
- In trial for sex offense

Admitted “for any bearing the evidence has on relevant matters, including [character conformity]”

Article 38.37, § 2

- Give 30-days notice (no request needed)
- Have hearing (jury could find brd)

Article 38.37, § 2

“Where there is great power
there is great responsibility”

-Churchill, 1906

Article 38.37, § 2

Cooking A Burger With Power Tools



Rule 403

Pawlak- 9000 images of
gay & child porn
in sex assault child trial
w/ 5 separate victims

Pawlak, 420 SW3d 807 (CCA)

Rule 403

Need for
evidence

Importance
of issue

Likelihood
of
improper
use



State's Election of Incident



Electing an incident

INDICTMENT

Indecency

Sexual Assault
contact V's sex organ
with D's sex organ

EVIDENCE

Touch on 4th of July

Sex in bathroom in Oct

Sex in bedroom in Jan



Electing an incident

Defense Entitled

- Notice of what he is accused of (vs. what is extraneous)

ELECTION: Allows State delay

Electing an incident

- On Defense Request
- Evidence of more than one incident to support a count/charge

Not required for Continuous

Owings, 2017 WL 4973823 (CCA)

Phillips, 193 SW3d 904 (CCA)

How to Elect

- In jury and defense's presence
- Identify the incident that the State is relying on to convict
- At Close of State's Case-in-chief

At the 2-
bedroom
house

Behind
the DQ

While
mom was
at work

Case to Watch- Election

Garcia, PD-0035-18

Is election error subject to constitutional harm standard even in absence of unanimity error?

-State was not required to timely elect

-jury charge limited to single instance

Jury Charge

Definitions

Beware non-penal code definitions

- ~~“penetration”~~
- ~~“female sexual organ”~~

The
Texas
Penal
Code

“On or About” Instruction

The image displays a grid of 48 monthly calendars for the year 2017, arranged in a 4x3x4 structure. Each calendar shows the days of the week and the dates for that month. The months are: January, February, March, April (top row); January, February, March, April (second row); May, June, July, August (third row); and September, October, November, December (bottom row).

“The State is not bound by the specific date alleged in the indictment. . . . [offense can occur] any time before the date of indictment.”

“On or About” Instruction



Taylor, 332 SW3d 483 (CCA)
Martin, 335 SW3d 867 (Austin)

“On or About” Instruction

“The State is not bound by the specific date alleged in the indictment
[offense can occur] any time
after [Sept 1, 2007] [D’s 17th bday] &
before the date of indictment.”

Application Paragraph

Continuous Sexual Abuse of a Young Child

Smith, 340 SW3d 41 (1st Dist.)

“NOW, if you find from the evidence brd that on or about Dec. 1, 2016 through Mar. 1, 2017, which said time period being a period that was 30 days or more in duration, in [County], Texas, the defendant, committed 2 or more of the following acts of sexual abuse, namely [act 1, act 2, and act 3], then you will find the defendant guilty of Continuous Sexual Abuse of a Child.”

“NOW, if you find from the evidence brd that on or about Dec. 1, 2016 through Mar. 1, 2017, which said time period being a period that was 30 days or more in duration, in [County], Texas, the defendant, committed 2 or more of the following acts of sexual abuse, namely [act 1, act 2, and act 3], then you will find the defendant guilty of Continuous Sexual Abuse of a Child.”

“NOW, if you find from the evidence brd that on or about Dec. 1, 2016 through Mar. 1, 2017, ~~which said time period being a period that was 30 days or more in duration,~~ in [County], Texas, the defendant, committed 2 or more of the following acts of sexual ^{during a period that was 30 days or more in duration} abuse, namely [act 1, act 2, and act 3], then you will find the defendant guilty of Continuous Sexual Abuse of a Child.”

Offense Unanimity

**True alternative
manners & means**

- Jurors don't have to agree
- Can charge jury if believe one or other

**Alternatives really
constitute 2
different offenses**

- Jurors must agree
- Charge jury they must be unanimous about either or both

Potential Unanimity Issues

We are seeking
one conviction

But our alternative
manners & means
really constitute
separate offenses

But we've proved
repeated instances
of the same
conduct

Offense Unanimity

**2 Different
Offenses**

breast

genitals

**Indecency
with a child**

Offense Unanimity

Different
Means;
Same
offense

Principal



Party

Guilty



Offense Unanimity

**2 Different
Offenses**

**By
contact**

**By
exposure**

**Indecency
with a child**

Offense Unanimity

Different
Means;
Same
offense

Act 1



Act 2

**Continuous
Sexual Abuse**



Offense Unanimity

**2 Different
Offenses**

**D
exposed**

**V
exposed**

**Indecency by
exposure**

Offense Unanimity Fix

On or about the 1st day of March 2011, did then and there intentionally or knowingly engage in sexual contact by touching the breast of the <VICTIM>, a child younger than 17, by means of the defendant's hand;

Intentionally or knowingly engage in sexual contact by touching the genitals of the <VICTIM>, a child younger than 17, by means of the defendant's hand;

against the peace and dignity of the State.

EXAMPLE

Is this set of instructions
okay?

How would you fix it?

EXAMPLE

unanimously

NOW, if you find from the evidence beyond a reasonable doubt that on or about [date] in [county], Texas, the defendant, did then and there intentionally or knowingly cause the penetration of the anus of [victim], a child younger than 14, by means of the defendant's sexual organ, then you will find the defendant guilty of the offense of aggravated sexual assault of a child as charged in the indictment

unanimously

OR, if you find from the evidence beyond a reasonable doubt that on or about [date] in [county], Texas, the defendant, did then and there intentionally or knowingly cause the penetration of the mouth of [victim], a child younger than 14, by means of the defendant's sexual organ, then you will find the defendant guilty of the offense

Incident Unanimity

**2 Different
Offenses**

**Taking a
shower**

**Mom's
room**

**Sexual
Assault**

Unanimity

Election ≠ Specific
Unanimity
Instruction

Even without a request for
election,

Defense can assert
non-unanimous verdict issue

Unanimity

You may return a verdict on a Count only if all twelve of you agree on the verdict as to that Count.

Specific Unanimity Instruction

The state has presented evidence of more than one incident to prove [offense] as alleged in the indictment. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict [on this count] you must all agree on at least one of the same incidents. And as to that incident, you must all agree that the state has proven all the elements of the offense beyond a reasonable doubt.

Unanimity & Harm

 Harm:

“Jurors, 6 of you can believe one thing occurred & 6 can believe another.”

Unanimity & Harm



Harm: -Defense objection

-Inconsistent Defenses

-Unanswered jury
questions on unanimity

-Partial acquittal

Unanimity & Harm



Harm:

Jury either believed all occurred or none occurred

Focus on one event & generic testimony about others

Lessers



Defense must show:

- 1) Offense Requested is LIO
- 2) **Some** evidence for rational juror to find if D is guilty, he is guilty only of LIO

Lessers

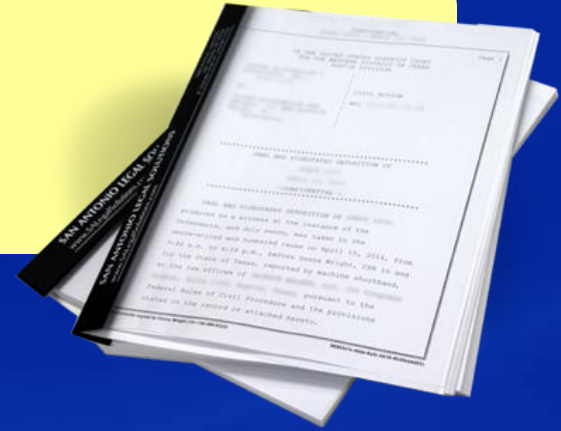


When in doubt...

**Instruct on the
Lesser**

For the Record

- Get verbal answers
- Use statutory language
- Narrate: “The witness is indicating about one inch”
- Correct opposing counsel’s descriptions
- Necessity for closed-circuit testimony & description of set up



For the Record

“My work has this cute thing they do where if you’re really good at your job, they get you to do everyone else’s, too.”



For the Record

Defense Counsel

- Not asking for medical care defense
- Not objecting
(testimony RE: victim's truthfulness)

Judge

- Questioning witness in jury's presence
- Not knowing sentencing range

Punishment

“Requires Bigamy” Enhancement

Sexual Assault § 22.011(f) 1st Degree if

Victim was person D was prohibited from marrying or purporting to marry or with whom D was prohibited from living under the appearance of being married under Section 25.01 (Bigamy)

Case to Watch—Enhancements

PC § 12.42(c)(2) Two-strikes Law



conviction of other
jurisdiction's law

“substantially similar”
to
Texas sex offense

Fisk, PD-1360-17, granted

Post- Conviction

Motions for New Trial

- Motion/amended motion filed w/in 30 days? (of sentenced in open court)

If NOT, object

- Is hearing within 75 days?
- Does it intrude on jury deliberations? (Rule of Evid. 606(b))

Direct Appeal

- Write Executive Summary for each issue
- Use Headings
- Squarely meet Appellant's points
- Be scrupulous about facts, law
- Make your point, then prove it
 - with relevant excerpts from record,
caselaw

Habeas Corpus

Recantation?

- Have a live hearing
- Highlight prior recants jury heard

Ineffective Assistance Claim?

- Get an affidavit from trial counsel

Prepare Findings that Find FACTS

Resources

TDCAA-

- State's Appellate Manual
- Writs book (Jacobs)

Pattern Jury Charges-

- State Bar
- McCormick/Blackwell

Resources

State Prosecuting Attorney's Office

512-463-1660

www.spa.texas.gov

Information@spa.texas.gov



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Questions?