

ENGROSSED SENATE AMENDMENT
TO
ENGROSSED HOUSE BILL NO. 2017

BY: LARASON, JOHNSON (Rob)
and WEESE of the HOUSE

and

BROWN of the SENATE

(CRIMINAL PROCEDURE - AMENDING 22 O.S. 1991,
SECTION 753 - PROCEEDINGS FOR CRIMES AGAINST
CERTAIN CHILDREN - CODIFICATION -
EFFECTIVE DATE)

AUTHOR: Add the following Senate Coauthor: RUBOTTOM

AUTHOR: Add the following House Coauthor: WEBB

AMENDMENT NO. 1. Strike the stricken title, enacting clause and
entire bill and insert

[CRIMINAL PROCEDURE - AMENDING 12 O.S. 1991, SECTION
2803.1 AND 22 O.S. 1991, SECTIONS 752 AND 753 -
PROCEEDINGS FOR CRIMES AGAINST CERTAIN CHILDREN -
CODIFICATION -

EFFECTIVE DATE]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 12 O.S. 1991, Section 2803.1, is
amended to read as follows:

Section 2803.1 A. A statement made by a child twelve (12) years of age or younger, which describes any act of physical abuse against the child or any act of sexual contact performed with or on the child by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

2. The child either:

a. testifies at the proceedings or pursuant to the provisions of Section 753 et seq. of Title 22 of the Oklahoma Statutes, or

b. is unavailable as defined in ~~Title 12~~ Section 2804 of this title as a witness. When the child is ~~unavailable as defined in Title 12 as a witness~~, such statement may be admitted only if there is corroborative evidence of the act.

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement.

~~C. Whenever the court deems it to be in the best interest of a child twelve (12) years of age or under who is testifying pursuant to this section, a parent of the child who is not a defendant in the case, relative, or next friend as determined by the court, may be allowed to be present in the court room during the testimony of the child.~~

SECTION 2. AMENDATORY 22 O.S. 1991, Section 752, is amended to read as follows:

Section 752. A. This section shall apply only to a proceeding in the prosecution of an offense alleged to have been committed against a child twelve (12) years of age or younger, and shall apply only to the statement of that child or other child witness.

B. The recording of an oral statement of the child made before the proceedings begin is admissible into evidence if:

1. The recording is made under circumstances which substantially comply with the procedures set forth in Section 753 et seq. of this title;

2. The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;

~~2.~~ 3. No attorney for any party is present when the statement is made;

~~3.~~ 4. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

~~4.~~ 5. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

~~5.~~ 6. The statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;

~~6.~~ 7. Every voice on the recording is identified;

~~7.~~ 8. The person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party;

~~8.~~ 9. Each party to the proceeding is afforded an opportunity to view the recording at least ten (10) days before trial, unless such time is shortened by leave of the court for good cause shown; and

~~9.~~ 10. The child either:

- a. ~~testifies~~ is available to testify under oath and be cross-examined at the proceedings, or
- b. ~~is unavailable as defined in Title 22 as a witness.~~

~~When the child is unavailable as defined in Title 22 as a witness, such recording may be admitted only if there is corroborative evidence of the act pursuant to Section 753 et seq. of this title.~~

SECTION 3. AMENDATORY 22 O.S. 1991, Section 753, is amended to read as follows:

Section 753. A. This section shall apply only to a proceeding in the prosecution of an offense alleged to have been committed against a child twelve (12) years of age or younger, and shall apply only to the testimony of that child or other child witness.

B. The court may, on the motion of the child witness, the attorney for any party or on its own initiative, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant, the state and the child, persons necessary to operate the equipment and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during ~~his~~ the testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during ~~his~~ the testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. All of the testimony given by a child via closed-circuit television shall simultaneously be recorded by visual and aural recording on film or videotape or by other electronic means, which recording shall be

preserved as part of the record in the case, and shall be available for use in any retrial of the case or as a court may lawfully direct.

C. The court may, on the motion of the child witness, the attorney for any party or on its own initiative, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of testimony under subsection B of this section may be present during the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided in subsection B of this section. ~~Only~~ The child giving testimony shall be under oath, and only the attorneys may question the child. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

1. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

2. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

3. Every voice on the recording is identified; and

4. Each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript transcribed by a licensed or certified court reporter is provided to the parties.

D. If the court orders the testimony of a child to be taken under subsections B or C of this section, the child shall not be required to testify in court at the proceeding for which the testimony was taken.

E. Prior to issuing an order pursuant to either subsection B or C of this section, the court shall, after hearing evidence on the matter, make a determination as to whether or not testimony by the child in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. An affirmative determination is prerequisite to such an order and must be supported by case-specific findings by the court to the effect that:

1. Use of the one-way closed-circuit television procedure as authorized by subsection B of this section or the visual and aural filming or videotaping or other electronic recording as authorized by subsection C of this section is necessary, in the particular case, to protect the welfare of the particular child witness;

2. The particular child witness would be traumatized by the presence of the particular defendant; and

3. The emotional distress which would be suffered by the child witness in the presence of the defendant would be more than de minimus, i.e., more than mere nervousness or excitement or some reluctance to testify.

F. At the conclusion of any trial in which testimony of a child is recorded as authorized by subsections B and C of this section, the trial court shall order such recording to be sealed, and such recording shall remain sealed subject to the further lawful order of a court until the case has been fully and finally adjudicated, on appeal or otherwise, at which time the recording shall be destroyed by the authority having custody.

G. 1. At any retrial of a proceeding in which a child's testimony was taken under subsection B or C of this section, the court may, on motion of the child witness, the attorney for any party or on its own initiative, after hearing evidence on the matter, order that the visual or aural recording of such prior

testimony be admitted in evidence, for viewing by the trier of fact, in lieu of a repetition by the child of such earlier testimony.

2. Such an order must be supported by case-specific findings to the effect that:

- a. the charge or charges against the defendant in the retrial constitute all or some of the charges on which he was tried in the earlier proceeding,
- b. the testimony which would be given by the child in the later proceeding would be substantially cumulative of the child's testimony recorded in the earlier proceeding,
- c. the use of such recorded testimony at the retrial, in lieu of the child's testimony either in the courtroom or pursuant to subsection B or C of this section, is necessary in the particular case to protect the welfare of the child witness,
- d. the particular child witness, in attempting to repeat such testimony, either in the courtroom or via an alternate procedure provided by subsections B and C of this section, and in being again subjected to cross-examination, would suffer emotional distress which would be more than de minimus and would be of such severity as to render the child unable to reasonably communicate, or, because of the extreme youth of such child at the time of the offense, the passage of time has adversely affected the child's ability to recall details of the events constituting the offense, and
- e. court action in granting the new trial, or reversing the previous conviction, was not based on any error associated with the child's previous testimony or the transmission or recording thereof.

3. If the court orders that the visual/aural recording of the child's testimony made under subsection B or C of this section in the earlier proceeding be admitted into evidence at the retrial, the child shall not be required to testify at such retrial either in the courtroom or via procedures provided in subsections B or C of this section; provided, nothing in this subsection shall prejudice the rights of a defendant under existing law to subpoena the child as a defense witness in the retrial.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 753.1 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. In any criminal prosecution for rape, sodomy or other sexual abuse in which the prosecution intends to call as a witness a minor aged twelve (12) or under, the court may, on motion of the child witness, the attorney for any party or on its own initiative, excuse the child witness from testifying if:

1. Evidence or testimony, or a combination thereof, exists which is, or would be in the opinion of a reasonable trier of fact, sufficient to constitute prima facie evidence of the defendant's guilt of the offense charged. Such evidence should be independent of the proposed testimony of the child witness, and may include videotape, photographic, audiotape, documentary or other evidence, or available testimony of other available witnesses;

2. The child witness's proposed testimony would be, as to such other evidence or testimony, largely cumulative;

3. There is a showing, or it would be reasonable to assume, that the appearance of such child testifying either in the courtroom or via closed-circuit television or recording pursuant to Section 753 of Title 22 of the Oklahoma Statutes would be detrimental to the health or well-being of such child; and

4. The defense, after being consulted, offers no objection.

B. Where dismissal of a child witness is proposed by the child witness, motion of the defense or on the court's own initiative, the state shall be afforded an opportunity to show why the child should not be dismissed and shall bear the burden of demonstrating the reasonable necessity of such child's testimony to the state's case against the defendant. The court shall not consider a potential jury's assessment of punishment for a defendant when making its decision.

C. When a child witness has been excused, defense counsel shall at no time, in the presence of the jury, make any comment concerning failure of such witness to testify; however, where the defense has agreed to both excusal and non-identification of a potential child witness, the judge shall upon request by defense counsel inform the jury of such fact when the defense has rested.

D. When a child witness is excused, such excusal should be accomplished prior to the preliminary hearing in the case but may take place at any time during the pendency of the case or trial thereof. Prior to excusal of a child witness, the trial court shall make appropriate findings supporting such action.

E. In any criminal prosecution for sexual abuse wherein excusal of a child witness is appropriate under this section and is agreeable to the defense, the state shall stipulate, if the defense requests, what the child's testimony would have been on the issues of consensual conduct or absence of use of force, unless the state is prepared to produce controverting evidence on such issues. Such stipulation shall be made known to the jury, if any.

F. The child witness's testimony shall not be deemed necessary to the state's prima facie case when:

1. It is needed only to establish certain collateral facts and the defense has agreed to enter into a stipulation favorable to the state on such fact issues; or

2. The information or indictment consists of multiple counts, and the state has evidence which a reasonable person would consider incontrovertible and which would be adequate, without the child victim's testimony, to support conviction upon a number of such counts sufficient to support an aggregate sentence of imprisonment for one hundred (100) years or more or for life under existing statutory punitive provisions.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 753.2 of Title 22, unless there is created a duplication in numbering, reads as follows:

A. This section shall apply only to a proceeding in the prosecution of an offense involving sexual misconduct alleged to have been committed against a child aged twelve (12) years or younger at the time of the offense, and shall apply only to testimony by and identification of that child.

B. For the purpose of protecting the mental health and well-being of the child, the court shall, at the earliest practicable time and prior to the preliminary hearing, if any, review all of the state's evidence, including testimony proposed to be elicited from the child. After evaluation of all such evidence, and after any hearing on the matter requested by the state, the court shall determine whether such testimony will be cumulative of other items of evidence, wholly or in part, and if so, determine what factual items, if any, in the child's proposed testimony can be eliminated without substantial prejudice to the case against the accused. Upon such determination, the court shall issue an order in limine restricting the state from eliciting such facts in any direct examination of the child as a state's witness. The court's order shall be supported by the following findings:

1. Certain specified facts as to which the child would have testified can be established by other evidence available to the state; and

2. Elimination of testimony by the child as to such facts would not cause substantial prejudice to the state's case against the accused.

C. Should the court determine that the child's anticipated testimony would be cumulative of other evidence as to all of the facts which the state is required to prove, and that all such facts can be established by such other evidence without substantial prejudice to the case against the accused, the court shall excuse the child as a witness for the state. In the case of a multi-count information or indictment, where the other evidence, standing alone, could in the court's opinion support convictions of the accused upon a sufficient number of such counts to permit imposition of an aggregate sentence of imprisonment for one hundred (100) years or more, or for life, the court may, on the motion of the child witness, the attorney for any party or on its own initiative, determine that the significance of the child's testimony in the proceeding is outweighed by a need to protect the child against emotional distress which would be more than de minimus and issue an order excusing the child as a witness for the state in the case.

D. At each stage of the proceeding, and in all documents filed in the case, the child shall be identified only by pseudonym. At no time shall the state, verbally or in any document, refer to or elicit the actual name of the child or, unless critical to the state's case against the accused, information on the basis of which the child's true identity could reasonably be ascertained.

SECTION 6. This act shall become effective September 1, 1992."

Passed the Senate the 21st day of April, 1992.

President of the Senate

Passed the House of Representatives the ____ day of
_____, 1992.

Speaker of the House of
Representatives