YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Mother's testimony was admissible as an excited utterance notwithstanding noncompliance with the requirements of the outcry witness statute.[In the Matter of M.A.M.](06-3-1)

On May 5, 2006, the Texarkana Court of Appeals held that an excited utterance is an independent exception to the hearsay rule, so the outcry statute--whether the juvenile version or the adult version--is not needed for its admission.

¶ 06-3-1. **In the Matter of M.A.M.**, MEMORANDUM, No. 06-05-00103-CV, 2006 Tex.App.Lexis 3826 (Tex.App.—Texarkana, 5/5/06).

Facts: In May 2004, nine-year-old D.I. came into her mother's bedroom in the middle of the night and reported that her stepbrother, fourteen-year-old M.A.M., had just done something "nasty" to her. Earlier that evening, D.I. and M.A.M., along with a couple of other siblings, had been lying on the floor of the living room in their pajamas, watching television. According to testimony, D.I. had drifted off to sleep, but awoke to find M.A.M.'s hand inside her pajama bottoms and his finger inside her.

Based on evidence that M.A.M. sexually assaulted D.I., M.A.M. was adjudged delinquent. In a single point of error, M.A.M. argues that the trial court, in violation of *Section 54.031 of the Texas Family Code*, harmfully erred in admitting D.I.'s mother's testimony recounting D.I.'s outcry to her about the assault.

Held: Affirmed.

Memorandum Opinion: At trial, when D.I.'s mother began to recount what D.I. told her M.A.M. had done, M.A.M. lodged a general hearsay objection. The State argued for, and the trial court decided in favor of, admitting the testimony based on the excited-utterance exception to the hearsay rule. *See TEX. R. EVID. 803(2)*. No argument was made to the trial court explicitly referencing *Section 54.031 of the Texas Family Code*, which by its terms is directly applicable to this situation:

This section applies to a hearing under this title n1 in which a child is alleged to be a delinquent child on the basis of a violation of any of the following provisions of the Penal Code, if a child 12 years of age or younger is the alleged victim of the violation: . . . Chapter 22 (Assaultive Offenses). n2

TEX. FAM. CODE ANN. § 54.031(a) (Vernon 2002) (footnotes added).

Outcry testimony, which is otherwise inadmissible hearsay, becomes admissible under *Section 54.031(c)*, if (1) the opposing party is given at least fourteen days' notice which contains the statutorily

required elements, (2) the trial court, as the result of a hearing held outside the presence of the jury, finds the outcry statement reliable based on its time, content, and circumstances, and (3) the victim is available to testify. *TEX. FAM. CODE ANN. § 54.031(c)* (Vernon 2002). There is no claim that all elements of *Section 54.031(c)* were met by the State as to D.I.'s mother's testimony.

> n1 *Section 54.031* is in the Texas Family Code's Title 3, the Juvenile Justice Code, *Sections 51.01-61.107*.
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> n2 Within the Texas Penal Code's Chapter 22 is *Section 22.011*, Sexual Assault, the offense M.A.M. is alleged to have committed against D.I.

The State asserts M.A.M. failed to preserve error with his general hearsay objection. But we need not address whether M.A.M.'s objection, lodged at the time D.I.'s mother was about to recount D.I.'s outcry to her about the sexual assault, properly preserved *Section 54.031* noncompliance as an issue on appeal. *Section 54.031* was not the sole vehicle for admission of the testimony.

The trial court properly overruled the hearsay objection after it had heard evidence sufficient to establish that D.I. told her mother about the assault shortly after it had happened, while D.I. was dominated by the emotions of the startling event. *See Zuliani v. State, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003)*; *McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)*. The trial court admitted the testimony under the excited-utterance exception to the hearsay rule. *See TEX. R. EVID. 803(2)*. On appeal, M.A.M. does not attack the excited-utterance ruling on its merits, but simply argues that the State must have complied with *Section 54.031*. We disagree.

Section 54.031, and its adult-defendant counterpart, *Article 38.072 of the Texas Code of Criminal Procedure,* state that an outcry statement "is not inadmissible because of the hearsay rule" if the provisions of the respective statute are met. *TEX. FAM. CODE ANN. § 54.031(c)*; *TEX. CODE CRIM. PROC. ANN. art. 38.072(2)(b)* (Vernon 2005). In other words, an outcry statement, which is otherwise inadmissible as hearsay, becomes admissible if the statutory terms are met. But an excited utterance is an independent exception to the hearsay rule, so the outcry statute--whether the juvenile version or the adult version--is not needed for its admission. *See Long v. State, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990)* (*Article 38.072* allows admission of "statements otherwise excludable" as hearsay); *Skidmore v. State, 838 S.W.2d 748, 753 (Tex. App.--Texarkana 1992, pet. ref'd)*. The testimony was, therefore, admissible as an excited utterance notwithstanding noncompliance with *Section 54.031*. n3

> n3 Even had there been error in admitting the outcry testimony, the error would have been harmless, since testimony recounting essentially the same information was admitted from the mother, without objection, and even from D.I., herself. *See Chamberlain v. State, 998 S.W.2d 230, 235 (Tex. Crim. App. 1999)*; *McFarland, 845 S.W.2d at 840*.

Conclusion: Because the mother's testimony recounted an excited utterance, it was admissible as such. There was no error.

We affirm the judgment of the trial court.