Review of Recent Juvenile Cases (2009)

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

A complaint on appeal which does not comport with the Motion to Suppress at trial, fails to preserve that argument for review.[McNichols V. State](09-1-13)

On January 29, 2009, the Houston Court of Appeals (14 Dist.) held that since appellant's written motion to suppress was not based on TFC §52.02(b) (parental notification), he failed to preserve that argument for review.

¶ 09-1-13. McNichols v. State, MEMORANDUM, No. 14-08-00125-CR, 2009 WL 196066 (Tex.App.-Hous. (14 Dist.)1/29/09).

Facts: Appellant has not challenged the sufficiency of the evidence; we therefore discuss the facts only briefly here and throughout the opinion as necessary to address his appellate issues.

On January 17, 2007, appellant took a plastic air soft gun from a WalMart store and followed a 30-year-old Hispanic woman out of the store, to the parking lot, and then to her minivan. He approached the woman, threatened her with the air soft gun wrapped in a bandana, and demanded that she give him her money. He then instructed her to move to the passenger seat, got into the van, and drove out of the parking lot. After a brief stop, he made her drive the van to a drive-through convenience store to buy some cigarettes and then park in the empty lot of a skating rink. He instructed her to get in the back of the van and remove her clothing; she complied. Appellant forced her to perform oral sex on him and attempted vaginal penetration. The complaining witness was able to fight appellant off; he grabbed his clothes and fled the scene, leaving behind a PlayStation 2 in a black case.

The complaining witness immediately reported the assault to police. Initially, officers were unable to develop any suspects. They obtained still photos from the WalMart surveillance videos and ran a CrimeStoppers piece in the local media. Several witnesses identified appellant from the photographs, including his parents. The investigating officer, Sergeant Thomas Keen of the Harris County Sheriff's Department, met with appellant's parents and discussed appellant's activities on the day in question. His parents reported that he had been dropped off and picked up at school as usual that day. They told Keen that appellant said he lost his PlayStation 2 that day. Appellant's parents provided Sergeant Keen with several photographs, but none were appropriate for a photo array. They also informed Keen that appellant left home the day after the offense and had not returned.

Keen obtained a yearbook page from appellant's seventh-grade yearbook. After concealing the names, he showed it to the complainant. She identified appellant's photograph. After speaking with appellant's parents, Keen filed charges against appellant for robbery, kidnapping, and sexual assault. Officers picked up an individual who identified himself as Johnathan McNichols on January 25, 2007. Keen requested that appellant

be held in the **juvenile** holding facility of the Wallisville substation, which is a certified **juvenile** processing center. Regarding parental notification, Keen testified as follows:

Q. [by the State]: And were his parents notified?

A. [by Keen]: I did notify the parents that morning. I don't know the exact time, whether it was around 1:00 or before 1:00 or after 1:00, but I personally made contact with the family and notified his family of--that he was incarcerated.

Q.: And did his father ultimately come down to the Wallisville substation?

A.: Yes, he did.

Keen testified that he took appellant before magistrate judge Mike Parrot, who informed appellant of the charges and his rights. Keen then interviewed appellant, and appellant provided a statement in which he confessed to the offense and articulated several specific details, such as the location of the air gun. After taking appellant's statement, Keen returned appellant to Judge Parrot. Judge Parrot again spoke with appellant; appellant signed his confession in Judge Parrot's presence, as required by <u>section 51.095 of the Texas Family</u> <u>Code</u>.

At his trial, appellant's statement was admitted into evidence over his objection based on Chapter 51 of the Texas Family Code. [FN1] Additionally, the complaining witness testified regarding the offense and identified appellant as her assailant. The jury found appellant guilty as charged.

<u>FN1.</u> Judge Parrot also testified at appellant's trial, detailing the procedures he followed to ensure that appellant's statutory rights were observed.

During the punishment hearing, several witnesses testified regarding appellant's prior bad acts. He had a history of acting out in school, and recently had acted out in a sexual manner. Appellant also had stolen his father's vehicle and broken into a local convenience store. In addition, he had started two fires, one in school and one at a school bus stop near his home. Luanne Martin, a counselor at appellant's middle school, testified regarding appellant's school behavior and described two occasions in which appellant recently acted out sexually in school. During her testimony, the following colloquy occurred:

Q.: What is your opinion about Johnathan's--Johnathan's ability to be in the community and not be a threat to others?

[Defense counsel]: Your Honor, I have to object. I don't believe this witness is qualified or has the background or expertise to give that side--that sort of opinion on future dangerousness.

[The Court]: Overruled. You may answer.

A.: Well, because I've seen Johnathan, if Johnathan is in a situation ... where he is not in control and where you're going to make him to do something that he doesn't want to do and this has been seen over and over again in the classroom and in other situations with other children, Johnathan is going to fight back. He is going to do something to get out of that situation. And it doesn't, I don't think it matters what it is that he's going to do, in an aggressive manner. It may be just running away, which he's done before for at least for a day or two; he ran away from school. It may be going to set a fire to get out of that situation. It may be going to hit somebody to get the attention off of him, I don't know.

But that is my greatest fear because it seems to be escalat[ing] as he's gotten older to more aggressive techniques.

Q.: Do you think he's dangerous to other people?

A.: Yes, ma'am, I do.

Q.: Do you think that will escalate as he becomes older?

A.: If he doesn't get the proper help, I think so.

Q.: Do you think that Johnathan is capable, if given a set of rules and being told you need to follow these rules for a period of time, is he capable of doing that?

A.: He has not been in the past.

Appellant's parents and another school counselor testified on his behalf at the punishment hearing. The jury also heard evidence of potentially extenuating circumstances. In particular, appellant was diagnosed with ADHD [FN2] when he was in elementary school and had been raped by a cousin at a young age. The State then presented the testimony of Dr. Nicole Dorsey, a clinical psychologist with the Children's Assessment Center, who testified in detail regarding the treatment appellant could receive in prison. She also testified regarding her deep concern about the future of an individual who had displayed the type of behavior appellant had displayed at such a young age.

<u>FN2.</u> Attention Deficit Hyperactivity Disorder.

At the close of the punishment phase, the jury sentenced appellant to 60 years' incarceration. The trial court rendered judgment on the jury's verdict and this appeal timely ensued.

Held: Affirmed

Memorandum Opinion: The State argues that appellant's first issue has not been preserved for review. We agree. Appellant's written motion to suppress was based on <u>section 51.095 of the Texas Family Code</u>, which specifies the manner in which a **juvenile** must be advised of his rights. This subsection provides that a statement of a child may be admitted in evidence when certain procedures have been followed. *See Tex.* Fam.Code Ann. § 51.095(a) (Vernon Supp.2008) (providing that a statement of a child is admissible when, among other things, (a) the statement is in writing and the child received warnings from a magistrate before it was made; (b) the written statement was signed in the presence of the magistrate by the child with no law enforcement personnel present; and (c) the magistrate is "fully convinced" that the child understands the nature and contents of the statement and signed it voluntarily). Additionally, appellant's trial counsel objected to the admission of appellant's statement as follows:

With respect to [appellant's statement], I will reurge the Motion to Suppress that has been done in writing with the Court in that it violates Mr. McNichols' [s] federal and state constitutional rights, and the statement was not taken in conformity *with Chapter 51 of the Texas Family Code.*

On appeal, however, appellant does not dispute that the procedures described in <u>section 51.095</u> were followed, but instead challenges the admission of the statement on the ground that the investigating officer allegedly failed to promptly notify appellant's parents when he was arrested, as required by Chapter 52 of the

Family Code. *See id.* § 52.02(b) ("A person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody, to ... the child's parent, guardian, or custodian[.]"). Because his complaint on appeal does not comport with his complaint at trial, he has failed to preserve this argument for review. *See <u>Hill v. State</u>*, 78 S.W.3d 374, 382 (Tex.App.-Tyler 2001, pet. ref'd).

Moreover, any error in admitting appellant's statement was harmless because there is ample evidence to support his conviction without his statement. *See <u>Reese v. State</u>, 33 S.W.3d 238, 243 (Tex.Crim.App.2000)* (" '[A] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect.'" (quoting <u>Johnson v. State, 967 S.W.2d 410, 417 (Tex.Crim.App.1998</u>)). Here, the complaining witness immediately notified police about her attack. She also testified in detail regarding the offense and positively identified appellant as her assailant. *See <u>Tex.Code Crim. Proc. Ann. art. 38.07</u> (Vernon 2005) (sexual assault conviction supportable on uncorroborated testimony of victim alone if victim informed another within one year of offense). The physical evidence discovered in the complaining witness's vehicle supported her statements. Several witnesses, including appellant's parents, identified appellant from the CrimeStoppers photographs released through the media. The State also introduced surveillance camera footage from the WalMart location showing appellant following the complaining witness to her vehicle. Given the record before us, we have fair assurance that any error in admitting appellant's statement did not influence the jury or had but a slight effect. Thus, we would overrule appellant's first issue even if it had been preserved for review.*

Conclusion: Having determined that appellant's first issue was not preserved for our review and having overruled appellant's second issue, we affirm the judgment of the trial court.