YEAR 2005 CASE SUMMARIES

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

In indecency with a child, failure to conduct a reliability hearing (for outcry witness) outside the presence of the jury was harmless error. [In the Matter of C.E.B.](05-3-20)

On June 30, 2005, the Beaumont Court of Appeals used the civil rules in their harmless error analysis (The trial court's error is reversible if it probably caused the rendition of an improper judgment) in trial court's failure to conduct reliability hearing for outcry witness.

05-3-20. In the Matter of C.E.B., III, MEMORANDUM OPINION, No. 09-04-128 CV, 2005 Tex.App.Lexis 5021 (Tex.App.— Beaumont 6/30/05).

Background: A jury found true the allegation that C.E.B., a juvenile, committed the offense of indecency with a child, pursuant to *Tex. Pen. Code Ann. § 21.11(a)(1)* (Vernon 2003). C.E.B. elected to have the trial court determine disposition and the trial court imposed a determinate sentence of three years' confinement at the Texas Youth Commission. C.E.B. raises two issues in which he complains of the trial court's error in admitting outcry testimony and of an impermissibly suggestive pre-trial identification procedure.

Facts: In August, 2003, L.K. (Leilani) and her family went to an R.V. park at Lake Conroe, Texas, for the weekend. The night of their arrival, the family went to dinner at the park's cafe. Leilani sat her four-year-old daughter, H.K., at a table to watch television. As Leilani stood in the doorway, she observed C.E.B. sit next to H.K. and stroke her arm. When Leilani went to pay, she could not observe H.K. As Leilani was getting drinks, H.K. approached her and said "'that boy' licked my ear, and he told me he loved me and he wanted to marry me, and he touched my private." Leilani asked H.K to "show mama what you mean by your privates," and H.K. "cupped her hand over her crotch area." When asked if H.K. told Leilani what he touched her with, Leilani testified, "his hand." Several hours later, Leilani reported the incident to park staff. The family left the park the next morning. Subsequently, Leilani spoke with the Montgomery County Sheriff's Department. She picked C.E.B. out of a photographic line-up and identified him in court.

Held: Affirmed

Memorandum Opinion: In his first point of error, C.E.B. argues the trial court erred by allowing H.K.'s outcry statement into evidence over a hearsay objection without conducting a reliability hearing outside the presence of the jury. *Section 54.031 of the Family Code* contains an exception to the hearsay rule for statements made by a victim of child abuse. *See Tex. Fam. Code. Ann. § 54.031* (Vernon 2002); *see also*

Tex. R. Evid. 801(d). n1 *Section 54.031* applies to a hearing in which a child is alleged to be delinquent on the basis of a violation of Chapter 21 of the Penal Code, if the alleged victim is twelve years of age or younger. *Tex. Fam. Code. Ann. § 54.031(a)*. Further, *section 54.031* applies to statements describing the alleged violation that were made by the victim to the first person, eighteen years of age or older, to whom the victim made a statement. *Tex. Fam. Code. Ann. § 54.031(b)*. A statement that meets those requirements is admissible despite the hearsay rule if certain conditions are met. *Tex. Fam. Code. Ann. § 54.031(c)*. One of those conditions is that "the juvenile court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement . . . ." *Tex. Fam. Code. Ann. § 54.031(c)(2)*. *See also In the Matter of G.M.P., 909 S.W.2d 198, 206-07 (Tex. App.--Houston [14th Dist.] 1995, no pet.)*. It is this requirement that C.E.B. claims was not satisfied.

> n1 *Section 54.031* is applicable in the trial of a juvenile and is the civil counterpart of the *Code of Criminal Procedure's article 38.072*, applicable in adult criminal proceedings. *Tex. Fam. Code Ann. § 54.031* (Vernon 2002); *Tex. Code Crim. Proc. Ann. art. 38.072* (Vernon 2005).

The record reflects that during direct examination, Leilani began to reveal what H.K. said when defense counsel made a timely hearsay objection. The State answered, "we filed an outcry statement with the Court which is an exception to the hearsay rule." The trial court agreed and overruled defense counsel's objection. It is clear the trial court failed to conduct a hearing outside the presence of the jury to determine the reliability of the outcry statement in accordance with *section 54.031*. *Id.*

The State argues that because C.E.B.'s objection was to hearsay instead of reliability, based on time, content or circumstances, C.E.B. failed to preserve the issue for review. The State further contends that even though the trial court did not conduct a hearing to determine if H.K.'s statements were reliable, such a finding by the trial court can be implied from the trial court's admission of Leilani's testimony.

Testimony disclosing an outcry statement is only admissible as a statutory exception to the hearsay rule; therefore, the requirements of the statute must be met for a statement to be admissible over a hearsay objection. *Long v. State, 800 S.W.2d 545, 547 (Tex. Crim. App. 1990)*; *In the Matter of G.M.P., 909 S.W.2d at 207*. n2 Since the statute pertains only to hearsay statements of child abuse victims, failure to specifically cite to the statute or to request a hearing does not waive an appellant's right to appellate review. *Long, 800 S.W.2d at 548*. Accordingly, the issue was preserved for our review. Because the record reflects the requirement of *section 54.031(c)(2)* was not satisfied, the trial court erred in admitting the statement over a hearsay objection. *Tex. Fam. Code Ann. § 54.031(c)(2)*; *Long, 800 S.W.2d at 547-48*; *see also In the Matter of G.M.P., 909 S.W.2d at 207*.

> n2 The statute is interpreted no differently in a juvenile trial than in an adult criminal trial. *See In the Matter of Z.L.B., 102 S.W.3d 120, 46 Tex. Sup. Ct. J. 512 (Tex. 2003)*.

Relying on *Nolen v. State, 872 S.W.2d 807, 812 (Tex. App.--Fort Worth 1994, pet. ref'd)*, the State argues the trial court's finding of reliability may be implied from the trial court's admission of the outcry statement. The issue raised in *Nolen* was whether the trial court abused its discretion by failing to conduct a balancing test after a timely objection under *Tex. R. Evid. 403*. *Id*. *Nolen* does not support the State's position that the requirements of *section 54.031* do not have to be met for the hearsay testimony to be admissible. We do not disagree that the trial court's finding of reliability can be implied from the

admission of the evidence, when it is admitted *after* the hearing has been held. *See Gabriel v. State, 973 S.W.2d 715, 718 (Tex. App.--Waco 1998, no pet.)*. The State cites no authority, and we are aware of none, holding the hearsay testimony of an outcry witness is admissible absent the statutorily required hearing. Accordingly, we find the trial court erred in admitting the testimony.

Having found error, we now consider whether that error was harmful. *See Tex. R. App. P. 44*. The State argues the error is harmless under either the civil or criminal rules while C.E.B. contends the civil rule governs. The Supreme Court of Texas has acknowledged juvenile proceedings are quasi-criminal in nature, but it has not determined whether the criminal or civil rules for harm analysis are employed on appeal. *See In re D. I. B., 988 S.W.2d 753, 756, 42 Tex. Sup. Ct. J. 467 (Tex. 1999)*. In *D. I. B.* the court noted the State relied on the civil rules and appellant did not challenge their application. *Id*. The court then found, "thus, we are not called upon to decide whether the criminal rule should govern a harm analysis in a juvenile case such as this one." *Id*. In light of C.E.B.'s application of the civil rules, and in accordance with *D. I. B.,* we evaluate whether the error was harmless pursuant to the rule for reversible error in civil cases. *See Tex. R. App. P. 44.1(a)(1)* (The trial court's error is reversible if it probably caused the rendition of an improper judgment).

In this case, the same evidence was admitted through the videotaped testimony of H. K. n3 H.K. told a forensic interviewer that a boy "started to do things to me." She described those things as, "he licked my ear . . . with his tongue" and "he put his hand on my private." H.K. said he "touched it with his hand." Furthermore, defense counsel solicited the same outcry testimony on cross-examination of the outcry witness. Leilani's testimony as the outcry witness was not the only evidence that C.E.B. engaged in sexual contact with H.K. by touching "any part of the genitals." *See Tex. Pen. Code Ann. § 21.11(c)(1)* (Vernon 2003). Because the jury heard other evidence of sexual contact, we are unable to say the trial court's error probably caused the rendition of an improper judgment. C.E.B.'s first point of error is overruled.

> n3 Defense counsel objected to the admission of the videotape during trial but that issue has not been presented on appeal.