

Review of Recent Juvenile Cases (2011)

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

The requirement that a statement must be signed by the child with no law enforcement officer or prosecuting attorney present, does not apply to video statements.[In the Matter of M.A.C.](11-3-10)

On April 14, 2011, the Eastland Court of Appeals held that the procedure set out for recorded statements does not contain the law enforcement, prosecutor, and weapon prohibitions found in the statute for written statements.

¶ 11-3-10. In the Matter of M.A.C., No. 11-09-00172-CV, --- S.W.3d ----, 2011 WL 1519351 (Tex.App.-Eastland, 4/14/11).

Facts: M.A.C. and the victim, J.M., resided in the same foster home in Midland in March 2009. M.A.C. was thirteen years old at the time, and J.M. was nine years old. One of the juveniles' foster parents, Austin Harris, testified that he and the youth in the foster home watched a movie in the main living area of the home on the evening of March 14, 2009. After the movie ended, he told all of the children that they needed to go to their respective bedrooms and get ready for bed. After a momentary absence, Mr. Harris returned to the main living area to adjust the thermostat for the home. He found M.A.C. and J.M. in the main living area with the lights turned off. J.M. said that she and M.A.C. were "just talking"; M.A.C. told Mr. Harris that he was looking for a pencil.

Mr. Harris reported his discovery to his wife, Linea Harris. Based on their suspicions, Mrs. Harris decided to question J.M. about the incident. She and Mr. Harris also questioned M.A.C. about the incident. M.A.C. told them that he had done "something very bad" in that he had touched J.M.'s breasts over her clothes. Mr. and Mrs. Harris subsequently reported the incident to their supervisors. Alexandra Arredondo, a former foster care case manager for the Buckner Home, testified that M.A.C. told her that he and J.M. touched each other under their shirts and that they were "humping" with their clothes on.

Andra K. Chamberlin, a forensic interviewer with the Midland Rape Crisis and Children's Advocacy Center, subsequently interviewed J.M. She testified that J.M. told her about three different incidents that had occurred with M.A.C. They included: (1) "humping" over clothes; (2) M.A.C. sucking on J.M.'s breasts and M.A.C. engaging in sexual intercourse with J.M.; and (3) another incident of "humping" over clothes when they were interrupted by Mr. Harris.

Detective Charles Sims of the Midland Police Department met with M.A.C. after Cham-berlin interviewed J.M. Detective Sims subsequently transported M.A.C. to meet with Honorable Joe L. Matlock, Justice of the Peace, for the administration of magistrate warnings for the purpose of obtaining a recorded statement from M.A.C. Judge Matlock testified that Detective Sims was present when he administered the magistrate warnings to M.A.C. and that Detective Sims remained present during the time that Judge Matlock subsequently asked

M.A.C. questions pertaining to the voluntariness of his statement.FN2 Judge Matlock testified that he requested Detective Sims to remain present during the entire warning and interview process. Furthermore, Detective Sims testified that he was armed during this process and that his firearm was visible at all times.

In the recorded statement, M.A.C. admitted that three incidents occurred with J.M. He stated that the first incident involved him accidentally touching J.M. The second incident involved him touching and sucking J.M.'s breasts. He also stated that J.M. asked to see his penis and that he showed it to her, after which they engaged in skin-to-skin contact. He initially denied that any penetration occurred during this episode, but then he later stated that penetration may have occurred for thirty seconds.FN3 The third incident he related pertained to the time that Mr. Harris caught him and J.M. in the main living area.

M.A.C. asserts in his first issue that the trial court erred in admitting his recorded statement into evidence. He contends that it was illegally obtained in violation of TEX. FAM.CODE ANN. § 51.095 (Vernon 2008). We note at the outset of our analysis that M.A.C. is not asserting that his statement was involuntary. See *Martinez v. State*, 131 S.W.3d 22, 35 (Tex.App.-San Antonio 2003, no pet.) (Due process may be violated by the admission of a confession that was not voluntarily given.). Instead, he contends that officials violated the procedural requirements of Section 51.095(a)(1)(B)(i).

Held: Affirmed

Opinion: M.A.C. contends that the provisions of Section 51.095(a)(1)(B)(i) were violated because Detective Sims was present during the entire warning and interview process and was armed during this process with his firearm visible at all times. Given Judge Matlock's testimony that he requested the presence of Detective Sims, we focus our attention to the presence of Detective Sims's weapon during the interview process. The critical inquiry is whether or not the weapon prohibition applied to the taking of M.A.C.'s recorded statement.

The State asserted at trial that the weapon prohibition of Section 51.095(a)(1)(B)(i) did not apply because M.A.C.'s statement was not the result of a custodial interrogation.FN4 Section 51.095(a)(1), (b)(1), (d); see *Martinez*, 131 S.W.3d at 32. The State asserts a different legal theory on appeal for upholding the trial court's admission of M.A.C.'s statement. Specifically, the State contends that the weapon prohibition set out in Section 51.095(a)(1)(B)(i) is inapplicable to M.A.C.'s statement because he gave a recorded statement pursuant to section 51.095(a)(5). We agree. As previously noted, we are required to uphold the trial court's ruling if it is correct under any theory of law applicable to the case. *Iduarte*, 268 S.W.3d at 548; *In re J.A.B.*, 281 S.W.3d at 65.

Subsection (a) of Section 51.095 consists of five subparts, each of which applies to a particular type of statement that a juvenile may make: subpart (a)(1) applies to written statements; subpart (a)(2) applies to oral statements evidencing the child's guilt; subpart (a)(3) applies to res gestae statements; subpart (a)(4) applies to statements made in court proceedings; and subpart (a)(5) applies to statements recorded by an electronic recording device. We focus our attention on subparts (a)(1) (written statements) and (a)(5) (recorded statements). Subpart (a)(1) is of interest because the weapon prohibition is found under this subpart. Subpart (a)(5) is of interest because M.A.C. gave a recorded statement.

The provisions for written statements contained in subpart (a)(1) contemplate two periods during which the magistrate will interact with the juvenile. Subpart (a)(1)(A)(i)-(iv) sets out four warnings that the magistrate must give the juvenile prior to the juvenile giving the written statement. The provisions of subpart (a)(1)(B)(i) set out the procedures that the magistrate must follow to assess the voluntariness of the juvenile's written statement after its preparation. Specifically, subpart (a)(1)(B)(i) provides:

[T]he statement must be signed in the presence of a magistrate by the child with no law enforcement officer or prosecuting attorney present, except that a magistrate may require a bailiff or a law enforcement officer if a bailiff is not available to be present if the magistrate determines that the presence of the bailiff or law enforcement officer is necessary for the personal safety of the magistrate or other court personnel, provided that the bailiff or law enforcement officer may not carry a weapon in the presence of the child.

Thus, by its express terms, the weapon prohibition applies when the juvenile executes a written statement in the presence of a magistrate.

The procedures for obtaining a recorded statement from a juvenile are similar to those applicable to obtaining a written statement. They are similar in the respect that subpart (a)(5)(A) requires a magistrate to give the juvenile the same warnings set out in subpart (a)(1)(A) for written statements. However, the statute provides a different follow-up procedure for recorded statements. The applicable follow-up procedure for a recorded statement is set out in subsection (f):

A magistrate who provides the warnings required by Subsection (a)(5) for a recorded statement may at the time the warnings are provided request by speaking on the recording that the officer return the child and the recording to the magistrate at the conclusion of the process of questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. If a magistrate uses the procedure described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.

Conclusion: As reflected above, the follow-up procedure set out in subsection (f) for recorded statements is discretionary. Furthermore, it does not contain the weapon prohibition found in subpart (a)(1)(B)(i) for written statements. Accordingly, the trial court did not err in allowing M.A.C.'s recorded statement to be admitted despite the fact that Detective Sims's firearm was visible. Appellant's first issue is overruled.