IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. PD-0244-19 & PD-0245-19

STATE OF TEXAS

v.

ERLINDA LUJAN, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS
EL PASO COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I agree with Presiding Judge Keller that this case, at least in the posture in which it has come to us, is not about the voluntariness of Appellee's statements, or even about the voluntariness of her waiver of *Miranda*/Article 38.22 rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); TEX. CODE CRIM. PROC. art. 38.22, § 2. It is purely a question of whether she was properly cautioned prior to the recording of the part of her statement that she made while in the car, as required both by *Miranda* and by Article 38.22, Section 3(a)(2). I do

not disagree with Presiding Judge Keller that, for purposes of the *Miranda* warnings, it may be appropriate to consider what Appellee said while in the car to be the same statement as the statement she made immediately before in the station house. But the statute is another matter.[1]

Section 3 of Article 38.22 governs admissibility of oral statements. It requires, among other things, that such statements be reduced to "an electronic recording," and on a "device . . . capable of making an accurate recording[.]" *Id*. §§ 3(a)(1), 3(a)(3). Most importantly for present purposes, it also requires that the warnings enumerated in Section 2(a) of Article 38.22 be "given" "prior to the statement but during *the* recording." *Id*. § 3(a)(2) (emphasis added; note the definite article). As far as I am concerned, this constitutes a plain requirement that a separate warning under Section 2(a) be given, not for each statement (or part of a statement) made, but for each discrete "recording" that is made, even if it constitutes no more than a continuation of a previous statement that was independently recorded. In other words, the statute plainly mandates that a warning be conveyed "during" each separate *recording* that is made—regardless of whether it is a separate "statement" or the continuation of an earlier-warned statement.

Here, there were separate recordings made on discrete recording "devices." Just as each of those devices must, by statute, be shown to be "capable of making an accurate recording," under Section 3(a)(3), each of the recordings made thereon must also contain

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[1] *See Resendez v. State*, 306 S.W.3d 308, 315 (Tex. Crim. App. 2009) ("Even if a suspect is given *Miranda* warnings and his constitutional rights have not been violated, an oral confession may still be inadmissible if the police fail to comply with the purely statutory requirement that they capture the *Miranda* warnings on the electronic recording.").

its own separate Section 2(a) warning, under Section 3(a)(2). Thus, regardless of whether *Miranda* requires separate warnings in this case, the statute does. For this reason, if no other, it was within the trial court's discretion to declare "the recording" that was made in the car inadmissible for failing to contain its own statutory warnings. *See State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) ("In considering a trial court's ruling on a motion to suppress, an appellate court must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case.").

On that basis, I respectfully concur in the result.

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