Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00063-CR

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EVERETT ARLAN HOLSETH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 98-33921

O P I N I O N

Appellant entered a plea of not guilty to the offense of driving while intoxicated. He was convicted and the court assessed punishment at 180 days in the Harris County Jail, probated for one year, and a $600 fine. In two points of error, appellant contends the trial court erred in admitting hearsay testimony and in excluding relevant evidence. We affirm.

On August 21, 1998, Tomball Police Officers Ernest McNabb and Frank Mitchell, while conducting a traffic stop, were flagged down by an unknown woman, who told them she

had been forced to drive off of the roadway by of an erratic driver. The woman pointed out the vehicle and the officers followed it.

While following the vehicle, the officers saw it swerve and fail to maintain a single lane of traffic. The officers stopped the driver for suspicion of driving while intoxicated. Officer McNabb approached the vehicle and asked appellant for his driver's license and proof of insurance. Appellant gave McNabb his driver's license, but did not have proof of insurance. Officer McNabb smelled the odor of an alcoholic beverage. He also noticed appellant's eyes were bloodshot and his speech was slurred. When McNabb asked appellant if he had been drinking, appellant responded that he had consumed two margaritas.

Officer McNabb then asked appellant to step out of his vehicle and perform several field sobriety tests. Appellant failed to follow directions and performed poorly on the tests. The officers took appellant to the police station where he was videotaped. Appellant was offered a breath intoxilyzer test, but refused the test. Officers McNabb and Mitchell concluded that appellant had lost the normal use of his mental and physical faculties due to alcohol consumption.

In his first point of error, appellant claims the trial court erred in allowing inadmissible hearsay into evidence. Appellant contends the error occurred during the direct examination of Officer McNabb as follows:

> Q. [by the prosecutor]: When did you first come into contact with the defendant?
>
> A. We were flagged down by –
>
> [Defense counsel]: Your Honor, I'm going to object to any testimony as hearsay about being flagged down and talked to by some third party.
>
> THE COURT: Overruled.
>
> A. We were flagged down by a female advising us that –
>
> [Defense counsel]: Again, I'm going to object to hearsay.
>
> THE COURT: Why is it not hearsay?

[Prosecutor]: Your Honor, it's not hearsay because it's not going to the truth of the matter. We are showing the state of mind of the officer.

THE COURT: Come up and tell me what it is then. I'll decide if it's not for the truth of the matter asserted therein.

(Bench discussion off the record).

[Prosecutor]: Your Honor, the response to his objection would be excited utterance.

THE COURT: You have to lay some groundwork for it.

Q. So, Officer, you were approached by somebody; is that correct?

A. Yes, ma'am.

[Objection to leading overruled].

Q. And what was the – was the person – what was their demeanor when they approached you?

A. They were excited.

THE COURT: Objection overruled. You can proceed.

Q. So what was said to you when you were approached by this person?

A. They pulled up beside us and said that the Suburban had almost run them off the road and – or, actually, had swerved over and caused her to run off the road.

Q. And so what did you do?

A. She also said that she thinks the driver was intoxicated.

[Defense counsel]: Objection to being nonresponsive, Judge.

THE COURT: What's the question?

[Prosecutor]: I'll rephrase the question, Judge.

THE COURT: Thank you.

During Officer Mitchell's testimony, appellant renewed his hearsay objection.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). An out-of-court statement is offered to prove the truth of the matter asserted if it is relevant only to the extent the fact finder believes it to be true and accurate. *See Perkins v. State*, 902 S.W.2d 88, 98 (Tex. App.—El Paso 1995, pet. ref'd). If the statement's probative value does not hinge on

its truthfulness, then it is not offered to show the truth of the matter asserted and is not hearsay. *See id.*

Here, the woman's statement that she had seen a vehicle driving erratically and that she thought the driver might be intoxicated was not offered to prove that appellant was driving erratically or was intoxicated. The statement was offered to prove how the officers came into contact with appellant. Therefore, the statement was not hearsay and was admissible. Appellant's first point of error is overruled.

In his second point of error, appellant contends the trial court abused its discretion in failing to allow rebuttal evidence during cross-examination. Although appellant claims the evidence was disallowed during cross-examination, the ruling appellant complains of occurred during appellant's redirect examination of Constable David Hill. On the night of appellant's arrest, he telephoned Constable Hill. Appellant attempted to elicit details of that telephone conversation in the following manner:

> Q. You said you had a conversation with Mr. Holseth?
>
> A. On the night of his arrest, yes, sir.
>
> Q. Did he call you?
>
> A. Yes, sir.
>
> Q. And what was the conversation?
>
> [Prosecutor]: Objection, Your Honor. Hearsay.
>
> [Defense counsel]: Judge, she brought it up and opened it up, talking about conservations.
>
> THE COURT: Why is it not hearsay?
>
> [Defense counsel]: Because she opened it up.
>
> THE COURT: There's not an opening the door exception to hearsay that I know. You can either impeach for prior inconsistent, or you can show one of the exceptions to the hearsay rule.

Appellant contends that because the prosecutor raised the issue of Hill's conversation with appellant during cross-examination of Hill, that the evidence is admissible. The State

argues that any error in the exclusion of the testimony was not preserved because appellant failed to make a bill of exception as required by the rules of evidence. TEX. R. EVID. 103(a)(2). We agree. Rule 103 provides:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected,
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> * * * * *
>
> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

In this case, there was no offer made. While the substance of the question asked was apparent, appellant has failed to provide this court with any offer that would indicate the witness's response, thus, the substance of the evidence is not before us. *See Johnson v. State,* 925 S.W.2d 745, 748 (Tex. App.—Fort Worth 1996, pet. ref'd). Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig. (J. Edelman concurs in the result only).

Do Not Publish — TEX. R. APP. P. 47.3(b).