Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-349

APRIL TERM, 2002

State of Vermont v. Stephen Willoughby	}	APPEALED FROM: District Court of Vermont, Unit No. 1, Windsor Circuit DOCKET NO. 378-3-01 Wrcr Trial Judge: Paul F. Hudson

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of driving while intoxicated (DWI), arguing that the trial court abused its discretion (1) by admitting an out-of-court declaration to a police dispatcher that a drunk man was getting into a car and driving away, and (2) by denying defense counsel's motion for a mistrial following the prosecutor's prejudicial questioning of a prospective juror. We agree with defendant on the first issue; accordingly, we reverse the conviction, and remand the matter for a new trial.

On March 1, 2001, Sharanda Hilliker, defendant's neighbor, called the Town of Windsor Police Department and reported that a drunk person was getting into a car and leaving a specified location. Hilliker gave police a brief description of the car, including its license plate number. The police dispatcher forwarded the information to Chief Byron Demond, who began following a vehicle that matched the description. After observing what he believed to be erratic operation by the driver, Chief Demond stopped defendant, noticed clinical symptoms of intoxication, and then called for back-up. Sargent Steven Morse responded to the scene and administered field dexterity tests. Defendant was eventually arrested and processed for DWI. At the police station, he refused to take a breath test after speaking to an attorney.

Defendant was charged with driving while under the influence of intoxicating liquor, in violation of 23 V.S.A. 1201(a)(2). The day before trial, defense counsel filed a motion in limine to exclude evidence of Hilliker's call to the dispatcher. The State opposed the motion. Hilliker appeared during the morning of the trial to ask the court to quash the State's subpoena for her to appear and testify on behalf of the State. The judge denied her motion, but she left the courthouse, and the State was unable to obtain her testimony. At trial, the first witness called by the State was the police dispatcher who took Hilliker's call. The dispatcher testified that she remembered receiving a telephone call from Hilliker concerning a possible drunk driver. When the prosecutor asked the dispatcher what Hilliker told her, defense counsel objected on hearsay grounds. The court overruled the objection, but instructed the jury that the testimony would be admitted for the limited purpose of explaining what action the police took in investigating the matter. The dispatcher then testified that Hilliker had reported "that there was a drunk person getting into a car outside her apartment."

Following the close of evidence, the jury convicted defendant of the charged offense. On appeal, defendant argues that the trial court abused its discretion by admitting Hilliker's hearsay statement and by denying defense counsel's motion for a mistrial following the prosecutor's prejudicial questioning of a prospective juror. Because our resolution of the first

issue requires reversal of defendant's conviction, we need not address the second issue.

An out-of-court statement may be admitted to show how it affected the hearer, but an area of special concern is when statements are admitted to show why an investigation was undertaken or how the arresting officers arrived upon a crime scene. J. Strong, McCormick on Evidence 249, at 102-03 (5th ed. 1999). A leading commentator explains the concern as follows:

The [arresting or investigating] officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct. They should not, however, be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted "upon information received," or words to that effect, should be sufficient.

Id. at 103.

Vermont law is in accord with this position. In State v. Beattie, 157 Vt. 162, 166-67 (1991), which involved a DWI prosecution, the arresting officer's affidavit of probable cause indicated that a passing motorist had told the officer that the person behind the wheel of a nearby van was either asleep, passed out, or dead. The trial court initially granted defendant's motion in limine to exclude the statement, allowing the officer to testify only that he received a report from a passing motorist. On the second day of trial, however, the court allowed the State to introduce the statement because the defendant had cast doubt on the officer's reasons for approaching the van. In affirming the conviction, we commended the court's initial limitation, citing McCormick, but recognized that defendant's attempt to take advantage of the court's ruling warranted introduction of the actual statement. Id. at 167.

Here, neither at trial nor on appeal, has the State adequately explained why Hilliker's actual statement, as opposed to general testimony that the officers were responding to a call, needed to be presented to the jury. Nor does our review of the record reveal the necessity for admitting the statement. Introducing the statement plainly created the risk that the jury would accept the statement as substantive evidence as to whether defendant was under the influence of intoxicating liquor at the time he was stopped - the sole contested issue at trial. See J. Strong, supra, at 102 (out-of-court statements offered to show effect on reader frequently have impermissible hearsay aspect as well as permissible hearsay aspect); United States v. Becker, 230 F.3d 1224, 1229 (10th Cir. 2000) (prejudicial impact of hearsay statement concerning reason for police investigation is particularly strong when statement goes precisely to issue government must prove). Because the potential prejudicial impact of the statement far outweighed its probative value, see V.R.E. 403, the court abused its discretion by admitting it. See United States v. Blake, 107 F.3d 651, 653 (8th Cir. 1997) (although out-of-court statement may be admissible for limited purpose of explaining to jury why police investigation was undertaken, statement is not admissible for nonhearsay purpose when propriety of investigation was not in issue at trial and only possible relevance of statement was to show that defendant committed charged offense); United States v. Mancillas, 580 F.2d 1301, 1310 (7th Cir. 1978) (because no suggestion of improper police action was raised at trial, court erred by admitting out-of-court statement to explain police presence at crime scene).

The State argues, however, that even assuming the trial court abused its discretion in admitting Hilliker's statement, the error was harmless because of the other overwhelming evidence that defendant was at least slightly impaired at the time he was stopped. See State v. Bradbury, 118 Vt. 380, 382-83 (1955) (person operating motor vehicle "while in the slightest degree under the influence of intoxicating liquor" may be found guilty of driving while intoxicated). The State points primarily to the testimony of two police officers and a third witness that defendant appeared to be intoxicated and admitted consuming alcohol.

We cannot conclude that admitting Hilliker's statement was harmless beyond a reasonable doubt. See State v. Carter, 164 Vt. 545, 555 (1996) (adopting beyond-reasonable-doubt harmless-error standard for both constitutional and nonconstitutional errors). The prosecutor began his opening argument in this case by repeating Hilliker's statement twice to the jury - "He's drunk and he's getting into a car." This emphasis went to the hearsay, not the nonhearsay, aspect of the statement. Chief Demond testified that defendant tail-gaited cars and nearly clipped one of them, but acknowledged that defendant was not given a ticket for any traffic offense other than DWI. The officers also testified that defendant

exhibited classic signs of impairment - slurred speech, watery eyes, etc. - but defense counsel encouraged the jury to examine closely defendant's appearance and actions in the videotape of him performing dexterity tests, which was admitted into evidence and played for the jury during trial. In denying defendant's motion for judgment of acquittal at the close of evidence, the trial court acknowledged that, taken individually, the clinical symptoms of impairment, did not amount to much, and that, at least to the layman, the dexterity tests appear to have been "pretty well done."

Obviously, the jury struggled before concluding that defendant was impaired at the time of operation. The jurors were unable to reach a decision during the afternoon after the evidence was closed. They came back the next day to continue deliberations. During midday, they sent a note to the trial judge indicating that they were stuck on the meaning of the term "under the influence" and needed to know if having any alcohol in one's system meant that one was under the influence. Finally, in the afternoon of the second day, they returned a guilty verdict. Upon review of the record, we cannot conclude beyond a reasonable doubt that the admission of Hilliker's statement had no effect on the judgment.

Reversed and remanded.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice