

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-420382-001 DT

06/16/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

CATHERINE LEISCH

v.

CHARLES B LEFKOWITZ (001)

MARK N WEINGART

MESA JUSTICE CT-WEST

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2013–420382.

Defendant-Appellant Charles B. Lefkowitz (Defendant) was convicted in West Mesa Justice Court of driving under the influence. Defendant contends the trial court erred as follows: (1) in admitting evidence of the results of his BAC test without the testimony of one of the Quality Assurance Specialists; and (2) in precluding his hearsay statement. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On April 13, 2013, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2). Prior to trial, the State filed a motion in limine noting that Officer Trott was the Quality Assurance Specialist (QAS) who did the calibration of the Intoxilyzer machine in question, but that he was no longer available. (R.T. of Jun. 19, 2014, at 5, 10.) The State asked to be allowed to have Officer Matthews give his opinion about the machine based on the reports prepared by Officer Trott. (*Id.* at 6–10, 14.) Defendant’s attorney objected, contending such testimony would violate Defendant’s right of confrontation. (*Id.* at 22–24.) After hearing arguments from the attorneys, the trial court ruled the QAS records were business records and that Officer Matthews would be allowed to testify about the calibration tests. (*Id.* at 27–28.)

In opening statement, the prosecutor told the jurors the evidence would show Defendant was drinking and ran his vehicle into a light pole. (R.T. of Jul. 11, 2014, at 19.) In opening statement, Defendant’s attorney said “Mr. Lefkowitz that night was trying to avoid a vehicle that pulled out in front of him and that’s why he hit the pole.” (*Id.* at 25.)

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Officer Christopher Morin testified about his observations that night. (R.T. of Jul. 11, 2014, at 53, 56–58.) On cross-examination by Defendant’s attorney, the following occurred:

Q. . . . My question is this; first of all, when you first had contact with Mr. Lefkowitz he told you that as he was southbound that a vehicle that was—

[The Prosecutor]: Objection, Your Honor. May we approach?

(R.T. of Jul. 11, 2014, at 92.) At the bench conference, the prosecutor objected on the basis that the testimony would be self-serving hearsay. (*Id.*) Defendant’s attorney made the following response about Defendant’s statements: “A, they’re not hearsay, because he’s here; B, they’re not hearsay because he’s the Defendant and it’s a statement that he made.” (*Id.* at 93.) The prosecutor responded that it was not a statement by a party opponent. (*Id.*) Defendant’s attorney elaborated further:

[Defendant’s attorney]: And then we can go through all the rest of the rules because that’s just bunk and in criminal cases anything said by a defendant is admissible.

(R.T. of Jul. 11, 2014, at 95.) The trial court then sustained the State’s objection. (*Id.* at 96.)

Defendant’s attorney later asked the officer about another statement Defendant had made, and again the prosecutor objected. (R.T. of Jul. 11, 2014, at 104–05.) Defendant’s attorney argued that, in addition to being Defendant’s statement, it showed his state of mind. (*Id.* at 106.) The trial court again sustained the State’s objection. (*Id.* at 114.)

After presentation of the evidence, the arguments, and the final instructions, the jurors found Defendant guilty of both charges. (R.T. of Jul. 11, 2014, at 232—33.) The trial court later imposed sentence. (R.T. of Jul. 22, 2014, at 5–7.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the trial court err in admitting evidence of the BAC test results.*

Defendant contends the trial court erred in ruling that the evidence of the BAC test results was admissible. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held, for an out-of-court statement that is considered “testimonial evidence” to be admissible under the confrontation clause, there are two requirements: (1) the declarant must be unavailable, and (2) the defendant must have had a prior opportunity to cross-examine the declarant. 541 U.S. at 68–69. The Court further stated, “Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records 541 U.S. at 56, quoted in *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, ¶¶ 11, 16 (Ct. App. 2006). In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court said the following:

[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial records.

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557 U.S. at 311 n.1. Prior to the decision of the Court in *Melendez-Diaz*, the Arizona Court of Appeals in *Bohsancurt* had held maintenance and calibration records for an Intoxilyzer were not “testimonial” and were admissible as business records:

Based on our conclusions that QARs [quality assurance records] are business records and do not contain evidence against individual defendants such as Bohsancurt, we hold the QARs are not testimonial under *Crawford*. Therefore, the Sixth Amendment does not bar admission of the QARs even though the QA specialist who prepared them is not present in court or subject to cross-examination.

Bohsancurt at ¶ 35; accord, *State v. Shivers*, 230 Ariz. 91, 280 P.3d 635, ¶¶ 14, 15 (Ct. App. 2012) (declaration of service of order of protection); *State v. Bennett*, 216 Ariz. 15, 162 P.3d 654, ¶¶ 7–8 (Ct. App. 2007) (records of prior conviction). Additionally, the Arizona Court of Appeals has held that “the expert may testify when the basis of her independent opinion are forensic reports prepared by a non-testifying expert, if the testifying expert reasonably relied on these facts and data to reach her conclusions.” *State ex rel. Montgomery v. Karp (Voris)*, 236 Ariz. 120, 336 P.3d 753, ¶ 1 (Ct. App. 2014). The trial court therefore correctly ruled the calibration and quality assurance testing records were admissible and that Officer Matthews could give his opinion about the machine based on the reports prepared by Officer Trott.

B. *Did the trial court err in ruling that Defendant’s statements, as elicited by Defendant’s attorney, would be hearsay and thus not admissible.*

Defendant contends the trial court erred in ruling that his statements, as elicited by his attorney, would be hearsay and thus not admissible. The rules of evidence exclude from the definition of hearsay the following:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

....

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity

Rule 801(d)(2)(A), ARIZ. R. EVID. To be admissible, the statement must be offered against a party, thus a criminal defendant’s prior exculpatory statement, offered by the defendant and not by the party-opponent, is hearsay and not admissible. *State v. Smith*, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983) (defendant’s exculpatory statement to the police officer was hearsay); *State v. Wooten*, 193 Ariz. 357, 972 P.2d 993, ¶¶ 46–47 (Ct. App. 1998) (trial court properly precluded defendant from offering his own statement denying responsibility for the killing). The trial court thus properly ruled Defendant’s statements, as elicited by his attorney, would be hearsay and thus not admissible.

Defendant acknowledges his statements would be considered hearsay, but contends they would have been admissible under one or more of the following exceptions:

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The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Rule 803(1), (2), and (3), ARIZ. R. EVID. This Court concludes Defendant is not entitled to relief on appeal under any of these theories.

1. *Present Sense Impression.* On appeal, Defendant contends his statements should have been admitted as present sense impressions. An offer of evidence at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose. *State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486, ¶ 48 (1998) (because defendant never claimed at trial the hearsay statement was admissible as a public record, defendant waived that argument on appeal). In the present case, Defendant never argued to the trial court that his hearsay statements were present sense impressions, thus he has waived that argument on appeal. Moreover, because he never argued to the trial court that his hearsay statements were present sense impressions, he never established that he made those statements while perceiving the event or immediately after perceiving the event. Defendant thus failed to establish the evidentiary prerequisite for admission under this exception.

2. *Excited Utterance.* On appeal, Defendant contends his statements should have been admitted as excited utterances. Again, Defendant never argued to the trial court that his hearsay statements were excited utterances and thus has waived that argument on appeal. And again, because he never argued to the trial court that his hearsay statements were excited utterances, he never established that those statements related to a startling event and that he was under the stress of excitement that it caused.

3. *Then-Existing Mental, Emotional, or Physical Condition.* Defendant contends his statements should have been admitted as showing his then-existing mental condition. Defendant did make that argument to the trial court. (R.T. of Jul. 11, 2014, at 106.) That exception does not, however, include a "statement of memory or belief." In the present case, any testimony that Defendant said he "was trying to avoid a vehicle that pulled out in front of him" would have been a statement of memory or belief and thus not included in this hearsay exception. The same is true of any statement that he rated himself as a zero on a scale of ten for intoxication. His statements thus were not admissible under this exception.

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III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not err (1) in admitting evidence of the results of his BAC test without the testimony of one of the Quality Assurance Specialists and (2) in precluding Defendant's hearsay statement.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the West Mesa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the West Mesa Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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