

Affirmed and Opinion filed June 7, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-01326-CR

JAMES EDWARD HICKS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court at Law No. 12
Harris County, Texas
Trial Court Cause No. 99-41847**

OPINION

In a single point of error, appellant challenges his conviction for misdemeanor assault, claiming the trial court erred in denying him the right to cross examine the complainant regarding a prior inconsistent statement. We affirm.

I. FACTUAL BACKGROUND

The complainant, Sonjia J. Jackson, was a bartender at the "Green Parrot" club. Appellant, whom Ms. Jackson knew as "Pee Wee," came to the club during her shift. Appellant began arguing with another patron. Ms. Jackson followed appellant and the other patron outside and told appellant to come back inside and pay his tab. Appellant refused, whereupon

Ms. Jackson informed him he would be banned from the club. Appellant then called her a “bitch” and grabbed her with both hands. Ms. Jackson pushed appellant off, but he grabbed her again, causing her pain. Ms. Jackson then called the police to report that appellant had assaulted her.

Officer Barbara E. Gastmeyer, of the Houston Police Department, went to the scene the night of the assault. Appellant claimed that Ms. Jackson made the allegation against him because he was ending their sexual relationship and returning to his wife.

Appellant was charged by information with the class A misdemeanor offense of assault. The information also contained enhancement paragraphs alleging convictions for two prior felony convictions for murder and a prior misdemeanor conviction for assault. Appellant entered a plea of “not guilty” to the information and pled true to the two murder enhancement paragraphs.

A jury found appellant guilty of the offense charged. After finding the two murder enhancement paragraphs true, the trial court assessed punishment at one year confinement in the Harris County Jail.

II. ISSUE PRESENTED FOR REVIEW

In his sole point of error, appellant complains that the trial court violated his constitutional right to confrontation by improperly limiting cross examination of Ms. Jackson regarding prior inconsistent statements she made to a Houston Police officer.

III. ANALYSIS

We begin by noting that the record does not support appellant’s factual assertions. The trial court did not deny him the right to cross examine Ms. Jackson. Appellant attempted to impeach Ms. Jackson’s credibility during trial *by asking Officer Gastmeyer* about a statement attributed to Ms. Jackson in a police report prepared by another officer. The state made a hearsay objection to this questioning, which the trial court sustained. During the cross examination of Officer Gastmeyer, the following exchange occurred:

DEFENSE: And isn't it true that she told y'all that – that she followed the defendant –

STATE: Your Honor, I'm going to object at this point that if the offense report is going to be hearsay and inadmissible because the other officer wrote it, the defense counsel should also not be allowed to ask questions regarding it.

COURT: It's not proper impeachment, I sustain the objection.

DEFENSE: Judge, I would just ask the Court that she was allowed to go into questions such as "no mention of Larry" on her direct; so, I would ask that I be allowed to go into the same thing.

COURT: I sustained her objection to your last question.

First, we note that the court's exclusion of Officer Gastmeyer's answer to the above question could not have affected cross-examination of Ms. Jackson because Ms. Jackson was not the one being questioned.

Secondly, Texas Rule of Appellate Procedure 33.1 requires that, to preserve a complaint for appellate review, an appellant must specifically and timely object. TEX. R. APP. P. 33.1(a). In the context of a trial court's ruling excluding evidence, the substance of the excluded evidence must have been made known to the trial court in the form of an offer of proof, or the excluded evidence must have been apparent from the context. TEX. R. EVID. 103(a)(2); *see Howard v. State*, 962 S.W.2d 119, 122 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd.) (finding that excluded testimony, forming the basis of appellant's denial of cross examination complaint, was not preserved for failure to make an offer of proof).

Here, appellant did not object to the trial court's ruling on the basis of denial of the right to confront or cross examine Ms. Jackson. Moreover, appellant did not disclose the substance of the excluded testimony he now claims was essential to reveal Ms. Jackson's bias, and the substance of that evidence is not apparent from the record. For these reasons, we find that appellant did not preserve his complaint for appellate review. Accordingly, appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Yates, Wittig, and Frost. (Wittig, J. concurring in result only).

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