

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION: AC
CASE NO: 2011AP900047AXXXMB
L.T. NO: 2011CT011490AXXXMB

KEREN-ESTHER HARP,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed: **SEP - 3 2014**

Appeal from the County Court in and for Palm Beach County,
Judge Paul Damico.

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PER CURIAM.

Keren-Esther Harp (the Defendant in the case below) was found guilty of Leaving the Scene of a Crash Involving Damage and Reckless Driving Causing Injury to Property following a jury trial. Defendant argues on appeal that the trial court erred by overruling her hearsay objection to the testimony of a community service aide¹ regarding statements made by another driver. Defendant contends that the testimony was inadmissible hearsay and by admitting such testimony, the court caused harmful error. We agree and reverse.

¹ Community Service Aides are trained civilian employees whose main function is accident investigations.

On April 11, 2011, an accident involving the Defendant and Rodolfo Vasquez occurred at the intersection of Lake Worth Road and Congress Avenue in the city of Lake Worth. Defendant was charged with Leaving the Scene of a Crash involving Damage and a Reckless Driving Causing Injury to Property. A jury trial was held on September 28, 2011. The State called Vasquez and Jean Ryan as witnesses in its case in chief. The Defendant also testified in her own defense.

The Defendant testified that she drove through a yellow light and that Vasquez struck her vehicle in the intersection. She testified that there was no damage to her car from the collision; her vehicle, a 1998 van, had a pre-existing cracked front light from when she purchased it. Vasquez testified that the Defendant ran a red light and collided with his vehicle while he was stopped at a red light. Vasquez testified that the impact scratched his bumper and caused it to hang improperly.

According Palm Beach County Sheriff's Office Community Service Aide Jean Ryan, the investigator of the accident, an individual by the name of Nicole Ansley was also involved in the accident. The damage to Ansley's car, however, consisted of "[a] slight mark on the left rear, but not much to speak of." Defendant denied ever colliding with the vehicle driven by Ansley. Ryan also observed what she deemed "fresh damage" on the right front side of the Defendant's car.

Ryan made the following references to Ansley² during her testimony:

MR. FLAGG³: Okay, and this damage was consistent with the testimony – or this investigation –

MR. EVANS⁴: Objection, speculation.

² Ansley was originally supposed to testify for the State, however, she did not appear in court.

³ Mr. Flagg is the attorney on behalf of The State.

⁴ Mr. Evans is the attorney representing Defendant.

THE COURT: No, with her qualifications she's qualified to answer. Overruled.

MR. FLAGG: Was the damage on Defendant's vehicle consistent with the information you had gathered from the other witnesses?

RYAN: Yes, it was.

MR. FLAGG: How so?

MR. EVANS: Objection as to relevance and she – again.

THE COURT: Overruled.

RYAN: The first impact⁵ had stated that it was the right front of the vehicle end of Ms. Harp's vehicle that had struck the left rear of the first vehicle that was involved in the accident; on the second –

MR. EVANS: Your Honor, I'm going to object as to hearsay, and may we approach on this?

THE COURT: Overruled at this point as to hearsay, denied as to approach. Next question?

MR. FLAGG: You can continue, ma'am.

RYAN: There was also—the damage was also consistent with the second vehicle that was struck; going across the front of V3 would have been the right front of this—of Ms. Harp's vehicle.

The Defendant argues that the trial court erred by overruling her hearsay objection. The State concedes, and we agree, that Ryan's statements were hearsay, therefore the issue before us is whether the admission of the statements was harmful error. An erroneous admission of hearsay is subject to harmless error review. *See Dixon v. State*, 589 So. 2d 1011 (Fla. 4th DCA 1991). The harmless error test places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the

⁵ The "first impact" refers to Ms. Ansley.

conviction. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. *Id.*

A swearing match is defined as “a dispute in which determining a vital fact involves the credibility choice between one witness’s word and another’s—the two being irreconcilably in conflict and there being **no other evidence.**” *Black’s Law Dictionary* 1488 (8th ed. 2004) (emphasis added). The bulk of the evidence in the case was a swearing match between Vasquez and the Defendant, as they each argued that the other caused the accident. Ryan’s hearsay testimony was that “[Ansley] had stated that it was the right front of the vehicle end of Ms. Harp’s vehicle that had struck the left rear of the first vehicle involved in the accident.” This was the only evidence explaining Ansley’s involvement in the accident and proving that the Defendant was the person who struck her, as neither the Defendant nor Vasquez testified to those facts. Without Ryan’s hearsay testimony, the only evidence in the record concerning Ansley was that she was involved in the accident and that her vehicle had a “slight mark” from the accident. There was no other testimony as to the position of Ansley’s vehicle relative to Vasquez or the Defendant.

The harmless error test requires the State to prove beyond a reasonable doubt that the hearsay did not contribute to the verdict. Ryan’s hearsay testimony was the only evidence in the record that the Defendant hit Ansley in addition to Vasquez. In a “swearing match” between the Defendant and Vasquez on the Reckless Driving charge, we find that Ryan’s testimony about Ansley as an additional victim may have affected the verdict. The existence of a second victim

in a Reckless Driving charge is extremely damaging to the Defendant's case, and is the type of fact that may have pushed the jury from deciding that the State had proven guilt only a preponderance of evidence—not guilty—to deciding that the Defendant was guilty beyond a reasonable doubt. As an independent investigator of the accident, the jury may very well have credited Ryan's testimony additional weight compared to Vasquez of the Defendant, both of whom had reasons to lie (the Defendant because she was on trial, and Vasquez because there was evidence that he lacked car insurance). Because we cannot be certain beyond a reasonable doubt that the hearsay statement was not prejudicial to the jury verdict, we REVERSE the Defendant's conviction and REMAND for a new trial.

KELLEY, MARTZ, and MCSORLEY, JJ., concur.