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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WILLIAM ELKINS, JR., Appellant.	)	2 CA-CR 2008-0296 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074045

Honorable Deborah Bernini, Judge

AFFIRMED IN PART AS MODIFIED
VACATED IN PART AND REMANDED

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P E L A N D E R, Judge.

¶1 After a jury trial, William Elkins, Jr. was convicted of criminal damage, a class four felony, and driving with an illegal drug or its metabolite in his body, a misdemeanor. He was sentenced to a presumptive term of ten years' imprisonment on the criminal damage conviction and to time served for the misdemeanor. On appeal, Elkins contends the trial court's erroneous admission of hearsay evidence resulted in his conviction of criminal damage as a class four rather than class five felony. The state agrees, as do we. Accordingly, we reduce the criminal damage conviction to a class five felony, affirm the convictions as so modified, vacate the sentence for criminal damage, and remand the case for resentencing on that conviction.

Background

¶2 In April 2007, Elkins drove his vehicle through a red light and caused a collision involving four other vehicles. The state charged him with two counts of aggravated assault, three counts of endangerment, driving under the influence of an intoxicant, and driving with an illegal drug or its metabolite in his body. At trial, all four other drivers testified about damage to their automobiles.

¶3 The first victim's vehicle received front-end damage and was towed from the scene. He never recovered the car after the accident. Although he did not know the current value of his vehicle, he testified he had paid around $400 to $500 for it and the car "was . . . worth more than zero to [him]."

¶4 The second vehicle involved in the accident sustained damage to its front bumper, hood, and windshield. Over Elkins's hearsay objection, that driver testified he had continued to drive his pickup truck in its damaged condition but had received an estimate of $2,506 to fix the vehicle. The third vehicle, a new pickup truck, cost $6,143 to repair. The fourth vehicle was "completely destroyed." That victim testified he had bought the vehicle two months before the accident for $1,080.

¶5 After a three-day trial, the jury found Elkins guilty of criminal damage and driving with an illegal drug in his system but could not reach a verdict on the other counts. The jury found the total value of the property damaged was more than $10,000.

Discussion

¶6 Criminal damage is classified as a class four felony "if the person recklessly damages property of another in an amount of ten thousand dollars or more." A.R.S. § 13-1602(B)(1). But the offense is a class five felony if the total damage is between $2,000 and $10,000. § 13-1602(B)(2). "[T]he state has the burden of establishing the amount of damages, and demonstrating what method it used to calculate the amount." *State v. Brockell*, 187 Ariz. 226, 229, 928 P.2d 650, 653 (App. 1996) (citation omitted).

¶7 Elkins contends the second victim's testimony that he had received an estimate that it would cost $2,506 to repair his vehicle was inadmissible hearsay. Without that evidence, Elkins maintains, his criminal damage conviction should have been designated as a class five felony because the total amount of damage was less than $10,000. Viewed in the

light most favorable to the state, the evidence showed the damage to the other three vehicles totaled $7,723. *See* A.R.S. § 13-1605 (damage amounts may be aggregated).

¶8 We agree with both parties that the second victim's testimony about the cost of repairing his truck was hearsay. Rule 801(c), Ariz. R. Evid., defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible unless an exception applies. Ariz. R. Evid. 802, 803, 804; *State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996).

¶9 The second victim's testimony was admitted for its truth because the state offered the evidence to prove it would cost $2,506 to repair his vehicle. The source of that information was "an invoice" from a company, not the owner's own knowledge or opinion of the value of his vehicle. *Cf. State v. Rendon*, 148 Ariz. 524, 527, 715 P.2d 777, 780 (App. 1986) (owner of stolen property may give opinion of its value). The state does not argue, nor do we find, the testimony was admissible under any hearsay exception set forth in Rule 803 or 804. Thus, as the state acknowledges, the testimony was inadmissible hearsay. *See State v. Printz*, 125 Ariz. 300, 302-03, 609 P.2d 570, 572-73 (1980) (in determining property value, testimony is hearsay when witness bases belief on merchant's assertion but not hearsay when witness has firsthand knowledge); *see also T.J.N. v. State*, 977 So. 2d 770, 773 (Fla. Dist. Ct. App. 2008) (estimated repair costs inadmissible hearsay); *In re J.T.*, 646 S.E.2d 523, 525

(Ga. Ct. App. 2007) (witness's testimony about repair costs inadmissible hearsay when she had not had vehicle repaired).

¶10 "[W]e must next determine whether the error was harmless." *State v. Fulminante*, 193 Ariz. 485, ¶ 49, 975 P.2d 75, 90 (1999). "For error to be harmless, and therefore not prejudicial, we must be able to say 'beyond a reasonable doubt, that the error did not contribute to or affect the verdict.'" *State v. Krone*, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993); *see also State v. May*, 210 Ariz. 452, ¶ 22, 112 P.3d 39, 45 (App. 2005) (evidentiary error is only reversible if party was prejudiced). We cannot say, nor does the state argue, the second victim's hearsay testimony was harmless error.

¶11 As discussed above, without that witness's testimony about the estimate to repair his vehicle, the total amount of damage to the other vehicles was considerably less than $10,000. *See* § 13-1602(B). Although the trial court admitted photographs depicting the damage to the witness's pickup truck, we cannot say beyond a reasonable doubt a jury would have found the damage or cost of repair to be $2,500 or more without the hearsay testimony. Therefore, the state failed to prove Elkins committed a class four felony by causing damage that exceeded $10,000. § 13-1602(B)(1); *see also Brockell*, 187 Ariz. at 229, 928 P.2d at 653. Accordingly, the classification of Elkins's conviction of criminal damage as a class four

felony was based on inadmissible, prejudicial hearsay testimony, and the classification must be reduced to a class five felony.[1] § 13-1602(B)(2).

Disposition

¶12 Elkins's conviction for criminal damage is reduced to a class five felony and, as so modified, is affirmed. His sentence on that count is vacated, and the case is remanded to the trial court to enter a conviction for criminal damage as a class five felony and to re-sentence Elkins on that count accordingly. Elkins's misdemeanor conviction and sentence are affirmed.

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JOHN PELANDER, Judge

CONCURRING:

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JOSEPH W. HOWARD, Chief Judge

_____
PHILIP G. ESPINOSA, Presiding Judge

[1]Elkins also argues the trial court erroneously precluded evidence about why the first victim had never recovered his vehicle after the accident. We need not address this issue, however, because we conclude, and the state concedes, Elkins's criminal damage conviction must be reduced to a class five felony, rendering his second issue moot. *See State v. Coghill*, 216 Ariz. 578, n.9, 169 P.3d 942, 950 n.9 (App. 2007).