

NOT DESIGNATED FOR PUBLICATION

EZZARD C. WILSON * **NO. 2004-CA-0844**
VERSUS * **COURT OF APPEAL**
ANGELINE A. JONES, AMOS * **FOURTH CIRCUIT**
MORRIS, DORIS MORRIS, * **STATE OF LOUISIANA**
AND STATE FARM *
INSURANCE COMPANY *
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-20705, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * *

Judge Terri F. Love
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(Court composed of Judge Terri F. Love, Judge Max N. Tobias Jr., Judge Leon A. Cannizzaro Jr.)

TOBIAS, J., CONCURS AND ASSIGNS ADDITIONAL REASONS

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AFFIRMED

This appeal arises out of a two-vehicle accident in which Ezzard C. Wilson, and Angeline A. Jones were the drivers. The trial court, in a bench trial, rendered judgment in favor of Mr. Amos Morris and Mrs. Doris Morris and dismissed Mr. Wilson's claims with prejudice. Mr. Wilson timely appealed.

FACTS AND PROCEDURAL HISTORY

Mr. Wilson and Ms. Jones were involved in an accident at the intersection of Franklin Avenue and Sage Street in New Orleans at approximately nine thirty in the evening. Officers arrived on the scene approximately forty-five minutes after the accident.

Mr. Wilson testified that at the time of the accident, he was driving 35 to 40 miles per hour northbound on Franklin Avenue in the far left lane closest to the neutral ground when Ms. Jones turned left from the U-turn lane onto northbound Franklin Avenue and the two vehicles collided. Mr. Wilson testified that he slammed on his brakes, drove up onto the curb, and

blew his horn; nevertheless, the right front end of his vehicle collided with the rear end of the vehicle driven by Ms. Jones. Ms. Jones' vehicle was extensively damaged in the accident, with the entire trunk pushed into the back seat.

Mr. Wilson testified that he had been at a barbeque party where alcohol was served four to six hours before the accident. However, he did not drink at the party because he was taking prescription pain medication and he did not begin to drink until after the accident when his friend Keith Gougis happened upon the accident scene. Mr. Wilson further testified that he asked Mr. Gougis to buy him a bottle of alcohol to calm him and he and Mr. Gougis then drank together at the accident scene. Mr. Gougis passed away two years after the accident without giving the police, the insurance company, or counsel a statement. During his testimony at the trial, Mr. Wilson described the accident as unavoidable and stated: "A sober man would have hit that woman."

The deposition of the investigating officer, Officer M.G. Augustus, was introduced at trial without objection. He testified regarding the police report that he completed during his investigation. Officer Augustus stated that he could not determine the primary cause of the accident because of conflicting statements from the drivers and the physical damage. While

investigating the accident, Officer Augustus detected the odor of alcohol on Mr. Wilson and arrested him for DWI. Mr. Wilson refused a chemical alcohol test and was subsequently arrested for DWI.

Mr. Wilson was interviewed during the DWI investigation, and Officer Augustus testified that he recorded Mr. Wilson's responses on the arrestee interview portion of the police report as follows, in pertinent part:

- “ 9. Where were you going? Home
10. Where did you start from? Peoples & Edge
TIME? Unknown
11. What Highway/ Roadway were you on? Franklin
What direction? N S E W
12. Have you been drinking? X Yes _ No What have you been
drinking? Crown Royal
How much? Two
Where? Edge St.
Time started drinking? [Illegible]
Time stopped drinking? Unknown
13. Did you feel the effects of any alcoholic beverage or drugs
when you stopped? X YES _ NO
* * *
14. Have you had any alcoholic beverage since the accident? X
YES _ NO
How much? Unknown.”

Officer Augustus also testified that another officer completed the upper portion of the arrestee interview form regarding field sobriety exercises. The arrestee interview form was signed by Officer Augustus and by “V. Aiola III”.

Officer Vincent Aiola, III, with the Crescent City Connection Police

Department (“CCCPD”), was called by the defense as an impeachment witness for the purpose of impeaching Mr. Wilson’s testimony regarding his alcohol consumption. Counsel for Mr. Wilson objected on the grounds that he was a surprise witness who was not at the accident scene. Counsel for Ms. Jones responded that entry number six on their witness list states: “Any witness needed for purposes of impeachment”. The trial court overruled the objection and allowed Officer Aiola to testify.

Officer Aiola testified that he is assigned to the CCCPD, and his duties have included DWI investigations over the past six years. Furthermore, Officer Aiola testified that he was present during and participated in the DWI investigation and arrest of Mr. Wilson. Officer Aiola testified regarding the standard procedures for interviewing a DWI arrestee and stated that the exact words of the arrestee are recorded on the arrestee interview form. Officer Aiola then testified regarding Mr. Wilson’s answers to the questions as recorded on the form: Mr. Wilson admitted he had two Crown Royal drinks on Edge Street, where he had been earlier in the evening.

On cross-examination, Officer Aiola clarified that only part of the arrestee interview form was in his handwriting. Officer Aiola testified that his handwriting was on the top of the form regarding the field sobriety

exercises, the arrestee's Miranda rights, and the interview start time. He also testified that his handwriting was at the bottom of the form, which asks the time the interview was concluded and the names of the investigating officers. Officer Aiola pointed out that the answers to the individual interview questions were in a different handwriting and speculated that he may have interviewed Mr. Wilson while Officer Augustus recorded Mr. Wilson's answers on the form. When confronted with Officer Augustus' deposition testimony that he, not Officer Aiola, conducted the investigation, Officer Aiola stated: "I am present at every DWI testing until completion, because a lot of these NOPD officers, who are not certified, need assistance. If he chose to conduct the interview, which by his handwriting he did, then he conducted the interview. But the fact that my handwriting is on the interview concluded time and the interview started time, I was present."

Mr. Wilson's wife testified that her husband called her shortly after the accident and she immediately went to the scene. When she arrived, she did not detect alcohol on her husband's breath, and his words were not slurred. Mrs. Wilson left the scene after approximately ten minutes to retrieve the vehicle insurance papers from their home. When she returned to the accident scene after thirty to forty-five minutes, she found her husband in the police car and observed him to be drunk. Mrs. Wilson testified that she

did not tell the police that her husband did not start drinking until after the accident because, based on her prior experience with the police, she felt it would not have done any good.

Ms. Jones' deposition was admitted in lieu of live testimony due to her declining health at the time of the trial. Ms. Jones suffers from Huntington Chorea, a progressive and fatal genetic disorder of the central nervous system which causes involuntary twitching of the limbs and torso. Ms. Jones indicated that at the time of the accident she was "just fine" and taking Paxil to relax her movements and another medication for headaches. Ms. Jones testified she looked left and right for oncoming traffic before turning left onto the northbound lane of Franklin Avenue. Ms. Jones stated she didn't see Mr. Wilson's vehicle until after she turned and was traveling northbound on Franklin Avenue. Ms. Jones admitted that she has never had a driver's license, although she has taken and failed the written exam. Before this incident, she had driven "a lot" and had not been involved in an accident. Ms. Jones stated that after the accident, Mr. Wilson left the scene and when he returned she saw that he had mints in his mouth.

Mrs. Morris, Ms. Jones' mother, testified that she loaned her vehicle to her son the night of the accident to take Ms. Jones Christmas shopping. Her son became ill and returned to his home asking Ms. Jones to drive

herself home in Mrs. Morris' vehicle. Mrs. Morris claimed she was unaware that Ms. Jones would be driving, and had she known, she would have picked up the car and her daughter. Mrs. Morris further testified that at the time of the accident Ms. Jones did not have any physical limitations, but that since the accident, Ms. Jones had deteriorated. Mrs. Morris admitted that she knew her daughter did not have a driver's license and she knew her daughter sometimes took the spare key to her vehicle to drive to the corner store. Mrs. Morris clarified, however, that she did not authorize her daughter to drive her vehicle.

The trial court found Mr. Wilson one hundred percent at fault for the accident and dismissed Mr. Wilson's claims against Ms. Jones with prejudice. The trial court also issued written reasons finding that Mr. Wilson had not proven by a preponderance of the evidence that Ms. Jones was at fault in causing the collision by failing to yield to traffic on a favored street and by creating a sudden emergency. Rather, the trial court found the evidence demonstrated that Mr. Wilson was the sole cause of the accident. Specifically, the trial court found that Mr. Wilson's testimony regarding when he began drinking alcohol, the speed of his vehicle at the time of the accident, and his evasive actions prior to impact all lacked credibility. Furthermore, the trial court found that Mrs. Wilson was not an unbiased

witness regarding the alcohol issue and that her credibility was further damaged by her failure to report to the police any information she had regarding when Mr. Wilson began to drink. Lastly, the trial court found that the physical damage to Ms. Jones' vehicle showed that she was established in the lane of traffic before Mr. Wilson's vehicle collided with the rear of her vehicle.

ANALYSIS

Mr. Wilson first argues that the judgment of the trial court is contrary to the law and evidence presented at trial. The liability of Ms. Jones and the liability of Mr. Morris will be addressed separately under the manifest error standard of review.

Mr. Wilson argues that the trial court erred in finding him one hundred percent liable for the accident when Ms. Jones made a left hand turn onto a favored street even though she observed oncoming traffic before making the turn, citing La. R.S. 32:121 and La. R.S. 32:122.

Apportionment of fault is a question of fact, subject to the manifest error/clearly wrong standard of review. *Ducombs v. Nobel Ins. Co.*, 2003-1704, (La.App. 4 Cir. 7/21/04), 884 So.2d 596. In *Ducombs*, this court further stated:

In reviewing allocation of fault, the Louisiana Supreme Court in *Clement v. Frey*, 95-1119, p. 7 (La.1/16/96), 666 So.2d 607, 610-611, explained, "there is an analogy between excessive or

inadequate quantum determinations and excessive or inadequate fault percentage determinations. In both, the trier of fact, unlike the appellate court has had the benefit of witnessing the entire trial and of reviewing first hand all the evidence." *Id.* To reverse a fact finder's factual determinations, the court of appeal must find (1) that a reasonable factual basis does not exist on the record; and (2) that the record establishes that the finding is manifestly erroneous or clearly wrong. *Cormier v. Comeaux*, 98-2378, p. 5 (La.7/7/99), 748 So.2d 1123, 1127. Thus, we must determine whether the trial court in the present case was clearly wrong or manifestly erroneous in the allocation of fault between the parties.

Ducombs, 2003-1704, p. 4-5, 884 So.2d 596, 599-60, citing *Sims v. State Farm Auto Ins. Co.*, 98-1613, p. 2 (La.3/2/99), 731 So.2d 197, 199

Mr. Wilson's assertion that Ms. Jones made the left hand turn despite observing oncoming traffic is contradicted by Ms. Jones' testimony. Ms. Jones testified in her deposition that she looked left and right for oncoming traffic before turning left onto the northbound lane of Franklin Avenue. Specifically, Ms. Jones testified that she did not see Mr. Wilson's vehicle until after she turned and was traveling northbound on Franklin Avenue. The trial court found Ms. Jones' testimony to be credible and corroborated by the physical damage to the trunk of the vehicle. Mrs. Morris' testimony, which was objected to as hearsay, did little more than restate her daughter's testimony. Consequently, even disregarding Mrs. Morris' testimony concerning what her daughter told her about the accident, we find that the trial court did not manifestly err in accepting Ms. Jones' testimony as

credible and legally sufficient to show she acted in accordance with the relevant traffic laws for left hand turns. Therefore, this argument is without merit.

Mr. Wilson also argues that the trial court erred in failing to apportion fault to Mr. and Mrs. Morris for allowing Ms. Jones to drive Mrs. Morris' vehicle. Mrs. Morris testified that she did not loan her vehicle to Ms. Jones the night of the accident and she did not authorize Ms. Jones' use of her vehicle. Both Mrs. Morris and Ms. Jones testified that at the time of the accident, Ms. Jones was not suffering from the effects of Huntington's Chorea beyond a few involuntary twitches. Mr. Wilson did not offer any evidence of Ms. Jones' physical incapacity to drive at the time of the accident. In light of our rulings on the remainder of Mr. Wilson's assignments of error, further discussion of this issue is pretermitted.

Mr. Wilson argues that Mrs. Morris' testimony regarding her daughter's statements to her about the accident was prejudicial hearsay not subject to the co-defendant/ co-conspirator hearsay exclusion because they were not co-conspirators. La. C.E. art. 801 D(3)(b). Furthermore, Mr. Wilson argues that Ms. Jones, the non-testifying co-defendant, appeared through a deposition without the right of cross-examination and that Mrs. Morris' testimony was inconsistent with Ms. Jones' deposition testimony.

In *Brooks v. Southern University and Agr. and Mechanical College*, 2003-0231, (La. App. 4 Cir. 7/14/04), 877 So.2d 1194, we discussed the use of hearsay in a similar situation and stated:

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La.Code Evid. Ann. art. 801(C) (West 1995). Hearsay is generally inadmissible. *Id.* art. 802. The trial court's erroneous admission of hearsay testimony is subject to the harmless error analysis. *State v. Perkins*, 97-1119 (La.App. 3 Cir. 6/17/98), 716 So.2d 120. The admission of a hearsay statement that is merely cumulative or corroborative of other evidence is generally held to be harmless error. *State v. Lavigne*, 95-0204 (La.App. 4 Cir. 5/22/96), 675 So.2d 771; *State v. Hawkins*, 90-1235 (La.App. 4 Cir. 9/15/95), 667 So.2d 1070, *affirmed* 96-0766 (La.1/14/97), 688 So.2d 473. When the declarant is present at trial and testifies regarding the same information contained in the hearsay, the hearsay is merely corroborative, and the error is harmless. *See, e.g.: State v. Ditcharo*, 98-1374 (La.App. 5 Cir. 7/27/99), 739 So.2d 957; *State v. Smith*, 97-1075 (La.App. 5 Cir. 4/15/98), 710 So.2d 1187.

Brooks, 2003-0231, p. 11, 877 So.2d 1194, 1203.

In the instant case, Ms. Jones' deposition testimony was admitted without objection. Despite Mr. Wilson's argument to the contrary, a reading of the deposition and the transcript clearly shows that Mrs. Morris' testimony regarding Ms. Jones' statements to her about the accident were essentially the same as Ms. Jones' deposition testimony. Therefore, the trial court's allowance of Mrs. Morris' testimony, even if erroneous, was

harmless in light of the admission into evidence of Ms. Jones' deposition testimony concerning the same subject matter.

Mr. Wilson argues that prejudicial and incompetent rebuttal testimony by Officer Aiola was introduced at trial and should be stricken. Specifically, Mr. Wilson claims that the testimony of Officer Aiola conflicted with the testimony of Officer Augustus regarding who conducted the DWI investigation of Mr. Wilson.

The trial court noted in its reasons for judgment that it was not clear which officer conducted which portion of the investigation, but found that both were present and participated in the DWI investigation. Our reading of Officer Aiola's testimony and Officer Augustus' deposition testimony, with careful attention to the actual questions asked of each officer, reveals that Officer Augustus and Officer Aiola were both present at and participated in the DWI investigation of Mr. Wilson. Therefore, the trial court did not err in allowing Officer Aiola to testify regarding the DWI investigation of Mr. Wilson.

Mr. Wilson argues that the trial court erred in failing to award damages to him as a result of injuries sustained in the accident. Having found no error in the trial court's allocation of fault, we find that this argument is without merit.

CONCLUSION

Finding no manifest error, the judgment of the trial court is affirmed.

AFFIRMED