NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 KA 2616

STATE OF LOUISIANA

VERSUS

CHARLES WHITEHEAD

Judgment Rendered: November 3, 2006.

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On Appeal from the
19th Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 3-04-0447

Honorable Louis R. Daniel, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

CARTER, C.J.

Defendant, Charles Whitehead, was charged by amended bill of information with one count of fourth offense operating a vehicle while intoxicated, a violation of LSA-R.S. 14:98(E)(4)(b). He pled not guilty.[1] Following a jury trial, defendant was found guilty as charged. He was sentenced to twenty-four years at hard labor without benefit of probation, parole, or suspension of sentence and a $5,000 fine. The court ordered the sentence to run consecutively to any other sentence defendant was serving. Defendant appeals, designating five assignments of error. For the following reasons, we affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress the evidence obtained as a result of the DPS Security Officer's lack of constitutional authority to make a stop and a subsequent arrest.

2. The trial court erred in allowing the unconstitutionally vague elements of LSA-R.S. 14:98 to be applied to the facts of the case.

3. The trial court erred in admitting improper lay witness opinion when allowing Officer Miller and Sergeant Rhodes to testify regarding their opinion that defendant was intoxicated.

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[1] Predicate # 1 was set forth as defendant's September 28, 1992 conviction, under 19th Judicial District Court docket number 4-92-967, for fourth offense DWI on April 5, 1992. Predicate # 2 was set forth as defendant's May 1, 1991 conviction, under 19th Judicial District Court docket number 5-90-1515, for fourth offense DWI on May 4-5, 1990. Predicate # 3 was set forth as defendant's April 18, 1990 conviction, under 19th Judicial District Court docket number 1-90-1248, for second offense DWI on November 10, 1989.

4. The trial court erred in allowing the DPS Officer to testify regarding the results of the field sobriety test for which he was not qualified or experienced to administer.

5. The trial court erred in allowing the parole officer to testify to information contained in records for which he was not the custodian, and said documents from which he testified were not authenticated, certified, or properly introduced into evidence.

FACTS

On March 5, 2004, at approximately 4:39 a.m., Department of Public Safety (DPS) Police Officer Stephen Miller came upon defendant's pickup truck blocking the intersection of Greenwell Springs and Joor Road in Baton Rouge, Louisiana. The engine of the pickup truck was running, but defendant appeared to be asleep at the wheel with a beer bottle in his lap. Officer Miller opened the door of the pickup truck, defendant stirred, and the vehicle began moving. Officer Miller put the vehicle into park and asked defendant to exit the vehicle.

Defendant was very unsteady on his feet. Officer Miller escorted defendant to the back of the police unit, and moved defendant's pickup truck into a nearby parking area. Officer Miller smelled alcohol on defendant and advised defendant of his **Miranda** rights. At that time, DPS Sergeant Mike Rhodes arrived at the scene to assist Officer Miller. Officer Miller administered field sobriety tests to defendant, which he failed, and then Officer Miller arrested defendant for DWI. Officer Miller advised defendant of his rights relating to a chemical test for intoxication, and defendant refused to take the test.

Defendant testified at trial. He conceded he had five prior DWI convictions. He claimed, at the time of the instant offense, however, he was only drinking a sixteen-ounce Dr. Pepper. He denied that his pickup truck was in the intersection when Officer Miller discovered him asleep in the truck. He claimed he dozed off while waiting for the traffic signal to change. He denied needing assistance to exit the pickup truck. He claimed his performance on the field sobriety tests was affected by his tiredness and by his wearing cowboy boots when he took the tests. He also claimed he had suffered a fractured skull in a car accident in 1987, as well as a head injury in a prison fight in 1992. He conceded he refused to take a breath test, but claimed he had always been told "by everybody and their brother" to never take the breath test. He also claimed he refused to take a breath test because he was aggravated with Officer Miller.

CONSTITUTIONALITY OF LSA-R.S. 40:1379D

In assignment of error number 1, defendant contends LSA-R.S. 40:1379D violates LSA-Const. art. VI, § 6 in that it affects the structure and organization or the particular distribution and redistribution of the powers and functions of the local governmental subdivision operating under a home rule charter.

Louisiana Constitution article VI, § 6 provides:

> The legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter.

Louisiana Revised Statute 40:1379 provides:

> A. The police employees[2] of the division[3] shall prevent and detect crime, apprehend criminals, enforce the criminal and traffic laws of the state, keep the peace and good order in the state in the enforcement of the state's police powers, and perform any other related duties imposed upon them by the legislature.
>
> B. Police employees of the division are peace officers and, any provision of the law to the contrary notwithstanding, except R.S. 40:1386 [industrial disputes], they have, in any part of the state, the same powers with respect to criminal matters and the enforcement of the law relating thereto as sheriffs, constables, and police officers have in their respective jurisdictions. They have all the immunities and matters of defense now available or hereafter made available to sheriffs, constables, and any police officers in any suit brought against them in consequence of acts done in the course of their employment.
>
> C. Any warrant of arrest or other process issued by the legislature or either house thereof, or any court of the state may be served and executed by any police employee of the division in any part of the state according to the tenor thereof without endorsement.
>
> D. Other police employees of the office, including but not limited to safety enforcement officers, public safety services police officers, and officers of the weights and standards mobile police force shall be commissioned under this Section and shall have all the authority and protection afforded by the provisions of this Section.
> (Footnotes added.)

Prior to trial, the defense moved to suppress the evidence seized as a result of defendant's arrest and any evidence garnered subsequent to the seizure, alleging, inter alia, the arresting officer lacked authority and jurisdiction to arrest defendant without a warrant.

Following a hearing and the submittal of memoranda on the issue, the trial court denied the motion. The trial court specifically found that LSA-R.S. 40:1379

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[2] "Police employee" means any employee who is assigned to police work as a peace officer pursuant to LSA-R.S. 40:1379. LSA-R.S. 40:1372(5).

[3] "Division" means the Division of State Police in the Department of Public Safety. LSA-R.S. 40:1372(3).

court denied the motion. The trial court specifically found that LSA-R.S. 40:1379 did not affect or change the structure or organization of the particular distribution and redistribution of the powers and functions of local government. Additionally, the trial court pointed out that any citizen, and thus, Officer Miller, would have been authorized to arrest defendant for aggravated obstruction of a highway of commerce, a violation of LSA-R.S. 14:96.

We do not reach the constitutional issue. Courts should refrain from reaching the constitutionality of legislation unless the issue is essential to the case or controversy. **Plainview Area Association v. State**, 05-0791 (La. 4/29/05), 900 So.2d 837, 838 (per curiam). As noted by the trial court, separate and apart from his challenged authority as a police officer, Officer Miller was authorized, as a private person, to arrest defendant for aggravated obstruction of a highway of commerce.

A private person may make an arrest when the person arrested has committed a felony, whether in or out of the presence of the person making the arrest. LSA-C.Cr.P. art. 214; **State v. Jackson**, 584 So.2d 266, 268 (La. App. 1 Cir.), writ denied, 585 So.2d 577 (La. 1991). Aggravated obstruction of a highway of commerce is the intentional or criminally negligent placing of anything, or performance of any act, on any road or highway, wherein it is foreseeable that human life might be endangered. LSA-R.S. 14:96. Aggravated obstruction of a highway of commerce is a felony. LSA-R.S. 14:96. Officer Miller testified he came upon defendant's pickup truck blocking the intersection of Joor Road and Greenwell Springs Highway, with the engine running, and defendant asleep at the wheel therein.

This assignment of error is without merit.

CONSTITUTIONALITY OF LSA-R.S. 14:98

In assignment of error number 2, defendant argues LSA-R.S. 14:98 is unconstitutionally vague because it contains the phrase "under the influence."[4]

Louisiana Revised Statute 14:98, in pertinent part, provides:

> A. (1) The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when:
>
> (a) The operator is under the influence of alcoholic beverages[.]

Statutes are presumed to be valid and must be upheld as constitutional whenever possible. A statute is unconstitutionally vague if a person of ordinary intelligence is not capable of discerning its meaning and conforming his conduct thereto. A penal statute must give adequate notice that certain contemplated conduct is proscribed and punishable by law and must provide adequate standards for those charged with determining the guilt or innocence of an accused. In interpreting criminal statutes, LSA-R.S. 14:3 requires that the provisions thereof "be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." The title of the act, while not part of the statute, may be used to determine legislative intent. As a general rule, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, in which case the intention of the drafters, rather than the

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[4] Although defendant did not challenge the constitutionality of LSA-R.S. 14:98 below, we consider his challenge now because he attacks the statute on its face. See **State v. Holmes**, 01-0955 (La. App. 1 Cir. 2/15/02), 811 So.2d 955, 957.

strict language, controls. **State v. Holmes**, 01-0955 (La. App. 1 Cir. 2/15/02), 811 So.2d 955, 958.

The phrase "under the influence" in LSA-R.S. 14:98 does not render the statute unconstitutionally vague. The terms "intoxicated" and "under the influence of alcoholic beverages" have a certain and well-understood meaning, *i.e.*, a person is intoxicated within the provisions of the statute when he does not have the normal use of his physical and mental faculties by reason of the use of alcoholic beverages (or narcotics), thus rendering such person incapable of operating an automobile in a manner in which an ordinary prudent and cautious man in full possession of his faculties, using reasonable care, would operate a motor vehicle under like conditions. **State v. Hightower**, 238 La. 876, 116 So.2d 699, 703 (1959).

This assignment of error is without merit.

IMPROPER TESTIMONY OF DPS OFFICERS

In assignment of error number 3, defendant argues the trial court improperly allowed Sergeant Rhodes and Officer Miller to give their opinion that defendant was intoxicated or impaired and the testimony was so prejudicial it is unlikely that defendant received a fair trial.

Louisiana Code of Evidence article 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
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> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Defendant references the following testimony from Officer Miller on redirect examination:

> [Defendant] was impaired. There's no way he could have safely operated a vehicle. I mean, he was – simply by him being passed out in the intersection in the vehicle, that speaks for itself. He should not have been behind a wheel.

Defendant also references the following testimony from Sergeant Rhodes on direct examination:

> In my opinion, based on what I observed from [defendant's] facial expressions, his eyes, and the smell of alcohol from his breath as he was talking to me, I felt he was impaired.

Additionally, defendant references the following exchange between the State and Sergeant Rhodes on redirect examination:

> [Rhodes]: I felt [defendant] had been drinking, sir, at the time that he talked to me, based on my experience and my years in law enforcement and dealing with people who have been intoxicated.
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> [State]: Did you believe he was intoxicated?
>
> [Rhodes]: Yes, sir, I did.

The testimony at issue was proper. Intoxication, with its attendant behavioral manifestations, is an observable condition about which a witness may testify. **State v. Allen**, 440 So.2d 1330, 1334 (La. 1983); see **State v. Minnifield**, 31,527 (La. App. 2 Cir. 1/20/99), 727 So.2d 1207, 1212, writ denied, 99-0516 (La. 6/18/99), 745 So.2d 19 ("[Police officers' conclusions that the defendant was intoxicated] were their opinions based on their observations of [defendant]. Their comments were rational in light of the circumstances to which they testified, and within the parameters of [LSA-C.E. art.] 701.")

This assignment of error is without merit.

IMPROPER FOUNDATION FOR RESULTS OF FIELD SOBRIETY TESTS

In assignment of error number 4, defendant argues the State failed to lay a proper foundation for the admissibility of the results of the field sobriety tests, and the testimony of Officer Miller regarding the tests and their results should have been excluded.

Defendant cites this Court's decision in **State v. Breitung**, 623 So.2d 23, 25 (La. App. 1 Cir.), writ denied, 626 So.2d 1168 (La. 1993), as setting forth the applicable law. Therein, we noted the proper foundation for admitting the results of a horizontal gaze nystagmus (HGN) test had been laid when a showing had been made that the officer who administered the test was trained in the procedure, was certified in its administration, and that the procedure was properly administered. **Id.**

In support of his argument, defendant references Officer Miller's statement at a pretrial motion hearing that, in his previous employment with the Greensburg Police Department, he required assistance from the Louisiana State Police to make a DWI arrest because, at the time of that arrest he "was not currently certified."

At trial, Officer Miller discussed his training in field sobriety tests. He received training concerning the HGN, walk-and-turn, and the one-leg stand tests at the Louisiana State Police Academy. He completed a forty-hour course exclusively devoted to DWI. Following the completion of his training, Officer Miller received a certificate that stated he had passed standardized field sobriety and the Intoxilyzer 5000 training.

During his training, Officer Miller successfully administered the HGN test to volunteers. Additionally, prior to the arrest of defendant, Officer Miller had

administered the HGN test in connection with several DWI arrests. He gave a detailed explanation of the administration of the HGN test, and in reference to defendant's performance on the HGN test, indicated defendant displayed a lack of smooth pursuit in both eyes, nystagmus at maximum deviation, and the onset of nystagmus prior to 45 degrees.

Officer Miller also gave detailed descriptions of the walk-and-turn and the one-leg stand tests, and indicated he had used the tests prior to defendant's arrest. In reference to defendant's performance on the walk-and-turn test, Officer Miller indicated defendant could not keep his balance while listening to instructions, used his arms for balance, turned incorrectly, and took the wrong number of steps. In reference to defendant's performance on the one-leg stand test, Officer Miller indicated defendant swayed while balancing, used his arms for balancing, and put his foot down four times.

The trial court ruled correctly in regard to Officer Miller's testimony concerning defendant's performance on the field sobriety tests. The State laid the proper foundation for the admission of the testimony into evidence.

This assignment of error is without merit.

IMPROPER TESTIMONY OF PROBATION AND PAROLE OFFICER

In assignment of error number 5, defendant argues the State failed to show that the information in the master prison record of defendant was within the personal knowledge of Probation and Parole Officer William Sellers and failed to show that he was entrusted with the legal duty to make and retain the record. Defendant also argues the State introduced the information contained in a parole

certificate which was prepared by the Parole Board and was not certified or authenticated by a proper custodian of that record.

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. LSA-C.E. art. 801(C). Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. LSA-C.E. art. 802.

Louisiana Code of Evidence article 803, in pertinent part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> **(8) Public records and reports.** (a) Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth:
>
> (i) Its regularly conducted and regularly recorded activities;
>
> (ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report[.]

At trial, the State presented testimony from Probation and Parole Officer William Sellers. Officer Sellers was employed by the State of Louisiana, Department of Corrections, Division of Probation and Parole. Officer Sellers supervised defendant following his release from Hunt Correctional Center on December 1, 2003. Officer Sellers was charged with the custody of defendant's master prison record, which was maintained by the Department of Corrections. Officer Sellers maintained records regarding each of his parolees' incarceration in penal institutions. The defense objected to Officer Sellers giving testimony from "a State rap sheet," alleging he was not the custodian and had not entered the

information on the master prison record. The trial court overruled the objection and permitted Officer Sellers to testify concerning matters reflected on defendant's master prison record.

Officer Sellers indicated he supervised defendant when he was placed under parole supervision in connection with 19th Judicial District Court docket number 4-92-967. Officer Sellers was given the documents concerning the matters for which defendant was placed under parole supervision. The defense objected to Officer Sellers testifying from a document provided by the Parole Board. Officer Sellers indicated defendant had signed the parole supervision or parole certificate on November 26, 2003, which was standard practice when the parolee was in a State penitentiary, and the parole officer would usually go over the form again with the parolee when he came into the office. Finally, Officer Sellers also indicated he had defendant under parole supervision in connection with 19th Judicial District Court docket number 5-90-1515.

During the testimony of Officer Sellers, the State moved to introduce into evidence certified true copies of a bill of information and minutes under 19th Judicial District Court docket number 4-92-967. The defense objected on the basis of improper foundation. The State argued the documents were self-authenticating documents of a public agency. The Court overruled the objection. The State also moved to introduce into evidence a certified true copy of a bill of information and a copy of minutes under 19th Judicial District Court docket number 5-90-1515. The defense objected, and the trial court overruled the objection. Additionally, the State moved to introduce into evidence certified true copies of a bill of information and minutes under 19th Judicial District Court

docket number 1-90-1248. Although defense counsel initially stated that she continued her objection regarding foundation, the defense did not object after a proper foundation was laid and the State moved to introduce the bill of information into evidence.

The State asked Officer Sellers, if upon examination of the offense dates in each of the three bills of information, and with his knowledge of the master prison record, were all three offenses within ten years of March 5, 2004, excluding defendant's period of incarceration in a State penal institution. Officer Sellers answered affirmatively.

Officer Sellers's testimony concerning defendant's period of incarceration was properly admitted. Officer Sellers was defendant's probation and parole officer and custodian of defendant's master prison record. He had personal knowledge of defendant's period of incarceration and release date.

Moreover, confrontation errors are subject to a harmless-error analysis. **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986). The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. **Id.** Factors to be considered by the reviewing court include "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." **Id.**; **State v. Wille**, 559 So.2d 1321, 1332 (La. 1990). The verdict may stand if the reviewing court

determines that the guilty verdict rendered in the particular trial is surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). **State v. Broadway**, 96-2659 (La. 10/19/99), 753 So.2d 801, 817, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000).

Error, if any, in the admission of the testimony in question was harmless. The defense presented testimony at trial that defendant was incarcerated between 1992 and 2003 and, while incarcerated, transferred between prisons for geographical reasons and for trustee status.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.