NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 0283

STATE OF LOUISIANA

VERSUS

CLOVIS R. WILLIAMS, III

On Appeal from the 20th Judicial District Court
Parish of East Feliciana, Louisiana
Docket No. 06-CR-387, Division "B"
Honorable William G. Carmichael, Judge Presiding

Samuel C. D'Aquilla
District Attorney
Clinton, LA

and

Amanda M. McClung
Assistant District Attorney
St. Francisville, LA

Attorneys for
State of Louisiana

Mark D. Plaisance
Baker, LA

and

Glynn J. Delatte, Jr.
Baton Rouge, LA

Attorneys for
Defendant-Appellant
Clovis R. Williams, III

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Judgment rendered September 14, 2009

PARRO, J.

The defendant, Clovis R. Williams, III, was charged by bill of information with vehicular homicide, a violation of LSA-R.S. 14:32.1. He pled not guilty. The defendant waived his right to a jury trial. Following a bench trial, the defendant was found guilty as charged. He was sentenced to serve a term of ten years of imprisonment at hard labor, with the first two years of the sentence to be served without benefit of probation, parole, or suspension of sentence. The court suspended four years of the term and ordered the defendant to be placed on active supervised probation for five years, with certain conditions, upon his release from custody. He was further ordered to pay a $2,000 fine and to make restitution to the family of the victim in the amount of $14,401.48. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence, and remand with instructions.

FACTS

On April 9, 2006, at about 9:30 p.m., Mary Downs was traveling northbound, alone in her Saturn Ion, on Louisiana Highway 67, south of Clinton, East Feliciana Parish. At the same time, the defendant was traveling southbound, alone in his Oldsmobile, on Louisiana Highway 67. The two vehicles collided on a curved portion of Louisiana Highway 67 near Idlewild Road. Downs was killed upon impact.

At the crash site, police officers observed beer in the defendant's vehicle. The defendant's breath and person smelled of alcohol. He had bloodshot eyes and his speech was slurred. The defendant told a police officer that he had consumed four or five beers before driving. About three hours after the accident, the defendant's blood was drawn, which revealed a blood alcohol concentration of .07 percent.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the evidence was insufficient to support the conviction of vehicular homicide. Specifically, the defendant contends the state failed to prove he was under the influence of alcohol and, as such, failed to prove a causal connection between any alleged intoxication and Downs's death. The defendant further contends the state did not prove that he caused the accident.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; LSA-Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see also LSA-C.Cr.P. art. 821(B); **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

At the time of the offense, LSA-R.S. 14:32.1 provided, in pertinent part:

> A. Vehicular homicide is the killing of a human being caused proximately or caused directly by an offender engaged in the operation of, or in actual physical control of, any motor vehicle, aircraft, watercraft, or other means of conveyance, whether or not the offender had the intent to cause death or great bodily harm, whenever any of the following conditions exists:

> (1) The operator is under the influence of alcoholic beverages as determined by chemical tests administered under the provisions of R.S. 32:662.[1]

Under the vehicular homicide statute, the "state . . . must prove that an offender's unlawful blood alcohol concentration combined with his operation of a vehicle to cause the death of a human being." **State v. Taylor**, 463 So.2d 1274, 1275 (La. 1985). The statute is not aimed at persons involved in vehicular fatalities whose alcohol consumption does not cause but merely "coincides" with such an accident. **Taylor**, 463 So.2d at 1275. Causation is a question of fact which has to be considered in light of the totality of circumstances surrounding the ultimate harm and its relation to the actor's conduct. **State v. Kalathakis**, 563 So.2d 228, 231 (La. 1990).

The defendant contends the state did not present any evidence to show the effects of the intoxication level of a blood alcohol concentration of .07 percent. He further contends in his brief that the state did not present any evidence to demonstrate that he was "under the influence such that his ability to operate a motor vehicle was impaired." The defendant also maintains that, because of the lack of physical evidence, a poorly investigated accident scene, and contradictory testimony, the state failed to prove that his operation of his vehicle caused Downs's death.

Louisiana State Police Trooper Bert Dabadie, with Troop A in Baton Rouge, who investigated the accident scene, testified that the crash between the two vehicles was the result of a head-on collision. At the time of the crash, it was a clear night, and the road was dry. Prior to impact, Downs was traveling north, and the defendant was traveling south. The resting place of the defendant's vehicle, an Oldsmobile, was in the southbound lane of Louisiana Highway 67, facing west. The

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[1] At the time of the offense, if the person had a blood alcohol concentration at the time alleged in excess of 0.05 percent but less than 0.08 percent by weight, such fact did not give rise to any presumption that the person was or was not under the influence of alcoholic beverages, but such fact could be considered with other competent evidence in determining whether the person was under the influence of alcoholic beverages. LSA-R.S. 32:662(A)(1)(b).

resting place of Downs's vehicle, a Saturn Ion, was also in the southbound lane, facing south. The Saturn Ion was south of the Oldsmobile. There was a single tire skid mark that went from the northbound lane and led to gouge marks near the center of the highway.[2] According to Trooper Dabadie, the skid mark was caused by Downs's vehicle.

Louisiana State Police Trooper Prentiss Bellue, III, whose expertise was in traffic accident investigation, testified at trial that he performed a crash investigation of the vehicles. The court ruled that it would listen to Trooper Bellue's conclusions based on the information he had and the measurements he took at the scene. The court also found that Trooper Bellue's conclusions would be admissible based on his training and experience. Trooper Bellue, who went to the accident scene four days after the accident, used a "Total Station," which involved survey equipment that mapped the scene by points. The points were entered into a computer, which printed out a diagram of the accident scene. The information used by Trooper Bellue was based, in large part, on the data collected by Trooper Dabadie and other officers on the night of the accident.[3]

Trooper Bellue testified that Downs was traveling north and the defendant was traveling south. Trooper Bellue determined Downs was traveling northbound because the 34-foot skid mark made by her tire went into the gouge marks at one direction, and then the skid mark swerved around from where the car was hit. The defendant's vehicle struck the front right side of Downs's vehicle, and the induced damage to her vehicle was pushed toward the driver's side, which indicated the impact came from the one to two o'clock position. The front right corner of her vehicle had buried into the defendant's grill at an angle. According to Trooper

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[2] During cross-examination of Trooper Dabadie, it became clear that he had misstated his east/west directions when testifying, and his final testimony was that the skid mark was in the northbound lane and the impact occurred "pretty much on the center line."

[3] On Trooper Bellue's diagram of the accident scene, the defendant's vehicle is facing east. At trial, Trooper Bellue admitted the defendant's vehicle was actually facing west. He explained, however, that this error on the diagram did not change his explanation of how the accident occurred. His calculations of the measurements still indicated that the defendant entered the northbound lane and collided with Downs's vehicle near the center of the highway.

Bellue, the defendant's vehicle, which weighed about 700 pounds more than Downs's vehicle, overpowered Downs's vehicle. Based on this information, Trooper Bellue testified that the defendant's vehicle was completely in the northbound lane at impact. Based on the angle of impact, the defendant would have been traveling south in Downs's northbound lane in a southwesterly direction, as if he was coming off of the east shoulder. When asked on direct examination what he concluded had occurred in this specific accident, based on his investigation and the measurements taken at the accident scene, Trooper Bellue responded:

> [The defendant] was travelling southbound in a northbound lane. [Downs] was travelling northbound. [Downs] slammed on the brakes due to the super elevation of the roadway and possible steering, which I don't believe it was steering because striations on the skid marks were straight. The super elevation caused her to slide down the roadway. He's coming across the roadway and hits her. After impact, he spins slightly counter-clockwise coming to rest on the roadway. [Downs's vehicle] spins counter-clockwise.

Andrew J. McPhate[4] testified as a witness for the defense. McPhate was accepted by the court as a mechanical engineer with expertise in the field of vehicle dynamics and accident reconstruction. McPhate agreed with Trooper Dabadie's estimates of the speeds the vehicles were traveling, namely 55 m.p.h. for the defendant's vehicle and 35 m.p.h. for Downs's vehicle. However, McPhate testified that the single skid mark, which was not indicated in any photographs taken by police, could not necessarily identify the direction Downs's vehicle was traveling. He further testified that the angular attitude of the vehicles prior to impact would have been about 25 degrees, based on Trooper Bellue's diagram. According to McPhate, a 25-degree angle would put the defendant's vehicle at a fairly severe angle if he was coming off the east shoulder, as testified to by Trooper Bellue. McPhate stated that these measurements, assuming Downs was traveling straight, would put the defendant at such an angle that his vehicle could not get to that particular position, as described by Trooper Bellue, without leaving yaw marks

[4] Although the transcript spells his surname as "McFate," his *curriculum vitae* spells his surname as "McPhate." We will use the correct spelling in this opinion.

traveling 55 m.p.h. However, there were no such marks on the highway. McPhate felt a more accurate angle of impact would have been about 20 degrees.

McPhate stated that the data was not definitive. It was not possible to tell which tire, the right or the left, of Downs's vehicle left the skid mark. According to McPhate, the scenario that the defendant was traveling on the wrong side of the road could not be proven from the data. Another reasonable hypothesis of how the accident occurred, McPhate concluded, was that Downs crossed the centerline while the defendant traveled straight in his southbound lane.

On cross-examination, McPhate admitted that Trooper Bellue's scenario of how the accident occurred was correct if he accepted the premise that the skid mark came from Downs's left front tire:

> Q. I like that idea. Go ahead.
>
> A. You like that idea. But what I'm saying is if we accept the skid mark --
>
> Q. Uh-huh. (Yes)
>
> A. -- that the steering was straight ahead, if we accept that the direction of the initial gouge marks were parallel to this skid mark and they all, and the skid mark has that jump on the end and we also, and then we see the gouge marks come out at the southwesterly angle, then yeah, the numbers will work out. The numbers will work out.
>
> Q. And if that's the case, then it makes sense that the accident occurred in the manner and at the initial impact location that Trooper Bellue said?
>
> A. Right.
>
> Q. Okay.
>
> A. If we can tie that, tie that skid mark to the left front.
>
> Q. Right.
>
> A. Then, yes.
>
> Q. Okay.
>
> A. That's the "if[.]"
>
> Q. Okay. So that is your biggest "if"; is that right?
>
> A. Exactly.

Q. Okay. It would change everything for you if that were the right front tire instead of the left front tire?

A. It would, right. Because now we would be over about five feet and everything would be taking place in the southbound lane.

Regarding his level of intoxication, the defendant's blood was drawn about three hours after the accident. His blood alcohol concentration was .07 percent. 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). Trooper Dabadie testified that he went to the hospital to speak to the defendant about the accident. The defendant told him he consumed four or five beers before driving. The defendant had a strong odor of alcohol on his breath. He also had bloodshot, glassy eyes, and his speech was slurred. When asked what happened in the crash, the defendant said he was not sure what happened and wanted to know if he was at fault.

Deputy Darren Kilcrease, with the East Feliciana Parish Sheriff's office, testified he was one of the first officers to respond to the accident scene. Deputy Kilcrease observed several beer bottles in the defendant's vehicle. Upon speaking to the defendant, he smelled alcohol on his person and on his breath. He also testified the defendant's speech was slightly slurred, and his eyes were a little glassy and bloodshot. The defendant was not given a field sobriety test. Deputy Ronnie Harrell, with the East Feliciana Parish Sheriff's office, was also at the scene. He testified that he observed a few Bud Light cans and a few broken Bud Light bottles inside the defendant's vehicle.

In finding the defendant guilty of vehicular homicide, the trial court stated it was clear Downs died as a result of the crash, the defendant was operating his vehicle, and he was under the influence of alcohol. The court noted he had the odor of alcohol on his breath and his person, his speech was slurred, his eyes were red, and there were empty beer containers in his vehicle. The court further found that he admitted to consuming alcohol prior to operating the vehicle, and the blood

test indicated the presence of alcohol in his system. The trial court attributed the defendant's lack of knowledge of how the wreck occurred to his impairment. Based on the skid mark evidence and the direction of the vehicles prior to the collision, the trial court found the defendant to be at fault. The trial court believed the defendant drove into the lane of the vehicle being driven by Downs. The defendant did not leave a skid mark. Downs's skid mark indicated she saw impending danger, slowed down, and applied her brakes.

Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. Accordingly, our role is not to assess credibility or reweigh evidence. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient support for a requisite factual conclusion. **State v. Thomas**, 05-2210 (La. App. 1st Cir. 6/9/06), 938 So.2d 168, 174, writ denied, 06-2403 (La. 4/27/07), 955 So.2d 683.

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **Thomas**, 938 So.2d at 175. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness, including an expert. **State v. Ducksworth**, 496 So.2d 624, 634 (La. App. 1st Cir. 1986). The fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **Thomas**, 938 So.2d at 175. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987).

We find that there was sufficient evidence of a causal relationship between the defendant's blood alcohol concentration and the victim's death to support the conviction. The evidence showed that the defendant was under the influence of alcohol at the time of the accident. It was reasonable for the trial court to infer that the defendant's blood alcohol concentration contributed to his lack of judgment, which resulted in his driving his vehicle into the lane being driven in by Downs, the scenario propounded by Trooper Bellue. The trial court further could have reasonably disregarded the hypothesis that Downs improperly drove her vehicle into the defendant's lane of travel. See **Thomas**, 938 So.2d at 175.

After a thorough review of the record, we find that the evidence supports the court's judgment. We are convinced that viewing the evidence in the light most favorable to the state, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of vehicular homicide because his intoxication, combined with his operation of his vehicle, caused the death of Downs. See **Thomas**, 938 So.2d at 175.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues Trooper Bellue could not offer opinion testimony because he was not qualified as an expert. Specifically, the defendant contends that, because the trial court did not qualify Trooper Bellue as an accident reconstruction expert, the trial court erred in allowing him to state his conclusion of how the accident occurred.

Trooper Bellue, upon taking the stand, explained that what he did in this case was not a reconstruction, but a crash investigation. Following a discussion of his qualifications, the prosecutor offered Trooper Bellue as an expert in the area of accident investigation and reconstruction. Defense counsel voir dired Trooper Bellue and elicited from him that he did not reconstruct this crash. When the trial

court asked if there was any objection to offering Trooper Bellue as an expert in the area of traffic reconstruction and accident investigation, defense counsel objected on the grounds that the officer did not meet the test of **Daubert**. The trial court then made the following ruling:

> I don't think it's necessary for me to reach the issue of whether or not he's an expert in the field of accident reconstruction because there wasn't any accident reconstruction. That's beyond the scope of his testimony. I will agree and listen to, I will not agree, but I will listen to his conclusions based on the information and measurements that he took at the scene and will consider his conclusions, and I will find those conclusions admissible based on his training and experience.

To this ruling, defense counsel responded, "I have no objection to those, to that, Judge. The only objection I had was to the reconstruction part."

It is clear from this exchange that the trial court ruled that it would consider Trooper Bellue's conclusions based on his training and experience, and that defense counsel made no objection to this particular ruling. The basis or ground for the objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper ruling and prevent or cure any error. A defendant is limited on appeal to the grounds for the objection that were articulated at trial. **State v. Young**, 99-1264 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005; see LSA-C.E. art. 103(A)(1); LSA-C.Cr.P. art. 841(A). The defendant failed to object to the trial court's ruling and, as such, has waived his right to raise the issue on appeal.

Moreover, throughout Trooper Bellue's entire testimony on direct examination, defense counsel lodged only a single objection, which was sustained by the trial court:

> Q. Okay. Were you able to come up with any other way that this impact could have happened with the damage to the cars, the gouge marks, the skid marks, other than Mr. Williams' car being into the northbound lane at the time of the impact?
>
> A. No.
>
> Mr. Delatte [defense counsel]: Judge, I'm gonna object.

> The Court: Sustained. That goes beyond my finding as to his ability to conclude what happened in this collision based on his measurements. That's purely speculation or expert opinion. Your objection is sustained.

The defendant did not ask for a mistrial at any time. When the trial court sustains an objection and defense counsel fails to request a mistrial, the defendant cannot later raise the issue on appeal. See LSA-C.Cr.P. art. 775 (which provides grounds for mistrial for both jury trials and bench trials); **State v. Baylis**, 388 So.2d 713, 720-21 (La. 1980); see also **State v. Legendre**, 05-1469 (La. App. 4th Cir. 9/27/06), 942 So.2d 45, 49 n.1; **State v. Akins**, 96-414 (La. App. 3rd Cir. 12/11/96), 687 So.2d 489, 499.

Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court imposed an illegal sentence. Specifically, the defendant contends that since he was sentenced to hard labor and not placed on probation, he could not be ordered to pay restitution. The defendant further contends the trial court failed to state the manner in which the restitution was to be paid, that is, whether in a lump sum or monthly installments.

As part of the defendant's sentence, the trial court ordered him to "make restitution to the family of the victim in the amount of $14,401.48." The defendant's assertion that he could not be ordered to pay restitution because he was sentenced to hard labor and not placed on probation is baseless. Four years of the defendant's ten-year sentence was suspended, and he was placed on five years of supervised probation. See LSA-C.Cr.P. arts. 893(A), 895(A)(7), and 895.1(A)(1).

However, the defendant's assertion that the trial court was required to state the manner in which restitution was to be paid has merit. "The restitution payment shall be made, in discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant." LSA-C.Cr.P. art. 895.1(A)(1). The trial court's ruling on payment of restitution did not

comply with this provision. Accordingly, we remand the matter to the trial court for a determination of the manner in which restitution should be paid, either in a lump sum or in monthly installments, based on the defendant's earning capacity and assets. See **State v. McGee**, 08-0395 (La. App. 5th Cir. 10/28/08), 996 So.2d 1191, 1195.

DECREE

The defendant's conviction and sentence are affirmed. With respect to the conditions of probation, the case is remanded to the trial court with instructions to determine the manner in which restitution should be paid in accordance with LSA-C.Cr.P. art. 895.1(A)(1). See **McGee**, 996 So.2d at 1195.

CONVICTION AND SENTENCE AFFIRMED; REMANDED WITH INSTRUCTIONS.