

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1131

STATE OF LOUISIANA

VERSUS

CLIFFORD D. WATTS

Judgment Rendered: February 11, 2011

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 472640 "G"

Honorable William J. Crain, Judge Presiding

Walter P. Reed
District Attorney
Covington, Louisiana

Counsel for Appellee
State of Louisiana

Kathryn W. Landry
Baton Rouge, Louisiana

Prentice L. White
Louisiana Appellate Project
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Clifford D. Watts

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

RHP by JW

HUGHES, J.

The defendant, Clifford D. Watts, was charged by bill of information with operating a vehicle while intoxicated, third offense, in violation of LSA-R.S. 14:98. The defendant entered a plea of not guilty. Following a trial by jury, the defendant was found guilty as charged. The trial court sentenced the defendant to five years imprisonment at hard labor, suspended all but seventy-five days of the sentence, and ordered that forty-five days be served without the benefit of probation, parole, or suspension of sentence. The trial court placed the defendant on active, supervised probation for the remainder of the five-year period upon his release from prison.

In addition to general conditions of probation, the trial court ordered that the defendant: pay a fine of two thousand dollars, and a fee of two hundred dollars to the Public Defender's Office; complete thirty days of community service; undergo substance abuse evaluation; undergo in-patient substance abuse treatment for a minimum of twenty-eight days followed by a maximum of twelve months out-patient treatment in accordance with the recommendation of the substance abuse counselor; serve two years of monitored home incarceration; and remain alcohol free and submit to drug and alcohol testing. The trial court further ordered the seizure, impounding, and selling of the vehicle operated at the time of the offense. Finally, the trial court prohibited the defendant from operating any vehicle not equipped with an ignition interlocking device during the time of his probation.

The defendant now appeals, challenging the sufficiency of the evidence in support of the conviction. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about July 8, 2009, at approximately 10:30 p.m., Deputy Shawn Graves of the St. Tammany Parish Sheriff's Office approached the defendant's

vehicle on Davis Landing boat launch, located on a dead-end road with one streetlight. The defendant's vehicle was parked in the shadows cast by the streetlight. Deputy Graves used his spotlight to illuminate the interior of the vehicle and observed the defendant in the driver's seat and a female on the passenger's side. Based on the defendant's responses to questioning and performance on field sobriety testing, the defendant was arrested for Driving While Intoxicated (DWI).

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that he was not intoxicated and was not operating a vehicle at the time he was approached by the police. The defendant notes that the key was not in the ignition when the police approached him and that he was simply sitting in the car with a friend, having a conversation. Although he acknowledges that there may have been some evidence of intoxication, the defendant contends that his medication for hypertension and his prior neck injury caused the deputy to believe that he was intoxicated. The defendant is not challenging his two prior DWI guilty plea convictions.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732.

In order to convict a defendant of driving while intoxicated, the prosecution must prove that the defendant was operating a vehicle and that he was under the influence of alcohol or drugs. LSA-R.S. 14:98. In **State v. Hightower**, 238 La. 876, 116 So.2d 699, 703 (1959), the court stated that “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 ordinarily prudent and cautious man in full possession of his faculties, using reasonable care, would operate a motor vehicle under like conditions.”

It has been widely recognized that 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). Some behavioral manifestations, independent of any scientific tests, are sufficient to support a charge of driving while intoxicated. **State v. Pitre**, 532 So.2d 424, 428 (La. App. 1st Cir. 1988), writ denied, 538 So.2d 590 (La. 1989). Behavioral manifestations, sufficient to support a charge of DWI, in the absence of a scientific test, are determined on a case-by-case basis. **State v. Anderson**, 2000-1737 (La. App. 1st Cir. 3/28/01), 784 So.2d 666, 676, writ denied, 2001-1558 (La. 4/19/02), 813 So.2d 421. An officer's subjective opinion that a subject failed a field sobriety test may constitute sufficient evidence of intoxication to support a DWI conviction. **State v. Graves**, 95-0578 (La. App. 1st Cir. 5/10/96), 675 So.2d 1141, 1145-46. We note that because the defendant refused to take a breath test, the legal presumption of intoxication contained in LSA-R.S. 14:98A(1)(b) is inapplicable herein.

Deputy Shawn Graves of the St. Tammany Parish Sheriff's Office testified that he was certified in field sobriety testing and instruction, as well as breathalyzer instruction. Deputy Graves further testified that he performs a battery of tests on a

DWI suspect. The first test administered by Deputy Graves was the horizontal gaze nystagmus test, which involves the use of a stimulus like a penlight to test for nystagmus detected by the involuntary jerking of the eyes. The testing, in part, consists of a check for the onset of nystagmus prior to forty-five degrees. This involves slowly moving the stimulus from the center of the subject's eye at his face to approximately forty-five degrees which is usually even with the subject's shoulder. According to his testimony, Deputy Graves observed jerking at approximately twenty-five degrees when conducting this portion of the test on the defendant. Deputy Graves stated that the quicker the onset of nystagmus occurs, the stronger the indication of a high dosage of alcohol in the subject's system. Upon completion of this testing twice, Deputy Graves also conducted a vertical gaze nystagmus, wherein he, in part, raised the stimulus to the maximum and held it there for approximately four seconds to see if there was any involuntary jerking or nystagmus indicators.

Deputy Graves next requested that the defendant perform a walk-and-turn test, wherein a person stands with his hands down by his sides, holding his left foot in place while placing his right foot in front of his left foot with the right heel touching the left toe. The subject is instructed to remain in that position until told otherwise. After ensuring that the subject understands the instruction, the subject is required to take several heel-to-toe steps while counting. Deputy Graves indicated that although the defendant understood the instructions, he performed poorly on the walk-and-turn testing.

The defendant was then given the instructions for the one-leg stand test. The defendant was required to acknowledge the instructions, but did not complete the test and swayed while attempting to maintain his balance.

Finally, the defendant was asked to take alphabetical and numerical testing. The defendant indicated that he had completed high school and three years of

college, and that he understood the instructions for the testing. The defendant was instructed to recite the alphabet from the letter C to the letter Q and instead stopped on the letter U. He was further instructed to count backwards from thirty-two to nineteen and he continued counting past the number nineteen.

After being advised of his **Miranda** rights, the defendant made several statements. He informed the deputy that he drove his vehicle to the location of the police encounter. After detecting a strong odor from the defendant's breath and person, Deputy Graves asked him if he had any alcoholic beverages and the defendant stated that he drank earlier, but not since he picked up the passenger in his vehicle. According to Deputy Graves, the defendant admitted to driving after consuming alcohol. Deputy Graves observed an open container in the front, passenger side of the vehicle. The defendant stated that it belonged to the passenger and the passenger confirmed this claim. The vehicle contained numerous empty Busch-brand beer cans throughout the driver's compartment and in the bed of the truck. Deputy Graves also concluded that the passenger of the vehicle was intoxicated. The keys to the vehicle were located on the driver's side of the dashboard.

Deputy Graves testified that there were six clues of intoxication, based on the defendant's performance on the testing, and noted the finding of four clues is statistically linked with an illegal blood-alcohol concentration of above .100 grams among eighty percent of the tested drivers. During cross-examination, Deputy Graves testified that he did not observe any signs or symptoms of a medical condition that could have affected the defendant's test results, and that the defendant did not inform him that he had any such condition. Deputy Graves also noted that if someone is consuming alcohol, once he stops, as long as his body has not reached its peak, his blood-alcohol concentration will continue to rise until the body reaches the peak amount of alcohol, and then the concentration will decrease.

Deputy Graves further stated that based on his experience with nervous individuals, they generally do not perform as poorly as the defendant did on the testing. The defendant was not suffering from any physical impairment to the deputy's knowledge. Deputy Graves testified that he asked the defendant if he had any injury that would prevent him from taking any part of the standardized field sobriety test. While the defendant indicated that he had a neck condition, he stated that he did not have any condition that would prevent him from taking the tests. Further, throughout the investigation, Deputy Graves observed the defendant looking over his shoulder to the left and right while speaking to him and the passenger. Based on Deputy Graves's professional experience and education and the defendant's performance, Deputy Graves concluded that the defendant was impaired above the legal limit of .08 blood-alcohol concentration and took him into custody. As noted, the defendant refused to submit to a breathalyzer test.

The passenger of the vehicle, Theresa Periso, testified on behalf of the defense. Periso stated that the defendant picked her up from her home at approximately 9:00 p.m., and they drove to the boat launch, about twenty minutes from her home. Once they arrived at that location, they sat and talked before being approached by Deputy Graves. Periso stated that she had not seen the defendant drink alcohol that night and that he did not seem as if he was drunk or driving while impaired. She conceded that she had been drinking that night and specified that she drank one whole and one-half can of Busch-brand beer, but was not drunk.

The defendant testified that he and Periso were friends and had children near the same age. He stated that he went to a party after work on the date in question. The defendant stated that he drank a few Natural Light-brand beers, specifically three, at the party and that Periso started calling him while he was there. The defendant further testified that forty-five minutes elapsed before he left to pick up Periso. He arrived at her home at approximately 9:15 p.m. and drove to the boat

launch. The defendant agreed with Deputy Graves's estimated arrival time of 10:30 p.m. and stated that he informed him that his neck was hurting. The defendant testified that his neck was injured when a heater fell on it several years ago but could not remember if he informed Deputy Graves of the cause of the injury. The defendant also stated that he received medical treatment for the injury. The defendant further stated that the muddy and graveled condition of the ground could have affected his test results and added that he was nervous at the time and had taken blood-pressure medication. During cross-examination, the defendant confirmed that his neck injury did not affect his daily functioning or motor ability.

A law officer may testify as to matters within his personal knowledge acquired through experience without first being qualified as an expert. See LSA-C.E. art. 701; **State v. Moses**, 367 So.2d 800, 805 (La. 1979). After a careful review of the record, including the testimony of Deputy Graves, we find that the evidence supports the jury's determination of guilt. The testimony of the deputy clearly established that the defendant was severely impaired. Additionally, the defendant refused to provide breathalyzer testing. While not presumptive evidence, refusal to take a chemical test is relevant evidence in a prosecution for DWI. See LSA-R.S. 32:666A(2)(c); **State v. Kestle**, 2007-1573 (La. 12/2/08), 996 So.2d 275, 281. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Viewing the evidence in the light most favorable to the prosecution, we are convinced that a rational trier of fact could have concluded that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the instant DWI offense. As noted, the defendant does not contest the

evidence of the predicate DWI convictions. Due to the foregoing, the assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.