NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 1284

STATE OF LOUISIANA

VERSUS

MICHAEL J. REYNOLDS

Judgment rendered December 21, 2007.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 386106
Honorable Larry J. Green, Judge

* * * * * *

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
MOLLY L. BALFOUR
ASSISTANT ATTORNEY GENERAL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

HOLLI HERRLE-CASTILLO
MARRERO, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
MICHAEL J. REYNOLDS

* * * * * *

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Michael J. Reynolds, was charged by bill of information with one count of third offense operating a vehicle while intoxicated (DWI), a violation of La. R.S. 14:98(D), and pled not guilty.[1] Following a jury trial, he was found guilty as charged. He was sentenced to a $2,000.00 fine, three years at hard labor, with all but the first thirty days of the sentence suspended and with the first thirty days without benefit of parole, probation, or suspension of sentence, and otherwise in compliance with La. R.S. 14:98(D). He now appeals, designating three assignments of error. For the reasons that follow, we affirm the conviction and sentence.

FACTS

On May 14, 2004, at approximately midnight, Kim Lara and Stacy Leigh Ann Gros were traveling on the Causeway between Jefferson Parish and St. Tammany Parish. The women noticed a green van in front of them, later determined to be driven by the defendant, which was swerving and not staying in its lane. The women notified the Causeway Police of their observations.

Causeway Police Officer Mike Thomas was dispatched to investigate the report concerning the defendant and, after observing the defendant's vehicle drift in its lane and follow too closely behind the vehicle in front of it, instructed the defendant to pull his vehicle over. Officer Thomas's patrol unit was fitted with video and audio-recording equipment. The State played the videotape of the vehicle stop at trial.

The defendant exited his vehicle and walked toward Officer Thomas. The defendant's clothes were in disarray, and he had blood on the right side of his face near his eye. Officer Thomas asked the defendant what had happened to him, and the defendant replied, "Tyrone hit me." The defendant subsequently indicated he had gone to New Orleans for a meeting, and a "black guy" had hit him. The defendant did not complain of a headache, blurred vision, nausea, or any other medical problem.

[1] Predicate #1 was set forth as the defendant's October 16, 2001 DWI conviction, under Twenty-second Judicial District Court Docket #324073. Predicate #2 was set forth as the defendant's October 22, 2001 DWI conviction, under Twenty-first Judicial District Court Docket #96018.

Officer Thomas detected a strong odor of alcohol on the defendant's breath. The defendant also swayed as he stood. He had no proof of insurance and no registration, and the license plate on his vehicle belonged to another vehicle.

Officer Thomas found no indication of the defendant's pupils being different sizes or nonreactive and performed the horizontal gaze nystagmus field sobriety test on the defendant. The defendant performed poorly on the test. He failed to follow instructions concerning not moving his head. His eyes had lack of smooth pursuit and distinct and sustained nystagmus at maximum deviation.

The defendant also performed poorly on the walk-and-turn field sobriety test. His balance was extremely poor. He did not touch his heels to his toes. He used his arms to balance. He stepped off of the line. He turned incorrectly, and he stopped to steady himself. The defendant refused to perform the one-leg stand field sobriety test.

Officer Thomas arrested the defendant for DWI and advised him of his **Miranda**[2] rights. The defendant initially denied having any weapons, but while being frisked indicated he had a knife in his pocket. He subsequently refused to submit to a breath test. Thereafter, he called his wife on the telephone and stated: "Hey babe. I'm going to jail. I'm not joking. ... Baby. I messed up. I'm sorry. Babe, I messed up. I'm sorry. I should have stayed at the Masonic Lodge. I apologize."

The State also presented testimony at trial from St. Tammany Parish Sheriff's Office Medical Director Dr. Richard Demory Inglese. Dr. Inglese indicated the defendant's account of his response to his head trauma was "quite unusual." Dr. Inglese also indicated the results of the medical exams taken by the defendant were inconsistent with significant neurological injury.

The State also presented testimony from a fingerprint expert that the defendant's fingerprints matched the fingerprints on the bills of information for predicate #1 and predicate #2.

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[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues the State failed to provide sufficient evidence that he was under the influence of alcohol, and to negate the reasonable hypothesis that he was not drunk, but drove erratically and performed poorly on the field sobriety tests as a result of a head injury he had sustained.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that 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," in order to convict, every reasonable hypothesis of innocence is excluded. **State v. Wright**, 98-0601, p. 2 (La. App. 1 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 (quoting La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **Wright**, 98-0601 at 3, 730 So.2d at 487.

The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. 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 that raises a

reasonable doubt. **State v. Smith**, 2003-0917, p. 5 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 799.

The crime of operating a vehicle while intoxicated is the operating of any motor vehicle when the operator is under the influence of alcoholic beverages. La. R.S. 14:98(A)(1)(a).

After a thorough review of the record, we are convinced the evidence, viewed in the light most favorable to the State, proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of third offense operating a vehicle while intoxicated and the defendant's identity as the perpetrator of that offense. The jury reasonably rejected the hypothesis of innocence presented by the defense; i.e., the defendant's lack of coordination was the result of head trauma, rather than intoxication, and there was no other hypothesis that raised a reasonable doubt. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

CHALLENGES FOR CAUSE

In assignment of error number 2, the defendant argues the trial court erred in failing to strike prospective jurors Smith, Johnson, Diehl, and Dennie for cause because they indicated they would hold the defendant's prior DWI convictions against him.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality, or on the ground that the juror will not accept the law as given to him by the court. La. Code Crim. P. art. 797(2) & 797(4).

In order for a defendant to prove error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his

peremptory challenges.[3] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. **State v. Taylor**, 2003-1834, pp. 5-6 (La. 5/25/04), 875 So.2d 58, 62.

A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **Taylor**, 2003-1834 at 6, 875 So.2d at 62-63.

Keith Smith, Julie Johnson, Charles Diehl, and Richard Dennie were on the first and only panel of prospective jurors. The defense asked the panel if becoming privy to the knowledge that the defendant had twice before been convicted of DWI would influence them, take them off of the even plane of being fair and unbiased, or lessen the burden of proof.

Smith indicated he would be negatively influenced, but not conclusively. He indicated it would depend on the merits of the case. When asked if there was anything the defense could do to "take that out of the trial" he stated, "[p]robably not."

Dennie stated, "[a]bout this particular charge. He is in court for. That's what I'm here for."

Diehl indicated the prior two offenses would prejudice him "a little bit." When asked if that was something the defense could fix or overcome, Diehl stated, "[d]epends on how the case plays out." The defense asked Diehl, "It's a feeling you have deep imbedded? It's a belief or feeling that you have?" Diehl responded, "Not a belief, no. It definitely does carry some prejudicial feelings toward your client."

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[3] The rule is now different at the federal level. <u>See</u> **United States v. Martinez-Salazar**, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

Johnson stated, "I feel the same way. I think it is a pattern of behavior. And I don't know if I could really be fair." The defense asked, "[t]hat's toward the defendant basically. Nothing we can do to change kind of the way you feel. You are speaking truthfully." Johnson replied, "[r]ight."

Thereafter, the following colloquy occurred:

> [State]: I want to also briefly talk to I believe it was Mr. Smith initially when [defense counsel] talked to you about the consequences of finding out that the defendant has two prior DWI convictions. Of course, human nature is that you are, I think you were pretty honest. Obviously I'm going to, it's something that will strike me and affect me.
>
> But this is what the State has to prove and this is the answer that is very important for the State to know, for the judge to know, [a]nd [for] [the defendant] and his attorney to know. If I tell you that the judge is going to instruct you that the State has to prove that those, there are two prior convictions beyond a reasonable doubt, but you cannot convict solely on the fact that he has two other convictions and that that is not to influence you with regard to this third case, that you are to put that aside and decide whether or not he is guilty of this particular DWI based solely upon the evidence you hear about the facts that occurred on May 14, May 15, 2004, can you do that?
>
> [Smith]: Yes.
>
> [State]: Without reservation, you can put those feelings aside and decide this case with regard to this DWI conviction aside from the fact that he has those other two.
>
> [Smith]: Yes.
>
> . . . .
>
> [Dennie]: It's about today.
>
> [State]: You could follow that.
>
> [Dennie]: Yes. No problem.
>
> [State]: If I fail to prove this DWI third, you are not going to convict him just because he had a DWI first, two DWI convictions in the past?
>
> [Dennie]: No.
>
> [State]: Would the fact that he has these other two influence how you look at this evidence?
>
> [Dennie]: No. It's about the charges we're about today.
>
> [State]: Mr. Diehl, same question to you?
>
> [Diehl]: When asked like that.
>
> [State]: Instructed that way.

[Diehl]: When asked that way, yeah. It would be.

[State]: You understand what my burden is? I have to prove to you that these other two existed. But you cannot convict him of this third one just because he has those other two. Or have that influence the way you look at the evidence in the case of the DWI third.

[Diehl]:[4] (Nods head affirmatively).

[State]: Can you do that?

[Diehl]:[5] Definitely.

[State]: Same question, Ms. Johnson?

[Johnson]: Yes, I could.

[State]: Do you understand the difference now?

[Johnson]: Yes.

[State]: Obviously, you think, God, he has two more. I hope he is not guilty of this third one. But you are influenced by that obviously. It's knowledge that you will have, that you wouldn't normally have in a criminal case. But you need to be able to put that aside and judge the facts of this case, based on what I present to you in this court of law about what happened on May 14th and May 15th. And never mind about the fact that he had the other two convictions.

[Johnson]: Yes.

The defense moved to strike Smith, citing his "overall statements" given in voir dire. The court denied the challenge, and the defense used its third peremptory strike against Smith.

The defense also moved to strike Johnson, citing the "[s]ame issues which were presented about the underlying DWI first, DWI second, and her considering those factors which are prejudicial to the defendant." Before the court ruled on the challenge, the defense also moved to strike Diehl and Dennie for cause, referencing their responses concerning being influenced by the defendant's underlying convictions. The court denied the challenge against Johnson. The defense asked the court to note its objection to the

[4] The voir dire transcript indicates this answer came from "PROSPECTIVE JUROR DEVILLIER." Emma J. Devillier was the assistant attorney general at voir dire.

[5] The voir dire transcript indicates this answer came from "PROSPECTIVE JUROR DEVILLIER." Emma J. Devillier was the assistant attorney general at voir dire.

court's ruling on Dennie, Diehl, and Johnson. The defense used its fifth and sixth peremptory strikes against Johnson and Diehl, and stated if it had not exhausted its peremptory strikes it would also have struck Dennie.

The trial court did not abuse its broad discretion in denying the challenges for cause against Smith, Johnson, Diehl, and Dennie. The prospective jurors demonstrated a willingness and ability to decide the case impartially according to the law and the evidence.

This assignment of error is without merit.

IMPROPER EXPERT TESTIMONY

In assignment of error number 3, the defendant argues the trial court erred in overruling the defense objection to Dr. Richard Demory Inglese testifying regarding a neurologist's reports.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. La. Code Evid. art. 702.

Trial courts are vested with great discretion in determining the competence of an expert witness, and rulings on the qualification of a witness as an expert will not be disturbed unless there was an abuse of that discretion. A combination of specialized training, work experience, and practical application of the expert's knowledge can combine to demonstrate that that person is an expert; a person may qualify as an expert based upon experience alone. **State v. Berry**, 95-1610, p. 20 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 456, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. Generally, the fact that a medical doctor is not a specialist in a particular field applies only to the effect on the weight to be given such testimony, not to its admissibility. **State v. Dorsey**, 34,977, p. 10 (La. App. 2 Cir. 9/26/01), 796 So.2d 135, 142, writs denied, 2001-2876 (La. 8/30/02), 823 So.2d 941, 2001-2963 (La. 10/14/02), 827 So.2d 414.

Dr. Inglese, the medical director for the St. Tammany Parish Sheriff's Office, was accepted, over defense objection, as an expert in the fields of internal medicine and

emergency medicine. According to Dr. Inglese, internal medicine involved the treatment of adult patients for medical problems other than those treated by obstetrics/gynecology and general surgery. He indicated internal medicine encompassed all of the subspecialty fields, such as cardiology, pulmonary, cancer medicine, and infectious diseases.

The State asked Dr. Inglese if he had occasion to evaluate patients for acute trauma. Dr. Inglese indicated he had treated several serious head traumas per week for the approximately fifteen years he had been a physician. He had received extensive training in emergency medicine during his residency, had worked as an emergency room physician in Korea, and had evaluated patients in the emergency room at Andrews Air Force Base in Maryland. He indicated that in his capacity as St. Tammany Parish Sheriff's Office Medical Director, he saw several people per week with massive facial or head trauma.

Dr. Inglese indicated it was the policy of the St. Tammany Parish Jail that the deputy bringing a prisoner to the jail would ask him or her if they were ill or injured in any way, if they had any medical problems or if they were taking any medications, if they had been in a motor vehicle accident within the last twenty-four hours, if they thought they might hurt or kill themselves, and, in the case of female prisoners, if they thought they might be pregnant. If the prisoner answered any of the questions affirmatively, the deputies would call medical personnel to perform a limited exam on the prisoner before booking. Medical personnel would refuse to accept any prisoner who had a "bad problem" and would instruct the deputy to take the prisoner to the hospital for further evaluation.

In the case of a prisoner with head trauma, prison medical personnel would first check the prisoner's mental status, including whether the person was awake, alert, and oriented; whether the medical person could hold the prisoner's attention; and whether the prisoner could fully converse and answer questions appropriately. Secondly, the prisoner's wound would be evaluated to determine whether the prisoner was actively bleeding, whether the wound was infected, and whether the wound needed sutures. Lastly, any injury on or around the prisoner's eye would be evaluated to determine if it

involved the ball of the eye. Any injury near the eye would be evaluated to determine if the eye was so swollen that a good eye exam could not be performed. If the injury involved the ball of the prisoner's eye or if a good eye exam could not be performed, the deputy would be instructed to take the prisoner to the hospital for evaluation.

The medical personnel who examined the defendant at the St. Tammany Parish Jail did not instruct the deputy with the defendant to take the defendant to the hospital.

Outside the presence of the jury, the State indicated the defense was relying on a medical condition defense, and the State intended to question Dr. Inglese concerning findings in medical records provided by the defense.

The defense objected to the proposed questioning, indicating the documents provided were from a neurologist, which Dr. Inglese was not, and from an ophthalmologist, which Dr. Inglese had testified was care that was referred out of the jail for treatment.

The court overruled the objection, holding that the State should be allowed to question Dr. Inglese concerning records submitted by the defense, and the defense could question the doctor on cross-examination in regard to his fields of expertise.

In response to State questioning, Dr. Inglese indicated that on May 17, 2004, two days after the defendant's release from the St. Tammany Parish Jail, the defendant saw an ophthalmologist regarding his eye and brow laceration. The defendant gave a history of being hit in the right eye on May 15, 2004, with a blunt object. The ophthalmologist referred the defendant to the emergency room for evaluation. Dr. Inglese summarized the findings of the ophthalmologist as follows:

> He thought, [the defendant's] eyes were a little bit deep set. And he wondered if it was possible that was some swelling, or if they were, or if there they are just naturally that way. So he put trauma, question mark. Enophthalmus [sic], trauma, question mark. He had a little drying of his cornea. He also wondered, he but [sic] question mark, question mark. Possible blow out fracture. Meaning were these findings the result of trauma. He wasn't really sure. And he had a black eye.

The next day, the defendant went to Alton Oschner Medical Center, where he gave a history of being injured while walking to his car late on May 14, 2004. He claimed he was struck on the right side of his face by an unknown object and fell to the ground. He

claimed an attempted mugging ensued, but the attackers ran away after he pulled out a knife. He claimed he then passed out, but later drove home with blurry vision, head pain, and a headache.

The defendant's physical exam at the emergency room was normal with the exception of a finding of a contusion or a bruise to the right side of the defendant's face. The treating physician recommended that the defendant get a CT scan "just to be sure" that he did not have any fractures that he could not feel.

On May 19, 2004, the defendant had a CT scan. The scan revealed no evidence of orbital or facial fracture.

The defendant's medical records indicated he next sought medical treatment in September of 2004, when he visited Dr. Ganji, a specialist in neurology and sleep disorders. The defendant complained of chronic headaches since the incident on May 14, 2004, where he claimed he was injured, pulled out a knife, fought off a single attacker, and passed out. A complete neurological examination revealed no abnormal findings. Dr. Ganji also ordered an MRI and an EEG of the defendant's brain. The MRI was "essentially completely normal,"[6] and the EEG was normal. The defendant had follow-up visits for headaches with Dr. Ganji for two years.

Dr. Inglese found the defendant's account of his response to his head trauma "quite unusual," and found the medical exams taken by the defendant inconsistent with significant neurological injury. Dr. Inglese indicated there were only two medical conditions that would result in someone having head trauma and passing out later. A person would recover from the first condition, vasovagal reaction, within minutes and have no permanent sequela. In regard to the second condition, an intercranial catastrophe; i.e., bleeding in the brain, the person would not regain consciousness until a neurosurgeon bored a hole in his skull and removed the excess blood.

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[6] Dr. Inglese indicated the CT scan revealed that the defendant had a nasal septum deviated towards the right side, but that a deviated septum was a naturally occurring phenomenon.

Dr. Ganji diagnosed the defendant as suffering from post-traumatic headaches. Dr. Inglese indicated, however, that the diagnosis was a "diagnosis of exclusion," based upon no other reason for the headaches other than the history given by the patient. He also indicated that whether someone had or did not have post-traumatic headaches said nothing about how hard they were hit initially, and "doesn't say there was a bad enough head injury four months earlier that would have, in turn, made you wobble and stumble."

On cross-examination, Dr. Inglese conceded he was not a neurologist and had never been qualified in the areas of neurology, ophthalmology, or psychology. He also conceded he had never examined the defendant and was not present when the defendant was presented at the St. Tammany Parish Jail.

Dr. Inglese identified Defense Exhibit #1 as a May 15, 2004 booking photograph of the defendant from the St. Tammany Parish Jail. He indicated the photograph depicted injuries to the right side of the defendant's face, near the orbit. He indicated he could not determine the extent of the defendant's head injury from the photograph alone without reading records of his medical examination and tests.

There was no abuse of discretion in overruling the defense objection against Dr. Inglese. Dr. Inglese's specialized knowledge assisted the jury in understanding the evidence and determining facts in issue. The fact that Dr. Inglese was not a neurologist or an ophthalmologist did not bar his testimony, but rather was a matter of the weight of the evidence.

This assignment of error is without merit.

CONCLUSION

For the above and foregoing reasons and because we find no merit to the defendant's arguments on appeal, we affirm his conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.