STATE OF LOUISIANA	*	**NO. 2002-KA-0709**
VERSUS	*	**COURT OF APPEAL**
RAYLYNN GARDNER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 249-547, DIVISION "B"
Honorable Manuel A. Fernandez, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin and Judge Max N. Tobias, Jr.)

JOHN J. FINCKBEINER, JR.
#3 COURTHOUSE SQUARE
CHALMETTE, LA 70043

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

The defendant, Raylynn Gardner, was charged by bill of information on November 27, 2000, with operation of a vehicle while intoxicated in violation of La. R.S. 14:98. She entered a plea of not guilty at arraignment on February 21, 2001. She was found guilty as charged after a bench trial on December 6, 2001. On March 18, 2002, she was sentenced to serve six months in Parish Prison; her sentence was suspended, and she was placed on six months inactive probation with special conditions and ordered to pay a $300 fine. Her motion for an appeal was granted.

The defendant's offense, operation of a vehicle while intoxicated, is a misdemeanor. Therefore, she has no right of appeal. La. C.Cr.P. art. 912.1B. She does, however, have a right of judicial review by application for a supervisory writ of review. La.C.Cr.P. art. 912.1C(1). In the interest of judicial economy, we convert this appeal to an application for supervisory writ of review.

At trial Officer John Simmons, who on November 27, 2002 was employed by the St. Bernard Parish Sheriff's Office, testified that he investigated an accident on Judge Perez Drive and Rowley Boulevard on that day. When he arrived, he observed the defendant seated in her vehicle; he asked her if she was injured, and she replied that she was not. The officer stated that he had taken special training and had been certified in detection

of persons suspected of driving while intoxicated. When he spoke with the defendant, the officer noticed that she spoke with slurred speech and he detected "an extreme order of alcoholic beverage [sic] from the vehicle and from her breath." Officer Simmons asked her to move from the driver's seat to the rear of the vehicle, and he observed that she had difficulty walking. The officer read her the Miranda rights and asked her if she had been drinking. She replied that she had "had a few." Officer Simmons then performed three field sobriety tests. The first, the horizontal gaze nystagmus test, involves the officer holding an object an arm's length from the subject's head and asking her to follow it with her eyes without moving her head. The defendant's eyes could not follow the object with a smooth pursuit. In two other sections of the nystagmus test, the defendant's eyes were "bouncing" when she tried to follow an object from the center of her face to a position forty-five degrees to the left or right and also when she tried to look at the object held out to the side near her shoulder. The officer also asked her to perform the walk-and-turn test in which she was asked to keep her arms at her sides and take nine steps heel to toe, turn and take nine more heel to toe steps. The defendant was unable to keep her balance and to touch her heel to her toe during the test. She also used her arms to maintain her balance. In the third test, the one-legged stand, the defendant "swayed quite a bit " as

she tried to balance and she tried to use her arms contrary to instructions.

Officer Simmons stated that he did not observe any physical trauma to the defendant nor did he recall her complaining of any injury received in the accident. He did find two half-full bottles of beer and clothing reeking of beer in the back seat area of her car. The defendant was again advised of her rights, arrested, and transported to Central Lock Up. There the defendant refused to take a blood alcohol content test. Officer Simmons reported that he asked the defendant a series of questions, and, while testifying, he reviewed a record of her answers. She told him she was on her way home from work between 7 and 8 a.m. when the accident occurred. When asked if she was on any medication, she told him she took cold medicine at 10:30 p.m. She also said she had no physical disabilities and that she had not been hurt during the accident. When asked if she had consumed any alcohol, she said she had had "under six" beers.

Under cross-examination, Officer Simmons said that the accident had not been the defendant's fault. It was caused by the other car's failure to yield the right of way. When asked if the defendant's performance on the tests would have been affected if she had suffered a concussion in the accident, the officer answered that it would have been affected. Officer Simmons also testified that if he believed someone had had a concussion, he

would call an ambulance and have the person taken to the hospital. He did not detect any signs that the defendant had suffered a concussion, nor did he see any bruises to her head. The defendant did not complain to the officer of dizziness or light-headedness.

The parties stipulated that the defendant was driving her vehicle when she was arrested.

Dr. John Olson, an expert in the field of neurology, testified that the defendant has been his patient since December 4, 2000. She began seeing him because of an injury sustained in the automobile accident occurring on November 27, 2000. When she was examined, the doctor found a

> mild left paracervical spasm. She has some mild decreased abduction of her upper arms. Presumption diagnosis was that she sustained a concussion as the result of head trauma. She also had another aspect that suggested the possibility of a damaged cervical disc. Also she had complaints referable to her lumbar spine.

His finding that she had sustained a concussion was determined by her history. Dr. Olson reported that the defendant told him that when she hit the other car, she hit her head and couldn't remember anything until the police arrived at the scene. By December 4, 2000 when the doctor saw the defendant, she did not present with a "severe" concussion. Dr. Olson said that performance on the horizontal gaze nystagmus test and the one-legged

stand test can be altered by head trauma. Many people have problems with the heel to toe walk-and-turn test, the doctor stated, and even cold medicine could cause those problems.

Under cross-examination, Dr. Olson admitted that he had no objective findings that the defendant had a concussion; all of the evidence came from her account of the accident. He concluded, "Had she not told me about the episode and concussion, I frankly would have no idea." When asked about the effect on the defendant if she had a concussion and also had consumed alcohol and cold medication, he answered that all three would play a role so that one could not say what caused her problems.

The defendant testified that she was driving on Judge Perez when a car from her right side crossed immediately in front of her. She put on the brakes but before she could stop she had collided with the car. On impact she hit her head and felt dazed. She remembers only bits and pieces of the accident scene. The defendant works as a beverage server at Harrah's Casino, and she got off work between 5:15 and 5:30 a.m. On leaving work, she transported two of her co-workers to their car, and both of them were drinking beer. The defendant did not remember whether her co-workers left their beer in her car or not. She is not allowed to drink at Harrah's, and she said she did not drink when she got off work. She does not remember telling

the officer that she had been drinking beer. When asked on cross-examination why she had refused to take a blood alcohol test, she answered that she was upset because her car was wrecked and she did not think she belonged in jail.

In a single assignment of error, the defendant maintains that the evidence was insufficient to support a conviction for operating a vehicle while intoxicated.

In State v. Ash, 97-2061, pp. 4-5 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, 667-68, this Court set forth the standard of review applicable to a claim that the evidence produced was constitutionally insufficient to support a conviction:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and, if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La. App. 4 Cir. 1989). When circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from

> which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proved such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La. 1987).

La. R.S. 14:98, relevant to operating a vehicle while intoxicated, provides in part:

> 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; or
>
> (b) The operator's blood alcohol concentration is 0.10 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; or
>
> (c) The operator is under the influence of any controlled dangerous substance listed in Schedule I, II, III, IV, or V as set forth in R.S. 40:964.

Therefore, a conviction for operating a vehicle while intoxicated requires only proof that the defendant was operating a vehicle and that the defendant was under the influence of alcohol or drugs. State v. Finch, 31,888 (La. App. 2 Cir. 5/5/99), 733 So.2d 716. In this case the parties

stipulated that that the defendant was driving the car, and so the only question here is whether she was intoxicated. A breath or blood alcohol test is not necessary for such a conviction. State v. Holley, 32,156 (La. App. 2 Cir. 8/18/99), 742 So.2d 636. The observations of the arresting officer may be sufficient to establish the defendant's guilt. State v. Finch, supra. Some behavioral manifestations of intoxication independent of any scientific test are sufficient to support a charge of driving while intoxicated. State v. Iles, 96-256 (La. App. 3 Cir. 11/6/96), 684 So.2d 38. Whether the behavioral manifestations of intoxication are sufficient to support the charge of driving while intoxicated must be determined on a case-by-case basis. State v. Deroche, 95-0376 (La. App. 1 Cir. 4/10/96), 674 So.2d 291.

In State v. Landry, 2001-0784 (La. App. 4 Cir. 12/12/01), 804 So.2d 791, this Court considered a similar case in which the defendant, who refused to take the breathalyzer test, was given the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged stand test, and his poor performances led the arresting officer to believe that he was intoxicated. Moreover, the officer smelled alcohol on the defendant's breath. In Landry, the court obviously found the officer to be a more credible witness than the defendant, and this Court declined to disturb the trial court's determination that the defendant was operating a vehicle while intoxicated.

See also, State v. Smith, 93-1490 (La. App. 1 Cir. 6/24/94), 638 So.2d 1212; State v. Worachek, 98-2556 (La. App. 1 Cir. 11/5/99), 743 So.2d 1269; and State v. Minnifield, 31,527 (La. App. 2 Cir. 1/20/99), 727 So.2d 1207,

By contrast, in State v. St. Amant, 504 So.2d 1094 (La. App. 5 Cir. 1987), an arresting officer's statement that the defendant smelled of alcohol, was unsteady on her feet, and seemed confused was insufficient to sustain the State's burden where the defendant did not appear intoxicated on a video recording of the field sobriety test. Similarly, in State v. Sampia, 96-1460 (La. App. 1 Cir. 6/20/97), 696 So.2d 618, the First Circuit found that defendant's conviction was not supported despite the arresting officer's observations that the defendant who was involved in an accident smelled of alcohol, had slurred speed, and swayed slightly. The officer did not observe the defendant until almost four hours after the accident and the defendant's speech and swaying could have been attributable to factors other than intoxication, such as her emotional state.

Those cases can be distinguished from the case at bar where the defendant's appearance and performance indicated intoxication that could not reasonably be attributable to other factors. In its reasons for judgment, the trial court in the case at bar stated:

> After listening carefully to the testimony, I note the very straight forwardness of Officer Simmons in his testimony and find no reason for him [to] be deceitful to the Court. The

> review of Dr. Olson's testimony [sic], I find that he bases his testimony largely on subjective facts, by assuming there was a concussion from the history. The remainder of his testimony is all possibilities and falls outside of the realm of any degree of medial [sic] probability.
>
> Insofar as Ms. Gardner's testimony is concerned, I find it improbable that the matter would have occurred in the manner she stated based upon the time, minutes, the relatively in-and-out frequency of the transient confusion, and her failure to take the test, and I find the defendant guilty.

The trial court observed the witnesses and assessed their credibility. We decline to disturb the court's determination that the defendant was operating a vehicle while intoxicated. Thus relief is denied.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED