NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 1225

STATE OF LOUISIANA

VERSUS

JACOB BELL

Judgment Rendered: December 23, 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case Number 3-07-0332

Honorable Todd W. Hernandez, Presiding

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

GUIDRY, J.

The defendant, Jacob Bell, was charged by bill of information with fourth offense operating a vehicle while intoxicated, a violation of La. R.S. 14:98(E). The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for new trial and postverdict judgment of acquittal, which were denied. The defendant was sentenced to twenty years at hard labor, with all but ten years of the sentence suspended. The trial court also imposed a $5,000 fine and ordered that the defendant be placed on supervised probation for five years upon his release, with three of those years of probation to be served under home incarceration. The trial court imposed various other probation conditions. The defendant now appeals, designating five assignments of error. We affirm the conviction. However, we vacate the sentence and remand for resentencing.

FACTS

On January 13, 2007, Captain Joseph Bourgeois, with the Baton Rouge City Police Department, was traveling northbound on I-110 when he observed the defendant, who was driving a pickup truck directly in front of him, drifting back and forth across the road. Captain Bourgeois activated his emergency lights and pulled over the defendant in a Burger King parking lot on Harding Boulevard. When asked for his driver's license, the defendant informed Captain Bourgeois his license was suspended. Captain Bourgeois detected a strong odor of alcohol from the defendant. The defendant's speech was slurred, and he was swaying. Captain Bourgeois Mirandized the defendant and asked him if he had been drinking. The defendant responded in the affirmative. Based on his observations and the condition the defendant was in, Captain Bourgeois arrested the defendant and placed him in his police unit. Captain Bourgeois had already completed his work

shift, so he contacted Corporal Mickey Duncan, with the Baton Rouge City Police Department DWI Task Force, to complete the investigation.

Captain Bourgeois called a wrecker to have the defendant's truck towed. While performing an inventory search of the defendant's truck, Captain Bourgeois found on the passenger-side floorboard a Styrofoam ice chest containing seven unopened cans of beer and one opened, empty can of beer. He also found two or three empty beer cans on the floor. In a CD case, he found a small bag of marijuana.

Corporal Duncan arrived on the scene and spoke to the defendant. Corporal Duncan detected a strong odor of alcohol on the defendant's breath and from his person. He further observed the defendant had slurred speech, bloodshot eyes, and was swaying. Corporal Duncan Mirandized the defendant and asked him if he had been drinking before driving. The defendant responded in the affirmative. Corporal Duncan gave the defendant the three standardized field sobriety tests. The defendant performed poorly on all three tests. The sobriety tests were recorded by the mounted video camera on Corporal Duncan's police unit. The videotape, which was played for the jury at trial, does not contain audio because Corporal Duncan forgot to turn on his microphone before administering the tests. Corporal Duncan testified at trial that, in his experience, the defendant was intoxicated. The defendant was taken to the police station where he urinated on himself. The defendant refused both a breath test and a urine drug screen test. At trial, the defendant's three prior DWI convictions were introduced into evidence.

ASSIGNMENTS OF ERROR, NOS. 1, 2, and 3

In these assignments of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends there was no chemical evidence to support his intoxication, and the videotape of his field

sobriety tests failed to show he was impaired or under the influence of alcohol or drugs.[1]

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the 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 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 La. C.Cr.P. art. 821(B); State v. Ordodi, 06-0207, p. 10 (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, La. R.S. 15:438 provides that the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 01-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144.

Louisiana Revised Statutes 14:98 provides in pertinent 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 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; . . .

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[1] In his first, second, and third assignments of error, the defendant asserts, respectively, the evidence was insufficient to support the conviction, the trial court erred in denying the motion for new trial, and the trial court erred in denying the motion for postverdict judgment of acquittal. The court shall grant a new trial when the verdict is contrary to the law and the evidence. See La. C.Cr.P. art. 851(1). The defendant filed a motion for new trial under La. C.Cr.P. art. 851(1), which was denied. The defendant's appeal addresses the sufficiency of the evidence. Sufficiency is properly raised by a motion for postverdict judgment of acquittal, not by a motion for new trial. Under La. C.Cr.P. art. 851, the trial court can consider only the weight of the evidence, not the sufficiency. See State v. Williams, 458 So.2d 1315, 1324 (La. App. 1st Cir. 1984), writ denied, 463 So.2d 1317 (La. 1985). Accordingly, we find no abuse of discretion in the instant matter of the trial court's denial of the defendant's motion for new trial.

In order to convict an accused of driving while intoxicated, the State need only prove that the defendant was operating a motor vehicle and that he was under the influence of alcohol. State v. Worachek, 98-2556, p. 8 (La. App. 1st Cir. 11/5/99), 743 So. 2d 1269, 1274.

The defendant argues in his brief that, given his refusal to give a breath or urine test, the State did not provide any chemical evidence at trial to prove intoxication. However, blood, breath, or urine samples are not necessary to prove intoxication. Intoxication with its attendant behavioral manifestations is an observable condition about which a witness may testify. What behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. Some behavioral manifestations, independent of any scientific tests, are sufficient to support a charge of driving while intoxicated. Furthermore, 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. Parry, 07-1972, p. 7 (La. App. 1st Cir. 3/26/08), 985 So. 2d 771, 775.

The defendant contends in his brief that, because of the lack of chemical evidence, the State relied on the videotape of the defendant's field sobriety tests. According to the defendant, the videotape did not show that he was impaired or under the influence of alcohol. He further maintains that the standardized field sobriety tests conducted by Corporal Duncan were not performed in accordance with specified procedure, which could compromise the validity of the results.

Corporal Duncan testified at trial the defendant performed poorly on all three of the field sobriety tests. On the horizontal gaze nystagmus (HGN) test, the defendant exhibited all six clues of impairment. On the walk-and-turn test, the defendant exhibited five of the eight clues of impairment. On the one-leg-stand test, which requires a person to hold one leg out and count to thirty, the defendant,

on three occasions, put his leg down after only a few seconds of counting. After the third failed attempt, Corporal Duncan stopped the test.

On cross-examination, defense counsel used a 1998 manual entitled "DWI Detection in Standardized Field Sobriety Testing" to attempt to impeach certain portions of Corporal Duncan's testimony regarding the HGN test.[2] For example, Corporal Duncan testified that when testing for equal tracking (a pre-test to testing for nystagmus), the pen should be six to twelve inches from the subject's nose, and the tracking takes one second. According to the manual Corporal Duncan was asked to review, however, the stimulus should be held twelve to fifteen inches from the suspect's nose, and the tracking should take two seconds per eye. Corporal Duncan further testified that when testing for distinct nystagmus at maximum deviations, the pen or stimulus is held for approximately two seconds. The manual, however, indicated that the stimulus is to be held for four seconds. Corporal Duncan indicated that, if the validity was based on what was indicated in the manual, then the validity of the HGN test was compromised.

On redirect examination, Corporal Duncan testified that the defendant exhibited all six clues of impairment on the HGN test. He testified that he has not read in any manual that the HGN test is the only test that determines if a person is intoxicated. He also testified that the 1998 manual used on cross-examination does not indicate that the HGN test is invalid if the correct seconds are not used. In his determination that the defendant was intoxicated, Corporal Duncan testified that he did not rely on only one test, but considered the totality of all of the circumstances.

Our review of the videotape of the defendant's sobriety tests revealed there was minimal swaying by the defendant. Because of the distance of the defendant from the mounted camera and somewhat poor quality of the video, we could not

[2] The manual was not introduced into evidence.

determine whether the defendant had bloodshot eyes. Similarly, because there was no audio, we could not determine whether, or to what extent, the defendant's speech was slurred. Corporal Duncan first administered the HGN test. Whether the defendant exhibited any clues of impairment, as testified to by Corporal Duncan, is simply not perceptible from the videotape. Following the HGN test, the defendant attempted to perform the one-leg-stand test. On each of his three attempts, he held out his left leg very briefly -- two or three seconds at the most -- before dropping his leg to the ground. Finally, on the walk-and-turn test, the defendant appeared to walk, slightly off-balance, the required nine steps one way (toward the camera) before turning, somewhat off-balance. He then appeared to walk the required nine steps the other way (away from the camera). Near the beginning of his nine steps away from the camera, the defendant stumbled slightly.

The guilty verdict indicates the jury accepted the testimony of the State's witnesses as true and rejected the defense hypothesis of innocence that the defendant was not intoxicated. The jury heard Corporal Duncan's testimony, including the discrepancies between his testimony and the alleged information in the 1998 DWI manual. The jury also heard Corporal Duncan testify that he was a standardized field sobriety testing instructor, and that he had given thousands of field sobriety tests. Corporal Duncan testified the defendant admitted to him he consumed three beers before driving. Duncan testified that when he first made contact with the defendant, there was a strong odor of alcohol emanating from the defendant's breath and the "pores of his skin." The defendant also had slurred speech, red bloodshot eyes, and swayed while standing.

Captain Bourgeois, who at one time was the Commander of the DWI Task Force, testified that while he was driving behind the defendant, he observed the defendant drift several times in his truck from one side of the road to the other side. At one point, the defendant drifted off of the road onto the grassy shoulder.

According to Captain Bourgeois, the defendant continued this erratic driving for several minutes. When Captain Bourgeois activated his emergency lights, the defendant did not pull over but continued to drift as he was driving. Captain Bourgeois activated his siren a couple of times. The defendant slowed down but continued to drive for about another three blocks before he pulled over. When Captain Bourgeois asked the defendant to step to the rear of his vehicle (the front of Captain Bourgeois's vehicle), the defendant grabbed onto his door and held on. As the defendant made his way toward Captain Bourgeois, he (defendant) grabbed the side of his truck a couple of times. Captain Bourgeois detected a very strong odor of alcohol emanating from the defendant. The defendant's speech became more slurred as he spoke. Captain Bourgeois also observed the defendant steadily sway as he stood there. The defendant admitted to Captain Bourgeois that he had been drinking. Captain Bourgeois found in the defendant's truck an ice chest with seven unopened cans of beer and one open empty can of beer. He also found two or three empty beer cans on the floor of the truck.

Based on the entirety of the testimony of Captain Bourgeois and Corporal Duncan, as well as the videotape of the field sobriety tests, the jury could have rationally concluded the defendant was intoxicated at the time he was pulled over. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases.

See State v. Mitchell, 99-3342, p. 8 (La. 10/17/00), 772 So. 2d 78, 83. 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. State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985).

After a thorough review of the record, we find the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any 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 operating a vehicle while intoxicated, fourth offense.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the trial court erred in imposing an excessive sentence.

A thorough review of the record indicates that defendant's counsel did not make a written or oral motion to reconsider his sentence. Under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Ordinarily, the defendant would be procedurally barred from having this assignment of error reviewed. See State v. Duncan, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So. 2d 1141, 1143 (en banc per curiam); see also State v. LeBouef, 97-0902, pp. 2-3 (La. App. 1st Cir. 2/20/98), 708 So. 2d 808, 809, writ denied, 98-0767 (La. 7/2/98), 724 So.2d 206. However, as will be discussed in the following assignment of error, because we are vacating the sentence and remanding for resentencing, this issue is moot.

ASSIGNMENT OF ERROR NO. 5

In his fifth assignment of error, the defendant argues the trial court erred when it immediately sentenced him after ruling on his motions for new trial and postverdict judgment of acquittal. Specifically, the defendant contends the trial court failed to delay sentencing for twenty-four hours following denial of the motions without obtaining any waivers of delay by him.

The trial court erred by sentencing the defendant without waiting twenty-four hours after the denial of his motions for new trial and postverdict judgment of acquittal. See La. C.Cr.P. art. 873. The trial court also erred when it ruled on the defendant's motion for new trial subsequent to sentencing the defendant. See La. C.Cr.P. art. 853. Nothing in the record indicates the defendant waived this time period under Article 873.

Prejudice will not be found if the defendant has not challenged the sentence imposed and the twenty-four hour delay violation is merely noted on review for error under La. C.Cr.P. art. 920(2). State v. Ducre, 604 So. 2d 702, 709 (La. App. 1st Cir. 1992). However, the defendant has assigned as error the trial court's failure to observe the twenty-four hour delay and has also contested the sentence imposed. In State v. Augustine, 555 So. 2d 1331, 1333-1334 (La. 1990), the Louisiana Supreme Court has held that a trial court's failure to observe the twenty-four hour delay is not harmless error if the defendant challenges the sentence on appeal. Because Augustine requires us to vacate the sentence, we find it inappropriate to review the merits of the excessive sentence challenge at this time. See State v. Claxton, 603 So. 2d 247, 250 (La. App. 1st Cir. 1992).

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.