NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0405

STATE OF LOUISIANA

VERSUS

AUGUSTO C. ABARCA

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 05-06-0207, Section V
Honorable Louis R. Daniel, Judge Presiding

Doug Moreau
District Attorney
Dylan C. Alge
Assistant District Attorney
Baton Rouge, LA

Attorneys for
State of Louisiana

D. Carson Marcantel
Delatte, Edwards & Marcantel
Baton Rouge, LA

Attorney for
Defendant-Appellant
Augusto C. Abarca

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered September 14, 2007

PARRO, J.

The defendant, Augusto C. Abarca, was charged by bill of information with operating a vehicle while intoxicated, third offense, a violation of LSA-R.S. 14:98, and pled not guilty.[1] He waived his right to a jury trial and, following a bench trial, was found guilty as charged. He was sentenced to two and one-half years of imprisonment without hard labor, with the first thirty days of the sentence to be served without benefit of parole, probation, or suspension of sentence; however, credit was given for any time served. The court further ordered that the remainder of the sentence after the first thirty days be suspended, and the defendant be placed on supervised probation, subject to general and special conditions,[2] with the Department of Public Safety and Corrections, Division of Probation and Parole, for a period of time equal to the remainder of the sentence of imprisonment. Additionally, the court imposed a $2,000 fine. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

East Baton Rouge Parish Sheriff's Deputy Justin Taylor testified at trial. On the night of December 20, 2005, Deputy Taylor was dispatched to investigate a suspicious white van on Coursey Boulevard between Sherwood Forest Boulevard and Southpark Drive. Deputy Taylor went to the specified location and saw a white van situated half on the sidewalk, half in a parking lot, with its front end wedged against a brick column in front of a business. The brick column had "scuff marks" or small scratches in the bricks. The vehicle's lights were on, its engine was running, and the transmission was in the drive gear. The defendant was the only occupant of the vehicle and was unconscious in the driver's seat with the window rolled down.

After shouting at the defendant to wake him up, Deputy Taylor asked him to step out of the vehicle. The defendant stumbled and staggered out of the vehicle and used the vehicle's door to maintain his balance. At Deputy Taylor's request, the defendant

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[1] Predicate offense #1 was set forth as the defendant's March 12, 2001 conviction, under Denham Springs City Court docket #176,603, for first offense DWI committed on January 14, 2001. Predicate offense #2 was set forth as the defendant's May 19, 2005 conviction, under Baton Rouge City Court docket #BR00151918, for first offense DWI committed on January 25, 2003.

[2] See LSA-C.Cr.P. art. 895; LSA-R.S. 14:98(D)(1)(b).

produced his driver's license. Deputy Taylor noticed a smell of an alcoholic beverage on the defendant's breath and asked him to perform field sobriety tests. The defendant refused to perform field sobriety tests. Based on his observations of the defendant, Deputy Taylor felt the defendant was impaired or intoxicated, arrested him, and advised him of his **Miranda**[3] rights. Thereafter, the defendant repeatedly told Deputy Taylor that he wanted to talk to Santa Claus.

At the police station, the defendant was read his rights relating to a chemical test, but he refused to sign the form or take the test. In response to questioning, the defendant indicated he had been "going home to his address . . . on Shakespeare Drive," after having started out from Southpark Drive. The defendant also indicated he had drunk "a couple of cups" of wine at his brother's house on Southpark. Deputy Taylor stated his question form indicated he asked the defendant, "[W]ere you operating a motor vehicle," and the defendant responded affirmatively. The question form also indicated Deputy Taylor asked the defendant, "Have you had any alcoholic beverages since the accident[,]" and the defendant responded negatively.

The state introduced documentation concerning predicate offenses #1 and #2 into evidence without objection.

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant challenges the sufficiency of the state's proof that he operated a motor vehicle while under the influence of an alcoholic beverage. He claims the state failed to prove that he operated the motor vehicle in question. He cites numerous cases interpreting whether the defendants therein were "operating a vehicle" within the meaning of LSA-R.S. 14:98. He also cites **State v. Boyle**, 34,686 (La. App. 2nd Cir. 9/17/01), 793 So.2d 1281, wherein, upon a **Crosby**[4] appeal from the denial of a motion to suppress the evidence for an unlawful stop and arrest, the court reversed the denial of the motion to suppress and the third offense DWI conviction.

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

[4] **State v. Crosby**, 338 So.2d 584 (La. 1976).

Initially, we note the defendant did not file a motion to suppress in this case. Failure to file a motion to suppress evidence in accordance with LSA-C.Cr.P. art. 703 prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress. LSA-C.Cr.P. art. 703(F).

Moreover, in **Boyle**, on the basis of an anonymous tip that the driver of a vehicle matching the description of the defendant's vehicle was intoxicated, the police approached the defendant in his parked vehicle at his residence. **Boyle**, 793 So.2d at 1282. The court in **Boyle** specifically noted the case involved an investigatory stop on the defendant's private property, rather than in a public place, and presented none of the exigent circumstances usually associated with automobiles on public roads involving public safety concerns. **Boyle**, 793 So.2d at 1284. In the instant case, however, the defendant's vehicle was already "stopped" when Deputy Taylor approached the vehicle. Further, an exigent circumstance, i.e., imminent danger to the defendant and the public if the defendant's running vehicle became dislodged from the brick column, was also present.

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 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 00-0895 (La. 11/17/00), 773 So.2d 732 (quoting LSA-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**, 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**, 03-0917 (La. App. 1st 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. LSA-R.S. 14:98(A)(1)(a). The statute does not require proof that the defendant was driving a vehicle, and the jurisprudence recognizes that the term "operating" is broader than the term "driving." In order to operate a motor vehicle, the defendant must have exercised some control or manipulation over the vehicle, such as steering, backing, or any physical handling of the controls for the purpose of putting the car in motion. It is not necessary that these actions have any effect on the engine, nor is it essential that the car move in order for the state to prove the element of operation. **State v. Smith**, 93-1490 (La. App. 1st Cir. 6/24/94), 638 So.2d 1212, 1215.

The trial court gave the following reasons for the verdict:

> In this case it is clear that the defendant was found by the officer behind the wheel of the vehicle, in the driver's seat, with the engine running, the engine in drive. He is, apparently, asleep at that time and, as the deputy takes – puts the vehicle in park and then makes certain observations about the defendant. This is not a case where the defendant is in a car that is not in operation as some of the cases that I have read that the defense provided to me. It is not a case where the defendant is parked in front of his own house where the engine was running in the **Rossi** case. Many times people can go – and I've done it myself, gone out into the garage to listen to the radio, with no intention of moving the vehicle in any point, but turning the vehicle on simply for the purpose of listening to the radio. This case is much more in line with the **Simms** [sic] case and I do find that the state has proven beyond a reasonable doubt that the defendant was operating the motor vehicle, that the defendant was under the influence of an alcoholic beverage at that time and I also find that he has the two prior DWI convictions and I find each of the elements of DWI to be proven, DWI third offense, to be proven beyond a reasonable doubt

> in this matter and I find the defendant guilty of operating a vehicle while intoxicated third offense.
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> . . .
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> I did want to – I did want to say also that even without the statement of the defendant that he was driving, I would and do find that the state excluded all other reasonable hypotheses. There is no other reasonable hypothesis, I feel and do not find, other than the defendant was operating that motor vehicle based on where it was found, in the condition it was in when found, next to a building with scratches.

State v. Sims, 426 So.2d 148 (La. 1983), involved an appeal from convictions for operating a vehicle while intoxicated, resisting an officer,[5] and possession of marijuana.[6] Shortly after midnight, while on patrol on U.S. Highway 79, Claiborne Parish Deputy George Shirey saw a vehicle on the northbound shoulder of U.S. 79 off the paved portion of the highway. Deputy Shirey drove by the parked vehicle and noticed its headlights were on and its motor was running. He also saw that a person (the defendant) was seated inside the vehicle, under the steering wheel, slumped over, and apparently asleep. **Sims**, 426 So.2d at 151.

Deputy Shirey tapped on the driver's door to attempt to wake up the defendant. Deputy Shirey then recognized the defendant, opened the car door, and called the defendant by name. The defendant still did not awaken. The defendant awoke when Deputy Shirey touched him on the shoulder. The defendant was disoriented and Deputy Shirey noticed a faint odor which he believed to be alcohol. The defendant was also mumbling and slurring his words. **Sims**, 426 So.2d at 151.

In response to Deputy Shirey's request for the defendant's driver's license, the defendant stood up to look for the license in his wallet, but fell back into his seat. Deputy Shirey asked the defendant to step to the rear of his vehicle in order to use the police unit's headlights to help him locate the license. As the defendant walked to the back of his vehicle, Deputy Shirey observed that the defendant swayed and used the vehicle for support. **Sims**, 426 So.2d at 151.

After the defendant subsequently performed poorly on field sobriety tests and

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[5] A violation of LSA-R.S. 14:108.

[6] A violation of LSA-R.S. 40:966.

was unable to produce a driver's license, Deputy Shirey arrested him for DWI. **Sims**, 426 So.2d at 151. The defendant's blood-alcohol level was subsequently determined to be .081 percent. **Sims**, 426 So.2d at 152. A subsequent inventory of the defendant's vehicle uncovered plastic bags containing marijuana in the glove compartment. **Sims**, 426 So.2d at 152.

In rejecting the defendant's claim that there was insufficient evidence to prove a violation of LSA-R.S. 14:98 because the state had failed to circumstantially prove that the defendant had "operated" his motor vehicle while intoxicated, the court in **Sims** noted:

> One possible hypothesis which can be advanced is that the defendant parked his vehicle and then consumed alcoholic beverages or smoked marijuana while in his car to become intoxicated. Given the facts of this case, however, we find that this hypothesis is not reasonable. It is unlikely that the defendant consumed any alcoholic beverages in his automobile after he had parked, for no alcoholic beverage containers were found in the car. Equally improbable is the theory that the defendant smoked marijuana as he sat in his car on the side of the road. Deputy Shirey testified that the defendant's car windows were rolled up when he initially approached the parked vehicle. Yet, the deputy only detected the smell of alcohol and did not encounter any odors resembling marijuana when he opened the defendant's car door. In addition, no evidence of burned marijuana was found during the inventory search. Another hypothesis is that the defendant walked away from his car and drank alcoholic beverages or smoked marijuana to become intoxicated. We find this hypothesis is unreasonable in light of the fact that the defendant was discovered slumped over his steering wheel with the motor running and the lights and stereo in operation.
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> The only reasonable hypothesis is that the defendant operated his vehicle while intoxicated. Therefore, we conclude that, viewing the evidence most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis had been excluded.

Sims, 426 So.2d at 155.

The cases relied upon by the defendant are distinguishable on their facts. **State v. Rutan**, 448 So.2d 267, 269-70 (La. App. 3rd Cir. 1984), involved a vehicle, with its engine not running, parked at a lounge where alcoholic beverages were sold. **City of Bastrop v. Paxton**, 457 So.2d 168, 169-70 (La. App. 2nd Cir. 1984), involved a vehicle parked in front of a bar, with its engine running, and an observation of a brake light flashing. However, the court in **Paxton** cited uncontradicted testimony concerning how the defendant came to be seated behind the wheel (which indicated the defendant had not driven the vehicle) and testimony from the defendant's girlfriend that she,

rather than the defendant, had driven the vehicle. **Paxton**, 457 So.2d at 170. **State v. Brister**, 514 So.2d 205, 206 (La. App. 3rd Cir. 1987), involved a vehicle stopped on an incline in a lane of traffic, with its engine not running, which rolled as the defendant turned to see who was behind him. **State v. Trahan**, 534 So.2d 73 (La. App. 3rd Cir. 1988), involved a vehicle, with its engine not running, which had been parked at a Taco Bell for two hours. **State v. Rossi**, 98-1253 (La. App. 5th Cir. 4/14/99), 734 So.2d 102, 103, writ denied, 99-0605 (La. 4/23/99), 742 So.2d 886, involved a vehicle, with its engine running, parked in front of the defendant's house.

After a thorough review of the record, we are convinced that 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 operating a vehicle while intoxicated and the defendant's identity as the perpetrator of that offense. The circumstantial evidence that the defendant in the instant case operated his vehicle while intoxicated was even more compelling than the evidence in **Sims**. When Deputy Taylor came upon the unconscious defendant, he was in a vehicle, in drive gear, which was only being prevented from moving by the brick column that the vehicle had crashed into. Further, this case also involved direct evidence, i.e., the defendant's admission to Deputy Taylor that the defendant had operated the vehicle, that was neither present in **Sims** nor in any of the cases relied upon by the defendant. The trial court reasonably rejected the hypothesis of innocence presented by the defense, i.e., the defendant became intoxicated after he crashed into the brick column, and the evidence did not support another hypothesis that raised a reasonable doubt. In reviewing the evidence, we cannot say that the trial court's determinations were irrational under the facts and circumstances presented to it. See **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 662.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the

pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

Louisiana Revised Statute 14:98(D)(2) provides a specific procedure for the trial court to follow in regard to the seizure, impoundment, and sale of the vehicle being driven at the time of the offense. The trial court failed to follow that procedure in this case. Although the failure to follow LSA-R.S. 14:98(D)(2) is error under LSA-C.Cr.P. art. 920(2), it is certainly harmless error. The defendant is not prejudiced in any way by the court's failure to follow LSA-R.S. 14:98(D)(2). Because the trial court's failure to follow LSA-R.S. 14:98(D)(2) was not raised by the state in either the trial court or on appeal, we are not required to take any action. As such, we decline to remand for correction of the error. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc).[7]

CONVICTION AND SENTENCE AFFIRMED.

[7] A petition for certiorari was filed at the Louisiana Supreme Court on January 24, 2007, and assigned docket number 2007-K-130.