NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1779

STATE OF LOUISIANA

VERSUS

DAVID KENT KORNAHRENS

Judgment Rendered: June 8, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 492221

Honorable Allison H. Penzato, Judge Presiding

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Walter P. Reed **Covington, LA**	**Counsel for Appellee,** **State of Louisiana**
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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

Guidry, J. dissents in part and assigns reasons.

WHIPPLE, J.

The defendant, David Kent Kornahrens, was charged by bill of information with one count of driving while intoxicated ("DWI"), fourth offense, a violation of LSA-R.S. 14:98. The bill of information lists the following three predicate DWI convictions: April 10, 1998, DWI conviction[1]; April 12, 2001, DWI conviction;[2] and April 25, 2005, DWI conviction.[3] The defendant pled not guilty. At the beginning of the trial, the defendant and the state entered into a stipulation of fact concerning the defendant's three predicate DWI convictions. Following a jury trial, the defendant was convicted as charged.

The defendant filed a motion for postverdict judgment of acquittal, urging that his April 10, 1998 predicate DWI conviction fell outside of the ten-year "cleansing period" from the date of the instant offense, June 20, 2010, and could not be used by the state to support a fourth-offense DWI conviction. The trial court denied the motion. After considering the defendant's presentence investigation report ("PSI"), the trial court sentenced the defendant to twenty-five years imprisonment at hard labor and imposed the mandatory fine of five thousand dollars. Subsequently, the defendant filed a motion to reconsider sentence, which the trial court denied.

On appeal, the defendant urges the following three assignments of error:

1. The trial court erred by denying the motion for postverdict judgment of acquittal. [Alternatively, in the event the court finds this issue waived, the defendant argues ineffective assistance of counsel.]

2. The trial court erred in imposing an excessive sentence.

3. The trial court erred in denying the motion to reconsider [the defendant's] sentence.

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[1]The bill of information alleges this conviction was obtained in 22nd Judicial District Court in St. Tammany Parish under Docket Number 281902.

[2]The bill of information alleges this conviction was obtained in 22nd Judicial District Court in St. Tammany Parish under Docket Number 320763.

[3]The bill of information alleges this conviction was obtained in the First Parish Court of Jefferson, Docket Number F1499363.

For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

At about 7:30 p.m. on June 20, 2010, Maghan Mayeux, her mother, and two cousins were returning home from a vacation at the beach. When Maghan's mother stopped to turn into Maghan's driveway, her car was hit from behind by a vehicle driven by the defendant, David Kent Kornahrens. The defendant's wife, Sherry Kornahrens, was in the front passenger seat of the defendant's vehicle. After the impact, Maghan saw Mrs. Kornahrens pour a drink out of the passenger side window. Thinking the people in the car were drinking, Maghan asked her mother to call the police.

Maghan then got out of the car to look at the damage to her mother's vehicle and to speak with the defendant. The damage was very minimal. However, when Maghan approached the defendant, she noticed his speech was slurred, he smelled of alcohol, and he could barely stand up. Maghan had no doubt the defendant was impaired. Maghan also spoke to Mrs. Kornahrens, who admitted to pouring out an alcoholic beverage. She told Maghan the drink was hers, and she had been the one drinking it.

Officer Christopher Pittman of the Mandeville Police Department responded to the accident scene. During his interactions with the defendant, Officer Pittman detected a consistent odor of alcohol emitting from his breath and observed the defendant swaying. Officer Pittman administered the Horizontal Gaze Nystagmus test ("HGN"). The defendant's results gave the officer probable cause to continue with the field sobriety investigation. However, the defendant declined to take the other field sobriety tests due to a prior medical condition concerning injuries to his back, shoulder, and ankle. The defendant also refused to take the breathalyzer test. However, he admitted to Officer Pittman that he consumed an alcoholic beverage

around 3:00 p.m. and he had taken prescribed medication, Norco and Soma, earlier in the day.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, the defendant contends the trial court erred when it denied his motion for postverdict judgment of acquittal. The defendant's motion for postverdict judgment of acquittal challenged the state's use of his April 10, 1998 predicate DWI conviction as falling outside of the ten-year "cleansing period" provided in LSA-R.S. 14:98(F)(2). Although the defendant acknowledges that he stipulated to the three predicate DWI convictions listed on the bill of information at trial, he asserts that a "closer inspection of the [s]tate's records" revealed his April 10, 1998 predicate DWI conviction occurred more than ten years prior to his June 20, 2010 arrest for the instant offense, was subject to the ten-year "cleansing period" provided in LSA-R.S. 14:98(F)(2), and could not be used to support the instant charge and conviction for DWI, fourth offense.

The defendant also contends the trial court miscalculated the cleansing period for the instant offense. He contends that the correct application of the ten-year period to the facts of his April 10, 1998 predicate DWI conviction demonstrates this predicate DWI conviction falls outside of the ten-year cleansing period. Thus, the defendant asserts, the trial court should have granted his motion for postverdict judgment of acquittal and modified the conviction to the lesser-included responsive offense of driving while intoxicated, third offense.

Conversely, the state asserts the defendant is bound by his stipulation to the three predicate DWI convictions. The state argues that a stipulation has the effect of withdrawing a fact from issue and disposing wholly with the need for proof of that fact. The state further asserts that as a result of its reliance upon the defendant's stipulation, the state was not required to introduce any evidence of the facts of the predicate DWI convictions. The state characterizes the defendant's

argument as essentially attempting to revoke his stipulation after his conviction. The state contends it is too late to do so.

While the state maintains the defendant's stipulation precludes him from challenging the validity of the three predicate DWI convictions, it also takes issue with the manner in which the defendant calculates the ten-year period in LSA-R.S. 14:98(F)(2). The state asserts the defendant failed to take into consideration the time periods associated with his predicate 2001 and 2005 DWI convictions that are excluded in computing the ten-year period for the instant offense. The state contends the excluded time associated with the defendant's 2001 and 2005 DWI convictions would certainly place the 1998 DWI conviction within the ten-year period for the instant offense. Although the state essentially concedes it did not produce evidence of the dates for the excluded periods at trial, in light of the defendant's stipulation on the record, the state asserts it was not required to provide proof of these dates.[4]

A motion for postverdict judgment of acquittal challenges the sufficiency of the evidence to support the conviction. 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 or not, 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 LSA-

[4]In reply to the state's arguments, the defendant urges in the alternative, and only in the event this court considers the issue waived by the stipulation, that he was denied effective assistance of counsel at trial. The defendant contends that the facts support such a claim, as counsel's actions in entering such a stipulation amount to deficient performance by stipulating to a charge that was not properly available for use as a predicate DWI offense. The defendant urges he was prejudiced by the deficient performance, as he is now serving a much harsher sentence than would have been available on a conviction for a third-offense DWI. However, the defendant did not raise the issue of ineffective assistance of counsel in his original brief. Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.6 provides that the reply brief shall be strictly confined to rebuttal of points urged in the appellee's brief. Therefore, this issue is not properly before the court on appeal.

C.Cr.P. art. 821(B); State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Mussall, 523 So. 2d 1305, 1308-09 (La. 1988). In the instant case, the defendant was convicted of DWI, fourth offense, a violation of LSA-R.S. 14:98. The statute, in pertinent part, provides:

> 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:
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> (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; 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; or
>
> (d)(i) The operator is under the influence of a combination of alcohol and one or more drugs which are not controlled dangerous substances and which are legally obtainable with or without a prescription.

In order to convict an accused of driving while intoxicated, the state need only prove the defendant was operating a vehicle and he was under the influence of alcohol or drugs. See State v. Parry, 2007-1972 (La. App. 1st Cir. 3/26/08), 985 So. 2d 771, 775; LSA-R.S. 14:98(A). To convict an accused of a fourth offense of driving while intoxicated, the state must also show the defendant had three other valid convictions. LSA-R.S. 14:98(E)&(F). Whether an offender's predicate convictions in a multiple offender DWI prosecution are considered essential elements of the offense or essential averments of the bill of information, the state bears the burden of establishing their constitutional validity, if they came by way of guilty pleas, and of proving the convictions at trial. Moreover, the state also bears the burden at trial of negating the cleansing period in LSA-R.S. 14:98(F). See State v. Mobley, 592 So. 2d 1282 (La. 1992) (per curiam).

Louisiana Revised Statutes 14:98(F)(2) governs when the state can use an offender's predicate DWI conviction to support a charge of multiple offense DWI. This statute provides that a prior conviction shall not include a conviction for an offense if committed more than ten years prior to the commission of the crime for which the defendant is being tried. In determining the ten-year "cleansing period," LSA-R.S. 14:98(F)(2), the periods of time during which the offender was awaiting trial, on probation for a DWI offense, under an order of attachment for failure to appear, or incarcerated in a penal institution in this or any other state shall be excluded in computing the ten-year period. Thus, in accordance with LSA-R.S. 14:98(F)(2), an initial ten-year cleansing period determined on a strictly calendar basis would comprise the period of time beginning with the date of commission of the offense for which the defendant is being tried and ending with the same month and day ten years earlier. However, because applicable periods of time designated in LSA-R.S. 14:98(F)(2) shall be excluded in computing the ten-year period; the total period of time attributed to all of the applicable, excludable periods of time cannot be counted in calculating the ten-year cleansing period. State v. Warren, 2011-1262 (La. App. 1st Cir. 2/10/12), ___ So. 3d ____, _____.

In the present case, the defendant and the state stipulated at trial to the validity of the defendant's three predicate DWI convictions. The record before us reveals the stipulation was initially discussed on the first day of the trial in the context of determining the time needed to try the case. The state advised the trial court that, if the defense required the state to prove the validity of the three predicate DWI convictions at trial, the state had witnesses on call who would provide the factual basis to establish the validity of these predicate DWI convictions. However, during this exchange, defense counsel advised the trial court and the state that it had researched the three predicate DWI convictions and they "link up." Defense counsel further indicated his agreement with the state's

representations that the defendant was the same person in each prior conviction and the convictions were appropriate. Accordingly, defense counsel specifically advised the trial court that the defense was willing to stipulate to the three predicate DWI convictions. On the second day of the trial, prior to calling its first witness, the state entered the stipulation into the record. At that time, the defense advised the trial court that the stipulation was correct and so stipulated for the record.

The record also contains other references to the stipulation that evidence the defense's intent to relieve the state of its burden of proving the validity of the three predicate DWI convictions. During their respective opening arguments, the state and defense counsel referenced the defendant's stipulation to the three predicate DWI convictions and therefore proving the predicate DWI convictions was unnecessary. Notably, during closing arguments, neither the state nor defense counsel addressed the predicate DWI conviction element of the state's case against the defendant. Moreover, defense counsel did not request a specific jury instruction concerning the application of the ten-year period provided in LSA-R.S.14:98(F)(2). Lastly, we note that defense counsel did not object to the trial court's final jury instructions, which included a specific instruction concerning stipulations or agreed upon facts. Specifically, the trial court instructed the jury, "When the District Attorney and the attorney for the defendant stipulate or agree to the existence of a certain fact or facts, you must accept such stipulated or agreed facts as conclusively proved."

A stipulation has the effect of withdrawing a fact from issue and disposing with the need for proof of that fact. State v. Seals, 2009-1089 (La. App. 5th Cir. 12/29/11), 83 So. 3d 285, 320-21; State v. Thornton, 611 So. 2d 732, 736 (La. App. 4th Cir. 1992). In the instant matter, the record clearly establishes the defense stipulated to the defendant's three predicate DWI convictions, thereby

relieving the state of the burden of proving their validity for use as predicates. Accordingly, the stipulation disposed wholly of the state's need to produce proof at trial of the defendant's identity as the person convicted in the three predicate DWI convictions, their constitutional validity, and the necessary dates that would prove these predicate DWI convictions fell within the ten-year period of the instant offense as defined by LSA-R.S. 14:98(F)(2).

On appeal, the defendant has not specifically challenged the sufficiency of the evidence to meet the state's burden of proving the defendant was operating a vehicle and that he was under the influence of alcohol and/or drugs. Nonetheless, a thorough review of the record establishes the fact witnesses testified to the following: the defendant was operating a vehicle; he consumed an alcoholic beverage; immediately after the accident his breath smelled of alcohol, his speech was slurred, and he was swaying; he failed a HGN test and declined further tests; and earlier that day he took his prescription medications, Norco and Soma. Testimony from the state's expert pharmacy witness established: Norco is an opioid derivative narcotic used for moderate to severe pain; Soma is a muscle relaxer that is used in connection with Norco for people who have severe irretractable pain; Norco and Soma cause mental confusion, drowsiness, and impairment of motor skills; Norco and Soma come with a warning not to drive or operate machinery, or to consume alcohol when taking these medications; and when Norco and Soma are taken together they produce an "additive response." In light of the defendant's stipulation as to the validity of his three predicate DWI convictions and the evidence produced at trial, we find that when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the state established, by sufficient evidence, the essential elements of the crime of driving while intoxicated, fourth offense, beyond a reasonable doubt.

Accordingly, the trial court correctly denied the defendant's motion for postverdict judgment of acquittal. This assignment of error is without merit.[5]

SECOND AND THIRD ASSIGNMENTS OF ERROR

In his second and third assignments of error, the defendant contends that his sentence is excessive and that the trial court erred in denying his motion to reconsider sentence. The sentence for DWI, fourth offense, provided at the time of the instant offense that an offender shall be imprisoned, with or without hard labor, for not less than ten years nor more than thirty years and shall be fined five thousand dollars. Seventy-five days of the sentence shall be imposed without benefit of probation, parole, or suspension of sentence. The court, in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment. If any portion of the sentence is suspended, the offender shall be placed on supervised probation with the Department of Public Safety and Corrections, Division of Probation and Parole, for a period of time not to exceed five years, which probation shall commence on the day after the offender's release from custody. LSA-R.S. 14:98(E)(1)(a)(prior to its 2010 amendment). In this matter, the trial court sentenced the defendant to twenty-five years imprisonment at hard labor and imposed the mandatory fine of $5000.00.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime

[5]In this assignment of error, the defendant also argues the trial court miscalculated the ten-year period provided in LSA-R.S. 14:98(F)(2). This argument is pretermitted, given our finding that the parties stipulated to the validity of the defendant's three predicate DWI convictions. In any event, because the defendant stipulated, the instant record does not contain all of the necessary dates, documents, etc. to further determine the cleansing period.

and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Andrews, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So. 2d 448, 454.

The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See State v. Holts, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988); see also LSA-C.Cr.P. art. 881.4(D). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of LSA-C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. State v. Brown, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569.

In the instant matter, the defendant argues that under the particular circumstances of this case, the sentence imposed is excessive. Specifically, the defendant asserts this particular offense was not at all egregious, as no one was physically injured and there was very minimal damage to the other vehicle. Although he does not dispute that his past reflects a history of alcohol-related crimes, he argues that this particular fact is subsumed within a fourth-offense DWI and should not provide a basis for unusually harsh treatment from the trial court. The defendant contends that the imposition of a near-maximum sentence at hard labor with no part of the sentence suspended is disproportionately harsh for this particular offense. The defendant argues that such a near-maximum sentence indicates the trial court failed to give adequate consideration to the mitigating factors designated in LSA-C.Cr.P. art. 894.1.

The record before us reveals the defendant spoke on his own behalf at the sentencing hearing. The defendant argued that he has been a productive member of society. He spoke of his long-term marriage to his wife. He advised the trial

court that they own their home and have owned and operated two businesses for the last ten years, and they pay taxes. The defendant told the trial court that he has raised two children and is attending to the care of his elderly, widowed mother. The defendant spoke of his physical disability that resulted from a back injury he sustained while helping restore electricity to his neighborhood after Hurricane Katrina. The defendant admitted that he should have sought help for alcohol and substance abuse. He told the trial court that he was not afforded the opportunity for mandatory participation in a substance abuse program in his prior DWI convictions.

The record also shows the trial court requested and reviewed a PSI. The report revealed that the defendant has an extensive criminal history of driving while intoxicated in the states of Texas and Louisiana. Including the instant DWI offense and the three predicate DWI convictions, the defendant has been arrested and charged with driving while intoxicated **twelve** times and has either pled guilty or was found guilty of eight of these charges. Prior to sentencing the defendant, the trial court noted, as particularly significant, that a person died as a result of the defendant's first DWI offense. The offense occurred in Texas in 1977, and the defendant pled guilty to involuntary manslaughter and DWI. It is also noteworthy that seven of the defendant's twelve DWI arrests and five of his eight DWI guilty pleas/convictions occurred in Louisiana from 1994 to 2010.

It is clear that the trial court considered the mitigating circumstances urged by the defendant and carefully reviewed the information provided in the PSI prior to sentencing the defendant. The trial court articulated that it was cognizant of the defendant's history and the factors set out in LSA-C.Cr.P. 894.1. Based on the information provided to it, the trial court found the defendant was in need of a custodial environment that can be most effectively accomplished by imprisonment and noted that it would recommend drug and alcohol treatment at the Department

of Public Safety and Corrections facility at which he will be housed. The trial court also articulated why it declined to suspend any of the defendant's sentence. Based upon his past history, the trial court found it was very likely that the defendant would commit another DWI-related offense during a period of any suspended sentence or probation. Lastly, the trial court found that a lesser sentence would deprecate the seriousness of the offense. Considering the record herein, we find the defendant has failed to show the trial court abused its great discretion in imposing sentence in this case. Therefore, the trial court correctly denied the motion to reconsider sentence.

These assignments of errors are likewise meritless.

CONCLUSION

For the reasons assigned, we affirm the defendant's conviction and sentence for fourth-offense DWI.

FOURTH-OFFENSE DWI CONVICTION AND SENTENCE AFFIRMED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1779

STATE OF LOUISIANA

VERSUS

DAVID KENT KORNAHRENS

GUIDRY, J., dissents in part and assigns reasons.

GUIDRY, J., dissenting in part.

A stipulation has the effect of a judicial admission or confession, which binds all parties and the court. Stipulations between the parties in a specific case are binding on the trial court when not in derogation of law. Such agreements are the law of the case. R.J. D'Hemecourt Petroleum, Inc. v. McNamara, 444 So. 2d 600, 601 (La.1983); State v. Smith, 39,698, p. (La. App. 2d Cir. 6/29/05), 907 So. 2d 192, 199. A court of appeal reviewing a decision based on stipulated facts is bound by the four corners of the stipulation. Terral v. Waffle House, Inc., 684 So. 2d 1165, 1168 (La. App. 1st Cir. 1996).

In the subject appeal, the State and the defendant entered a stipulation concerning the predicate DWI convictions listed on the bill of information. On the day before the jury trial, in open court, the following exchange occurred:

> State: I guess one question I have is, as far as time, and I have people on call, is: Is Mr. Dennis going to have me prove up the ***identification*** of the other three DWIs?
>
> Defense: No, Your Honor. I've researched them. They are - - I think they are - - they link up.

State: So that will cut down a lot. If we are going to stipulate that the other three DWIs ***are the same person*** and they are appropriate, then we don't need to bring people in to ***identify*** the defendant. That will cut down on a lot of time.

Court: Is that correct, Mr. Dennis?

Defense: Yes, Your Honor. [Emphasis added.]

On the day of the trial, the prosecutor entered the agreed-upon stipulation into the record. The transcript of the proceeding recites the following:

State: One brief thing, Your Honor, just to make sure we have no problems whatsoever, but I believe yesterday there was a stipulation that Mr. –

Defense: Kornahrens.

State: - - Kornahrens is in fact ***the same*** David Kornahrens that was convicted in – on April 10th, 1988 [sic], in No. 281902 of the 22nd Judicial District Court of St. Tammany Parish; and further convicted on April 12th, 2001, in Docket No. 320763 in the 22nd Judicial District Court of St. Tammany Parish, and is ***the same person*** that was convicted April 25th, 2005, in Case No. F1499363 in First Parish Court in Jefferson Parish, and stipulated that ***he is one and the same*** who has been previously convicted three other times.

Defense: That is correct, Your Honor. So stipulated.

Court: Thank you sir.

Anything further before we bring the jury in?

State: I just wanted to make sure that was on the record. Thank you. [Emphasis added.]

A plain, unexpanded reading within the four corners of the documented stipulation reveals that the State and the defendant stipulated solely to the ***identity*** of the defendant as the same person convicted, as well as to the existence and dates, of the predicate offenses -- nothing more.

Louisiana Revised Statute 14:98(F)(2) specifically provides that the time to be excluded in computing the ten-year period is for those periods of time the defendant "was awaiting trial," "on probation for an offense described in Paragraph 1 of this Subsection," or "incarcerated in a penal institution." Proof of

the time the defendant was actually incarcerated, as well as the time he was on probation for the predicate DWI convictions, must be supported by competent evidence. See State v. Thomas, 05-2210, pp. 10-11 (La. App. 1st Cir. 6/9/06), 938 So. 2d 168, 176-77, writ denied, 06-2403 (La. 4/27/07), 955 So. 2d 683. The only evidence offered by the State regarding the defendant's predicate offenses was the agreed stipulation.

The State did not produce evidence of the excluded periods, in light of the defense's stipulation on the record. The stipulation does not include the sentences imposed for the three predicate convictions, which information is needed in order to properly calculate the ten-year cleansing period for the instant offense and to determine whether the April 10, 1998 DWI conviction can be used to support a fourth-offense DWI conviction. Without information as to the sentences imposed, the defendant stipulating to the dates of the prior convictions does not establish that the April 10, 1998 DWI conviction falls within the ten-year period provided in the statute.

Thus, the stipulation does not establish the date of the defendant's earliest conviction, on April 10, 1998, as being within the ten-year cleansing period, and I believe the majority grossly errs in finding that the stipulation was sufficient to establish the State's burden of proof on this issue. See State v. Mobley, 592 So. 2d 1282 (La. 1992) (per curiam).

Moreover, I believe the majority further errs in concluding that the objection to the *sufficiency* of the evidence is waived due to the defendant's failure to raise a contemporaneous objection to the charge given to the jury. The defendant does not raise as error the failure of the trial court to properly instruct the jury on the charge of fourth offense DWI. But, as has been often held by the courts of this state, even if the trial court did improperly instruct the jury, such an error would be deemed harmless if the record otherwise shows that the evidence is sufficient to sustain the

defendant's conviction for the crime charged. See State v. Howard, 98–0064, pp. 18–19 (La.4/23/99), 751 So.2d 783, 805, cert. denied, Howard v. Louisiana, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999) (holding that an invalid instruction on the elements of an offense is harmless if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the charge); see also State v. Thomas, 427 So. 2d 428 (La. 1983) (wherein the Louisiana Supreme Court ordered the case remand and that a responsive verdict be entered where the record showed that the jury had rendered a verdict for the wrong crime based on an erroneous jury charge, but the evidence was sufficient to support a finding that the defendant was guilty of a legislatively-authorized responsive verdict).

Federal due process "constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 313-14, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560 (1979). As I find the evidence in this case to be insufficient to fairly support a conclusion that every element of the crime of fourth-offense DWI, particularly the element that all the predicate crimes occurred within the ten-year cleansing period, has been established beyond a reasonable doubt, I respectfully dissent.