NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1363

STATE OF LOUISIANA

VERSUS

EDMOND T. BARRAS, JR.

Judgment Rendered: March 23, 2007.

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 379855

Honorable William J. Burris, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

McDonald, J. concurs.

CARTER, C. J.

The defendant, Edmond T. Barras, Jr., was charged by bill of information with driving while intoxicated (DWI), second fourth offense, in violation of LSA-R.S. 14:98E. He pled not guilty. A jury found the defendant guilty as charged. The trial court sentenced the defendant to imprisonment at hard labor for twenty years without benefit of probation, parole, or suspension of sentence. The trial court also ordered that the defendant pay a $5,000.00 fine. The trial court ordered that the sentence run consecutive to any sentence the defendant was then serving. The defendant now appeals. Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On April 10, 2004, Deputy Sean Beavers of the St. Tammany Parish Sheriff's Office, Criminal Patrol Division, stopped the defendant after observing him driving erratically. According to Deputy Beavers, as the defendant exited his vehicle, he almost fell to the ground. He swayed when he walked, his speech was slurred, and he smelled of a strong alcohol odor. The defendant performed poorly on all field sobriety tests administered, was arrested and transported to the Second District's Office for an intoxilyzer test. After being informed of his rights relating to the chemical test for intoxication, the defendant initially agreed to submit to the test. However, before providing a sufficient breath sample, the defendant withdrew his consent and refused to further submit to the test. The defendant was transported to the St. Tammany Parish Prison and charged with DWI. The defendant had five prior DWI convictions. The defendant's priors included a March 15, 2000 guilty plea to DWI fourth offense wherein the defendant was sentenced to ten years imprisonment. The defendant was released on parole in 2003, after serving three years of the sentence for that offense.

DISCUSSION

In his first two assignments of error, the defendant argues the trial court erred in allowing Deputy Beavers to testify that the defendant's poor performance on the horizontal gaze nystagmus (HGN) and one-leg stand field sobriety tests indicated that the defendant's blood alcohol content was over the legal limit of 0.08 grams. The defendant contends the inclusion of such references to his blood alcohol level was improper in this case where no chemical testing was performed. The defendant argues that the field sobriety tests performed herein did not yield any numerical results and thus, such testimony should not have been allowed. The defendant argues that the testimony in question, which suggested a per se violation of LSA-R.S. 14:98(A)(1)(b), only served to confuse the jury and raised the risk that the jury would convict the defendant based upon improper evidence. In response, the State notes that Deputy Beavers did not testify that the sobriety tests in question resulted in a numerical value. The State contends Deputy Beavers testified that the results of the tests indicated to him that the defendant was intoxicated, and that his level of intoxication was over the legal limit. This testimony, the State asserts, is permissible as it explains the primary purpose behind field sobriety tests.

Louisiana Revised Statute 14:98 defines the offense of operating a vehicle while intoxicated as follows, 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[.]

At the trial, Deputy Beavers testified that prior to the defendant's arrest, he administered the HGN, one-leg stand, and walk and turn field sobriety tests. Deputy Beavers explained the HGN procedure where the subject is requested to follow an object with his eyes and the officer looks for sudden involuntary jerking of the eye while following the object. He explained, "[i]f you start to see jerking, slight jerking at 45 degrees, that means they are over the legal limit, intoxication." Counsel for the defendant immediately objected to this testimony. Counsel argued that Deputy Beavers had not established that he was qualified to provide an interpretation of "what [the] signs on the test actually mean in terms of a person's level of intoxication." The trial court sustained the objection and allowed the prosecutor to lay the proper foundation regarding the deputy's certification. The prosecutor proceeded to question the deputy regarding his training and certification. Deputy Beavers testified that he was trained in the testing procedure and certified to administer each of the field sobriety tests in question. Counsel for the defendant objected and noted that while Deputy Beavers's testimony indicated that he was qualified to administer the tests in question, it did not establish that he was qualified to testify regarding what the results of the tests indicated. In response, the prosecutor noted that Deputy Beavers did, in fact, testify that he received instruction on interpreting what the results of the HGN test. The trial court overruled the defense's objection.

Thereafter, Deputy Beavers continued his testimony regarding the defendant's performance on the various sobriety tests and what the performance indicated. He stated that the defendant exhibited all six clues of alcohol consumption on the HGN test. Deputy Beavers testified that the presence of all six clues indicated that the defendant was "over the legal limit of 0.08 grams." Deputy Beavers further testified that he interpreted the defendant's hopping, swaying,

using his arms for balance, and putting his foot down more than three times during the one-leg stand test, to mean that the defendant's blood alcohol concentration "was over 0.08."

Upon review of the record in this case, we find that the defendant is correct in his assertion that the trial court erred in allowing Deputy Beavers to testify that the "clues" observed in the HGN test and the defendant's failed performance on the one-leg stand test indicated that the defendant's blood alcohol concentration was over the legal limit of 0.08 grams percent. While these particular tests are considered admissible evidence of intoxication and/or impairment, there is no statutory or jurisprudential authority to support use of these tests as evidence of an individual's specific blood alcohol level. Only breath and/or blood testing can determine an individual's specific blood alcohol level.

The second circuit considered a similar issue in **State v. Inzina**, 31,439 (La. App. 2 Cir. 12/9/98), 728 So.2d 458. In **Inzina**, the investigating officer, based upon his observation of the defendant, the results of the field sobriety tests administered, and the officer's past experience, testified that "in all probability [the defendant's] blood alcohol would have been over .10 grams percent or above." On appeal, the defendant argued that this testimony should not have been allowed as it called for a conclusion and for speculation. The second circuit found no error in the admission of the testimony based upon the facts of that particular case. The second circuit noted that the prosecution in that case did not rely upon the statutory presumption of intoxication and the officer's testimony was not introduced to prove that the defendant's blood alcohol level was at or above the legal limit. The second circuit further noted that the defendant received a bench trial, and thus, the likelihood that the evidence would confuse the fact finder was greatly reduced. **Inzina**, 728 So.2d at 468.

However, the facts and circumstances presented in the instant case differ from those in **Inzina**, leading us to a different conclusion. Significantly, in this case, we cannot say that the State did not rely on the statutory presumption of intoxication. In both its opening remarks and charge to the jury, the trial court informed the jury of the relevant portions of LSA-R.S. 14:98, including both LSA-R.S. 14:98(A)(1)(a) (the "under the influence" requirement) and 14:98(A)(1)(b) (the presumption of intoxication provision). In its opening remarks, the trial court expressly excluded 14:98(A)(1)(c), stating, "[t]he third portion [of the statute] the State's indicated they are not proceeding under concerning controlled dangerous substances." The trial court did not exclude the statutory presumption of intoxication set forth in 14:98(A)(1)(b). Furthermore, unlike the defendant in **Inzina**, the defendant herein was tried by a jury. Therefore, we find that the trial court erred in admitting Deputy Beavers' testimony.

However, our inquiry does not stop here. The erroneous admission of prejudicial evidence is subject to harmless error analysis. See **State v. Leonard**, 05-1382 (La. 6/16/06), 932 So.2d 660, 668-669. An error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. **State v. Leger**, 05-0011 (La. 7/10/06), 936 So.2d 108, 140, cert. denied, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2007). See also LSA-C.Cr.P. art. 921.

After reviewing the record evidence in this case, we find that the error in allowing Deputy Beavers' testimony regarding the defendant's blood alcohol level was harmless error that does not warrant reversal of the defendant's conviction.

It is well settled that 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 test, are sufficient to support a charge of driving while intoxicated. **State v. Anderson,** 00-1737 (La. App. 1 Cir. 3/28/01), 784 So.2d 666, 676, writ denied, 01-1558 (La. 4/19/02), 813 So.2d 421. 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. See **State v. Smith**, 93-1490 (La. App. 1 Cir. 6/24/94), 638 So.2d 1212, 1215.

In the instant case, Deputy Beavers testified that the defendant had a strong odor of alcohol on his breath and person, was unsteady on his feet, and his speech was slurred. He also testified that, during the HGN test, the defendant showed signs of all six intoxication indicators (three in each eye). During the "walk-and-turn test," the defendant could not keep his balance, stepped off of the line, stopped walking and used his arms to steady himself, and failed to proceed heel-to-toe as instructed. According to Deputy Beavers, the defendant did not offer any explanation for his poor performance. During the one-leg stand test, the defendant hopped, swayed while balancing, repeatedly put his foot down, and used his arms to balance himself. Based upon these observed behavioral manifestations, Deputy Beavers concluded that the defendant was intoxicated.

Deputy Beavers further testified that in response to questioning at the time of the offense, the defendant admitted that he imbibed four beers.

In his own defense, the defendant testified that, although he consumed three and one-half glasses of wine earlier that night, he was not impaired. He admitted that he drove erratically (performed a wide turn, drove in the middle of the road, entered an emergency lane to turn right on red, failed to come to a complete stop at a stop sign, etc.), but claimed that he did so because he was tired. The defendant further stated that he thought he was alone on the road on the night in question. He

stated that if he had known that Deputy Beavers was behind him, he would not have driven this way. The defendant attributed his poor performance on the field sobriety tests to orthopedic problems and fatigue. The defendant denied telling Deputy Beavers that he drank four beers, stating he only consumed wine.

The defendant further testified that he had a drinking problem in the past. He admitted that he had previously been convicted of DWI five times. In fact, at the time of the instant offense, he was on parole for the March 15, 2000, DWI fourth offense conviction.

Considering the foregoing, we find that the guilty verdict in this case was surely unattributable to the erroneous admission of the testimony in question. The deputy's testimony regarding the defendant's behavioral manifestations and his poor performance on the field sobriety tests was clearly sufficient to prove the defendant had been drinking and was impaired. Compare **State v. Smith**, 638 So.2d 1212; **State v. Worachek**, 98-2556 (La. App. 1 Cir. 11/5/99), 743 So.2d 1269; **State v. Minnifield**, 31,527 (La. App. 2 Cir. 1/20/99), 727 So.2d 1207, writ denied, 99-0516 (La. 6/18/99), 745 So.2d 19. It is not necessary that a DWI conviction be based upon a breath or blood alcohol test; the observations of the arresting officer may be sufficient to establish the defendant's guilt. **State v. Conner**, 02-363 (La. App. 5 Cir. 11/13/02), 833 So.2d 396, 402, writ denied, 02-3064 (La. 4/25/03), 842 So.2d 396. These assignments of error lack merit.

In his third assignment of error, the defendant contends the trial court erred in allowing Deputy Beavers to testify that the defendant initially began to submit to a breath test, but stopped once he observed the intoxilyzer's LCD printout reflecting his blood alcohol level. The defendant argues that the inference from this testimony was that the defendant stopped taking the breath test when the LCD reading indicated that he was at or above the legal limit.

Prior to trial of this matter, counsel for the defendant urged an oral motion in limine seeking to exclude any reference to the fact that the defendant observed the reading on the LCD reach 0.1 – 0.116 before he stopped the sample. Counsel argued that because there was not a valid reading made, Deputy Beavers should not be allowed to reference any particular numbers in his testimony. The trial court granted the motion. The prosecutor then argued that the witness should be allowed to testify that when the test began, the defendant was in a position to view the machine and its readout, and that the defendant stopped blowing into the machine once the machine began processing the sample. The prosecutor agreed, however, that there would be no mention made of any numerical values shown on the readout produced by the machine. Over the defense's argument that such testimony would suggest that there was a reading with some validity, the trial court agreed to allow the testimony.

At trial, Deputy Beavers testified that once an individual blows into the intoxilyzer properly, it automatically displays the blood alcohol concentration level. He further testified that the defendant was in a position where he could see the machine's display. Once the display began to indicate that it was processing the sample, the defendant put the tube down and refused to submit any further. Deputy Beavers further testified that because the defendant decided to discontinue his participation, there was insufficient air and the machine was not able to produce a valid result.

We find no error in the admission of the aforementioned testimony, which was merely the investigating officer's recount of the circumstances surrounding the defendant's refusal to properly take the breath test. A defendant's refusal to take the breath test is admissible at a DWI prosecution; the weight of such evidence is left to the trier of fact. LSA-R.S. 32:666A(2)(c); **State v. Dugas**, 252 La. 345, 355,

211 So.2d 285, 289 (1968), cert. denied, 393 U.S. 1048, 89 S.Ct. 679, 21 L.Ed.2d 691 (1969); **State v. Washington**, 498 So.2d 136, 138 (La. App. 5 Cir. 1986). Furthermore, the motion in limine sought to prohibit reference to the numerical information on the display. As the State notes in its brief, there was absolutely no reference at trial to the actual numbers that appeared on the display. Deputy Beavers testified only that the defendant was positioned where he could see the display. Moreover, even if the testimony could be said to be erroneous, the error would clearly be harmless given the strong evidence of the defendant's intoxication presented at the trial.

In his final assignment of error, the defendant contends the trial court erred in denying his motion for a new trial based upon the errors assigned above. Because we find no merit in the assigned errors, we likewise find no error in the trial court's denial of the defendant's motion for a new trial.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.