The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2019-K-00501

VS.

DEDRICK MATTHEWS

IN RE: Dedrick Matthews - Applicant Defendant; Applying For Writ Of Certiorari, Parish of East Baton Rouge, 19th Judicial District Court Number(s) 04-14-0587, Court of Appeal, First Circuit, Number(s) 2018 KA 1107;

September 17, 2019

Writ application denied.

JLW

BJJ

SJC

JTG

SMC

Hughes, J., would grant in part.

Supreme Court of Louisiana
September 17, 2019

Deputy Clerk of Court
For the Court

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 1107

STATE OF LOUISIANA

VERSUS

DEDRICK MATTHEWS

Judgment rendered FEB 25 2019

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 04-14-0587
Honorable Anthony J. Marabella, Jr., Judge

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HILLAR C. MOORE, III DISTRICT ATTORNEY DALE R. LEE ASSISTANT DISTRICT ATTORNEY BATON ROUGE, LA	ATTORNEYS FOR STATE OF LOUISIANA
BARRY S. RANSHI MARTIN E. REGAN, JR. NEW ORLEANS, LA	ATTORNEYS FOR DEFENDANT-APPELLANT DEDRICK MATTHEWS

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BEFORE: WELCH, CHUTZ, AND LANIER, JJ.

DEFENDANT'S EXHIBIT

LANIER, J.

Defendant, Dedrick Matthews, was charged by bill of indictment with two counts of vehicular homicide, a violation of La. R.S. 14:32.1 (counts one and two), and two counts of first degree vehicular negligent injuring, a violation of La. R.S. 14:39.2 (counts three and four), in an incident involving four victims. He pled not guilty. Defendant filed a myriad of counseled and pro-se motions, *inter alia*, a motion for speedy trial, a motion to quash, a motion to suppress, and a motion to dismiss, all of which were denied. Some of these denials were argued in this court during the pendency of the prosecution. See **State v. Matthews**, 2017-1106 (La. App. 1 Cir. 10/16/17), 2017 WL 4675786 (unpublished writ action); **State v. Matthews**, 2017-0432 (La. App. 1 Cir. 4/28/17), 2017 WL 1535206 (unpublished writ action).

After a trial by a six-member jury, defendant was found guilty as charged on all counts. The trial court imposed consecutive terms of imprisonment at hard labor as follows: twenty-five years as to count one, twenty-five years as to count two, five years as to count three, and five years as to count four. The trial court ordered that defendant be given credit for time served and that his sentences on counts one and two be served without the benefit of probation, parole, or suspension of sentence for the first three years of the sentences. Defendant filed unsuccessful counseled and pro-se motions for new trial, post-verdict judgment of acquittal, and reconsideration of sentence. Defendant now appeals. For the following reasons, we affirm the convictions and sentences.

FACTS

During the early morning hours of March 30, 2014, Johnny Galmon ("Galmon"), Kandace Cox ("Cox"), Tyquinicia Barnes ("Barnes"), and Barnes' sister, Khadijah Johnson ("Johnson"), were riding in Galmon's two-door Honda Accord on I-10. The four had been at Barnes' and Johnson's mother's house and were headed to a club in Port Allen. While at the house, both Johnson and Galmon had a daiquiri. During the drive, the car had a flat tire, which Cox and Galmon fixed with a spare donut tire on the roadside at the I-10/I-110 split at the base of the bridge.

Sergeant James Pittman, a Baton Rouge Police Department ("BRPD") accident reconstruction specialist, was qualified at trial, without objection, as an expert in accident investigation and reconstruction in addition to speed calculation. Sgt. Pittman described the process used to measure and record the scene of an accident using precision instruments, in addition to looking at physical evidence to determine the chain of events that initiated and followed a collision. He also extensively discussed the use of "crush calculations" in proprietary software and the cars' event data recorders to determine the speeds of the two vehicles, a Honda Accord and a Dodge Charger, at the time of the crash.

Sgt. Pittman opined that the evidence from the scene and the vehicles' computers showed that immediately after changing the tire, the victim's Honda began driving up the bridge in the far right-hand lane. He estimated they were travelling at about 20 mph. Sgt. Pittman stated that the posted speed limit on the bridge is 60 mph and that the minimum speed on the bridge would have been 45 mph. From the photographs, Sgt. Pittman noted it was a clear, dry evening, and that the street lights appeared to be functioning properly. Based on his review of the photographs, Sgt. Pittman said he had no reason to believe that either vehicle did not have its headlights on.

Sgt. Pittman testified that as manifested by the removal of his foot from the throttle, defendant likely noticed something in the road at about 0.6 seconds before impact and was driving 99 mph, braking to 93 mph, at impact. Defendant did not begin braking until 0.4 seconds before impact. While the initial braking event was not severe, Sgt. Pittman suspected defendant was still trying to figure out what was in front of him when the collision happened. Sgt. Pittman explained that while there was some attempt to steer left immediately before the crash, he could not determine if it was intentional or in reaction to the impending collision. Moreover, Sgt. Pittman admitted to having difficulty in mathematically determining defendant's speed at point of impact due to the 892 feet defendant traveled after the crash. Instead, he considered most accurate the Charger's event recording of 93 mph at impact. None of the victims were wearing

seatbelts at the time of impact. Galmon and Cox sustained fatal injuries in the collision, and Barnes and Johnson were both seriously injured.

A "crush energy report" generated by Sgt. Pittman on May 28, 2014, was introduced into evidence. That report contained a result based on formula error, which was noted on the record as improperly calculating the crash speed. That error was highlighted by Sgt. Pittman in his testimony and on the report. Sgt. Pittman only noticed the error the morning of his trial testimony, which caused him to generate an amended report that same morning. Immediately thereafter, it became apparent that defense counsel did not have a copy of the amended report, which was dated March 1, 2018.

It was defense counsel's concern that his crash expert did not have the new report with which to compare his findings. The trial court ended the trial day early in order to permit defendant's expert time to examine the new report. In a hearing outside the presence of the jury, Sgt. Pittman noted that the defense expert had the same underlying data that he collected and should be aware the initial report's result was erroneous. On the next day of trial, defense counsel withdrew the objection, stating on the record the error was not detrimental to defendant's case, but, in fact, helped his case.

Sgt. Pittman narrated a presentation of photographs taken at the scene for the benefit of the jury, including photos of both vehicles and their conditions following the crash. One photograph of each deceased victim was shown as well. Sgt. Pittman noted the Honda appeared to have a "donut" tire as a result of the tire change.

Lieutenant Cory Reech was dispatched to the scene of the collision on the "superstructure" of the I-10 Horrace Wilkinson Bridge ("bridge") over the Mississippi River. Upon his arrival, he saw the Honda "almost at the top of the superstructure" with the bodies of Galmon and Cox in and next to the car, in addition to seeing defendant's car a few hundred feet beyond the Honda. Lt. Reech described that one victim had been ejected from the Honda and was in the road, and the other victim was partially ejected as the result of a serious rear collision. Barnes sustained injuries requiring plates to be installed in her face and pins in her shoulder, left arm, and pelvis. Her pancreas had

ruptured in the collision. Johnson sustained broken ribs and punctured lungs, and required a chest tube to breathe while receiving emergency care.

While at the scene of the accident, Lt. Reech saw the driver of the vehicle who caused the collision and approached him to conduct an investigation. Lt. Reech later identified the driver as defendant in open court. Other officers who had responded to the scene before Lt. Reech believed defendant may have been intoxicated. Upon initial contact, Lt. Reech **Mirandized**[1] defendant, who said he understood his rights. Lt. Reech noted the odor of alcohol on defendant's breath and stated that defendant had slurred speech and glassy red eyes. At the scene, defendant told Lt. Reech that he was driving the vehicle, that he was "momentarily distracted by his passenger," and that "the next thing he knew," his vehicle struck the Honda. Defendant also admitted he had consumed two to three drinks at a casino. Defendant further stated that he and his companion chose to drive across the river to go to another bar because the casino stopped serving alcohol at 2:00 a.m.

Lt. Reech administered the Horizontal Gaze Nystagmus portion of the standardized field sobriety test twice. Defendant showed six out of six clues both times, indicating a substantial probability that defendant was intoxicated. At that point, Lt. Reech asked defendant to submit to a breath test at the police station. Defendant initially agreed to comply, and Lt. Reech sent defendant to the station in the care of BRPD Sergeant John Fontenot because he had an audio/video recording system in his vehicle. That video was played for the jury.

After four failed attempts at completing the chemical breath test on an Intoxilyzer 5000, Lt. Reech determined defendant was being intentionally non-compliant and took his willful failure to perform the tests as a refusal. Defendant belched during the fourth test administration, which Lt. Reech understood as a stalling tactic, knowing that no fewer than 15 minutes of no mouth contamination must occur for a proper test to be run. With those circumstances, and the fact there were fatalities in the collision, Lt. Reech

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

determined a chemical blood test was necessary. At no point did defendant refuse to submit to a blood draw, and in fact went to sleep in the blood draw room while waiting for a phlebotomist.

A short time later, Lt. Reech met with defendant in parish jail to continue his investigation. While defendant refused to give a statement, he made some "unsolicited comments" that Lt. Reech recorded in his notes. In those comments, defendant expressed remorse, but also suggested "some kind of drug" may have been in his drink.

Mary Tate, of the Louisiana State Police crime lab, testified at trial as an expert in the field of blood alcohol analysis. Before her testimony began, defense counsel raised an objection regarding the chain of custody of defendant's specimen. Defendant's blood sample was sent to a lab in Indiana to be tested for synthetic cannabinoids. When the sample was returned, the evidence bag that had been sent with it was missing. As a result, the State waived presenting any findings from that lab, though Tate testified the label on the samples remained the same. However, the State Police lab tested the sample before being sent to Indiana, thus the State argued those results should remain admissible. Regarding the chain of custody for defendant's blood sample relative to the Louisiana State Police lab, the trial court found a sufficient chain of custody was established by a preponderance of the evidence.

Tate testified about the procedures she used to test blood for alcohol content. Following that discussion, Tate revealed defendant's blood sample had a blood alcohol concentration ("BAC") of 0.11. Following her testimony, the State stipulated victim Galmon also had a BAC of 0.11, in addition to a positive reading for alprazolam in the amount of 4.1 ng/ml. The State noted the therapeutic range for that drug is between 10 and 40 ng/ml.

Defendant called one witness, Richard Fox, as an expert in accident reconstruction. Fox testified that Galmon was travelling at such a slow speed, he rendered himself a "looming" risk to anyone behind him. Fox testified that defendant had a "quicker reaction time than average" "for a sober person," and that his application of the brakes and a left turn indicated he did all he could to avoid the accident, even had he been sober. Fox

determined the speed of the Honda to be 17.5 mph. Fox conceded that a "normal" driver operating a vehicle at 100 mph is focusing well ahead due to his speed, and normal reaction time calculations did not "apply to him."

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, defendant challenges the sufficiency of the evidence. Defendant contends that because victim Galmon was both intoxicated and under some amount of influence of alprazolam, defendant was not the proximate or direct cause of the collision that resulted in the charged offenses. Defendant claims that Galmon's extremely low speed of 17 mph on the bridge created an unavoidable hazard such that any average sober driver would have been at high risk of a collision. Essentially, on appeal defendant posits that Galmon's alleged criminal actions in both driving while intoxicated and below the minimum posted speed limit on I-10 absolve defendant from any criminal liability for the collision. In turn, the State argues defendant was "clearly intoxicated" and "clearly caused the accident with no intervening causation."

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 La. Code Crim. 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, 1308-1309 (La. 1988). The **Jackson** standard of review, incorporated in La. Code Crim. P. art. 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, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1 Cir. 6/21/02), 822 So.2d 141, 144. 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. **State v. Wright**, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 487, writ denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & writ denied sub nom, **State ex rel. Wright v. State**, 2000-0895 (La. 11/17/00), 773 So.2d 732.

An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Thomas**, 2005-2210 (La. App. 1 Cir. 6/9/06), 938 So.2d 168, 175, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness, including an expert. **State v. Leger**, 2017-0461 (La. App. 1 Cir. 11/15/17), 236 So.3d 577, 585. The fact that the record contains evidence that conflicts with the testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Morgan**, 2012-2060 (La. App. 1 Cir. 6/7/13), 119 So.3d 817, 826.

At the time of the collision at issue herein,[2] La. R.S. 14:32.1 provided in pertinent part:

> A. Vehicular homicide is the killing of a human being caused **proximately or caused directly** by an offender engaged in the operation of, or in actual physical control of, any motor vehicle, ... whether or not the offender had the intent to cause death or great bodily harm, whenever any of the following conditions exist and such condition was a contributing factor to the killing:

[2] La. R.S. 14:32.1 was amended to its current version by 2014 La. Acts, No. 372, § 1, eff. May 30, 2014. The amendment did not change the elements the State is required to prove.

> (1) The operator is under the influence of alcoholic beverages as determined by chemical tests administered under the provisions of R.S. 32:662.[3]
>
> (2) The operator's blood alcohol concentration is 0.08 percent or more by weight based upon grams of alcohol per one hundred cubic centimeters of blood.
>
> . . . .
>
> (4) The operator is under the influence of alcoholic beverages. (Emphasis added.)

Additionally, at the time of the offense, La. R.S. 14:39.2 provided in pertinent part:

> A. First degree vehicular negligent injuring is the inflicting of serious bodily injury upon the person of a human being when **caused proximately or caused directly** by an offender engaged in the operation of, or in actual physical control of, any motor vehicle, ... whenever any of the following conditions exists:
>
> (1) The offender is under the influence of alcoholic beverages.
>
> (2) The offender's blood alcohol concentration is 0.08 percent or more by weight based upon grams of alcohol per one hundred cubic centimeters of blood. (Emphasis added.)

Under the vehicular homicide statute, and by analogy first degree vehicular negligent injuring,[4] the State, "in order to convict, must prove that an offender's unlawful blood alcohol concentration combined with his operation of a vehicle to cause the death of a human being." **State v. Taylor**, 463 So.2d 1274, 1275 (La. 1985). The statute should be construed to require proof of a causal relationship between an operator's unlawful blood alcohol concentration and the death of the victim in order to convict. *Id.* The evident purpose of the vehicular homicide statute is to curb traffic fatalities caused by the consumption of alcohol. It is not aimed at persons involved in vehicular fatalities whose alcohol consumption does not cause, but merely coincides with, such an accident. *Id.* The defendant's intoxication need not constitute the sole cause of the killing, but rather, need only be a contributing factor. See La. R.S. 14:32.1; **State v. Dock**, 49,784 (La. App. 2 Cir. 6/3/15), 167 So.3d 1097; **State v. Lewis**, 2013-1588 (La. App. 4 Cir.

[3] "If the person had a blood alcohol concentration at that time of 0.08 percent or more by weight, it shall be presumed that the person was under the influence of alcoholic beverages." La. R.S. 32:662(A)(1)(c).

[4] Though La. R.S. 14:39.2(A) lacks the "contributing factor" language of La. R.S. 14:32.1, it stands to reason the legislature would not have intended for a different analysis to be applied in offenses that are largely the same, aside from the ultimate condition of the victim.

8/27/14), 147 So.3d 1251, 1261, writ denied, 2014-1992 (La. 5/15/15), 170 So.3d 158. Causation is a question of fact that has to be considered in light of the totality of circumstances surrounding the ultimate harm and its relation to the actor's conduct. **State v. Kalathakis**, 563 So.2d 228, 231 (La. 1990). Relative to first degree vehicular negligent injuring, a "violation of a statute or ordinance shall be considered only as presumptive evidence of negligence ...." La. R.S. 14:39.2(B).

In support of his contention that there was not a sufficient connection between defendant's driving while intoxicated at nearly 100 mph at 3:00 a.m. up the I-10 bridge and the fatal collision with the victims' vehicle, defendant cites **Burrage v. United States**, 571 U.S. 204, 210, 134 S.Ct. 881, 887, 187 L.Ed.2d 715 (2014), for the proposition that when a crime requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the proximate cause of the result. However, **Burrage** is easily distinguishable from this case because the already-intoxicated victim of the offense purchased heroin from defendant, used it three separate times, and subsequently died. **Burrage**, 571 U.S. at 206, 134 S.Ct. at 885. The Court noted there was testimony the victim might have died even without the heroin, and that he had six drugs in his system at the time of death. The Court found that the heroin at issue was "not an independently sufficient cause of the victim's death" and, therefore, concluded that defendant could not be subject to sentence enhancing provisions where his conduct was not the "but-for" cause of death. **Burrage**, 571 U.S. at 218-219, 134 S.Ct. at 892.

Other cases from this court are instructive. In **State v. Archer**, 619 So.2d 1071, 1073-1075 (La. App. 1 Cir.), writ denied, 626 So.2d 1178 (La. 1993), this court found the State did not prove sufficient proximate cause where the victim ran a red light, was speeding, and was intoxicated while an also intoxicated defendant attempted to make a left turn across traffic with the aid of an undisputedly green left-turn arrow. In that case, but for being intoxicated, defendant was driving prudently, and the victim was purposefully breaking several laws while also being intoxicated. In other words, with the victim speeding and running a red light, it was "sufficiently reasonable that a rational juror

could not have found proof of guilt beyond a reasonable doubt." **Archer**, 619 So.2d at 1075.

On the other side of the spectrum relative to a victim's culpability, in **State v. Watts**, 2014-0429 (La. App. 1 Cir. 11/21/14), 168 So.3d 441, 447, writ denied, 2015-0146 (La. 11/20/15), 180 So.3d 315, this court found:

> The State presented evidence from which a reasonable fact finder could determine that the defendant's judgment was impaired by his blood alcohol concentration and that this caused him to drive at speeds ranging between 84 and 95 miles per hour along a two-lane road with a posted speed limit of 45 miles per hour when traffic in the opposite lane of travel was moving very slowly. Given the defendant's reckless manner of driving, it was reasonable for the jury to infer that his intoxication contributed to his excessive speeding, failure to see the victim's vehicle, and failure to apply his brakes until one second prior to his impact with the victim's vehicle.

See also, **State v. Kenny**, 2011-1819 (La. App. 4 Cir. 5/29/13), 116 So.3d 992, 998, writ denied, 2013-1719 (La. 2/14/14), 132 So.3d 402; **State v. Dickinson**, 2008-0558 (La. App. 1 Cir. 11/3/08), 5 So.3d 179, 182-184, writs denied, 2008-2813, 2008-2876 (La. 6/5/09), 9 So.3d 870; **State v. Thomas**, 2005-2210 (La. App. 1 Cir. 6/9/06), 938 So.2d 168, 173-174, writ denied, 2006-2403 (La. 4/27/07), 955 So.2d 683.

As established at trial, defendant was maintaining a speed of 99 mph until 0.6 seconds before impact. The data recovered from his own vehicle confirmed defendant's story that he did not see the vehicle until collision was imminent. Though defendant's expert attempted to explain that a slow moving vehicle would be a "looming" danger for cars approaching it quickly from behind, this is negated by the fact defendant plainly did not see the vehicle at all until it was too late. Moreover, defendant's expert explained that a "normal" driver operating a car at 100 mph is more attentive to traffic in front of him and normal reaction times do not "apply to him." It defies rationality to find defendant's excessive speed and inattentiveness due to his 0.11 BAC did not, at a minimum, contribute to the fatal collision.

It is undisputed that Galmon was intoxicated. However, there was no testimony at trial linking his slow speed to his intoxication. This is notable because Galmon and Cox had just replaced a tire on their vehicle with a donut at the base of the bridge. There was no evidence the Honda was difficult to see, and Sgt. Pittman testified there was no reason

to believe that either vehicle, or the bridge itself, was lacking in illumination despite the late hour. In sum, though defendant's reaction time may have allegedly been faster than a sober driver, viewing the evidence in a light most favorable to the prosecution, it was well within the fact finders' ambit to find credible State evidence indicating defendant's intoxication was a contributing factor to his reacting to the victims' car only 0.6 seconds before impact. This claim is without merit.

In regards to defendant's claim of ineffective assistance of counsel for counsel's failure to put on evidence of Galmon's intoxication and its effect on his driving, such a claim is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted.[5] See **State v. Carter**, 96-0337 (La. App. 1 Cir. 11/8/96), 684 So.2d 432, 438.

ASSIGNMENT OF ERROR NO. 2

In his next assignment of error, defendant makes a combined claim regarding evidence derived from two different State expert witnesses, in addition to an unrelated challenge to the constitutionality of the warrantless blood draw performed on him. The first claim is expressly made and involves the trial court permitting the Louisiana State Police toxicology reports into evidence, notwithstanding the fact the chain of custody of the blood samples was broken by a subsequent lab. The State argues it met its burden of proof in establishing the chain of custody of defendant's blood sample.

The second claim involves the last-minute revelation by Sgt. Pittman that he noticed the calculations on his original crash energy report were incorrect. Defendant now argues that his expert was prejudiced by his not receiving the report until the evening before he was set to testify.

The final claim makes cursory reference to the warrantless blood draw that obtained a blood sample from defendant. Though he argues it was unconstitutionally obtained, he does not give any legal basis or rationale in support. In any event, this claim

[5] The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq. in order to receive such a hearing.

will not be discussed as this court has already addressed, and found meritless, the presumed underlying claim regarding the constitutionality of La. R.S. 32:666(A)(1) in the denial of defendant's prior writ application. See **State v. Matthews**, 2015-1296 (La. App. 1 Cir. 10/1/05), writ denied, 2015-2022 (La. 12/7/15) (unpublished writ actions).

As to the first claim, after the State had the sample tested to determine defendant's BAC, it was sent to a lab in Indiana on the speculation it contained evidence of synthetic marijuana use. However, as previously noted, upon the return of the evidence, the original envelope containing the samples was missing. As a result, the State waived presentation of any evidence derived from the Indiana lab's testing procedures. Included with defendant's sample sent to Indiana was one belonging to Galmon. Both parties subsequently stipulated that the lab's results also revealed that Galmon was both intoxicated at 0.11 BAC, and had 4.1 ng/ml of alprazolam in his system.

The law does not require that evidence of chain of custody eliminate all possibility that an object has been altered for admission; it suffices if custodial evidence establishes that it is more probable than not that object is one connected with the case and a preponderance of the evidence is sufficient. **State v. Sweeney**, 443 So.2d 522, 528 (La. 1983) (citing **State v. Dotson**, 260 La. 471, 512, 256 So.2d 594, 608-609 (La. 1971), cert. denied, 409 U.S. 913, 93 S.Ct. 242, 34 L.Ed.2d 173 (1972)); **State v. Smith**, 2015-0186 (La. App. 1 Cir. 9/18/15), 181 So.3d 111, 116, writ denied, 2015-1870 (La. 9/16/16), 206 So.3d 204. Moreover, any lack of positive identification or a defect in the chain of custody goes to the weight of the evidence rather than to its admissibility. **State v. Gentry**, 462 So.2d 624, 627 (La. 1985); **State v. Crucia**, 2015-0303 (La. App. 1 Cir. 9/18/15), 181 So.3d 751, 758, writ denied sub nom, **State ex rel. Crucia v. State**, 2015-1986 (La. 11/18/16), 213 So.3d 385.

Here, as noted above, the evidence actually admitted at trial against defendant was obtained from the Louisiana State Police laboratory, and the officer who was present at the sample's collection, as well as the analyst who performed the testing, were present and testified. Additionally, the "transportation lady" was available to testify, but the trial

court reasoned she was unnecessary as the State had met its burden. Defendant has not shown any trial court error regarding the chain of custody.

As to defendant's second claim, while defense counsel objected to the late production of the report, after the report was tendered and defendant's expert witness had the opportunity to examine it, defense counsel retracted his objection. It is clear from the record below that any error was unintentional, that there was no malicious intent to hide any evidence, and that the underlying data upon which the report was based was turned over properly and well in advance of trial. In fact, defense counsel acknowledged the error benefited defendant's trial strategy in that it lowered the estimated speed of Galmon's car from 17.7 mph to 17.5 mph. Because defense counsel retracted his objection, and did so with good reason, there is nothing for this court to review. See La. Code Crim. P. art. 841; **State v. Lampley**, 2018-0402 (La. App. 1 Cir. 11/2/18), ___ So.3d ___, ___, 2018 WL 5732843 (unpublished).

ASSIGNMENT OF ERROR NO. 3

In his final assignment of error, defendant claims he received an excessive sentence. Specifically, defendant raises two sub-claims. First, defendant argues the trial court improperly retroactively applied the amended sentencing provisions of La. R.S. 14:32.1(D), effective May 30, 2014. Second, defendant alleges the trial court failed to consider any mitigating evidence and considered elements of the offense as aggravating factors, contrary to the provisions of La. Code Crim. P. art. 894.1. In support, defendant claims other offenders who committed more heinous acts received lesser sentences than he. Defendant also contests the consecutive nature of his sentences.

The State argues both that the sentences are not constitutionally excessive and that defendant did not raise all of his arguments regarding excessiveness below. The State's latter point is in error as defendant raised a myriad of related claims in his pro-se motion to reconsider sentence.

Retroactive Application of La. R.S. 14:32.1(D)

In his first excessive sentence sub-claim, defendant contends the trial court erroneously retroactively applied the present version of the vehicular homicide statute,

rather than the version in effect at the time of the offense. At present, and effective May 30, 2014, La. R.S. 14:32.1(D) holds:

> Notwithstanding the provisions of Code of Criminal Procedure Article 883, if the offense for which the offender was convicted pursuant to the provisions of this Section proximately or directly causes the death of two or more human beings, the offender shall be sentenced separately for each victim, and such sentences shall run consecutively. In calculating the number of deaths for purposes of this Subsection, a human being includes an unborn child.

However, the version in effect at the time of the offense[6] contained no such provision mandating consecutive sentences. As such, this court will address the appropriateness of the consecutive sentences as it does when addressing an ordinary excessiveness claim.

Mitigating Factors/Consecutive Sentences

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Dufrene**, 2017-1496 (La. App. 1 Cir. 6/4/18), 251 So.3d 1114, 1125. 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 and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Spikes**, 2017-0087 (La. App. 1 Cir. 9/15/17), 228 So.3d 201, 204. 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. Ford**, 2017-0471 (La. App. 1 Cir. 9/27/17), 232 So.3d 576, 587. 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 Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Letell**, 2012-0180 (La.

[6] See 2012 La. Acts, No. 662, § 1, which was effective between June 7, 2012 and May 27, 2014. There was an intervening version of the statute that did not contain the mandatory consecutive sentence language, which was effective May 28, 2014 to May 29, 2014. See 2014 La. Acts, No. 280, § 1.

App. 1 Cir. 10/25/12), 103 So.3d 1129, 1138, writ denied, 2012-2533 (La. 4/26/13), 112 So.3d 838.

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982); **State v. Ducote**, 2016-1457 (La. App. 1 Cir. 4/12/17), 222 So.3d 724, 727. The trial judge should review defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981); **State v. Scott**, 2017-0209 (La. App. 1 Cir. 9/15/17), 228 So.3d 207, 211, writ denied, 2017-1743 (La. 8/31/18), 251 So.3d 410. On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam); **State v. McCasland**, 2016-1178 (La. App. 1 Cir. 4/18/17), 218 So.3d 1119, 1123.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. Code Crim. P. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. **State v. Riles**, 2006-1039 (La. App. 1 Cir. 2/14/07), 959 So.2d 950, 956, writ denied, 2007-0695 (La. 11/2/07), 966 So.2d 599.

Pre-trial, post-trial, and at sentencing, defendant steadfastly denied any responsibility for causing the accident and consistently attempted to place blame on the four victims for their own deaths throughout several filings and letters to the trial court. Moreover, when given a chance to speak at his sentencing, he said, among other things:

> First of all, I would like to give my condolences to the family who lost their loved ones in this unfortunate accident. I could truly sympathize with them because I personally know how it feels to lose a child to misfortune. The Lord knows that remote and indirect consequences were not foreseeable, but I did exercise reasonable care by taking evasive actions to avoid the collision. I did everything in my power any person of ordinary and prudent would've did to avoid similar circumstances, to avoid a collision, and I'm just deeply pained. My whole life I've always been a God-fearing man, and I've been praying since this unfortunate accident occurred that [G]od will comfort the family that lost their loved ones. Also, comfort my family, also. I know that unfortunate night, it will haunt us forever; and I've made up my mind, also, seek counseling. I know that I need it. It is essential. And I wish I could turn back the hands of time, like, you know, just – it -- it's hard. It's hard. It's hard.

From the record below, defendant presented no other mitigating evidence outside of the fact that his incarceration would be hard on his own family.

It is clear in its reasons for sentence that the trial court thoroughly considered Article 894.1. At sentencing, the trial court noted defendant had four prior felony convictions for drug offenses and had an extensive criminal history.[7] The trial court then went through the facts proven at trial, noting that the victims had been travelling slowly on a spare tire and that defendant was only able to decelerate "slightly" before colliding with the victims. The court then went on to list the extensive and permanent injuries suffered by the surviving victims who had to be removed from their vehicle with "jaws of life" operated by rescuers. The court further highlighted the fact that defendant was intoxicated at a level of 0.11 BAC and had fallen asleep for the majority of the drive from the scene to the police station, and then again to the hospital. It found relevant the fact that defendant did not know how much he had to drink, that he was driving because the passenger was "more drunk than him," and that they were travelling across the river "to go party some more."

However, in arriving at appropriate sentences, the trial court focused largely on defendant's lack of remorse. The court noted at sentencing how defendant primarily focused on the effects of a conviction on his own family. The trial court did take umbrage

[7] Defendant's PSI also includes information regarding multiple arrests in Louisiana, Texas, and Florida for possession and distribution drug offenses, in addition to an arrest for driving while intoxicated and being a felon in possession of a firearm.

with defendant's characterization of the incident as a "simple accident" and his many pre-trial pro-se motions asserting the same. Specifically, the court found:

> An accident is where a person inadvertently runs a stop sign, when a person is following too closely, or when a person is being inattentive. An accident is not when a person becomes so intoxicated they greatly exceed the speed limit, they get behind the wheel because they are the least drunk, they are driving across the river to drink more, they are driving over ninety-five miles per hour in that condition killing two people instantly and seriously injuring two others.

The court reasoned the accident was "was caused by the defendant's impaired driving and judgment as a result of his intoxication, inattentiveness, and outrageously high speed." After observing defendant had been arrested "multiple times for drinking offenses, drug offenses" and was a "fourth time" convicted felon, the trial court found that defendant was in need of a correctional or custodial environment and that a lesser sentence would deprecate the seriousness of his offense. The court was also concerned he would continue to commit drug and alcohol-related crimes.

This court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Parker**, 2012-1550 (La. App. 1 Cir. 4/26/13), 116 So.3d 744, 754, writ denied, 2013-1200 (La. 11/22/13), 126 So.3d 478. In sentencing defendant, the trial court made clear defendant's conduct constituted the worst offenses and that defendant was one of the worst offenders. Also as noted, he poses an unusual risk to the public safety.

Though defendant contends otherwise, in its reasons the trial court was not referring to elements of the offense as aggravating factors, merely the deplorably reckless manner in which defendant committed the offenses themselves. Additionally, the court did not improperly retroactively apply the present version of La. R.S. 14:32.1(D), but instead found where "[t]he automobile in which the victims were riding after the crash resembled a two-seat automobile rather than the sedan it was," due to "his total lack of any remorse and acceptance of responsibility, counts one, two, three, and four shall run consecutively with each other." The trial court did contemplate the mitigating evidence, however there was not much presented by defendant to consider. Finally, given the

circumstances and consequences of defendant's actions, the maximum sentence defendant received was not unconstitutionally excessive. See **State v. White**, 2010-1799 (La. 7/1/11), 68 So.3d 508, 511 (per curiam); **State v. LeBlanc**, 2009-1355 (La. 7/6/10), 41 So.3d 1168, 1173-74 (per curiam); **State v. Deville**, 2011-88 (La. App. 3 Cir. 10/5/11), 74 So.3d 774, 780-81, writ denied, 2011-2450 (La. 3/30/12), 85 So.3d 114.

The trial court adequately considered the factors set forth in Article 894.1. Given the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial court. The trial court provided sufficient justification in imposing maximum sentences and ordering that they be served consecutively. See **State v. Mickey**, 604 So.2d 675, 679 (La. App. 1 Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

The assignment of error regarding the imposition of consecutive sentences is without merit.

REVIEW FOR ERROR

The defendant requests that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, regardless of whether such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

Upon conviction for vehicular homicide, La. R.S. 14:32.1(B)[8] mandates imposition of a fine of not less than $2,000.00 nor more than $15,000.00. The trial court did not impose any fines. Although the failure to impose the fine is error under Article 920(2), it is not inherently prejudicial to defendant. Because the trial court's failure to impose the fine was not raised by the State, and consistent with this court's jurisprudence, we are not required to take any action. See **State v. Price**, 2005-2514 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTIONS AND SENTENCES AFFIRMED.

[8] Though La. R.S. 14:32.1 has been amended since the date the offenses were committed, the fine amounts have remained unchanged in circumstances such as present herein.

Additional material from this filing is available in the Clerk's Office.