REL: April 12, 2019

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2018-2019

CR-17-1155

Bryan Patrick Hopson

v.

State of Alabama

Appeal from Lee Circuit Court
(CC-17-768)

WINDOM, Presiding Judge.

Bryan Patrick Hopson appeals his convictions for second-degree assault, a violation of § 13A-6-21(a)(3), Ala. Code 1975; leaving the scene of an accident, a violation of § 32-10-1, Ala. Code 1975; two counts of attempting to elude a law-

enforcement officer, violations of § 13A-10-52(b), Ala. Code 1975; third-degree assault, a violation of § 13A-6-22(a)(2), Ala. Code 1975; reckless endangerment, a violation of § 13A-6-24, Ala. Code 1975; and reckless driving, a violation of § 32-5A-190, Ala. Code 1975. Hopson was sentenced as a habitual felony offender to 17 years in prison for his conviction of second-degree assault, to 10 years in prison for his conviction of leaving the scene of an accident, to 15 years in prison for his convictions of attempting to elude, to 1 year in jail for his conviction of third-degree assault, to 1 year in jail for his conviction of reckless endangerment, and to 90 days in jail for his conviction of reckless driving. The sentences for Hopson's convictions of second-degree assault and leaving the scene of an accident were to be served consecutively; all other sentences were to be served concurrently.

On January 10, 2017, at 10:39 p.m., Deputy David Gamper with the Lee County Sheriff's Department was on patrol when he saw a white Volkswagen Jetta automobile in Opelika matching the description of a vehicle he knew to be driven by Bryan Hopson. Deputy Gamper was familiar with Hopson and was aware

that there was an outstanding warrant for Hopson's arrest. After confirming that the vehicle belonged to an individual affiliated with Hopson, Deputy Gamper initiated a traffic stop of the vehicle. The Jetta traveled slowly for approximately one-tenth of a mile before coming to a stop. Deputy Gamper approached the Jetta and asked Hopson, the driver, to step out of the vehicle. Jerrilyn McDonald was a passenger in the vehicle. Instead of complying with Deputy Gamper's command, Hopson drove away. Deputy Gamper returned to his vehicle and pursued Hopson. During the pursuit, Deputy Gamper reached a speed of 136 miles per hour. Hopson often drove on the wrong side of the road, swerving along the way to avoid oncoming vehicles. Spike strips were laid by other law-enforcement officers along Hopson's anticipated route. Despite Hopson's driving over the spike strips and having his tires punctured, Hopson continued to drive at speeds of approximately 50-60 miles per hour. The chase finally ended when the vehicle Hopson was driving struck a vehicle being driven by Hillary Cole. The chase lasted 28 minutes and covered 43 miles over county roads in three counties. A dash-camera video recording

of the traffic stop and subsequent pursuit was entered into evidence and published to the jury.

After the accident, Hopson got out of the vehicle and ran into the woods. A K-9 unit was dispatched to track Hopson. A short time later, Hopson was found asleep in a wooded area near the crash.

Cole went to the hospital for minor injuries suffered in the collision. McDonald, Hopson's passenger, sustained more significant injuries. McDonald was transported by ambulance to a local hospital. McDonald testified that as a result of the crash she broke her back in two places, fractured her shoulder in three places, broke her femur, and sustained a compound injury to her ankle. McDonald was hospitalized for six days after surgery for her injuries. The insertion of a rod and a metal plate was required to repair her femur. McDonald was not released from care for six months. McDonald testified that as a result of her injuries she cannot "bend down any more because [she] can't get up" and that her ankle is "always going to be messed up." (R. 249.) She stated that she cannot run or jog.

On appeal, Hopson argues: 1) that the circuit court erred in denying his motions for judgment of acquittal; 2) that his convictions violate principles of double jeopardy; and 3) that the State failed to prove his prior convictions under the Habitual Felony Offender Act, § 13A-5-9, Ala. Code 1975 ("the HFOA").

I.

Hopson contends that the circuit court erred in denying his motions for judgment of acquittal with respect to his convictions for: a) second-degree assault and b) reckless-endangerment.[1]

Regarding the sufficiency of the evidence, this Court has held:

> "In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided

[1]Hopson's sufficiency claims are being addressed first because if the evidence is held insufficient to sustain Hopson's conviction for reckless-endangerment, that determination would dispose of the need to address Hopson's claim that his convictions for both reckless endangerment and reckless driving violate double-jeopardy principles.

> the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Cr. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993). With these basic principles of law in mind, this Court will review Hopson's specific claims.

A.

Hopson argues that the evidence was insufficient to convict him of second-degree assault because the State failed to prove that McDonald suffered "serious physical injury" as a result of the crash. Hopson cites McDonald's statement that her broken back "was not a big deal" and that her back was "just mostly sore." (R. 257.) Hopson also notes that

McDonald did not return to see an orthopaedic physician following her surgery and that the State failed to provide medical records substantiating McDonald's injuries.

Section 13A-6-21(a)(1), Ala. Code 1975, provides that a person commits the crime of assault in the second degree if, with intent to cause serious physical injury to another person, he or she causes serious physical injury to any person. Serious physical injury is defined in § 13A-1-2(14), Ala. Code, as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." (Emphasis added.)

In Hunter v. State, 866 So. 2d 1177 (Ala. Crim. App. 2003), this Court discussed "serious and protracted disfigurement" in relation to the proof of serious physical injury in an assault case, and we noted that "protracted" is defined as "'prolong[ed] in time or space.'" Id. at 1179 (quoting Merriam-Webster's Collegiate Dictionary (10th ed. 1999)). Furthermore, although a medical expert's testimony about the victim's injuries may be helpful, such evidence is

not necessary to prove that a victim has suffered "serious physical injury." See James v. State, 654 So. 2d 59, 60 (Ala. Crim. App. 1994). A layman may generally testify as to his own bodily condition. Charles W. Gamble, McElroy's Alabama Evidence, § 128.10(4) (6th ed. 2009).

The State presented evidence indicating that as a result of the crash McDonald suffered a broken femur, sustained injuries to her back, fractured her shoulder in three places, and sustained a compound injury to her ankle. She required surgery to repair her femur and was hospitalized for six days. To repair her femur, a metal rod and plate were placed inside her leg; McDonald testified that the rod is intended to be permanent. McDonald was under a doctor's care for six months. As a result of her injuries, McDonald has limited mobility and cannot run or jog. McDonald testified that her ankle is "always going to be messed up." (R. 249.)

The State's evidence was sufficient for the jury to have reasonably concluded that McDonald had suffered a protracted impairment of her health. Therefore, McDonald suffered "serious physical injury" as defined in § 13A-1-2(14), and the circuit court properly denied Hopson's motion for a judgment

of acquittal as to the count for second-degree assault. See Ex parte Marlowe, 854 So. 2d 1189, 1193 (Ala. 2003) (adopting this Court's shift from the more stringent definition of "serious physical injury"); see also Glass v. State, 671 So. 2d 114, 120 (Ala. Crim. App. 1995), overruled on other grounds by Ex parte Gentry, 698 So. 2d 916 (Ala. 1996) (holding that the victim had suffered a "protracted impairment of health" where, as a result of the assault, she suffered severe sinus headaches, a deviated septum, additional sinus problems, and pain in her jaw when she chewed); Jones v. State, 620 So. 2d 129, 131 (Ala. Crim. App. 1993) (holding that the victim had suffered a "protracted impairment of health" where he was hospitalized for a total of 21 days on 2 separate occasions, he had received treatment for several months, and he still had a bullet in his arm and a metal plate in his leg); Thomas v. State, 418 So. 2d 964, 965-66 (Ala. Crim. App. 1982) (holding that, although a medical expert testified that the victim's wounds were superficial, the victim's testimony about her recurring pain and suffering from her wounds and her exhibition of her scars to the jury were sufficient to support the jury's determination that she had suffered serious

physical injury). To the extent there was conflicting evidence regarding the severity of McDonald's injuries, the conflicting evidence merely created a question for the jury. See Waddle v. State, 473 So. 2d 580, 582 (Ala. Crim. App. 1985) ("[W]e have held that, where there is a conflict in the evidence, the inferences to be drawn from the evidence, the weight of the evidence, and the credibility of the witnesses are all questions for the jury." (citations omitted)). Therefore, this issue does not entitle Hopson to any relief.

B.

Hopson contends that the evidence was insufficient to sustain his conviction for reckless endangerment. According to Hopson, his actions did not endanger Deputy Gamper; rather, Deputy Gamper "was only endangered (if at all) because Gamper elected to initiate the chase and continue it." (Gamper's brief, at 52.)

Count 7 of the indictment against Hopson charged as follows:

> "The Grand Jury of Lee County charges that before the finding of this indictment, Bryan Patrick Hopson, whose name is otherwise unknown to the Grand Jury, did on or about January 10, 2017, reckless[ly] engage in conduct, to-wit: driving at [a] high rate of speed and leading law enforcement in a car chase,

> which created a substantial risk of serious physical injury to another person, to-wit: Deputy David Gamper, in violation of § 13A-6-24 of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 26.)

Under § 13A-6-24, a person commits reckless endangerment when he or she "recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." The Commentary to § 13A-6-24 clarifies that the statute "does not require any particular person to be actually placed in danger, but deals with potential risks, as well as cases where a specific person actually is within the area of danger."

In this case, evidence was presented indicating that Hopson chose to speed off during the traffic stop and that the ensuing chase lasted 28 minutes, during which the vehicles traveled 43 miles at speeds that exceeded 100 miles per hour. Deputy Gamper's pursuit of Hopson at those speeds created a substantial risk of serious physical injury to him. Thus, the evidence was sufficient to sustain Hopson's reckless-endangerment conviction. That Deputy Gamper elected to give pursuit, which was done in the course of his duties as a law-

enforcement officer, is irrelevant. Therefore, this issue does not entitle Hopson to any relief.

II.

Having addressed Hopson's claims regarding the sufficiency of the evidence, this Court turns to Hopson's argument that some of his convictions violate double-jeopardy principles.

The Fifth Amendment to the United States Constitution protects a criminal defendant from being twice put in jeopardy for the same offense. "The Fifth Amendment's Double Jeopardy Clause protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." Woods v. State, 709 So. 2d 1340, 1342 (Ala. Crim. App. 1997) (citing Meyer v. State, 575 So. 2d 1212, 1217 (Ala. Crim. App. 1990), and North Carolina v. Pearce, 395 U.S. 711 (1969)). Hopson's claims implicate the Clause's third protection -- prohibiting multiple punishments for the same offense.

A.

Hopson argues that his convictions for reckless endangerment and reckless driving violate double-jeopardy principles because, he says, reckless driving is a lesser-included offense of reckless endangerment.

Because the offenses of reckless endangerment and reckless driving are defined in distinct statutes, the test announced in Blockburger v. United States, 284 U.S. 299, 304 (1932), is appropriate for this Court's analysis:

> "In Blockburger v. United States, 284 U.S. 299, 304 (1932), the United States Supreme Court held that 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.' The Blockburger test is a two-pronged test. First, 'the threshold inquiry under Blockburger is whether the alleged statutory violations arise from "the same act or transaction."' State v. Watkins, 362 S.W.3d 530, 545 (Tenn. 2012). See also State v. Armendariz, 140 N.M. 182, 188, 141 P.3d 526, 532 (2006) ('The first part of the test requires the determination of whether the conduct underlying the offenses is unitary.'); R.L.G., Jr. v. State, 712 So. 2d 348, 359 (Ala. Crim. App. 1997) ('Before the double jeopardy prohibition is triggered ... it must appear ... that the crimes arose out of the same act or transaction.' (citations omitted)), aff'd, 712 So. 2d 372 (Ala. 1998); and State v. Thompson, 197 Conn. 67, 72, 495 A.2d 1054, 1058 (1985) ('An analysis of the Blockburger test involves a threshold determination of whether the offenses arose out of the 'same act or transaction,' and a substantive

> analysis of whether they contain distinct elements.'). The Double Jeopardy Clause does not operate to prohibit prosecution, conviction, and punishment in a single trial for discrete acts of the same offense. See Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991). Thus, whether a defendant's conduct constitutes the same act or transaction 'does not determine whether there is a double jeopardy violation; rather it determines if there could be a violation.' State v. Schoonover, 281 Kan. 453, 467, 133 P.3d 48, 62 (2006).
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> "Second, if the offenses did arise from the same act or transaction, then it must be determined whether each offense requires proof of an additional fact which the other does not, i.e., whether the two offenses are the 'same' for double-jeopardy purposes. '[A]pplication of the test focuses on the statutory elements of the offense,' Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975), and is a rule of statutory construction based on the assumption that a legislature 'ordinarily does not intend to punish the same offense under two different statutes.' Whalen v. United States, 445 U.S. 684, 692 (1980). See also Rutledge v. United States, 517 U.S. 292, 297 (1996) ('[We presume that "where two statutory provisions proscribe the 'same offense,'" a legislature does not intend to impose two punishments for that offense.') (quoting Whalen, 445 U.S. at 692). It is well settled 'that a lesser included and a greater offense are the same under Blockburger.' Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977). See also Heard [v. State, 999 So. 2d 992 (Ala. 2007)], and Lewis v. State, 57 So. 3d 807 (Ala. Crim. App. 2009)."

Williams v. State, 104 So. 3d 254, 256-57 (Ala. Crim. App. 2012).

The State argues that the reckless-driving conviction and the reckless-endangerment conviction were not based on the same act or transaction and, alternatively, that, even if the two convictions were based on the same act or transaction, the Blockburger test is satisfied because the offenses each require proof of an element that the other does not. This Court disagrees.

First, this Court must determine whether the offenses of reckless endangerment and reckless driving in this case are the same for double-jeopardy purposes.

> "In determining whether a defendant's conduct constituted the same act or transaction for purposes of double jeopardy, courts look to various factors.
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> "'For example, in [State v.] Schoonover, [281 Kan. 453, 133 P.3d 48 (2006)], the Kansas Supreme Court set forth the following factors to be considered:
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> "'"[S]ome factors to be considered in determining if conduct is unitary, in other words if it is the 'same conduct,' include: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4)

> whether there is a fresh impulse motivating some of the conduct."
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> "'281 Kan. at 497, 133 P.3d at 79. Likewise, the Minnesota Supreme Court has held that "[f]actors considered when analyzing whether conduct is a single behavioral incident include 'time and place ... [and] whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective.'" State v. Bertsch, 707 N.W.2d 660, 664 (Minn. 2006) (quoting State v. Johnson, 273 Minn. 394, 404, 141 N.W.2d 517, 524-25 (1966)). New Hampshire also focuses on whether the acts are "'sufficiently differentiated by time, location, or intended purpose.'" State v. Farr, 160 N.H. 803, 810, 7 A.3d 1276, 1282 (2010) (quoting Rashad v. Burt, 108 F.3d 677, 681 (6th Cir. 1997)). See also Commonwealth v. Rabb, 431 Mass. 123, 725 N.E.2d 1036 (2000).'

"Williams [v. State], 104 So. 3d [254] at 262. The United States Court of Appeals for the First Circuit examines 'whether the crimes were different in place and time, whether there was common conduct linking the alleged offenses, whether the individuals involved in each offense were different, and whether the evidence used to prove the offenses differed.' United States v. Soto, 799 F.3d 68, 86-87 (1st Cir. 2015). Similarly, the United States Court of Appeals for the Eighth Circuit has held that '[f]actors relevant to the inquiry are: the time interval between the successive actions; the place where the actions occurred; the identity of the victim(s); the existence of an intervening act; the similarity of the defendant's acts; and the defendant's intent at the time of his actions.' Velez v. Clarinda Correctional Facility, 791 F. 3d 831, 835 (8th Cir. 2015). See also State v.

> Bernard, 355 P.3d 831, 840 (N.M. Ct. App. 2015) ('Herron v. State, 1991-NMSC-012, 111 N.M. 357, 805 P. 2d 624 [(1991)], established the unit of prosecution indicia of distinctness "under the modern analysis." ... The Herron test consists of the following six factors: "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) number of victims."'); State v. Fore, 185 Or.App. 712, 717, 62 P.3d 400, 403 (2003) ('"[Two charges arise out of the same act or transaction if they are so closely linked in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge."' (quoting State v. Fitzgerald, 267 Or. 266, 273, 516 P.2d 1280, 1280 (1973))); and People v. Rodarte, 190 Ill.App.3d 992, 1001, 547 N.E.2d 1256, 1261-62, 139 Ill. Dec. 635, 640-41 (1989) ('Factors to be considered in determining whether a defendant's conduct constitutes separate acts or merely distinct parts of a single act are: (1) the time interval occurring between successive parts of the defendant's conduct; (2) the existence of an intervening event; (3) the identity of the victim; (4) the similarity of the acts performed; (5) whether the conduct occurred at the same location; and (6) prosecutorial intent.')."

State v. Stephens, 203 So. 3d 134, 138-39 (Ala. Crim. App. 2016).

In this case, Hopson's reckless conduct could not be separated into discrete acts. Rather, the conduct occurred over a continuous interval. Hopson was convicted of driving his vehicle recklessly due, in part, to driving at excessive

speeds, driving on the wrong side of the road, and failing to stop at a stop sign, all in an attempt to elude the pursuing law-enforcement officer.

Having determined that both offenses arose from the same act or transaction, this Court must now determine whether each offense -- reckless endangerment under § 13A-6-24 and reckless driving under § 32-5A-190 -- requires proof of a fact that the other does not.

A comparison of the statutory elements of reckless endangerment and reckless driving indicates that reckless endangerment has a general-conduct element while reckless driving can arise only out of the operation of a vehicle. Thus, there are situations in which reckless endangerment can be committed without committing reckless driving. "However, the Alabama Supreme Court has explicitly rejected a strict 'elements' approach to the lesser-included/same offense determination, and has implicitly recognized the Blockburger test as a 'floor' rather a 'ceiling' for 'same offense' definitions." King v. State, 574 So. 2d 921, 931 (Ala. Crim. App. 1990) (Bowen, J., concurring specially).

> "Section 13A-1-8(b)(1), Ala. Code 1975, provides that '[w]hen the same conduct of a defendant may

establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if ... [o]ne offense is included in the other, as defined in Section 13A-1-9.' Section 13A-1-9(a), Ala. Code 1975, provides:

> "'(a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
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> > "'(1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
> >
> > "'(2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
> >
> > "'(3) It is specifically designated by statute as a lesser degree of the offense charged; or
> >
> > "'(4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission.'

"In Ford v. State, 612 So. 2d 1317 (Ala. Crim. App. 1992), this Court explained:

> "'"'[T]o be a lesser included offense of one charged in an indictment, the lesser

> offense must be one that is necessarily included, in all of its essential elements, in the greater offense charged[,]' Payne v. State, 391 So. 2d 140, 143 (Ala. Cr. App.), writ denied, 391 So. 2d 146 (Ala. 1980), ... unless it is so declared by statute."
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> "'James v. State, 549 So. 2d 562, 564 (Ala. Cr. App. 1989). "Whether a crime constitutes a lesser-included offense is to be determined on a case-by-case basis." Aucoin v. State, 548 So. 2d 1053, 1057 (Ala. Cr. App. 1989). "In determining whether one offense is a lesser included offense of the charged offense, the potential relationship of the two offenses must be considered not only in the abstract terms of the defining statutes but must also ... in light of the particular facts of each case." Ingram v. State, 570 So. 2d 835, 837 (Ala. Cr. App. 1990) (citing Ex parte Jordan, 486 So. 2d 485, 488 (Ala. 1986); emphasis in original). See also Farmer v. State, 565 So. 2d 1238 (Ala. Cr. App. 1990).'

"612 So. 2d at 1318. The 'particular facts' of each case are those facts alleged in the indictment. Thus, 'the statutory elements of the offenses and facts alleged in an indictment -- not the evidence presented at trial or the factual basis provided at

> the guilty-plea colloquy -- are the factors that determine whether one offense is included in another.' Johnson v. State, 922 So. 2d 137, 143 (Ala. Crim. App. 2005)."

Williams, 104 So. 3d at 263-64.

Section 13A-6-24 provides that "[a] person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."

Hopson's indictment for reckless endangerment charged that Hopson did

> "reckless[ly] engage in conduct, to-wit: driving at a high rate of speed and leading law enforcement in a car chase, which created a substantial risk of serious physical injury to other person, to-wit: Deputy David Gamper, in violation of § 13A-6-24, of the Code of the Alabama, against the peace and dignity of the State of Alabama."

(C. 26.)

Section 32-5A-190 provides that a person is guilty of reckless driving if that person "drives any vehicle carelessly and heedlessly in willful or wanton disregard for the rights or safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property."

Hopson's indictment for reckless driving charged that Hopson did

> "drive a motor vehicle carelessly and heedlessly in willful or wanton disregard for the rights and safety of persons or property, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, in violation of § 32-5A-190 of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 28.)

Based on the statutory elements of the offenses and the facts as alleged in the indictments charging them, reckless driving is a lesser-included offense of reckless endangerment in this case. The commission of the reckless-endangerment offense as alleged in the indictment necessarily included all the elements of the reckless-driving offense as alleged in the indictment. In other words, Hopson could not have committed the reckless-endangerment offense without also having committed the reckless-driving offense. See, e.g., State v. Potter, 31 Wash. App. 883, 887-88, 645 P.2d 60, 62 (1982) (holding that "proof of reckless endangerment through use of an automobile will always establish reckless driving").

Because Hopson was convicted of both a greater offense and a lesser offense included within the greater offense, his

convictions for both reckless endangerment and reckless driving violate double-jeopardy principles. Accordingly, Hopson's conviction and sentence for reckless driving must be vacated. See, e.g., Gholston v. State, 57 So. 2d 178 (Ala. Crim. App. 2010); Renney v. State, 53 So. 3d 981 (Ala. Crim. App. 2010); Lewis v. State, 57 So. 3d 807 (Ala. Crim. App. 2009); Holloway v. State, 971 So. 2d 729 (Ala. Crim. App. 2006); and Young v. State, 892 So. 2d 988 (Ala. Crim. App. 2004) (noting that the proper remedy when a defendant is convicted of both a greater and a lesser-included offense is to vacate the conviction and the sentence for the lesser-included offense).

B.

Hopson also argues that his convictions for two counts of attempting to elude a law enforcement officer violate double-jeopardy principles. The multiple counts arose from multiple third parties' having been injured during Hopson's attempt to elude. Hopson argues, though, that the legislature intended to allow only one conviction for attempting to elude law-enforcement officers regardless of the number of third parties injured or killed while the accused is attempting to elude.

"This is not a case where the same act or transaction constitutes a violation of two distinct statutory provisions. See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)." Girard v. State, 883 So. 2d 714, 715 (Ala. Crim. App. 2002), superseded by statute as stated in C.B.D. v. State, 90 So. 3d 227, 248 (Ala. Crim. App. 2011). Instead, "[t]he pertinent inquiry in deciding whether [these convictions are] acceptable in the face of constitutional guarantees against double jeopardy then becomes defining the correct unit of prosecution." Girard, 883 So. 2d at 715 (citing Bell v. United States, 349 U.S. 81 (1955)). In Townsend v. State, 823 So. 2d 717 (Ala. Crim. App. 2001), this Court stated:

> "'A single crime cannot be divided into two or more offenses and thereby subject the perpetrator to multiple convictions for the same offense. Const. of 1901, Art. I, § 9; U.S. Const. Amend. V.' Ex parte Darby, 516 So. 2d 786, 787 (Ala. 1987). Such question of double jeopardy is determined by the following principles:
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> > "'[I]t has been aptly noted that "the Blockburger [v. United States, 284 U.S. 299 (1932),] test is insufficient where ... the concern is not multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transaction." Rashad v. Burt, 108 F.3d 677 (6th Cir.

> 1997). This is because when "a defendant is convicted for violating one statute multiple times, the same evidence test will never be satisfied." State v. Adel, 136 Wash. 2d 629, 965 P.2d 1072 (1998). The "appropriate inquiry" in such a case "asks what 'unit of prosecution' was intended by the Legislature as the punishable act. ... The inquiry requires us to look to the language and purpose of the statutes, to see whether they speak directly to the issue of the appropriate unit of prosecution, and if they do not, to ascertain that unit, keeping in mind that any ambiguity that arises in the process must be resolved, under the rule of lenity, in the defendant's favor." Commonwealth v. Rabb, 431 Mass. 123, 725 N.E.2d 1036 (2000) (concluding that allegedly multiple drug possessions justify multiple charges if the possessions are sufficiently differentiated by time, place or intended purpose, the case here regarding defendant's possession of drugs at his residence for immediate sale and his possession of drugs at motel for future sales).'
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> "4 Wayne R. LaFave et al., Criminal Procedure § 17.4(b), 2001 Pocket Part n.66 (2d ed. 1999). See also Project, 'Twenty Ninth Annual Review of Criminal Procedure,' 88 Geo. L.J. 879, 1293 (2000) ('when the government seeks to prove that a single act or occurrence results in multiple violations of the same statute, the rule of lenity requires only one punishment unless legislative intent to impose multiple punishments is shown')."

Townsend, 823 So. 2d at 722 (footnote omitted).

Count 3 of the indictment charged that Hopson

"did on or about January 10, 2017, operate a motor vehicle on a street, road, alley, or highway and intentionally flee or attempt to elude a law enforcement officer, to-wit: Lee County Deputy David Gamper, after having received a signal from the officer to bring the vehicle to a stop, and in the course of said flight or attempt to elude, he caused death or physical injury to an innocent bystander or third party, to-wit: Jerry Lynn McDonald, in violation of § 13A-10-52(b) and (c) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 22; emphasis added.)

Count 4 of the indictment charged that Hopson

"did on or about January 10, 2017, operate a motor vehicle on a street, road, alley, or highway and intentionally flee or attempt to elude a law enforcement officer, to-wit: Lee County Deputy David Gamper, after having received a signal from the officer to bring the vehicle to a stop, and in the course of said flight or attempt to elude, he caused death or physical injury to an innocent bystander or third party, to-wit: Hillary Cole, in violation of § 13A-10-52(b) and (c) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(C. 23; emphasis added.)

Section 13A-10-52 states:

"(a) It shall be unlawful for a person to intentionally flee by any means from anyone the person knows to be a law enforcement officer if the person knows the officer is attempting to arrest the person.

"(b) It shall be unlawful for a person while operating a motor vehicle on a street, road, alley,

> or highway in this state, to intentionally flee or attempt to elude a law enforcement officer after having received a signal from the officer to bring the vehicle to a stop.
>
> "(c) A violation of subsection (a) or (b) is a Class A misdemeanor unless the flight or attempt to elude causes an actual death or physical injury to innocent bystanders or third parties, in which case the violation shall be a Class C felony. In addition, the court shall order the suspension of the driver's license of the defendant for a period of not less than six months nor more than two years."

Because this case involves two convictions under the same statute, this Court must decide whether Hopson's attempt to elude Deputy Gamper constitutes one "unit of prosecution" or two. In other words, the question here is whether the legislature intended that the defendant be prosecuted for each innocent bystander or third party injured during an attempt to elude.[2]

As set forth above, subsections (a) and (b) of § 13A-10-52, Ala. Code 1975, describe the unlawful conduct. The plain language of subsection (b) of the statute -- under which

[2]This Court does not decide here whether the offense of eluding a police officer is an offense against an officer rather than an offense against law enforcement as a class or against the public order, thereby defining the unit of prosecution by each officer involved in the pursuit rather than the offense. See, e.g., State v. Mitchell, 719 So. 2d 1245, 1247-48 (Fla. Dist. Ct. App. 1998).

Hopson was charged -- proscribes the conduct of attempting to elude by motor vehicle a law-enforcement officer after having received a signal from the officer to bring the vehicle to a stop. Subsection (c) sets forth the punishments for a violation of the statute. The offense is classified as a misdemeanor unless the flight or eluding "causes an actual death or physical injury to innocent bystanders or third parties." If a death or injury occurs, the offense is elevated to a Class C felony. The intent of subsection (c) was not to alter the gravamen of the crime of attempting to elude, but rather to enhance the penalty for attempting to elude a law-enforcement officer when that act causes death or physical injury to an innocent bystander or third party.

Furthermore, the offense of attempting to elude does not involve a victim per se. This Court has recognized that double-jeopardy principles are not violated when multiple convictions involving multiple victims are obtained from one criminal transaction. Examples of statutes that allow multiple prosecutions for multiple victims are generally the criminal-code provisions for assaultive offenses. In assaultive offenses, this Court has held that the allowable

unit of prosecution is each victim. See Ex parte McKinney, 511 So. 2d 220 (Ala. 1987) (allowing for multiple convictions when more than one person is injured as the result of a single act); Burnett v. State, 155 So. 3d 304 (Ala. Crim. App. 2013) (allowing for multiple robbery convictions for acts against multiple victims inside one business); Glass v. State, 14 So. 3d 188 (Ala. Crim. App. 2008) (holding that convictions for four counts of reckless endangerment did not violate the prohibition against double jeopardy where defendant placed well being of four people at risk when he rammed another vehicle with his vehicle).

Considering Alabama's statutory scheme, this Court sees no indication that the legislature intended to punish a person multiple times for attempting to elude because multiple persons were injured during the offense. In criminalizing the conduct, the legislature has focused solely on the act of eluding; whether death or physical injury occurs to an innocent bystander or third party is relevant only in classifying the level of punishment such conduct would receive. Thus, the plain language of the statute describes the "unit of prosecution" as the conduct of fleeing or attempting to elude. The structure of the statute indicates

that the legislature intended to limit the statute's "unit of prosecution" to the unlawful conduct set forth in subsection (a) and (b). The unit of prosecution under the attempting-to-elude statute does not turn upon the number of persons killed or who suffered physical injury as a result of the offense.

The State argues, though, that a death or physical injury to an innocent bystander or third party is an additional element of the offense of attempting to elude and that the language of subsection (c) indicates that the legislature intended an offender to be punished for each innocent bystander or third party killed or physically injured during the offense. This Court disagrees with the State's characterization of subsection (c), but, even if this Court were to accept the argument, the language of subsection (c) would be unavailing to the State. The following cases are instructive.

In McPherson v. State, 933 So. 2d 1114 (Ala. Crim. App. 2005), the appellant had been convicted of two counts of discharging a firearm into an occupied dwelling, a violation of § 13A-11-61, Ala. Code 1975. Each count of the indictment alleged that McPherson discharged a firearm into an occupied dwelling and specifically named an occupant of the dwelling.

McPherson argued that the two convictions violated double-jeopardy principles. In concluding that McPherson's two convictions violated double-jeopardy principles, this Court stated:

> "Section 13A-11-61(a), Ala. Code 1975, provides, in pertinent part:
>
> > "'No person shall shoot or discharge a firearm ... into any occupied or unoccupied dwelling ... in this state.'
>
> "Discharging a firearm into an occupied dwelling is not a victim-specific offense. Rather, the unit of prosecution in a case that involves discharging a firearm into an occupied dwelling is the act of discharging the firearm into that dwelling. Therefore, the number of people who are in the dwelling at the time of the offense is irrelevant.
>
> "In this case, the appellant was charged with discharging a firearm into the same dwelling during one course of conduct. The only difference between [the counts] of the indictment was the name of the occupant in the dwelling at the time of the offense. However, this case involved only one unit of prosecution, which was the appellant's act of discharging the firearm into the Waldens' occupied dwelling. The fact that more than one person was in the dwelling at the time of the act was irrelevant, and the names of the various occupants in [the counts] of the indictment were superfluous. Therefore, the appellant's convictions for two counts of discharging a firearm into an occupied dwelling violate double jeopardy principles."

933 So. 2d at 1118.

In Dake v. State, 675 So. 2d 1365 (Ala. Crim. App. 1995), this Court held that the appellant could be convicted of only one count of leaving the scene of an accident even though four persons were injured. The statute under which the appellant was convicted, § 32-10-2, Code of Alabama 1975, reads as follows:

> "The driver of any motor vehicle involved in an accident resulting in injury to or the death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, shall upon request exhibit his driver's license to the person struck or the driver or occupant of or person attending any motor or other vehicle collided with or damaged and shall render to any person injured in such accident reasonable assistance, including the transportation of, or the making of arrangements for the transportation of such person to a physician or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or if such transportation is requested by the injured person."

In reaching its conclusion in Dake, the Court examined McKinney v. State, 511 So. 2d 220 (Ala. 1987), in which the Alabama Supreme Court held that the "legislative intent to allow multiple prosecutions for a single act that injures more than one person is determined by the 'description of the unit of prosecution within the substantive criminal law statutes. [R. Owens, Alabama's Minority Status: A Single Criminal Act

Injuring Multiple Persons Constitutes Only A Single Offense,]

16 Cum. L. Rev., [85,] 104 [(1985-86)].'" McKinney, 511 So. 2d at 224. The Court stated:

> "'"How, then, should the unit of prosecution be described so that an intent to allow multiple convictions is clear and unequivocal? Instead of using the word 'any' to describe the unit of prosecution, the singular words 'a' or 'another' should be used. An examination, then, should be made of the Alabama Criminal Code to see how the unit of prosecution is described. This examination will disclose whether the code allows multiple convictions.
>
> "'"A review of the criminal code discloses that there are basically four categories into which the statutes can be divided. The first category includes those statutes that prohibit conduct that cannot affect multiple persons or property with a single act. These statutes prohibit such crimes as sex offenses, criminal trespass, burglary, forgery, and escape. The second category contains statutes in which the unit of prosecution is described with the word 'any'; based on the above mode of statutory construction, only one conviction should be allowed. This category consists of the following statutes: interference with

> custody, indecent exposure, enticement of a child to enter a vehicle or house for immoral purposes, possession of burglary tools, criminal possession of explosives, and transportation of stolen property, or property obtained by false pretense into the state.
>
> "'"Under the majority view, the remaining two categories would allow multiple convictions. The third category uses the indefinite article 'a' to describe the unit of prosecution, and includes such offenses as arson, offering a false instrument for recording, illegally possessing or fraudulently using a credit or debit card, permitting or facilitating an escape, bribing or intimidating a witness or a juror, promoting prostitution, abandoning a child, and endangering the welfare of a child. The last category uses the descriptive term 'another,' and incorporates, in addition to the above offenses, all forms of homicide, assault, kidnapping and unlawful imprisonment, theft of property, robbery, and the hindering of the prosecution or the apprehension of an escapee."
>
> "'16 Cum. L. Rev., supra, at 105-07.'

"McKinney, 511 So. 2d at 224-25. (Emphasis added.) Under the ... classification scheme [set forth in McKinney], a violation of § 32-10-2 falls into the second category of statutory offenses because the

> 'descriptive unit of prosecution' in that statute is the word 'any.' See § 32-10-2, supra. Furthermore, 'leaving the scene of an accident' is not a crime against the person. For these reasons, we hold that the law of the State of Alabama, as set out in McKinney, prohibits multiple convictions for violations of § 32-10-2."

675 So. 2d at 1367.

The wording of § 13A-10-52(c) is unambiguous. Section 13A-10-52(c) does not use the words "another," "person," or "individual." It uses the plurals "bystanders" and "third parties," and provides that a person commits a felony if, in attempting to elude a law-enforcement officer, he or she causes an actual death or physical injury to innocent bystanders or third parties. Proof of an identifiable individual as an additional element of the statute is not required; thus, an offense against each person who was killed or physically injured would not constitute a separate allowable unit of prosecution. The plural language indicates that the intent was to account for all persons injured during a single offense and to enhance the penalty for the injury. Subsection (c) did not change the "unit of prosecution" of the offense.

Hopson was charged with and convicted of two counts of attempting to elude a law-enforcement officer. The only difference between the counts is the name of the person who was injured. Both persons were injured at the same time as the result of the same conduct of Hopson -- attempting to elude Deputy Gamper. Because Hopson violated the attempting-to-elude statute only once, this Court holds that Hopson's two convictions for attempting to elude violate double-jeopardy principles. Accordingly, one of Hopson's convictions for attempting to elude must be vacated.

III.

Hopson argues that he was incorrectly sentenced because, he says, the State failed to prove his prior convictions for the purpose of applying the HFOA. Hopson contends that the State failed to present certified copies of his prior convictions.

It is well settled that an appellate court's review is limited to matters timely raised below. Ross v. State, 581 So. 2d 495 (Ala. 1991). "The trial court may not be put in error for failure to rule on a matter which was not presented to it or decided by it." City of Rainbow City v. Ramsey, 417

So. 2d 172, 174 (Ala. 1982) (citing Southern Cement Co. v. Patterson, 271 Ala. 128, 122 So. 2d 386 (1960)). The State's failure to properly prove a prior conviction is not a jurisdictional matter. "'The failure to object in the trial court to the State's method of proving or failure to prove prior convictions precludes consideration of that issue on appeal.'" Hale v. State, 848 So. 2d 224, 231 (Ala. Crim. App. 2002) (quoting Nichols v. State, 629 So. 2d 51, 57-58 (Ala. Crim. App. 1993), citing in turn Harrell v. State, 555 So. 2d 257 (Ala. Crim. App. 1989) and Faircloth v. State, 471 So. 2d 485 (Ala. Crim. App. 1984)). Because Hopson did not object during the sentencing hearing to the State's alleged failure to provide certified documentation of his prior convictions, Hopson's argument has not been properly preserved for appellate review. Therefore, this issue does not entitle him to any relief.

IV.

For the foregoing reasons, this Court affirms Hopson's convictions and sentences for second-degree assault, third-degree assault, leaving the scene of an accident, and reckless endangerment. However, this Court remands this cause to the

circuit court with instructions for the circuit court to vacate Hopson's conviction and sentence for reckless driving and to vacate one of Hopson's convictions and sentences for attempting to elude law enforcement and to enter a new judgment. Due return should be filed in this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; AND REMANDED WITH INSTRUCTIONS.

Kellum, McCool, Cole, and Minor, JJ., concur.