NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0535

STATE OF LOUISIANA

VERSUS

ANTWOENE IRVING

Judgment Rendered: NOV 0 1 2013

TMH

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On Appeal from the
20th Judicial District Court,
In and for the Parish of East Feliciana,
State of Louisiana
Trial Court No. 11345

Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The defendant, Antwoene Irving, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed a motion for post-verdict judgment of acquittal, which was denied. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

After dating for a brief period, the defendant and Kiewanna Sopsher began living together in Kiewanna's trailer on Central Avenue in Roseland, Tangipahoa Parish. Kiewanna's young son and daughter also lived with them. According to several relatives of Kiewanna who testified at trial, the defendant began physically abusing Kiewanna. On different occasions, Kiewanna had an injured lip, marks and scratches on her, bumps on her head, and bruises on her neck. A short time later, to get away from the defendant, Kiewanna moved out of the trailer and into the home of her sister, who lived about one-half mile from Kiewanna.

On the evening of April 5, 2011, Kiewanna drove her eleven-year-old son, Dareale, to the trailer they had lived in so that Dareale could get a belt for school. When Dareale got to the door of the trailer, he saw the defendant standing near Kiewanna's vehicle, a Buick Rendezvous, talking to her. Moments later, Dareale heard his mother scream and saw the defendant inside the vehicle choking Kiewanna, accusing her of having been with another man. Dareale tried to get the defendant off of his mother, but the defendant kicked Dareale to the ground. The defendant then jumped in the driver's seat and drove the Buick away with Kiewanna in the front passenger seat. Less than one mile away, the defendant turned onto Washington Avenue. As he drove, Kiewanna was somehow ejected

from the vehicle. After hitting the roadway, she may also have been run over by the rear wheel of the vehicle. The defendant stopped, picked up Kiewanna, who was not breathing, and placed her on the backseat floorboard. He then drove around for about three hours, including as far north as McComb, Mississippi. After talking on a cell phone to some people he knew, the defendant turned himself in to the police. The Buick, with Kiewanna's body still in it, was found on La. Hwy. 67 in East Feliciana Parish.

Dr. Susan Garcia, the pathologist who performed the autopsy on Kiewanna, testified that the cause of death was a hinge fracture to the skull. Dr. Garcia explained that Kiewanna had a fracture line across the base of her skull, which usually causes severe debilitating injury to that part of the brain stem that is crucial to functioning, and often results in instantaneous death.

The defendant was interviewed by the police. In a recorded statement, the defendant said that Kiewanna asked him to go for a ride. The defendant denied trying to choke Kiewanna or that Dareale tried to stop him. The defendant admitted that during their relationship, he had choked Kiewanna once. The defendant claimed that while he was driving, Kiewanna somehow fell from the vehicle because she apparently thought the defendant was going to beat her up. After she hit the ground, the defendant stated that he felt the back tire run over a bump. He then stopped the vehicle, picked up Kiewanna, placed her in the vehicle, and drove around.

The defendant did not testify at trial.

LAW AND ANALYSIS

In three related assignments of error, the defendant argues, respectively: (1) the trial court erred in failing to instruct the jury the State had to prove the victim died from a direct act of the defendant; (2) the trial court erred in denying the motion for post-verdict judgment of acquittal regarding the felony murder rule,

which required proof of a direct act of the offender as a prerequisite of murder; and (3) the evidence was insufficient to support the second degree murder conviction. The defendant suggests that all of the assignments of error address one issue: "the proof of necessary support [for] a second degree murder conviction under the felony murder rule."

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See 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, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 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 the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Three criminal statutes are at issue in this appeal. The first statute relates to second degree murder in La. R.S. 14:30.1, and provides in pertinent part:

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of . . . aggravated burglary, . . . [or] second degree kidnapping, . . . even though he has no intent to kill or to inflict great bodily harm.

The second criminal statute relates to second degree kidnapping, found at La. R.S.

14:44.1, and provides in pertinent part:

> A. Second degree kidnapping is the doing of any of the acts listed in Subsection B wherein the victim is:
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> * * * * *
>
> (2) Used to facilitate the commission of a felony or the flight after an attempt to commit or the commission of a felony;
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> (3) Physically injured or sexually abused;
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> * * * * *
>
> B. For purposes of this Section, kidnapping is:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> (2) The enticing or persuading of any person to go from one place to another; or
>
> (3) The imprisoning or forcible secreting of any person.

Louisiana Revised Statute 14:60 is the third criminal statute at issue, regarding aggravated burglary, and providing in pertinent part:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,
>
> * * * * *
>
> (3) Commits a battery upon any person while in such place, or in entering or leaving such place.

Specific intent is an issue under the second degree murder statute. Specific intent is that state of mind that exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Such state of mind can be formed in an instant. **State v. Cousan**, 94-2503 (La. 11/25/96), 684 So.2d 382, 390. Specific intent need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. **State v. Graham**, 420 So.2d 1126, 1127 (La. 1982). The existence of specific intent is an ultimate legal conclusion to

be resolved by the trier of fact. **State v. McCue**, 484 So.2d 889, 892 (La. App. 1st Cir. 1986).

The defendant does not contest the pertinent facts in this case, namely, that he took control of Kiewanna's vehicle; he drove around with her in the passenger seat; and at some point during the drive, Kiewanna fell or was ejected out of the moving vehicle and died as a result of the injuries she sustained. Confined to a single legal issue, the defendant argues that the State failed to establish that his actions constituted the direct act of killing Kiewanna. Relying on a recent Louisiana Supreme Court decision, **State v. Small**, 2011-2796 (La. 10/16/12), 100 So.3d 797, the defendant contends that the State's "inability to establish that [he] pushed [Kiewanna] out of the car precludes the State from proving an essential element of the crime." According to the defendant, the prosecution's theory that Kiewanna threw herself from the moving vehicle to avoid being beaten by the defendant is simply the articulation of the proximate cause standard. The defendant notes in his brief that with regard to the felony murder rule, the court in **Small** rejected the proximate cause test and adopted the agency test, which requires the State to prove the offender performed the direct act of killing. **Id.**, 100 So.3d at 807. The defendant further argues that the Supreme Court's pronouncement in **Small** was a refinement of the felony murder rule.

In **Small**, 100 So.3d at 799-804, the defendant left her six and seven-year-old children alone in their apartment while she went to a friend's home to drink. A fire broke out in the apartment, the six-year-old succumbed to smoke inhalation, and died a few days later. Indicted for second degree murder, the prosecution argued the defendant was guilty of second degree felony murder having committed the underlying felony of cruelty to juveniles, defined in La. R.S. 14:93 as the intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable

pain or suffering is caused to said child. The defendant was found guilty as charged and the appellate court affirmed her conviction.

However, the Supreme Court reversed the conviction for second degree murder in **Small**, 100 So.3d at 807-10, finding that the offense of cruelty to juveniles under these circumstances entailed conduct that involved criminal negligence for lack of supervision. Thus, there was no direct act of killing; instead the act was a negative act. The Supreme Court further noted that second degree murder was a "crime of violence" and that cruelty to juveniles and second degree cruelty to juveniles were the only crimes included in the felony murder rule's list of enumerated felonies that could be committed by an act of neglect. **Id.**, 100 So.3d at 809. All of the other crimes involve physical force or the substantial risk of the use of physical force. While neglect could be interpreted to include lack of supervision, to use the cruelty to juveniles' statutes to extend second degree felony murder into the realm of lack of supervision removed the use of any "physical force" or the "substantial risk of physical force" that these crimes of violence entailed. **Id.**, 100 So.3d at 810. The court added that while the instant matter was distinguishable from some of its prior decisions in that there was no third party involved causing the death, those cases still required that the "offender" perform the direct act of killing, and accordingly, the Supreme Court saw no necessity that a third party commit an act of killing in order to apply the agency doctrine.

The defendant's reliance on, and interpretation of, **Small** are misplaced. Rather than having refined any law in **Small** as suggested by the defendant, the Supreme Court reaffirmed that the felony murder rule has been consistently interpreted the same for over fifty years in this State; that is, from the 1959 decision of **State v. Garner**, 238 La. 563, 115 So.2d 855 (1959), up to the **Small** decision in 2012, the felony murder rule has required that a direct act of a defendant cause the death of the victim. In **Small**, 100 So.3d at 807-08, the

Supreme Court noted that in 2000 it reaffirmed **Garner's** requirement of a direct act of killing in **State v. Myers**, 99-1849 (La. 4/11/00), 760 So.2d 310, 315, and the court itself concluded that the agency test as set forth in **Garner** is still the law in Louisiana and that the physical element of the defendant's act or conduct in causing the death must still be proven.

The agency test adopted in Louisiana requires that a "direct act" of the defendant or his accomplice commit the act of killing, and that the proximate cause test, rejected by our Supreme Court, holds the defendant responsible for all deaths that foreseeably result from the acts of defendant and co-felons. **Small**, 100 So.3d at 807-09. However, in reviewing some of its prior jurisprudence, the Supreme Court in **Small**, 100 So.3d at 812, made clear that, regarding causation, it is not essential that the act of the defendant should have been the sole cause of the death; it is sufficient that the act hastened the termination of life or contributed, mediately or immediately, to the death, in a degree sufficient to be a clearly contributing cause. See **State v. Mathews**, 450 So.2d 644, 646 (La. 1984). The Supreme Court further noted that in previous decisions, it had found the State could establish causation by showing the defendant's conduct was a "substantial factor" in bringing about the forbidden result, or that the defendant's acts were a clearly "contributing cause" of death. **Small**, 100 So.3d at 812.

In the instant matter, the defendant stated that Kiewanna jumped or fell from the vehicle, and, similarly, the theory of the defense was that Kiewanna voluntarily ejected herself from the vehicle. Detective Don McKey, with the East Feliciana Parish Sheriff's Office, testified the defendant told him that when Kiewanna was hanging on the vehicle, he grabbed her, trying to keep her from jumping. The prosecution's theory was that Kiewanna leapt from the moving vehicle to get away from the defendant. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that

hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). When asked in his second interview with the police why he thought she tried to get out of the car, the defendant stated that Kiewanna knew that he was going to "beat her up or something."

Several witnesses testified at trial that the defendant physically abused Kiewanna on several occasions, leaving marks and scratches on her, including on her neck. A short time before she was killed, Kiewanna had broken up with the defendant, left her own trailer and moved in with her sister, to get away from the defendant. On the night she was killed, the defendant had attacked, choked and kidnapped Kiewanna and, apparently, refused to let her out of her vehicle as he drove away. Thus, the jury's verdict reflected the reasonable conclusion that based on the physical evidence and the eyewitness testimony, Kiewanna jumped from the vehicle because she was in fear of receiving great bodily harm from the defendant or even of being killed. See **Moten**, 510 So.2d at 61. On appeal, the reviewing court does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events. **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 83; see **State v. Juluke**, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293 (per curiam).

The defendant's contention that the State failed to prove the direct act of killing because Kiewanna "elected to eject herself from the car" is baseless. Kiewanna ejected herself from the vehicle on her own volition to escape direct acts of violence upon her person by the defendant. See **Small**, 100 So.3d at 812. Kiewanna was killed while the defendant was engaged in the perpetration of the second degree kidnapping of her (or while he was engaged in an aggravated burglary). As such, the defendant's conduct was a substantial factor in bringing about Kiewanna's death. See **State v. George**, 39,772 (La. App. 2d Cir. 7/1/05),

908 So.2d 79, 84-85 (the defendant's second degree felony-murder conviction was affirmed where the victim who had been forced into a car trunk, after the attempted forcible rape by the defendant, jumped out of the moving car and died from her injuries). See also **State v. Hano**, 2005-2090 (La. App. 1st Cir. 6/9/06), 938 So.2d 181, 191-93, writ denied, 2006-1713 (La. 1/26/07), 948 So.2d 164; **State v. Davies**, 35,783 (La. App. 2d Cir. 4/5/02), 813 So.2d 1262, 1267, writ denied, 2002-1564 (La. 5/9/03), 843 So.2d 389.

In his statements to the police, the defendant said that Kiewanna invited him to take a ride, and that the next thing he knew while he was driving her vehicle, she just fell out of the vehicle. The defendant explained that before she fell out of the vehicle, she was hanging on the door frame facing the defendant, with her legs hanging outside of the vehicle. Then at some point, she let go. Had the defendant been invited into the vehicle or had not entered it against Kiewanna's will, then the State could not have established the underlying felony of aggravated burglary or second degree kidnapping. However, testimony and physical evidence suggest the defendant was not invited into the vehicle and Kiewanna had no intention of riding around with him. Kiewanna had broken up with the defendant and moved out of her own trailer to get away from him. On the night the defendant got into her vehicle, Kiewanna had only made a quick ride over to the trailer with her son, Dareale, so that he could get a belt for school. Kiewanna was wearing pajama bottoms and apparently wore no shoes when she drove to the trailer, actions strongly indicative of her intending a very brief trip from her sister's house and back. Dareale testified that before he went into the trailer to get his belt, he saw the defendant choking Kiewanna while he had her pushed back into the front passenger seat. Dareale intervened and tried to get the defendant off of his mother, but the defendant kicked him, knocking him out of the vehicle, before taking off with Kiewanna still in the vehicle. Kiewanna jumped out of her vehicle only 4/10

of a mile from where the defendant abducted her. Detective Mike Moore, with the Tangipahoa Parish Sheriff's Office, testified that he drove the 4/10 of a mile distance from where Kiewanna was abducted to where Kiewanna's blood was found on the roadway, the spot where she allegedly jumped from the vehicle. According to Detective Moore, that drive took only seconds. The autopsy revealed that Kiewanna had linear abrasions on the right and left sides of her neck. In her left eye she had petechiae, burst blood vessels usually caused by strangulation. Dr. Garcia testified that her neck injuries were not caused from hitting the road, but were consistent with being choked.

The jury heard the testimony and viewed the evidence presented to it at trial and found the defendant guilty as charged. The defendant did not testify. See **Moten**, 510 So.2d at 61-62. In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). Moreover, the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See **Mitchell**, 772 So.2d at 83.

The fact that the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). Whether the jury believed the defendant pushed Kiewanna out of the vehicle or

that she jumped from the vehicle cannot be ascertained from the guilty verdict. Regardless, under either scenario the defendant would be guilty of second degree murder because to have pushed her would have indicated a specific intent to kill or to inflict great bodily harm; and if she jumped, it was to avoid further abuse at the hands of the defendant while he was engaged in the perpetration of an aggravated burglary or second degree kidnapping.

We note as well, the defendant's actions of leaving the scene where Kiewanna was injured and probably deceased, taking the body with him and driving around for hours are actions that are inconsistent with a theory of innocence. Flight following an offense reasonably raises the inference of a "guilty mind." **State v. Captville**, 448 So.2d 676, 680 n.4 (La. 1984); see **State v. Fuller**, 418 So.2d 591, 593 (La. 1982) (flight and attempt to avoid apprehension indicate consciousness of guilt, and therefore, are circumstances from which a juror may infer guilt).

After a thorough review of the record, we find that the evidence supports the jury's unanimous verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of the hypothesis of innocence suggested by the defense at trial, that the defendant was guilty of the second degree murder of Kiewanna Sopsher. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Accordingly, the trial court did not err in denying the postverdict judgment of acquittal.

The defendant also argues the trial court erred in refusing to include the defendant's request for the jury charge that Kiewanna died as a direct act of the defendant. Specifically, during trial, defense counsel's motion for jury instructions requested the following language be provided to the jury: "The State of Louisiana must prove that the physical element of Antwoene Irving's act or conduct in

causing the death may only be shown by proof that he . . . performed the direct act of killing." Finding that the charge would only confuse the jury, the trial court denied the motion. We find no error in the trial court's ruling. The trial court provided the full definition of second degree murder (less the irrelevant enumerated felonies) in its jury charges. This statutory definition adequately covered the applicable law. Moreover, as the trial court pointed out at the motion hearing, and as discussed above, to include such language about the direct act of killing "would lead the jury to conclude that [the defendant had] to actually touch, push, shoot, grab, stab, batter, or whatever to be guilty under the felony murder statute," but the jurisprudence does not support that contention.

Accordingly, these assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.