NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0810

STATE OF LOUISIANA

VERSUS

ANTHONY LEBOEUF, JR.

Judgment Rendered: OCT 2 8 2016

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On Appeal from the
17th Judicial District Court
In and for the Parish of Lafourche,
State of Louisiana
Trial Court No. 519,866

The Honorable Christopher J. Boudreaux, Judge Presiding

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Jane L. Beebe
New Orleans, Louisiana

Attorney for Appellant,
Anthony Leboeuf, Jr.

Camille A. Morvant, II
District Attorney
Heather Hendrix
Assistant District Attorney
Thibodaux, Louisiana

Attorneys for Appellee,
State of Louisiana

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BEFORE: PETTIGREW, McDONALD, AND DRAKE, JJ.

DRAKE, J.

The defendant, Anthony LeBoeuf, Jr., was charged by bill of information with driving while intoxicated, fourth offense, a violation of La. R.S. 14:98 (count 1); public intimidation, a violation of La. R.S. 14:122 (count 2); and aggravated flight from an officer, a violation of La. R.S. 14:108.1 (count 3). The defendant pled not guilty and, following a jury trial, was found guilty as charged on all three counts. For the DWI, fourth offense, conviction, the defendant was sentenced to fifteen years imprisonment at hard labor, with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence, and ordered to pay a $5,000 fine; for the public intimidation conviction, he was sentenced to one year imprisonment at hard labor; for the aggravated flight conviction, he was sentenced to one year imprisonment at hard labor. The sentences were ordered to run consecutively.[1] The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.

FACTS

On April 8, 2013, about 6:30 a.m., Deputy Blake Thibodaux, with the Lafourche Parish Sheriff's Office, responded to a disturbance call. When Deputy Thibodaux drove to West 21st Street in Larose, he was flagged down by a motorist, Leah Chiasson. Leah told the deputy, who had gotten out of his unit, that her boyfriend, the defendant, was following her and that he had been drinking and driving recklessly. The defendant was directly behind Leah in a pickup truck. He was not wearing a seat belt. Deputy Thibodaux told the defendant twice to get out of his truck. The defendant ignored the deputy and drove away. Deputy Thibodaux got back in his unit, turned on his lights and siren, and followed the defendant. The defendant refused to stop and drove through several

[1] The sentencing minute entry reflects the trial court ordered the sentences to run concurrently. The sentencing transcript and commitment order, however, indicate the sentences were ordered to run consecutively. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

neighborhoods at a high rate of speed. He also ran several stop signs and forced a couple of vehicles off the roadway. The defendant finally pulled over in the Schlumberger parking lot. Deputy Thibodaux arrested the defendant and placed him in the back of his unit.

As Deputy Thibodaux drove the defendant to the police station, the defendant became increasingly hostile. He cursed at the deputy and called him the "N" word. The defendant also told Deputy Thibodaux that he knew a lot of people on the bayou and that he would see to it that the deputy lost his job. At the police station, Deputy Eric Guidry, with the Lafourche Parish Sheriff's Office, submitted a "breathalyzer" test to the defendant. The defendant's BAC level was .083.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the court erred in denying his motion to suppress the evidence. Specifically, the defendant contends that Deputy Thibodaux conducted an illegal traffic stop because he had no reasonable suspicion to believe a crime had been committed; as such, the results of the Intoxilyzer (breath test) should have been suppressed.

Trial courts are vested with great discretion when ruling on a motion to suppress. **State v. Long**, 2003-2592 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751. In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the

hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

In denying the motion to suppress, the trial court stated in pertinent part:

> The matter's . . . a motion to suppress a stop of or an attempted stop of Mr. LeBoeuf, as he was heading up West 21st Street toward LA 1. Immediately in front of him, according to the testimony of the officer and Ms. Chiasson, was the vehicle of Leah Chiasson. The testimony of Ms. Chiasson was equivocating at best and purposeful at worst.
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> First, she indicated that she didn't say anything, then she couldn't remember whether she said anything. But if she did say something, the deputy heard it, the deputy probably remembers better. But then, of course, she says, "I didn't say anything. Never said it." So her credibility on the issue of whether she said anything is kind of iffy. However, she's gesturing with her right hand. Maybe I shouldn't of asked the question, but it's kind of hard to imagine a driver gesturing to the inside of the vehicle.
>
> But her indication is that she, at least, made a gesture to the officer. The officer's responding, and is properly in the area because he's responding to a complaint. Doesn't know whether he's responding to this complaint or not. And he testifies to an encounter with Mr. LeBoeuf. The encounter is - actually, the entire encounter, as brief as it was, is on video. Deputy sees the white truck slowing. That's what the video shows. The female voice says, "He's drunk." I heard it. I had to listen to it, again, to make sure.
>
> If she's doing this (Demonstrating.) and saying, "He's drunk," the deputy stops his vehicle immediately on the side of him. Tells him to get out. The deputy then backs up. The video camera catches the vehicle - the rear of the vehicle - unfortunately, not the defendant himself. But at that point, the deputy has, at least, a reasonable suspicion as to the defendant, because the driver immediately in front points to the guy behind her and says, "He's drunk."
>
> Maybe the deputy was supposed to ignore that, but he didn't. Now, he didn't ask the gentleman to get out of the vehicle. He said, "Get out." Then he said, "Get out of the truck." Then he said, "Get out of the truck," again. Had Mr. LeBoeuf driven off with his seatbelt, and said it was an unreasonable stop, I don't know that there would have been enough for the deputy to pursue. But the only evidence that I think is credible and that matches the affidavit - because she, certainly, didn't use the words "highly intoxicated," but she said, "He's drunk." It's on the tape.
>
> As he drove off, even without a seatbelt, the Court can see and hear the acceleration of the vehicle on a street that has not that type of speed limit. The manner of takeoff by the defendant, certainly, heightened the suspicion of the deputy beyond just the no seatbelt. And I believe there was a justification to then pursue the defendant. And as every traffic violation mounted, his suspicion became even more justified. We didn't get into those types of things. The issue is really the initial stop on West 21st Street, and I think it was a fine stop. I have no problems with that stop. And I'm going to deny the motion

to suppress.

The Fourth Amendment to the United States Constitution and article I, § 5, of the Louisiana Constitution protect people against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the State to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. La. Code Crim. P. art. 703(D); **State v. Johnson**, 98-0264 (La. App. 1st Cir. 12/28/98), 728 So.2d 885, 886. Evidence derived from an unreasonable stop, i.e., seizure, will be excluded from trial. **State v. Benjamin**, 97-3065 (La. 12/1/98), 722 So.2d 988, 989.

The right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is, however, recognized by both federal and state jurisprudence. **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); **State v. Ducre**, 604 So.2d 702, 706 (La. App. 1st Cir. 1992). A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions. La. Code Crim. P. art. 215.1(A). See **State v. Belton**, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984).

Reasonable suspicion to stop is something less than the probable cause required for an arrest, and the reviewing court must look to the facts and circumstances of each case to determine whether a detaining officer had sufficient facts within his knowledge to justify an infringement of the suspect's rights. **State v. Robertson**, 97-2960 (La. 10/20/98), 721 So.2d 1268, 1269. In order to assess the reasonableness of an officer's conduct, it is necessary to balance the need to

search or to seize against the harm of invasion. **State v. Scott**, 561 So.2d 170, 173 (La. App. 1st Cir.), writ denied, 566 So.2d 394 (La. 1990). The totality of the circumstances must be considered in determining whether reasonable suspicion exists. **State v. Payne**, 489 So.2d 1289, 1291-92 (La. App. 1st Cir.), writ denied, 493 So.2d 1217 (La. 1986). The detaining officer must have knowledge of specific, articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop. **State v. Flowers**, 441 So.2d 707, 714 (La. 1983), cert. denied, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed.2d 476 (1984); **State v. Turner**, 500 So.2d 885, 887 (La. App. 1st Cir. 1986). The officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable, and deference should be given to the experience of the officers present at the time of the incident. **State v. Francis**, 2010-1149 (La. App. 4th Cir. 2/16/11), 60 So.3d 703, 709, writ denied, 2011-0571 (La. 10/7/11), 71 So.3d 311.

The defendant, in brief, concedes that Deputy Thibodaux observed that he was not wearing a seat belt. The defendant also does not take issue with Deputy Thibodaux's pursuit of him after he sped away. According to the defendant, however, Deputy Thibodaux stopped him before he (the deputy) even knew he (the defendant) was not wearing his seat belt. The defendant suggests that Deputy "Thibodaux testified that his authority to make [the defendant] leave or get out of his vehicle was the complaint of disturbance up the street that he never made it to." Not wearing a seat belt is only a violation when the vehicle is moving; and the defendant asserts that his vehicle was in park when Deputy Thibodaux saw him not wearing his seat belt. The defendant suggests he simply was observed not wearing a seat belt and "there was no other reason to stop him or order him out of his truck." Thus, according to the defendant, his initial detention was not justified based on his not wearing a seat belt since he was putting his truck into "park." It

was at that point in time, the defendant asserts, "that he was illegally detained and ordered out of his vehicle."

Because the defendant's claims are groundless, we find no reason to disturb the trial court's ruling in denying the motion to suppress. The record reveals that defendant was not parked (or in the process of parking) when Deputy Thibodaux first approached him. Further, Deputy Thibodaux did not testify, the defendant's assertion notwithstanding, that "his authority" to make the defendant get out of his vehicle "was the complaint of disturbance up the street that he never made it to." Deputy Thibodaux simply testified that he was on his way to a disturbance call when he was flagged down by Leah. When asked at trial if he ever made it to the disturbance call for which he was initially called out, Deputy Thibodaux testified, "No, I did not."

Deputy Thibodaux testified at the motion to suppress hearing that the defendant was driving behind Leah when he (Deputy Thibodaux) approached them from the opposite direction. When Leah flagged down Deputy Thibodaux, as he was approaching the two vehicles, he saw the defendant driving without his seat belt on. This information was established during the cross-examination of Deputy Thibodaux:

> Q. Could you tell whether or not Mr. LeBoeuf had a seatbelt on prior to the time that he actually stopped his vehicle with you at the original site?
> A. Yes.
> Q. He did have a seatbelt?
> A. He did not have a seatbelt on.
> Q. Okay. So both times that he stopped, right?
> A. Yes.
> Q. Did he ever – let me rephrase the question. On the video, you instruct him to exit his vehicle.
> A. Yes, sir.
> Q. And you're saying, at that point as he was coming towards you, you were able to observe that he did not have a seatbelt on?
> A. Yes. He did not have a seatbelt on.

Thus, *as the defendant was driving*, Deputy Thibodaux observed the defendant was

not wearing a seat belt. See La. R.S. 32:295.1(A)(1) & (F).[2] Accordingly, based on the seat belt violation alone, Deputy Thibodaux had the right to conduct a traffic stop. See La. Code Crim. P. art. 215.1(A); **Belton**, 441 So.2d at 1198.

Moreover, based on the information Leah conveyed to him, Deputy Thibodaux had the right to stop the defendant on suspicion of driving while intoxicated. See La. R.S. 14:98. According to Deputy Thibodaux at the motion to suppress hearing, after Leah had flagged him down, she told him that the defendant, who was behind her, had been drinking and was driving erratically. Thus, when Deputy Thibodaux was asked at the motion to suppress hearing what his reason was for stopping the defendant, the deputy replied, "It's an investigation into a possible intoxicated driver." Deputy Thibodaux noted at the motion to suppress hearing that he had no direct knowledge of the defendant's condition at that time (when Leah first spoke of the defendant). But the deputy's having not confirmed the level of the defendant's intoxication (or even if he was intoxicated) before stopping the defendant and telling him to get out of his car is of no moment. Based on the apparently viable information from a motorist (Leah) who specifically singled out the defendant and conveyed in person to Deputy Thibodaux that the defendant had been drinking, the deputy had reasonable suspicion to believe the defendant was (or had been) drinking while driving; as such, Deputy Thibodaux had the right to conduct an investigatory stop and question the defendant. La. Code Crim. P. art. 215.1(A); **Terry**, 392 U.S. at 22-23, 88 S.Ct. at 1880-81. See **Navarette v. California**, __ U.S. __, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (finding that a 911 call from an anonymous motorist that a pickup truck had run her off the road provided reasonable suspicion for a traffic stop of the truck based on an ongoing crime such as drunk driving); **State v. Gates**,

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[2] La. R.S. 32:295.1(A)(1) provides in pertinent part that each "driver of a passenger car . . . [or] pickup truck, in this state shall have a safely belt properly fastened about his or her body at all times when the vehicle is in forward motion."

2013-1422 (La. 5/7/14), 145 So.3d 288, 295-96; **State v. Elliott**, 2009-1727 (La. 3/16/10); 35 So.3d 247, 252.

Based on the foregoing, we find that the trial court did not err or abuse its discretion in denying the motion to suppress. Deputy Thibodaux, based on both his observation of the defendant not wearing a seat belt and his conversation with Leah, had reasonable suspicion to stop the defendant and further investigate the matter.

Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the court erred in denying his motion for postverdict judgment of acquittal. Specifically, the defendant contends the State failed to prove he had three prior DWI convictions.

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.

In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty he waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser. The judge must also ascertain that the accused understands what the plea connotes and its consequences. If the defendant denies the allegations of the bill of information, the State has the initial burden to prove the existence of the prior guilty plea and that the defendant was represented by counsel when it was taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. To meet this requirement, the State may rely on a contemporaneous record of the guilty plea proceeding, i.e., either the transcript of the plea or the minute entry. **State v. Henry**, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. See **State v. Carlos**, 98-1366 (La. 7/7/99), 738 So.2d 556, 559. While a colloquy between the judge and defendant is the preferred method of proof of a free and voluntary waiver, the colloquy is not indispensable when the record contains some other affirmative showing of proper waiver. **State v. Carson**, 527 So.2d 1018, 1020 (La. App. 1st Cir. 1988). Everything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred. **Boykin** only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights which he may have. **Henry**, 788

So.2d at 541. See **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The predicate convictions at issue are a December 8, 2003 guilty plea for driving while intoxicated, committed on May 11, 2003 (docket number 390431, 17th JDC, Lafourche Parish); a February 12, 2004 guilty plea for driving while intoxicated, second offense, committed on December 13, 2003 (docket number 399778, 17th JDC, Lafourche Parish); and a July 28, 2010 guilty plea for driving while intoxicated, third offense, committed on December 9, 2009 (docket number 479289, 17th JDC, Lafourche Parish).

The burden rests on the State to prove at trial, beyond a reasonable doubt, the existence of the prior convictions and the defendant's identity as the prior offender, when charging a second, third, or subsequent offense. **Carlos**, 738 So.2d at 558-59. The defendant argues, in brief, that the State failed to prove he had three prior DWI convictions. Specifically, the defendant asserts that his identity was not proven for each of the prior convictions. The defendant argues that proof of his prior convictions came only by way of the testimony of Lafourche Assistant District Attorney, Kristine Russell, who was neither an expert in court documents and identification, nor custodian of the court records. The defendant further points out that Russell was not a fingerprint expert, and that the records introduced into evidence were not certified by a court clerk or custodian. The defendant asserts that "the dates on the records were internally inconsistent." All of these factors, according to the defendant, indicate the State failed to prove beyond a reasonable doubt that he was "the same Anthony LeBoeuf charged and convicted within the past ten years of three prior DWI convictions."

Despite the defendant's assertions, there was no requirement or necessity for Russell to be an expert in "court documents" or fingerprints. Moreover, the defendant's assertion notwithstanding, all of the documents submitted into

evidence by the State (minutes, bills of information, and **Boykin** hearings for each predicate conviction) *were* certified as true copies by the clerk (or deputy clerk) of court. Further, all of these court documents were properly submitted into evidence without the testimony of a custodian of records pursuant to La. Code Evid. art. 803(8).

Russell was the prosecutor for each of the defendant's three prior DWI convictions. She is identified as such in each of the three **Boykin** transcripts submitted into evidence. Further, at trial Russell identified the defendant in court as the person she prosecuted in each of the three cases.

The defendant does not provide any instances of "internally inconsistent" dates in the records submitted into evidence. We note that for his second prior DWI conviction (docket number 399778), the defendant was convicted on 2/12/04. On the defendant's third prior DWI conviction (docket number 479289), the bill of information indicates the defendant was convicted for his second prior DWI on 2/14/04 (instead of 2/12/04). The 2/14 date is clearly a typographical error. All of the other dates and information regarding the identity of the defendant are consistent. That is, the bills of information, minute entries, and **Boykin** transcripts for the defendant's three prior DWI convictions indicate the defendant as Anthony LeBoeuf, Jr., his date of birth as November 2, 1979, his correct social security number and address. At sentencing for the instant offense, the defendant indicated his date of birth was November 2, 1979.

One variation in the information is the defendant's address on the documents of his third DWI conviction. Here, while the name and date of birth are the same, the address is different. This third conviction was about six years after his second conviction and the address is different because he apparently moved during that time. Another variation is the spelling of the defendant's name. Throughout the nine documents submitted into evidence (bill of information, minute entry, and

Boykin transcript for each of the three prior DWI convictions), the defendant's last name is spelled "LEBOEUF" or "LEBOUEF." We do not find this rather frequent transposition of the "e" and "u" in the surname is indicative of different identities, but rather of careless recordation and transcription. There is also no issue with the ten-year cleansing period because the commissions of all three prior DWI offenses were less than ten years before the commission of the instant offense. See La. R.S. 14:98(F)(2).[3]

The jury heard all of the testimony and viewed all of the evidence presented to it at trial and found the defendant guilty. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. 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 **State v. Mitchell**, 99-3342 (La. 10/17/00), 772 So.2d 78, 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).

Based on the documentary and testimonial evidence, the State clearly proved the defendant's identity and that he had three separate prior DWI convictions. After a thorough review of the record, we find that the evidence supports the jury's verdict regarding the DWI conviction. We are convinced that viewing the evidence

[3] This statute was amended by 2014 La. Acts, No. 385, § 1, effective January 1, 2015. The provisions of La. R.S. 14:98(F)(2) are now contained in La. R.S. 14:98(C)(3).

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 every reasonable hypothesis of innocence, that the defendant was guilty of DWI, fourth offense. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues his sentence is excessive. Specifically, the defendant contends the trial court erred in imposing consecutive sentences.

A thorough review of the record indicates the defendant did not make or file a motion to reconsider sentence based on any specific ground following the trial court's imposition of the sentence. Under La. Code Crim. P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. See **State v. Mims**, 619 So.2d 1059 (La. 1993) (per curiam). The defendant, therefore, is procedurally barred from having this assignment of error reviewed because of his failure to file a motion to reconsider sentence after being sentenced. See **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.