STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KA 0231

STATE OF LOUISIANA

VERSUS

CORNELIUS TYRONE KIRSH

Judgment Rendered: NOV 01 2017

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On Appeal from
The 22nd Judicial District Court,
Parish of St. Tammany, State of Louisiana
Trial Court No. 555145
The Honorable Allison H. Penzato, Judge Presiding

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BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

CRAIN, J.

The defendant, Cornelius T. Kirsh, was convicted of attempted aggravated obstruction of a highway (count one) and aggravated flight from an officer (count two).[1] He was adjudicated a second-felony habitual offender and sentenced to seven years at hard labor on count one and four years at hard labor, without probation or suspension of sentence, on count two. The state filed a second habitual offender bill of information for count two, and for that count the defendant was adjudicated a third-felony habitual offender.[2] The prior sentence for count two was vacated, and the defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant appeals alleging two counseled assignments of error and one *pro se* assignment of error. We affirm the convictions, habitual offender adjudication on count two, and sentences.

FACTS AND PROCEDURAL HISTORY

On the afternoon of July 30, 2014, Slidell Police Officers Bradford Hoops and Donald Nunez, in separate vehicles, were dispatched to the area of U.S. Highway 190 (Gause Boulevard) and Walnut Street in response to a report of a suspicious vehicle, described as a white SUV, and a disturbance possibly involving a weapon. The officers approached Walnut Street from Cypress Street with their lights and sirens activated. Officer Hoops turned left onto Walnut Street traveling south, while Officer Nunez turned right onto Walnut Street, then left onto Beechwood Drive, and, at that point, also began traveling south. Beechwood Drive contains a curve and eventually intersects again with Walnut Street in the

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[1] The defendant was also convicted of possession of a firearm by a convicted felon; however, the trial court granted a new trial on that conviction, which is not before the court in this appeal.

[2] The predicate convictions were two February 7, 2011 convictions for simple robbery in St. Tammany Parish, bearing docket numbers 488694 and 489946 in the Twenty-Second Judicial District Court.

direction both officers were traveling. The speed limit in the area is twenty miles per hour.

As Officer Hoops drove south on Walnut Street, he observed a white SUV traveling towards him in a northerly direction at an estimated speed of 50 miles per hour and accelerating. The SUV drove off the roadway to the right and then made a hard left turn onto Beechwood Drive, hitting a curb and driving in the opposing lane of travel. Officer Hoops turned right on Beechwood Drive behind the vehicle, which was still traveling well above the speed limit as it encountered and passed a group of children on the left side of Beechwood Drive.

Officer Nunez, traveling south on Beechwood Drive, saw the white SUV coming towards him at a high rate of speed and in the wrong lane of travel. The SUV came to a stop, and as Officer Nunez positioned his patrol vehicle to block the SUV, a passenger fled the vehicle. Officer Nunez exited his patrol vehicle and held the two remaining occupants of the SUV at gunpoint. Officer Hoops arrived and briefly chased the fleeing individual before returning to assist Officer Nunez. Upon approaching the SUV, both officers detected an odor of gunpowder. The defendant was identified as the driver of the vehicle, and his juvenile brother was a passenger. The police did not recover a weapon and did not apprehend the individual who fled the scene.

DISCUSSION

Sufficiency of the Evidence

In his first counseled and only *pro se* assignment of error, the defendant contends the evidence is insufficient to support his convictions. In particular, he argues the state failed to prove he intentionally or negligently placed anyone's life in danger (attempted aggravated obstruction of a highway), intentionally refused to bring his car to a stop (aggravated flight from an officer), and committed any of the

acts enumerated in the aggravated flight from an officer statute that endanger human life.

A conviction based on insufficient evidence cannot stand, as it violates due process. *See* U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, an appellate court must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt based on the entirety of the evidence, both admissible and inadmissible, viewed in the light most favorable to the prosecution. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *State v. Oliphant*, 13-2973 (La. 2/21/14), 133 So. 3d 1255, 1258; *see also* La. Code Crim. Pro. art. 821B; *State v. Mussall*, 523 So. 2d 1305, 1308-09 (La. 1988). When circumstantial evidence forms the basis of the conviction, the evidence "assuming every fact to be proved that the evidence tends to prove . . . must exclude every reasonable hypothesis of innocence." La. R.S. 15:438; *Oliphant,* 133 So. 3d at 1258.

The due process standard does not require the reviewing court to determine whether it believes the witnesses or whether it believes the evidence establishes guilt beyond a reasonable doubt. *State v. Mire,* 14-2295 (La. 1/27/16), ____ So. 3d ____, ____ (2016WL314814). Rather, appellate review is limited to determining whether the facts established by the direct evidence and inferred from the circumstances established by that evidence are sufficient for *any* rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Alexander*, 14-1619 (La. App. 1 Cir. 9/18/15), 182 So. 3d 126, 129-30, *writ denied*, 15-1912 (La. 1/25/16), 185 So. 3d 748. The weight given evidence is not subject to appellate review; therefore, evidence will not be reweighed by an appellate court to overturn a fact finder's

determination of guilt. *State v. Wilson*, 15-1794 (La. App. 1 Cir. 4/26/17), 220 So. 3d 35, 41.

Attempted Aggravated Obstruction of a Highway of Commerce

Aggravated obstruction of a highway of commerce, in relevant part, is the intentional or criminally negligent placing of anything or performance of any act on any road or highway wherein it is foreseeable that human life might be endangered. *See* La. R.S. 14:96A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27A. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt. La. R.S. 14:27C.

Officer Hoops testified the defendant drove at a high rate of speed near a group of twenty to thirty children who were near the curve in Beechwood Drive. Describing that portion of the chase, Officer Hoops testified:

> [When the defendant] drove past those children [it] is one of the times I have been most scared for the lives of young children at the hands of another motorist that I've actually witnessed for myself in my 13 years of law enforcement.

Officer Nunez testified the SUV was still traveling well above the speed limit as it rounded the curve and came into his view as he approached from the opposite direction.

In contrast, the defendant and his brother testified that the defendant was driving safely. The defendant estimated his top speed to be 35 miles per hour, and his brother stated the vehicle was traveling 20 or 25 miles per hour. They denied

that any children were in the area of the incident and denied any knowledge of why the police would be interested in their vehicle.

Presented with this conflicting testimony, the jury could have reasonably concluded the defendant was traveling at a high rate of speed on a neighborhood street in close proximity to children, and his actions were intentional or criminally negligent and foreseeably endangered human life. 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 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. 1 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.

When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. *State v. Captville*, 448 So. 2d 676, 680 (La. 1984). Here, the verdict reflects the jury's reasonable rejection of defendant's theory that he operated his vehicle in a completely safe manner. In accepting a hypothesis of innocence that was not unreasonably rejected by the factfinder, a court of appeal impinges on a factfinder's discretion beyond the extent necessary to guarantee the fundamental protection of due process of law. *See Mire*, ___ So. 3d at ___. An appellate court errs by substituting its appreciation of the evidence

and credibility of witnesses for that of the factfinder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the factfinder. *See State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (*per curiam*). We cannot say the jury's determination was irrational under the facts and circumstances presented to it. *See State v. Ordodi*, 06-0207 (La. 11/29/06), 946 So. 2d 654, 662.

Sufficient evidence was presented to convict the defendant of aggravated obstruction of a highway of commerce; therefore, the evidence is also sufficient to support the defendant's conviction for the responsive offense of attempted aggravated obstruction of a highway. *See* La. R.S. 14:96A and 14:27C. This portion of defendant's first assignment of error is without merit.

Aggravated Flight from an Officer

Aggravated flight from an officer, in relevant part, is the intentional refusal of a driver to bring a vehicle to a stop under circumstances wherein human life is endangered, knowing that he has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe the driver or operator has committed an offense. La. R.S. 14:108.1C. The signal shall be given by an emergency light and a siren on a vehicle marked as a police vehicle. La. R.S. 14:108.1C. Circumstances wherein human life is endangered shall be any situation where the operator of the fleeing vehicle commits at least two of the following acts: leaves the roadway or forces another vehicle to leave the roadway, collides with another vehicle or watercraft, exceeds the posted speed limit by at least 25 miles per hour, travels against the flow of traffic, fails to obey a stop sign or a yield sign, or fails to obey a traffic control signal device. La. R.S. 14:108.1D. These exclusive aggravating factors elevate the crime of flight from an officer

from a misdemeanor to a felony. *See State v. Williams*, 07-0931 (La. 2/26/08), 978 So. 2d 895, 896 (*per curiam*).

Officers Hoops and Nunez engaged their emergency lights and sirens before turning onto Walnut Street. Officer Hoops first saw the white SUV coming towards him on Walnut Street. The vehicle was traveling about 50 miles per hour, or 30 miles per hour above the speed limit, and "continued to accelerate at an extremely high rate of speed." Officer Hoops described the vehicle's turn onto Beechwood Drive as follows:

> A. [The] vehicle then pulled far to the right, cut the corner going into the opposing lane of traffic, turned the corner at a high rate of speed, went over – it looked like it hit the curb but it made a bump and it continued this way, and I accelerated to try to catch up with the vehicle.
>
> Q. Now was it on the wrong side of the travel road at any point in time in that?
>
> A. Yes, sir, it was.
>
> Q. Did it leave the roadway?
>
> A. It appeared that way, yes.

Officer Nunez testified that when the defendant's vehicle rounded the curve on Beechwood Drive, the vehicle was in the wrong lane of travel and was going about 40 to 45 miles per hour.

The defendant denies these actions and argues he did not stop his vehicle in response to sirens and emergency lights, because he did not realize the officers were pursuing him. According to the defendant, he did not believe he was supposed to stop for Officer Hoops' police car because it was so far down Walnut Street and was approaching in a head-on manner, rather than from behind.

Initially, we note that upon the immediate approach of an authorized emergency vehicle making use of audible or visual signals, the driver of every

other vehicle is required to yield the right-of-way and immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer. *See* La. R.S. 32:125A. The defendant did not take this action. Instead, according to Officer Hoops' testimony, the defendant accelerated, drove off the roadway, then made a hard left turn into the oncoming lane of Beechwood Drive. The defendant continued driving at a high rate of speed away from Officer Hoops until encountering Officer Nunez's vehicle approaching from the opposite direction on Beechwood Drive. Only then did the defendant stop his vehicle.

The testimony indicates the defendant saw Officer Hoops' police car, with its emergency lights and siren engaged, and responded by accelerating his vehicle to a speed in excess of twenty-five miles per hour over the speed limit. He then ran off the roadway to the right, made a hard left turn, and traveled against the flow of traffic. This evidence supports a finding that defendant, knowing he had been given a visual and audible signal to stop by a police officer, intentionally refused to stop his vehicle and committed at least three of the enumerated acts "circumstances wherein human life is endangered." *See* La. R.S. 14:108.1C and D. The jury reasonably rejected defendant's hypotheses of innocence that he was unaware of his obligation to stop for Officer Hoops and that he did not commit any of the acts proscribed by Louisiana Revised Statute 14:108.1D. We cannot say the jury's determination was irrational under the facts and circumstances presented to it. *Ordodi*, 946 So. 2d at 662. This portion of defendant's first assignment of error is also without merit.

Double Jeopardy

The state raises the issue of double jeopardy, proposing that the evidence supporting the two convictions is essentially the same; therefore, the conviction for attempted aggravated obstruction of a highway should be set aside. We ordered the defendant to file a supplemental brief and address the issue of double jeopardy. In his supplemental brief, the defendant joins the state, arguing his convictions for attempted aggravated obstruction of a highway and aggravated flight from an officer violate the prohibition against double jeopardy, and alleges the evidence required to support a conviction for aggravated flight from an officer is sufficient to warrant a conviction for attempted aggravated obstruction of a highway. We disagree.

Both the federal and state constitutions provide that no person shall twice be put in jeopardy of life or liberty for the same offense. U.S. Const. amend. V; La. Const. art. I, § 15. The Double Jeopardy Clause protects the accused against multiple punishments for the same offense as well as a second prosecution for the same offense after acquittal or conviction. *State v. LeBlanc*, 618 So. 2d 949, 957 (La. App. 1 Cir. 1993), *writ denied*, 95-2216 (La. 10/4/96), 679 So. 2d 1372.

As recently clarified by our supreme court, Louisiana uses the "*Blockburger* test" to determine whether double jeopardy exists. *See State v. Franks*, 16-1160 (La. 10/18/17), _____ So. 3d _____. Under *Blockburger*, where the *same act or transaction* constitutes a violation of two distinct statutory provisions, the test 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. *See Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

The prohibition against double jeopardy is not violated, however, when the defendant is prosecuted for different criminal acts committed during one sequential, continuing course of conduct. *See City of Baton Rouge v. Jackson*, 310 So. 2d 596,

598 (La. 1975); *State v. Staden*, 14-0459 (La. App. 1 Cir. 9/24/14), 154 So. 3d 579, 584, *writ denied*, 14-2254 (La. 6/5/15), 171 So. 3d 945; *State v. Letell*, 12-0180 (La. App. 1 Cir. 10/25/12), 103 So. 3d 1129, 1137, *writ denied*, 12-2533 (La. 4/26/13), 112 So. 3d 838. In those instances, the defendant is not being punished twice for the same act. Rather, he has committed and can be prosecuted for separate crimes attributable to separate and distinct acts that occurred successively. *See Jackson*, 310 So. 2d at 598-99; *Staden*, 154 So. 3d at 584; *see also State v. Martin*, 11-1843 (La. App. 1 Cir. 5/2/12), 92 So. 3d 1027, 1032, *writ denied*, 12-1244 (La. 11/9/12), 100 So. 3d 836 ("Because the evidence showed that two separate crimes occurred, each of which could have been proven without any evidence as to the other, no double jeopardy violation occurred.").

The jurisprudence contains numerous examples of prosecutions for multiple offenses, each separate and distinct, committed by a defendant while operating a motor vehicle in one continual event. In *Jackson*, the defendant was charged with running a flashing red light and driving while intoxicated. After pleading guilty to running the red light, the defendant filed a motion to quash the DWI prosecution based on a plea of double jeopardy. *Jackson*, 310 So. 2d at 597-98. Pointing out that his traversal of the intersection without stopping coincided with his driving while intoxicated, the defendant argued that the identical conduct, having already been punished based on his plea to running the red light, could not again be punished as the offense of driving while intoxicated. *Jackson*, 310 So. 2d at 599. The trial court granted the motion, but the supreme court reversed. Reiterating that double jeopardy does not protect an offender who goes on a crime spree and violates numerous statutory provisions, the supreme court recognized that the state may be able to prove the defendant operated his vehicle while intoxicated at some point other than when he disregarded the red light, explaining:

> It is quite conceivable that the state will prove operation of a motor vehicle while intoxicated for some point in time other than at the involved intersection. It is further likely that the state will prove (or attempt to prove) that the defendant operated the motor vehicle while intoxicated, with evidence well beyond simply his having been observed traversing the intersection without having stopped for the flashing red light.
>
> In this case it does not appear that one offense is a lesser included offense of the other, nor does it appear that the evidence necessary to support a conviction on one charge would necessitate an acquittal on the other charge or invoke collateral estoppel. The fact that some evidence may be the same in each prosecution is of no moment under these circumstances.

Jackson, 310 So. 2d at 600.

Similarly, in *State v. Williams*, 07-0931 (La. 2/26/08), 978 So. 2d 895 (*per curiam*), the defendant was charged with aggravated flight from an officer and multiple traffic offenses arising out of the same incident. The defendant pled guilty to the traffic offenses and, citing double jeopardy, sought to quash the prosecution for aggravated flight from an officer, arguing that "it would subject him to trial for the same conduct for which he had previously been convicted and punished." *Williams*, 978 So. 2d at 895. The trial court denied the motion to quash, and the defendant entered a plea of guilty as charged, reserving his right to appeal the adverse ruling. After the court of appeal reversed the trial court's ruling, the supreme court reinstated the conviction and sentence. *Williams*, 978 So. 2d at 899. Citing actions by the defendant that, independent of the traffic offenses, would be sufficient to establish at least two of the essential aggravating factors necessary for a conviction for aggravated flight from an officer, the supreme court stated:

> In the present case, the information contained in the police report held open the possibility that a rational trier of fact, considering all of the evidence presented at trial, could have found that defendant engaged in conduct giving rise to a risk to human life by first traveling against the flow of traffic however briefly when he backed away from Officer McCartney and nearly collided with the patrol unit occupied by Officers Hill and Matthews and then forced other vehicles from the

> road in the ensuing high-speed chase with the officers. Thus, from a functional perspective offered by the information contained in the police report, defendant's guilty plea to aggravated flight from an officer did not necessarily subject him to a second prosecution for conduct as to which he had already been prosecuted.

Williams, 978 So. 2d 898-99. *See also State v. Bates*, 37,282 (La. App. 2 Cir. 10/16/03), 859 So. 2d 841, 849, *writ denied*, 04-0141 (La. 5/21/04), 874 So.2d 173 (defendant's convictions arising out of a car chase for aggravated flight from an officer and aggravated criminal damage to property did not violate double jeopardy); *State v. Jones*, 12-0565 (La. App. 4 Cir. 4/24/13), 115 So. 3d 643, 650 (guilty pleas to traffic offenses did not bar prosecution for aggravated flight from an officer during the same incident, where the traffic offenses did not involve the acts enumerated in La. R.S. 14:108.1D).

The evidence in this case similarly establishes multiple, distinct criminal acts while the defendant attempted to evade police. According to Officer Hoops, as the defendant approached the turn from Walnut Street onto Beachwood Drive, he reacted to the sight of Officer Hoops' police car by rapidly accelerating his vehicle to a speed that exceeded the speed limit by 25 miles per hour. He then veered his vehicle off the roadway to the right, then turned sharply to the left onto Beechwood Drive, traveling in the wrong lane of travel. That conduct alone satisfies three of the aggravating elements for aggravated flight from an officer and supports a conviction for that offense. *See* La. R.S. 14:108.1D. The defendant then proceeded down Beechwood Drive through a residential neighborhood at an excessive rate of speed, passing precariously close to a group of children standing near the road. That act foreseeably endangered human life and independently supports a conviction for attempted aggravated obstruction of a roadway. *See* La. R.S. 14:96A. Rather than being punished twice for the same offense, the evidence shows that two successive but separate crimes occurred and were independently proven. The defendant's

convictions for aggravated flight from an officer and attempted aggravated obstruction of highway do not constitute double jeopardy.

Excessive Sentence

In the remaining counseled assignment of error, the defendant contends the habitual offender sentence on count two is unconstitutionally excessive. The record establishes the defendant did not make or file a motion to reconsider sentence following the trial court's imposition of the sentence. Under Louisiana Code of Criminal Procedure articles 881.1E and 881.2A(1), the failure to make or file a motion to reconsider sentence precludes 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 is procedurally barred from having this assignment of error reviewed. *See State v. Bell*, 14-1046 (La. App. 1 Cir. 1/15/15), 169 So. 3d 417, 424; *State v. Duncan,* 94-1563 (La. App. 1 Cir. 12/15/95), 667 So. 2d 1141, 1143 (*en banc, per curiam*). The defendant's second assignment of error is not reviewable on appeal.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.