STATE OF LOUISIANA

VERSUS

CALVIN KING

NO. 22-KA-371

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 11-690, DIVISION "G"
HONORABLE E. ADRIAN ADAMS, JUDGE PRESIDING

May 24, 2023

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and John J. Molaison, Jr.

CONVICTIONS AFFIRMED; SENTENCE ON COUNT ONE AFFIRMED; SENTENCE ON COUNT TWO VACATED; REMANDED FOR RESENTENCING ON COUNT TWO

JGG
SMC
JJM

Appendix "A"

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

Honorable Paul D. Connick, Jr.
Thomas J. Butler
Darren A. Allemand
Douglas W. Freese
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COUNSEL FOR DEFENDANT/APPELLANT,
CALVIN KING

Bertha M. Hillman

DEFENDANT/APPELLANT,
CALVIN KING

In Proper Person

GRAVOIS, J.

Defendant/appellant, Calvin King, appeals his convictions and sentences of second degree murder in violation of La. R.S. 14:30.1 (count one) and armed robbery with a firearm in violation of La. R.S. 14:64 and 14:64.3 (count two). For the reasons that follow, we affirm defendant's convictions and his sentence on count one, vacate his sentence on count two, and remand the case for resentencing.

PROCEDURAL HISTORY

On February 10, 2011, a Jefferson Parish Grand Jury indicted defendant, Calvin King, with second degree murder in violation of La. R.S. 14:30.1 (count one) and armed robbery with a firearm in violation of La. R.S. 14:64 and La. R.S. 14:64.3 (count two).[1] Defendant pled not guilty at his arraignment the next day. On January 30 and 31, and February 1, 2013, the case was tried before a twelve-person jury that found defendant guilty as charged. On September 13, 2013, the trial judge granted defendant's motion for new trial and denied his motion for post-verdict judgment of acquittal.

On September 24, 2013, the State filed a timely motion for appeal that was granted. In *State v. King*, 14-389 (La. App. 5 Cir. 12/16/14), 167 So.3d 117, this Court dismissed the appeal, but granted the State thirty days from the date of its opinion within which to file a writ application with this Court seeking review of the trial court's ruling granting a new trial under this Court's supervisory jurisdiction.

On May 13, 2015, this Court granted the writ application filed by the State, reversed the trial court's ruling granting defendant's motion for new trial, and reinstated defendant's convictions and sentences. *State v. King*, 15-KH-39 (La.

[1] Willie J. Gross, Jr. was also indicted with second degree murder and armed robbery in that same indictment. He was subsequently convicted of those crimes and sentenced, and his convictions and sentences were affirmed by this Court on appeal. *See State v. Gross*, 12-73 (La. App. 5 Cir. 2/21/13), 110 So.3d 1173, *writ denied*, 13-661 (La. 10/25/13), 124 So.3d 1091.

App. 5 Cir. 5/13/15) (unpublished writ disposition). On September 18, 2017, the Louisiana Supreme Court granted defendant's writ application, reversed this Court's judgment, and reinstated the trial court's judgment granting defendant's motion for new trial. *State v. King*, 15-1283 (La. 9/18/17), 232 So.3d 1207.

On January 22, 2018, defendant filed a Motion to Quash the indictment on the basis of double jeopardy, and the trial court denied the motion to quash on March 15, 2018. Defendant filed a writ application with this Court that was denied on July 26, 2018. *State v. King*, 18-K-194 (La. App. 5 Cir. 7/26/18) (unpublished writ disposition). Defendant filed a writ application with the Louisiana Supreme Court that was denied on November 20, 2018. *State v. King*, 18-1429 (La. 11/20/18), 256 So.3d 994.

On October 25, 2021, the case proceeded to trial before a twelve-person jury, and on October 29, 2021, the jury unanimously found defendant guilty as charged. Defendant filed a Motion for a New Trial and a Motion for Post-Verdict Judgment of Acquittal, both of which were denied on December 15, 2021. On that same date, the trial court sentenced defendant to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on count one, and imprisonment at hard labor for thirty years without the benefit of parole, probation, or suspension of sentence on count two, with the sentences to run concurrently.

On February 11, 2022, defense counsel filed a written motion for appeal that was granted on February 15, 2022. In this appeal, defendant, in a *pro se* brief, and defense counsel challenge defendant's convictions involving the second degree murder of Javier Sanchez and the armed robbery of Maria Abreu and Mr. Sanchez.

FACTS

On November 2, 2007, Maria Abreu was alone in the two-story apartment she shared with her boyfriend, Javier Sanchez, at 1905 Clearview Parkway,

Apartment E, when she heard a knock on the door.[2] Ms. Abreu opened the door, and three unknown men with firearms came inside without her permission.[3] They demanded two kilos of cocaine and began searching the apartment. When they could not find the cocaine, they became angry. According to Ms. Abreu, the men took money that was in a black case belonging to her and Mr. Sanchez.[4] They also took her jewelry that was on a table near the television in the living room, but they did not take the jewelry that Ms. Abreu was wearing.

At some point, the men took her upstairs. Ms. Abreu remembered trying to call Mr. Sanchez while she was upstairs, but the men took her phone from her. The men then taped her hands and feet to the bed with gray duct tape. She testified that they tried either before or after to tie her with phone charger wires, and the men also touched her with an electric device on her foot, describing the feeling as "weird" but not that strong. While she was tied to the bed upstairs, Mr. Sanchez came home. The three men were downstairs at the time. Ms. Abreu heard Mr. Sanchez say what a "sh*tty" day it had been because she did not answer the phone.[5]

When she heard them leave, she untied herself, after which she walked to the window and looked outside. When she did so, she saw Mr. Sanchez's vehicle was

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[2] Maria Abreu testified at trial with the help of an interpreter.

[3] Lieutenant Frank Renaudin testified that Ms. Abreu said that there was a knock on the door, after which she looked out the peephole and saw three black males, but did not answer the door. They left but later she went outside to smoke a cigarette and the males came back telling her their vehicle broke down or they hit her car. The males subsequently forced her back into her apartment.

Ms. Abreu later testified that the three men were in a truck when they arrived at her apartment and that the truck was still there when she left the apartment after the incident; however, she stated that when she returned to the apartment, the truck was gone. She also recalled the men saying something about having had an accident with the car.

[4] Ms. Abreu did not remember how much money was in the case, but said it could have been $9,000. She maintained that she and Mr. Sanchez earned that money by working and that none of the money was drug money. Lieutenant Renaudin testified that Ms. Abreu told him that $9,600 was stolen from her.

[5] Lieutenant Renaudin testified that Ms. Abreu told him that when she heard Mr. Sanchez come in, she also heard something drop to the floor and Mr. Sanchez say, "Where's my wife?" He stated that she said she did not hear anything after that.

in reverse, after which it left. According to Ms. Abreu, she could see inside Mr. Sanchez's vehicle due to the interior lights being on. She saw the legs of four individuals, explaining that Mr. Sanchez was in the middle of the back seat with an individual on each side of him. She indicated that she recognized the light-colored jeans Mr. Sanchez was wearing. She also saw the legs of the driver in the front seat.

Ms. Abreu was afraid to go downstairs and did not want to be in the apartment, so she opened a different window and went to a neighbor's house where she banged on a window. When no one responded, she left. She then took a car and went to the house of Mr. Sanchez's friend, Rene Izaguirre,[6] after which she went to Bud's Broiler where she formerly worked in order to get help and use the phone. She recalled talking to people at Bud's Broiler, but stated that they did not understand her.[7]

Sergeant Christopher Bassil of the Jefferson Parish Sheriff's Office ("JPSO") responded to a call at Bud's Broiler on Clearview Parkway at approximately 11:00 p.m. on November 2, 2007. There, he encountered Ms. Abreu. He attempted to speak to her, but he was unable to do so at that time since she spoke very little English. According to Sergeant Bassil, Ms. Abreu appeared to be panicked and frightened. Ms. Abreu showed him her wrists, and he could see

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[6] Lieutenant Renaudin testified that Mr. Izaguirre lived on Harvard Street. The Louisiana State Police searched that address in connection with a separate investigation and found $73,000, which he said was later returned to Mr. Izaguirre. Lieutenant Renaudin testified that there was a strong indication that Mr. Sanchez and Mr. Izaguirre were engaged in drug transactions. He did not develop any information that Mr. Izaguirre was involved in the killing of Mr. Sanchez.

He testified that a white truck on Harvard was searched and that a red blood-like substance was taken from that truck. Deputy Chief Timothy Scanlan later testified that a sample taken from a smear on the rear of the truck was examined by serologist, Pamela Williams, and that no blood was detected on that specimen. Also, the State and the defense stipulated that Mr. Izaguirre was charged in an indictment in Texas with manufacturing a narcotic substance and that he remained at large on that charge.

[7] Ms. Abreu testified that she was later arrested and jailed, but she did not know why. She explained that the government put a material witness bond on her and would not let her out of jail unless she agreed to testify. She further explained that after four or five months, she agreed to do so. Ms. Abreu maintained that the detective told her she was in jail for her own protection.

skin irritation and redness on them. He pieced together that something had happened to her boyfriend or husband and that she lived across the street, so they went there. When he walked in the door, he immediately saw that a "to-go Popeyes" had been dropped on the floor and that the apartment had been ransacked. He thereafter called crime scene and detectives for assistance and a Spanish-speaking deputy to translate.

That same night, at 11:30 p.m., Lieutenant Kevin Burns Jr. of the New Orleans Police Department and his partner received phone calls reporting that a person was on the side of the road. He and his partner arrived and found a deceased male, later identified as Mr. Sanchez on I-510 near the abandoned Six Flags park in New Orleans East. Two 9 mm spent shell casings were found near Mr. Sanchez's body in the roadway.[8] A receipt from Popeyes Famous Fried Chicken at 4701 Veterans near Clearview was also recovered. The receipt was for a transaction on November 2, 2007, at approximately 8:30 p.m. Lieutenant Burns later went to Popeyes and viewed surveillance video which showed that Mr. Sanchez was alive at the time of the purchase and alone inside his vehicle. Mr. Sanchez departed that location at approximately 8:41 p.m.

JPSO Lieutenant Frank Renaudin arrived at the Clearview Parkway apartment crime scene and started investigating. The officers recovered duct tape that was used to bound Ms. Abreu to the bed, on which fingerprints found were positively identified as belonging to defendant, Calvin King. Lieutenant Renaudin showed Ms. Abreu a photographic lineup with defendant's picture in it as number five, and she positively identified defendant as being one of the perpetrators. Co-

[8] Dr. Dana Troxclair, a forensic pathologist at the Jefferson Parish Coroner's Office testified as an expert in the field of forensic pathology. Dr. Troxclair explained that Dr. Paul McGarry performed the autopsy of Mr. Sanchez and that she reviewed the findings in Dr. McGarry's report. She testified that Mr. Sanchez's cause of death was a gunshot wound to the abdomen and that the manner of death was homicide. Dr. Troxclair testified that a 9 mm projectile was recovered from Mr. Sanchez's clothing.

defendant Willie Gross's fingerprint was also found in the apartment from a "patron" box in the kitchen. Lieutenant Renaudin showed Ms. Abreu a photographic lineup with Mr. Gross's photograph, and she positively identified Mr. Gross as another perpetrator. Lieutenant Renaudin explained that as Ms. Abreu viewed the lineups, she immediately picked out both individuals and that when she did so, "absolute fear" came over her body. She physically broke down and cried, screamed, whimpered, trembled, and shook.[9]

Lieutenant Renaudin indicated that photographs were taken of the crime scene in the apartment, and of Ms. Abreu. The photographs included photographs showing the bedposts with duct tape on them, and photographs of Ms. Abreu's wrist, an overall picture of Ms. Abreu, and two close-ups of her lower legs, respectively. He testified that he saw visual signs on Ms. Abreu's hands and above her ankle area that were consistent with her being tied up. Lieutenant Renaudin also identified photographs of the back parking lot taken during the day, but maintained that there was enough ambient light to be able to see in the back parking lot at night. He testified that after his interviews of Ms. Abreu, he deduced that Mr. Sanchez was taken against his will by three men at gunpoint.

Sergeant Troy Bradberry testified that he showed two photographic lineups and the JPSO fingerprint report to defendant after he was taken into custody. In response, defendant said, "Y'all did y'all homework. I did duct tape the girl. I left before he got here because I did not want to be involved in that. And, yes, Willie was with me. I left and walked to Kenner." Sergeant Bradberry confirmed that the statement was not recorded.

[9] Detective Rivere likewise testified that when Ms. Abreu viewed the photographic lineup that included defendant, she immediately became visibly upset; she was shaking and started to cry.

JPSO Detective Todd Rivere testified that Mr. Sanchez's vehicle was later found backed into a covered carport of an abandoned duplex at 4700 Lynhuber Drive in New Orleans East, one block from Mr. Gross's family home. The interior of the vehicle had been intentionally set on fire.

Detective Rivere asserted that phone records were obtained.[10] One of the phones was used by Ms. Abreu, and the other one was used by Mr. Sanchez. He testified, and the records showed, that on November 2, 2007, a call was made from Ms. Abreu's phone to Mr. Sanchez's phone at 8:13 p.m., that a call was made from Mr. Sanchez's phone to Ms. Abreu's phone at 8:26 p.m., and that four calls were made from Mr. Sanchez's phone to Ms. Abreu's phone between 9:27 p.m. and 9:28 p.m. The records also showed that four calls were made from Bud's Broiler's phone to Mr. Sanchez's phone at 10:38 p.m., 10:47 p.m., 10:49:14 p.m., and 10:49:55 p.m.

Detective Rivere indicated that the calls made at 8:13 p.m., 8:26 p.m., 9:27 p.m., and 9:28 p.m. were relayed off of tower 204 in Metairie, that the 10:47 p.m. call was relayed off of tower number 229 in New Orleans (5495 Crowder Road), and that the 10:49 calls were relayed off of tower number 190 in New Orleans (6560 Morrison Road). A review of the maps submitted as State's Exhibit 69 and 70, reflects that tower numbers 190 and 229 were in New Orleans East near to where Mr. Sanchez's body and vehicle were recovered and near the Gross's family residence.

Keith Lobrono testified for the defense that he was a licensed Louisiana private investigator and was contacted by defense counsel to go to the apartment complex at 1905 Clearview Parkway and determine the ability of someone to see

[10] The State and the defense stipulated that if called to testify, a representative from Verizon would appear in court and say that these phone records were records kept in the ordinary course of the company's business, that these records were accurate, and that the records produced were complete.

onto the back parking lot from a second-story apartment window. Mr. Lobrono went to the apartment complex in February and October of 2011. He asserted that he could not see much in the back parking lot because it was very dark. Mr. Lobrono also asserted that in October of 2011, he went to the second floor and looked out of the window at different distances, but could not see parking space "E."[11]

Mr. Lobrono testified that he researched the phases of the moon on November 2, 2007 and learned that the moon was in the last quarter, which he described as a "very dark moon." Mr. Lobrono admitted that he did not know what the lighting conditions were in November of 2007 and that he was not in a position to disagree with anyone who was there at that time, and said they could see into that parking lot. He further admitted he did not have the interior light on in his SUV that he parked below to determine if could see inside it.

ASSIGNMENT OF ERROR NUMBER ONE
PRO SE ASSIGNMENT OF ERROR NUMBER FIVE[12]

In her first assignment of error, defendant's appellate counsel argues that the evidence was insufficient to support defendant's convictions of second degree murder and armed robbery. She asserts that with respect to the second degree murder conviction, there was no evidence that defendant committed or was a principal to murder, nor was there evidence that Mr. Sanchez was kidnapped and taken against his will. Counsel asserts that Ms. Abreu testified that Mr. Sanchez could have left the apartment voluntarily and that neither Ms. Abreu nor anyone else witnessed the murder. As to the armed robbery conviction, counsel contends that the only evidence that Ms. Abreu was the victim of an armed robbery was her

[11] Mr. Lobrono testified that parking space "E" belonged to apartment "E" and was the parking space closest to the apartment building.

[12] Because the assignments of error are related, this Court will address both assignments in a single analysis.

self-serving testimony, which counsel claims was replete with contradictions and irreconcilable conflicts. Counsel asserts that no reasonable person could have or should have believed her. She points out that on cross-examination, Ms. Abreu was impeached several times with prior statements given in depositions and at hearings. Counsel maintains that there was no evidence that defendant took anything of value from Ms. Abreu and that nothing belonging to Ms. Abreu was found in defendant's possession, even after a search of his residence.

In his *Pro Se* Assignment of Error Number Five, defendant argues that the trial court erred in denying his Motion for Post-Verdict Judgment of Acquittal. He contends that the trial court's ruling on this motion showed that the trial court ignored the applicable law and counsel's argument. Defendant asserts that the record sufficiently supports his allegation of substantial error with respect to the denial of this motion. As such, he argues that his convictions and sentences should be reversed.

The proper procedural vehicle for raising the issue of the sufficiency of the evidence is a motion for post-verdict judgment of acquittal. La. C.Cr.P. art. 821. *State v. Lande*, 06-24 (La. App. 5 Cir. 6/28/06), 934 So.2d 280, 289 n.18, *writ denied*, 06-1894 (La. 4/20/07), 954 So.2d 154. Here, defendant filed a Motion for Post-Verdict Judgment of Acquittal under La. C.Cr.P. art. 821 and argued that the evidence was insufficient to support the verdicts, noting that there were many inconsistencies in Ms. Abreu's testimony.[13] The trial court denied this motion.

In reviewing the sufficiency of the evidence, an appellate court must determine that the evidence, whether direct, circumstantial, or a mixture of both, viewed in the light most favorable to the prosecution, was sufficient to convince a

[13] La. C.Cr.P. art. 821(B) provides, "A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the state, does not reasonably permit a finding of guilty."

rational trier of fact that all of the elements of the crime have been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Baham*, 14-653 (La. App. 5 Cir. 3/11/15), 169 So.3d 558, 566, *writ denied*, 15-40 (La. 3/24/16), 190 So.3d 1189. When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 provides, "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." The reviewing court is not required to determine whether another possible hypothesis of innocence suggested by the defendant offers an exculpatory explanation of events. Rather, the reviewing court must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational trier of fact could not have found proof of guilt beyond a reasonable doubt. *Baham*, 169 So.3d at 566.

Encompassed within proving the elements of an offense is the necessity of proving the identity of the defendant as the perpetrator. Where the key issue is the identification, the State is required to negate any reasonable probability of misidentification to carry its burden of proof. *State v. Ray*, 12-684 (La. App. 5 Cir. 4/10/13), 115 So.3d 17, 20, *writ denied*, 13-1115 (La. 10/25/13), 124 So.3d 1096. Identification by only one witness is sufficient to support a conviction. *State v. Williams*, 08-272 (La. App. 5 Cir. 12/16/08), 3 So.3d 526, 529, *writ denied*, 09-143 (La. 10/16/09), 19 So.3d 470. In the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a requisite factual finding. *State v. Caffrey*, 08-717 (La. App. 5 Cir. 5/12/09), 15 So.3d 198, 202, *writ denied*, 09-1305 (La. 2/5/10), 27 So.3d 297.

Defendant was convicted of second degree murder and armed robbery. La. R.S. 14:30.1 defines second degree murder as the killing of a human being when

the offender: 1) has specific intent to kill or to inflict great bodily harm; or 2) is engaged in the perpetration or attempted perpetration of one of several enumerated felonies, even though the offender has no intent to kill or to inflict great bodily harm. *See State v. Lewis*, 05-170 (La. App. 5 Cir. 11/29/05), 917 So.2d 583, 589-90, *writ denied*, 06-757 (La. 12/15/06), 944 So.2d 1277. Here, the jury was instructed as to both the specific intent and felony murder elements of second degree murder.

Felony second degree murder is defined by La. R.S. 14:30.1(A)(2) as the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of one of several enumerated felonies, including second degree kidnapping. *See* La. R.S. 14:44.1. Second degree kidnapping is a general intent crime. La. R.S. 14:44.1; *State v. Cerda-Anima*, 12-682 (La. App. 5 Cir. 5/30/13), 119 So.3d 751, 758, *writ denied*, 13-1487 (La. 1/10/14), 130 So.3d 321.

In presenting its theory of felony murder, the State alleged that defendant was engaged in the commission or attempted commission of second degree kidnapping. One need not possess specific intent to kill or inflict great bodily harm to commit second degree felony murder. Rather, under the felony murder theory, the State need only prove the commission of the underlying felony or the attempt thereof. *Cerda-Anima*, *supra*.

As to count two, armed robbery is "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. R.S. 14:64(A); *State v. Martin*, 07-1035 (La. App. 5 Cir. 10/28/08), 996 So.2d 1157, 1160.

Under La. R.S. 14:24, "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly

counsel or procure another to commit the crime, are principals." Only those persons who knowingly participate in the planning or execution of a crime are principals to that crime. *State v. Pierre*, 93-893 (La. 2/3/94), 631 So.2d 427, 428; *State v. King*, 06-554 (La. App. 5 Cir. 1/16/07), 951 So.2d 384, 390, *writ denied*, 07-371 (La. 5/4/07), 956 So.2d 600. In addition, under the law of principals, a person may still be convicted of a crime even if he has not personally fired the fatal shot. *State v. Massey*, 11-357 (La. App. 5 Cir. 3/27/12), 91 So.3d 453, 463, *writ denied*, 12-991 (La. 9/21/12), 98 So.3d 332.

Mere presence at the scene of a crime does not make one a principal to the crime. *State v. Page*, 08-531 (La. App. 5 Cir. 11/10/09), 28 So.3d 442, 449, *writ denied*, 09-2684 (La. 6/4/10), 38 So.3d 299. However, "[i]t is sufficient encouragement that the accomplice is standing by at the scene of the crime ready to give some aid if needed, although in such a case it is necessary that the principal actually be aware of the accomplice's intention." *State v. Anderson*, 97-1301 (La. 2/6/98), 707 So.2d 1223, 1225.

In *State v. Gross*, 12-73 (La. App. 5 Cir. 2/21/13), 110 So.3d 1173, *writ denied*, 13-661 (La. 10/25/13), 124 So.3d 1091, the defendant, Mr. Gross (the co-defendant in the instant case), was convicted of second degree murder and armed robbery. On appeal, he challenged the sufficiency of the evidence used to convict him of second degree murder. Specifically, the defendant contended that the State failed to prove beyond a reasonable doubt that he murdered Mr. Sanchez, noting that no witness or evidence linked him to that murder. The defendant asserted that after the drug deal, he drove home to Baton Rouge and was unaware of any plan or intent to kill Mr. Sanchez. This Court found that a rational trier of fact could have found that the evidence, although largely circumstantial, was sufficient under the *Jackson* standard to support the defendant's second degree murder conviction. This Court also found that from the evidence, a rational trier of fact could have

reasonably found that the defendant, Mr. King, and another perpetrator entered Mr. Sanchez and Ms. Abreu's apartment, that they were armed with guns, that they took money, jewelry, pistols, and cell phones, and that they then kidnapped Mr. Sanchez and took him to New Orleans East, where one of the three men shot and killed him and dumped his body on the side of the road. This Court concluded that a rational trier of fact could have reasonably assumed that the victim was murdered by the persons who kidnapped him, citing *State v. Morris*, 99-3075 (La. App. 1 Cir. 11/3/00), 770 So.2d 908, *writ denied*, 00-3293 (La. 10/12/01), 799 So.2d 496, *cert. denied*, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). Accordingly, this Court found no merit to the defendant's arguments relating to the sufficiency of the evidence.

In the instant case, upon review, we find that a rational trier of fact could have found that the evidence was sufficient under the *Jackson* standard to show that defendant committed armed robbery and that he was at least a principal to the second degree kidnapping of Mr. Sanchez, who was killed during the commission of that offense.

Ms. Abreu testified that three men with guns forced their way into her apartment, demanding two kilos of cocaine. They searched the apartment, but could not find the cocaine. Ms. Abreu asserted that the men took money that belonged to her and Mr. Sanchez from a black case. The men also took jewelry that was on a table near the television in the living room, but they did not take the jewelry she was wearing. Ms. Abreu indicated that the men took her upstairs, duct-taped her hands and feet, and tied her to the bed. She recalled that the men touched her with an electric device on her foot, describing the feeling as "weird" but not that strong. Ms. Abreu explained that she heard Mr. Sanchez come home and say what a "sh*tty" day it had been because she did not answer the phone.

Ms. Abreu testified that she heard them leave at some point, after which she untied herself, walked to the window, and looked outside. When she did so, she could see inside Mr. Sanchez's vehicle due to the interior lights being on. Ms. Abreu recalled that the vehicle was in reverse and then left. She saw the legs of four individuals, explaining that Mr. Sanchez was in the middle of the back seat with an individual on each side of him. Lieutenant Renaudin testified that there was enough ambient light to be able to see in the back parking lot at night. Ms. Abreu also stated that afterwards, she took a car and went by Mr. Izaguirre's house, and then she went to Bud's Broiler where she spoke to individuals who did not understand her.

Sergeant Bassil testified that when he arrived at Bud's Broiler at approximately 11:00 p.m., he tried to communicate with Ms. Abreu, but she did not speak much English. He went to the apartment, where he saw that a "to-go Popeyes" had been dropped on the floor and that the apartment had been ransacked. A Popeyes receipt and surveillance video indicated that Mr. Sanchez made a purchase at Popeyes at approximately 8:30 p.m. Lieutenant Burns testified that at 11:30 p.m., Mr. Sanchez's body was found on the side of the road in New Orleans East. Dr. Troxclair testified that Mr. Sanchez had been fatally shot once in the abdomen. Ms. Abreu positively identified defendant and Mr. Gross in photographic lineups as two of the perpetrators.

Additionally, defendant's fingerprints were found on duct tape located inside the apartment, and Mr. Gross's fingerprint was found on a liquor box also found inside the apartment. Lieutenant Renaudin testified that he saw visual signs on Ms. Abreu's hands and ankle area that were consistent with her being tied up. Sergeant Bradberry testified that defendant admitted he duct-taped Ms. Abreu and that Mr. Gross was with him, but defendant claimed that he left after that. Detective Rivere testified that Mr. Sanchez's vehicle was found backed into the driveway of a

vacant duplex in New Orleans East, one block from the house of Gross's relative, with the interior of the vehicle intentionally burned.

Defense counsel argues on appeal that Ms. Abreu's testimony contained inconsistencies, and therefore, she was not credible. The record reflects that Ms. Abreu testified that she did not know Mr. Sanchez to sell cocaine. She further testified that she did not remember telling the police that she thought Mr. Sanchez sold cocaine. However, Ms. Abreu later testified that she remembered saying she thought he sold cocaine. She testified that she suspected that he did. On redirect examination, the State asked Ms. Abreu if given everything that has happened, can she say she knows for sure that Mr. Sanchez was a drug dealer. Ms. Abreu responded, "I wouldn't be able to tell you myself; but from everything I've heard, I may believe it myself now." Taken as a whole, this testimony does not appear inconsistent. Rather, it indicates that Ms. Abreu suspected that Mr. Sanchez sold cocaine, but did not have personal knowledge of it.

Counsel further asserts that Ms. Abreu testified that her jewelry was taken during the robbery, but that Ms. Abreu was wearing gold jewelry when she met with Deputy Bassil at Bud's Broiler. Ms. Abreu testified that the men took her jewelry that was on a table near the television in the living room, but that they did not take the jewelry she was wearing. Although it may appear unusual that the perpetrators did not also take the jewelry that Ms. Abreu was wearing, this testimony does not appear to be inconsistent. Counsel also asserts that Ms. Abreu testified that she was shot with a taser, but that there was no evidence of a taser injury on her body. Ms. Abreu testified that the men touched her with an electric device on the front of one of her feet, describing the feeling as "weird" but not that strong. She also testified that she told a police officer about this incident. Sergeant Bassil testified that he did not see any injury on her body that would be consistent

with being shot with a taser or electric gun. This testimony does not appear to be inconsistent since Ms. Abreu did not claim that she was injured by the device.

Counsel provides that Ms. Abreu denied being told to pick out number 5, defendant, from the lineup, but that the transcript of an April 27, 2008 hearing proved she had been told to choose him. Ms. Abreu testified that no police officers told her whom to pick out in the lineups. Ms. Abreu later testified that she did not remember testifying at a previous hearing that she was told to pick number 5 in the lineups. Defense counsel referred Ms. Abreu to her April 27, 2008 deposition, pages 15 and 16, Defense Exhibit 27, which was admitted into evidence. At trial, defense counsel then asked Ms. Abreu:

> Q. Now, do you remember saying this, you were asked the question: "Did you mention to Barbara Rivera Fulton that you were told to pick out Number 5?["] And your answer was: "Yes, I told her." Then the question was put to you: "So you told her that you were told to pick out Number 5?" And you [sic] answer was: "I told her that because I was confused. I was ready to get out of here. But really no one threatened me or promised me to do this." The question then: "So you said that you - - basically, you lied?" And your answer was: "I lied there to her." And the question was put: "But you're not lying now then?" And your answer was: "I'm under oath. I'm not lying."
>
> So do you remember lying about the identification at some point?
>
> A. I don't even remember who Barbara is.
>
> Q. She was a lawyer. Do you remember that?
>
> A. No.

On redirect examination, Ms. Abreu positively identified defendant in court as the man who tied her to the bed. She also testified that she had not lied in court when called to testify and that she did not think she had lied during the deposition.

This Court addressed the credibility of a witness in *State v. Cowart*, 01-1178 (La. App. 5 Cir. 3/26/02), 815 So.2d 275, 284-85, *writ denied*, 02-1457 (La. 5/9/03), 843 So.2d 387. In that case, there was no physical evidence linking the

defendant to the crime, and a single witness identified the defendant as the perpetrator of a shooting. At trial, the reliability of the eyewitness was attacked because the witness had initially lied to the police, gave a description that did not match the defendant, had perjured herself during motion hearings, and had changed her story about the crime scene and the number of shots she heard. Despite this long list of deficiencies, this Court held that it was within the jury's discretion to believe the witness's testimony.

In the instant case, the jury heard the testimony and clearly found the State's witnesses to be credible, despite any inconsistencies in Ms. Abreu's testimony. It is not the function of the appellate court to assess credibility or reweigh the evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So.2d 442, 443. The trier of fact shall evaluate credibility, and when faced with a conflict in testimony, is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Bradley*, 03-384 (La. App. 5 Cir. 9/16/03), 858 So.2d 80, 84, *writs denied*, 03-2745 (La. 2/13/04), 867 So.2d 688 and 08-1951 (La. 1/30/09), 999 So.2d 750. We find that there are no irreconcilable conflicts with the physical evidence and that it was within the jury's discretion to believe Ms. Abreu's testimony. *See Cowart, supra.*

Additionally, much of Ms. Abreu's testimony and statements to the police were corroborated. Ms. Abreu positively identified defendant and Mr. Gross as two of the perpetrators in photographic lineups and testified that the men tied her hands and feet with duct tape during the incident. Her testimony was corroborated by defendant who admitted that he duct-taped Ms. Abreu and that Mr. Gross was with him during the incident. Her testimony was also corroborated by defendant's fingerprint being found on duct tape in the apartment and by Mr. Gross's fingerprint being found on a liquor box in the kitchen. Also, Lieutenant Renaudin testified that he saw visual signs on Ms. Abreu's hands and ankle area that were

consistent with her being tied up, and photographs of those injuries were admitted into evidence at trial.

Lieutenant Renaudin testified that Ms. Abreu told him that when she heard Mr. Sanchez come in, she also heard something drop to the floor. This information was corroborated by Sergeant Bassil who saw a Popeye's bag on the floor when he entered the apartment. Sergeant Bassil testified that from what little he could understand from Ms. Abreu at Bud's Broiler, he pieced together that something had happened to her boyfriend or husband and that she lived across the street. This information was corroborated when he went into their apartment across the street and saw that it had been ransacked. As to the credibility of the identifications, Lieutenant Renaudin recalled that when Ms. Abreu positively identified defendant and Mr. Gross, it was a moment that would always remain with him as "absolute fear" came over her, and she broke down crying and screaming.

Additionally, Lieutenant Renaudin testified that he found Ms. Abreu to be credible in everything she described to him and the manner in which she described it. He considered her statements to be truthful "through the years and through multiple, multiple interpreters" that were utilized. Lieutenant Renaudin admitted testifying previously in 2013 that there were inconsistencies in her statements; however, he testified that the incident happened a long time ago in 2007. He explained that Ms. Abreu had been through a traumatic event and that in his experience in dealing with victims of violent crimes, as time goes by, a person may remember something that may have previously seemed insignificant. Lieutenant Renaudin asserted that there were no inconsistencies that were detrimental to the investigation or that led him to believe she was not a victim or not credible.

In light of the foregoing, we find that a rational trier of fact could have found that the evidence was sufficient under the *Jackson* standard to show that defendant committed armed robbery and that he was at least a principal to the second degree

kidnapping of Mr. Sanchez, who was killed during the commission of that offense. As was stated above, under the law of principals, a person may still be convicted of a crime even if he has not personally fired the fatal shot. *See Massey*, *supra*. We further find for these same reasons that the trial court did not abuse its discretion in denying defendant's Motion for Post-Verdict Judgment of Acquittal. These assignments of error are without merit.

***PRO SE* ASSIGNMENT OF ERROR NUMBER ONE**

Defendant argues on appeal that his trial record is incomplete, and he is being denied due process and equal protection of the law under the Fourteenth Amendment based upon his denial of right to full judicial review. He asserts that his appellate counsel is ineffective for not being able to properly prepare for him an effective appeal. He further argues that without the full record, his appellate counsel cannot provide meaningful representation. He maintains that appellate counsel cannot possibly know if errors existed in the missing portions of the records, noting that she was not the trial attorney.

Specifically, defendant contends that minute entries are missing from the appellate record in violation of Louisiana Courts of Appeal, Rule 2-1.5. He also contends that closing arguments by the State and defense counsel are missing. Further, he asserts that on October 27, 2021, the State called four witnesses to testify—Dana Troxclair, Christopher Bassil, Kevin Burns, and Frank Renaudin. He claims that the transcripts of the testimony of these witnesses are missing from the record. He also explains that on October 28, 2021, the State called four more witnesses to testify—Sergeant Troy Bradberry, Timothy Scanlan, Deputy Todd Rivere, and key witness, Maria Abreu. Defendant contends that this whole day was not transcribed and that he has not received these transcripts. Additionally, on October 29, 2021, the defense presented an expert witness, Keith Lobrono, but that the testimony of this witness is also missing from the transcripts. As such,

defendant argues that his convictions and sentences should be set aside and that the case should be remanded to the trial court for further proceedings.

On August 31, 2022, defendant's appellate counsel filed a motion to supplement the record, suspend briefing, and re-set the briefing schedule. She requested that this Court order the trial court to supplement the record with the transcripts of closing arguments. On September 1, 2022, this Court granted the motion and ordered the Clerk of Court for the 24th Judicial District Court to supplement the record with "the portion of the transcript of the proceedings held on October 29, 2021 that includes closing arguments." On September 28, 2022, the appellate record was supplemented with the transcript of the closing arguments on October 29, 2021.

On October 11, 2022, defendant's appellate counsel filed a brief in this Court, and the State filed its brief on November 22, 2022. On November 29, 2022, defendant filed a *pro se* motion to supplement the record with the same portions of the record he is asking for in this appeal and an extension of time to file a *pro se* brief. On November 30, 2022, this Court granted defendant's motion and ordered that the Clerk of Court for the 24th Judicial District Court supplement the appellate record with the portion of the transcript of the proceedings held on October 29, 2021, that included the jury charges. This Court ordered that the due date for defendant's *pro se* brief would be set by this Court upon receipt of the supplement and its transmission to defendant.

On December 6, 2022, defendant filed a *pro se* brief. The appellate record was supplemented on December 9, 2022, with a transcript of the jury charges. On December 16, 2022, this Court transmitted a copy of this supplemental record to defendant and gave defendant until January 13, 2023, to file another supplemental brief.

On January 4, 2023, defendant filed a *pro se* motion to be provided full copies of the trial transcripts including the testimonies of Dana Troxclair, Christopher Bassil, Kevin Burns, Frank Renaudin, Sergeant Troy Bradberry; Timothy Scanlan, Deputy Todd Rivere, Maria Abreu, and Keith Lobrono so that he could file a proper supplemental brief. On January 9, 2023, this Court denied defendant's motion, finding that after reviewing the official record of this appeal, the testimonies of the witnesses identified by defendant were included in the official record of this appeal that was previously provided to defendant. On January 18, 2023, defendant filed another *pro se* supplemental brief, again arguing that the witness testimonies were missing from the record.

Defendant argues that the appellate record is incomplete because it is missing the transcript of closing arguments; however, the appellate record has been supplemented with the transcript of closing arguments. Also, defendant claims that the following minute entries are missing from the record: 1) impaneling of the grand jury by which the indictment was found; 2) time when the jury retired to deliberate; 3) time returned to render the verdict; 4) the jury verdict. Contrary to defendant's assertion, the appellate record contains these minute entries.

On page 80 of the appellate record, a minute entry dated February 10, 2011, titled, "Twenty-Fourth Judicial District Court Grand Jury" shows the members of the Grand Jury and the crimes with which they indicted defendant. On page 76, a minute entry dated October 29, 2021, shows that closing arguments were from 10:22 a.m. to 11:49 a.m.; that the trial court read the jury instructions from 11:49 a.m. to 12:15 p.m.; that at approximately 12:44 p.m., the jurors entered with a question or questions; that at approximately 2:10 p.m., the jurors entered with a question or questions; and that at 3:18 p.m., the jury returned with a verdict of guilty as charged.

Finally, the testimony of the witnesses identified by defendant are, in fact, included in the official record of this appeal that was previously provided to defendant. As such, we find that the appellate record is not incomplete as alleged by defendant. To the extent that defendant argues his counsel was ineffective for not being able to properly prepare an effective appeal, this argument lacks merit since defendant's underlying argument lacks merit.[14] In light of the foregoing, we find this assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In his second *pro se* assignment of error, defendant argues that the indictment for second degree murder of Mr. Sanchez and the armed robbery of Ms. Abreu was not brought in open court by a Jefferson Parish Grand Jury. He further argues that there is no minute entry of February 10, 2011, nor a transcript of the proceedings to show that the minute clerk, the foreperson of the Grand Jury, and the district attorney were present in open court.

Defendant also contends that the minute entries do not reveal the presiding judge and the official court reporter for the findings of the Grand Jury indictment to be filed. Additionally, he asserts that the minute entries do not show that the other Grand Jury members were attending the return or presentment, nor does it

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[14] The Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution safeguard a defendant's right to effective assistance of trial counsel. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court held that a defendant asserting an ineffective assistance claim must show that defense counsel's performance was deficient and that the deficiency prejudiced the defendant. To establish ineffective assistance of counsel, the defendant has the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. When the claim of ineffective assistance of appellate counsel is based on a failure to raise an issue on appeal, the "prejudice prong" of the *Strickland* test requires the petitioner to establish that the appellate court would have granted relief had the issue been raised. *State v. Cambrice*, 15-2362 (La. 10/17/16), 202 So.3d 482, 487 (citing *United States v. Phillips*, 210 F.3d 345 (5th Cir. 2000)). *See also State v. Kent*, 15-323 (La. App. 5 Cir. 10/28/15), 178 So.3d 219, 232, *writ denied*, 15-2119 (La. 12/16/16), 211 So.3d 1165 (citing *State v. Roberson*, 94-1570 (La. App. 3 Cir. 11/02/95), 664 So.2d 687, 692 (citing *Phillips*, *supra*)) ("In the appellate context, the [*Strickland*] prejudice prong first requires a showing that we would have afforded relief on appeal."

show that at least nine grand jurors constituted a quorum and concurred to find an indictment.

Defendant argues that the minute entries do not reflect that the indictment was properly returned in open court, noting that the minute clerk did not sign the indictment. He asserts that a contradictory hearing is needed because the Grand Jury did not make a legal finding as to second degree murder and armed robbery.

In the appellate record, on page 80, there is a minute entry dated February 10, 2011, which is titled, "Twenty-Fourth Judicial District Court Grand Jury." This minute entry shows the name of the presiding judge, Judge Donald A. Rowan Jr. of Division "L," and the name of the court reporter, Dana Daste. The minute entry also reflects that this was a partial return of the Jefferson Parish Grand Jury, and it states that the foreperson and eleven other members were present, giving their names. The minute entry provides that after being sworn and taking the stand, the following report was made by the foreperson, namely, that defendant, Calvin King, was indicted with second degree murder in violation of La. R.S. 14:30.1 and armed robbery in violation of La. R.S. 14:64 and La. R.S. 14:64.3. The foreperson also reported that Willie J. Gross Jr. was indicted with those same offenses and that warrants were to be issued for both defendants. The minute entry further provides that representing the district attorney's office were assistant district attorneys, Paul Schneider, Ernest Chin, and Lauren Dileo. At the bottom of the return, the following is stated:

> IT IS ORDERED BY THE COURT that the findings of the Grand Jury of this partial return be filed with the Clerk of Court and the accused for whom "A True Bill" was found be brought into the Court to be arraigned, if the accused for whom "A True Bill" was found is not in custody, let a warrant be issued for their arrest. Those for whom "A No True Bill" was returned, their bond(s) is (are) cancelled, if any, and they are to be released from custody if incarcerated.

This order was signed by Jan Soto, Deputy Clerk. Underneath her signature is "Grand Jury Minute Entry 2-10-11."

Because the February 10, 2011 Grand Jury minute entry provides the information that defendant alleged was missing from the appellate record, we find no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In this *pro se* assignment of error, Defendant argues that the trial court provided an unconstitutional jury instruction on the law of principals, and therefore, his convictions and sentences should be reversed. He contends that this defective instruction was read to the jury without an objection by the defense. Defendant further argues that at no point did the trial court explain that he personally had to have the specific intent to kill or to inflict great bodily harm in order to be found guilty of second degree murder. He asserts that even though the jury instruction was not objected to below, this Court can still consider this issue in light of *State v. Green*, 493 So.2d 588 (La. 1986), and *State v. Taylor*, 96-320 (La. App. 3 Cir. 11/6/96), 683 So.2d 1309, *writ denied*, 96-2828 (La. 6/20/97), 695 So.2d 1348.

To begin, the record reflects that defense counsel did not object to the jury instruction regarding principals. However, because the jury instruction at issue pertains to the definition of principals and defendant is alleged to have been a principal to second degree murder and armed robbery, we find that this issue involves the definition of the charged offenses. Thus, we find that defendant is entitled to appellate review on this issue. *See State v. Smith*, 05-951 (La. App. 5 Cir. 6/28/06), 934 So.2d 269, *writ* denied, 06-2930 (La. 9/28/07), 964 So.2d 357.

La. C.Cr.P. art. 802 mandates that the trial court instruct the jury on the law applicable to each case. *State v. Cornejo-Garcia*, 11-619 (La. App. 5 Cir. 1/24/12), 90 So.3d 458, 462. The standard for reviewing jury charges requires that

the charges be read as a whole. *State v. Hill*, 98-1087 (La. App. 5 Cir. 8/31/99), 742 So.2d 690, 698, *writ denied*, 99-2848 (La. 3/24/00), 758 So.2d 147. A verdict will not be set aside because of a challenged jury charge unless such portion, when considered in the context of the entire charge, is determined to be erroneous and prejudicial. *Id.*

When considering an allegedly improper jury instruction, a reviewing court must determine whether it is "reasonably likely" that the jury applied the challenged instruction in an unconstitutional manner, not whether it is possible that the jury misapplied the instruction. *State v. Gatewood*, 12-281 (La. App. 5 Cir. 10/30/12), 103 So.3d 627,635. In determining whether it is reasonably likely that the jurors applied the instruction unconstitutionally, the challenged terms are considered in relation to the instructions as a whole. *Id.* The test is whether, taking the instructions as a whole, reasonable persons of ordinary intelligence would understand the charge. *Id.* at 635-636.

Here, the following law regarding principals was read to the jury:

> Under Louisiana law, all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the crime, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals in that crime. However, a principal may be convicted of a higher or lower degree of the crime charged, depending upon the mental element proven at trial.
>
> All persons knowing the unlawful intent of a person committing a crime, who were present consenting thereto, and aiding or abetting, either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring, at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment.
>
> Further, each person consenting to the commission of an offense and doing any one act which is an ingredient in the crime immediately connected with or leading to its commission, is a principal.
>
> "Mere presence at the scene of the crime does not, however, make one a principal. There must be proof that he actually committed a crime, or that he had agreed to commit it, or was present with a

design to encourage, incite, or in some manner to aid, abet, or assist in actual preparation."

Later on, the trial court charged the jury that in order to convict defendant of second degree murder, it must find that defendant acted with the specific intent to kill or to inflict great bodily harm or that the killing occurred while defendant was engaged in the perpetration or attempted perpetration of second degree kidnapping, even if he did not intend to kill or to inflict great bodily harm.

In the instant case, the trial court instructed the jury on the law of principals, after which it instructed the jury that to convict defendant of second degree murder, the jury was required to find that he either possessed specific intent to kill or to inflict great bodily harm or that he killed Mr. Sanchez during an enumerated felony even though he did not have specific intent. Therefore, we find that it was unlikely that the jury misunderstood the trial court's charges. *See State v. Manning*, 03-1982 (La. 10/19/04), 885 So.2d 1044, *cert. denied*, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). Also, a portion of the charges read by the trial court was the definition of principals provided by La. R.S. 14:24. *See State v. Buchanon*, 95-625 (La. App. 1 Cir. 5/10/96), 673 So.2d 663, 668, *writ denied*, 96-1411 (La. 12/6/96), 684 So.2d 923.

In light of the foregoing, we find the trial court did not provide an unconstitutional jury instruction on the law of principals to the jury. Accordingly, this assignment of error is without merit.

***PRO SE* ASSIGNMENT OF ERROR NUMBER FOUR AND *PRO SE* ASSIGNMENT OF ERROR NUMBER SIX**[15]

Defendant asserts in *Pro Se* Assignment of Error Number Four that the double jeopardy clause precludes a second trial once the trial judge or reviewing court has found the evidence legally insufficient to support the verdict in the first

[15] Because the assignments of error are related, this Court will address both assignments in a single analysis.

trial. He argues that he was denied his rights of due process and equal protection, when the trial court in the first trial found that the State's evidence was insufficient, but then allowed a retrial utilizing the same witnesses, inconsistent testimony, and circumstantial evidence that was found insufficient in the first trial. Defendant argues that collateral estoppel applies in the instant case and that his convictions and sentences should be reversed.

Defendant argues in *Pro Se* Assignment of Error Number Six that the trial court erred by denying his Motion to Quash the indictment on the grounds of double jeopardy. He contends that retrying him under these circumstances places him in peril of life and limb in violation of the Fifth Amendment. As such, defendant argues that he should be released from custody.

The record reflects that on January 22, 2018, defendant filed a Motion to Quash the indictment on the basis of double jeopardy. The State filed an opposition, and the trial court denied the Motion to Quash on March 15, 2018. Defendant thereafter filed a writ application with this Court challenging the trial court's denial of his Motion to Quash. This Court denied the writ, stating in pertinent part:

> In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the U.S. Supreme Court held that retrial of a defendant charged with the same offense as in the first prosecution is a violation of the double jeopardy clause when the retrial is granted on the ground that the evidence presented at the first trial was legally insufficient to support a guilty verdict. Subsequently, in *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), the U.S. Supreme Court determined that when a defendant's successful appeal of his conviction rested upon a finding that the conviction was against the weight of the evidence, not upon a holding that the evidence was legally insufficient to support the verdict, the Double Jeopardy Clause did not bar retrial.
>
> In the instant case, after reviewing the application before us, we conclude that, for both charges, the trial [court] weighed conflicting testimony, which is a hallmark of review based on evidentiary weight, not evidentiary sufficiency. *Tibbs v. Florida*, *supra*. This conclusion is further supported by the trial court's denial of relator's Motion for Post-Verdict Judgment of Acquittal,

> which was the proper vehicle for challenging the sufficiency of the evidence under La. C.Cr.P. art. 821. Under these circumstances, we find that the double jeopardy clause does not bar retrial of defendant and, therefore, the trial judge did not abuse his discretion by denying the Motion to Quash.

King, 18-K-194, *supra*.

Afterwards, defendant filed a writ application with the Louisiana Supreme Court that was denied on November 20, 2018. *See State v. King*, 18-1429 (La. 11/20/18), 256 So.3d 994.

On appeal, defendant again challenges the trial court's denial of his Motion to Quash the indictment on the basis of double jeopardy. Under the doctrine of "law of the case," an appellate court will generally decline to consider its own rulings of law on a subsequent appeal in the same case. *State v. Allen*, 17-685 (La. App. 5 Cir. 5/16/18), 247 So.3d 179, 185, *writ denied*, 18-1042 (La. 11/5/18), 255 So.3d 998. The law of the case doctrine is discretionary. Reconsideration of a prior ruling is warranted when, in light of a subsequent trial record, it is apparent that the determination was patently erroneous and produced unjust results. *State v. Falcon*, 13-849 (La. App. 5 Cir. 3/12/14), 138 So.3d 79, 87-88, *writ denied*, 14-769 (La. 11/14/14), 152 So.3d 877.

Upon review, we find that there is no additional evidence in the subsequent trial record that would suggest that this Court's prior determination on this issue was patently erroneous or produced unjust results, and thus, we decline to reconsider this Court's previous ruling regarding the Motion to Quash. These assignments of error are without merit.

ERRORS PATENT REVIEW

In his *pro se* brief, defendant requests an errors patent review. However, this Court routinely reviews the record for errors patent in accordance with La. C.Cr.P. art. 920, *State v. Oliveaux*, 312 So.2d 337 (La. 1975), and *State v. Weiland*,

556 So.2d 175 (La. App. 5 Cir. 1990), regardless of whether defendant makes such a request.

Motion to Reconsider Sentence Ruling

The record does not reflect a ruling on the oral motion to reconsider sentence. After sentencing, defense counsel said, "the defense would orally file a Motion to Reconsider Sentence, request a hearing date for that motion." He added that he would file a written motion as well. The trial court subsequently set the hearing on the motion for December 16, 2021 at 9:00 a.m. A minute entry dated December 16, 2021, states, "The defense attorney waives the presence of the Defendant, Calvin King. The Defendant was represented by Katie Ellis. The Defendant is currently incarcerated with the Jefferson Parish Prison. As of 10:55 a.m., no motion to reconsider sentence has been filed in regards to this matter."

In *State v. Taylor*, 04-1389 (La. App. 5 Cir. 5/31/05), 905 So.2d 451, 458, *writ denied*, 05-2203 (La. 5/26/06), 930 So.2d 12, the defendant made an oral Motion for Reconsideration of Sentence without stating specific grounds for the motion as required by La. C.Cr.P. art. 881.1. The defendant indicated that he would file a written supplement to his oral motion but failed to do so. This Court found that the defendant abandoned his oral Motion for Reconsideration of his sentence by failing to file a written supplement because he did not orally state the specific grounds upon which it was based, and therefore, there was nothing for the trial court to consider.

In the instant case, defendant made an oral motion to reconsider sentence without stating specific grounds for the motion as required by Article 881.1. Defendant indicated that he would file a written motion to reconsider sentence but failed to do so. Upon review, we find, as this Court did in *Taylor*, *supra*, that defendant abandoned his oral motion to reconsider sentence by failing to file a

written motion as well because he did not orally state the specific grounds upon which it was based. As such, there was nothing for the trial court to consider.

Indeterminate Sentence

Upon review, we find that defendant's sentence on count two (armed robbery with a firearm) is indeterminate. La. R.S. 14:64.3 provides for an additional penalty of five years imprisonment without benefits to be served consecutively to the sentence imposed under La. R.S. 14:64, when a firearm is used in the commission of the crime of armed robbery. Defendant was indicted with armed robbery with a firearm in violation of La. R.S. 14:64 and La. R.S. 14:64.3 and was found guilty as charged. The trial court sentenced defendant on count two to thirty years at hard labor without the benefit of parole, probation, or suspension of sentence, but did not state whether the five-year enhancement penalty was included as part of the thirty-year sentence.

Because the trial judge failed to indicate whether the thirty-year sentence includes the additional five-year consecutive sentence required by La. R.S. 14:64.3, we find that the sentence imposed is indeterminate. Accordingly, we vacate the sentence on count two and remand this matter for resentencing. *See State v. Nelson*, 17-650 (La. App. 5 Cir. 5/23/18), 248 So.3d 683, 691.

DECREE

For the foregoing reasons, defendant's convictions are affirmed. Defendant's sentence on count one is also affirmed. Defendant's sentence on count two is vacated, and the case is remanded to the trial court for resentencing in conformity with this opinion.

CONVICTIONS AFFIRMED; SENTENCE ON COUNT ONE AFFIRMED; SENTENCE ON COUNT TWO VACATED; REMANDED FOR RESENTENCING ON COUNT TWO

FIFTH CIRCUIT
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY MAY 24, 2023 TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

22-KA-371

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE E. ADRIAN ADAMS (DISTRICT JUDGE)
DARREN A. ALLEMAND (APPELLEE)
THOMAS J. BUTLER (APPELLEE)
BERTHA M. HILLMAN (APPELLANT)

MAILED
CALVIN KING #205018 (APPELLANT)
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

HONORABLE PAUL D. CONNICK, JR.
(APPELLEE)
DISTRICT ATTORNEY
DOUGLAS W. FREESE (APPELLEE)
GABRIELLE HOSLI (APPELLEE)
ASSISTANT DISTRICT ATTORNEY
TWENTY-FOURTH JUDICIAL DISTRICT
200 DERBIGNY STREET
GRETNA, LA 70053

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No. 2023-KO-00790

VS.

CALVIN KING

IN RE: Calvin King - Applicant Defendant; Applying For Writ Of Certiorari, Parish of Jefferson, 24th Judicial District Court Number(s) 11-690, Court of Appeal, Fifth Circuit, Number(s) 22-KA-371;

January 17, 2024

Writ application denied.

WJC
JLW
JDH
SJC
JTG
JBM
PDG

Supreme Court of Louisiana
January 17, 2024

Katie Manaroue
Chief Deputy Clerk of Court
For the Court

Appendix "B"

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No. 2023-KO-00790

VS.

CALVIN KING

IN RE: Calvin King - Applicant Defendant; Applying for Reconsideration, Parish of Jefferson, 24th Judicial District Court Number(s) 11-690, Court of Appeal, Fifth Circuit, Number(s) 22-KA-371;

March 19, 2024

Application for reconsideration not considered. See Louisiana Supreme Court Rule IX, § 6.

JDH

JLW

SJC

JTG

WJC

JBM

PDG

Supreme Court of Louisiana
March 19, 2024

Katie Marjanovic

Chief Deputy Clerk of Court
For the Court

Appendix "C"