NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1055

STATE OF LOUISIANA

VERSUS

DEMENICA WESTBROOK

Judgment Rendered: DEC 2 3 2014

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 12 CR8 116014

Honorable Scott Gardner, Judge

* * * * * * *

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Pettigrew, J. concurs

WELCH, J.

The defendant, Deminica Westbrook, was charged by grand jury indictment with two counts of aggravated kidnapping (counts 1 and 2), in violation of La. R.S. 14:44; two counts of armed robbery (counts 3 and 4), in violation of La. R.S. 14:64; and aggravated burglary (count 5), a violation of La. R.S. 14:60.[1] The defendant pled not guilty to the charges and, following a jury trial, was found guilty as charged on counts 1, 2, and 5, and guilty of the responsive offenses of first degree robbery, a violation of La. R.S. 14:64.1, for counts 3 and 4. The defendant filed a motion for postverdict judgment of acquittal, which was denied. For each of the aggravated kidnapping convictions (counts 1 and 2), the defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for each of the first degree robbery convictions (counts 3 and 4), he was sentenced to ninety-nine years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; and for the aggravated burglary conviction (count 5), he was sentenced to thirty years imprisonment at hard labor. All sentences were ordered to run consecutively. The defendant moved for reconsideration of the sentences, which was denied. The defendant now appeals, designating four assignments of error. We affirm the convictions. We affirm the sentences for aggravated kidnapping (counts 1 and 2) and aggravated burglary (count 5). We vacate each of the ninety-nine-year sentences for the first degree robbery convictions (counts 3 and 4) and resentence the defendant on each of those counts (3 and 4) to forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. We remand for correction of the minutes and commitment order.

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[1] Eric Jackson, Joshua Moses, Bryan Johnson, and Robert Morris were four codefendants. The defendant was tried alone. Also, the counts in the bill of information were renumbered to avoid confusion. The counts, as numbered in this opinion, were the official counts for the trial court and jury.

FACTS

On the afternoon of September 11, 2011, Lonnie Fornea and his son, Jeffrey Fornea were sitting on the patio behind Lonnie's house on Fornea Road in Angie, Louisiana, located in Washington Parish. According to the testimony of Lonnie and Jeffrey, following the sound of a gunshot, four unknown males with bandannas covering their faces approached the Forneas. One perpetrator had a silver pistol; one had a pipe; one had a pry-bar; and one had Jeffrey's .22 caliber Ruger rifle, which was stolen from Lonnie's house the night before. Lonnie was hit in the back of the head with the pipe and fell to the ground. The perpetrator with the pistol ordered Jeffrey to open the utility room door, but Jeffrey could not because the door was locked and he did not have keys. That person broke the glass on the door with his pistol and unlocked the door. He walked Jeffrey to the kitchen, then forced him to lie down on the kitchen floor. The perpetrators took Jeffrey's wallet, the change in his pockets, and his keys. One of them told Jeffrey to open the safe in the bedroom, but Jeffrey said he did not know the combination to the safe. The person with the handgun grabbed Lonnie and brought him to his bedroom, which contained Lonnie's safe. The perpetrator with the rifle held his gun to Jeffrey's head, brought Jeffrey to the bedroom, and forced him on the bed. Lonnie told his assailants that he could not see his combination lock without his glasses. Jeffrey was walked outside to Lonnie's truck to get his glasses. With his glasses, Lonnie was able to open his safe. Lonnie was forced on the bed alongside Jeffrey. They took Lonnie's wallet which, according to Lonnie, had between $600 and $700 in it. The person with the pistol told two of the other perpetrators to get the items in the safe. They took coins, paper money (including silver notes), a red Toucan Sam lunch box with coins in it, jewelry, and several guns. They left the house.

Shortly thereafter, the police were called out to the area. After talking to several witnesses, Deputy Jason Hargrove, with the Washington Parish Sheriff's

Officer, put out a BOLO for a maroon Lincoln Town Car. About one hour later, Lieutenant Quenzel Spikes, with the Washington Parish Sheriff's Office, was driving in the Varnado area when he spotted the maroon Lincoln at the end of A. Moses Road. Lieutenant Spikes called Deputy Hargrove, who arrived moments later, along with Officer Tim Dillon of the Varnado Police Department. Several people got into that vehicle, and several people got into another vehicle nearby, a gray (or silver) Pontiac Grand Prix. When the two cars drove down the road, the officers effected felony stops of both vehicles. Backup arrived shortly thereafter. A total of nine suspects were apprehended, five from the Lincoln and four from the Pontiac. In the Lincoln, the police found black bandannas, a gray bandanna, 2.38 caliber bullets, a Resource Bank bag with change in it (that Lonnie kept in his safe), and a Remington .380 caliber pistol with blood on the barrel. A DNA test revealed it was Lonnie's blood. In the trunk of the Pontiac, the police found the red lunch box.

Following further questioning and investigation, the police arrested the following five of the nine people for their involvement with the crimes committed at the Fornea residence: the twenty-three-year-old defendant, twenty-three-year-old Robert Morris, twenty-three-year-old Eric Jackson, eighteen-year-old Joshua Moses, and seventeen-year-old Bryan Johnson. A total of just over $1,308, in bills and in coins, was taken from the felony stop. When the suspects were initially stopped and searched, the police found various denominations of money on their persons. Eric had a $100 bill and also a $1 bill that had Jeffrey Fornea's name on it; Robert had fives and twenties, including silver certificates (that Lonnie kept in his safe); and Bryan had twelve $2 bills. There was no money found on the defendant.

In exchange for a fifteen-year sentence and his truthful testimony, Bryan Johnson testified at trial. According to Bryan, the defendant, Robert, Eric, and

Joshua, all his cousins, got into Eric's Lincoln on A. Moses Road on September 11, 2011. Eric drove to Lonnie Fornea's house at the behest of the defendant because the defendant knew there was money in the house and he wanted to go inside. When they got out of the car, the defendant had a silver handgun, Joshua had a rifle, Robert had a crowbar, and Bryan had a pipe. Bryan covered his face with a gray handkerchief, and the others used hats and black handkerchiefs to cover their faces. The defendant told Bryan, Robert, and Joshua to walk around one side of the house while the defendant was going to walk around the other side. Eric stayed in his car. Before they began walking, the defendant's pistol discharged, likely accidentally. The defendant told Eric to drive away, which he did. The four remaining cohorts walked to the back of the house, where they encountered Lonnie and Jeffrey. Bryan struck Lonnie in the back of the head with his pipe. They broke the window on the door to gain access into the house. Robert and Bryan went inside, took some items, and then went outside. The defendant and Joshua then walked Lonnie and Jeffrey, at gunpoint, into the kitchen, and the others followed. Bryan went outside to look for Eric. When Bryan went back inside, he saw Lonnie and Jeffrey being led at gunpoint to a back room where Lonnie kept his safe. After the safe was opened, Bryan and Joshua began grabbing items from it, including money, jewelry, and a red box. They put the items in bags and gave the bags to the defendant and Robert. The four perpetrators left the house and put the bags into the trunk of Eric's car (who had returned). They all got in the car and Eric drove back to A. Moses Road. They went to an abandoned house nearby and placed some of the plunder there. Some people began "just grabbing things." They went back to the main road and hung out. Malcolm Jackson drove up in his gray Pontiac Grand Prix. A police officer drove down the road, then turned around and left. The defendant and his cohorts decided to leave that area and go to Bogalusa. The defendant, Robert, Joshua, and Christopher Crain rode

with Eric in his car. Bryan, Percy Lenore, and Christopher Moses rode with Malcolm in his Pontiac. Eric and Malcolm drove off and within minutes were stopped by the police. All nine suspects were removed from the vehicles and placed into a police transport van and taken to the Bogalusa Police Department.

Tiesha Myles testified that about a week after the robberies, she and her friend, Katrina Hill, were sitting on Katrina's porch on Front Street in Bogalusa. Katrina's dog had killed a possum. According to Tiesha, when they saw the defendant riding past on his bike, they asked him if he would pick up the possum. A passing Sheriff's car prompted the defendant to walk into Katrina's house. According to Tiesha, the defendant was "frantic." The defendant asked them where the back door was. When Tiesha asked the defendant what was wrong, the defendant said the police were looking for him because eight or nine of his cousins had robbed a man in Angie or Varnado. According to the defendant, the man's ex-wife had told one of his (the defendant's) cousins that the man had $80,000 in a safe. When they got to the house, there was only about $3,000 and everything was in "paper form." The defendant said they hit one of them "upside the head" and there was another man there with him. The defendant further stated that the police had a jar of coins, but did not have enough information to hold him, so they let him go. Katrina Hill provided similar testimony to Tiesha's testimony. Katrina testified that after the defendant told them about the robbery, she called her parole officer and told him what the defendant had said.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying the motion to quash. Specifically, the defendant contends that "the duplicitous indictment" violated the prohibition against double jeopardy. The defendant argues that the aggravated kidnapping charge was included solely

because it carries a life sentence while the other crimes charged do not. The defendant contends that the facts do not support the charges of aggravated kidnapping.

The concern in this assignment of error is not one of double jeopardy. The issue raised here one of sufficiency of the evidence, which we address in the defendant's second assignment of error. Moreover, aggravated kidnapping and armed robbery are clearly separate offenses requiring proof of different elements, and the State was clearly within its province and authority to charge the defendant with and seek convictions for each separate offense committed. See La. C.Cr.P. art. 61; **State v. Ballett**, 98-2568 (La. App. 4th Cir. 3/15/00), 756 So.2d 587, 599-600, writ denied, 2000-1490 (La. 2/9/01), 785 So.2d 31; **State v. Roblow**, 623 So.2d 51, 55-56 (La. App. 1st Cir. 1993). Therefore, the indictment was not duplicitous and, accordingly, the trial court did not err in denying the motion to quash. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the convictions. Specifically, the defendant contends that his identity as one of the perpetrators at the Fornea residence was not established by the State. The defendant further contends that regarding the aggravated kidnapping convictions, the State failed to prove every element because there was no kidnapping and the extortion element was not satisfied.

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. C.Cr.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. Furthermore, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness is sufficient to support a conviction. It is the factfinder who weighs the respective credibilities of the witnesses, and this court will generally not second-guess those determinations. See **State v. Hughes**, 2005-0992 (La. 11/29/06), 943 So.2d 1047, 1051. **State v. Davis**, 2001-3033 (La. App. 1st Cir. 6/21/02), 822 So.2d 161, 163-64.

The parties to crimes are classified as principals and accessories after the fact. La. R.S. 14:23. Principals are all 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. La. R.S. 14:24. Only those persons who knowingly participate in the planning or execution of a crime are principals. An individual may be convicted as a principal only for those crimes for which he personally has the requisite mental state. See **State v. Pierre**, 93-0893 (La. 2/3/94), 631 So.2d 427, 428 (*per curiam*). The State may prove a defendant guilty by showing that he served as a principal to the crime by aiding and abetting another. Under this theory, the defendant need not have actually performed the taking to be found guilty of a robbery. **State v. Smith**, 513 So.2d 438, 444-45 (La.

App. 2nd Cir. 1987). Further, a defendant convicted as a principal need not have personally held a weapon to be found guilty of armed robbery. **State v. Dominick**, 354 So.2d 1316, 1320 (La. 1978). One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime, depending upon the mental element proved at trial. **State v. Holmes**, 388 So.2d 722, 726 (La. 1980).

In his brief, the defendant does not argue that the crimes of first degree robbery and aggravated burglary were not committed (aggravated kidnapping is discussed below). He asserts, instead, that his identity as the person who committed these crimes was not established at trial. The defendant notes that no money, coin or bills, or jewelry was found on his person upon his arrest and search of his person. He further points out there was no physical evidence, namely fingerprints or DNA, linking him to the crimes. The defendant adds that no testing was performed on the pistol recovered from the Lincoln to determine who was holding the gun.

Mary Crain and her daughter, Ivena, testified at trial. Mary stated she and Ivena were sitting on the porch sometime around noon on September 11, 2011, when she saw Robert Morris, Bryan Johnson, Joshua Moses, and the defendant get into the car (a "red Lincoln") of Eric Jackson, who was driving.[2] They had on bandannas. They left, were gone for about two or three hours, then returned. Upon their return, they appeared nervous. Ivena testified the "burgundy Lincoln" was gone for only about fifteen minutes.

The defendant contends in brief that Mary's testimony was inconsistent with

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[2] In this line of questioning, the prosecutor repeatedly refers to the color of the Lincoln as red; thus, when the prosecutor asked Mary Crain if she saw "a red Lincoln car," she replied in the affirmative. The one time Mary refers to the car as red is in the following exchange:

> Q. How much longer was it after they got back, when the red car got back?
>
> A. Right shortly after the red car got back then we see the police went down -- down the road and then turn back.

the other evidence, which suggested the crimes took place in the late afternoon. The defendant also points out that Mary testified that she could not see things at a distance.

The defendant also attacks the testimony of Bryan Johnson, who admitted to his involvement, and placed the defendant at the scene of the crimes. The defendant notes that while Bryan testified the defendant was six feet one inch tall and was the one with the pistol during the commission of the crimes, Jeffrey told the police that the person with the pistol was five feet five inches tall. The defendant suggests that a comparison of Bryan's testimony with other evidence indicates he was not credible and, further, that Bryan's "testimony was clearly coached and admittedly given in exchange for a fifteen year sentence."

The defendant also notes in brief that Tiesha Myles and Katrina Hill testified that he was involved in the commission of these crimes. The defendant suggests that for him to have confessed to his involvement in the crimes "to two complete strangers was simply not believable," and that "it is apparent that this testimony was coached." The defendant suggests that Katrina, who had a revocation hearing pending, was motivated to cooperate with the State, so she contacted her probation officer and told him of the defendant's involvement in the crimes.

Finally, the defendant suggests that the evidence presented failed to exclude a number of reasonable hypotheses of innocence. According to the defendant, he could have just been riding in the car with the perpetrators of the crimes. Also, some of the other people riding in either car at the time of the stop and/or some of the ten to fifteen people whom Lieutenant Spikes observed standing by the Lincoln could have been perpetrators of the crimes.

These arguments by the defendant regarding alleged inconsistencies in the testimony of witnesses who placed him at the scene of the crimes challenge the jury's credibility determinations. The defendant suggests Bryan Johnson provided

coached testimony in exchange for a fifteen-year sentence; but whether or not Bryan was to be believed was for the jury to determine. At the start of his testimony, Bryan made clear to the jury that he was pleading guilty to aggravated battery and aggravated burglary in exchange for a fifteen-year sentence and his truthful testimony. In Louisiana, an accomplice is qualified to testify against a co-perpetrator even if the State offers him inducements to testify. The inducements would merely affect the witness's credibility. Additionally, a conviction may be sustained on the uncorroborated testimony of a purported accomplice, although the jury should be instructed to treat the testimony with great caution. When the accomplice's testimony is materially corroborated by other evidence, such instruction is not required. An accomplice's testimony is materially corroborated if there is evidence that confirms material points in an accomplice's testimony, and confirms the defendant's identity and some relationship to the situation. **State v. Castleberry**, 98-1388 (La. 4/13/99), 758 So.2d 749, 761, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); **Hughes**, 943 So.2d at 1051.

Further, the fact that money or jewelry was not found on the defendant when he was stopped and arrested with the other suspects did not establish his lack of involvement in these crimes. Any rational factfinder could have concluded that the defendant gave the money and/or other items he took to someone else to hold, or that the defendant did not personally take any items, but directed the others to take items from the safe. Further, according to Bryan Johnson, following the robbery, Eric Jackson drove the perpetrators back to A. Moses Road; they went to an abandoned house on that road and stashed some of the items they had stolen, including the red box with coins, jewelry, and folding money (bills). Detective Glen McClendon, the lead investigator with the Washington Parish Sheriff's Office, testified that none of the residences on A. Moses Road were searched. Lonnie testified that he got most, but not all, of his money back. He further

testified that he never got back the four long guns that were stolen from his safe. Accordingly, a rational factfinder could also have concluded that the defendant did take items from Lonnie's house and dropped them off at the abandoned house before he was stopped by the police.

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

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. See **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Orgeron**, 512 So.2d 467, 469 (La. App. 1st Cir. 1987), writ denied, 519 So.2d 113 (La. 1988).

In this case, the jury heard all of the testimony and viewed the physical

evidence presented to it at trial and found the defendant guilty. The identification of the defendant by witnesses as one of several people who kidnapped and robbed Lonnie and Jeffrey and burglarized Lonnie's home was clearly established. The defendant did not testify or offer any counterfactual evidence. In finding the defendant guilty, the jury clearly rejected the defense's theory of misidentification. See **Moten**, 510 So.2d at 61.

The defendant complains that testing for fingerprints was not performed on the .380 caliber handgun found in the trunk of Eric's Lincoln. But under La. R.S. 14:24, it is irrelevant whether or not the defendant was holding the gun during the robberies, kidnappings, and burglary. As an aider and abettor or as someone who counseled, procured, or assisted the others to rob, kidnap, and burglarize, the defendant was a principal to the crimes committed by the others. See **Dominick**, 354 So.2d at 1320; **Smith**, 513 So.2d at 444-45.

The defendant further argues in brief that the State failed to prove two of the elements of aggravated kidnapping. Louisiana Revised Statutes 14:44 defines the crime of aggravated kidnapping as follows:

> Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:
>
> (1) The forcible seizing and carrying of any person from one place to another; or
>
> (2) The enticing or persuading of any person to go from one place to another; or
>
> (3) The imprisoning or forcible secreting of any person.

The defendant contends there was no kidnapping since there was no carrying of any person from one place to another. The Forneas were seized (the defendant does not contest there was a forcible seizure) and walked at gunpoint from the back porch to the bedroom where the safe was located. According to the defendant, such movement, all of which took place at the Fornea residence, does not

constitute being moved "from one place to another" within the meaning of La. R.S. 14:44.

Pursuant to the "forcible seizing" provision of the aggravated kidnapping statute, La. R.S. 14:44(1), the State is required to prove the following essential elements: 1) the forcible seizing and; 2) the carrying of any person from one place to another (the asportation element); 3) with the intent to force the victim, or some other person, to give up anything of apparent present or prospective value (the extortion element); 4) in order to secure the release of that person. **State v. Arnold**, 548 So.2d 920, 923 (La. 1989).

A review of the jurisprudence regarding the asportation element suggests the issue may not be settled as to whether a person can be moved from one place to another within a house or within a single structure for purposes of the kidnapping statutes. Those cases dealing with second degree kidnapping (and even simple kidnapping) are useful in our analysis since the "forcible seizing and carrying of any person from one place to another" elements are identical. See La. R.S. 14:44(1) & La. R.S. 14:44.1(B)(1),[3] & La. R.S. 14:45(1). In fact, the only real distinction is that aggravated kidnapping has an extortion component. In **State v. Polk**, 376 So.2d 151, fn.1 (La. 1979), Justice Tate observed:

> The kidnapping is classified as "aggravated", La. R.S. 14:44,

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[3] A. Second degree kidnapping is the doing of any of the acts listed in Subsection B wherein the victim is:

(1) Used as a shield or hostage;
(2) Used to facilitate the commission of a felony or the flight after an attempt to commit or the commission of a felony;
(3) Physically injured or sexually abused;
(4) Imprisoned or kidnapped for seventy-two or more hours, except as provided in R.S. 14:45(A)(4) or (5); or
(5) Imprisoned or kidnapped when the offender is armed with a dangerous weapon or leads the victim to reasonably believe he is armed with a dangerous weapon.

B. For purposes of this Section, kidnapping is:

(1) The forcible seizing and carrying of any person from one place to another; or
(2) The enticing or persuading of any person to go from one place to another; or
(3) The imprisoning or forcible secreting of any person.

> rather than as far less serious "simple kidnapping", La. R.S. 14:45, solely because the seizure and asportation of the victim was made with the intent to rape her "to force the victim ... to give up anything of apparent present or prospective value" (i.e., the offender's sexual gratification), La. R.S. 14:44; for the intent to extort is the essential difference between the two crimes.

The critical distinction between the crime of aggravated kidnapping and the crime of simple kidnapping is the kidnapper's intent to extort. **State v. Lagrange**, 97-361 (La. App. 3rd Cir. 10/29/97), 702 So.2d 1005, 1009. See **State v. Zihlavsky**, 33,467 (La. App. 2nd Cir. 6/21/00), 764 So.2d 250, 255, writ denied, 2000-2434 (La. 5/25/01), 792 So.2d 756 (the difference between aggravated kidnapping and second degree kidnapping is the intent to extort).

In **Arnold**, 548 So.2d at 921-25, the defendant abducted the victim at knifepoint in a grocery store parking lot and drove her to a nearby apartment complex. Our supreme court found all the essential elements of the crime of aggravated kidnapping had been proven beyond a reasonable doubt. Concurring in **Arnold**, 548 So.2d at 926 n.4, Justice Lemmon suggested in a footnote, "[a]" robber's moving a victim at knifepoint from one room to another for the purpose of opening a safe arguably should not be punished as a kidnapping. This case does not present such an insignificant movement or difference in risk."

In **State v. Davillier**, 99-1204 (La. 12/10/99), 752 So.2d 149, 150 (*per curiam*), the defendant dragged the victim by the hair from one side of her truck to the other and forced her into a cab, from where she ran and escaped. The supreme court found the facts insufficient to establish the crime of second degree kidnapping because the defendant "had not yet moved her from the immediate physical environment in which his initial physical assault had taken place." **Id.** According to the supreme court, the term "from one place to another" "requires evidence that the offender relocated the victim from one physical setting or environment to another." **Id.**

In **State v. Bowie**, 2000-3344 (La. 4/3/02), 813 So.2d 377, 380-82, cert. denied, 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002), the defendant moved his victim throughout his house at gunpoint before choking him to death with an iron cord. The defendant was sentenced to death and our supreme court affirmed the conviction and death sentence. In its unanimous recommendation to impose the death penalty, the jury found, among other aggravating circumstances, that the killing occurred while the defendant was engaged in armed robbery or second degree kidnapping. In finding the State had failed to establish the murder was committed during a second degree kidnapping, the supreme court opined, in pertinent part:

> The state argued that this offense was committed while defendant was armed, R.S. 14:44.1(A)(5), when he forcibly moved the victim from one room to another in his home[.]. . . There is no debate, however, that the state failed to establish a forcible seizing and carrying "from one place to another" with respect to movement of the victim from room to room. While no particular distance need be traveled, this Court has interpreted the phrase to require "evidence that the offender relocated the victim from one physical setting or environment to another." **State v. Davillier**, 99 1204, (La.12/10/99), 752 So.2d 149, 150 (relocating a victim from one side of a truck to the other does not satisfy the substantial coerced movement from the immediate physical environment in which the assault occurs and does not constitute second degree kidnapping); **State v. Arnold**, 548 So.2d 920, 926, (La.1989) ("[a] robber's moving a victim at knife point from one room to another for the purpose of opening a safe arguably should not be punished as a kidnapping."). The state's evidence produced at trial does not establish the substantial movement required for a carrying "from one place to another."
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> **Bowie**, 813 So.2d at 393.

In **State v. Williams**, 2002-0260 (La. App. 4th Cir. 3/12/03), 842 So.2d 1143, 1143-45, writs denied, 2003-1991 (La. 1/16/04), 864 So.2d 625, 2006-1583 (La. 3/23/07), 951 So.2d 1096, the defendant physically threatened his wife in their home. She ran outside, but he ran after her and blocked her path with a shovel. He forced her back inside and hit her with the shovel in the living room. She ran upstairs into a room and he followed her and continued to beat her. Fearing she

might be killed, she jumped out of the window. The defendant was charged with second degree kidnapping and found guilty as charged. The fourth circuit in **Williams** cited the aforementioned cases (**Arnold**, **Davillier**, and **Bowie**) in addressing the physical movement of the victim and found the following:

> In the present circumstance, the evidence established that the defendant prevented the victim from leaving the residence by wielding the shovel and demanding that she go back inside. It could be argued that the victim's immediate physical environment changed when she was forced to reenter the home. Nevertheless, the defendant's moving of the victim from outside the door to inside the door would not meet the "from one place to another" element of second degree kidnapping.
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> **Williams**, 842 So.2d at 1146.

In affirming the conviction for second degree kidnapping, the fourth circuit found that another provision of the statute applied, namely that the evidence had established the "imprisoning or forcible secreting of any person" element. **Id**. at 1146-47.

In **State v. Webb**, 2013-0146 (La. App. 4th Cir. 1/30/14), 133 So.3d 258, 270, writ denied, 2014-0436 (La. 10/3/14) ___ So. 3d ___, with no mention of **Arnold**, **Davillier**, or **Bowie**, the fourth circuit appeared to reach a result contrary to its earlier decision in **Williams**. In **Webb**, despite the victim having been moved only from room to room within her home, the court found the elements of second degree kidnapping had been established. **Id**. at 263, 270. In noting the applicable element of "forcible seizing and carrying of any person from one place to another" at issue and citing to La. R.S. 14:44.1(A)(5) and 14:44.1(B)(1), the fourth circuit stated:

> M.M.'s unrefuted testimony established the elements of second degree kidnapping. She testified that the defendant broke into her residence brandishing a gun. He blindfolded her and tied her hands behind her back to prevent her escape. He held her at gunpoint while he stole money, jewelry, and other valuables from her residence. The defendant moved M.M. from the living room to her bedroom, where he raped her several times at gunpoint. Moreover, M.M. testified that the defendant accompanied her to the bathroom and would not allow

her to wipe herself. During the entire ordeal, the defendant restricted M.M.'s movements and imprisoned her at gunpoint in her home.

Webb, 133 So. 3d at 270.

In **State v. Steward**, 95-1693 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1009-10, the victim was walking on Pontchartrain Boulevard in Slidell when the defendant approached and grabbed her. He struck her in the face, pulled her by the hair, and dragged her away from the well-lit area at the road's edge. As he continued to drag her, she managed to break free and run away. The defendant was convicted of attempted forcible rape and second degree kidnapping. On appeal, regarding the second degree kidnapping conviction, the defendant argued the State failed to prove that the victim was seized and carried from one place to another. Rejecting the argument, this court stated in pertinent part:

> [T]he only question presented for review is whether or not the victim was forcibly seized and carried from one place to another. The state presented the testimony of the victim that she was seized at the side of the road and dragged some distance toward a darkened area in the bank parking lot.
>
> Dr. Wheelis, the emergency room physician who treated the victim on the night in question, testified that the victim had a dislocated shoulder, lacerations to her face and multiple abrasions on her body. . . . He stated that the abrasions on the victim's lower extremities were consistent with being dragged across a cement surface, asphalt surface or even the ground itself.
>
> We have no difficulty in finding that the victim in this case was forcibly seized and carried from one place to another. Accordingly, the evidence was sufficient to prove second degree kidnapping.

Steward, 681 So.2d at 1013.

In **State v. Arbuthnot**, 625 So.2d 1377, 1383-84 (La. App. 1st Cir. 1993), this court found that the State established the "seizing and carrying of any person from one place to another" element with evidence that the defendant and his accomplice forcibly seized and carried the victims from one area of the bank to another. We further noted that the second degree kidnapping statute did not require that the distance traveled during the forcible seizure be any particular length. **Id.** at pp. 1383-84 <u>See</u> **State v. Robinson**, 32,794 (La. App. 2nd Cir.

3/1/00), 754 So.2d 311, 319, writ denied, 2000-0989 (La. 3/23/01), 787 So.2d 1008.

Steward and **Arbuthnot** pre-date **Davillier** and **Bowie**. Arguably, thus, the analyses and/or results may have been different had these decisions been published subsequent to the supreme court decisions. In any event, we need not and do not decide in this case whether the forced movement of the Forneas by the defendant and his accomplices from one room to another within the house satisfied the element of "forcible seizing and carrying of any person from one place to another" under the aggravated kidnapping statute. The facts clearly established the Forneas were confined at gunpoint in their bedroom while the perpetrators took money and items from Lonnie's safe. Accordingly, the State proved the defendant committed aggravated kidnapping of the Forneas pursuant to La. R.S. 14:44(3), or by the imprisoning or forcible secreting of both victims.

Just as with the "forcible seizing and carrying of any person from one place to another" element, the second degree kidnapping element of "imprisoning or forcible secreting of any person" under 14:44.1(B)(3) is identical to the aggravated kidnapping element under 14:44(3). In **State v. Berry**, 99-0001 (La. 5/7/99), 735 So.2d 618, 619 (*per curiam*), the supreme court found that the defendant's herding the victims into their own bathroom satisfied the element of "forcibly secret[ing] the victims inside their own home." The conviction was reduced from aggravated kidnapping to second degree kidnapping only because the extortion element had not been proven.

As we noted, while the court in **Williams** found that the moving of the victims to different rooms in their home did not satisfy the "carrying of any person from one place to another" element of the second degree kidnapping statute, the evidence was sufficient to support a conviction under either subsection A(3) (physically injured or sexually abused) or A(5) (imprisoned or kidnapped when the

offender is armed with a dangerous weapon) and subsection B(3) (the imprisoning or forcible secreting of any person).

As noted, the victim in **Williams**, 842 So.2d at 1144-45, ran outside but was forced back inside by the defendant who had a shovel. He hit her with the shovel in the living room and she ran upstairs into a room where the defendant followed her and continued to beat her. See **Arbuthnot**, 625 So.2d at 1383 (where the robbers forced the victims into the bathroom and shut the door). Similarly, both Jeffrey and Lonnie were forced into Lonnie's home at gunpoint. They were forcibly moved into the kitchen and, from there, to the bedroom containing Lonnie's safe. After Lonnie was forced to open the safe at gunpoint, Jeffrey was forced face-down on the bed and not allowed to move. Jeffrey testified that when he tried to turn his head to see, the intruder with the rifle would bump him on the back of his neck with the weapon and tell him to turn his head. Lonnie testified that the intruder with the pistol repeatedly demanded that he open the safe. As Lonnie tried to dial the correct combination on the safe lock, the person with the pistol kept bumping Lonnie on the back of his head with the weapon. When Lonnie finally got the safe open, the person with the pistol shoved him on the bed and held the pistol on him while the others looted the safe. When they finished taking what they wanted, the perpetrators left the room and closed the bedroom door. Jeffrey and Lonnie heard one of the perpetrators on the other side of the door counting backwards from the number thirty, by ones. Jeffrey testified that he and his father just laid there, and that he (Jeffrey) was scared to move. Jeffrey stated that he thought they were going to shoot him and his father when they finished the "thirty count down."

Based on the foregoing, Jeffrey and Lonnie were clearly confined, or imprisoned, by the defendant and his accomplices while being forced to give up something of value. The words "imprison" and "confine" are synonymous.

Arbuthnot, 625 So.2d at 1384. See **State v. Segura**, 2012-899 (La. App. 3rd Cir. 3/6/13), 129 So.3d 76, 79 (where, in affirming the conviction for aggravated kidnapping, the third circuit found that the inmates' capturing of the deputy as he entered the cell was sufficient to establish the element of "imprisoning or forcibly secreting any person" under La. R.S. 14:44(3), and that it was not necessary, in prosecuting the defendant under 14:44, to prove the victim was moved from one place to another because that was not an element of the offense under 14:44(3) under the plain language of the statute); **State v. Garcia**, 44,562 (La. App. 2nd Cir. 10/28/09), 26 So.3d 159, 163-65, writ denied, 2009-2583 (La. 2/11/11), 56 So.3d 992 (where, in affirming the conviction for aggravated kidnapping, the second circuit found, despite the defendant's argument that his victims "were not taken anywhere" when they were tied up, forced to a back bedroom, assaulted, and put inside a closet, that the jurisprudence did not require any movement of the victims to take place as imprisonment can constitute aggravated kidnapping; it was not necessary to show the victims were moved from, or even around, the apartment; and the fact the victims were tied up and locked in a closet was sufficient).

The defendant also argues in brief that the extortion element was not met; that is, according to the defendant, there was no indication that Lonnie was ordered to open the safe in order to gain his release. He contends that the State failed to prove he sought to obtain something of value by playing upon the victim's fear and hope of eventual release in order to gain compliance with his demands.

This contention is baseless. While the defendant (or any of his accomplices) may not have specifically informed Lonnie that if he opened the safe, then they would not be harmed and/or they would be left in peace once the perpetrators obtained what they wanted, there is no requirement under the law for such communication. In **Arnold**, the supreme court stated:

Defendant would have this court expand the fourth element and

> require the state to prove, either directly or circumstantially, that he *explicitly communicated* to the victim his intent to release her once he was in receipt of ransom (i.e., sexual gratification). A review of the history of the statute and our jurisprudence reveals such a requirement has never been part of the law of aggravated kidnapping. Rather, all the law has required is evidence of defendant's intent to extort something of value by playing upon the victim's hope of release.
>
> **Arnold**, 548 So.2d at 923.
>
> The **Arnold** court continued:
>
> Thus, the crucial question in determining whether an aggravated kidnapping has occurred is not whether the defendant had intent to release the victim at either the outset of the crime or indeed at any point during the crime. The more important question and the issue to be focused upon is whether the defendant sought to obtain something of value, be it sex or money or loss of simple human dignity, by playing upon the victim's fear and hope of eventual release in order to gain compliance with his demands.
>
> **Arnold**, 548 So.2d at 925.

When asked on direct examination what he thought would happen if they did not open the safe, Jeffrey testified, "They would have shot us. They had their mind[s] set. They was going to get in the safe." Lonnie testified on direct examination about the compulsion he was under to open the safe:

> Q. Okay. If you hadn't opened the safe?
> A. I had to open the safe.
> Q. If you had not opened it --
> A. I had to open it --
>
> * * *
>
> Q. Did you get the impression that if you didn't open the safe that something bad was going to happen to you?
>
> * * *
>
> A. I think so.

While there was no direct evidence that the defendant forced his victims to submit to his demands as a condition of their release, it is reasonable to infer that the defendant intended to release them only after taking things of value, because that is in fact what occurred. Intent, though a question of fact, may be inferred from the circumstances of the transactions. **State v. Custard**, 384 So.2d 428, 430 (La. 1980). Further, under these circumstances, requiring additional evidence that

the defendant expressly announced to the victims that they would not be released unless they complied with his/their demands is overly technical and unnecessary. See **Arnold**, 548 So.2d at 924; **State v. Morris**, 99-3075 (La. App. 1st Cir. 11/3/00), 770 So.2d 908, 925-26, writ denied, 2000-3293 (La. 10/12/01), 799 So.2d 496, cert. denied, 535 U.S. 934, 122 S.Ct. 1311, 152 L.Ed.2d 220 (2002). See also **State v. Leger**, 2005-0011 (La. 7/10/06), 936 So.2d 108, 172-73, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007); **Steward**, 681 So.2d at 1009-10 (second degree kidnapping conviction affirmed despite that at no time during the struggle did the assailant indicate by his words or his actions that he intended to rob the victim, and her purse and other items were later retrieved from the area where the victim was first attacked by the assailant).

Accordingly, we find the evidence clearly established that the defendant (and his cohorts), in holding Jeffrey and Lonnie at gunpoint, sought to obtain something of value - money, jewelry, and other items - by playing upon their victims' fear and hope of eventual release in order to gain compliance with his/their demands, namely to open the safe. See **Arnold**, 548 So.2d at 925.

After a thorough review of the record, we find the evidence negates any reasonable probability of misidentification and supports the trial court's findings of guilt. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of two counts of aggravated kidnapping, two counts of first degree robbery, and aggravated burglary. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 3 and 4

In these related assignments of error, the defendant argues, respectively, the sentences imposed for his first degree robbery convictions are illegal; and the

sentences imposed are excessive. Specifically, the defendant contends the trial court erred in ordering all of his sentences to run consecutively rather than concurrently.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential

for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (*per curiam*).

The defendant states in brief that the alleged illegal activity was all part of a common scheme or plan with each alleged act being part of the whole illegal course of conduct. Thus, according to the defendant, the trial court should not have imposed consecutive sentences since the statutory presumption for sentencing a person for acts constituting parts of a common scheme or plan is to have the sentences run concurrently.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. C.Cr.P. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. **State v. Breland**, 97-2880 (La. App. 1st Cir. 11/6/98), 722 So.2d 51, 53.

It is clear in its reasons for sentence that the trial court thoroughly considered La. C.Cr.P. art. 894.1. In arriving at appropriate sentences, particularly in its determination of whether to run the sentences consecutively, the trial court stated in pertinent part:

> Mr. Westbrook, on the one hand, this Court is faced with the proposition that you are a young man who is intelligent, articulate, and seemingly well-suited to contribute to this society. On the other hand, with your leadership skills and with your companions, you chose to lead one of the most violent assaults on homeowners that I have seen occur in this parish. You terrorized men who, in all likelihood, you didn't know from Adam, out of greed. For that, I

suspect that you understand the consequences are severe.

I've reviewed Article 894.1, and I make the following findings.

There's an undue risk that during the period of a suspended sentence or probation that the defendant will commit another crime.

The defendant is in need of correctional treatment or custodial environment that can be provided most effectively by his commitment to an institution.

A lesser sentence will deprecate the seriousness of the defendant's crimes.

I also find, under Subsection B, the offender's conduct during the commission of the offense manifested deliberate cruelty--deliberate cruelty--to the victim.

I find that the offender used a dangerous weapon during the commission of the offense; that the offender was a leader in this endeavor and acting in concert with more than one person with the respect to whom the offender occupied the position of organizer, a supervisory position, dragging down many of your friends into horrible jail sentences along with you.

I also find that this is one of the worst of the worst offenses and, thus, in imposing my sentence [sic], I take those circumstances into account.

* * *

In finding that you are one of the worst of offenders and that this is one of the worst of offenses, I make the decision to run these sentences consecutive. That is, after serving two life sentences without parole, probation, or suspension of sentence you will have a further two hundred twenty-eight (228) years of which one hundred ninety-eight (198) are without benefit of probation, parole, or suspension of sentence.

This community cannot tolerate the type of violence which this Court witnessed during this trial.

In the instant matter, the defendant's violent criminal conduct of burglarizing a home and robbing and kidnapping at gunpoint the two occupants of the house clearly makes him an extraordinary threat to the safety of the community. Under these circumstances, the imposition of consecutive sentences did not render these sentences excessive. <u>See</u> **State v. Crocker**, 551 So.2d 707, 715 (La. App. 1st Cir. 1989). The sentences imposed for these offenses were within the statutory limits and did not constitute an abuse of discretion by the trial court. <u>See</u> **State v. Palmer**, 97-0174 (La. App. 1st Cir. 12/29/97), 706 So.2d 156, 160.

This court has stated that maximum sentences permitted under statute may

be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. In sentencing the defendant, the trial court made clear the defendant's conduct constituted the worst offenses and that the defendant was one of the worst offenders. Also as noted, he poses an unusual risk to the public safety.

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial court. The trial court provided sufficient justification in imposing maximum sentences and ordering that they be served consecutively. See **State v. Mickey**, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Accordingly, the sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive. The assignment of error is without merit.

SENTENCING ERRORS

In his third assignment of error, the defendant correctly points out that the sentences imposed for his first degree robbery convictions are illegal. For each of the two counts (counts 3 and 4), the trial court sentenced the defendant to ninety-nine years at hard labor without benefits for the "armed robbery of Cedric Lonnie Fornea" and the "armed robbery of Jeffery [sic] Fornea." However, the defendant was not convicted of armed robbery, but was convicted of the responsive offenses of first degree robbery. The trial court sentenced the defendant under the wrong criminal statute and, accordingly, imposed illegally harsh sentences.

It is clear the trial court sought to impose maximum sentences for each conviction. Accordingly, we vacate each of the ninety-nine year sentences for

counts three and four, and resentence the defendant for each of the two convictions (counts three and four) of first degree robbery to the maximum sentence of forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:64.1(B) & La. C.Cr.P. art. 882. Further, as intended by the trial court, those sentences are to run consecutively to each other and to all other sentences imposed. We remand this case to the trial court for correction of the minutes and commitment order to reflect the appropriate convictions for first degree robbery and the appropriate forty-year sentences for these convictions, and for transmission of the amended commitment order to the Department of Corrections.

CONVICTIONS AFFIRMED; SENTENCES FOR AGGRAVATED KIDNAPPING (COUNTS 1 AND 2) AND AGGRAVATED BURGLARY (COUNT 5) AFFIRMED; EACH OF THE NINETY-NINE-YEAR SENTENCES AT HARD LABOR FOR THE FIRST DEGREE ROBBERY CONVICTIONS (COUNTS 3 AND 4) VACATED AND DEFENDANT RESENTENCED ON EACH COUNT (3 AND 4) TO FORTY YEARS IMPRISONMENT AT HARD LABOR WITHOUT BENEFIT OF PAROLE, PROBATION, OR SUSPENSION OF SENTENCE; REMANDED FOR CORRECTION OF THE MINUTES AND CORRECTION AND TRANSMISSION OF THE COMMITMENT ORDER.