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| **STATE OF LOUISIANA** | * | **NO. 2017-KA-0101** |
| **VERSUS** | * | |
| | | **COURT OF APPEAL** |
| **JOHNATHAN P. SIMS** | * | |
| | | **FOURTH CIRCUIT** |
| | * | |
| | | **STATE OF LOUISIANA** |

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 525-300, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
**Judge Joy Cossich Lobrano**
* * * * * *

(Court composed of Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins, Judge Paula A. Brown)
**JENKINS, J., CONCURS IN PART AND DISSENTS IN PART**

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**CONVICTIONS AFFIRMED;**
**SENTENCES VACATED IN PART;**
**REMANDED WITH INSTRUCTIONS**
**NOVEMBER 15, 2017**

Appellant, Jonathan Sims ("Defendant"), appeals his September 16, 2015 convictions for home invasion, a felony in violation of La. R.S. 14:62.8, domestic abuse battery by strangulation, a felony in violation of La. R.S. 14:35.3(L), and aggravated battery, a felony in violation of La. R.S. 14:34.[1] Finding that the evidence is sufficient to support Defendant's convictions,[2] that Defendant's right to confrontation was not violated, and that Defendant's ineffective assistance of counsel claim is not properly before the Court, we affirm Defendant's convictions. Further, finding patent errors as to each of the sentences imposed, we vacate

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[1] Defendant's counsel assigned error only to his conviction for home invasion. Defendant, through a *pro se* supplemental brief, assigned errors to his conviction for aggravated battery, a felony in violation of La. R.S. 14:34, and domestic abuse battery by strangulation, a felony in violation of La. R.S. 14:35.3(L).

[2] In *Jackson v. Virginia,* the Supreme Court provided the standard for review of a claim of insufficiency of the evidence, stating

> the relevant question is whether, after 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. This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).

Defendant's sentences in part and remand the case to the district court to impose sentences as instructed by this opinion.

**Factual Background**

A relationship began between Defendant and the victim in 2013. In early 2014, Defendant moved into the victim's home. The victim eventually ended that relationship, and told Defendant to move out and return his key. Defendant vacated the home, but left behind some personal items and refused to return the key.

On September 14, 2014, the victim asked her uncle to come to her apartment because she was afraid that Defendant may be waiting there for her. The victim asked her uncle to search her residence to ensure Defendant was not present. Finding nothing, her uncle eventually left. After her uncle left, the victim put her children to bed. When she exited the children's bedroom, she heard the closet door open, and began to run. Defendant emerged from the closet and began chasing the victim. She attempted to run out of the house, but Defendant caught her.

Defendant began punching the victim in the face. As she fell to the floor, Defendant climbed on top of her and began to strangle her. Shortly thereafter, the victim's uncle returned and knocked on the door. Defendant stopped strangling the victim, threw a towel at her, and told her to wipe the blood from her face. They went outside and, as Defendant and the victim's uncle were speaking, the victim managed to get inside her home and lock the door.

After being locked outside the victim's home, Defendant kicked the door open. The victim grabbed her child and ran back out of the door that Defendant had forced open. Defendant dragged the victim into the backyard and began beating her again while she was holding her child. Once Defendant had punched the victim's face, head, and stomach, he picked up an aluminum broom handle and

demanded that the victim let go of the child. After the victim refused, Defendant began beating the victim with the broom handle, repeatedly striking her across the face and the body. The broom handle eventually broke, but Defendant continued to beat the victim with the remaining piece. After the broom handle slipped out of his hand, Defendant strangled the victim in the street.[3]

Nigel Daggs ("Officer Daggs"), an officer with the New Orleans Police Department ("NOPD"), responded to a domestic disturbance call at the victim's home shortly after 11:00 pm. When Officer Daggs arrived, he observed the victim with bruises on her face, an open wound near her left eye, and scratches on the knuckles of her right hand. Officer Daggs further observed a silver broom handle lying in the street in front of the neighbor's yard and a cracked door frame in the interior doorway of the victim's home. The victim gave a brief statement on the scene, but her injuries required that she be relocated to Tulane Hospital. There, the victim was treated for a head injury, deep bruise of jaw, facial laceration, fracture of the hand, contusion to the eye, and shoulder strain. At the hospital, she gave a written statement to Officer Daggs.

On June 24, 2015, Defendant was charged by bill of information with home invasion, a felony in violation of La. R.S. 14:62.8; aggravated battery, a felony in violation of La. R.S. 14:34; and domestic abuse battery by strangulation, a felony in violation of La. R.S. 14:35.3(L). Despite the fact that at the time of Defendant's act, the home invasion statute contained an enhancement provision for home invasions where a child under the age of twelve was present, *see* La. R.S. 14:62.8(B)(3)(2017)(repealed 11/1/2017), the bill of information does not contain

[3] During the attack victim's uncle and cousin, who had arrived on the scene, called 911.

any reference to that sentencing enhancement or allege that a child under twelve was present at the time of the home invasion. The two-day trial commenced September 16, 2015, and concluded the following day. The jury found Defendant guilty of home invasion, aggravated battery, and domestic abuse battery by strangulation. Defendant filed a motion for new trial which was denied. On March 15, 2016, the State filed a multiple bill of information pursuant to La R.S. 15:529.1, charging Defendant as a quadruple felony offender.[4]

On July 19, 2016, at Defendant's sentencing hearing, counsel for Defendant filed a motion for post-verdict judgment of acquittal. The district court denied the motion. Thereafter, Defendant was sentenced to serve twenty-five years at hard labor for home invasion; ten years for aggravated battery; and three years for domestic abuse, all to run concurrently with each other and any other charge.

On July 25, 2016, the multiple bill hearing was held. At that time, the district court denied Defendant's motion to quash the multiple bill, and found Defendant to be a quadruple felony offender as charged. The district court vacated Defendant's original sentences, and reimposed the same sentences that were imposed on July 19, 2016.[5] The district court then orally granted Defendant's motion for appeal and appointment of counsel, but advised counsel that he would have to file a formal notice of appeal. Defendant's counsel then filed a formal notice of appeal and a

[4] On March 15, 2016, the State filed a multiple bill of information pursuant to La. R.S. 15:529.1, charging Defendant as a quadruple offender based on a 2009 guilty plea to unauthorized entry of an inhabited dwelling; a 2002 guilty plea to illegal possession of a stolen automobile worth over $500; and a 1996 guilty plea to illegal possession of a stolen automobile worth over $500. On June 1, 2016, the State amended the multiple bill of information to add another predicate conviction, a 2004 guilty plea to illegal possession of a stolen vehicle worth over $500 and theft over $500.

[5] The sentences imposed were twenty-five years at hard labor for home invasion; ten years for aggravated battery; and three years for domestic abuse, all to run concurrently with each other and any other charge.

motion to reconsider sentence. The district court granted the motion for appeal and denied the motion to reconsider sentence. This appeal timely follows.

**Errors Patent**

Louisiana Code of Criminal Procedure article 920 directs appellate courts to consider errors discoverable by an inspection of the pleadings and proceedings. *State v. Thomas,* 2012-0177, p. 6 (La. App. 1 Cir. 12/28/12), 112 So.3d 875, 878. In this case, the record reveals that when resentencing Defendant as a fourth-felony habitual offender on his conviction for home invasion, the district court failed to impose the mandatory fine required by La. R.S. 14:62.8(B).[6] Additionally, the record establishes that although Defendant was found guilty as a fourth-felony offender on each conviction, the district court failed to impose the mandatory minimum enhanced sentence for each offense as required under La. R.S. 15:529.1.[7]

Statutory restrictions are contained in a sentence whether or not verbally imposed by the sentencing court. *State v. Hall,* 2002-1098 (La. App. 4 Cir. 3/19/03), 843 So.2d 488. With respect to the failure to impose a fine, the failure to impose a mandatory fine requires a remand of the case for the imposition of the fine. *See State v. Jefferson,* 2004-1960, p. 40 (La. App. 4 Cir. 12/21/05), 922 So.2d 577; *State v. Brown,* 2003-2155, p. 5 (La. App. 4 Cir. 4/14/04), 895 So.2d 542;

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[6] La. R.S. 14:62.8(B) (2014) provides that "whoever commits the crime of home invasion shall be fined not more than five thousand dollars and shall be imprisoned at hard labor for not less than one year nor more than thirty years." *See also State v. Ellis*, 2012-0540, p. 5 (La. App. 4 Cir. 1/16/13), 109 So.3d 944, 947 (holding that "the failure to impose a mandatory fine requires that the matter be remanded for imposition of that fine").

[7] La. R.S. 15:529.1 states "[t]he person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term of not less than the longest prescribed for a first conviction but ***in no event less than twenty years*** and not more than his natural life." (emphasis added). *See State v. Shaw*, 2006-2467 pp. 23-24 (La. 11/27/07), 969 So.2d 1233, 1247 (holding that all sentences for convictions on same date for a single course of criminal conduct are subject to enhancement under the Habitual Offender Law, overruling *State ex rel. Porter v. Butler*, 573 So.2d 1106 (La. 1991), and *State v. Sherer*, 411 So.2d 1050 (La. 1982)).

*State v. Lindsey,* 2012-1195, p. 9 (La. App. 4 Cir. 11/20/13), 129 So.3d 759, 764-65.[8] Thus, we remand this case and instruct the district court to impose the fine required by La. R.S. 14:62.8(B).

Additionally, as stated *supra*, after being found guilty of the multiple bill, which alleged Defendant was a fourth-felony offender on each of his convictions in the case *sub judice*, Defendant was resentenced to twenty-five years at hard labor for home invasion, ten years for aggravated battery, and three years for domestic battery involving strangulation. The sentences for aggravated battery and domestic abuse battery do not comport with La. R.S. 15:529.1, which requires that a defendant who is adjudicated as a fourth-felony offender be sentenced to a minimum of twenty years for new felony convictions. *See supra,* fn. 7.

In *State v. Kelly*, 2015-0484 (La. 6/29/16), 195 So.3d 449, the Louisiana Supreme Court made clear the extent to which appellate courts may correct illegally lenient sentences for patent error. After finding that an error is patent on the face of the record when it is discoverable by an inspection of the pleadings and proceedings without an inspection of the evidence, the *Kelly* court stated that bills

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[8] As Judge Jenkins recognizes in her partial concurrence and partial dissent filed in this matter, the facts of this case could implicate a sentencing enhancement under the prior version of 14:62.8(B)(3)(2017)(repealed 11/1/2017). The dissent as to this alleged error is based on the fact that the victim "testified that her two children were in the house when Defendant emerged from the closet…" and testified that "one of her children was two years old at the time." As the dissent makes clear, correcting this error requires reviewing the evidence—not merely the pleadings and proceedings—before this Court. We decline to impose this sentencing enhancement on appeal, as such a correction goes beyond patent error review as contemplated by La. C.Cr.P. art. 920. *See State v. Kelly*, 2015-0484, p. 6 (La. 6/29/16), 195 So.3d 449, 453 (finding that where discovery and correction of an illegally lenient sentence required review beyond "a mere inspection of the pleadings and proceedings and without inspection of the evidence," the appellate court exceeded its authority to correct errors patent when it corrected that sentence). Moreover, any fact other than that of a prior conviction that increases the penalty for a crime must be submitted to jury and proven beyond a reasonable doubt. *Apprendi v. New Jersey,* 530 U.S. 466, 492, 120 S.Ct. 2348, 2364, 147 L.Ed. 2d 435. As stated *supra,* the bill of information contains no allegation that a child under the age of twelve was present at the time of the home invasion, and thus, the jury made no finding in that regard.

of information and verdicts are parts of criminal records that can be reviewed during a patent error analysis. *Id.* at 2015-0484, p. 6, 195 So.3d at 453 (citations omitted).

In the case *sub judice,* the multiple bill of information clearly charges Defendant as a multiple offender on the home invasion, domestic abuse battery by strangulation, and aggravated battery counts. The district court's verdict found Defendant guilty of the multiple bill of information. Accordingly, unlike the alleged error of not sentencing Defendant under La. R.S. 14:62.8(B)(3)(repealed November 1, 2017) addressed in the partial concurrence and partial dissent filed in this matter,[9] this error is patent on the face of the record.

The authority to correct illegally lenient sentences is permissive, not mandatory. *See State v. Bell,* 2014-735, p. 11 (La. App. 5 Cir. 3/11/15), 169 So.3d 574, 579. Due to the length of Defendant's sentence as to home invasion, which he is serving concurrently with these counts, correcting Defendant's sentences for domestic abuse battery by strangulation and aggravated battery would likely not increase the amount of time Defendant would spend imprisoned. Using our discretion not to correct these sentences in this domestic violence case would be an arbitrary decision not to follow the will of the Legislature as expressed in La. R.S. 15:529.1 rather than an exercise of restraint arguably warranted by a desire not to place Defendant in a worse position for having exercised his right to appeal. Accordingly, we vacate Defendant's sentences for aggravated battery and domestic abuse battery by strangulation, and remand the case for resentencing on these two counts in accordance with La. R.S. 15:529.1.

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[9] *See supra* n. 8.

**Assignments of Error**

Defendant assigns multiple errors regarding his trial, including insufficiency of evidence, a Confrontation Clause violation, and a claim of ineffective assistance of counsel.[10] When a defendant asserts multiple trial errors, including sufficiency of the evidence, the appellate court must first determine the sufficiency of the evidence. *State v. Williams,* 2015-498, p. 4 (La. App. 3 Cir. 12/9/15), 181 So.3d 857, 861.

Defendant argues that the evidence for his convictions is insufficient. Under *Jackson v. Virginia*, when analyzing the sufficiency of evidence, the reviewing court must view the evidence in the light most favorable to the prosecution and analyze whether any rational trier of fact could have found that the State proved its case beyond a reasonable doubt. *State v. Brown,* 2003-0897, p. 18 (La.4/12/05), 907 So.2d 1, 22. "[T]he rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court." *State v. Williams*, 2011-0414 p. 18 (La. App. 4 Cir. 2/29/12), 85 So.3d 759, 771. The existence of conflicting statements as to factual matters affects the weight of the evidence, not its sufficiency, and such a determination rests solely with the trier of fact who may accept or reject, in whole or in part, the testimony of any witness.[11] "The testimony of a single witness, if believed by the trier of fact, is sufficient to support a

[10] While Defendant did not fully brief his Confrontation Clause and ineffective assistance of counsel assignments of error, he argued them summarily. Accordingly, we choose to address these assignments of error. *See Clark v. Dep't of Police,* 2012-1274, p. 8 (La. App. 4 Cir. 2/20/13), 155 So. 3d 531, 536 (wherein this Court held Uniform Rule, Courts of Appeal, Rule 2-14, which required the courts to view a defendant's claim not briefed or argued on appeal as abandoned, invalid).

[11] *State v. Wells*, 2010-1338, p. 5 (La. App. 4 Cir. 3/30/11), 64 So.3d 303, 306; *see also State v. Jones*, 537 So.2d 1244 (La. App. 4 Cir.1989).

conviction."[12] On appeal, a reviewing court must consider the record as a whole, as that is what a rational trier of fact would do. *State v. Santinac*, 1999-0782, p. 6 (La. App. 4 Cir. 6/14/00), 765 So.2d 1133, 1137.

Defendant first argues that the evidence is not sufficient to support his conviction for home invasion. The Louisiana legislature has defined home invasion as:

> …the unauthorized entering of any inhabited dwelling, or other structure belonging to another and used in whole or in part as a home or place of abode by a person, where a person is present, with the intent to use force or violence upon the person of another or to vandalize, deface or damage the property of another.

La. R.S. 14:62.8(A).

Defendant argues that the evidence was insufficient in two respects: (1) that the entry was not unauthorized; and (2) that the dwelling he entered did not belong to another. Regarding Defendant's argument that his entry was authorized, Louisiana courts have previously held that the fact that a person previously had permission to enter a house does not imply that the person continues to have such authorization.[13] The relevant inquiry is "not whether defendant could generally enter the victim's residence, but whether this particular entry was authorized." *State v. Spain*, 99-1956, p. 7 (La. App. 4 Cir. 3/15/00), 757 So.2d 879, 884. In *State v. Ellis*, 2012-0540, p. 8 (La. App. 4 Cir. 1/16/13), 109 So.3d 944, 949, this Court

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[12] *Wells*, 2010-1338, p. 5, 64 So.3d at 306.

[13] *State v. Nunnery*, 2004-1560, p. 12 (La. App. 4 Cir. 12/8/04), 891 So.2d 67, 73; *see also State v. Cojoe*, 2000-1856 (La. App. 4 Cir. 3/21/01), 785 So.2d 898 (finding that even though the defendant still had belongings inside of the residence and although the defendant previously had permission to enter the house, the evidence that the victim subsequently changed the locks demonstrated that the defendant's entry on that occasion was unauthorized.); *see also Wells*, 2010-1338, pp. 5-8, 64 So.3d at 306-08 (where the court found the defendant's entry was unauthorized based on police officer's testimony that the victim told him she asked the

upheld a conviction of home invasion where a defendant had an oral sublease with the victim, had already paid rent for that month, had stayed at the residence several days leading up to the incident, and still had his belongings inside. The *Ellis* court found that the defendant's entry into the dwelling was "unauthorized," after victim testified that the defendant did not have permission to enter the home after she locked him out. *Id.* In the case *sub judice*, as in *Ellis,* Defendant's prior permission to be in the home, his possession of a house key, and the presence of his personal items in the victim's home are not sufficient to imply that Defendant was authorized to enter the victim's home on September 14, 2014.

Defendant also argues that the victim's failure to change the locks evidences his continued authorization to be present in her home. Defendant has failed to cite any cases, and we have found none, that require the victim to bear the financial burden of replacing the locks in order to revoke her previous consent to another's entry into her home. Given that Defendant hid in the closet and that the victim asked her uncle to search the premises for Defendant, the jury had a reasonable basis to conclude that Defendant entered the victim's home that night without authorization. *See Jackson*, 433 U.S. at 319.

As to Defendant's argument that the dwelling he entered did not belong to another, Defendant relies upon the assertion that he was a resident of the victim's home at the time of the offense. He contends that his possession of the house key and the fact that he maintained a Dish Network satellite/cable account at the home demonstrated he lived there at the time and that the dwelling did not belong (solely) to another. This argument lacks merit. The record shows that the lease on

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defendant, her ex-boyfriend, not to enter the house and had locked him out. The door had been damaged when the defendant kicked it open and pulled the victim out of bed.)

the home was solely in victim's name and, although Defendant had permission to reside there while they were dating, she revoked that permission prior to the September 14, 2014 incident. *Compare State v. Coleman*, 2002-1000, p. 13 (La. App. 4 Cir. 9/25/02), 828 So.2d 1130 (finding that a jury had a reasonable basis to conclude that the defendant committed an unauthorized entry even though the defendant and victim had lived together, defendant's belonging were still in the home, and the defendant had possession of a house key). Moreover, the victim asked Defendant to return the house key on several occasions and he refused, and she asked Defendant to cancel the Dish Network account. Accordingly, a rational finder of fact viewing the evidence in the light most favorable to the prosecution could have found that the home belonged to another. *See State v. Wilson*, 2006-1421 p.11 (La. App. 4 Cir. 3/28/07), 956 So.2d 41, 48. This assignment of error lacks merit.

Defendant next argues that the evidence is not sufficient to support his conviction for domestic abuse battery by strangulation. He asserts that the State failed to prove by sufficient evidence that the victim was strangled. La. R.S. 14:35.3(L) defines domestic abuse battery by strangulation as, in relevant part:

> A. Domestic abuse battery is the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member.
>
> B. For purposes of this Section:
>
> ….
>
> (7) "Strangulation" means intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim.

In the case *sub judice*, the victim testified that she was strangled and Officer Daggs testified that the victim gave both a verbal statement at the scene and

a written statement at the hospital indicating that she was strangled. The victim's uncle also testified that Defendant strangled the victim. Additionally, multiple 911 calls were admitted into evidence and played for the jury, during which family members present at the scene allege that Defendant is strangling the victim at the time of their calls.

Nevertheless, Defendant argues that this evidence is insufficient to prove domestic abuse battery by strangulation because he alleges that the victim's medical records show no evidence that she was strangled. This is inaccurate. The victim's medical records indicate that she complained of neck pain and was brought to the hospital in a cervical collar, more commonly known as a neck brace. Moreover, the jury could have properly credited the witness testimony accusing Defendant of strangulation, as the statutory definition of strangulation requires that Defendant impeded the victim's breathing or flow of blood by applying pressure to her throat or neck, not that he must cause some injury by doing so that would be noted in medical records. *Compare State v. Byles*, 94-776, p. 6 (La. App. 5 Cir. 2/15/95), 652 So.2d 59, 64 (wherein a court affirmed a defendant's conviction of second degree murder where the evidence otherwise indicated that the cause of death was strangulation, despite the absence of marks on the body associated with strangulation). A rational juror, viewing the evidence in the light most favorable to the prosecution, could have found beyond a reasonable doubt that Defendant strangled the victim. This assignment of error lacks merit.

Further, Defendant argues that the evidence is insufficient to convict him of aggravated battery. La. R.S. 14:34 defines aggravated battery as "a battery committed with a dangerous weapon." A dangerous weapon is defined as "any gas, liquid or other substance or instrumentality, which, in

the manner used, is calculated or likely to produce death or great bodily harm." La. R.S. 14:2(A)(3).

Defendant argues that the evidence was insufficient on this count because the State did not provide sufficient evidence to show that Defendant hit the victim with a broom handle.[14] The victim testified that she was hit with a broom handle, and Officer Daggs observed a broken metal broom handle at the scene. Moreover, the victim's medical records indicate bruises on her face and an open wound near her left eye. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that the victim was in fact battered with a broom handle. Furthermore, a rational jury could have also determined that the broom handle, in the manner it was used, constitutes a dangerous weapon. *Compare State v. Davis*, 2013-48,161, p.9 (La. App. 2 Cir. 8/7/13), 121 So.3d 1207, 1212 (wherein a court found that the jury was reasonable in concluding a mop handle and other ordinary household items utilized by defendant to physically beat and injure victim constituted dangerous weapons as contemplated by the statute). This assignment of error lacks merit.

Additionally, Defendant argues that he did not have an opportunity to confront or cross-examine a relative of the victim. In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. U.S. Const. amend. VI. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53–54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d

[14] Defendant refers to this item in his brief as a "metal pipe." In the record, it is repeatedly identified as a broken broom handle.

177 (2004). In the case *sub judice*, victim's relative was not called to testify by the State or Defendant during trial. Rather, the relative placed a 911 phone call at the scene during the September 14, 2014 incident which was played for the jury at trial.

Statements are non-testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. *Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006); *State v. Beauchamp*, 2010-0451, p. 4 (La. App. 1 Cir. 9/10/10), 49 So.3d 5, 7. Because a review of the 911 call at issue indicates the relative's statement had the primary purpose of enabling police officers to respond to an ongoing emergency at the victim's residence, the relative's statement was not testimonial in nature. Accordingly, Defendant's right to confrontation has not been violated. This assignment of error lacks merit.

Lastly, Defendant argues that his counsel denied his request for an expert witness and such expert would have caused a different outcome of the case. We construe this *pro se* assignment of error to argue ineffective assistance of counsel. *See State v. Bradley*, 516 So.2d 1337, 1339 (La. App. 4th Cir. 1987) (wherein this Court construed the defendant's *pro se* assignment of error based on its contents rather than the defendant's phrasing of the assignment.)

As a general rule, a claim of ineffective assistance of counsel is properly raised in an application for post-conviction relief at the district court, rather than on appeal. This is because post- conviction relief creates the opportunity for a full evidentiary hearing under La. C.Cr.P. art. 930. *State v. Ellis,* 42,520, p. 19 (La. App. 2d Cir.9/26/07), 966 So.2d 139, 150; *State v. Payne*, 47,481, p. 10 (La. App.

2 Cir. 12/12/12), 108 So.3d 174, 181. The record before the Court contains no evidence to support Defendant's argument that he requested an expert and his counsel denied the request. Accordingly, the record before the Court is insufficient to allow the Court to address this assignment of error.

Defendant's convictions are affirmed. Defendant's sentences aggravated battery and domestic abuse battery are vacated, and the case is remanded with the instruction that the district court resentence Defendant on those counts in accordance with the requirements of La. R.S. 15:529.1. Defendant's sentence for home invasion is affirmed, however, the district court is further instructed to impose the fine required by La. R.S. 14:62.8(B).

**CONVICTIONS AFFIRMED;**
**SENTENCES VACATED IN PART;**
**REMANDED WITH INSTRUCTIONS**