NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 1753

STATE OF LOUISIANA

VERSUS

RONTRELL WISE

Judgment Rendered: May 7, 2010

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Assumption, Louisiana
Trial Court Number 07-19

Honorable Ralph Tureau, Judge

* * * * * * *

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

The defendant, Rontrell Wise, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] The defendant entered a plea of not guilty. The trial court denied the defendant's motion to suppress. Upon a trial by jury, the defendant was found guilty as charged.[2] The defendant was sentenced to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant now appeals, assigning errors to the admission of his taped statement and the sufficiency of the evidence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On December 19, 2006, just after 7:00 p.m., Sergeant Delwin Williams of the Assumption Parish Sheriff's Office was dispatched to Champ Lane in Belle Rose to investigate a report of a possible body lying in the roadway.[3] Sergeant Williams located the body, later identified as Dantrell F. Anderson, the victim, lying on his stomach on the northbound shoulder on the northbound side of Champ Lane. Rescue workers arrived at the scene shortly thereafter. Sergeant Williams

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[1] The defendant was also indicted for other charges, but was only tried on the charge of second degree murder in the instant case.

[2] Prior to the sentencing, a motion for post verdict judgment of acquittal and a motion for a new trial were filed. Both of the motions were based on the sufficiency of the evidence. Just before the sentence was imposed, the trial court denied the motion for new trial and the defendant waived sentencing delays. However, the trial court did not rule on the motion for post verdict judgment of acquittal at that time. The appeal was ordered on December 9, 2008, and the trial court subsequently ruled on the motion for post verdict judgment of acquittal on September 22, 2009. As noted by the defendant in footnote one of his appeal brief, the trial court no longer had jurisdiction over the case at that time and, for that reason, the ruling on the motion for post verdict judgment of acquittal is a nullity. La. C.Cr.P. art. 916. Nonetheless, the motion for new trial based on the same grounds was denied prior to sentencing and the trial court, though without jurisdiction, did attempt to deny the motion for post verdict judgment of acquittal. Considering the trial court's denial of the motion for new trial, its attempt (although invalid) to deny the motion for post verdict judgment of acquittal, and our conclusion herein that the evidence was constitutionally sufficient, any error under La. C.Cr.P. art. 920(2) in the trial court's failure to timely rule on the motion for post verdict judgment of acquittal did not "inherently prejudice" the defendant. See **State v. Price**, 2005-2514, pp. 21-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-125 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

[3] Sergeant Williams and another officer received an earlier dispatch regarding a shot fired into the residence directly across from the scene where the victim's body was recovered.

secured the area and began questioning three subjects who were standing on the roadway when he arrived. Lieutenant Darren Crochet of the Assumption Parish Sheriff's Office arrived at the scene after the victim's body was removed. The Sheriff's Office subsequently received a call regarding a possible second gunshot victim, Travis Franklin, who had been transferred to St. Elizabeth Hospital in Gonzales.

According to trial testimony, Franklin and Dewayne Fernandez were with the victim on the day of the shooting. They were travelling in Franklin's vehicle, visiting friends. At some point, Fernandez asked Franklin to take him back to Georgetown Lane to the location from which Franklin had picked him up earlier that day. Franklin took Fernandez back, and they agreed to meet later to take the victim back to Thibodaux.

Franklin and the victim went to Donaldsonville and as they were on their way back to Georgetown Lane, they contacted Fernandez by cellular phone and told him they were almost back. Fernandez asked Franklin to give him more time, stating that he was at Popeye's. When Franklin arrived at Fernandez's residence on Georgetown Lane, Fernandez approached his vehicle and another male subject approached the passenger side pointing a rifle at the victim and telling him to get out of the truck. A third male subject approached the driver's side of the vehicle and pointed a rifle at Franklin and told him to get out of the truck. His door was ajar at the time. The victim was pulled out of the truck and told to "Give it up, give it up." Fernandez stood behind one of the gunmen as he pointed his rifle at Franklin. The gunmen did not point their weapons toward Fernandez. Instead of exiting the vehicle, Franklin attempted to shut the door. The subject fired his weapon and the bullet struck Franklin's left leg and right foot. The engine of his truck was still running. As Franklin shifted gears and drove away, gunshots came through the back window. The gunmen were wearing ski masks and all black

clothing.

Franklin provided a statement to the police the next day. Fernandez voluntarily went to the police to provide a statement regarding the shooting. After Fernandez implicated the defendant, the defendant was brought in for questioning. The defendant ultimately confessed to shooting the victim. The defendant stated, in part, that he and the victim struggled over the defendant's gun and the victim ran into the path of the bullet when the defendant fired his weapon.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the trial court should not have allowed his taped statement to be utilized at trial. The defendant specifically argues that the police lacked probable cause to arrest him. The defendant further contends that the statement was not freely given because the police used coercive tactics and provoked an intrinsically untrustworthy statement after he invoked his right to silence. The defendant denied initiating further questioning. Moreover, the defendant contends that his right to remain silent was not scrupulously honored. The defendant argues that he, at seventeen years old, suffered under the infirmities of youth, vulnerability, and susceptibility recognized by the U.S. Supreme Court in **Roper v. Simmons**, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The defendant argues that the statement was brought about by force, including an illegal arrest by a multitude of armed officers, isolation in the jail, threats and acts of direct violence, trickery and deceit, and should have been suppressed as unreliable. Contending that there was no physical evidence connecting him with the shooting, the defendant argues that the introduction of the statement cannot be deemed as harmless.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. In **Payton v. New York**, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639

(1980), the United States Supreme Court held that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. **Payton**, 445 U.S. at 576, 100 S.Ct. at 1374-1375. Concerning a defendant's statements to the police outside the home following a **Payton** violation, the Supreme Court held in **New York v. Harris**, 495 U.S. 14, 21, 110 S.Ct. 1640, 1644-45, 109 L.Ed.2d 13 (1990), that, where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of **Payton**.

Probable cause to arrest exists when facts and circumstances within the arresting officer's knowledge and of which he has reasonable and trustworthy information are sufficient to justify a man of average caution in the belief that the person to be arrested has committed or is committing an offense. Although mere suspicion cannot justify an arrest, the officer does not need sufficient proof to convict. **State v. Bell**, 395 So.2d 805, 807 (La. 1981). Probable cause must be judged by the probabilities and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act. Whether probable cause existed at the time of the arrest must be determined without regard to the result of the subsequent search. **State v. Buckley**, 426 So.2d 103, 107 (La. 1983).

A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. C.Cr.P. art. 703(A). The State bears the burden of proving that an accused, who makes an inculpatory statement or confession during custodial interrogation, was first advised of his constitutional rights and made an intelligent waiver of those rights. **State v. Davis**, 94-2332, p. 8 (La. App. 1st Cir. 12/15/95), 666 So.2d

400, 406, writ denied, 96-0127 (La. 4/19/96), 671 So.2d 925. See also La. C.Cr.P. art. 703(D). In **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court promulgated a set of safeguards to protect the therein delineated constitutional rights of persons subject to custodial police interrogation. The warnings must inform the person in custody that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612. In addition to showing that the **Miranda** requirements were met, the State must affirmatively show that the statement or confession was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises in order to introduce into evidence a defendant's statement or confession. La. R.S. 15:451.

The Supreme Court in **Miranda** explained what is meant by custodial interrogation: the questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. **Rhode Island v. Innis**, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). The Supreme Court in **Miranda** stated, if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. When a defendant exercises his privilege against self-incrimination, the validity of any subsequent waiver depends upon whether the police have scrupulously honored his right to remain silent. **State v. Taylor**, 2001-1638, p. 6 (La. 1/14/03), 838 So.2d 729, 739, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). The Supreme Court identified the critical safeguard in the right to remain silent as a person's "right to cut off questioning." **Michigan v. Mosley**, 423 U.S. 96, 103, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975). Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the

duration of the interrogation. **Mosley**, 423 U.S. at 103-04, 96 S.Ct. at 326.

The exercise of the right to remain silent does not act as a complete bar to further questioning. Whether the police have "scrupulously honored" a defendant's "right to cut off questioning" is a determination made on a case-by-case basis under the totality of the circumstances. **Mosley**, 423 U.S. at 104-106, 96 S.Ct. at 326-328; **Taylor**, 2001-1638 at pp. 6-7, 838 So.2d at 739; **State v. Brooks**, 505 So.2d 714, 722 (La.), cert. denied, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987). Factors going into the assessment include: (1) who initiates further questioning, although significantly, the police are not barred from reinitiating contact; (2) whether there has been a substantial time delay between the original request and subsequent interrogation; (3) whether **Miranda** warnings are given before subsequent questioning; (4) whether signed **Miranda** waivers are obtained; (5) whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning; and (6) whether pressures were asserted on the accused by the police between the time he invoked his right and the subsequent interrogation. See **Taylor**, 2001-1638 at p. 7, 838 So.2d at 739; **Brooks**, 505 So.2d at 722.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. **State v. Leger**, 2005-0011, p. 10 (La. 7/10/06), 936 So.2d 108, 122, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

The hearing on the motion to suppress the evidence commenced on May 5, 2008. The testimony presented at the motion to suppress hearing indicates that on

December 19, 2006, Lieutenant Crochet began investigating the homicide of Anderson. The defendant, Fernandez, and Ken Bozeman were the three suspects. Lieutenant Crochet testified that the police made contact with Fernandez first and he made a statement implicating the other suspects. Fernandez stated that the defendant and Bozeman committed the homicide. Based on Fernandez's statement, the police located the defendant on December 20, between 2:30 and 3:30 p.m. at his residence. Upon arrival at the defendant's residence, the officers advised him that they wanted to speak with him in reference to a homicide and advised him of his **Miranda** rights. The defendant was transported to the Criminal Investigation Division, a substation in Labadieville, again advised of his **Miranda** rights, and an Advice of Rights form was executed wherein the defendant signed a waiver of his rights. The defendant provided a recorded statement and did not request an attorney. Lieutenant Crochet also testified that the statement was made freely and not under the influence of fear, duress, intimidation, threats, or promises. According to his testimony, Lieutenant Crochet was present during the entire interview and questioned the defendant along with Lieutenant Lonnie Mabile. The interview lasted forty-five minutes to an hour and was concluded at 4:17 p.m. when the defendant "said he was done." The defendant did not confess during this interview and repeatedly stated that he was not involved in the murder.

After the interview of the defendant, the police conducted another interview of Fernandez. The defendant was in an isolated room adjacent to the room in which Fernandez was being interviewed. The police subsequently formally arrested the defendant and transported him to jail. A Prisoner's Rights Statement was executed. The defendant signed the form indicating that he understood his rights. When asked about the basis of the arrest, Lieutenant Crochet stated that the information and statement provided by Fernandez were consistent with the facts of the case and that Fernandez and Franklin watched the defendant commit the

homicide.

Lieutenant Crochet further testified that another interview of the defendant began when he was at the jail the next day, December 21. Lieutenant Crochet stated that when he arrived at the jail he received word from other correction officers, whose names he could not recall at the time of the suppression hearing, that the defendant wanted to speak to him. According to Lieutenant Crochet, the defendant was escorted to him and he told the lieutenant that he needed to talk to him and to tell the truth. The defendant was crying and stating that he could not believe that he shot someone who he did not even know, and that "[m]y mama is going to kill me." Lieutenant Crochet contacted Captain Wade Martin who set up an interview in the judge's chambers in the downstairs courtroom in the Assumption Parish Courthouse. He read the defendant his rights and executed another Advice of Rights form. The defendant signed the form and did not request an attorney. According to Lieutenant Crochet, no threats, promises, coercion, or pressure of any kind were used against the defendant. During the interview, the defendant admitted to opening the passenger door of the vehicle and asking the passenger for drugs and money. The defendant stated that the victim ran in front of his bullet and that he knew he had shot the victim when he fell down. The second interview also lasted from forty-five minutes to an hour. Lieutenant Crochet specifically denied telling the defendant that he would put his mother away for forty years.

During a break of the second interview, the defendant started "breaking down" and crying and repeating that he could not believe he killed someone and his concern about his mother's reaction. The audio recording continued during this break and defendant was still crying when the video recording was resumed. Lieutenant Mabile and Captain Martin were present during the break of the interview along with the defendant and the lieutenant. Lieutenant Crochet testified

that no one choked the defendant.

The defendant's uncle, Ronald Wise, also testified at the suppression hearing. He stated that during a telephone conversation that took place about one or two months after the defendant's arrest, the defendant told him that he was choked and forced to say he killed someone. Mr. Wise did not report this information prior to the hearing. Rhonda Wise, the defendant's mother, testified that she and the defendant were home when she found out about the shooting. When asked for a specific time she stated, "Between 6:00 and 6:30 and my brother told us that somebody got shot on the other lane, must have been after seven [the approximate time of the shooting]." She also stated that the defendant told her he was forced to say he committed the offense although he did not do so and that he had been choked. She did not report the information before the hearing.

At the hearing, the defendant testified that he was told to sign papers. He stated that the blue paper "was saying something about rights." The defendant confirmed that during the first interview he told Lieutenant Crochet that he did not have anything to do with the murder, that his mother could verify that he was home at the time, and that he did not have anything else to say. The defendant denied initiating the second interview. The defendant stated that he initially denied involvement again, that he was told that his mother would get forty years for lying about his whereabouts, and that he was choked and told he had to confess if he wanted to go home. The defendant further stated that he was afraid and "started going on about things that he was saying" and crying. According to the defendant, he was choked at the jail and during the break of the second interview in the courthouse. The defendant testified that during the break of the second interview he stated that he did not want to answer questions and an officer slapped a cup of water over, water splashed on him, and the officer told the defendant he "better not mess this up." The defendant stated that Lieutenant Crochet, Lieutenant Mabile,

and another detective were present at the time. The trial court denied the motion to suppress the statements.

On October 8, 2008, the motion to suppress hearing was reopened. The trial court allowed the defendant to present evidence to, in pertinent part, support the argument that the evidence should be suppressed as fruit of a poisonous tree from an arrest without a warrant or probable cause. The defendant's aunt, Rosalynn Wise, was the first defense witness. She testified that the defendant was handcuffed before he was taken in for questioning. The defendant testified that a total of six officers, including Sheriff Waguespack, Lieutenant Mabile, and Lieutenant Crochet, came to his home to take him in for questioning. According to the defendant, one of the officers came into his mother's bedroom and grabbed him out of the bed. Lieutenant Crochet grabbed his shirt and took him into the living room. He further testified that the police handcuffed his right arm to the strap of his belt loop. Two officers were guarding the hallway with their guns up. The defendant testified that he did not feel that he was free to go. The defendant confirmed that Lieutenant Crochet advised him of his rights and that he knew he did not have to cooperate.

Lieutenant Crochet testified and reiterated that the defendant was brought in for questioning based on statements gathered from Fernandez and Franklin. According to Lieutenant Crochet, Franklin stated that he believed he had been set up by Fernandez, and Fernandez implicated the defendant. The witnesses' testimony from the previous hearing was adopted. The trial court again denied the motion to suppress.

Based on the record before us, we find that the trial court did not err in denying the motion to suppress the statements contested herein. It makes no difference whether the defendant's arrest occurred inside his home or at the police substation. Under both scenarios, the statements are admissible. If the arrest

occurred at the police substation, there was no **Payton** violation. On the other hand, if there was a **Payton** violation, the exclusionary rule does not bar the State's use of the subsequent statements made by the defendant outside of his home, because there was probable cause to arrest the defendant based on the information Fernandez provided to the police implicating the defendant in the shooting. See **New York v. Harris**, 495 U.S. at 21, 110 S.Ct. at 1644-1645.

We further find that the police scrupulously honored the defendant's right to cut off questioning. The first interview of the defendant, conducted on December 20, was abruptly discontinued when the defendant stated that he did not have anything else to say. While it is questionable as to whether the defendant actually invoked his right to remain silent, based on the testimony of Lieutenant Crochet, the defendant initiated further interrogation. Assuming an invocation, there was a substantial time delay between the defendant's original invocation and the subsequent interview. Moreover, the defendant was again advised of his **Miranda** rights.

While the defendant alleges that he was attacked during the break of the video recording, we note that the defendant had fully confessed to the offense before the break took place. Furthermore, the continuous audio recording does not indicate that the defendant was attacked during the break of the video recording. Based on our review of the audio recording, the defendant was offered something to drink immediately after the video recording was discontinued. The defendant started crying. One of the officers can be heard telling the obviously upset defendant "drink your water" and further stating, "you're doing the right thing now," "you're telling the truth." In the videotape, the defendant's appearance after the break did not reveal any signs that he had been physically attacked during the break. The defendant did not appear to be under any undue duress after the break.

Thus, based on our review of the record, we find that the statements in

question were freely and voluntarily made after advice and waiver of **Miranda** rights. Accordingly, the confession was properly admitted into evidence at the trial. The record supports the trial court's denial of the defendant's motion to suppress the evidence at issue herein. The first assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that during the suppression hearing, the trial court erred in overruling the defense objection to the authenticity of the videotape offered into evidence. The defendant contends that the videotape introduced at the hearing and at trial was not the one made at the time of the defendant's statement on December 21, 2006, and was not identified as a true copy. The defendant notes that the videotape admitted into evidence includes the beginning of the interview of the defendant, an unrelated interview with a child, and the rest of the interview with the defendant. The defendant further contends that a review of the videotape and audiotape, along with the hearing and trial testimony, reveal that two tapes should have been admitted and the single tape presented as the original was edited. The defendant argues that the original tapes are exculpatory and should be ordered by this court to be produced considering the abuse that was alleged to have occurred while the tape was being changed.

As noted by the defendant, on October 30, 2008, the State filed a motion to introduce evidence, requesting the trial court to order an attached "continuous" VHS cassette of the entire December 21, 2006 statement be placed into evidence as a substitute for State's exhibit number six. The State contended that the proposed substitute was the cassette that was introduced at the motion to suppress hearing and played in its entirety. The audio recording of the December 21 statement was entered into evidence as State's exhibit number seven. The motion further contends that after introducing exhibit six into evidence, the State erroneously

placed into evidence the VHS cassette that only contained the first part of the December 21 statement instead of the VHS cassette of the entire statement played during the hearing. The trial court granted the State's motion to substitute the VHS cassette on November 3, 2008.

Regarding the evidence in question of the December 21 statement, the following colloquy took place between the assistant district attorney and Lieutenant Crochet during the motion to suppress hearing:

Q. Let me ask you. How did you record this interview?

A. It's video and audio.

Q. Okay. And your audio was from a cassette and one from digital recorder?

A. Yes.

Q. Okay. I'm going to play it now.
Let me ask you something. On the video tape, you were present during this whole questioning?

A. Yes, I was.

Q. And on the video tape, did the video tape run continuous during this whole process?

A. No, sir, it had to be stopped.

Q. Why did it have to be stopped?

A. There was something else on the first tape. Detective Mabile had to change it out about mid-way.

Q. And so the tape was changed out. The copy that you provided to us, you provided two copies to the State; is that correct?

A. Yes.

Q. One showing the point where it stops and the other one showing the entire interview; is that correct?

A. Yes.

Q. And now the audio for the digital recorder, was that ever stopped?

A. No, sir. The audio tape stayed on the entire time. It was never

turned off.

Q. So the audio tape provides a continuous recordation of what went on while the video tape was being changed?

A. That is correct.

Louisiana Code of Evidence article 1003, provides:

> A duplicate is admissible to the same extent as an original unless:
>
> (1) A genuine question is raised as to the authenticity of the original;
>
> (2) In the circumstances it would be unfair to admit the duplicate in lieu of the original; or
>
> (3) The original is a testament offered for probate, a contract on which the claim or defense is based, or is otherwise closely related to a controlling issue.

Where a mechanical reproduction of the original is offered into evidence and is the substantial equivalent of the original, admission over objection is reversible error only upon a showing that the content of the purported copy does not accurately reflect that of the original. **State v. Vincent**, 338 So.2d 1376, 1381 (La. 1976); **State v. Spradley**, 97-2801, p. 13 (La. App. 1st Cir. 11/6/98), 722 So.2d 63, 71, writ denied, 99-0125 (La. 6/25/99), 745 So.2d 625.

In **Spradley**, the defendant contended that the trial court erred in allowing the State to introduce a copy of the videotapes of the crime. He argued that the explanations regarding the State's failure to introduce the original were insufficient and unsatisfactory and that no testimony was given to explain the absence of the original videotapes. The defendant claimed that he was denied a fair trial because copies of the tapes were used. The detective therein, Detective Tim Collins of the Plaquemine City Police Department, testified that when making videotapes of undercover drug buys, the same tape was used the entire night and a number of transactions were recorded on one tape. Thereafter, each individual transaction was put on a separate tape. Detective Collins stated that he brought the tape[s] of

the defendant's transactions to court and verified that the tapes were accurate depictions of the original tape recordings. Iberville Parish Sheriff's Officer Gerald Jenkins confirmed Detective Collins's testimony. This court observed that the defendant made no showing or claim that the original videos of the crimes were not accurately depicted in the versions introduced at trial and found that the defendant's argument lacked merit.

Similarly, in the instant case Lieutenant Crochet testified that the videotape in question contained the entire interview that was originally recorded on two separate videotapes and that the copy accurately depicts the original recordings. The defendant has failed to make a showing that the content of the purported copy does not accurately reflect that of the originals. Thus, we find no error in the admission of the videotape. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the final assignment of error, the defendant contends that the evidence was insufficient to support a guilty verdict, denying him due process. The defendant points out that there were no identifiable fingerprints on Franklin's vehicle or anywhere else at the crime scene. The defendant further notes that there was no DNA evidence of his involvement and no gunshot residue on his hands. The defendant stresses that he broke his left hand four weeks before the shooting and there was no medical testimony that he, being left-handed, could have either engaged in a struggle with a larger man or fired a weapon. The defendant claims that his statement corroborated what the police found, reiterates his assertion that the statement was coerced, and contends that it was inconsistent with the eyewitness account of the facts. The defendant also states that Franklin did not positively identify anyone at the time of the shooting. The defendant insists that the jury focused on a statement that was unreliable because it was contradicted by physical evidence and Franklin's testimony.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United States Supreme Court in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). That standard of appellate review, adopted by the Legislature in enacting La. C.Cr.P. art. 821, is whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt. **State v. Brown**, 2003-0897, p. 22 (La. 4/12/05), 907 So.2d 1, 18, cert. denied, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006). When analyzing circumstantial evidence, La. R.S. 15:438 provides that the trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. **State v. Graham**, 2002-1492, p. 5 (La. App. 1st Cir. 2/14/03), 845 So.2d 416, 420.

When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984). Additionally, where 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 in order to carry its burden of proof. **State v. Smith**, 430 So.2d 31, 45 (La. 1983); **State v. Long**, 408 So.2d 1221, 1227 (La. 1982). Positive identification by only one witness may be sufficient to support the defendant's conviction. **State v. Hayes**, 94-2021, p. 4 (La. App. 1st Cir. 11/9/95), 665 So.2d 92, 94, writ denied, 95-3112 (La. 4/18/97), 692 So.2d 440.

Louisiana Revised Statutes 14:30.1(A), in pertinent part, defines second degree murder as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm or when the offender is engaged in the

perpetration or attempted perpetration of armed robbery, although he has no intent to kill or inflict great bodily harm. In this case the defendant does not contest the fact that the murder occurred but instead challenges his identity as the perpetrator.

After Fernandez implicated the defendant as one of the shooters and the defendant was placed under arrest, Lieutenant Crochet executed a search warrant at the defendant's residence and recovered the jacket that he believed the defendant had on the night of the shooting, a blue jacket with the letter "R" on front of it. Lieutenant Crochet seized the jacket as evidence. When Lieutenant Crochet went back to the jail, the defendant requested to speak to him. When he made contact with the defendant, the defendant was crying and stated that he could not believe that he killed an innocent person and that his mother was going to kill him. After the defendant was advised of his rights, an audio and videotaped interview took place wherein the defendant confessed to the murder.

Dr. Richard Tracey, of the Orleans Parish Coroner's Office and an expert in the field of forensic pathology, performed the autopsy of the victim. Dr. Tracey testified that the victim suffered one gunshot wound and the bullet travelled through the thorax, penetrating the heart and lungs. After examining all of the evidence, including the victim's clothing, Dr. Tracey concluded that the entry wound was on the victim's back and the exit wound was in the front. Thus, the shooter was behind the victim.

Lieutenant Mabile participated in the execution of search warrants in this case. The search of Franklin's vehicle, a red Ford Expedition, led to the discovery of a green leafy substance in a clear white plastic open bag in the driver's side door compartment. Lieutenant Mabile gave the evidence to Lieutenant Lewis Lambert, a detective in the Criminal Investigations Division of the Assumption Parish Sheriff's Office. The substance was later determined to be marijuana. Lieutenant Lambert participated in the instant investigation and arrived at the scene at about

7:30 p.m. Several .380 caliber shell casings were discovered at the scene and a bullet was found lying on the road approximately twenty-eight feet from the location of the victim's body. The bullet had what appeared to be blood and body tissues on it. Several bullets were also recovered from Franklin's vehicle, including the 7.62 millimeter bullet that hit Franklin, which was found underneath the gas pedal.

Vickie Hall, an expert in trace evidence and gunshot residue, received and examined evidence of this case from the Assumption Parish Sheriff's Office. She testified that no gunshot residue was detected on the samples from the defendant's hands. She explained that these results indicated three possibilities: (1) the defendant did not fire a firearm, (2) the weapon involved is one that does not leave a significant amount of indicative elements, or (3) the defendant wiped or washed his hands on purpose or from normal daily activities prior to the sample being taken. The gunshot-residue test was performed on or about December 20th at 4:30 p.m., while the evidence showed that the shooting took place at approximately 7:00 p.m. on the night before, December 19th. According to Hall, based on that time frame it was essentially impossible to find residue on the shooter's hands. The examination of the defendant's blue "Rockwear" jacket in evidence did result in the finding of gunshot residue on the left cuff and the left chest area of the jacket. Based on Hall's findings, the person wearing the jacket fired a firearm, handled a firearm that had been fired, or transferred residue particles to an article of clothing, or was in close proximity to a firearm when it was fired.[4]

Franklin testified that on the day of the shooting, Fernandez told him to pick him up from Georgetown Lane. Franklin was travelling in a 1998 Ford Expedition. The victim was with Franklin at the time. After picking Fernandez up, the three individuals went to Klotzville to visit some of Franklin's friends.

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[4] During the initial police interview, the defendant stated that he was left-handed.

Fernandez told Franklin and the victim to take him back to Georgetown because he wanted to fry some coon and fish and they complied. Fernandez arranged for Franklin to later pick him up again. As Fernandez exited a blue house and approached Franklin's vehicle, someone pointed a rifle at the victim and told him to get out of the vehicle. Another gunman came to the driver's side and instructed Franklin to get out of the vehicle. Franklin described the gunmen as wearing "all black; they had on ski masks."

Franklin testified that the gunman who went to the passenger side and pulled the victim out of the truck was, "the guy right there," presumably the defendant. Although Franklin informed the police during his December 20, 2006 interview that Fernandez set up the incident, he did not identify the defendant as the deceased victim's shooter. However, describing him as short, at the trial Franklin stated that based on his size, weight, eyes, and mouth, he was sure it was him. The gunman who approached the driver's side of the truck shot Fernandez as he closed the driver's door and drove off. Franklin ducked additional gunfire as he drove off. Franklin admitted to smoking marijuana on the day of the shooting, specifically, "one joint." Franklin testified that he recognized Bozeman when Bozeman was taken to jail and that he was certain that Bozeman, based on his size, height, weight, and the portion of his face that was not covered by the ski mask, was the individual who approached the driver's side of the vehicle and shot him.

During the defendant's second interview with the police, he admitted to shooting the victim. According to the defendant, Fernandez set up the plan to 'jack' Franklin (to take Franklin's money and "whatever" he had). Fernandez instructed the defendant and Bozeman to wait at his residence while he contacted Franklin. When Franklin's truck arrived, the subjects approached, armed with firearms. The defendant stated that he was wearing a black shirt around his head, a blue jacket with an 'R' on it, and a bandana. After the victim exited the vehicle, he

reached into his pants for what the defendant thought might be a gun and then he grabbed the defendant's gun. According to the defendant, the victim was shot when he went across the path of the defendant's firearm after he discharged it. The defendant did not know how many times he fired the weapon and stated that he was shooting at the air. The defendant also stated that he was left-handed. The defendant was wearing an arm sling at the time of the interview but stated that he was not wearing it at the time of the shooting. He could not remember which hand he used to discharge the weapon. During the interview, the defendant displayed his ability to use his hand by moving it and making a fist. He stated that he broke his hand about six and one-half weeks before the interview and was told that it would take eight weeks to fully heal.

The defendant's mother testified that the defendant is left-handed and that he had broken his hand about two months before the shooting and wore a sling on his left arm as a result. The defendant's mother further testified that she got home between 6:00 p.m. and 6:30 p.m. on the night of the shooting. At that time, the defendant was there frying fish, and she was certain he did not leave the home before she found out about the shooting from a neighbor. This testimony was consistent with the defendant's initial statement to the police and the defendant's trial testimony. At trial, the defendant admitted to being with Fernandez on the day of the shooting. He stated that early that day, he, Fernandez, and Bozeman purchased fish while they were in a trailer park and Fernandez left after they cleaned the fish. The defendant briefly saw Fernandez again that day around 3:00 p.m. or 3:30 p.m., just before the defendant went home to fry the fish. Regarding the defendant's whereabouts at the time of the shooting and his use of an arm sling, his aunt's testimony was consistent with the defendant and his mother's testimony.

The defendant's uncle, Ronald Wise, also testified. Ronald Wise stated that he spoke to Franklin after the shooting and that they were cousins. According to

Ronald Wise, Franklin stated that he could not identify the defendant as one of the gunmen.

The defendant confessed to the shooting during his second interview with the police. The jury obviously rejected the defendant's trial testimony denying involvement in the shooting. An appellate court is constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases; that determination rests solely on the sound discretion of the trier of fact. **State v. Mitchell**, 99-3342, p. 8 (La. 10/17/00), 772 So.2d 78, 83. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Richardson**, 459 So.2d 31, 38 (La. App. 1st Cir. 1984). Moreover, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **Richardson**, 459 So.2d at 38. Thus, the fact that the record contains evidence that conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Azema**, 633 So.2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So.2d 460; **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985).

A thorough review of the entirety of the evidence presented at trial reveals that the State established the defendant's identity as the shooter. Thus, we are convinced that the evidence presented herein negated any reasonable probability of misidentification. Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of second degree murder and the defendant's identity as the perpetrator of the offense. For the above reasons, the assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.