NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1807

STATE OF LOUISIANA

VERSUS

JACE COLBY WASHINGTON

Judgment Rendered: MAY 06 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 431086-1, DIVISION "C"

THE HONORABLE RICHARD A. SWARTZ, JUDGE

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In Proper Person

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

Defendant, Jace Colby Washington, was charged by grand jury indictment with one count of second degree murder, a violation of La. R.S. 14:30.1, and one count of attempted second degree murder, a violation of La. R.S. 14:27 & 14:30.1.[1] He pled not guilty to both charges. Subsequently, the state nol-prossed the charge of attempted second degree murder. Following a trial by jury on the charge of second degree murder, defendant was convicted of the responsive offense of manslaughter, a violation of La. R.S. 14:31. After denying defendant's motions for new trial and for post verdict judgment of acquittal, the trial court sentenced defendant to twenty-five years at hard labor. Defendant now appeals, raising one counseled and four pro se assignments of error. For the following reasons, we affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

Counseled Assignment of Error:

1. The trial court erred in imposing an excessive sentence.

Pro Se Assignments of Error:

1. The trial court erred in excluding the admission of the statement of a co-defendant.

2. The trial court erred in allowing the state to introduce other crimes evidence without giving fair notice to, and over the objection of, defendant.

3. The trial court erred in denying defendant's motion to suppress the search warrant.

4. The trial court erred in denying defendant's motion for post verdict judgment of acquittal.

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[1] The indictment also charged Glenn J. Carter, Edric R. Cooper, and Grant A. Gethers with the same offenses. Carter's conviction for second degree murder was affirmed by this Court in **State v. Carter**, 2008-2586 (La. App. 1st Cir. 6/19/09), 11 So.3d 1245, 2009 WL 1706810 (unpublished), writ denied, 2009-1692 (La. 3/26/10), 29 So.3d 1249. Cooper pled guilty to manslaughter on August 11, 2008. The record does not indicate the disposition of the charge against Gethers.

FACTS

On the evening of April 29, 2007, defendant, Glenn J. Carter, Edric R. Cooper and Grant A. Gethers entered a mobile home in Slidell, Louisiana, that was occupied by Jose Luis Martinez-Carpio (the victim) and several other individuals with the intent of robbing the occupants. All four assailants had their faces covered. Defendant was armed with a 9-millimeter semiautomatic handgun. Carter and Cooper were also each armed with a handgun. Carter and Gethers went into the living room area, while defendant and Cooper entered a bedroom and pointed their guns at the two men inside. While Cooper was demanding money from the men, sudden gunshots were heard from the living room. All four assailants fled the mobile home. Cooper fired one shot before his gun jammed, but no one was hit by that bullet. The parties jointly stipulated that the victim was shot by Carter and died that same day.

SUFFICIENCY OF THE EVIDENCE

In his fourth pro se assignment of error, defendant contends the evidence was insufficient to support his conviction. Specifically, he argues the evidence did not establish either that he had specific intent to kill or cause great bodily harm to the victim or that he participated in an attempted robbery. He maintains he was not a principal to any crime and stresses that Carter confessed to shooting the victim.

In cases such as the present one where the defendant raises issues on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for determining the sufficiency of the evidence first is that insufficient evidence to support the guilty verdict bars the retrial of a defendant because of the constitutional protection against double jeopardy, thereby rendering all other issues

moot. See **Hudson v. Louisiana**, 450 U.S. 40, 43-45, 101 S.Ct. 970, 972-73, 67 L.Ed.2d 30 (1981); **State v. Hearold**, 603 So.2d 731, 734 (La. 1992). Accordingly, we will first determine whether the evidence was sufficient to support defendant's manslaughter conviction.

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 also La. C.Cr.P. art. 821B; **State v. Ordodi**, 06-0207 (La. 11/29/06), 946 So.2d 654, 660. The **Jackson v. Virginia** standard of review incorporated in La. C.Cr.P. art. 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. **State v. Patorno**, 01-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

On appeal, defendant contends the evidence was insufficient to support his conviction because the evidence did not establish either that he shot the victim or that he had specific intent to kill him or cause him great bodily harm. In fact, the parties stipulated at trial that the victim was shot by Carter. However, the theory of the state's case was that defendant was guilty of felony second degree murder, not because he shot the victim or had specific intent to kill or cause him great bodily harm, but because defendant was a principal to the attempted armed robbery that resulted in the victim's death. The jury returned a verdict finding defendant guilty of the responsive offense of manslaughter.

Louisiana Revised Statutes 14:31 provides, in pertinent part, that:

A. Manslaughter is:

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(2) A homicide committed, **without any intent to cause death or great bodily harm**.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person ...
(Emphasis added.)

Thus, under La. R.S. 14:31A(2)(a), the state is not required to prove the defendant possessed specific intent to kill or inflict great bodily harm in order for the defendant to be guilty of manslaughter. This provision defines manslaughter as the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in La. R.S. 14:30 (first degree murder) and 14:30.1 (second degree murder), or any intentional misdemeanor directly affecting the person, even though he has no intent to kill or to inflict great bodily harm. See **State v. Brumfield**, 329 So.2d 181, 189-90 (La. 1976); **State v. Anseman**, 607 So.2d 665, 668-69 (La. App. 5th Cir. 1992), writs denied, 613 So.2d 989-90 (La. 1993). Under the explicit language of this provision, specific intent to kill or to inflict great bodily harm is not an essential element of manslaughter under La. R.S. 14:31A(2)(a).

Moreover, "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals." La. R.S. 14:24. Mere presence at the scene of a crime does not make a person a principal to the crime. A defendant may only be convicted as a principal for those crimes for which he personally has the requisite mental state. **State v. Neal**, 00-0674 (La. 6/29/01), 796 So.2d 649, 659, cert. denied, 535 U.S. 940, 122 S.Ct. 1323, 152 L.Ed.2d 231 (2002).

In the instant case, the trial court in its instructions to the jury identified aggravated assault as an intentional misdemeanor directly affecting the person that

could possibly support a manslaughter conviction under La. R.S. 14:31. Under La. R.S. 14:37A, an aggravated assault is an "assault" committed with a dangerous weapon. "Assault" is defined in La. R.S. 14:36 as "an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery." "Battery" is defined by La. R.S. 14:33, in pertinent part, as the "intentional use of force or violence upon the person of another...."

To establish defendant's guilt, the state presented the following testimony of Cooper, one of the participants in the attempted robbery who pled guilty to manslaughter as a result of the victim's death. Cooper testified that he, Carter, Gethers and defendant went to the mobile home where the victim and several other individuals resided for the specific purpose of committing an armed robbery (which he described as "going to hit the lick") to get money. After arriving there in two vehicles, they covered their faces to conceal their identities. To further facilitate the plan, Cooper, Carter and defendant each armed themselves with a handgun. Once inside, Cooper and defendant went into a bedroom occupied by two men. While he and defendant held their guns on the men, Cooper demanded money from them. According to Cooper, they heard sudden gunshots from the living room at that point. All four perpetrators fled the mobile home. Cooper got into Carter's vehicle and defendant got into Gethers' car, and they left the scene. Carter's mobile phone began ringing with an incoming call, but he did not answer it. At trial, the state introduced records establishing multiple calls between Carter and defendant's mobile phones in the period shortly after the shooting.

During the subsequent police investigation, the police seized a 9-millimeter handgun from defendant's residence. The gun, which belonged to defendant's father, was introduced into evidence at trial. During his testimony, Cooper identified it as being the same gun that defendant used during the attempted robbery. Additionally, the state introduced the testimony of Carlton Davis and

Stanley Doyle, who each testified that Cooper, accompanied by defendant and Gethers, visited them in Vicksburg, Mississippi, the week before the attempted robbery. Both Davis and Doyle testified they saw defendant in possession of a semiautomatic gun during that visit.

Defendant testified in his own defense at trial. He denied ever being at the victim's mobile home or having any knowledge of the shooting. According to his testimony, he was at home visiting with Gethers at the time the shooting occurred. He denied being with Cooper at any time that evening. Defendant further denied being in possession of a handgun, either during the visit to Mississippi or on the day of the shooting.

Defendant's father, Henry Washington, testified at trial that defendant was at home from approximately 8:40 p.m. until 9:30 p.m. on the evening of the shooting. The police first received a report of the shooting at 9:17 p.m. Washington testified that, although defendant was aware he had a handgun, defendant did not know where he kept it, which was under a desk in Washington's home office. He further indicated that the gun was present in that location on the day of the shooting.

Hence, the jury was presented with conflicting testimony in the instant case. The trier-of-fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. An appellate court will not assess the credibility of witnesses or reweigh the evidence to overturn a trier-of-fact's determination of guilt. **State v. Lofton**, 96-1429 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331. 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.

After a thorough review of the record, we find the evidence sufficient to support a conviction for manslaughter. Defendant participated in a plan with his co-perpetrators to arm themselves with handguns in order to rob the occupants of the mobile home wherein the victim resided. It was implicit in the plan that the handguns would be used to threaten and coerce the occupants of the mobile home into giving up their money, thereby intentionally placing them in reasonable apprehension of receiving a battery. Pointing a gun at or threatening an individual with a gun constitutes the crime of aggravated assault. See La. R.S. 14:36 & 37A; **State v. Julien**, 09-1242 (La. App. 3d Cir. 4/7/10), 34 So.3d 494, 499; **State v. Fountain**, 93-2561 (La. App. 4th Cir. 12/15/94), 647 So.2d 1254, 1257, writ denied, 95-0140 (La. 6/23/95), 656 So.2d 1010. Moreover, aggravated assault is an intentional misdemeanor directly affecting the person that can support a conviction for manslaughter. See **Brumfield**, 329 So.2d at 189-90. In the instant case, it was while the perpetrators were attempting to execute the planned robbery, using handguns to threaten and coerce the mobile home's occupants, that the victim was shot and killed by one of defendant's co-perpetrators. Thus, the proof of defendant's participation as a principal to the aggravated assault upon the victim and the other occupants was sufficient to support his conviction for manslaughter. See La. R.S. 14:24 and 14:31A(2)(a).

The guilty verdict returned in this case indicates the jury accepted the state's evidence, particularly the testimony of Cooper that defendant participated in the planned assault upon the mobile home's occupants that resulted in the victim's death, and rejected defendant's claim that he was at home at the time of the shooting and was innocent of any involvement therein. See **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 453. We cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662. An appellate court errs by substituting its

appreciation of the evidence and credibility of witnesses for that of the trier-of-fact and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected, by the trier-of-fact. See **State v. Calloway**, 07-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). When a case involves circumstantial evidence and the trier-of-fact 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). Accordingly, 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 defendant was guilty of manslaughter. We find no error in the denial of defendant's motion for post-verdict judgment of acquittal. See La. C.Cr.P. art. 821B.

Moreover, even if the evidence did not support defendant's manslaughter conviction, he would not automatically be entitled to a reversal. If a defendant does not timely object to an instruction on a responsive verdict that is not supported by the evidence and the jury returns a verdict of guilty of that responsive offense, the defendant may not complain on appeal that the evidence does not support the responsive verdict to which he failed to object. Under such circumstances, the conviction of the responsive offense may be affirmed, whether or not the evidence supports the verdict, if the evidence is sufficient to support the offense charged. **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251-52 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983).

The record does not reflect that defendant objected herein to the inclusion of manslaughter as a responsive offense. Thus, defendant would be entitled to a reversal of his conviction only if the evidence is insufficient to support a

conviction of the charged offense, second degree murder. See **State v. Collins**, 09-2102 (La. App. 1st Cir. 6/28/10), 43 So.3d 244, 251. Based on our review, we find the evidence was sufficient to support a conviction for second degree murder.

Louisiana Revised Statutes 14:30.1, prior to amendment by Acts 2009, No. 15 Sec. 1, provided, in pertinent part, that:

> A. Second degree murder is the killing of a human being:
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> ****
>
> (2)(a) When the offender is engaged in the perpetration or attempted perpetration of ... armed robbery ... even though he has no intent to kill or to inflict great bodily harm.

This provision defines second degree murder as the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of certain enumerated felonies, including armed robbery, even though he has no intent to kill or to inflict great bodily harm. See **State v. Goodley**, 01-0077 (La. 6/21/02), 820 So.2d 478, 483. Thus, under the explicit language of this provision, specific intent to kill or to inflict great bodily harm is not an essential element of felony murder under La. R.S. 14:30.1A(2).

In the instant case, the state presented testimony establishing that defendant participated in a plan to rob the occupants of the mobile home in which the victim resided. Furthermore, defendant took an active role in the attempted robbery, holding a handgun on occupants of the mobile home while money was demanded from them. It was during the execution of the planned assault and robbery of the occupants that the victim was shot and killed by one of defendant's co-perpetrators. As previously noted, the guilty verdict returned by the jury reflects its acceptance of the state's evidence and rejection of the claim of innocence presented by the defendant's own testimony. Thus, the proof of defendant's participation in the attempted armed robbery was sufficient to support a conviction as a principal to second degree murder. See La. R.S. 14:24 and 14:30.1A(2). As

the Supreme Court stated in **State v. Kalathakis**, 563 So.2d 228, 231 (La. 1990), "the *mens rea* of the underlying felony [provides] the malice necessary to transform an unintended homicide into a murder." 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 defendant was guilty of second degree murder. See La. C.Cr.P. art. 821B.

This assignment of error lacks merit.

EXCLUSION OF CARTER'S STATEMENTS

In his first pro se assignment of error, defendant contends the trial court erred in excluding as inadmissible hearsay statements made by his co-perpetrator, Glenn Carter, which he claims exculpated him and were crucial to his defense. The statements in question were made by Carter to the police several days after the murder. Defendant argues the statements exculpate him, because Carter describes only himself and Cooper as being involved in the attempted robbery.[2] Defendant maintains the statements would have cast serious doubts on Cooper's crucial trial testimony that defendant was involved in the crime. Hence, he asserts the exclusion of the statements deprived him of his right to fully confront and cross-examine the state's witnesses and to his constitutional right to prepare a defense.

Generally, hearsay is not admissible, unless subject to an exception found in the Louisiana Code of Evidence or as otherwise provided by legislation. La. C.E. art. 802. Defendant argues that Carter's statements were admissible in the present case as statements against penal interest. Louisiana Code of Evidence article 804, which delineates certain exceptions to the general rule against admissibility of

[2] In the statements, Carter never specifically states that only two participants were involved in the attempted robbery, nor was he questioned on that point. Nevertheless, an inference that there were only two participants reasonably can be drawn from his failure to mention anyone other than himself and Cooper as participants.

hearsay statements in cases where the declarant is unavailable, provides, in pertinent part, as follows:

> **A. Definition of unavailability.** Except as otherwise provided by this Code, a declarant is "unavailable as a witness" when the declarant cannot or will not appear in court and testify to the substance of his statement made outside of court. ...
>
> ****
>
> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> ****
>
> **(3) Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.** (Emphasis added.)

Thus, when a statement tending to expose the declarant to criminal liability is offered to exculpate the accused, Article 804B(3) expressly requires corroborating circumstances indicating trustworthiness. The burden of satisfying the corroboration and trustworthiness requirement rests upon the accused. **State v. Hammons**, 597 So.2d 990, 996-97 (La. 1992). That burden may be satisfied by evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the statement. Circumstantial evidence of the veracity of the declarant as to the portion of the statement exonerating the accused is generally sufficient. Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify his statements for the benefit of the accused. **Hammons**, 597 So.2d at 997.

Under compelling circumstances, formal rules of evidence must yield to a defendant's constitutional right to confront and cross-examine witnesses and to present a defense. Normally, inadmissible hearsay may be admitted if it is reliable, trustworthy and relevant, and if its exclusion would compromise the defendant's right to present a defense. See U.S. Const. amend. VI; La. Const. art. I, § 16; **State v. Van Winkle**, 94-0947 (La. 6/30/95), 658 So.2d 198, 202; **State v. Gremillion**, 542 So.2d 1074, 1078 (La. 1989).

In the instant case, after trial had already begun, the trial court held a hearing on defendant's motion in limine concerning the admissibility of Carter's prior statements. During the hearing, Carter was called to testify, but invoked his Fifth Amendment right against self-incrimination. Defendant argued that, since Carter was unavailable to testify, his prior statements were admissible under La. C.E. art. 804B(3). The state responded that the statements were inadmissible, because defendant failed to establish the necessary corroborating circumstances indicating trustworthiness of the statements, especially since Carter testified at a suppression hearing that the statements in question were coerced by the police. The trial court ruled that Carter's statements were inadmissible because the two prior statements were inconsistent with each other in describing Carter's participation in the instant crime and were not sufficiently corroborated by other circumstances.

On appeal, defendant contends the trial court erred because Carter's statements that there were only two participants in the attempted armed robbery were corroborated by the testimony of Jose Roberto Romero-Echegoyen, who testified at trial, and Luis Fernando Martinez-Avila, who testified at the preliminary examination hearing held in this matter. We disagree. These men were roommates of the victim and were present in the mobile home when the shooting occurred, although not in the same room. They each testified to seeing only two assailants. However, while they testified to seeing only two assailants,

their overall testimony indicates there was at least one more. During his trial testimony, Romero-Echegoyen described hearing the fatal gunshots coming from the living room while he was in his bedroom being held at gunpoint by two men. This scenario requires that at least three assailants were involved. Defendant's assertion that there was no evidence to suggest the presence of anyone other than Carter and Cooper at the crime scene is mistaken.

Defendant also points out that Cooper's trial testimony corroborated Carter's statements on several points. Nevertheless, the fact that Carter's statements and Cooper's testimony may have agreed on some incidental points is of little avail to defendant. Cooper's testimony was clearly inconsistent with Carter's statements on the crucial issue of the number of participants in the attempted robbery. Moreover, it was on this precise issue that defendant sought to introduce the statements.

Under Article 804B(3), when a hearsay statement tending to expose the declarant to criminal liability is offered for the purpose of exculpating the accused, it is admissible only if the defendant establishes corroborating circumstances indicating trustworthiness. **Hammons**, 597 So.2d at 996-97. In view of the inconsistencies between the two prior statements, as well as Carter's testimony at the suppression hearing regarding coercion, we find no error or abuse of discretion in the trial court's exclusion of the statements as being inadmissible hearsay evidence. Defendant failed to present the necessary corroborating evidence to indicate the trustworthiness of the statements.

This assignment of error is without merit.

ADMISSIBLITY OF WITNESS TESTIMONY

In his second pro se assignment of error, defendant contends the trial court erred in denying his motion in limine to exclude the testimony of Davis and Doyle regarding having seen defendant with a semiautomatic handgun shortly before the

instant crime was committed. The stated grounds of the motion were: (1) that the testimony of these witnesses was not relevant; (2) that it was offered as impermissible character evidence; and (3) that whatever probative value the testimony had as character evidence was greatly outweighed by its prejudicial effect. The state responded that the evidence was offered to show that defendant was in possession of a semiautomatic handgun, such as that he was alleged to have used in the instant crime, only days before the crime was committed. The trial court denied the motion in limine, concluding the testimony was relevant and not so prejudicial as to preclude its admission.

On appeal, defendant argues Davis and Doyle should not have been allowed to testify, since the defense was notified only days before trial that these witnesses would testify, impeding his ability to prepare a defense. Initially, we note this contention constitutes a new ground for objection that cannot be raised for the first time on appeal. The grounds for an objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make a proper ruling and prevent or cure any error. A defendant is limited on appeal to those grounds for an objection that were articulated to the trial court. See La. C.Cr.P. art. 841A; La. C.E. art. 103A(1); **State v. Young**, 99-1264 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005. In any event, defendant's argument is meritless. In the absence of extraordinary circumstances, the state is not required to provide its witness list to the defendant. The state must do so only in situations where a determination has been made that there are peculiar and distinctive reasons why fundamental fairness requires such a disclosure. See **State v. Weathersby**, 09-2407 (La. 3/12/10), 29 So.3d 499, 501 (per curiam). No such showing has been made in this case.

As an additional basis for excluding the testimony, defendant asserts it was inadmissible character or other crimes evidence. We disagree. The mere fact that defendant was seen in possession of a gun does not by itself constitute

impermissible character evidence. In order to constitute impermissible other crimes evidence, the evidence in question must point unmistakably to a prior crime. See **State v. Edwards**, 97-1797 (La. 7/2/99), 750 So.2d 893, 906, cert. denied, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999). In this case, the testimony of which defendant complains clearly does not meet this criteria, despite defendant's assertion that it amounts to evidence of illegal gun possession. Indeed, the witnesses merely testified that they saw defendant in possession of a handgun, without any suggestion that he was doing anything illegal or improper.

Finally, defendant contends the testimony was irrelevant and its probative value was outweighed by the risk of unfair prejudice. All relevant evidence is generally admissible. La. C.E. art. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. La. C.E. art. 401. Any evidence, whether direct or circumstantial, is relevant if it tends to prove or disprove the existence of any material fact. **State v. Mosby**, 581 So.2d 1060, 1065 (La. App. 1st Cir. 1991), affirmed, 595 So.2d 1135 (La. 1992). However, even relevant evidence may be excluded, if its probative value is substantially outweighed by the risk of unfair prejudice. La. C.E. art. 403.

A party seeking to introduce evidence over an objection bears the burden of showing that it is relevant. However, once that burden is met, the burden shifts to the party opposing the introduction of the evidence to show that the evidence is inadmissible under Article 403 because its probative value is substantially outweighed by its prejudicial effect. **State v. Jones**, 03-0829 (La. App. 4th Cir. 12/15/04), 891 So.2d 760, 767, writ denied, 2005-0124 (La. 11/28/05), 916 So.2d 140. Moreover, the trial court has considerable discretion in determining the relevancy of evidence, and its ruling will not be disturbed on appeal absent an

abuse of discretion. **State v. James**, 02-2079 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 584.

In the instant case, defendant was accused of participating in an attempted robbery that resulted in a homicide while armed with a semiautomatic handgun. The testimony in question, showing that he had possession of a semiautomatic handgun shortly before the crime, was offered as circumstantial evidence to show he had access to a handgun on the date of the crime. Without doubt, the evidence was relevant for this legitimate purpose, and not merely for the purpose of damaging defendant's reputation or character, as he asserts. Moreover, the probative value of this evidence clearly outweighed any risk of unfair prejudice. Defendant's argument that the evidence was unduly prejudicial is based in large part on his contention that the evidence amounted to evidence of a prior crime, which we have already rejected.

This assignment of error is without merit.

MOTION TO SUPPRESS

In his third pro se assignment of error, defendant asserts the trial court erred in denying his motion to suppress a 9-millimeter handgun that was seized from his home pursuant to a defective search warrant. Specifically, he argues the affidavit of probable cause supporting the issuance of the warrant contained false and misleading information based on the self-serving statement of Cooper, and that the affiant acted in bad faith in including the information in the affidavit. Defendant further argues that the affidavit failed to establish probable cause, because it did not adequately demonstrate Cooper's reliability or the basis of his knowledge.

At the hearing on the motion to suppress, defense counsel argued the affidavit contained intentional misrepresentations, since the police were in possession of two statements from Cooper prior to the execution of the search warrant, as well as a statement from Carter, all of which were contradictory to each

other. Defense counsel asserted the affiant chose to include information from Cooper's statements that indicated defendant was involved in the attempted robbery, while omitting any references in the statements that indicated he was not involved. In response, the prosecutor pointed out that Cooper's second statement was given after the execution of the warrant. At that point, defense counsel continued to argue that the affidavit nevertheless contained intentional misrepresentations, since the police knew that Cooper and Carter had given inconsistent statements on the issue of defendant's involvement in the attempted robbery. No witnesses were called to testify at the suppression hearing. After reviewing the search warrant and the statements in question, the trial court specifically found that there were no intentional misrepresentations and that probable cause to issue the search warrant existed. The trial court denied the motion to suppress.

When a search and seizure of evidence is conducted pursuant to a search warrant, the defendant has the burden to prove the grounds of his motion to suppress. La. C.Cr.P. art. 703(D); **State v. Hunter**, 632 So.2d 786, 788 (La. App. 1st Cir. 1993), writ denied, 94-0752 (La. 6/17/94), 638 So.2d 1092. Further, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

Article I, § 5 of the Louisiana Constitution requires that a search warrant may issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. La. C.Cr.P. art. 162A. Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has

reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. The process of determining probable cause requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system. **State v. Green**, 02-1022 (La. 12/4/02), 831 So.2d 962, 968. Moreover, a magistrate's determination of probable cause, prior to issuance of a search warrant, is entitled to significant deference by a reviewing court. The task of a reviewing court is simply to ensure that under the totality of the circumstances the issuing magistrate had a "substantial basis" for concluding that probable cause existed. **Green**, 831 So.2d at 969.

An affidavit supporting a search warrant is presumed to be valid. The defendant must prove by a preponderance of the evidence that the affidavit contains intentional misrepresentations. **State v. Kreitz**, 560 So.2d 510, 512 (La. App. 1st Cir.), writ denied, 565 So.2d 940 (La. 1990). When a defendant proves that an affidavit contains false statements, it should be determined whether the misrepresentations were intentional or unintentional. **State v. Brannon**, 414 So.2d 335, 337 (La. 1982); **Kreitz**, 560 So.2d at 512.

The making of material and intentional misrepresentations to a magistrate in order to secure a search warrant involves a fraud upon the court and results in the invalidation of the warrant and suppression of the items seized. However, if the misrepresentations or omissions are inadvertent or negligent, the warrant should be retested for probable cause after striking that which had been misrepresented or supplying that which had been omitted. **State v. Byrd**, 568 So.2d 554, 559 (La. 1990); **State v. Peterson**, 03-1806 (La. App. 1st Cir. 12/31/03), 868 So.2d 786, 793, writ denied, 04-0317 (La. 9/3/04), 882 So.2d 606. The harsh result of

quashing a search warrant, when the affidavit supports a finding of probable cause, should result only when the trial court expressly finds an intentional misrepresentation or omission was made to the issuing magistrate. **Kreitz**, 560 So.2d at 512.

Further, it is well established that even when a search warrant is found to be deficient, the seized evidence may nevertheless be admissible under the good-faith exception of **United States v. Leon**, 468 U.S. 897, 918-22, 104 S.Ct. 3405, 3418-20, 82 L.Ed.2d 677 (1984), wherein the United States Supreme Court held the exclusionary rule should not be applied to bar the use of evidence obtained by officers acting in an objectively reasonable, good-faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid. **Leon**, 468 U.S. at 923, 104 S.Ct. at 3421, enumerated four instances in which suppression remains an appropriate remedy: (1) where the issuing magistrate was misled by information the affiant knew was false or would have known was false except for a reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. As reflected by the nature of the instances enumerated in **Leon,** suppression of evidence seized pursuant to an invalid warrant is not a remedy to be lightly considered. Furthermore, the jurisprudence presumes good faith on the part of the executing officer, and the defendant bears the burden of demonstrating the necessity for suppression of evidence by establishing a lack of good faith. **State v. Maxwell**, 09-1359 (La. App. 1st Cir. 5/10/10), 38 So.3d 1086, 1092, writ denied, 10-1284 (La. 9/17/10), 45 So.3d 1056.

In the instant case, the affidavit of probable case contained the following allegations:

> Carter provided an inculpatory statement, admitting to participating in the homicide with intentions of robbing the victim. Carter stated he had a handgun and shot the victim during the robbery attempt. In addition, Carter implicated his friend, Edric Cooper as his accomplice. Cater [sic] was arrested for first degree murder on May 4, 2007.
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> ****
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> Cooper provided an inculpatory statement, admitting to participating in the homicide with intentions of robbing the victim. Cooper stated he, Carter, and two other black male subjects, Grant Gethers and Jace Washington went to the residence with the intention of robbing the subjects in the trailer. Cooper continued to state the four were riding in Carter's Tahoe and parked down the street away from the trailer and used bandannas and clothing articles to conceal their identities. Carter gave Washington a .380 caliber Lorcin handgun to arm himself; while Carter armed himself with a .45 caliber Glock and Cooper was in [sic] already in possession of a 9mm handgun. All subjects approached the trailer with Carter and Washington entering the trailer. Cooper and Gethers were standing outside the trailer as "lookouts." Cooper stated he heard Carter demanding the residents to empty their pockets which was followed by multiple gunshots. Cooper observed Washington exit the trailer in a hurry and he and Gethers followed. Carter exited the trailer last and all ran to Carter's Tahoe in which they fled the area. Cooper advised Carter threw the .45 caliber handgun into the wooded area just prior to getting in the vehicle. Carter drove directly to Washington's residence of 113 Westminster, Slidell, Louisiana where Cooper, Washington and Gethers got out of the Tahoe and into Washington's vehicle. They left the residence. Cooper stated he gave the 9mm handgun to Washington at the residence.

Defendant presented no testimony to establish that the affiant, Detective Stacey Callender, deliberately concealed information or made any deliberate misrepresentation to the magistrate in the affidavit of probable cause that would have affected the issuance of the warrant. The affidavit clearly discloses that Carter implicated himself and Cooper, while Cooper additionally implicated defendant and Gethers. Further, although defendant continues to claim on appeal that, at the time the affidavit was executed, Cooper had given the police two

contradictory statements regarding the events in question, no evidence supporting this claim was introduced at the suppression hearing.

However, a review of the affidavit reveals that it does fail to disclose that, before he gave the statement admitting he shot the victim, Carter had given an earlier statement in which he gave a different account of what occurred. In the earlier statement, Carter admitted to his participation in the crime, but claimed Cooper shot the victim. It is not clear whether this information would have affected the issuance of the warrant, since Carter admitted in both statements to his participation in the crime and it was actually Cooper's statement, rather than Carter's, that provided probable cause for the search warrant. However, even if this information should have been included in the affidavit, defendant failed to introduce any evidence that this omission was intentional. In this context, "intentional" means a deliberate act designed to deceive the issuing magistrate. **State v. Lamartiniere**, 362 So.2d 526, 529 n.2 (La. 1978); **Peterson**, 868 So.2d at 793. Herein, the trial court specifically found there were no intentional misrepresentations in the affidavit.

Nevertheless, even though there were no intentional misrepresentations, it appears much of the information included in the affidavit was later recanted by Cooper, including the following allegations: that everyone rode to the crime scene in the same vehicle; that Cooper (rather than defendant) was in possession of a 9-millimeter handgun; that Cooper stood outside the residence as a lookout; that all of the participants immediately drove to defendant's residence after the homicide; and that Cooper gave the 9-millimeter handgun to defendant at defendant's residence. However, even with these allegations excised, it appears the affidavit could support a finding of probable cause, since it still establishes defendant's participation in the crime resulting in the victim's death, giving rise to a reasonable belief that evidence of that crime might be found at defendant's residence.

In any event, even if the search warrant is considered defective, the **Leon** good-faith exception to the exclusionary rule is applicable, since the physical evidence was seized by officers acting in an objectively reasonable good-faith reliance on a search warrant issued by a detached and neutral magistrate. See **Leon**, 468 U.S. at 918-22, 104 S.Ct. at 3418-20. We reject defendant's contention that the good-faith exception is not applicable because the affidavit of probable cause contained intentional misrepresentations and omissions and was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. As noted, the trial court specifically found there were no intentional misrepresentations contained in the affidavit. This determination cannot be reversed by this Court in the absence of a clear abuse of the trial court's discretion, which has not been shown herein. See **Green**, 655 So.2d at 281. Further, there is nothing on the face of the warrant that would make it so deficient that it could not be presumed valid. Given the facts known to Detective Callender at the time she executed the affidavit of probable cause, it was reasonable for her to believe she was providing the judge with sufficient information to issue a warrant. Therefore, the facts do not support a finding that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." **Leon**, 468 U.S. at 923, 104 S.Ct. at 3421. Accordingly, suppression of the evidence would not be appropriate under the **Leon** good-faith exception to the exclusionary rule.

Finally, we also reject defendant's argument that the affidavit did not establish probable cause because it failed to adequately demonstrate the informant's reliability or basis of knowledge. A magistrate may issue a search warrant when the totality of the circumstances, viewed in a commonsense and non-technical manner, establish there is a fair possibility that contraband or evidence of a crime will be found in a particular place. See **State v. Barrilleaux**, 620 So.2d

1317, 1320 (La. 1993). We note that this case does not involve an anonymous informant. Rather, it contains information from a named individual who admitted to participating in the crime under investigation. As such, there was no question as to his basis of knowledge.

For these reasons, we find no error or abuse of discretion in the trial court's denial of defendant's motion to suppress. This assignment of error is without merit.

EXCESSIVE SENTENCE

In his only counseled assignment of error, defendant contends the trial court abused its discretion in sentencing him to twenty-five years at hard labor and in denying his motion for reconsideration of sentence. Specifically, defendant argues the sentence is excessive in view of the fact that he was only nineteen at the time of the offense, he had no prior criminal history, and he played a lesser role in the victim's death, since he only agreed to participate in an armed robbery and did not participate in the shooting. Additionally, noting that the trial court failed to order a presentence investigation report (PSI), he argues the record does not reflect that the trial court adequately considered defendant's personal history and circumstances, as it was required to do. Defendant suggests his sentence should be reduced to twelve years or less to comport with that received by his co-perpetrator, Edric Cooper, who actually fired a weapon while committing the instant offense and had a prior criminal history.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Even when a sentence is within statutory limits, it may be unconstitutionally excessive. See **State v. Sepulvado**, 367 So.2d 762, 766-67 (La. 1979). A sentence is considered unconstitutionally 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 grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **Andrews**, 655 So.2d at 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. **State v. Trahan**, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be set aside absent a showing of a manifest abuse of the trial court's wide discretion. **Andrews**, 655 So.2d at 454.

Louisiana Code of Criminal Procedure article 894.1 sets forth items which must be considered by the trial court in imposing sentence. Although the trial court need not recite the entire checklist of Article 894.1, the record must reflect that it adequately considered the criteria therein. In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

In the instant case, defendant was originally charged with second degree murder, which carries a mandatory sentence of life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1B. He was convicted of the responsive offense of manslaughter and faced a sentence of imprisonment at hard labor for not more than forty years. See La. R.S. 14:31B. Defendant received a sentence of twenty-five years imprisonment. This sentence was slightly over the midpoint of the sentencing range.

Defendant's contention that the trial court failed to give adequate weight to the mitigating factors of his youth, lack of a prior criminal record, and his alleged lesser role in the offense lacks merit. In imposing sentence, the trial court explicitly indicated defendant was being sentenced in accordance with the provisions of Article 894.1. The trial court clearly was aware of defendant's

youth, having asked defendant his age before imposing sentence. As to defendant's role in this incident, the evidence reflects he threatened the occupants of the residence with a handgun, displaying a callous disregard for their safety. The trial court noted that, although defendant maintained he was not involved, after hearing all of the evidence presented at trial, the court was convinced beyond a reasonable doubt that defendant participated in the attempted armed robbery that resulted in the victim's death. The fact that the evidence in this case might have supported a verdict of second degree felony murder under La. R.S. 14:30.1A(2) was an appropriate sentencing consideration. See **State v. Parfait**, 96-1814 (La. App. 1st Cir. 5/9/97), 693 So.2d 1232, 1244 n.5, writ denied, 97-1347 (La. 10/31/97), 703 So.2d 20.

Additionally, immediately prior to sentencing defendant, the trial court held a hearing on defendant's motions for new trial and for a post verdict judgment of acquittal, after which it denied the motions.[3] During sentencing, the trial court expressed an opinion that defendant's testimony both at trial and during the motion hearing was untruthful. The trial court further concluded that defendant had attempted to intimidate and/or threaten witnesses who testified against him at the hearing. Such conduct indicates a continued propensity for criminal misconduct on defendant's part, as well as a failure to accept responsibility for his actions. Finally, the trial court indicated that any lesser sentence would deprecate the seriousness of the offense.

Having reviewed the record, we find no merit in defendant's contention that the trial court should have ordered preparation of a PSI. We note that defendant does not contend he requested the preparation of a PSI, as he could have. In any event, the ordering of a PSI lies within the discretion of the trial court. La. C.Cr.P.

[3] Defendant expressly waived the sentencing delays provided in La. C.Cr.P. art. 873.

art. 875A(1); **State v. Johnson**, 604 So.2d 685, 698 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

Furthermore, we reject defendant's suggestion that his sentence should be reduced to be the same or less than that of his co-perpetrator, Cooper. The record reflects that Cooper pled guilty to manslaughter as a result of his involvement in the victim's death and testified on behalf of the state in the instant matter, both of which may have been factors considered by the sentencing court. In any event, there is little value in making such sentence comparisons. It is well established that sentences must be individualized to the particular offender. **State v. Batiste**, 594 So.2d 1, 3 (La. App. 1st Cir. 1991).

Considering the reasons given by the trial court, we find no abuse of discretion in the trial court's imposition of a sentence of twenty-five years. The record adequately supports the sentence imposed.

This assignment of error lacks merit.

For these reasons the conviction and sentence are affirmed.

AFFIRMED.