NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1967

STATE OF LOUISIANA

VERSUS

JOSHUA MOSELY

Judgment rendered May 2, 2014.

* * * * * *

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 573334
Honorable Randall L. Bethancourt, Judge

* * * * * *

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JOSHUA MOSELY

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

The defendant, Joshua Mosely, was charged by bill of information with two counts of attempted first degree murder, violations of La. R.S. 14:27 and La. R.S. 14:30. The defendant pled not guilty. He filed a motion to suppress confession and inculpatory statements. A hearing was held on the matter, wherein the motion to suppress was denied. Following a jury trial, the defendant was found guilty as charged on both counts. For each count, the defendant was sentenced to forty years imprisonment without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. The defendant filed a motion to reconsider sentences, which was denied. The defendant now appeals, designating four assignments of error. We affirm the convictions and sentences.

FACTS

In Houma, at about 3:00 a.m., on April 18, 2010, the defendant was riding with his friend, Johnny Stewart (also known as "Boochie"), and his cousin, Davole Martin. Boochie was driving, the defendant was in the front passenger seat, and Davole was in the back seat. The defendant had a 9mm semi-automatic handgun on his lap. As Boochie drove down Westside Boulevard, the defendant saw a group of people across the street near Dashley's Convenience Store (on the corner of Westside Boulevard and Alma Street). The defendant told Boochie and Davole that he was going to shoot at the crowd. When Boochie stopped at a stop sign, the defendant got out, walked to the back of the car, and fired about six shots into the crowd. He got back in the car, and Boochie drove away. The defendant's gunfire struck two people, Macy Chaisson and Sarah Rollins. The two girls were friends and were hanging out with other friends when they were shot. The girls recovered from their injuries. Macy was shot in the stomach and had the bullet surgically removed about two months later. Sarah was shot through her left knee. Neither girl knew the defendant, nor did the defendant know anyone in the crowd. The defendant was arrested one month later after questioning at the Houma Police Department over his involvement in an unrelated drive-by shooting on

May 17, 2010. When questioned about the incident on April 18, the defendant admitted in a recorded interview that he shot the two girls.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in denying his motion to suppress inculpatory statements. Specifically, the defendant contends that neither he nor his father were able to comprehend the **Miranda** warnings; he was promised leniency in his second interview, wherein he confessed to the shootings; and his second interview should have been inadmissible because he invoked his right to silence in the first interview.

Testimony and evidence introduced at the hearing on the motion to suppress inculpatory statements established that the defendant was brought to the Houma Police Department for questioning on May 18, 2010. The sixteen-year-old defendant was with his father, Travelyn Mosely. According to Detective Travis Theriot, with the Houma Police Department, the defendant was a suspect in a drive-by shooting that occurred the previous night (May 17), wherein two people had been shot. Detective Theriot testified at the hearing that he presented a form from the Juvenile Division to Travelyn and the defendant, entitled "Rights For Interrogation Of Juveniles." The form contained the complete **Miranda** warnings, and indicated to the defendant that before deciding whether he wanted an attorney or to answer questions, he would be given the opportunity to discuss these issues with his father. Detective Theriot read the **Miranda** warnings aloud to the defendant and Travelyn. The form was dated May 18, 2010, with a time of 7:04 a.m., and signed by Travelyn and Detective Theriot. Following standard procedure, Detective Theriot left the interview room to allow Travelyn to discuss with his son his rights and the options available to him. Several minutes later, Travelyn summoned the detective back to the room and informed him the defendant was ready to answer questions. At that point, Detective Theriot went over two more forms with Travelyn and the defendant. The "Acknowledgment By Concerned Adult" form asked if Travelyn understood the defendant's rights; if he discussed those rights with his son; if

he discussed with his son that anything he says can be used against him in court; and if he discussed with his son that he had a right to an attorney at no cost to him. Travelyn checked "yes" to these four questions, initialed each question, and signed the form. The "Child's Consent To Questioning" form, which was read to the defendant, asked if he discussed his right to remain silent and refuse to answer questions; if he discussed that anything he says can be used against him; if he discussed his right to have a lawyer represent him; if he understood these rights; and if he was willing to answer questions without having a lawyer present. The defendant checked "yes" to these five questions. The sixth question asked the defendant if any threats or promises had been made to him or if he had been pressured into answering questions or giving up his rights. The defendant checked "no." The defendant initialed each question and signed the form.

Detective Theriot and Detective Dexter Detiveaux, with the Houma Police Department, then interviewed the defendant. In this audio recording, the defendant was questioned about a drive-by shooting the night before (May 17). The defendant denied any involvement in the shooting. When the defendant was told to tell the truth (three other witnesses in the vehicle identified the defendant as the shooter), he began crying. Travelyn stated, "Boy stop crying. Just book him man, because he's going to start catching his seizures . . . Take him to jail." The defendant again denied shooting anyone. Travelyn then said, "Josh, Josh just shut up. I can go?" Travelyn then left the police station, and the detective terminated questioning.

One of the three witnesses in the vehicle with the defendant had earlier informed Detective Theriot that the defendant was also responsible for a shooting on Westside Boulevard (a month ago, and the instant matter). Thus on the same day, May 18, only minutes after the defendant's interview had been terminated, Detective Theriot contacted the lead detective on the other April 18, 2010 shooting case, Cher Pitre, with the Terrebonne Parish Sheriff's Office. Shortly thereafter, Detective Pitre, along with Detective Donald Tomlin, with the Terrebonne Parish Sheriff's Office, arrived at the Houma Police Department. Before speaking to the defendant, Detective Pitre had an

officer from the Houma Police Department pick up Travelyn from his house and bring him back to the police station. Upon Travelyn's arrival, Detective Pitre spoke to him alone. She informed Travelyn that the defendant was possibly the shooter in another incident that occurred a month earlier. Detective Pitre told Travelyn she wanted to speak to the defendant, Travelyn consented, and they entered the interview room together. In the pre-interview, prior to any recording, the defendant was asked about the April 18 shootings, wherein he denied any knowledge of the incident. Travelyn demanded of his son that he tell the truth. According to Detective Pitre, Travelyn asked the defendant if he had a gun, and the defendant nodded. Travelyn then asked the defendant if he shot two people, and again the defendant nodded. Travelyn became very upset and left the interview room.

Detectives Pitre and Tomlin remained with the defendant to question him about the shootings. In this second audio recording, the defendant stated he was riding in a black Honda with Johnny Stewart, also known as "Boochie." Boochie drove to a street by Cannata's and stopped at a stop sign. The defendant got out, walked to the back of the car, and started shooting at a group of people. The defendant said he fired six times. He got back in the car, and Boochie drove away. Later that night, the defendant saw a friend, Dustin Calloway, in another car. Boochie pulled up to the other car, and the defendant told Dustin that he shot two girls. More questioning ensued before the interview was terminated at 11:25 a.m. on May 18, 2010.

Travelyn testified on direct examination at the motion to suppress hearing that he had a fifth or sixth grade education and that he could not read. He stated he remembered the detective telling him the defendant had a right to a lawyer, but he (Travelyn) was sleepy. On cross examination, Travelyn admitted that he could read. Travelyn further stated that he had prior convictions and knew that if he could not afford an attorney, one would be appointed to him. The trial court then asked Travelyn if he understood that his son had a right to a lawyer and that if he could not afford one, he would get a "free one." Travelyn responded in the affirmative. The trial court asked

Travelyn if he knew that anything said in that room would be used against his son. Travelyn responded in the affirmative.

The defendant testified at the motion to suppress hearing that he had been awake for a long time and that earlier that evening, before he was arrested, he had gone to a graduation party and drank alcohol. The defendant further stated that the new detectives (Pitre and Tomlin) did not **Mirandize** him, and that Detective Pitre told him that the judge would "take it lean" on him because of his youth. Also, according to the defendant, he was promised that the detectives would tell the judge he did the shooting, but he did not want to hurt anyone.

In denying the motion to suppress, the trial court provided the following reasons:

> I have several observations. Number 1, the defendant was, in fact, evaluated by two doctors early this year who both will find that the defendant, at the time of their evaluation early in 2011, was able to assist in the defense of his case. I will quote from Doctor Bryan Matherne. "He had been living with his grandmother and had no significant medical problems. During my evaluation he was found to be alert and responsive with" no need -- "with no evidence of mental dysfunction. He understood the court proceedings and is certainly able to assist his attorney in his defense."
>
> Similarly Doctor Mary Eschete opined that he would be able -- "He would be able to assist his attorney and find any witnesses. Although he does have a history of problems controlling his temper, he should be able to maintain proper decorum in the courtroom and assist his attorney." Now, I bring that up because obviously the first concern of the Court is the defendant's ability to understand what was going on that night.
>
> Now, truly this was -- the reports were done after the fact in January of this year; however, there was no testimony brought up in the motion hearing that the defendant didn't know what was going on. Quite the contrary, there were statements made by the defendant which would cause the Court to conclude that the defendant knew exactly what was going on, for goodness sakes. For example, as I mentioned earlier, he even made comments about well, what would a judge do.
>
> Furthermore, we have the defendant asking for his father. And obviously the father comes not once, but twice. Now, I do realize that Mr. Travelyn Mosely may not necessarily be a highly educated man; however, if y'all remember I asked him in a roundabout way if he knew the court system and he told me -- he told y'all that he was -- yeah, he watched a lot of T.V. He was asked about -- he heard about the **Miranda** Rights. He knew all about **Miranda** Rights. He knew that he [had] the right to remain silent, to have an attorney. So that gave me reason to believe, other than

in addition to the fact that we have the officers doing the questioning go over all that, all the rights with Mr. Travelyn Mosely, he understood that he had the right to have his son not make a statement. He knew that he had the right to remain silent. He knew he had the right to ask for a lawyer. I don't buy the argument that Mr. Travelyn Mosely was sleeping. He may have been tired and the defendant, Joshua, may have been tired as well, but it didn't give rise to the level of not knowing what they were doing.

Also, interestingly, Mr. Travelyn Mosely comes back -- leaves and comes back. Now, that again tells me that Mr. Travelyn Mosely is not sleeping. He knows what he is doing. He is given yet another opportunity to shut it down to say we need to get a lawyer. Not once -- not once ever did Mr. Travelyn Mosely or Joshua Mosely say I want a lawyer and they were given every opportunity to do that.

The facts of this case, when taken as a whole, the totality of what went down that evening, that event, on that event leads the Court to conclude that the defendant knew what was going on, he knew his rights. He chose to talk. He chose not to ask for a lawyer. The father chose to let his son talk and prompted the talking on at least one occasion. And Mr. Travelyn Mosely never did request a lawyer as well when he could have. And it is interesting to note two other things, Mr. Travelyn Mosely pretty much threw up his hands in the air, so to speak, and left. And he kind of did that at the hearing as well when we had the hearing on this motion. He testified, and for whatever reason, and I will note this for the record, Mr. Travelyn Mosely left this courtroom even though he was advised he could stay. He did, he left, he flew out of here, he left. I think that is telling.

Anyway, for those reasons ... I am denying the defendant's motion[.]

When a court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

It is well-settled that the ruling in **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), protects an individual's Fifth Amendment privilege during incommunicado interrogation in a police-controlled atmosphere. In **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612, the Supreme Court defined "custodial interrogation" as "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." Thus, before a confession or inculpatory statement made during a custodial interrogation may be introduced into evidence, the State must prove beyond a reasonable doubt that the defendant was first advised of his **Miranda** rights, that he voluntarily and intelligently waived those rights, and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La. Code Crim. P. art. 703(D); La. R.S. 15:451. **Hunt**, 2009-1589 at 11, 25 So.3d at 754. See **State v. Patterson**, 572 So.2d 1144, 1150 (La. App. 1 Cir. 1990), writ denied, 577 So.2d 11 (La. 1991). Where the defendant alleges police misconduct in reference to the statement, the state must specifically rebut these allegations. **State v. Montejo**, 2006-1807, p. 20 (La. 5/11/10), 40 So.3d 952, 966, cert. denied, __ U.S. __, 131 S.Ct. 656, 178 L.Ed.2d 513 (2010). Since the general admissibility of a confession is a question for the trial court, its conclusions on the credibility and weight of the testimony are accorded great weight and will not be overturned unless they are not supported by the evidence. See **Patterson**, 572 So.2d at 1150. The trial court must consider the totality of the circumstances in determining whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 2004-1718, p. 12 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 2005-1570 (La. 1/27/06), 922 So.2d 544. In determining whether the ruling on 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).

In his brief, the defendant advances several reasons why the motion to suppress should have been granted. The defendant asserts that neither he nor his father, Travelyn, were able to comprehend the defendant's rights at the time of the interrogation. According to the defendant, Travelyn has only a fifth or sixth grade education and is "semi-literate." The defendant notes that when Travelyn was

questioned about his son's rights in the first interview (with Detective Theriot), Travelyn responded that he was "asleep." Under these circumstances, Travelyn would have been unable to adequately explain the defendant's rights to him. The defendant further asserts he did not understand his rights because he did not know the meaning of many of the words, like "coercion." Further, the defendant had been awake for more than twenty-four hours before the first interview and had consumed alcohol the prior evening. Also, the sixteen-year-old defendant had reached only the ninth grade because of his "delayed educational process," and was failing all of his classes.

Despite these various assertions, there is nothing in the record before us to suggest that the defendant or Travelyn did not understand the defendant's **Miranda** warnings, particularly the right to remain silent and the right to an attorney. Detective Pitre testified at the motion to suppress that she did not smell alcohol on the defendant's breath, his pupils were not dilated, and he was not behaving in any way that would lead her to believe that the defendant was intoxicated. The trial court asked Detective Pitre if the defendant had given her any indication that he was sleepy, groggy, or drowsy. She responded, "No." The detective further responded in the negative when asked if the defendant exhibited any signs of being impaired by alcohol or drugs. Also, during her questioning of the defendant, at no time did he ask for an attorney or refuse to answer questions.

Detective Theriot testified at trial that during his interview (the first interview) the defendant and Travelyn understood the defendant's **Miranda** rights. At no time during the interview, according to the detective, did he observe impairment in any way from drugs or alcohol. Further, at no time did either one not understand the questions being asked. Neither appeared to be sleep-deprived, and neither one ever asked for an attorney. When they were initially going over the forms and Travelyn stated that he was "asleep," Detective Theriot understood the comment to mean Travelyn was sleepy. In any event, the detective made clear that Travelyn was never asleep during the interview and responded in the affirmative when asked if Travelyn was "wide awake."

Travelyn testified at the motion to suppress hearing that he had a fifth or sixth grade education; however, when he filled out the "Rights For Interrogation of Juveniles" form (the first form), Travelyn indicated that he had an eleventh grade education. Despite the defendant's description of Travelyn as "semi-literate," the testimony of the interviewing detectives at the motion to suppress hearing and the trial, as well as the rights forms in evidence, revealed the defendant was clearly literate, was well aware of what he was doing and saying, and was at all times cognizant and alert. Further, Travelyn's own problems with past arrests and convictions indicate his familiarity with the criminal justice system. An individual's prior experiences with the criminal justice system are relevant to the waiver of rights inquiry because they may show the individual has, in the past, and, perhaps, on numerous occasions, been informed of his constitutional rights against self-incrimination, both by law enforcement and judicial officers. See **State v. Robertson**, 97-0177, p. 26 (La. 3/4/98), 712 So.2d 8, 30, cert. denied, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998); **Green**, 655 So.2d at 283-284.

Moreover, there is no absolute requirement that an attorney or guardian must be present with a juvenile suspect at the time he makes a statement. Instead, a totality of the circumstances standard is used as the basis for determining the admissibility of juvenile confessions. See **State v. Fernandez**, 96-2719, pp. 3-10 (La. 4/14/98), 712 So.2d 485, 486-490; **State v. Harper**, 2007-0299, p. 18 (La. App. 1 Cir. 9/5/07), 970 So.2d 592, 604, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173. The defendant was read and explained his rights by both his father and a detective; the defendant initialed these forms, confirming that his rights were explained to him and that he understood them. Further, our own review of both interviews reveals coherent, relevant, intelligent responses by the defendant. As such, nothing in the record indicates the defendant did not understand his rights or that he did not freely and voluntarily waive those rights.

The defendant in brief further argues that his second interview (the interview that is the subject of the instant matter where he confessed to shooting the two girls)

should have been suppressed because it was made in response to promises of leniency. According to the defendant, the police told Travelyn they would get the defendant some help as long as he cooperated. Further, the police promised he would not go to jail if he confessed to the shootings. At the beginning of the (second) interview, Detective Pitre told the defendant that his father wanted to get him help. The defendant replied, "Man what [judge] you know about to let somebody out that shot four people." According to the defendant in brief, this comment by him (about what judge would let him out) could only have been in response to the police promising him that he would get leniency in order to induce him to confess.

Other than the defendant's self-serving testimony at the motion to suppress hearing, there is nothing in the record to suggest he was promised leniency. Detective Pitre testified at trial that the "help" Travelyn wanted for his son was psychiatric help. The defendant, himself, had been shot in the head a year before the instant matter and was angry about not having gotten any sympathy or remorse over being shot. Detective Pitre testified that nothing was told to the defendant about leniency or cutting a deal. At the motion to suppress hearing, when Detective Pitre was asked if there were promises made when "dad" was present, she responded, "No. There was [sic] no promises made ever." Detective Theriot testified at trial there were no promises made whatsoever for leniency by him or Detective Detiveaux. See **State v. Lavalais**, 95-0320, pp. 7-8 (La. 11/25/96), 685 So.2d 1048, 1053-1054, cert. denied, 522 U.S. 825, 118 S.Ct. 85, 139 L.Ed.2d 42 (1997) (where despite an officer allegedly promising the defendant, among other inducements, that he would talk to the judge and do whatever he could to help, our supreme court found the comments did not render the defendant's confession involuntary).

The defendant in brief also argues that his statement in the second interview (where he confessed to the shootings) should have been suppressed because it was obtained after he had invoked his right to silence at the end of the first interview. The relevant portion of the first interview is near the end of it:

Father: Boy stop crying. Just book him man, because he's going to start catching his seizures and I don't have no (Inaudible). Take him to jail.

Mosely: I don't like going to jail. Man I didn't shoot nobody bra.

Father: (Inaudible) I don't believe he shot them.

Mosely: That's what I'm saying I really didn't shoot nobody.

Father: (Inaudible)

Detiveaux: Well this is what you're looking at Josh. If you (Inaudible). We know the gunshots came from that car. If you can't tell us who shot them...

Mosely: I don't know. (Inaudible)

Detiveaux: Okay

Theriot: Okay

Mosely: What ya'll want me to say somebody else shot...

Father: Josh, Josh just shut up. I can go?

According to the defendant, Travelyn withdrew his son's consent to answer questions when he told the detectives to just book him and take him to jail. Further, the defendant contends, the "sentiment was reaffirmed moments later" when Travelyn told the defendant to shut up. While **Miranda** does not require that a defendant exercise his right to remain silent by any particular phrasing, see **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), we do not see how the following -- "Boy stop crying. Just book him man, because he's going to start catching his seizures and I don't have no (Inaudible). Take him to jail." -- was an invocation by Travelyn on his son's behalf to stop speaking. Travelyn seemed to be speaking out of concern for his son's health. Clearly understanding that the call to decide when the defendant should be booked and/or taken to jail was not Travelyn's to make, the detectives likely took these remarks as signs of exasperation. Recall that in both of the defendant's interviews, Travelyn got angry and walked out of the room. Similarly, a few seconds later when Travelyn said "Josh, Josh just shut up," it was not at all clear to the detectives that he was invoking his son's right to stop speaking. Up until this point, the defendant had

been crying for some time, so his father's rebuke to "shut up" may have been nothing more than an attempt to curtail his son's crying.

Detective Theriot testified at trial that he thought Travelyn told the defendant to shut up because he "was crying as you can hear," and then, "[Travelyn] was getting very upset. I believe that's why he told him to shut up." Further, Detective Theriot testified that he did not understand Travelyn's exhortation to "just book" the defendant to mean that the defendant was supposed to stop answering questions. Notwithstanding speculation on what someone was thinking, the detectives *did*, in fact, stop questioning when Travelyn told the defendant to shut up and then left. According to his testimony at trial and the motion to suppress hearing, Detective Theriot stopped the questioning, not because Travelyn indicated his son was to stop answering questions, but because he was not "getting anywhere" with the interview. If the defendant's right to silence was invoked moments earlier (by the "take him to jail" comment), the defendant suffered no harm from the single statement by Detective Detiveaux that followed the alleged invocation, because the defendant confessed to nothing.

While it is not clear that Travelyn had invoked the defendant's right to silence at the end of the first interview, even assuming that he did invoke it, it is clear that when Detective Pitre went to talk to the defendant for the second interview, Travelyn had waived the defendant's right to silence. Travelyn spoke to Detective Pitre outside of the presence of the defendant and, when she informed him the defendant was a suspect in another shooting, Travelyn agreed to go back into the interview room while the detective spoke to his son. Further, it should be noted that at no time in either interview did the defendant, himself, ever invoke his right to silence or ask for a lawyer. Before Detective Pitre interviewed the defendant, one of the Houma Police Department detectives informed her that the defendant had been **Mirandized** already in the first interview. Thus, when Detective Pitre sat down to interview the defendant, she did not **Mirandize** him again, but confirmed with the defendant that he had indeed been informed of his rights only a few hours before. When Travelyn left again at the

beginning of this interview (because the defendant had nodded that he had a gun and shot the girls), Travelyn did not say or do anything to suggest that he was invoking his son's right to silence or to stop answering questions.

Except where the circumstances indicate coercion, there is no necessity to reiterate the **Miranda** warnings at each phase of an interrogation. **State v. Kimble**, 546 So.2d 834, 840 (La. App. 1 Cir. 1989). A requirement that the **Miranda** warnings be repeated before each separate interrogation would quickly degenerate into a formalistic ritual. See **State v. Harvill**, 403 So.2d 706, 709 (La. 1981). In **Maguire v. United States**, 396 F.2d 327, 331 (9th Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 897, 21 L.Ed.2d 792 (1969), the defendant was properly advised of his **Miranda** rights three days before his interrogation by another law enforcement officer. Despite a deficient recitation of **Miranda** rights prior to the latter interrogation, the court held that the proper giving of **Miranda** rights three days earlier was sufficient to defeat the claim by the defendant that he had not been advised of his **Miranda** rights. See **Kimble**, 546 So.2d at 840-841, whereupon the defendant's admission that he received his **Miranda** rights on September 2, this court affirmed the defendant's conviction despite a technically deficient recitation of **Miranda** rights that preceded the defendant's confession two days later on September 4. In **Harvill**, 403 So.2d at 709, the defendant did not dispute the fact that he was previously advised of his rights, but instead characterized the taped interview as a second distinct interrogation session which mandated an independent explanation of the **Miranda** warnings. The supreme court rejected the defendant's claim and found that absent some significant break in the interrogation process, such as a specific request for assistance of counsel, repetition of the **Miranda** warnings prior to the taping of defendant's statement is not required.

Accordingly, the defendant had been clearly apprised of his rights at the time of the second interview and at no time during the interview did he invoke his right to silence or ask for an attorney. While not dispositive of the issue before us, we note the internal inconsistency of the defendant's argument regarding Travelyn. The defendant insists that Travelyn is a semi-illiterate who cannot read and understood nothing of

what he was being told regarding the **Miranda** warnings; at the same time, the defendant assures us that Travelyn knew exactly what he was doing and what he was talking about when he told the detectives to book his son and take him to jail, and shortly thereafter when he told his son to "shut up." Instead of the possibility of any other interpretation of these remarks, the defendant wants us to know that Travelyn meant one thing and one thing only -- to exercise his son's right for him to be silent. As the defendant notes in his brief, Travelyn "clearly and unambiguously withdrew his consent to the questioning of his son and invoked his son's right to silence by telling the police to book him and take him to jail."

Finally, the defendant argues in brief that the eyewitness to the shooting, Davole Martin, testified against the defendant to save himself. Davole had been charged as a principal to the two shootings and, according to the defendant, testified to garner leniency from the State. At the end of his cross-examination, Davole responded in the affirmative when asked, "Are you hoping that the District Attorney will drop your charge either to a lower charge or dismiss it altogether after this trial is over?" Despite any sentiments regarding leniency Davole may have harbored, shortly before opening statements in response to the defendant's motion to reveal the deal, the prosecutor made clear to the trial court that there had been no promises made to any of the co-defendants on any case. Further, the following colloquy took place with the prosecutor when Davole testified at trial:

> Q. All right. Now, Davole, as we sit here today you are actually still charged in this case aren't you?
>
> A. Yes, sir.
>
> Q. And you are facing the same charges that Joshua Mosely is facing aren't you?
>
> A. Yes, sir.
>
> Q. Have I or anybody from the District Attorney's Office promised you any -- anything --
>
> A. No, sir.
>
> Q. -- in connection with your testimony here today?

A. No, sir.

In sum, we agree with the ruling of the trial court. The defendant had been thoroughly informed of his rights, understood those rights, and intelligently waived his rights explicitly, as well as implicitly through his actions and words. See **State v. Brown**, 384 So.2d 425, 426-428 (La. 1980). There is no evidence in the record to suggest the defendant was intimidated, coerced, deceived, threatened, or induced in any way that would have led him to waive his right to remain silent for any reason other than as a function of his free will. See **Robertson**, 97-0177 at 26, 712 So.2d at 30. Accordingly, we find no legal error or abuse of discretion by the trial court in denying the defendant's motion to suppress.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 AND 3

In these related assignments of error, the defendant argues, respectively, that the Louisiana Constitution provision for non-unanimous jury verdicts violates the Fourteenth Amendment's Equal Protection Clause of the United States Constitution; and the ten to two non-unanimous jury verdicts on both counts in this case violates his "right to a jury" under the Sixth and Fourteenth Amendments to the United States Constitution. Specifically, the defendant contends that the enactment of La. Const. art. I, § 17(A) was motivated by an express and overt desire to discriminate and has had a racially discriminatory impact since its adoption.

It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. A party must raise the unconstitutionality in the trial court, the unconstitutionality must be specially pleaded, and the grounds outlining the basis of unconstitutionality must be particularized. See **State v. Hatton**, 2007-2377, pp. 13-14 (La. 7/1/08), 985 So.2d 709, 718-719. In the instant case, the defendant failed to raise his challenge to Louisiana Constitution Article I, § 17(A) in the trial court. Accordingly, the issue is not properly before this court.

Nevertheless, we address this oft-repeated issue to press this court's position that this argument regarding non-unanimous verdicts is untenable. Whoever commits the crime of attempted first degree murder shall be imprisoned at hard labor. La. R.S. 14:27(D)(1)(a) & 14:30(C)(2). Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See **Apodaca v. Oregon**,[1] 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); **State v. Belgard**, 410 So.2d 720, 726 (La. 1982); **State v. Shanks**, 97-1885, pp. 15-16 (La. App. 1 Cir. 6/29/98), 715 So.2d 157, 164-165.

The defendant suggests that since subsequent legal developments call **Apodaca** into serious question, this court should find Louisiana Constitution article I, § 17(A) (and by extension, Article 782, which is essentially the codification of the constitutional provision) unconstitutional. In support of this assertion, the defendant cites the decision of **McDonald v. City of Chicago, Ill.**, __ U.S. __, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). The defendant's reliance on this jurisprudence is misplaced. The **McDonald** Court, while holding that the Second Amendment right to keep and bear arms is fully applicable to the States through the Fourteenth Amendment, did nothing to alter the well-established jurisprudence holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials. See **McDonald**, 130 S.Ct. at 3035 n.14. The **McDonald** Court specifically stated that, although the Sixth Amendment requires unanimous jury verdicts in federal criminal trials, it does not require unanimous jury verdicts in state criminal trials. See **McDonald**, 130 S.Ct. at 3035 n.14; **State v. Bishop**, 2010-1840, pp. 10-11 (La. App. 1 Cir. 6/10/11), 68 So.3d 1197, 1205, writ

[1] Oregon's non-unanimous jury verdict provision of its state constitution was challenged in **Apodaca**. **Johnson v. Louisiana**, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), decided with **Apodaca**, upheld Louisiana's then-existing constitutional and statutory provisions allowing nine-to-three jury verdicts.

denied, 2011-1530 (La. 12/16/11), 76 So.3d 1203. The defendant's argument has been repeatedly rejected by this court. See **State v. Smith**, 2006-0820, pp. 23-24 (La. App. 1 Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; **State v. Caples**, 2005-2517, pp. 15-16 (La. App. 1 Cir. 6/9/06), 938 So.2d 147, 156-157, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684.

The defendant also asserts in his brief that Louisiana's non-unanimous jury verdict scheme violates equal protection because racial discrimination was a substantial factor behind the enactment of the constitutional provision. Louisiana adopted its nonunanimity rule in its 1898 constitutional convention, a convention designed, according to the defendant, "to produce a constitution that would entrench white power once and for all." Our supreme court in **State v. Bertrand**, 2008-2215 (La. 3/17/09), 6 So.3d 738, addressed this issue over four years ago: "Finally, defendants argue that the use of non-unanimous verdicts have an insidious racial component, allow minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed." **Bertrand**, 2008-2215 at 6, 6 So.3d at 742. The **Bertrand** Court found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments.[2] Regarding the equal protection argument that such verdicts have an insidious racial component, the **Bertrand** Court noted that the issue had already been decided as meritless by a majority of the United States Supreme Court in **Apodaca**. **Bertrand**, 2008-2215 at 7-8, 6 So.3d at 743.

Thus, while **Apodaca** was a plurality rather than a majority decision, the United States Supreme Court, as well as other courts, has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. **Bertrand**, 2008-2215 at 6-8, 6 So.3d at 742-743. Thus, Louisiana Constitution article I, § 17(A) (or La. Code Crim. P.

[2] In **Bertrand**, the supreme court only considered Article 782, while the defendant in the instant case attacks Article I, § 17(A) itself. We find this approach to be a distinction without a difference, because Article 782 closely tracks the language of Article I, § 17(A).

art. 782(A)) is not unconstitutional and, therefore, not in violation of the defendant's constitutional rights. See **State v. Hammond**, 2012-1559, pp. 3-4 (La. App. 1 Cir. 3/25/13), 115 So.3d 513, 514-515, writ denied, 2013-0887 (La. 11/8/13), 125 So.3d 442.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the trial court erred in imposing excessive sentences.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1 Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (La. App. 1 Cir. 5/9/03), 849 So.2d 566, 569.

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

crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144, pp. 1-2 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

In the instant matter, the defendant, facing a maximum sentence of fifty years at hard labor (one-hundred years with consecutive sentences), was sentenced to forty years at hard labor. See La. R.S. 14:27(D)(1)(a) & La. R.S. 14:30(C)(2). The defendant argues in his brief that the trial court failed to give adequate weight to certain mitigating circumstances such as his youth; that he had no significant history of criminal activity; the act was not premeditated; he had unresolved issues regarding his own experience with being shot; and the gunshot wound to his head left him suffering from uncontrolled seizures that may have affected his mental functioning.

We note initially there was no evidence at trial establishing the defendant suffered from uncontrolled (or any) seizures, or that as a result of these seizures his mental functioning was affected. Moreover, while the trial court did not refer to Article 894.1 by name, it is clear it carefully considered aggravating and mitigating circumstances. Prior to sentencing, the trial court questioned the defendant about his history, wherein the defendant discussed his education, family, living arrangements with his grandmother, his head injury from being shot, the specifics of the shootings in the instant matter, and why he shot the girls. Following this colloquy, the trial court stated in pertinent part:

> This is a very troubling case, it really is. This is, on the one hand it's a youthful offender. On the other hand, it's an extremely dangerous situation where all citizens are placed in danger because of the actions of this individual. The minimum, under our law the minimum is ten years on each count. That's twenty years minimum, minimum, minimum. I heard the evidence in two trials. I've been thinking about this sentence for many months. I've researched what other courts have done in similar cases. I've considered the defendant's youth, his status in life. This is a tough one for the Court. I got to tell you, this is a very tough one. He was offered a jail -- a prison sentence at a pretrial conference that he rejected. No matter what I do, it ain't going to be good for this young man. It's going to be a tough sentence. It's a tough one.

Considering the trial court's thorough review of the circumstances, the nature of these violent, senseless, and completely unprovoked crimes, and the fact the defendant was sentenced to less than half of the maximum sentence allowable under the law (two consecutive fifty-year maximum sentences), we find no abuse of discretion by the trial court. Accordingly, the sentences imposed by the trial court are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive. The trial court did not err in denying the motion to reconsider sentence.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.