NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0907**
VERSUS	*	**COURT OF APPEAL**
NATHANIEL THORNTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
STATE OF LOUISIANA	**NO. 2003-K-0699**
VERSUS	
NATHANIEL THORNTON	

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 421-885, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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CONVICTION AND SENTENCE AFFIRMED
FIVE –YEAR ADDITIONAL SENTENCE IS VACATED
TRIAL COURT'S RULING THE DEFENDANT NOT A SECOND-FELONY HABITUAL OFFENDER IS REVERSED
JUDGMENT IS RENDERED THAT DEFENDANT IS A SECOND-FELONY HABITUAL OFFENDER
CASE IS REMANDED TO TRIAL COURT WITH ORDER TO VACATE ORIGINAL SENTENCE AND TO RESENTENCE DEFENDANT PURSUANT TO LSA-C.CR.P. ART. 893.3

STATEMENT OF THE CASE

Defendant Nathaniel Thornton was charged by grand jury indictment on May 24, 2001 with second degree murder, a violation of La. R.S. 14:30.1.

Defendant pleaded not guilty at his June 15, 2001 arraignment. Defendant was found guilty of manslaughter on September 19, 2001, at the close of a three-day trial before a twelve-person jury. During jury deliberations, the trial court denied defendant's motion to quash on the ground of prescription.

On October 15, 2002, defendant was sentenced to thirty years at hard labor, and five years imprisonment without parole, probation or suspension of sentence, purportedly pursuant to La. C.Cr.P. art. 893.3, to run consecutive to the thirty-year sentence. The trial court denied defendant's motion for new trial on February 5, 2002. On November 6, 2002, this court granted defendant's writ application. On February 25, 2003, the trial court found defendant not guilty to the charge that he was a second-felony habitual offender. The trial court denied defendant's motion to reconsider sentence, and granted defendant's motion for appeal. On May 6, 2003, this Court granted the State's writ application.

FACTS

New Orleans Police Officer Errol Washington responded to an aggravated battery call at Ben's Grocery Store on April 2, 1999. The store was located at 6445 Isadore Street, at the intersection of General Mayer Avenue, two blocks from the river. Upon his arrival, Officer Washington observed an unknown male lying facedown in a pool of blood inside the

store entryway. The victim, who Officer Washington believed was still alive, was later identified as Guy Henderson. Officer Washington identified a photo shown him on cross-examination that depicted a beer can standing upright alongside of the curb in front of the grocery store.

Dr. Michael Defatta, qualified by stipulation as an expert in the field of forensic pathology, performed an autopsy on the victim. The cause of death was a single gunshot wound that entered the victim's left shoulder, and traveled from left to right at a slightly downward angle. The bullet passed through the victim's left lung, one of the major blood vessels to his heart and his right lung, exiting on the right side of his chest. Dr. Defatta confirmed that the gun was fired from between twelve and thirty-six inches away. The victim's urine sample tested positive for morphine, as well as cocaine. The doctor confirmed that one hour before his death the victim ingested cocaine, but he could not say when the morphine or other opiate had been consumed.

Officer Kenneth Leary, qualified as an expert in the field of firearms examination and identification, matched a bullet recovered from the scene of the crime to a particular Smith & Wesson .357 magnum caliber revolver. An evidence tag indicated that the revolver was obtained from the Elmira Street residence of Mary Thornton.

Officer Rhonda Brooks, who on April 7, 1999 was a technical

specialist with the crime lab, testified that on that date she took photographs at 405 Elmira Street in conjunction with the execution of a search warrant. She identified photos depicting a firearm with a bald eagle on the grip that was sitting on a bedroom dresser inside of a residence at that address. Officer Brooks was not asked to take any fingerprints at the residence, and she was the only crime lab technician on the scene.

Officer Edward Delery, qualified by stipulation as an expert in the field of the enhancement development of latent fingerprints, testified that he was able to find only one partial latent fingerprint on the Smith & Wesson .357 magnum revolver previously identified as recovered from the residence of Mary Thornton. He was not able to find any latent prints on the cartridges identified as having been in the revolver when it was recovered.

Sergeant Tyrone Beshears testified that on the night of April 13, 1999, he was on routine patrol on Canal Street when a woman approached and informed him that defendant, who was nearby, was wanted for murder. The officer approached defendant near the corner of Canal and Rampart Streets. He was in the process of handcuffing defendant when defendant took flight. Defendant was eventually apprehended some six blocks away, on the second floor of the Tulane Medical Center hospital. Defendant was advised of his Miranda rights and transported to the Eight District police station. At the

station, Sgt. Beshears confirmed by computer that defendant was wanted for murder. The officer noted this out loud, at which point defendant said that he had shot the victim in the side because defendant had robbed him, but had not meant to kill him.

Officer Orlando Matthews testified that on the night of April 13, 1999, he responded to Sgt. Beshear's call of a possible subject wanted for murder in the 1000 block of Canal Street. Before he could get to the scene, Sgt. Beshears reported that the individual was fleeing down Canal Street. The individual fled up Elks Place into Tulane Medical Center, located in the 1400 block of Tulane Avenue, where he was apprehended. Officer Matthews advised defendant of his rights.

Rochelle Winchester testified that the victim had been an attendant at her wedding. She knew who defendant was, but did not know him personally. At 6:30 or 7:00 a.m. on the morning of the murder, defendant knocked on her door and asked if her husband, Eddie Winchester, was home. She said he was not, whereupon defendant asked if the victim was there. Again, Mrs. Winchester replied in the negative. She said defendant was traveling in a truck. She saw defendant the next day, the day after the murder, when he came to her residence looking for her husband Eddie. Mrs. Winchester next saw defendant perhaps ten to fifteen days later, as she was

exiting a bus on Canal Street. She then informed a police officer who was in the Canal Street neutral ground. Mrs. Winchester subsequently saw the officer chase defendant. Mrs. Winchester admitted a prior felony theft conviction. Mrs. Winchester testified on cross-examination that on the day the victim was killed she was living with her husband at 424 Elmira Street.

Eddie Winchester testified that he was a close friend of the victim, and was with him on the morning of the murder. Mr. Winchester admitted three prior convictions, one for carrying a concealed weapon, one for distribution of cocaine and one for distribution of false drugs. He also admitted that he had been arrested for aggravated assault in Orleans Parish, but had not yet been formally charged by the district attorney's office. He responded in the negative when asked whether anyone in the district attorney's office had promised him anything in exchange for his testimony. Mr. Winchester testified that he and the victim had been hanging out all night drinking and using narcotics. They also sold some narcotics that night.

Mr. Winchester said that at approximately 5:30 a.m., he and the victim rode a bus to the east bank of the river, ate breakfast at the Greyhound Bus Terminal, and returned to the west bank. They went to Ben's Grocery Store, where he gave the victim a dollar to buy a beer. Mr. Winchester remained outside, while the victim went into the store. While outside, Mr. Winchester

observed defendant drive up in a small black or blue pickup truck. Defendant walked up to Mr. Winchester talking about "his money." Mr. Winchester said he thought defendant was playing, because they had been out all night together, and casually pushed him. Defendant walked off saying, "yeah, all right." Defendant went to the truck, and the victim walked out of the store. Defendant came back, said something about his money, and shot the victim. Defendant then walked back to the truck, entered, and drove off. Mr. Winchester testified that he had seen the gun earlier that night, in the truck. Mr. Winchester maintained that he did not have a gun that night. Mr. Winchester went to his grandfather's home, a half block away, and got a van, intending to take the victim to the hospital. However, a man inside the store informed him he had telephoned police, who directed him not to touch the victim. Mr. Winchester said he then left the scene. Mr. Winchester said on cross examination that the victim was shot outside of the store, but that by the time he returned with his grandfather's van the victim was inside of the store.

At some later date, on a Tuesday, Mr. Winchester said he was driving past Ben's Grocery Store when police were questioning people there. Police entered their vehicles and chased and stopped him. He did not try to flee. They handcuffed him and searched his car, saying that they had received

word that he was riding around with guns. Mr. Winchester later gave a statement to Det. Shields. Mr. Winchester identified defendant in a photographic lineup on April 6, 1999. Mr. Winchester admitted that he was arrested that day for failing to make a payment related to his parole from the 1989 drug conviction. Mr. Winchester said that the victim's mother asked him to let the courts handle the matter of her son's murder, not to get himself in any trouble.

Mr. Winchester admitted on cross examination that on the morning of the murder, he and the victim had gone to the Calliope Project before eating breakfast, hoping to purchase heroin. They found none. He admitted that he had not volunteered this information to Det. Shields. Mr. Winchester said he and the victim had both ingested heroin overnight, and the victim had used crack cocaine. Mr. Winchester also admitted that he had sold crack cocaine that night. He admitted that when previously asked where he and the victim went that morning, he had only mentioned going to breakfast. However, he said he would not lie under oath. He admitted to four previous convictions. Mr. Winchester replied in the negative when asked on redirect examination whether he had ever lied about why he and the victim traveled to the east bank of the river that morning.

Officer Raymond Loosemore, qualified by stipulation in the

comparison and analysis of fingerprints, testified that he did not find a match between defendant's fingerprints and a photograph of a latent fingerprint submitted by Officer Delery.

Det. Keenen Shields, the lead homicide detective on the case, testified that at approximately 2:00 p.m. on the day of the murder, he went to the home of defendant's mother, Mary Thornton, 405 Elmira Street. A small, dark-colored Ford Ranger pickup truck belonging to Kirk Bias was located around the corner from Ms. Thornton's residence. In canvassing the neighborhood, Det. Shields developed the names of several witnesses, including Eddie Winchester. Other officers located Mr. Winchester, and Det. Shields interviewed him on April 6, 1999. The detective admitted that he had Mr. Winchester sign a waiver of rights form before he interviewed him, but said that at no time was Mr. Winchester a suspect in the murder. He also said that Mr. Winchester had not been arrested that day.

Det. Shields displayed a photo lineup to Mr. Winchester. As a result of Mr. Winchester's identification of one of the photographs, Det. Shields prepared an arrest warrant for defendant and search warrant for Mary Thornton's Elmira Street residence. At the residence, Mrs. Thornton pointed out, at the request of police, the room where defendant slept. A search of that room turned up the Smith & Wesson .357 Magnum revolver previously

identified at trial as the murder weapon. It was found under the bed. Det. Shields was advised on April 13, 1999 that defendant had been arrested by Sgt. Beshears. Det. Shields went to the Eighth District police station to interview defendant. Det. Shields had been advised that defendant had already been advised of his Miranda rights. Defendant admitted shooting the victim. He said he was looking for the victim and "them" because he thought they had taken his money, and that when he found the victim he shot him. Det. Shields then read defendant his rights, and defendant indicated that he wished to speak with an attorney before making a decision to waive his rights. Det. Shields said that at this point he was still looking for a second suspect, Jernard Walker, known by the nickname of J.D.

Det. Shields confirmed on redirect examination that he heard that Eddie Winchester was driving around with a gun, and that task force officers were assisting him in trying to locate Mr. Winchester to stop him from effecting any "street justice."

Elaine Henderson, the mother of the victim, testified to the last time she saw her son.

Mary Thornton, defendant's mother, testified that at approximately 9:30 or 10:00 p.m. on the night the victim was murdered, defendant came home appearing nervous and scared. The pocket was ripped on the blue

Dickey trousers he was wearing. He removed his trousers in the bathroom, put on another pair, said he had to go, and left. Mrs. Thornton bagged up the pair of trousers, because she thought it might have been evidence that somebody had ripped his pants. She did not mention the pants to Det. Shields the next day when he was canvassing the neighborhood because she did not have an attorney.

Defendant testified he was with a female friend on the night of the murder, until she dropped him off at approximately 11:00 p.m., at an apartment complex located near the corner of Preston and Isadore Streets. They referred to this area outside of or within the apartment complex as "the cutoff." The victim and Eddie Winchester were there. Eddie Winchester was selling drugs. The victim was standing around. Defendant said he gave Eddie Winchester $75 in exchange for $150-$160 worth of drugs. Defendant said he had $500 or $600 that night in a roll, which he flashed when he peeled off the $75 to give Eddie Winchester. Afterward, defendant, Eddie Winchester and the victim went to a convenience store in a small dark-colored pickup truck being driven by Jernard Walker. Defendant rode in the bed of the truck across from the victim. At one point defendant noticed through the small open window in the truck's cab that Eddie Winchester had placed a gun on the seat, between him and the driver.

Defendant bought a bottle of Crown Royal at the store, and the four men went back to the cutoff to drink it. Defendant said it was then about 3:00 or 4:00 p.m. He left to make a drug sale, and when he returned to the cutoff the victim and Winchester were gone.

Defendant recalled them saying something about going to Winchester's home, so he got a ride there with a friend in a four-door car. Mrs. Winchester told him Eddie was not there, that he was in the cutoff. Defendant returned to the cutoff at approximately 6:30 a.m., where he found Eddie Winchester and the victim. They subsequently walked to Ben's Grocery Store. The two of them were behind defendant. They were talking, but he could not hear what they were saying. The victim went into the store, while defendant and Eddie Winchester remained outside. Defendant heard the bell on the door of the store ring, and the next thing he knew the victim was pointing a gun at his face and demanding his money. Defendant said he kept his hands up in the air, expressing disbelief at what the victim was doing. Eddie Winchester ran up behind him, cut open his pants pocket with a knife, grabbed defendant's roll of money, and fled. The victim was still holding the gun on him. Defendant said at that point he attempted to take the gun. He and the victim struggled over the gun for several seconds until it discharged. He said he had his hand on the gun, and the victim had his left

hand on it. Defendant said he did not intend to discharge the gun. He did not know where the bullet struck. He saw no blood on the victim. The victim released his grip on the gun after it discharged, and walked into the store. Defendant said the victim had nothing in his hands when he approached him except the gun. He did not have a beer.

After the shooting, defendant left the scene and went to his mother's residence with the gun. He said he kept if for protection, because he knew Eddie Winchester was coming to look for him. He also said he did not want to leave the gun on the street. Defendant acknowledged being arrested and advised that he was wanted on a murder charge. He admitted telling Sgt. Beshears that he knew about the murder, but denied confessing to it. He said he told Det. Shields he wanted to speak with an attorney. He said he already knew he had that right, and did not have to talk to the police. Defendant said that when he told Det. Shields he did not want to say anything to him, the detective said, "Well, that's why I'm going against you."

Defendant replied in the negative when asked on cross-examination whether he had ever talked about his case with his attorneys. Defendant said that night he had approximately $800 worth of crack cocaine on his person. It was not stolen, and he transferred it to another pair of pants when he changed at his mother's residence. He said he had started off the night with

$200, and had $500-$600 at the time he was robbed. Defendant said that when he left the scene he saw Jernard Walker, and got in his truck. When he told Walker what happened, Walker wanted nothing to do with it, and jumped out of the truck. Defendant drove the truck to his mother's residence. He was asked how he got inside of his mother's home that night. He replied that he knocked on the door and was let in. He was confronted with his mother's prior testimony that she got up after she heard him come in. Defendant then testified that he could not say whether or not the door was open or not. He also noted that his father had been at the residence.

Defendant was asked why he, the victim and Eddie Winchester went to Ben's Grocery store that morning. Defendant replied that they went to get something to munch on. When asked whether he had been hungry, defendant replied in the negative. Asked if Winchester or the victim had been hungry, he also replied in the negative. Defendant was questioned about his actions after the gun discharged. He described himself as shocked, scared and nervous. Defendant was asked why, if he took the gun for protection from Eddie Winchester, he had left it at his mother's residence. Defendant said he came to his senses, and did not want to hold the gun anymore. He also testified later that he had simply avoided areas where Eddie Winchester might find him. Defendant was asked why he did not go

to police. He replied that he wanted to talk to an attorney before he made that decision. Asked whether he had called an attorney that day, or the next day, defendant replied in the negative. He explained that he was trying to save his money to hire an attorney and turn himself in. He checked into a Bridge City motel. A friend paid for the room. When asked why he ran from police on Canal Street on April 13, defendant reiterated that he was trying to save money to hire an attorney and then turn himself in to police. Defendant speculated that the chrome gun he saw Eddie Winchester place on the seat of Jernard Walker's pickup truck was the same chrome gun previously identified as the murder weapon. Defendant admitted that his sole source of income was selling drugs.

ERRORS PATENT

The record reflects two errors patent. First, the record reflects that the trial court sentenced defendant on the same date it denied his motion for new trial, October 15, 2001. La. C.C.P. art. 873 mandate a twenty-four delay between the denial of a motion for new trial and sentencing, unless the defendant expressly waives the delay or pleads guilty. However, a defendant may implicitly waive the twenty-four hour delay by announcing his readiness for sentencing. State v. Pierre, 99-3156, p. 7 (La. App. 4 Cir.

7/25/01), 792 So. 2d 899, 903 (implicit waiver where defense counsel responds in the affirmative when trial court inquires if he is ready for sentencing); State v. Robichaux, 2000-1234, p. 7 (La. App. 4 Cir. 3/14/01), 788 So. 2d 458, 464-465 (implicit waiver where defense counsel announced to trial court that he wished to file a motion for new trial prior to sentencing).

In the instant case, the trial court announced it would sentence defendant before proceeding on the bill of information charging him as a habitual offender. At that point, defense counsel stated that he would file a motion for new trial before sentencing. In addition, after hearing argument and denying the motion for new trial in the instant case, the trial court asked if there was anything else by the defendant. Defense counsel replied, "Prior to sentencing, Your Honor?" To which the trial court replied, "Yes." Defendant then apologized, apparently to the victim's family and/or loved ones, and asked for mercy. The trial asked if defendant was ready for sentencing, and was advised that the victim's mother wished to make a victim impact statement. After the statement, the trial court asked the defendant to come back up, and then imposed sentence. It is clear that defendant implicitly waived his right to the twenty-four hour delay in La. C.C.P. art. 873, and that he desired to be sentenced at that time.

As to the second error patent, the trial court sentenced defendant to an additional five years imprisonment without parole, probation or suspension of sentence, purportedly pursuant to the firearm sentencing provisions in La. C.Cr.P. art. 893.3, such sentence to run consecutively to the thirty-year sentence imposed on the conviction for manslaughter. Defendant specifically objected to this additional sentence. Moreover, this court has recognized the imposition of an additional sentence under La. C.Cr.P. art. 893.3 to be an error patent. See State v. Lee, 2002-1793, p. 22 (La. App. 4 Cir. 4/2/03), 844 So. 2d 970, 985, writ denied, 2003-1247 (La. 10/10/03), 855 So. 2d 330. As this court detailed in Lee, La. C.Cr.P. art. 893.3 provides for nothing more than the imposition of a mandatory minimum sentence for the defendant's possession, use, discharge, etc. of a firearm during his commission of an offense for which he has been convicted. Lee, 2002-1793, pp. 41-49, 844 So. 2d at 996-1000. In the instant case, the trial court apparently found that La. C.Cr.P. art. 893.3(B) was applicable. Under that provision, if the trial court finds by clear and convincing evidence that the offender actually used a firearm in the commission of the felony or specifically enumerated misdemeanor for which he has been convicted, the court shall impose a minimum term of imprisonment of at least five years, or the maximum sentence in the event that the maximum is less than five years.

Thus, since the trial court in the instant case found that the requirements of La. C.Cr.P. art. 893.3(B) were met, it could not have given defendant a suspended sentence, even though there is no minimum sentence provided for a conviction for the manslaughter death of an adult. La. R.S. 14:31. The court had to impose at least a five-year sentence. In addition, under La. C.Cr.P. art. 893.3(F) and (G), respectively, the mandatory minimum sentence imposed under Paragraph (B) is without the benefit of suspension of sentence or parole.

The five-year sentence additional sentence imposed on defendant in connection with his use of a firearm must be vacated, and the case remanded for resentencing under La. C.Cr.P. art. 893.3. Because defendant's thirty-year sentence for manslaughter is more than the five-year mandatory minimum sentence provided for by La. C.Cr.P. art. 893.3(B), resentencing will simply entail stipulating that the first five years of his thirty-year sentence shall be without the benefit of suspension of sentence or parole, as mandated by La. C.Cr.P. art. 893.3(F) and (G), respectively.

ASSIGNMENT OF ERROR NO. 1

Defendant's first claim of error is that the evidence is insufficient to convict him of manslaughter.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." State v. Smith, 600 So.2d 1319 (La.1992) at 1324.
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> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from Jackson v. Virginia, supra, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. State v. Jacobs, 504 So.2d 817 (La.1987).

98-0011 at pp. 13-14, 744 So. 2d at 106-107, quoting State v. Egana, 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So. 2d 223, 227-228.

Defendant was charged with, and tried for, second degree murder, a violation of La. R.S. 14:30.1, but was convicted of the lesser offense of manslaughter, a violation of La. R.S. 14:31. Manslaughter is defined in pertinent part by La. R.S. 14:31(A)(2) as a homicide committed without any intent to cause death or great bodily harm, when the offender is engaged in the perpetration of any felony not enumerated in the first degree or second degree murder statutes, La. R.S. 14:30 and R.S. 14:30.1, respectively.

In the instant case, defendant primarily complains of the sufficiency of the evidence relative to Eddie Winchester's credibility. A court reviewing a conviction for sufficiency is not permitted to decide whether it believes the witnesses; it is not the function of an appellate court to assess credibility. State v. Marcantel, 2000-1629, p. 9 (La. 4/3/02), 815 So. 2d 50, 56. In a case where there is no physical evidence to link a defendant to the crime charged, the testimony of one witness, if believed by the trier of fact, is sufficient support for a factual conclusion required for a verdict of guilty. Id.

In the instant case, Eddie Winchester's wife testified that in the early morning hours of the day of the shooting, defendant came to her home

looking for her husband Eddie and the victim. Det. Shields testified that defendant told him after being arrested that he was looking for the victim and "them" because he thought they had taken his money, and that when he found the victim he shot him. Eddie Winchester testified that defendant pulled up to the grocery store in a truck, got out, and accosted them, asking about "his" money. Winchester thought defendant was playing, and casually pushed him. Defendant walked off saying, "yeah, all right." Defendant went to the truck, and the victim walked out of the store. Defendant came back, mentioned something about his money, and shot the victim. Defendant admitted that he took the gun from which the fatal shot was fired to his mother's home after the shooting. The gun was later found there by police.

A warrant was issued for defendant's arrest for the murder of the victim. Eleven days after the murder, defendant fled from Sgt. Tyrone Beshears and other officers who attempted to stop him. Defendant essentially admitted during his testimony at trial that he knew he was wanted in connection with the murder, and that was why he fled—he claimed he was trying to save enough money to hire an attorney, at which time he planned to turn himself in to police. Flight is a circumstance from which guilt can be inferred. State v. Smith, 98-2645, p. 5 (La. App. 4 Cir. 1/26/00), 752 So. 2d

314, 317-318; State v. Recasner, 98-2518, p. 3 (La. App. 4 Cir. 12/22/99), 750 So. 2d 336, 338. Sgt. Beshears testified that defendant admitted he shot the victim because the victim stole his money, but said he did not mean to kill the victim.

Defendant testified at trial that it was the victim who pulled the gun on him, that he attempted to wrest control of it from the victim, that each had a hand on the gun, and that the gun discharged during the struggle. The coroner testified that cause of death was a single gunshot wound that entered the victim's left shoulder and traveled from left to right at a slightly downward angle, penetrated both lungs, and exited on the right side. The coroner also confirmed that the gun was fired from between twelve and thirty-six inches away. Defendant argues that the trajectory of the bullet, and the fact that it was fired at close range is "entirely consistent" with his description of the events. There was no expert evidence to support this proposition. To the contrary, common sense suggests that defendant's version of the events was very unlikely, given that the gun was fired from twelve to thirty-six inches away from the victim, the entrance wound was on the left shoulder, and the bullet traversed the body to exit on the right side.

Defendant notes that the beer can depicted in a crime scene photograph of the scene is consistent with his version of the events, meaning

that the victim exited the grocery store with a can of beer, put it down on the curb, and then approached defendant and pulled a gun on him. Defendant's mother testified that defendant's pants were ripped when he came home on the day of the murder. While this would be consistent with defendant's claim that Eddie Winchester cut open his pants pocket and stole his money while defendant and the victim were struggling over the gun, defendant could have ripped the pocket himself in order to set up his alibi. Or, Winchester and the victim could have cut the pocket open at an earlier point in time that night or morning and robbed defendant, and defendant could have later tracked them to the grocery store and shot the victim in retaliation. It can also be noted that Eddie Winchester had been less than fully forthcoming with the police, the district attorney's office, and at a prior hearing, about what he and the victim did on the morning of the murder. That is, Winchester did not divulge until trial that he and the victim had also gone to the Calliope Project that morning intending to purchase heroin.

However, viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of all the essential elements of the crime of manslaughter, to wit: defendant killed the victim by shooting him, without any intent to cause death or great bodily harm, while engaged in the perpetration of an

aggravated battery—the intentional use of force or violence upon the person of another by shooting, a felony not enumerated in La. R.S. 14:30 or R.S. 14:30.1.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, defendant argues that he is entitled to a new trial because the State withheld exculpatory or Brady material, that being information that the State had refused the charge as to Eddie Winchester's arrest for aggravated assault.

Defendant's trial was held on September 17-19, 2001. Voir dire was conducted on September 17, 2001. Eddie Winchester testified on September 18. He admitted on direct examination that he had been arrested for aggravated assault, with a gun, and that the charges were pending at the time he gave his testimony at trial. He replied in the negative when asked on direct examination whether anyone in the district attorney's office had promised him anything in exchange for his testimony. The defense cross-examined defendant on the issue, and Winchester admitted that he would face between five and ten years in prison if convicted of the offense.

Subsequent to trial, defendant discovered that the district attorney's

office had screened the charge on September 17, 2001, and refused it either on that date or on September 18, 2001—the screening form reflects that the case was screened on September 17, but the form has "September 18, 2001" stamped twice on it. The refusal of the charge was the subject of a "supplemental" motion for new trial by defendant. The court heard this supplemental motion for new trial on February 2002, where the State represented that the charge was refused on the morning of the day Eddie Winchester testified, September 18. The trial court essentially found that defendant's inability to bring out on cross-examination that the charge was refused did not undermine the outcome of the trial.

The Louisiana Supreme Court discussed Brady relative to a witness facing a criminal charge in State v. Bowie, 2000-3344 (La. 4/3/02), 813 So. 2d 377, as follows:

> In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that the suppression by the prosecution of evidence favorable to the accused, when requested, violates the defendant's due process rights, if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. The Brady rule encompasses evidence, which impeaches the testimony of a witness when the reliability or credibility of that witness may be determinative of guilt or innocence. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); State v. Knapper, 579 So.2d 956, 959 (La.1991). A prosecutor does not breach his constitutional duty to disclose favorable evidence "unless the omission is of sufficient significance to result in the denial of the defendant's

right to a fair trial." United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); State v. Willie, 410 So.2d 1019, 1030 (La.1982).

For purposes of Brady's due process rule, a reviewing court, in determining materiality of evidence, must ascertain "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (citing Bagley, 473 U.S. at 678, 105 S.Ct. 3375). Thus, the reviewing court does not put the evidence to an outcome-determinative test in which the court weighs the probabilities that the defendant would have obtained an acquittal at trial or might do so at a second trial. Instead, a Brady violation occurs when the "evidentiary suppression 'undermines confidence in the outcome of the trial.' " Kyles, 514 U.S. at 434, 115 S.Ct. 1555 (quoting Bagley, 473 U.S. at 678).

Despite the state's contention that it has no duty to turn over information concerning plea bargains or other inducements to its witnesses, it is well established that the state does have an affirmative due process obligation to divulge information which is favorable to an accused and material on the issues of guilt or punishment or the credibility of a witness whose reliability may be determinative of guilt or innocence or affect the outcome of the trial. Kyles, 514 U.S. at 434, 115 S.Ct. 1555; United States v. Bagley, 473 U.S. at 667, 105 S.Ct. 3375 Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); State v. Knapper, 579 So.2d 956, 959 (La.1991); State v. Rosiere, 488 So.2d 965, 970-971 (La.1986). There is no category of information, which is per se undiscoverable against an accused's right to Brady information. In the instant case, the crux of state's case against the defendant rested on the credibility of the four witnesses. Clearly, the witnesses' credibility had a significant impact on the outcome of the trial.

A particular type of impeachment evidence, which may rise to the level of materiality under Brady, is that used to show

bias, interest or corruption. Thus, any plea bargains or other inducements should be made available to the defense prior to trial. A defendant's right to demonstrate facts and circumstances which might influence the witness's perceptions or color his testimony, thereby lessening the weight the fact-finder might accord his testimony, is guaranteed in both state and federal criminal proceedings and is an important function of the right to confront and cross-examine. U.S. Sixth Amendment; Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Giglio; La. Const. Art. I, § 16; La. C.E.art. 607(C), (D) (authorizing admission of intrinsic and extrinsic evidence to show bias, interest or corruption); State v. Clark, 492 So.2d 862, 869 (La.1986); State v. Trahan, 475 So.2d 1060, 1062-1063 (La.1985); State v. Nash, 475 So.2d 752, 754-755 (La.1985); > State v. Rankin, 465 So.2d 679, 681 (La.1985); State v. Sweeney, 443 So.2d 522, 529 (La.1983); State v. Brady, 381 So.2d 819, 821-822 (La.1980). See also the former La. R.S. 15:492 (repealed; see La.C.E.art. 607).

The possibility that the state may have some "leverage over a witness due to that witness' pending criminal charges is recognized as a valid area of cross-examination." Rankin, 465 So.2d at 681. It is well-settled that a witness's "hope or knowledge that he will receive leniency from the state is highly relevant to establish bias or interest." State v. Vale, 95-1230, 95-0577, (La.1/26/96), 666 So.2d 1070, 1072, quoting Brady, 381 So.2d at 822. See State v. Daniel, 378 So.2d 1361, 1367-1368 (La.1979); State v. Bailey, 367 So.2d 368 (La.1979); State v. Franks, 363 So.2d 518, 520 (La.1978); State v. Robinson, 337 So.2d 1168 (La.1976). A similar rule applies in federal courts. Davis v. Alaska; Giglio. Moreover, a "witness's bias or interest may arise from arrests or pending criminal charges, or the prospect of prosecution, even when he has made no agreements with the state regarding the conduct." Vale, 666 So.2d at 1072, citing Nash. Therefore, if the state entered into a deal or arrangement with an eyewitness, and if the revelation would have lessened that witness's credibility and "in any reasonable likelihood [could] have affected the judgment of the jury," the defendant is entitled to reversal and a new trial. Giglio, 405 U.S. at 153, 92 S.Ct. at 766; see Bagley, 473 U.S. at

676, 105 S.Ct. at 3380.

2000-3344, pp. 7-10, 813 So. 2d at 384-385.

In Bowie, supra, four witnesses testified at the defendant's first-degree murder trial. All four had been in the company of the defendant and the victim on the night of the murder, at the victim's home. Some were drinking, some were smoking marijuana and some were using crack cocaine. One victim punched the victim three times after being ordered to do so by the defendant. After the defendant robbed and strangled the victim to death, he directed the four witnesses to clean up, which they did. The four witnesses and the defendant then left the victim's home in the victim's car. The murder was not reported until many hours later, after defendant commented that he had to get rid of the two female witnesses, and then shot one of them four times. The single male witness still in the company of the defendant then fled with the two female witnesses.

The defendant was convicted of first-degree murder and sentenced to death, primarily on the testimony of those four witnesses. None of the four witnesses was ever charged with a crime. On appeal, the defendant argued a Brady violation—that the State had failed to disclose plea bargains and other inducements to the witnesses, despite his discovery requests. The State maintained that it did not charge any of the witnesses with a crime relating to

the events because none of their testimony supported a finding of criminal culpability. To support this assertion the State introduced the testimony of a detective who said that investigators generally believed the accounts of the four witnesses and found credible their claims of having been frightened of the defendant and fearful of retribution. The detective said the witnesses had been under the control of the armed defendant, and noted that none of them had shared in the proceeds of the robbery of the victim.

The Louisiana Supreme Court in Bowie found that the defense had failed to show the existence of any deals or inducements, or any basis for impending charges. As a result, the court found that the defendant failed to demonstrate prejudice from any non-disclosure, and no reversible error.

In the instant case, the record contains a police report detailing Eddie Winchester's arrest on June 24, 2001 for aggravated assault. The record contains subpoenas sent by the district attorney's office to the alleged victim of the aggravated assault by Eddie Winchester, as well as two witnesses, requesting that they appear before the district attorney on July 10, 2001. The record also contains copies of two letters from an assistant district attorney, dated July 20, 1001, to the victim and one witness, informing them that he needed their help to reach a screening decision. He informed them that it was imperative that they contact him before July 27, 2001, and to telephone

collect if necessary. The assistant district attorney also stated in the letters that if the recipients failed to call him by the indicated date, he would be forced to refuse prosecution of the case. On September 17 or 18, 2001, that same assistant district attorney refused the charge against Winchester. There is no definitive proof that the charge was refused prior to Winchester testifying, although it was done prior to the conclusion of the trial.

As in Bowie, defendant presents no evidence that the prosecution offered any inducement to obtain Eddie Winchester's testimony. Although, unlike in Bowie, Winchester had been arrested on a charge, Winchester admitted this fact on direct examination, and defendant cross-examined him on the issue. It is undisputed that Eddie Winchester gave a statement to police on April 6, 2001 detailing his version of the events surrounding the April 2, 2001 murder. This was two and one-half months before his June 24, 2001 arrest for aggravated assault. There is no indication that Eddie Winchester's trial testimony was materially different from what he told police on April 6. The record establishes that the aggravated assault charge against Winchester was refused by the State because of the failure of the victim and a witness to come forward.

There was no Brady violation in the instant case, because it cannot be said that any failure by the State to inform defendant before the conclusion

of the trial that the charge against Eddie Winchester was refused undermined confidence in the outcome of the trial. See Bowie, 2000-3344, p. 8, 813 So. 2d at 384.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 3

In this assignment of error, defendant argues that his sentence is excessive.

La.Const. art. I, § 20 explicitly prohibit excessive sentences; State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, grant of post conviction relief on other grounds affirmed, 2001-1667 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1132. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So.2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987). A sentence is constitutionally

excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. Baxley, 94-2984 at p. 9, 656 So.2d at 979; State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators

of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a

> remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

Defendant in the instant case was sentenced to thirty years at hard labor on his conviction for manslaughter. Defendant filed a motion to reconsider the sentence on the ground that it was excessive, thus preserving his right to raise this issue on appeal. Under La. R.S. 14:31, a person convicted of manslaughter in the death of an adult, as in the instant case, shall be imprisoned at hard labor for not more than forty years. Defendant received a sentence that was seventy-five percent of the maximum. Defendant's sole argument on appeal as to excessiveness is that his sentence is excessive "in light of the weak evidence against him, and the strong likelihood that the shooting was an accident." The evidence discussed in defendant's assignment of error directed to the sufficiency of the evidence refutes this argument. Even assuming arguendo that defendant did not intend to kill the victim, the evidence does not support a finding that the shooting was an accident. The evidence supports a finding that defendant tracked down the victim and intentionally shot him in retaliation for robbing defendant of money derived from selling cocaine. There is no merit to defendant's argument that his sentence is excessive because the evidence

against him was weak and/or that the shooting was an accident. The sentence is supported by the record.

There is no merit to this assignment of error.

SUPPLEMENTAL ASSIGNMENT OF ERROR

In his supplemental assignment of error, defendant argues that the trial court erred in denying his motion to quash the grand jury indictment on the ground that the method of selecting the grand jury and grand jury foreperson in Orleans Parish at the time of his indictment was unconstitutional. Defendant filed a motion to quash the indictment on the above grounds prior to commencement of trial. The trial court denied that motion to quash on September 17, 2001, the first day of trial, and noted an objection by defendant to that ruling.

Subsequent to defendant's trial and conviction, the Louisiana Supreme Court in State v. Dilosa, 2002-2222 (La. 6/27/03), 848 So. 2d 546, struck down as unconstitutional La. C.Cr.P. art. 412 and La. R.S. 15:114 in their entirety, the introductory phrases of La. C.Cr.P. arts. 413(B) and 414 (B) ("In parishes other than Orleans,"), and La. C.Cr.P. arts. 413(C) and 414 (C) in their entirety. The offending provisions together provided procedures, applicable only in Orleans Parish, for the selection of the grand jury venire, the impaneling of the grand jury, selection of the grand jury foreman, the

time for impaneling grand juries and the period of service, and the rotation of judges who select and control the grand jury. The court found that the provisions were "local laws" concerning "criminal actions" which regulated the "practice" of Orleans Parish criminal courts in violation of La. Const. art. III, § 12(A)(3).

The grand jury that indicted defendant on May 24, 2001, and the foreman of that grand jury, were selected while the applicable procedures declared unconstitutional in Dilosa, supra were all in effect.

The defendants in Dilosa filed motions to quash their October 1999 indictments on March 16, 2001, arguing that La. C.Cr.P. arts. 412, 413 and 414, and La. R.S. 15:114 were local laws prohibited under the state constitution. In the instant case, defendant filed the motion to quash his May 2001 indictment for second-degree murder in either July or August 2001 on the ground that La. C.Cr.P. arts. 412, 413 and 414, and La. R.S. 15:114 were local laws prohibited under La. Const. art. III, § 12. The same trial judge who in June 2001 granted the defendants' motion to quash in Dilosa denied defendant's motion to quash in the instant case on September 17, 2001. Defendant's conviction and sentence were under direct appeal to this court at the time of the Dilosa decision.

The State appears to argue that defendant fails to show that he

suffered any prejudice, that defendant rests his claim of reversible error solely on Dilosa's holding that the statutes and statutory provisions were unconstitutional as local laws. La. C.Cr.P. art. 921 states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."

The statutes and/or provisions thereof were declared unconstitutional in Dilosa solely because they were local laws in violation of La. Const. art. III, §12(A). This prohibition against local laws is simply intended to reflect a policy decision that legislative resources and attention should be concentrated upon matters of general interest, and that purely local matters should be left to local governing authorities. Morial v. Smith & Wesson Corp., 2000-1132, p. 22 (La. App. 4 Cir. 4/3/01), 785 So. 2d 1, 17; Kimball v. Allstate Ins., Co., 97-2885, p. 4 (La. 4/14/98), 712 So. 2d 46, 50. No substantial right of a criminal defendant is affected solely because he is indicted by a grand jury selected pursuant to local laws passed by the Louisiana State legislature, as the only reason such local laws are prohibited is because of a policy that legislative resources and attention should be concentrated on matters of general interest, and that purely local matters should be left to local governing authorities.

By way of comparison, in Rideau v. Whitley, 237 F.3d 472 (5 Cir. 2000), the court reversed the defendant's conviction based on racial discrimination in the selection of the grand jury that indicted him. As in the instant case, the defendant filed a pre-trial motion to quash his indictment. He alleged that there had been a systematic exclusion of black jurors from the Calcasieu Parish grand jury that returned his indictment for first-degree murder. The motion to quash was denied, and the Louisiana Supreme Court affirmed that ruling in 1973. In 1994, the defendant filed a petition for federal habeas corpus, ultimately leading the 5th U.S. Circuit Court of Appeals to reverse his conviction on the ground that his indictment by a grand jury from which black citizens were systematically excluded because of their race violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The court followed a rule of mandatory reversal of the conviction and indictment in such cases, and did not require a showing of prejudice, because the intentional discrimination in the selection of the grand jury was a "grave constitutional trespass possible only under color of state authority wholly within the power of the State to prevent," because of the need to eliminate that systematic flaw, and because of the difficulty of assessing the prejudicial effect on any given defendant. Rideau, 237 F.3d at 489, quoting Vasquez v. Hillery, 474 U.S. 254, 262 &

264, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

Defendant fails to show that he was prejudiced by having been indicted by a grand jury selected in accordance with the local laws found to be unconstitutional in Dilosa, much less that his indictment approached the "grave constitutional trespass" found in Rideau, leading that court to automatically reverse defendant Rideau's conviction and indictment without a finding of prejudice. Although in the instant case the trial court erred in denying defendant's motion to quash his grand jury indictment based on the unconstitutionality of the local laws at issue, defendant has failed to show that the error affected his substantial rights. Accordingly, the error does not require reversal of defendant's conviction, sentence and indictment.

STATE ASSIGNMENT OF ERROR

On May 6, 2003, this court consolidated a writ filed by the State with the instant appeal. In that writ the State sought relief from a trial court ruling that it failed to prove defendant was a second-felony habitual offender.

There was no dispute at the habitual offender hearing but that defendant was identified—by documents presented and the testimony of the State's fingerprint expert—as the same person as the one referred to in those documents. However, the State mistakenly informed the court that no

minute entry from the date defendant pleaded guilty was contained in the documents, and consequently the court found that the State had failed to meet its burden of proof.

In State v. Shelton, 621 So.2d 769, 779-780 (La.1993), the Supreme Court set forth the applicable rule relative to the State's burden of proof in a habitual offender proceeding, as follows:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one that reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

621 So. 2d at 779-780.

In Shelton, the State presented evidence including a waiver of constitutional rights/plea of guilty form, and a minute entry, which stated

that the judge "gave the Defendant his rights." 621 So. 2d at 777. The Louisiana Supreme Court held that this was sufficient proof of the existence of the prior guilty plea and that defendant was represented by counsel at the time the plea was taken, and this was all that was necessary for the State to meet its burden of proof.

In the instant case, the State produced at the hearing a number of documents to prove the prior conviction, including a copy of an arrest register showing defendant's July 17, 1997 arrest for possession with intent to distribute crack cocaine. A copy of a screening form from the district attorney's office, dated November 16, 1997, in case # 393-340, showed that the charge of possession with intent to distribute was refused, while a charge of possession was accepted. A copy of a bill of information dated November 20, 1997, in case # 393-340 reflected that defendant was indicted for committing, on July 17, 1997, the offense of possession of cocaine. Also included was a waiver of constitutional rights/plea of guilty form dated May 12, 1998, wherein defendant purportedly waived a number of rights, including, as in Shelton, his rights under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)—his right to trial by jury, his right or privilege against self-incrimination, and the right to confront accusers. As in Shelton, after each right were the defendant's initials indicating a waiver of

those rights. As in Shelton, the form stated that the defendant understood all of the possible legal consequences of pleading guilty and wished to plead guilty, which statement was initialed by the defendant. The form was signed by the defendant and his attorney, and stamped with the signature of the trial judge.

Also included in the documents submitted by the State at the habitual offender hearing was an untitled preprinted document, in case # 393-340, stating that the defendant, in person, attended by his counsel, Keith Hurtt, appeared before the court on that date, May 12, 1998, withdrew his former plea of not guilty, and pleaded guilty to possession of cocaine. The document stated that the court, prior to accepting the guilty plea, advised the defendant personally of all his rights and that he would give up those rights by pleading guilty. The document stated that the trial court advised the defendant of certain rights specifically, including his Boykin rights. The document stated that the defendant personally waived each of those rights, "as noted by the court reporter," and the court accepted the guilty plea as knowingly, intelligently, freely and voluntarily made. Handwritten at the bottom of the form is the sentence, two years at hard labor, suspended, with two years of active probation, with that sentence, in case # 393-340, to run concurrently with # 395-243. Handwritten on the document, at the top right,

are the names of the minute clerk and court reporter, and their respective titles.

The docket master from case # 393-340, also introduced by the State at the habitual offender hearing, contained an entry that on May 12, 1998 defendant appeared at the bar attended by counsel, and through counsel withdrew his former plea of not guilty. The docket master entry also stated that the trial court ordered a plea of guilty entered on the minutes. That same docket master entry noted the sentence of two years at hard labor, suspended, with two years active probation. The State also introduced a copy of a minute entry from June 2, 2000, in case # 393-340, which reflected a probation revocation for the conviction. The minute entry reflects that the court ordered the probation revoked and the original sentence of two years at hard labor executory, with that sentence to run concurrently with case # 395-243.

The State argued in its writ application that the preprinted document reciting that the trial court personally advised the defendant of his rights and the fact that he was giving up those rights by pleading guilty, which form contained the handwritten names and respective titles of the minute clerk and court reporter, as well as the sentence imposed, was in fact a minute entry. It is not disputed that this document was introduced at trial. That

document is what this court has previously referred to as a "preprinted" and/or "fill-in-the-blanks" minute entry, discussed in State v. Blunt, 464 So. 2d 869 (La. App. 4 Cir. 1985).

In Blunt, a similar form was involved—it was relative to a prior conviction emanating from the same section of Orleans Parish Criminal District Court as the prior conviction in the instant case, and apparently with the same judge presiding over the respective prior guilty plea proceedings. In Blunt, the State introduced a waiver of rights form, initialed by the defendant to indicate each right ceded by the plea, and a purported minute entry, which was, as described by this court, a "pre-fabricated, fill-in-the-blanks-form (with blanks only for the defendant's and his lawyer's names, and h's intended to be but here not completed to read "his" or "her")." 464 So. 2d at 871. Citing State v. Lewis, 367 So. 2d 1155 (La. 1979), overruled in part by State v. Holden, 375 So. 2d 1372 (La. 1979), and Holden, supra, this court in Blunt held that "a guilty-plea, rights-waiver form executed by defendant, although complete in every detail, is insufficient without minutes or transcript of a colloquy between judge and defendant showing the knowing and voluntary waiver required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)." 464 So. 2d at 871. This court in Blunt stated that Lewis required a contemporaneous record. However,

Lewis did not require a contemporaneous record to prove the existence of the guilty plea, or that the defendant was attended by counsel at the time he entered the plea, but required "a contemporaneous record of a Boykin examination demonstrating the free and voluntary nature of a plea of guilty with an articulated waiver of the constitutional rights required by Boykin v. Alabama." Lewis, 367 So. 2d at 1160.

In Shelton, decided some eighteen years after this court's decision in Blunt, the Louisiana Supreme Court discussed its holdings in Lewis, Holden and another case, State v. Nelson, 379 So. 2d 1072 (La. 1980), setting forth what was then the state of the law under those three prior cases as follows:

> Subsequent to Lewis, Holden, and Nelson, the basic approach to the use of guilty pleas in an habitual offender proceeding has not significantly changed. We have consistently held that in order to enhance a sentence with a prior guilty plea, the State bears the burden of proving the guilty plea was constitutionally taken, and, to meet its burden, the State must introduce a contemporaneous record of a Boykin examination which demonstrates the guilty plea was free and voluntary and which includes a waiver of the three constitutional rights specified in Boykin. The cases have turned instead on one issue: whether the State has met its burden of producing a "contemporaneous record" which reflects a specific waiver of the three rights where it has submitted anything other than a "perfect" transcript of the colloquy. (footnotes omitted).

621 So. 2d 774.

The court in Shelton then proceeded to radically alter the applicable law regarding the burden of proof in habitual offender proceedings. The

impetus behind the change effected by Shelton was the U.S. Supreme Court's decision in Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992):

> In light of the fact that Parke holds Boykin does not require that the entire burden be placed on the prosecution in a recidivism proceeding and because our present system of placing the entire burden on the State fails to give any presumption of regularity to a final conviction used in an habitual offender hearing, we today revise our previous scheme allocating burdens of proof in habitual offender proceedings. (footnote omitted).

Shelton, 621 So. 2d at 779.

In Shelton, the court characterized Parke as stating that Boykin did not require that the State bear the burden of proving adequate Boykinization at a habitual offender proceeding. Therefore, in Shelton the court relieved the State of the burden of proving that the defendant was advised of his rights under Boykin, and that he understood and waived those rights, i.e., that he was properly "Boykinized," and freely, knowingly and voluntarily pleaded guilty to the prior offense. Today, under Shelton, the initial burden on the State is simply "to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken." Shelton, 621 So. 2d at 779. If the State meets this burden, the presumption of regularity of judgments is that the conviction was obtained in a procedure that afforded the defendant all the rights, e.g., under Boykin, and protections to which he

was entitled. The sole reason this court found in Blunt that the preprinted fill-in-the-blanks-form was deficient was because it did not suffice to prove that the defendant had been Boykinized before pleading guilty to the offense. Blunt never stood for the proposition that a preprinted fill-in-the-blanks "minute entry" cannot be employed as evidence to prove the existence of a prior guilty plea, or as evidence that the defendant was attended by counsel at that guilty plea.

In State v. Cargo, 609 So. 2d 905 (La. App. 4 Cir. 1992), this court relied solely on Blunt in reversing the defendant's adjudication as a habitual offender because the State introduced only a pre-printed "minute entry" and waiver of rights of form "as evidence that defendant had voluntarily waived his constitutional rights at the time he pled guilty to the predicate [offense]." 609 So. 2d at 906. Cargo does not stand for the proposition that a pre-printed "minute entry" cannot be used as evidence to prove the existence of a guilty plea, or that the defendant was attended by counsel at that guilty plea.

In State v. Gales, 622 So. 2d 808 (La. App. 4 Cir. 1993), this court noticed as an error patent that during the habitual offender proceeding the State had offered only a "preprinted fill-in-the-blanks minute entry" as proof that the defendant waived his Boykin rights. 622 So. 2d at 816. This court

in Gales cited Blunt for the proposition that such a form "could not be considered a contemporaneous record of a guilty plea." Id. However, because Blunt did not stand for such a proposition, neither does Gales. To the extent that Gales purports to stand for such a proposition, it is without the support of any authority cited therein, as the only two cases cited by this court in Gales were Blunt and Cargo.

In summary, although in Shelton the State apparently presented a "contemporaneous" minute entry, not a preprinted/fill-in-the-blanks one as in the instant case, the initial burden placed on the State by Shelton is simply the production of evidence "to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken." Shelton, 621 So. 2d at 779. Shelton does not limit the method by which the fact of the prior guilty plea by a defendant attended by counsel must be proven. To the extent that Blunt, Cargo, Gales or any other pre-Shelton decision purports to hold that the State cannot meet its initial burden in a habitual offender proceeding by producing a preprinted minute entry such as in the instant case, instead of a contemporaneous one, such decision or decisions were implicitly overruled by Shelton.

In the instant case, there is the guilty plea/waiver-of-rights form, the preprinted fill-in-the-blanks minute entry form—which states that defendant

was represented by counsel on the day he pleaded guilty—and a minute entry showing that his probation was revoked in the case. In addition, a docket master entry reflects that on the day of the guilty plea defendant was attended by counsel. As noted, the preprinted fill-in-the-blanks minute entry has handwritten at the top left the names of the court reporter and minute clerk, the same information that generally would be on a contemporaneous minute entry. The preprinted fill-in-the-blanks minute entry also has the sentence handwritten at the bottom—two years at hard labor, suspended, with two years active probation. The contemporaneous minute entry reflecting the defendant's probation revocation in the case reflects that a sentence of two years at hard labor was made executory.

There is nothing to suggest that the preprinted fill-in-the-blanks minute entry form reflects anything other than what it states as to defendant being present in court on May 12, 1998, represented by counsel, and pleading guilty to a felony offense relative to La. R.S. 40:967. If defendant did not plead guilty and receive a suspended sentence of two years at hard labor with two years active probation as reflected by the preprinted fill-in-the-blanks minute entry, then a grievous error occurred when defendant's probation was revoked and that two-year sentence was made executory. There is nothing to suggest that the probation revocation was an error. The

preprinted fill-in-the-blanks minute entry is buttressed by the minute entry reflecting the probation revocation. All of this evidence, taken together, proves the existence of the prior guilty plea, and that defendant was attended by counsel at that plea. Therefore, the State met its initial burden under Shelton, and the burden shifted to defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. Defendant failed to produce any such evidence. Accordingly, the trial court erred in finding that the State had failed to prove defendant was a second-felony habitual offender.

There is merit to this assignment of error.

CONCLUSION

For the foregoing reasons, the defendant's conviction is affirmed; the defendant's thirty-year sentence for manslaughter is affirmed, but that the additional five-year sentence imposed by the trial court under La. C.Cr.P. art. 893.3 is vacated; the trial court judgment finding defendant not to be a second-felony habitual offender be reversed; we render judgment adjudicating defendant a second-felony habitual offender; and remand this matter to the trial court for the trial court to vacate defendant's original sentence and resentence him as a second-felony habitual offender, with such sentence to be imposed in accordance with La. C.Cr.P. art. 893.3.

CONVICTION AND SENTENCE AFFIRMED
FIVE –YEAR ADDITIONAL SENTENCE IS VACATED
TRIAL COURT'S RULING THE DEFENDANT NOT A SECOND-FELONY HABITUAL OFFENDER IS REVERSED
JUDGMENT IS RENDERED THAT DEFENDANT IS A SECOND-FELONY HABITUAL OFFENDER
CASE IS REMANDED TO TRIAL COURT WITH ORDER TO VACATE ORIGINAL SENTENCE AND TO RESENTENCE DEFENDANT PURSUANT TO LSA-C.CR.P. ART. 893.3