NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 2551

STATE OF LOUISIANA

VERSUS

WALTER J. COPELAND, JR.

Judgment Rendered: December 23, 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 397655

The Honorable Larry J. Green, Judge Presiding

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Guidry, J. dissents: I do not find that the error with respect to the jury instruction was harmless beyond a reasonable doubt.

GAIDRY, J.

The defendant, Walter J. Copeland, Jr., and his codefendant, Michael Wayne Richardson, were charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. Defendant pleaded not guilty.[1] At the conclusion of a jury trial, defendant was convicted of the responsive offense of manslaughter, a violation of La. R.S. 14:31. The trial court sentenced defendant to imprisonment at hard labor for thirty-five years.

Defendant now appeals, urging the following assignments of error:

1. The trial court erred and/or abused its discretion in denying the defendant's motion to suppress the confession.

2. The trial court erred in refusing to charge the jury on the law of accessories after the fact.

3. The sentence imposed was excessive.

Finding no merit in the assigned errors, we affirm defendant's conviction and sentence.

FACTS

On March 11, 2005, the victim, Toney Dewayne Sylve, was shot and killed inside his residence in Slidell, Louisiana. The victim's girlfriend, Kelly Callender, was present when the shooting occurred. She testified that two masked men wearing gloves and dark clothing entered the residence, held her and the victim at gunpoint, and demanded money. The victim was shot in the chest during the robbery. Michael Richardson and defendant were subsequently convicted as the perpetrators of the homicide.

[1] Codefendant Richardson was tried separately and convicted. He is not a party to the instant appeal.

FIRST ASSIGNMENT OF ERROR: DENIAL OF MOTION TO SUPPRESS

The record in this case reflects that defendant filed a motion to suppress his statement to the police in connection with the investigation of the victim's murder. Following a hearing, the trial court denied the motion. Defendant filed a supervisory writ application with this court seeking review of the trial court's ruling on the motion to suppress. We reviewed defendant's claim and denied the writ application in an unpublished decision. *State v. Copeland*, 06-1747 (La. App. 1st Cir. 10/2/06). Defendant then filed a supervisory writ application with the Supreme Court, which also was denied. *State v. Copeland*, 06-2640 (La. 1/19/07), 948 So.2d 156.

By this assignment of error, defendant again seeks review of the trial court's ruling denying the motion to suppress. Although the pretrial determination does not absolutely preclude a different decision on appeal, judicial efficiency demands that this court accord great deference to pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. *See State v. Johnson*, 438 So.2d 1091, 1105 (La. 1983). *See also State v. Humphrey*, 412 So.2d 507, 523 (La. 1981) (on rehearing).

Upon review, we find that the record in this case fully supports our previous decision on the issue presented in the writ application and is devoid of any additional circumstances and evidence that would lead us to change the conclusion we reached therein.

Defendant contends that the trial court erred in denying his motion to suppress as he was not properly advised of his rights, because he was not informed of why he was being detained and questioned prior to his interrogation. Defendant argues that under La. C.Cr.P. art. 218.1, he should

have been fully advised of the reason for his detention. Absent evidence that he was advised of the reason for his detention, defendant argues, the trial court erred as a matter of law in denying the motion to suppress.

At the hearing on the motion to suppress, Detective Dale Galloway of the St. Tammany Parish Sheriff's Office testified that he advised defendant of his *Miranda* rights, defendant appeared to understand his rights, and he agreed to waive his rights prior to talking with Galloway. Galloway stated that defendant was not made any promises or threatened with anything in exchange for waiving his rights and talking to the police.

Galloway did not arrest or stop defendant; he was already in custody at the time Galloway spoke to him. Galloway did not know how long defendant had been in custody prior to the questioning, but indicated that he did not think defendant had been in custody for very long. Galloway was unsure of the time he personally became involved in the investigation. According to Galloway, he advised defendant of his rights at 2:45 a.m. on March 13, 2005, at the Slidell Law Enforcement Complex. Defendant was also given a rights-waiver form to sign. Galloway conceded that the rights waiver form did not advise defendant why he was being detained and questioned. Galloway admitted that when he advised defendant of his rights, he did not advise defendant of the reason why he was being detained and questioned. He was not present when defendant was initially stopped, so he was unaware of whether defendant was advised of his rights at that time.

Galloway questioned defendant and took his statement only after defendant was advised of his *Miranda* rights. According to Galloway, the statement was not recorded, as defendant declined to give a recorded statement, but he took notes and then compiled them in a narrative form in

his report, which was later given to the case detective.[2] Galloway was unaware of any other statements given by defendant.

At the conclusion of the hearing, defense counsel argued that under La. C.Cr.P. art. 218.1, a person who has been detained for questioning shall be advised of the reasons for which he is being detained and advised of his rights. Defense counsel argued that based on the testimony at the hearing, defendant was not advised prior to questioning as to why he was being detained. Defense counsel argued that the state rested and failed to present any other evidence regarding that issue. Defense counsel admitted that defendant had been advised of his *Miranda* rights, but emphasized that Galloway did not advise defendant of the reason why he was being questioned. Additionally, counsel noted that the reason for the questioning was not stated on the advice of rights form. Defense counsel argued that because of Galloway's failure to advise defendant why he was being detained and questioned, defendant's statement should be suppressed.

The prosecutor countered that suppression of the statement is not a remedy when a person is not informed why they are being detained and questioned. The prosecutor asserted that prior to questioning, defendant was advised of his rights, acknowledged his rights, signed a waiver of those rights, and agreed to speak with Galloway. The prosecutor also noted that defendant later was arrested and charged with armed robbery and murder. The prosecutor claimed that there was nothing to support defendant's contentions that the statement should be suppressed and set forth that there was no remedy for this situation. The court subsequently denied the motion to suppress.

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[2] Galloway did not discuss the content of defendant's statement at the suppression hearing. At trial, Galloway testified that in that statement, defendant denied having any involvement in, or knowledge of, the shooting and robbery.

The Louisiana Constitution expressly requires authorities to advise a person "fully of the reason for his arrest or detention" and of his constitutional rights if the person "has been arrested or detained in connection with the investigation or commission of any offense[.]" La. Const. art. I, § 13. Louisiana Code of Criminal Procedure article 218.1 also provides:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

At the motion to suppress hearing, Galloway testified that he was not present when defendant was initially detained. Defendant was already in custody when Galloway spoke to him. The prosecutor stated that defendant was later arrested and charged. Thus, it is clear that defendant was not advised of the reason for his detention by Galloway. Although defendant was advised of his rights and signed a rights waiver form, there was no affirmative evidence presented at the hearing that defendant was fully advised as to why he was being detained and questioned prior to speaking with Galloway.

It is well settled that for a confession or inculpatory statement to be admissible into evidence, the state must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. The state must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. *State v. Thomas,* 461 So.2d 1253, 1256 (La. App. 1st Cir. 1984), *writ denied,* 464 So.2d 1375 (La. 1985). Additionally, the state must show that an accused who makes a statement or confession during

custodial interrogation was first advised of his *Miranda* rights. *State v. King,* 563 So.2d 449, 453 (La. App. 1st Cir.), *writ denied*, 567 So.2d 610 (La. 1990).

The admissibility of a confession is, in the first instance, a question for the trial judge; his conclusions on the credibility and weight of the testimony relating to the voluntary nature of the statement will not be overturned unless they are not supported by the evidence. *State v. Sanford*, 569 So.2d 147, 150 (La. App. 1st Cir. 1990), *writ denied*, 623 So.2d 1299 (La. 1993). *See also State v. Patterson*, 572 So.2d 1144, 1150 (La. App. 1st Cir. 1990), *writ denied*, 577 So.2d 11 (La. 1991). Whether or not a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. *State v. Benoit*, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. *State v. Hernandez*, 432 So.2d 350, 352 (La. App. 1st Cir. 1983).

On appeal, defendant argues his statement should have been suppressed based upon the state's failure to prove that he was advised of the reason for his arrest.[3] Defendant's motion to suppress did not contain an allegation of that basis. The motion to suppress merely asserted that any statements and confessions by defendant should be suppressed as having been "made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises and/or without mover having been advised of his right to remain silent and right to counsel." Consequently, the state's evidence centered on the latter allegations, and the state sought to prove that defendant's statement was voluntarily made. To the extent that defendant now argues that the state failed to prove he was advised of the

[3] Although the statement defendant gave to the police is referred to as a "confession" in the record, the contents of the statement reflect that it was not actually a confession.

reason for his detention, it is clear that the state obviously failed to do so because it was prepared to address only the allegations made in defendant's motion. While the state has the burden of rebutting any specific allegations made by defendant, no allegations of failure to advise him of the reason for his arrest were made. The state bore its burden of affirmatively showing that defendant's statement was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements or promises after having been advised of his *Miranda* rights. La. R.S. 15:451. Notably, defendant does not make any specific allegations of misconduct. He does not claim that he was not advised or that he was unaware of the reason for the questioning. He only complains that the state failed to prove that he was so advised. As previously noted, the state met its burden of proving that the statement was freely and voluntarily made.

Furthermore, the trial transcript reflects that defendant was, in fact, advised of the reason for his detention. Detective Lenny Thompson, the arresting officer, testified at trial that defendant was advised of the reason for his arrest at the time of the arrest. This reinforces our determination that the trial court did not err in denying defendant's motion to suppress the statement.

This assignment of error lacks merit.

SECOND ASSIGNMENT OF ERROR:
ACCESSORY AFTER THE FACT JURY INSTRUCTION

In his second assignment of error, defendant contends that the trial court erred in refusing to instruct the jury regarding the definition of accessory after the fact under La. R.S. 14:25. He argues that the jury could have easily inferred from the evidence that he was an accessory after the fact rather than a principal to the crime of second degree murder.

Defendant's hypothesis of innocence was presented through his own testimony at the trial. He testified that although he was aware of discussions by Richardson and Hess (about possibly robbing the victim), he did not accompany them to the victim's residence nor did he participate in the crimes. According to defendant, he, Hess and Richardson were standing outside Hess's residence (located next door to the victim's residence) when they observed what Hess believed to be a drug transaction between the victim and a passenger of a white Ford Bronco. After having discussed various financial issues, Richardson suggested that they rob the victim. According to defendant, Richardson displayed a rifle in his vehicle and a pistol in his possession. Defendant claimed that upon deciding not to be involved in the robbery or its planning, he walked away from the area. He claims he did not again encounter Richardson until later, when Richardson drove up next to him on the street and instructed him to get into the vehicle. Defendant admitted that he entered the vehicle and rode with Richardson back to Mississippi. In Mississippi, defendant assisted Richardson in burning several items taken from the victim's residence. According to defendant, he was paid approximately $200.00 in "hush money."

The record in this case reflects that, prior to trial of this matter, defendant filed a written motion to enter a plea of guilty to the lesser offense of accessory after the fact. The trial court denied the motion. Later, during the trial, defense counsel requested that the definition of accessory after the fact be included in the jury instructions. The defense argued that this request was supported by the evidence to be presented in his testimony reflecting that he did not participate in the murder and robbery, but rather merely assisted in destroying evidence after the crimes were committed. The trial court deferred ruling on the special instruction request until the conclusion

of the state's evidence. The court later denied the request, explaining that accessory after the fact was not a responsive verdict to second degree murder.

Under La. C.Cr.P. art. 807, a requested special jury charge shall be given by the court if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is adequately covered by the general charge or in another special charge to be given. *State v. Tate,* 01-1658, p. 20 (La. 5/20/03), 851 So.2d 921, 937, *cert. denied,* 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004). Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *State v. Marse,* 365 So.2d 1319, 1323-24 (La. 1978). *See also* La. C.Cr.P. art. 921.

The Louisiana Supreme Court's decision in *State v. Marse*, 365 So.2d 1319 (La. 1978), was the basis of this court's holding in *State v. Gray*, 430 So.2d 1251 (La. App. 1st Cir. 1983). In *Marse*, the defendant, charged with first degree murder, requested special instructions on the elements of negligent homicide, a verdict not responsive to the offense charged. The supreme court determined that negligent homicide was a theory of the defense the jury could have reasonably inferred from the evidence and, therefore, a negligent homicide instruction should have been given. However, the supreme court concluded that the trial court's failure to give the requested instruction on negligent homicide did not warrant a reversal of the defendant's conviction as the jury was adequately informed, without the special jury charge, of its duty to acquit the defendant if the evidence warranted only a finding of criminal negligence. As such, any error with

respect to the trial court's failure to give the requested instruction was harmless. *Id.* at 1322-24.

In the instant case, although accessory after the fact is not a verdict responsive to a charge of second degree murder under La. C.Cr.P. art. 814 there is some evidence in the record, particularly the defendant's version of the events as presented in his trial testimony, from which a jury could have reasonably inferred the defendant to be guilty of the offense of accessory after the fact and not of being a principal to the killing. As such, the trial court was obligated to instruct the jury as to the law applicable to this theory of the defense. *See State v. Gray*, 430 So.2d at 1253. *But cf. State v. Williams*, 606 So.2d 1387, 1389-91 (La. App. 2nd Cir. 1992).

While acknowledging that the assignment presents a legitimate issue, we must conclude that the trial court's failure to give the requested charge, while erroneous, does not constitute reversible error. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). We find the trial court's refusal to include defendant's requested accessory after the fact instruction to be harmless error. The record reflects there was sufficient discussion at trial, without the special jury charge, to inform the jury that if it believed defendant was only guilty of accessory after the fact, it should return a verdict of not guilty. Since the only verdicts given the jury for consideration were guilty as charged of second degree murder, guilty of manslaughter, guilty of negligent homicide, and not guilty, it was not absolutely necessary for the trial court to have given an explicit instruction on accessory after the fact in order to convey to the jury the definition of accessory after the fact, and also that an accessory finding must

result in a verdict of not guilty. During opening and closing arguments, defense counsel repeatedly advised the jury that, if anything, defendant was guilty of the offense of accessory after the fact. Thus, we find that the guilty verdict in this case was obviously based upon a finding that defendant was involved in the commission of the offense as a principal and was surely unattributable to the omission of the accessory after the fact instruction. Under the circumstances of this case, where the offense of accessory after the fact was clearly discussed in opening and closing arguments, we do not find that defendant's substantial rights were prejudiced by the failure of the trial court to give the requested special instruction pertaining to this theory of defense. *See State v. Gray*, 430 So.2d at 1253.

Accordingly, we conclude that this assignment of error ultimately lacks merit.

THIRD ASSIGNMENT OF ERROR:
EXCESSIVE SENTENCE

In his final assignment of error, defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. Citing his youthful age of eighteen and the fact that he has a learning disability, he asserts that the thirty-five year sentence provided by the trial court is nothing more than a purposeless and needless infliction of pain and suffering.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). 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. *State v. Hogan*,

480 So.2d 288, 291 (La. 1985). Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979); *State v. Lanieu*, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, *writ denied*, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lobato*, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. C.Cr.P. art. 894.1. The trial court need not recite the entire checklist of article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Herrin*, 562 So.2d 1, 11 (La. App. 1st Cir.), *writ denied*, 565 So.2d 942 (La. 1990). In light of the criteria expressed by article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. *State v. Watkins*, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982).

The penalty provision of La. R.S. 14:31(B) provides that punishment for a manslaughter conviction shall be imprisonment at hard labor for not more than forty years. Thus, defendant's sentence of thirty-five years at hard labor was within the statutory requirements.

In sentencing defendant, although the trial judge did not list every aggravating or mitigating circumstance, the record indicates that it

considered relevant factors of the sentencing guidelines set forth in article 894.1. Prior to imposing sentence, the trial court specifically noted that defendant was a "young man" and the problems he experienced during his youth. The court also observed, however, that the offense involved entering the victim's home to commit the crime.

Considering the reasons for sentence provided by the trial court and the circumstances of the instant offense, we find no abuse of sentencing discretion in this case. Reviewing the facts and circumstances of the senseless killing, we cannot conclude that the trial judge abused his discretion in imposing the thirty-five year sentence, which is five years below the maximum sentence that could have been imposed on the manslaughter conviction. In light of the harm to society and to the victim, the sentence does not constitute the needless imposition of pain and suffering, nor does it shock our sense of justice.

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

CONVICTION AND SENTENCE AFFIRMED.