

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2007 KA 0675**

**STATE OF LOUISIANA**

**VERSUS**

**ADELL ATKINS**

**Judgment Rendered: November 2, 2007**

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On Appeal from the Nineteenth Judicial District Court  
In and For the Parish of East Baton Rouge  
State of Louisiana  
Docket No. 09-04-0709

Honorable Todd Hernandez, Judge Presiding

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Hon. Doug Moreau  
District Attorney  
Baton Rouge, Louisiana

Counsel for Appellee  
State of Louisiana

By: Aaron Brooks  
Assistant District Attorney

Frank Sloan  
Mandeville, Louisiana

Counsel for Defendant/Appellant  
Adell Atkins

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**BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.**

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**McCLENDON, J.**

The defendant, Adell Atkins, was charged by grand jury indictment with one count of first degree murder (count one), a violation of LSA-R.S. 14:30, two counts of attempted first degree murder (counts two and three), violations of LSA-R.S. 14:30 and 14:27, and one count of simple escape (count four), a violation of LSA-R.S. 14:110.<sup>1</sup> He pled not guilty to all charges. Following a trial by jury on counts one, two, and three, the defendant was found guilty as charged on all counts. Thereafter, pursuant to the recommendation of the jury, the trial court sentenced the defendant to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence on count one. The trial court sentenced the defendant to imprisonment at hard labor for twenty-five years without benefit of probation, parole, or suspension of sentence on count two and on count three. The trial court ordered that the sentences be served consecutively. After the imposition of the sentences, the state dismissed count four.

The defendant now appeals, urging in a single assignment of error that the trial court erred in imposing consecutive sentences. Finding no merit in the assigned error, we affirm the defendant's convictions and sentences.

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<sup>1</sup> The joinder of these offenses in one indictment was improper. LSA-C.Cr.P. art. 493 allows two or more offenses to be charged in the same indictment provided the offenses are triable by the same mode of trial. First degree murder is triable by a jury of twelve persons, all of whom must concur to render a verdict and thus cannot be joined with attempted first degree murder which is triable by a jury of twelve persons, ten of whom must concur to render a verdict, and simple escape which is triable by a jury of six, all of whom must concur to render a verdict. See LSA-Const. art. I, § 17A; LSA-C.Cr.P. art. 782(A); LSA-R.S. 14:30(C), 14:27(D)(1) & 14:110(B)(3). However, the defendant waived the misjoinder of offenses by not filing a motion to quash the indictment on the basis of the misjoinder as required by LSA-C.Cr.P. art. 495, and by moving forward with the trial. See *State v. Mallett*, 357 So.2d 1105, 1109 (La.1978), cert denied, 439 U.S. 1074, 99 S.Ct. 848, 59 L.Ed.2d 41 (1979).

## FACTS

On August 16, 2004, the defendant, along with his co-defendant, Terry Thompson, decided that they would rob the Urban Sports Center store located on Greenwell Springs Road in Baton Rouge. Armed with concealed handguns, the defendant and Thompson pretended to patronize the store. They lingered in the store until closing time. Shortly after the front doors were locked, the defendant and Thompson pulled out their guns and began shooting. Thompson was identified as the assailant who shot the manager, Nidal Hamideh, and his wife, Hana Hamideh. The defendant was identified as the assailant who shot Jermaine Lee, a store employee. Hana Hamideh did not survive the shooting.

## ASSIGNMENT OF ERROR

In his sole assignment of error on appeal, the defendant contends that the trial court erred in ordering the sentences to be served consecutively rather than concurrently. Specifically, the defendant argues that there is no justification for imposing consecutive sentences because the injuries actually caused by his actions (shooting Jermaine Lee) were not especially cruel.

LSA-C.Cr.P. art. 881.1 states, in pertinent part:

A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.

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B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.

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E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider

sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.

Our review of the record reflects that defense counsel did not make a written or oral motion to reconsider sentence. Under LSA-C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to file or make a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. See also State v. Duncan, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). Thus, the defendant is barred procedurally from now having this assignment of error reviewed on appeal. See State v. LeBouef, 97-0902, p. 3 (La. App. 1 Cir. 2/20/98), 708 So.2d 808, 809, writ denied, 98-0767 (La. 7/2/98), 724 So.2d 206; State v. Duncan, 94-1563 at p. 2, 667 So.2d at 1143.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

**CONVICTIONS AND SENTENCES AFFIRMED.**