NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1808

STATE OF LOUISIANA

VS.

PAUL J. WHITE

****

JUDGMENT RENDERED: FEBRUARY 8, 2008

****

ON APPEAL FROM THE
TWENTY-THIRD JUDICIAL DISTRICT COURT
DOCKET NUMBER 18982, DIVISION D
PARISH OF ASCENSION, STATE OF LOUISIANA

HONORABLE PEGRAM J. MIRE, JUDGE

****

ANTHONY FALTERMAN **DISTRICT ATTORNEY** **DONALDSONVILLE, LA**	**ATTORNEY FOR** **PLAINTIFF/APPELLEE** **STATE OF LOUISIANA**
AND	
DONALD D. CANDELL **ASSISTANT DISTRICT ATTORNEY** **GONZALES, LA**	**ATTORNEY FOR** **PLAINTIFF/APPELLEE** **STATE OF LOUISIANA**
FRANK SLOAN **MANDEVILLE, LA**	**ATTORNEY FOR** **DEFENDANT/APPELLANT** **PAUL J. WHITE**

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ

MCDONALD, J.

The defendant, Paul J. White, was charged by bill of information with three counts of attempted first degree murder of a peace officer (counts 1, 2 and 3), violations of La. R.S. 14:30 and 14:27; one count of armed robbery (count 4), a violation of La. R.S. 14:64; and one count of aggravated flight from an officer (count 5), a violation of La. R.S. 14:108.1(C). He pled not guilty. Following a jury trial, the defendant was found guilty as charged on all counts, except for count 2. On count 2, the defendant was found guilty of the responsive offense of attempted manslaughter (of Deputy Baldwin), a violation of La. R.S. 14:31 and 14:27. For each of the attempted first degree murder convictions (counts 1 and 3), the defendant was sentenced to fifty years at hard labor. For the attempted manslaughter conviction (count 2), the defendant was sentenced to twenty years at hard labor. For the armed robbery conviction (count 4), the defendant was sentenced to fifty years at hard labor. For the aggravated flight from an officer conviction (count 5), the defendant was sentenced to two years at hard labor. The sentences were ordered to run concurrently. The defendant now appeals, designating four assignments of error. We affirm the armed robbery conviction (count 4) and sentence, and the aggravated flight from an officer conviction (count 5) and sentence. We reverse the attempted first degree murder convictions (counts 1 and 3) and vacate the sentences. We reverse the attempted manslaughter conviction (count 2) and vacate the sentence.

FACTS

On July 22, 2005, at about 11:15 p.m., the defendant pumped $10.13 worth of gas into his pickup truck at the Super Stop Shell station in Prairieville, Ascension Parish. The defendant walked into the store and gave Royd Riley, the cashier, eight dollars. The defendant told Riley he did not have the rest of the money. The defendant then pulled a knife and told Riley to open the register and give him the

money. Riley grabbed for the knife, but the defendant pulled back. The defendant left the store without taking any money and drove away in his truck.

The police were called, and the defendant was spotted minutes later near Airline Highway by Deputy Bill Taylor with the Ascension Parish Sheriff's Office. Deputy Taylor used his lights and siren to attempt to pull the defendant over, but the defendant refused to stop. Several other deputies with the Ascension Parish Sheriff's Office joined in the chase, including Deputies David Baldwin, Micah Berteau, Mike Johnson, and Richard Boe. All the deputies were in separate vehicles, except for Deputies Johnson and Boe, who were riding together. The defendant drove erratically over the 45 miles per hour speed limit for several minutes. He swerved across both lanes of traffic, cut through parking lots, and drove into the left lane of oncoming traffic. Deputy Taylor positioned his unit in front of the defendant's truck and slowed down, causing the defendant to collide twice into the rear of Deputy Taylor's unit. After the second collision, both vehicles stopped and the defendant exited his truck with the knife still in his hand and began running.

Deputies Taylor, Baldwin, and Berteau chased the defendant behind a residence into a wooded area, while continually ordering the defendant to stop and drop the knife. Deputies Johnson and Boe also gave pursuit. The defendant said that he was not going back to jail, and that they were going to have to shoot him. Deputies Taylor, Baldwin, and Berteau surrounded the defendant and continued to order the defendant to drop the knife. Deputy Taylor was within approximately ten feet of the defendant, with his gun drawn, when the defendant advanced toward him and slashed at him with the knife. Deputy Taylor did not shoot at the defendant for fear it would hit one of the surrounding deputies. Deputy Berteau had approached the defendant from behind and was attempting to disarm him with a police baton. After slashing at Deputy Taylor, the defendant turned around and slashed at Deputy Berteau. The defendant continued to move, attempting to escape. Deputies Taylor and Berteau

sprayed and hit the defendant with pepper spray; however, it did not seem to have any effect. At some point, the defendant slashed at Deputy Baldwin.

The escape attempt and pursuit continued and the defendant exited the woods into a cleared area. Deputy Taylor had holstered his weapon and was facing the defendant attempting to disarm him with his police baton. Deputy Baldwin was able to approach the defendant from the rear and disarm him with a baton strike. The defendant was subdued, handcuffed and taken to jail. The defendant could not be booked until he had been taken to the hospital to have his injuries examined. Deputy Baldwin took the defendant to Prevost Hospital and was standing guard by him in the waiting room when he made several unsolicited comments. The defendant told Deputy Baldwin that he was sorry he had caused all of the problems, and that he had been smoking crack all day and was trying to get some money to get more crack.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the evidence was insufficient to support the two convictions for attempted first degree murder, the conviction for attempted manslaughter, and the conviction for armed robbery. The defendant does not contest the conviction for aggravated flight from an officer.

When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to an acquittal under **Hudson v. Louisiana**, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proved beyond a reasonable doubt. When the entirety of the evidence, including inadmissible evidence which was

erroneously admitted, is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion by the court of the trial error issues as to that crime would be pure dicta since those issues are moot. **State v. Hearold**, 603 So.2d 731, 734 (La. 1992).

A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson**, 443 U.S. at 319, 99 S.Ct. at 2789. See also La. Code Crim. P. art. 821(B); **State v. Ordodi**, 2006-0207, p. 10 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585, pp. 4-5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Armed Robbery Conviction

La. R.S. 14:64(A) provides:

> Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

The defendant contends that the armed robbery statute includes a temporal sequence. The defendant attempted to rob Riley, the cashier, at knifepoint of the money in the cash register. This was the only time force or intimidation was used. However, the defendant left without taking any money from the store. He did not pay for $2.13 worth of gas; however, he had already pumped the gas before he even

entered the store and therefore, he did not take the gas by use of force or intimidation. Accordingly, the defendant argues, his armed robbery conviction should be reduced to attempted armed robbery.

The defendant's assertion regarding a temporal sequence is erroneous. The use of force or intimidation does not have to occur before, or contemporaneous with, the taking. The force or intimidation element of robbery is satisfied by evidence that force or intimidation directly related to the taking occurred in the course of completing the crime. **State v. Meyers**, 620 So.2d 1160, 1162-63 (La. 1993).

A rational trier of fact could have reasonably concluded that the gas taken by the defendant was in the immediate control of the cashier. Further, a rational trier of fact could have concluded beyond a reasonable doubt that the defendant used force or intimidation to retain possession of the gas without paying for it and to effect an escape from the scene. The act of holding up the cashier at knifepoint intimidated the cashier from attempting to prevent the defendant's escape. This intimidation was directed at the victim of the taking at the place of the taking and immediately after the taking of the gas, and a rational juror could have concluded that the intimidation occurred in the course of the defendant's committing a robbery. See **Meyers**, 620 So.2d at 1163.

After a thorough review of the record, we find that the evidence supports the guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of armed robbery.

The assignment of error as to the issue of the sufficiency of the armed robbery conviction is without merit.

Attempted Manslaughter and Attempted First Degree Murder Convictions

The defendant was charged with three counts of attempted first degree murder of a peace officer. He was convicted of two counts of attempted first degree murder of Deputies Taylor and Berteau and one count of the responsive offense of attempted manslaughter of Deputy Baldwin. First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties. La. R.S. 14:30(A)(2). Manslaughter is a homicide which would be first degree murder or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31(A)(1). Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose. La. R.S. 14:27.

In order for an accused to be guilty of attempted murder, a specific intent to kill must be proven beyond a reasonable doubt. Although a specific intent to inflict great bodily harm may support a conviction of murder, the specific intent to inflict great bodily harm will not support a conviction of attempted murder. **State in Interest of Hickerson**, 411 So.2d 585, 587 (La. App. 1st Cir.), writ denied, 413 So.2d 508 (La. 1982). See **State v. Butler**, 322 So.2d 189 (La. 1975). See also **State v. Fauchetta**, 98-1303, p. 7 (La. App. 5th Cir. 6/1/99), 738 So.2d 104, 108, writ denied, 99-1983 (La. 1/7/00), 752 So.2d 176. Attempted manslaughter also requires the presence of specific intent to kill. **State v. Brunet**, 95-0340, p. 5 (La. App. 1st Cir. 4/30/96), 674 So.2d 344, 347, writ denied, 96-1406 (La. 11/1/96), 681 So.2d 1258.

The testimony and evidence presented at trial, when viewed pursuant to the **Jackson** standard in the light most favorable to the prosecution, was sufficient to

support the convictions of attempted manslaughter of Deputy Baldwin and attempted first degree murder of Deputies Taylor and Berteau. When Deputies Taylor, Baldwin, and Berteau surrounded the defendant with their guns drawn, and continued to order the defendant to drop the knife, they did not shoot the defendant, despite being engaged in a lethal-force encounter, because the other deputies were too close to the defendant. Deputies Taylor, Berteau, Johnson, and Boe testified at trial that the defendant told them that he was not going back to jail, and that they were going to have to shoot him. Deputy Taylor was within feet of the defendant when the defendant advanced toward him and slashed at him with the knife, causing him to jump back. At this time, Deputy Berteau was sneaking up behind the defendant, and the defendant turned and slashed at him, causing Deputy Berteau to retreat. Deputy Taylor testified that he did not see the defendant slash at Deputy Baldwin. Also, Deputy Johnson offered no testimony about Deputy Baldwin. However, Deputy Baldwin testified that the defendant slashed at Deputy Taylor, then at Deputy Berteau, and then at him. Deputy Baldwin also felt the encounter was a deadly-force situation and that, if he would have had a clear shot, he would have taken the shot.

According to Deputy Johnson, he saw the defendant lunge at Deputy Taylor and attempt to stab him in the torso, but Deputy Taylor dodged the defendant's knife thrust. Deputy Johnson also saw the defendant lunge at Deputy Berteau and try to stab him. Deputy Johnson testified that the bulletproof vests that the deputies were wearing were designed to stop a bullet only, and that a knife would go right through them.

This evidence was sufficient to infer from the circumstances that the defendant intended to kill Deputies Taylor, Berteau, and Baldwin. The defendant's acts of slashing or stabbing at three law enforcement officers with a large knife after just having informed them that he was not going back to jail and that they would have to shoot him, when reviewed in a light most favorable to the prosecution, manifests an

intent to kill. See **State v. Taylor**, 96-320, pp. 9-10 (La. App. 3rd Cir. 11/6/96), 683 So.2d 1309, 1314-15, writ denied, 96-2828 (La. 6/20/97), 695 So.2d 1348.

The assignment of error as to the issue of the sufficiency of the attempted manslaughter conviction and the attempted first degree murder convictions is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in instructing the jury that attempted murder included an attempt to commit great bodily harm. This argument has merit.

After both parties rested and prior to closing arguments, defense counsel objected to the jury charge which provided that in order to find the defendant guilty, the jury must find that he had specific intent to kill or to inflict great bodily harm upon a peace officer. Defense counsel correctly stated that it was his understanding of the law that:

> [T]he correct charge should read for an Attempted First Degree Murder that "intent to inflict great bodily harm" is not sufficient to support a conviction for Attempted First Degree Murder. It must be "specific intent to kill" only. In other words, if Mr. White only had intention to inflict great bodily harm, then under our law, he's got to be found not guilty of the Attempted First Degree Murder[.]

The prosecutor responded that the jury instructions were taken straight from the revised statute and that "[i]t's either 'with an intent to kill,' 'or an intent to inflict great bodily harm[.]'" The trial court agreed with the prosecutor and overruled defense counsel's objection.

The defendant was charged with three counts of attempted first degree murder of a peace officer and convicted of two counts of attempted first degree murder of a peace officer and one count of the responsive charge of attempted manslaughter of a peace officer. As discussed above, in order for an accused to be guilty of attempted

first degree murder or attempted manslaughter, a specific intent to kill must be proven beyond a reasonable doubt.

During his closing argument, the prosecutor stated in pertinent part:

> Once again, go back to the first definition of what did the circumstances indicate from his actions, what was his intent based on the circumstances. Okay? And you take all of those factors into consideration to determine if he had a specific intent to kill or to inflict great bodily harm. Okay?

During his rebuttal closing argument, the prosecutor stated in pertinent part:

> The law says, and I'm talking about the Murder, an "attempt" is defined as "any person, who having a specific intent . . . accomplished his purpose." So, once again, that's right. You go to his intent. He's threatening. He's jabbing at police officers. His intent is to kill. And the law is "specific intent to kill or to inflict great bodily harm." I submit to you attempting to stab an officer with that 12- or 13-inch butcher knife, wherever I put it, is an intent to inflict great bodily harm. I don't care how you slice it. If you get stabbed with that knife, it's going to be great bodily harm, and if he intended and whether or not he could have accomplished it is immaterial. He attempted to do it; therefore, he's guilty of attempting to kill Sergeant Bill Taylor, attempting to kill Deputy David Baldwin, and attempting to kill Deputy Berteau.

A misstatement of the law by the prosecutor does not prejudice a defendant if the judge subsequently admonishes or correctly instructs the jury. **State v. Roy**, 95-0638, p. 14 (La. 10/4/96), 681 So.2d 1230, 1239, cert. denied, 520 U.S. 1188, 117 S.Ct. 1474, 137 L.Ed.2d 686 (1997). The trial court in the instant matter neither admonished nor correctly instructed the jury. To the contrary, the trial court added to the jury's confusion by providing the following jury instructions:

> No. 1, thus, in order to find him guilty of Attempted First Degree Murder, first of all, you have to find that he attempted to kill Sergeant Bill Taylor [during the perpetration or attempted perpetration of an enumerated felony], or that Paul White has a specific intent to kill or inflict great bodily harm upon a . . . peace officer . . . and when the specific intent to kill or inflict great bodily harm is directly related to the victim's status as a . . . peace officer[.]
>
> No. 2, in order to find him guilty of Attempted First Degree Murder of Deputy Baldwin, the same requirements. No 3, in order to find him guilty of Attempted First Degree Murder of Deputy Berteau, the same requirements. . . .
>
> * * * * *
>
> The second responsive verdict for Attempted First Degree Murder is "Manslaughter." " 'Manslaughter' is . . . such that the killing would

not be murder under 30 or 30.1." So, that's the definition of "Manslaughter." Again, with that, you have to add "attempt." Okay?

Accordingly, the trial court's jury instructions violated the well-established rule of **Butler**. However, the error at issue is not structural, but rather a trial error which may or may not have prejudiced defendant and thus is subject to harmless error analysis. See **State v. Hongo**, 96-2060, p. 5 (La. 12/2/97), 706 So.2d 419, 422. An invalid instruction on the elements of an offense is harmless if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the erroneous instruction. The determination is based upon "whether the guilty verdict actually rendered in *this* trial 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). **Hongo**, 96-2060 at p. 4, 706 So.2d at 421.

In the instant matter, the testimony of the deputies varied to some degree depending on who was testifying. For example, the two deputies not involved directly in the altercation with the defendant testified that the defendant lunged at the deputies. Deputy Johnson testified that he saw the defendant lunge at Deputy Taylor and try to stab him in the torso area, and that Deputy Taylor dodged the thrust with the knife. Deputy Johnson further testified that he saw the defendant "slash at Deputy Berteau and then lunge at him and try and stab him, also." Deputy Johnson offered no testimony about Deputy Baldwin. Deputy Johnson also testified that he was prepared to use deadly force and that he felt the situation was a lethal-force encounter. He testified that the bulletproof vests that all the deputies were wearing were designed to stop a bullet only, and that a knife would go right through them. Deputy Boe testified that he observed the defendant at several points during the foot pursuit lunge at Deputies Taylor, Baldwin, and Berteau at different times.

Deputy Taylor testified that when he was within ten feet of the defendant, the defendant suddenly advanced toward him and made a slash with the knife. Deputy

Taylor jumped back. At the same time, Deputy Berteau was sneaking up behind the defendant. When the defendant saw Deputy Berteau, the defendant slashed at him, and Deputy Berteau retreated. Deputy Taylor testified that he did not see the defendant slash at Deputy Baldwin. On direct examination, when the prosecutor asked him if he thought it was a life or death situation, Deputy Taylor responded, "I was in fear of receiving great bodily harm." Deputy Taylor also testified that if he would have had a clear shot at the defendant, he would have taken the shot.

On direct examination, Deputy Baldwin testified that the defendant slashed at Deputy Taylor, then at Deputy Berteau, and then at him (Deputy Baldwin). He also testified that it was a deadly-force situation at the time and that, if he would have had a clear shot, he would have taken the shot. On cross-examination, Deputy Baldwin testified that after the defendant advanced at Deputy Berteau, the defendant did not keep going or run after Deputy Berteau. Deputy Baldwin explained, "Well, Deputy Berteau backpedaled, and that -- that was the end of that. He didn't continue to chase him down."

Deputy Berteau testified on direct examination that the defendant lunged at him, and that he and Deputy Taylor sprayed him with pepper spray. He also testified that if he would have had a clear shot, he would have taken the shot. After spraying him, Deputy Berteau holstered his gun and pulled out his baton. According to Deputy Berteau, the defendant charged at him, and he dropped his baton and backpedaled. When he could not get his gun out, he turned around and ran. When he turned back around, no one was behind him. The defendant and the other deputies had run out of the woods in the opposite direction. On cross-examination, the following colloquy between defense counsel and Deputy Berteau took place:

> Q. No, that's okay. . . . If he was focused on Deputy Taylor, he didn't make an advance and then continue to advance and chase him or --
> A. No.
> Q. -- anything like that?
> A. No.

Q. Okay.
A. He advanced toward him and -- and, you know, turned around, and he would kind of --
Q. And kind of retreated?
A. -- kind of do it to everybody, you know, just to let everybody know, "Hey, I got the knife" or whatever, you know, but he would just, you know, "I'm not going back to jail," and turn and do it to -- to the next deputy, you know."

Later during cross-examination, the following colloquy between defense counsel and Deputy Berteau took place:

Q. Okay. Now, I want to ask you, I guess, specifically about the advances that you witnessed of Mr. White. Okay? There was one advance that you saw at Deputy Taylor, correct?
A. (Nods in an affirmative manner.)
Q. Okay. And were you able to notice or did you observe whether or not Mr. White retreated back after that or continued on with the advance?
A. It -- it looked like it was just a brief, you know, jump forward toward maybe scare him, to make him get back, you know. It didn't look like he -- you know, it -- he didn't take like several steps in a chase. You know, I mean, it was -- it was an advancement enough to -- in a threatening manner, you know. I'm -- like I'm coming after you, but he didn't break out in a run and chase him, you know.

* * * * *

Q. Okay. With respect to an advance made at you, did he continue that advance and, you know, really jab at you or was this advance followed by an immediate retreat?
A. It -- it -- when -- when he sat -- when he turned around and I seen his eyes were looking dead at me and he turned around with that knife, and I don't know if he was getting up at the -- you know, exactly off the ground. By the time I figured he was coming after me, I backed up. I mean, I hit a tree. I dropped my ASP. I turned around and took off in -- in the opposite direction. I -- I mean, as far as I know, he wouldn't -- he didn't even leave the ground, but I -- I didn't stick around to find out.

Base on the foregoing evidence, we cannot say that the guilty verdicts were unattributable to the trial court error. Prior to deliberating, the jury was repeatedly told by the prosecutor and the trial court that finding that the defendant had either specific intent to kill or to inflict great bodily harm upon a peace officer would satisfy the definition of attempted first degree murder. Some of the testimony, especially Deputy Berteau's testimony on cross-examination, suggested that the defendant swung his knife as little as one time at each of the three deputies in a defensive-type posture trying to escape. The defendant never verbally threatened the deputies. No

deputy was hurt, or even touched by the knife. *Cf.* **Brunet**, 95-0340 at pp. 5-7, 674 So.2d at 347-48 (where similar instruction was found harmless considering the severity of the wound inflicted). It is not unreasonable that the jury could have concluded that the defendant did not have specific intent to kill, but did have intent to inflict great bodily harm. Because it is questionable that the jury would have convicted of attempted first degree murder, or even attempted manslaughter, had it known that it had to find a specific intent to kill, we cannot say that the erroneous jury instruction was harmless error. See **Hickerson**, 411 So.2d at 586-87 (where this court found that at most the defendant had the specific intent to inflict great bodily harm when he stabbed his victim in the shoulder with a twelve-inch knife). See **Taylor**, 96-320 at pp. 11-15, 683 So.2d at 1315-18.

Accordingly, the two convictions for attempted first degree murder (counts 1 and 3) and the conviction for attempted manslaughter (count 2) are reversed. The sentences for these convictions are vacated and the case is remanded to the trial court. On remand, with regard to count 2, the State may not retry the defendant on the charges of attempted first degree murder or attempted second degree murder. The fact that the defendant was found guilty of a lesser degree of the offense charged constitutes an acquittal of all greater offenses charged, and the defendant cannot be retried on the greater offenses on a new trial. La. Code Crim. P. art. 598(A); **State v. Boudreaux**, 402 So.2d 629, 630 (La.1981).

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that the trial court erred in sentencing him before ruling on his motion for a new trial and motion for postverdict judgment of acquittal. Specifically, the defendant contends that the trial court did not observe the required twenty-four hour delay between the denial of the motions and sentencing.

At the sentencing hearing, prior to the trial court sentencing the defendant, defense counsel informed the court that he had looked over the presentence investigation report. He then addressed the court, asking it to consider the fact that the only person hurt in this case was the defendant. Defense counsel then informed the trial court that the defendant wished to speak. After the defendant spoke, defense counsel informed the trial court that the defendant's mother wished to speak. The defendant's mother was sworn in and testified, among other things, about the defendant's addiction. At no time during this part of the sentencing hearing did defense counsel inform the trial court of any outstanding motions for a new trial or postverdict judgment of acquittal. Following the defendant's mother's testimony, the following colloquy took place:

> The Court: Anything further, Mr. Unangst [defense counsel]?
> Mr. Unangst: No, sir. Thank you, Judge.
> The Court: That's it?
> Mr. Unangst: That's it.

The trial court then sentenced the defendant. Following sentencing, defense counsel informed the trial court that yesterday he had filed a motion for a new trial and a motion for postverdict judgment of acquittal. The trial court denied the motions.

The defendant did not enter a contemporaneous objection to the trial court's failure to rule on his motion for a new trial or motion for postverdict judgment of acquittal before sentencing. At the conclusion of the defense witness testifying, the trial court asked defense counsel if there was anything further, to which defense counsel responded, "No, sir." The trial court again offered defense counsel the opportunity to address the court with any other matter when it asked, "That's it?" Defense counsel responded, "That's it." Therefore, the defendant's failure to enter a contemporaneous objection precludes him from complaining of this error on appeal. We find further that by twice informing the trial court that he had no new business prior to sentencing, the defendant implicitly waived the twenty-four hour waiting

period required by La. Code Crim. P. art. 873. See **State v. Lindsey**, 583 So.2d 1200, 1205-06 (La. App. 1st Cir. 1991), writ denied, 590 So.2d 588 (La. 1992). See also **State v. Dixon**, 620 So.2d 904, 912-13 (La. App. 1st Cir. 1993). We also find that by the defendant conducting a sentencing hearing and calling a witness on his behalf to testify prior to his sentencing, he implicitly waived the waiting period. Moreover, the defendant has not cited any prejudice resulting from the trial court's failure to delay sentencing, nor have we found any indication that he was prejudiced. Thus, any error which occurred is not reversible. See **State v. Steward**, 95-1693, p. 23 (La. App. 1st Cir. 9/27/96), 681 So.2d 1007, 1019.

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues the trial court erred in imposing excessive sentences. Specifically, the defendant contends that the maximum sentences imposed for the two attempted first degree murder convictions, the attempted manslaughter conviction, and the aggravated flight from an officer conviction are excessive. The defendant does not challenge his sentence for armed robbery. Since the sentences for the attempted first degree murder convictions and the attempted manslaughter conviction are vacated, the only sentence for our review is the two-year sentence for the aggravated flight from an officer conviction.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The

trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code of Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The trial court adequately considered the factors set forth in Article 894.1. The trial court also reviewed the presentence investigation report and noted that the defendant was officially classified as a third-felony offender, with a criminal history that included possession of a Schedule II Controlled Dangerous Substance, theft, and simple robbery.

This Court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Hilton**, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. In sentencing the defendant, the trial court stated that it believed there was an undue risk that during a period of a suspended sentence or probation, the defendant would commit another crime. The trial court further stated that it believed the defendant knowingly created a risk of death or great bodily harm to more than one person.

Considering the trial court's careful review of the circumstances and the defendant's criminal history, we find no abuse of discretion by the trial court. Accordingly, the two-year sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

This assignment of error is without merit.

ARMED ROBBERY CONVICTION (COUNT 4) AND SENTENCE AFFIRMED; AGGRAVATED FLIGHT FROM AN OFFICER CONVICTION (COUNT 5) AND SENTENCE AFFIRMED; ATTEMPTED FIRST DEGREE MURDER CONVICTIONS (COUNTS 1 AND 3) REVERSED AND SENTENCES VACATED; ATTEMPTED MANSLAUGHTER CONVICTION (COUNT 2) REVERSED AND SENTENCE VACATED.