

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2006 KA 1631**

**STATE OF LOUISIANA**

**VERSUS**

**TERRY THOMPSON**

**Judgment rendered: March 28, 2007**

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**On Appeal from the 19<sup>th</sup> Judicial District Court  
Parish of East Baton Parish, State of Louisiana  
Case Number 09-04-0720; Sec: VII  
The Honorable Todd W. Hernandez, Judge Presiding**

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**BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.**

*Hughes, J., concurs.*



## **DOWNING, J.**

Defendant, Terry Thompson, was charged by grand jury indictment with first degree murder (count one) and attempted first degree murder (counts two and three), violations of La. R.S. 14:30 and 14:27. He pled not guilty. After a trial by jury, the defendant was found guilty as charged.

During the penalty phase of the trial, the trial court ordered a mistrial based on the deadlocked status of the jury. The trial court denied the defendant's motion for new trial. As to count one, the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. As to counts two and three, the defendant was sentenced to twenty-five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The court ordered that the sentences be served consecutively. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals, raising the following assignment of error:

1. The evidence presented to the jury was insufficient to prove the essential elements of the crimes of first-degree murder and attempted first-degree murder beyond a reasonable doubt.

For the following reasons, we affirm the convictions and sentences.

### **FACTS**

On or about August 16, 2004, near store closing time, supposed patrons of Urban Sports Center (located at 7790 Greenwell Springs Road in Baton Rouge, Louisiana) shot three store employees in the course of an armed robbery. Adell Atkins was identified as the assailant who shot Jermaine Lee, one of the store employees. The defendant was identified as the assailant who shot Nidal Hamideh, the store manager, and his wife, Hana Hamideh. Hana Hamideh did not survive the shooting.

## SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues that the evidence presented by the State was insufficient to prove that the defendant had a specific intent to kill as to each count. The defendant specifically contends that the person who shot the victims used a .22 caliber revolver and wore a cap at the time of the offenses. The defendant contends that he used a .38 caliber revolver, that he did not have on a cap at the time of the offenses, and that he did not shoot any of the victims. The defendant further contends that there was no evidence that he knew Atkins had a weapon or that he knew Atkins had the specific intent to kill anyone. Finally, the defendant contends that Atkins's specific intent to kill cannot be transferred to the defendant. Herein, the defendant does not challenge the evidence of the armed robbery.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), and adopted by the Legislature in enacting La. Code Crim. P. art. 821, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. The *Jackson* standard of review 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 trier of fact must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. *State v. Graham*, 02-1492, p. 5 (La. App. 1 Cir. 2/14/03), 845 So.2d 416, 420. When a case involves circumstantial evidence and the jury reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant

is guilty unless there is another hypothesis which raises a reasonable doubt.

*State v. Moten*, 510 So.2d 55, 61 (La. App. 1 Cir. 1987).

La. R.S. 14:30A defines first degree murder, in pertinent part, as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of armed robbery, first degree robbery, second degree robbery, or simple robbery.<sup>1</sup> Under La. R.S. 14:27A, a person is guilty of an attempt to commit an offense when he has a specific intent to commit a crime and “does or omits an act for the purpose of and tending directly toward the accomplishing of his object[.]” Thus, an attempt to commit first-degree murder requires that the offender possess the specific intent to kill and that he commit an overt act tending toward the accomplishment of that goal. La. R.S. 14:27A & 14:30A.

Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant’s actions or facts depicting the circumstances. *State v. Cummings*, 99-3000, p. 3 (La. App. 1 Cir. 11/3/00), 771 So.2d 874, 876. Specific intent to kill can be implied by the use of a deadly weapon such as a knife or a gun. Further, specific intent may be inferred from a defendant’s actions and the circumstances. *State v. Maten*, 04-1718, p. 5 (La. App. 1 Cir. 3/24/05), 899 So.2d 711, 716-717, writ denied, 05-1570 (La. 1/27/06), 922 So.2d 544.

La. R.S. 14:24 provides:

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<sup>1</sup> During the trial of this matter, the State focused its case on two basic first-degree murder theories: 1) that the defendant specifically intended to kill during the commission of an armed robbery, and/or 2) that the defendant had specific intent to kill more than one person. Nonetheless, the judge instructed the jury as to the first theory only.

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

While all persons “concerned in the commission of a crime” are principals under La. R.S. 14:24, this rule has important qualifications. All persons concerned in the commission of attempted first or second-degree murder must possess the specific intent to kill to be found guilty of the offense. *State v. LeBlanc*, 94-0282 (La. 6/3/94), 637 So.2d 489. An individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. *State v. Bridgewater*, 00-1529, p. 10 (La. 1/15/02), 823 So.2d 877, 890, *cert denied*, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed2d 1089 (2003).

Glennis Bergeron (State witness) and her husband were in Urban Sports Center’s parking lot at the time of the shootings. The Bergerons had pulled into the parking lot to secure some pieces of furniture that were loaded into the back of their truck. As they were shifting the furniture, they heard a “popping noise,” glass shatter, and someone shout, “Don’t shoot me.” The Bergerons immediately entered their vehicle and called for emergency assistance from a nearby location. They observed two individuals walk out of the store.

Jermaine Lee (State witness), who was a shoe clerk at Urban Sports Center, was at work on the night of the offenses. Lee provided the police with a physical description of the assailants and identified them as the defendant and Atkins in photographic lineups and in court during his trial testimony.<sup>2</sup> In Lee’s statement regarding his photographic identification of

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<sup>2</sup> The officers made a photographic lineup including the defendant’s photograph after his fingerprints were found at the scene. (R. 2707). Atkins’s fingerprints were also found at the scene. (R. 2683).

Atkins, Lee wrote, “[H]e shot me[.]” In Lee’s statement regarding his photographic identification of the defendant, Lee wrote that the defendant was known to him “as a killer[.]” The photographic lineups and statements took place on August 24, 2004. According to Lee’s trial testimony, at approximately 8:00 p.m., the electronic door lock was activated, precluding entry but allowing the final customers to exit the store. Ultimately, the defendant and Atkins were the only two supposed patrons left in the store. The defendant selected a pair of shoes and informed Lee that he would be purchasing them after selecting a shirt and some pants. Lee brought the shoes to the counter. Lee looked out of the store door and noted the presence of a possibly occupied truck in the parking lot facing the parking lot exit. As Lee walked back toward the counter with his head down, he observed the defendant and Atkins approaching the front of the store. As Atkins walked through the clothing racks, Lee noticed that he had a gun. Lee stopped in place. When Lee looked up, Atkins “cracked a little smile on his face,” raised his gun, and pulled the trigger. The impact knocked Lee back, but he was able to remain on his feet. Lee ran toward the door in an attempt to escape. As Lee ran into the door, the glass shattered.<sup>3</sup> As the store door was lined with burglar bars, Lee could not escape. Lee turned toward Atkins and begged him not to shoot him again. Lee stood facing toward the inside of the store with his back against the door, as Atkins faced Lee. Lee had a clear view of the front of the store, including the counter area. Atkins aimed his gun toward Lee and instructed him to lie on the floor. Believing he would be executed in the event of his compliance, Lee remained standing. Lee observed the defendant as he stood by the counter

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<sup>3</sup> Lee was unsure as to whether the impact of his body caused the glass door to shatter or whether the door was shot as Lee approached it.

and raised his gun. Lee heard a gunshot and observed Mr. Hamideh grab his face. At the sound of the gunfire, Atkins turned toward the counter.

Lee ran to the bathroom in the back of the store and climbed up into the ceiling. Lee remembered that his cell phone was in his pocket. He used his cell phone to call for emergency assistance. Lee informed the dispatcher of his injury and location. Lee remained on the line with the dispatcher until the police and paramedics arrived. Lee was treated at Our Lady of the Lake Regional Medical Center. Due to the condition and location of the bullet lodged in Lee's chest, it was not removed. The State introduced an X-ray of Lee's chest, revealing the location of the bullet.

During cross-examination, Lee confirmed that he waited on the defendant and Atkins for approximately thirty minutes on the night in question and had ample time to observe them. Lee was questioned regarding his description of the assailants to the police. Regarding whether the assailants were wearing caps at the time of the shooting, Lee stated that Atkins was wearing a cap the whole time while the defendant wore a cap part of the time. At the time of the shooting, Lee stood approximately three to five feet away from Atkins. Lee stated that he also had a clear view of the defendant at the time of the shooting.

Victim Nidal Hamideh testified that around 8:00 p.m. he activated the switch that locks the store door. As he and his wife stood behind the counter conversing, Lee began yelling. Lee told Mr. Hamideh to open the door. Mr. Hamideh looked toward Lee and then toward Mrs. Hamideh. Mr. Hamideh was instantly shot in the face. Mr. Hamideh looked at the assailant as he again fired and struck Mr. Hamideh again. Mrs. Hamideh laid on the floor behind the counter in a futile attempt to avoid gunfire. After Mrs. Hamideh was struck, Mr. Hamideh begged the assailant to stop. Mr. Hamideh was

shot again when he lay over his wife's body in an effort to protect her. When one of the assailants attempted to open the cash register, Mr. Hamideh stood up and opened the register and then used the switch to unlock the door. Before leaving the store, Atkins pointed his gun at Mr. Hamideh and attempted to shoot him. According to Mr. Hamideh, Atkins had run out of bullets. Atkins asked the defendant if he had any more bullets and the defendant responded negatively. The assailants then exited the store. Mr. Hamideh waited for the assailants to reach their vehicle before locking the door. The assailants exited the parking lot after a customer pulled in. Mr. Hamideh attempted to revive Mrs. Hamideh before calling for emergency assistance. In court, Mr. Hamideh specifically identified Atkins as the person who shot Lee. Mr. Hamideh further testified that both assailants used revolvers and both of them fired their weapons.

During cross-examination, Mr. Hamideh confirmed that when he heard a gunshot, he did not look towards Lee. Lee's request that he open the door came immediately after the gunshot. Mr. Hamideh looked towards his wife just before he was shot in the face. Mr. Hamideh specified that the defendant was the person who shot him in the face. According to Mr. Hamideh, the defendant smiled at him before shooting him. He stated that the defendant was standing in front of the counter at the time of the shooting.

Mr. Hamideh also identified the defendant and Atkins in photographic lineups. In his statement regarding the identification of the defendant, Mr. Hamideh wrote, "shot at us and robbed us." In his statement regarding the identification of Atkins, Mr. Hamideh wrote, "shot at me plenty times then robbed me and demand to open ... door." The lineup and statements were given on August 25, 2004. When confronted with his statements during cross-examination, Mr. Hamideh stated that Atkins "probably" took a shot at



him when he was covering his wife's body. Mr. Hamideh stated that the bullet grazed his back. Mr. Hamideh added that Atkins tried to shoot him again, but was out of bullets. During re-direct examination, Mr. Hamideh reiterated that the defendant shot him in the face and Mrs. Hamideh in the head and Atkins shot Lee.

Dr. Cheryl Braud treated Mr. Hamideh following his admission to Our Lady of the Lake Regional Medical Center's emergency room. According to her testimony, two bullets entered Mr. Hamideh's body. He had an entrance wound on his left cheek, and the bullet was lodged between his nose and his mouth. Mr. Hamideh had a second bullet in his scalp around his right ear. Dr. Braud further testified that Mr. Hamideh had an abrasion made by a grazed bullet in his left scapula area and a bullet wound in his right hand. There was also a possibility that another bullet grazed the back of his head. Bullet fragments were removed and given to the police.

Dr. Gilbert Corrigan, an expert in forensic pathology, performed an autopsy on the deceased victim. The deceased victim suffered one gunshot wound behind her left ear. The bullet traveled to the center of the victim's brain. The bullet fragments were removed and collected as evidence. Dr. Corrigan classified the wound as distant. During cross-examination, Dr. Corrigan estimated that the distance of the shooter from the victim was at least two or three feet.

State witness and expert in firearms examination Charles Watson, of the Louisiana State Police Crime Laboratory, testified as to the findings of the examination of the bullet fragments removed from the victims (Mr. and Mrs. Hamideh), a bullet that was found at the scene, and the X-ray of the bullet lodged in Lee's body. According to the findings, the bullet fragments removed from the victims were consistent with a .22 caliber bullet. The

damaged bullet found at the scene was consistent with a .38 caliber bullet. The bullet lodged in Lee's body is within the size range of a .22 caliber bullet. Both .22 caliber and .38 caliber bullets can be fired from revolvers. No casings were found at the scene. According to Watson, this indicates that revolvers were used, as they do not eject cartridges. The officers did not recover any weapons.

Detective Ross Williams of the Baton Rouge City Police Department obtained a warrant for the defendant's arrest after Lee identified him in the photographic lineup. The defendant was arrested on August 24, 2004. A rights form was executed, and he was interviewed. The defendant did not appear to have any gunshot wounds at the time of the arrest. He initially denied any involvement. Then, Sergeant Dennis Moran of the Baton Rouge City Police Department obtained a recorded statement from him. In the recorded statement, the defendant admitted to limited involvement in the robberies (that he acted as the "watchout"), but denied involvement in the shootings. The defendant stated that Atkins did the shooting.<sup>4</sup> He further stated that he had "a three eighty" while Atkins was armed with a .22 caliber revolver. He also admitted to pulling his gun out, but stated that he did not have any bullets.

The defense called one witness, Lt. Madeline Brooks of the Baton Rouge City Police Department. Lt. Brooks took a taped statement from Lee on August 20, 2004, after Lee's hospital release. During the interview, Lee stated that the taller assailant shot him and confirmed that the taller assailant

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<sup>4</sup> The defendant referred to Atkins as "Dre" during the interview, but confirmed that Dre and Adell Atkins were one in the same. The defendant also stated that he ran to the door after "Dre" began firing his weapon, and "Dre" shot the defendant twice. Sergeant Moran testified that there was no evidence, outside of the defendant's statement, that the defendant had been shot during the incident. (R. 2717-2718). The interview took place on August 24, 2004, less than ten days after the date of the offenses.

was wearing a cap. During cross-examination, the State offered Lee's taped statement into evidence and the tape was published.

Herein, the defendant was found guilty of the attempted first-degree murder of Nidal Hamideh and Jermaine Lee and the first-degree murder of Hana Hamideh. The State's burden of proving that the defendant specifically intended to kill the victims could be accomplished by proof that the defendant was the shooter (since Lee was shot in the chest, and the Hamidehs were shot in their heads) or, under the law of principals, that the defendant planned to utilize deadly force during the commission of the robbery. La. R.S. 14:30.1 & 14:24. As previously stated, on appeal, the defendant argues that there was insufficient evidence that he had the requisite specific intent to kill. The defendant claims that the person who shot the victims, Adell Atkins, was wearing a hat. The defendant further claims that he had a .38 caliber revolver and did not shoot anyone. Since no one was struck by a .38 caliber bullet, the defendant argues that the State failed to prove that he had the specific intent to kill.

We find this argument flawed and unconvincing. Herein, the defendant is not claiming that he did not fire his weapon.<sup>5</sup> To the contrary, the defendant notes that the police found a damaged .38 caliber bullet at the scene and concludes that the bullet proves that one of the assailants was armed with a .38 revolver. Even if we were to accept the defendant's argument, we would find sufficient evidence to support the convictions, as the defendant's argument is not inconsistent with specific intent to kill. Based on his own argument, the defendant is guilty of attempted first-degree murder as he proposes that he fired his weapon but failed to strike anyone.

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<sup>5</sup> We note that the argument presented by the defendant on appeal is significantly inconsistent with his claim during his recorded interview that he was armed with a firearm, but did not have any bullets or attempt to fire the weapon.

The defendant would also be guilty of first-degree murder under his argument based on the law of principals. Nonetheless, the trial testimonies of Nidal Hamideh and Jermaine Lee clearly indicated that the defendant shot the Hamidehs and acted as principal in the attempted murder of Lee. We find nothing in the record that significantly conflicts with their testimonies. Lee interacted with the defendant during an approximate thirty-minute period leading up to the shootings. Lee further testified that he remembered the defendant's face from the defendant's prior visit to the store, about a week before the offenses. While Lee may have provided inconsistent statements as to whether or not the shooter was wearing a cap, Lee was firm in his belief (based on his observations at close range) that the defendant shot the Hamidehs and Atkins shot Lee. Mr. Hamideh's testimony was consistent with Lee's testimony. Viewing the evidence in the light most favorable to the prosecution, we find that the evidence presented herein clearly shows the existence of all of the necessary elements of the offenses, including the specific intent to kill. The sole assignment of error lacks merit.

### **DECREE**

For the foregoing reasons, we affirm the defendant's convictions and sentences.

### **CONVICTIONS AND SENTENCES AFFIRMED**