NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0931

STATE OF LOUISIANA

VERSUS

TERRY JEROME MALBROUGH

Judgment rendered: November 2, 2007

****

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, State of Louisiana
Number 438,332 & 438,612
The Honorable Timothy C. Ellender, Judge Presiding

****

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KUHN, J CONCURS

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

DOWNING, J.

The defendant, Terry Jerome Malbrough, was charged by grand jury indictment with four counts of first degree murder (case number 438,332), violations of La. R.S. 14:30. The defendant was further charged by grand jury indictment with four counts of attempted first degree murder (case number 438,612), violations of La. R.S. 14:30 and La. R.S. 14:27. The defendant entered a plea of not guilty as charged on all counts. In case number 438,332, the State filed notice of intent to seek the death penalty. The defendant filed a "motion for pretrial hearing to determine the issue of the defendant's mental retardation and to exclude the death penalty." After a hearing, the trial court ruled that the defendant could not be subjected to a sentence of death. The trial court denied the defendant's motion to suppress his confession. After a trial by jury, the defendant was found guilty of the responsive offense of second degree murder on each count under case number 438,332, in violation of La. R.S. 14:30.1. The defendant was also found guilty of the responsive offense of attempted second degree murder on each count under case number 438,612, in violation of La. R.S. 14:30.1 and La. R.S. 14:27. The trial court denied the defendant's motion for new trial. Under case number 438,332, the defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on each count. The trial court ordered that these sentences be served consecutively. Under case number 438,612, the defendant was sentenced to fifty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on each count. The trial court ordered that the sentences on counts one, two, and three be served consecutively to each other and to all counts under case number 438,332. The trial court ordered that the sentence imposed on count four be served concurrently with all other counts. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals, assertng that the trial court erred in denying the motion to suppress his confession and in denying the motion to reconsider sentence. In a supplemental brief, the defendant further argues that the trial court erred in accepting non-unanimous verdicts as to the second degree murder convictions and that the offenses were improperly joined. For the following reasons, we affirm the convictions and sentences.

FACTS

On July 14, 2004, at approximately 1:00 a.m., Detective Charles Jackson of the Terrebonne Parish Sheriff's Office was dispatched to the scene of a burned home located at 240 Idlewild Drive in Houma, Louisiana. Residents of the home included the defendant, and Lawrence, Velma, Tammy, Antoinette, Ernest, and Darlene (the three-year-old daughter of the defendant and Antoinette) Touro. John Freeman, Louis Adams, and Myron Thibodaux were also residents of the home. Several officers of the Sheriff's Office investigated the incident along with the Louisiana State Fire Marshall's Office and the local fire department. Brian Fontenot (an expert witness) of the Louisiana State Fire Marshall's Office arrived at the scene at approximately 1:30 a.m. Fontenot and other investigators determined that the fire originated in the laundry room of the home. The fire investigators specifically determined that the fire started at, or near, floor level, near the middle of the washer and dryer. Mervin A. Stringer (an expert witness retained by State Farm Insurance Company) and Agent Donald R. Davenport of the Bureau of Alcohol, Tobacco, Firearms, and Explosives also investigated the fire. Stringer and Agent Davenport also concluded that the fire originated on the west side of the laundry room, where the washer and dryer were located. There was no evidence that the washer and dryer malfunctioned or were the cause of the fire. The investigators did not release information regarding the origin of the fire.

Donald Carter (arson supervisor and expert witness) of the Louisiana State Fire Marshall's Office also investigated the scene and interviewed the defendant with Detective Jackson on July 20, 2004. During the interview, the defendant admitted to starting the fire. According to the defendant's confession, he set paper on fire with his cigarette lighter and threw the paper against the washer in the laundry room. The other residents of the home were asleep at the time. (S-14). Four individuals perished in the fire: Velma, Tammy, Antoinette, and Darlene Touro. The defendant, Lawrence Touro, Ernest Touro, John Freeman, and Louis Adams were present, but they escaped from the burning home. Apparently, Myron Thibodaux was not present. Fontenot and Carter concluded that the cause of the fire was arson by the defendant. Stringer and Agent Davenport also concluded that the fire was intentionally set.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant contends that the trial court erred in denying the motion to suppress his confession. The defendant notes that his mild retardation is undisputed. The defendant further asserts that it is undisputed that the **Miranda** rights were not explained to him. In distinguishing the instant case from **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, the defendant asserts that his unfamiliarity with the criminal justice system shows that he was naïve and was suddenly injected into a foreign environment. The defendant further states that he made no attempt to exculpate himself. The defendant states that test results indicated that he did not completely understand his right to an attorney.

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. 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. 1 Cir. 1990). The admissibility of a confession is, in the first instance, a question for the trial court. Its conclusions on the credibility and weight of testimony relating to the voluntariness of the confession for the purpose of admissibility will not be overturned on appeal unless they are not supported by the evidence. **State v. Daughtery**, 563 So.2d 1171, 1177 (La. App. 1st Cir. 1990). Whether 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 statement or confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983).

The Louisiana Supreme Court has explained that diminished mental or intellectual capacity does not itself vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession. **Benoit**, 440 So.2d at 131; see also **State v. Young**, 576 So.2d 1048, 1053 (La. App. 1 Cir. 1991). The State has the burden of proving that the defendant's mental defect did not preclude him from giving a voluntary and free confession with a knowledgeable and intelligent waiver of his rights. The critical factors are whether or not the defendant was able to understand the rights explained to him and whether or not he voluntarily gave a statement. **State v. Stewart**, 93-0708 (La. App. 1 Cir. 3/11/94), 633 So.2d 925, 931; **Young**, 576 So.2d at 1053.

Detective Jackson and Donald Carter testified at the suppression hearing. According to Detective Jackson's testimony, he and Carter went to the defendant's home on July 20, 2004 and asked him to come to the Sheriff's Office for questioning. The defendant was twenty-two years old at the time of the interview. When they arrived at the Sheriff's Office, the defendant's rights were read to him

before any questioning. A waiver of rights form was executed at approximately 10:21 a.m. Specifically, the defendant was informed of the following rights:

> You have the right to remain silent.
>
> Anything you say can and will be used against you in court.
>
> You have the right to talk to a lawyer for advice before we ask you any questions and to have with you during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you before questioning, if you wish.
>
> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You will also have the right to stop answering at any time until you talk to a lawyer.

Detective Jackson read each right to the defendant and paused between each right to ask the defendant if he understood the right that was read to him. As to each right, the defendant indicated that he understood and placed his initials adjacent to the written right on the form. The defendant signed the waiver indicating that he understood his rights. Detective Jackson told the defendant that he did not have to talk if he did not want to do so. The defendant did not give any indication that he did not understand his rights. Detective Jackson stated that the recitation of the rights took him a little longer than normal in this case because he wanted to make sure the defendant understood the rights that were read to him. No force, threats, promises or coercion were used.

During a pre-interview conducted after the waiver of rights form was executed, Detective Jackson and Carter determined the defendant had specific information concerning the fire. They activated the recording devices (audio and video) at approximately 12:20 p.m. and obtained the confession. During cross-examination, Detective Jackson confirmed that he provided an explanation for each of the rights and for the waiver section of the form. According to Detective Jackson, all of the defendant's rights were explained within one minute.

Carter recalled Detective Jackson reading each right to the defendant directly from the form and stated that it took him a "couple of minutes" to do so. Regarding the initiation time of 10:21 a.m. expressed on the form and the time of 10:22 a.m. stated below the defendant's signature acknowledging he understood his rights, Carter stated that the time frame could be "real close to 2 minutes."

State witness Dr. Bergeron, an expert in psychology, had tested the defendant in the past. At the age of eighteen, the defendant had an I.Q. of 63. The defendant's verbal I.Q. was 65 at that time. According to Dr. Bergeron, an I.Q. below 70 is considered mentally retarded. Dr. Bergeron explained that verbal I.Q. scores are significant in this case because the defendant's ability to understand and use language is at issue. Dr. Bergeron viewed the videotaped confession and stated that he did not observe any reason to conclude that the voluntariness of the defendant's statement was compromised. Dr. Bergeron performed a psychological evaluation of the defendant after the incident and confession. The defendant's verbal IQ was 68 and his index score (which examines "verbal ability, mostly apart from attention and concentration") was 74. Dr. Bergeron stated that the scores indicated that the defendant would have difficulty understanding his rights. He added that the rights would have to be explained to the defendant.

Dr. Bergeron further conducted a behavioral sample that consisted of a test designed solely to determine the comprehension of **Miranda** rights. Dr. Bergeron stated that the test is highly controversial by and large because it is difficult to pass. The rights, as stated on the form and outlined above, were read to the defendant and he was instructed to "say that in your own words." This process was completed for each right separately. As to his right to remain silent, the defendant stated, "you don't have to speak." As to self-incrimination, the defendant stated, "what I say can hurt me in the long run." As to his right to an attorney, the

defendant stated, "I can see one lawyer when the questioning starts--." The defendant did not complete this response. As to his right to a court-appointed attorney, the defendant stated, "If you can't pay for one, the Court will appoint one to you, to give me a lawyer." As to each response, the defendant was graded on a scale from zero to two with two being the highest score a response could receive. On his first and fourth response, Dr. Bergeron gave the defendant a score of two. For his second and third responses, Dr. Bergeron gave the defendant a score of one on each.

Dr. Bergeron also conducted a behavioral sample on **Miranda** rights recognition wherein the first four rights were compared with other statements. The defendant was asked to state whether the right and the other statement were the same or different. The defendant scored eleven out of twelve possible points. According to Dr. Bergeron, several factors, along with the test scores and the defendant's classification as mildly retarded, should be considered in determining whether the defendant understood his rights. Those named factors include experience with the court system, comfort with examiners, and basic education or exposure to **Miranda** rights (on television for example). Dr. Bergeron confirmed that the defendant has the ability, in a slightly impaired fashion, to paraphrase and recognize his rights. The defendant reads at a fourth-grade level. Thus, the defendant would have difficulty understanding the **Miranda** rights as written.

Defense witness Dr. Frank Friedberg, an expert in psychology, also testified at the hearing. Dr. Friedberg reviewed the defendant's school records and the tests performed by Dr. Bergeron. Dr. Friedberg concluded that the defendant would not be able to understand his rights based upon the explanation given by Detective Jackson. While noting that the defendant's chronic history of mental retardation does not preclude his understanding of his rights, Dr. Friedberg concluded that the officers did not spend ample time explaining the rights to the defendant. Dr.

Friedberg also explained the defendant's tendency, as a mentally retarded person, to acquiesce or agree and say he understands when he actually does not. Dr. Friedberg agreed with the testing performed by Dr. Bergeron. Dr. Friedberg did not review the defendant's statement. During cross-examination, the State quoted the following portion of the defendant's statement:

> Carter: Okay, Terry, is there any other statements [sic] that you want to make?
>
> Defendant: Yes.
>
> Carter: What do you want to say?
>
> Defendant: I want to- I want to say that God forgive me for what I have done and I don't know what I didn't do; so God forgive me, please. Thank you.

Dr. Friedberg agreed that the confession seemed voluntary in this context.

In denying the defendant's motion to suppress the statement, the trial court expressed that the rights form included very simple language. The trial court noted Carter's line of questioning at the beginning of the recorded interview. Carter asserted that all of the defendant's rights were read to him. The defendant confirmed that the rights were read to him and that he understood them at the time and still understood them. Carter also reiterated the defendant's willingness to speak without an attorney and the defendant confirmed such willingness. Carter asked the defendant repeatedly if he had been coerced or pressured, adding the simplistic language, "done anything to you." The trial court observed the absence of testimony concerning the defendant's education except the defendant's indication that he graduated from high school. The trial court especially considered the defendant's body language during the interview and concluded that the defendant's confession was voluntary.

On appeal, the testimony adduced at the suppression hearing will be viewed in light of the entire record. **Green**, 94-0887 at p. 11, 655 So.2d at 280-81. During

the trial, the suppression-hearing witnesses presented testimony consistent with the testimony presented at the hearing. Dr. Bergeron placed emphasis on the fact that the interviewers made it clear to the defendant that he had the right to leave, and the defendant did not give any indication of a desire to do so. Dr. Friedberg examined the defendant's school records. The defendant's school records indicated that he attended special education classes and was reading at a third-grade level at the age of eighteen. At the time of the trial, Dr. Friedberg still had not viewed the defendant's recorded confession.

Trial courts are vested with great discretion when ruling on a motion to suppress. **State v. Long**, 03-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179. When credibility and weight of testimony relating to the voluntariness of a confession for the purpose of admissibility are at issue, the trial court's determination will not be reversed on appeal in the absence of a clear abuse of discretion. **State v. Brown**, 486 So.2d 876, 878 (La. App. 1 Cir. 1986) (citing **State v. Brumfield**, 464 So.2d 1061 (La. App. 1 Cir. 1985)).

In **Young**, the defendant had an I.Q. of 67 and was classified as mildly retarded by a psychologist testifying as an expert witness for the defense. The defendant in that case confessed to a murder. He had a poor education, possible brain damage, and a possible personality disorder. There also was evidence that the defendant was a paranoid schizophrenic. No expert medical testimony was offered at the motion to suppress hearings. The defendant relied on the trial testimony of a psychologist who testified as an expert witness for the defense. The psychologist concluded that, because of delusions of grandiosity and/or persecution, the defendant might confess to a crime he did not commit. However, the State's medical experts in that case found no evidence that the defendant was schizophrenic, and the reports of the sanity commission members concluded that the defendant was competent to stand trial and able to assist in his defense. After

considering all of the evidence and reviewing the defendant's confessions, this court found that the State proved that the defendant had the mental capacity to, and did in fact, knowingly and intelligently waive his constitutional rights before making his confessions and that the confessions were made freely and voluntarily.

In the matter before us, after carefully reviewing the testimony adduced at the motion to suppress hearing and the defendant's audiotaped statement, in light of the entire record, we find that the State met its burden of proving that the defendant gave a knowing and voluntary confession. The State proved that the defendant's mental defect did not preclude him from giving a voluntary and free confession with a knowledgeable and intelligent waiver of his rights. The rights form consisted of simplistic phrasing of the rights. Since the rights were read to the defendant, he was not required to read them on his own. During the videotaped interview, the defendant appeared calm and very willing to confess to the offense. He provided responsive, intelligent answers to questions and gave a comprehensible account of the facts of the offense. We find no abuse of discretion in the trial court's denial of the motion to suppress the confession. This assignment of error lacks merit.

SUPPLEMENTAL BRIEF: ASSIGNMENT OF ERROR NUMBER THREE

In assignment of error number three (raised in the defendant's supplemental brief), the defendant contends that the trial court erred in accepting non-unanimous verdicts on the second-degree murder convictions. Ten jurors concurred in the verdicts of guilty of the responsive offense of second-degree murder. Citing La. Code Crim. P. art. 782A, the defendant argues that unanimous verdicts were required because the defendant was charged with first-degree murder, a crime punishable by the death penalty. The defendant concludes that the acceptance of

the second-degree murder convictions with non-unanimous verdicts constitutes reversible error.

In case number 438,332 herein, the defendant was charged with four counts of first-degree murder. According to the version of La. R.S. 14:30 in effect at the time of the offenses and trial, first degree murder was punishable by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury. La. Const. art. I, § 17A provides as follows: "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict." See also La. Code Crim. P. art. 782A. In addition to these express provisions, it has been determined that a conviction on a lesser-included offense operates as an acquittal on the greater charged offense. La. Code Crim. P. art. 598A; **Green v. United States**, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Therefore, in view of the above, it is clear that the vote on the lesser-included offense, which acts as an acquittal verdict on the capital charge, must conform to the requirements for a lawful verdict on the greater offense, a unanimous verdict. Any other conclusion would violate the constitutional mandate that "a verdict" in a capital case must be by a unanimous jury. **State v. Goodley**, 398 So.2d 1068, 1070 (La. 1981).[1]

However, the facts in the instant case are distinguishable from those in **Gooodley.** We note that in **Atkins v. Virginia**, 536 U.S. 304, 122 S.Ct. 2242, 153

[1] The penalty provision for first degree murder, La. R.S. 14:30C, was amended in the 2007 legislative session, 2007 La. Acts No. 125, §1, to provide as follows:

> (1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art 782 relative to cases in which punishment may be capital shall apply.
>
> (2) If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The provisions of C.Cr.P. Art 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

It appears from this amendment that the Legislature intended to overrule the applicable law involved in **Goodley**. This amendment was not in effect, either at the time the offenses in this case were committed or at the time of trial, conviction and sentencing.

L.Ed.2d 335 (2002), the United States Supreme Court held that execution of mentally-retarded persons constitutes an excessive punishment and thus violates the Eighth Amendment. Enacted in 2003 in response to **Atkins**, La. Code Crim. P. art. 905.5.1A provides that no person who is mentally retarded shall be subjected to a sentence of death. Accordingly, the trial court ruled that the defendant was not subject to the death penalty in the instant case. Therefore, there was no longer a "capital verdict" before the jury, since the only penalty that could be imposed as a result of a conviction was punishment by life imprisonment at hard labor. *Cf.* **Goodley**, 398 So.2d at 1071 n.4. Pursuant to this finding, the trial court, in pertinent part, instructed the jury as follows, "[t]en (10) members of the jury must concur to reach a verdict in this case, as to any count."

This assignment of error lacks merit.

SUPPLEMENTAL BRIEF: ASSIGNMENT OF ERROR NUMBER FOUR

In assignment of error number four (raised in the defendant's supplemental brief), the defendant contends that "joinder" of the offenses of first degree murder, a capital offense, and attempted first degree murder, a non-capital offense, was prejudicial error. The defendant contends that the cases were improperly joined because the offenses charged could not be tried by the same mode of trial. The defendant asserts that the convictions and sentences should be reversed and the cases remanded for separate trials.

At the outset we observe that the defendant's first-degree murder and attempted first-degree murder offenses were not charged in the same indictment, thus joinder is not at issue herein. Arraignment on all counts was held in the same proceeding. Additional pretrial proceedings in both cases were conducted simultaneously. No formal consolidation request is reflected in the record. See La.

Code Crim. P. art. 706. It is clear, however, that consolidation did occur since the charges were tried together in a single proceeding. Nonetheless, misjoinder of offenses and improper consolidation of offenses are not jurisdictional defects and do not constitute a denial of due process. Thus, misjoinder of offenses may be waived by failure to timely object by a motion to quash, and improper consolidation of offenses for trial may be waived by the failure to object. La. Code Crim. P. art. 495; see La. Code Crim. P. art. 706; **State v. Mallett**, 357 So.2d 1105, 1109 (La. 1978). Herein, the defendant did not object to the consolidation of the offenses for trial until after the trial commenced. As the defendant failed to contemporaneously object, he waived the argument of improper consolidation of offenses for trial. La. Code Crim. P. art. 841.

Moreover, for the following reasons we find that any error as to the consolidation of the offenses for trial was harmless beyond a reasonable doubt. The following considerations may be applied to determine whether prejudice results from improper consolidation: (1) whether the jury would be confused by the various counts; (2) whether the jury would be able to segregate the various charges and evidence; (3) whether the defendant could be confounded in presenting his various defenses; (4) whether the crimes charged would be used by the jury to infer a criminal disposition; and (5) whether, especially considering the nature of the charges, the charging of several crimes would make the jury hostile. **State v. Lewis**, 489 So.2d 1055, 1059 (La. App. 1 Cir. 1986). The same evidence was used to prove all of the charges herein, as they arose out of a single event. Thus, there was no need to segregate the evidence, nor was there any risk of confusion, improper inference, or hostility on the part of the jury. The defendant has not specified the manner in which he was prejudiced, and we find no prejudice. The guilty verdicts on these offenses were surely unattributable to any error as to

consolidation of the offenses. See **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant asserts that the trial court erred in denying his motion to reconsider sentence. The defendant points out that the trial court imposed maximum sentences and ran all but one sentence consecutively. The defendant contends that the trial court failed to consider the fact that he was only twenty-two years old when the crimes were committed, that he was mildly retarded, and that he had no criminal history.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. 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. Leblanc**, 04-1032, p. 10 (La. App. 1 Cir. 12/17/04), 897 So.2d 736, 743; **State v. Faul**, 03-1423, p. 4 (La. App. 1 Cir. 2/23/04), 873 So.2d 690, 692.

Article I, section 20 of the Louisiana Constitution explicitly prohibits excessive punishment. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the revewing court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1753, 99-1528, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167.

The trial court has wide discretion in imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 03-0977, pp. 19-20 (La. App. 1

Cir. 2/23/04), 874 So.2d 197, 210. Thus, where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Holmes**, 99-0631, p. 4 (La. App. 1 Cir. 2/18/00), 754 So.2d 1132, 1135.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. Code Crim. P. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified when the offender poses an unusual risk to the safety of the public. See **State v. Crocker**, 551 So.2d 707, 715 (La. App. 1 Cir. 1989).

At the sentencing hearing, a victim-impact statement was made by Charlene Chatagnier. Chatagnier noted that one of the victims, Velma Touro, was "like your mom. She just about raised you[.]" Chatagnier asked the defendant how he could kill his own daughter. She explained that the deceased victims suffered a horrible death. She stated that she could not forgive the defendant. The defendant declined to make a statement.

The trial court imposed the mandatory sentence of life imprisonment at hard labor without probation, parole, or suspension of sentence on each second-degree murder conviction. La. R.S. 14:30.1B. As to each of the attempted second-degree murder convictions, the defendant was sentenced to the maximum term of imprisonment, fifty years imprisonment at hard labor without probation, parole, or suspension of sentence. La. R.S. 14:30.1B & La. R.S. 14:27D(1)(a). Regarding the maximum sentences imposed, the trial court reviewed Article 894.1 and stated that it had not seen worse crimes and recognized the risk of the defendant committing another crime. The trial court concluded that the defendant is in need

of a custodial environment that can be provided most effectively by his commitment to an institution. The trial court further found that the defendant's conduct manifested deliberate cruelty to the victims. The court observed that the defendant knew or should have known that the victims were particularly vulnerable due to the youth of his child and the disabilities of some of the other victims. The defendant created a risk of death or great bodily harm for at least eight people. The offenses resulted in death, significant permanent injury, or significant economic loss to the victims. The defendant used a dangerous weapon, fire, in the commission of the offenses. Finally, the trial court reiterated that the offenses involved multiple victims.

The defense counsel objected to the sentences imposed, noting the defendant's mental retardation as a mitigating circumstance. The defendant also filed a written motion to reconsider sentence.[2]

We find that the trial court adequately considered the facts of the case and the defendant's background, including his mental status. The defendant made no attempt to extinguish the fire when he started it or to warn any of the occupants. Instead, the defendant exited the room and ultimately exited the house when the fire and smoke began to spread. Under these circumstances, the imposition of seven consecutive sentences does not render these eight sentences excessive. Considering the victims' suffering, the defendant's lack of remorse, and the facts of the offenses, the imposition of the mandatory and maximum sentences herein is not disproportionate or shocking. Thus, we find that the record supports the sentences imposed herein. The trial court did not abuse its discretion in imposing sentence or err in denying the motion to reconsider sentence. Thus, assignment of error number two lacks merit.

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[2]The grounds for the written motion to reconsider sentence will be discussed in our review for error section.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under La. Code Crim. P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence.

In the review for error section of the defendant's original appeal brief, the defendant contends that on count three in case number 438,332 he was "sentenced to a count of first degree murder when he was found guilty of second degree murder." (Defendant's original appeal brief p. 11). Prior to imposing the sentences, the trial court asked the State and defense counsel whether the defendant was convicted as charged. The defense counsel responded negatively. The State elaborated, noting that the defendant was charged with first degree murder but was found guilty of second-degree murder on all four counts. The State also pointed out the convictions in the other case. The trial court instructed the defendant to rise for sentencing and proceeded to recite the penalty for second-degree murder.

While imposing sentences on the four counts in case number 438,332, the trial court repeated the crime of conviction on counts one, two, and four as "second degree murder." However, the trial court stated "first degree murder of Antoinette Touro" in imposing an indefinite sentence of "imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence" on count three. As to the other three counts in 438,332, the trial court stated, "life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence." The trial court then imposed sentences on the attempted second-degree murder counts, labeling each count as such.

The defendant filed a motion to reconsider sentence, noting the trial court's error. As mentioned by the defendant in his appeal brief, the trial court amended

the sentence on count three in case number 438,332 to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant remarks that in amending the sentence, the trial court did not indicate that the defendant was convicted of second-degree murder as opposed to first-degree murder. However, we observe that the trial court did not again mislabel the count as first-degree murder.

It is clear that the trial court initially inadvertently labeled count three in case number 438,332 as first-degree murder and initially inadvertently omitted the word "life" in imposing this term of imprisonment. The defendant was found guilty of second-degree murder on each count in case number 438,332. Based on our review of the record, it is clear the trial court was fully aware of such convictions and sentenced the defendant accordingly. We find the court's amendment of the sentence sufficient. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Price**, 05-2514, pp. 18-22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25.

DECREE

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

CONVICTIONS AND SENTENCES AFFIRMED