NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 1607

STATE OF LOUISIANA

VERSUS

MEDJOURE CHEFNEY

Judgment Rendered: February 12, 2010

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Case Number 19715
Honorable Brenda Bedsole Ricks, Presiding

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Scott M. Perrilloux District Attorney Patricia Parker Assistant District Attorney Amite, LA	Counsel for Appellee State of Louisiana
Frederick Kroenke Louisiana Appellate Project Baton Rouge, LA	Counsel for Defendant/Appellant Medjoure Chefney

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BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

Carter CJ Dissents with reasons
Pettigrew J. concurs

GUIDRY, J.

The defendant, Medjoure Chefney, was charged by grand jury indictment with one count of second degree murder (count I), a violation of La. R.S. 14:30.1; one count of attempted second degree murder (count II), a violation of La. R.S. 14:27 and La. R.S. 14:30.1; one count of attempted armed robbery (count III); a violation of La. R.S. 14:27 and La. R.S. 14:64; and one count of armed robbery (count IV), a violation of La. R.S. 14:64.[1] He pled not guilty on all counts and moved to quash, arguing the State had failed to comply with La. C. Cr. P. art. 578. Following a hearing, the trial court denied the motion to quash. The defendant applied to this court for supervisory relief, but the writ application was denied. State v. Chefney, 2008 KW 1211 (La. App. 1st Cir. 6/20/08) (unpublished).

Following a jury trial, he was found guilty as charged on counts I and III, not guilty on count II, and guilty of attempted armed robbery on count IV. He moved for a new trial and a post-verdict judgment of acquittal, but the motions were denied. On count I, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. On count III, he was sentenced to forty-five years at hard labor plus an additional five years for the use of a firearm during the commission of the offense. On count IV, he was sentenced to forty-five years at hard labor plus an additional five years for the use of a firearm during the commission of the offense. The court ordered that all of the sentences would run consecutively with each other.

The defendant now appeals, contending that the trial court erred in denying the motion to quash, that he was denied his right to counsel by being housed far

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[1] Jerell Jackson Marshall was initially charged by the same indictment with the same offenses. Thereafter, the indictment was amended as to Marshall, to dismiss counts II and III against him, and to amend counts I and IV to charge him as an accessory after the fact to those offenses.

away prior to trial, and that the State failed to disclose exculpatory evidence. For the following reasons, we conditionally affirm the convictions and sentences on counts I, III, and IV.

FACTS

Christopher Bellazar, the surviving victim in this matter, testified at trial. On May 13, 2005, at approximately 2:00 a.m., he and Shun Alberts, the deceased victim, were in Bellazar's yard on Ed Brown Road in Albany. The men were approached by two gunmen. Bellazar indicated that one of the gunmen, whom he later identified as the defendant, demanded money and dope. Bellazar conceded he had a prior conviction for possession of cocaine, but claimed he did not have any dope on him that night. He indicated he did have $300 from the sale of his car speakers. Bellazar surrendered his money to the defendant, while Alberts turned his pockets inside out, revealing only a cell phone. Alberts told the defendant to "chill out." The defendant responded by shooting him. Bellazar ran towards his front door, but was shot in the leg before he could enter the home. He identified photographs of a TEC-9 assault weapon as the weapon that the defendant used during the incident. He indicated he had a previous altercation with the defendant approximately two or three weeks before the incident. He advised police officers investigating the incident at issue that the defendant had a scar or tattoo under his eye and was Rodney Dillon's cousin or relative from New Orleans. Thereafter, he selected a photograph of the defendant in a six-person photographic array as depicting the gunman who shot Alberts.

Tessa Square, Bellazar's girlfriend, also testified at trial. Bellazar was living with her on Ed Brown Road at the time of the incident. On the night of the incident, she was awakened from her sleep by shots and went to the door. Bellazar kicked the

door open and ran past her, stating that Shun had been shot. Square went to the door to close it, and saw two men outside. The man closest to the door had a mark under his left eye. Square had seen him walking on the street before, knew him as "Moe," and knew he was related to Rodney Dillon. She identified the defendant in court as the man she had seen outside her door.

Ricardo "R.J." Miller also testified at trial. He indicated he met the defendant, whom he knew as "New Orleans" or "Moe," while riding around with him and Josh Dantzler, "Jerell," and "Cordera" on the night of the incident. At approximately 2:30 a.m. or 3:00 a.m., Miller, Jerell, and the defendant returned to Albany, and drove down Ed Brown Road. They passed two people standing outside and slowed for a four-way stop. The defendant suddenly exited the vehicle, armed with a TEC-9 and either a 9mm or .40 pistol. Thereafter, Miller saw the defendant approach the two people, heard a shot, saw "flame come from a gun," and then a few seconds later, heard two more shots. Miller saw one of the people fall and one of them run away. Approximately one minute later, the defendant returned to the truck. He stated, "the gun was jamming," and "Man, I think I killed him." The defendant then stated, "y'all tell anybody, I'm going to kill you mother f***rs."

DISCUSSION

UNTIMELY COMMENCEMENT OF TRIAL

In assignment of error number 1, the defendant argues that the trial court erred in denying the motion to quash because the pretrial pleadings filed by the defense did not suspend the period of limitation long enough for trial to be timely commenced.

Except as otherwise provided in the Louisiana Code of Criminal Procedure, Title XVII, Chapter 2, no trial shall be commenced in non-capital felony cases

after two years from the date of institution of the prosecution. La. C. Cr. P. art. 578(A)(2). Second degree murder, attempted second degree murder, attempted armed robbery, and armed robbery are non-capital felony offenses. La. R.S. 14:30.1(B); La. R.S. 14:27(D)(1)(a) & 14:30.1(B); La. R.S. 14:27(D)(3) & La. R.S. 14:64(B); La. R.S. 14:64(B).

When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial. La. C. Cr. P art. 580. For the purposes of Article 580, a preliminary plea is any pleading or motion filed by the defense that has the effect of delaying trial. These pleadings include properly filed motions to quash, motions to suppress, or motions for a continuance, as well as applications for discovery and bills of particulars. State v. Brooks, 02-0792, p. 6 (La. 2/14/03), 838 So.2d 778, 782 (per curiam).

Once the accused shows that the State has failed to bring him to trial within the time periods specified by Article 578, the State bears a heavy burden of demonstrating that either an interruption or a suspension of the time limit tolled prescription. State v. Morris, 99-3235, p. 1 (La. 2/18/00), 755 So. 2d 205 (per curiam). However, when a trial court denies a motion to quash, that decision should not be reversed in the absence of a clear abuse of the trial court's discretion. State v. Love, 00-3347, p. 12 (La. 5/23/03), 847 So. 2d 1198, 1208.

Prosecution in this matter was instituted by indictment on June 29, 2005. Thus, absent interruption or suspension, the State had to bring the matter to trial no later than June 29, 2007. Trial commenced in this matter on June 24, 2008.

The defense moved for discovery on August 11, 2005, seeking, in part,

discovery under La. C. Cr. P. arts. 718 (documents and tangible objects) and 719 (reports of examinations and tests).

On September 6, 2005, the State filed a response to discovery, indicating that "[d]iscoverable information not now in the possession of the State will be furnished via Supplemental Response if and at such times as same is received by the State."

On March 27, 2006, in open court, the State indicated it was waiting on a lab report in the matter.

On April 27, 2006, in open court, the State indicated it was still waiting on lab reports and asked for a pretrial conference "to try to get the results of the DNA, toxicology, [and] the gun[.]" By joint motion, pretrial conference was set for October 26, 2006.

On October 26, 2006, in open court, the State indicated that it was still waiting on lab reports, and moved for a continuance of the pretrial conference to March 22, 2007. The defense indicated it had no objection to the request for continuance, and the request was granted.

On March 22, 2007, in open court, the State indicated that it was still waiting on lab reports.

On November 15, 2007, at pretrial conference, the State indicated that the matter was ready to set for trial, and suggested a trial date in February and a final pretrial conference in January. The court asked the defense if those dates were acceptable, and the defense stated, "[t]hey're fine with me, judge." The court set a pretrial conference for January 24, 2008, and set trial for February 25, 2008.

On January 24, 2008, the State indicated that after consulting the deceased victim's family, it was not making any offers to the defendant to plead to reduced charges in the matter. The State asked that the trial date of February 25, 2008, be

maintained.

On February 25, 2008, the State asked that the trial date be continued due to the trial of Mark Lewis, which was in progress, and because evidence sent to the crime lab for testing was still outstanding. The court stated, "[t]he next trial date is not until June. That would be an intervening date to determine if all discovery is complete and everything is ready for trial." The defense stated, "[i]f that's the next date, that's the next date, judge." The court set a pretrial conference for April 14, 2008, and set trial for June 23, 2008.

On April 14, 2008, the State indicated it still had not received certain DNA results from the crime lab, but suggested that the trial date be maintained. The court asked the State if it needed a May 15, 2008 date, and the State answered affirmatively. The court asked the defense if that date was acceptable, and the defense asked, "[f]or a pretrial?" The State added, "[f]or me to try to have that crime lab report here[,]" and the defense stated, "[t]hat's fine."

On May 14, 2008, the defense moved to quash, arguing the State had failed to comply with Article 578.

Court was cancelled on May 15, 2008, due to severe bad weather.

On June 16, 2008, following a hearing, the court denied the motion to quash. The defendant applied to this court for supervisory relief from that ruling, but the writ application was denied. State v. Chefney, 2008 KW 1211 (La. App. 1st Cir. 6/20/08) (unpublished).

On Monday, June 23, 2008, the State indicated it had received a crime lab report the previous Friday and had hand delivered the report to the defense on the same day to complete discovery. The State indicated it was ready to proceed. The defense indicated it was also ready to proceed, but voiced objections to having little

time with the defendant due to his being housed in North Louisiana, and to inadequate notice of the ballistics report.

The outstanding discovery in this matter suspended the running of the time limits because the State's ability to prosecute the case was actually affected until that discovery was available to satisfy the defense motion for discovery. See Brooks, 02-0792 at p. 8, 838 So. 2d at 783. Moreover, the November 15, 2007 pretrial conference also constituted grounds for suspension under Article 580 because it directly affected, by mutual assent, the State's ability to bring this case to trial in a timely manner. The result of setting a trial date beyond the original date of prescription was to extend prescription in the same manner as if counsel had joined in a continuance for that avowed purpose. See State v. Fish, 05-1929, p. 3 (La. 4/17/06), 926 So. 2d 493, 495 (per curiam).

This assignment of error is without merit.

DENIAL OF RIGHT TO COUNSEL

In assignment of error number 2, the defendant argues he was denied his right to counsel because prior to trial, he was held in a facility in North Louisiana, which would have required his appointed counsel to travel many hours to meet with him to prepare for trial, and he was only brought to Livingston Parish one week prior to trial.

On November 15, 2007, at a pretrial conference, defense counsel stated he had not seen the defendant in nine months and requested that the defendant "be left here" so that counsel could confer with him before trial. The court indicated it could not instruct the sheriff's office to do anything.

On January 24, 2008, at a pretrial conference, defense counsel stated he had seen the defendant for only ten minutes in a year and requested that the defendant

be transferred from "up north" to "down here." The court indicated that it had no control over where the defendant was held.

On June 16, 2008, at a pretrial and motion to quash hearing, defense counsel moved that the defendant be housed in Livingston Parish. The court indicated that the sheriff's office had control of the defendant.

After the trial court denied the motion to quash, the defendant applied to this court for supervisory relief, challenging that ruling and also alleging error in the denial of access to his attorney, but the writ application was denied. State v. Chefney, 2008 KW 1211 (La. App. 1st Cir. 6/20/08) (unpublished).

The defendant does not allege that he and his counsel were not permitted to communicate with each other but, rather, that communication between them would have been more convenient had he been housed in Livingston Parish. However, inconvenience to defense counsel caused by the housing of the defendant outside of the parish where the court is located does not constitute a denial of the right to counsel. See State v. Vaccaro, 411 So. 2d 415, 427 (La. 1982).

This assignment of error is without merit.

BRADY VIOLATIONS

In assignment of error number 3, the defendant argues that the State failed to disclose evidence that, just prior to his death, Alberts referred to his assailant as "Looney" or "Nooney." In assignment of error number 4, the defendant argues the State failed to disclose lab reports indicating that marijuana was found at the scene, that two cartridges and three cartridge cases were found at the scene, and that none of this evidence produced fingerprints.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). Favorable evidence includes both exculpatory evidence and evidence impeaching the testimony of a witness when the reliability or credibility of that witness may be determinative of the defendant's guilt or innocence, or when it may have a direct bearing on the sentencing determination of the jury. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (citing Bagley, 473 U.S. at 682, 105 S.Ct. at 3383). Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434, 115 S.Ct. at 1566; Bagley, 473 U.S. at 678, 105 S.Ct. at 3381.

IDENTIFICATION EVIDENCE

Livingston Parish Sheriff's Office Detective Brian Smith testified at trial. He indicated he spoke to Bellazar at the hospital after the shooting. In giving his account of the incident, Bellazar indicated that Alberts had referred to the gunman

as "Looney" or "Nooney" during the incident. Bellazar told Detective Smith that the gunman had a scar under his eye, was from New Orleans, and was Rodney Dillon's cousin or relative. Bellazar also indicated that he had seen the gunman before, but at that time, could not recall exactly where he had seen him. Subsequently, Bellazar indicated that he had been in an altercation with the gunman approximately two or three weeks prior to the incident at issue.

On cross-examination, the defense asked Detective Smith whether he conducted an investigation to determine the identity of "Looney" or "Nooney." Detective Smith replied affirmatively, indicating that he asked everyone that he interviewed including, Cordera Marshall, Josh Dantzler, Travis Dantzler, Jerell Marshall, the defendant, and Sonya Johnson, if they knew a "Looney" or "Nooney."

Ricardo Miller testified that the defendant was known as "Moe" and "New Orleans."

Mica Watts testified that she worked as an investigator for the district attorney's office. She indicated that she had been unsuccessful in her attempts to locate Cynthia Dillon (Rodney Dillon's mother). On cross-examination, Watts indicated she was unfamiliar with the names "Looney" or "Nooney."

In closing, the defense argued that "Looney" or "Nooney" may have been someone, other than the defendant, who was also involved in the earlier altercation with Bellazar. The defense pointed out that Alberts had called the gunman "Looney" or "Nooney" and not "Moe." The defense also argued that Miller might be protecting "Looney" or "Nooney." Lastly, the defense argued that Watts had not even been asked to look for "Looney" or "Nooney."

The State responded that Alberts may not have even said "Looney" or "Nooney;" that was only Bellazar's account of what he heard, and it was possible

that Alberts had stated "Newie," in reference to the defendant being from New Orleans.

Initially, we note that in order for the testimony concerning "Looney" or "Nooney" to be exculpatory, Alberts would have to have been identifying someone other than the defendant. However, Bellazar, the surviving victim, repeatedly identified the defendant as the gunman shortly after the incident and at trial.

However, even assuming, arguendo, that the testimony concerning "Looney" or "Nooney" was Brady material, a thorough review of the record reveals that this evidence was not "material" such that the defendant would be entitled to any relief. There is no reasonable probability sufficient to undermine confidence in the outcome that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The defense presented its theory to the jury that the real gunman was "Looney" or "Nooney," rather than the defendant, but the jury rejected that theory in light of the other evidence.

LABORATORY REPORTS

> Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph, or otherwise reproduce any results or reports, or copies thereof, ... of scientific tests or experiments, made in connection with or material to the particular case, that are in the possession, custody, control, or knowledge of the district attorney and intended for use at trial. Exculpatory evidence shall be produced under this Article even though it is not intended for use at trial.

La. C. Cr. P. art. 719(A) (indentation added).

Louisiana Code of Criminal Procedure article 729.5 prescribes sanctions for failure to honor a discovery right, leaving in the trial judge's discretion the decision of whether to order a mistrial or enter any such other order as may be appropriate.

As pertinent here, La. C. Cr. P. art. 775 provides that a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial. However, a mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for a mistrial will not be disturbed on appeal without abuse of that discretion. State v. Berry, 95-1610, p. 7 (La. App. 1st Cir. 11/8/96), 684 So. 2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So. 2d 603.

Prior to trial, the defense moved for discovery under Artilce 719(A).

At trial, Louisiana State Police Crime Lab Firearms Examiner Charles R. Watson, Jr. indicated that there were some possible controlled dangerous substances that had been examined by someone else at the lab in connection with the case. After the court recessed the trial to allow the defense to examine the reports, the defense moved for mistrial, arguing that the State had failed to disclose the reports in question and that the defendant had been unduly prejudiced. Counsel for the State indicated that day he had shown the defense the lab report he had, and did not know whether the report had been disclosed in discovery because he had only been involved with the case for a few months. The State argued, in any event, the report did not contain any exculpatory information, but merely indicated that no fingerprints were able to be lifted and that no DNA was found. The State indicated it had not intended to introduce the report, but had no objection to the report being introduced into evidence. The defense argued that the report did contain exculpatory information. The defense claimed that Bellazar had indicated that he was not smoking or selling marijuana at the time of the

incident, but the report indicated that marijuana was found at the scene. The State responded that the incident occurred on an open lot. The court denied the motion for mistrial.

The laboratory reports in question listed items recovered from the crime scene, including one Winchester 9mm cartridge case, one R-P .40 S&W cartridge case, two FC 9mm Luger cartridge case, one WIN 9mm Luger cartridges, and .02 grams of marijuana in a clear plastic baggie corner, and indicated that no identifiable latent prints were developed on the items.

The defense introduced the reports into evidence and questioned Watson concerning them. Watson indicated that the reports stated that a clear baggy containing marijuana was found at the scene. He also indicated that two 9mm cartridges and three cartridge cases, two 9mm and one .40, were found at the scene, and that the .40 cartridge case could not have been fired in the same gun that fired the 9mm cartridge case. He also indicated that no fingerprints, and thus none of the defendant's fingerprints, were recovered from the cartridges or the cartridge cases.

The defense also referenced the fact that marijuana was found at the scene in cross-examining Bellazar on his claim that he did not have any dope on him at the time of the incident.

There was no abuse of discretion by the trial court in denying the instant motion for a mistrial. The alleged Brady material was disclosed to the defense prior to the end of trial, and prejudice, if any, caused by the late disclosure of the lab reports was mitigated by the defense introducing the reports into evidence and questioning Bellazar and Watson concerning the contents of the reports and the implications of the testing performed on the items recovered at the scene. The late

disclosure of the reports did not make it impossible for the defendant to obtain a fair trial. The defendant did not suffer such substantial prejudice that he was deprived of any reasonable expectation of a fair trial.

These assignments of error are without merit.

REVIEW FOR ERROR

Under La. C. Cr. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered an error in the proceedings relative to a sanity hearing request that was granted by the trial court, but was later withdrawn by defense counsel.[2]

A defendant does not have an absolute right to the appointment of a sanity commission simply upon request. A trial judge is only required to order a mental examination of a defendant when there are reasonable grounds to doubt the defendant's mental capacity to proceed. La. C. Cr. P. art. 643. It is well established that "reasonable grounds" exist where one should reasonably doubt the defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. To determine a defendant's capacity, we are first guided by La. C. Cr. P. arts. 642, 643, and 647. State ex rel. Seals v. State, 00-2738, p. 5 (La. 10/25/02), 831 So.2d 828, 832.

As a general matter, Article 642 allows "[t]he defendant's mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the

[2] Although the defendant does not assign the trial court's failure to determine his sanity as error, we note that the error appears to be such that it raises an issue of constitutional due process and is subject to being raised pursuant to an out-of-time appeal, which, depending on how much time has elapsed, could impede the ability of the court to make a fair and proper retrospective determination of competency. State ex rel. Seals v. State, 00-2738, p. 6 (La. 10/25/02), 831 So. 2d 828, 833; State v. Carney, 25,518, p. 2 (La. App. 2d Cir. 10/13/95), 663 So. 2d 470, 472.

court." The Article additionally requires that "[w]hen the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution ... until the defendant is found to have the mental capacity to proceed." La. C. Cr. P. art. 642. Next, Article 643, provides, in pertinent part, "The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." Last, if a defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. See La. C. Cr. P. art. 647; State ex rel. Seals, 00-2738 at p. 5, 831 So. 2d at 831-32.

Questions regarding a defendant's capacity must be deemed by the court to be *bona fide* and in good faith before a court will consider if there are "reasonable grounds" to doubt capacity. Where there is a *bona fide* question raised regarding a defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. At this point, the failure to resolve the issue of a defendant's capacity to proceed may result in nullification of the conviction and sentence under State v. Nomey, 613 So. 2d 157, 161-62 (La. 1993), or a *nunc pro tunc* hearing to determine competency retrospectively under State v. Snyder, 98-1078 (La. 4/14/99), 750 So. 2d 832; State ex rel. Seals, 00-2738 at p. 6, 831 So. 2d at 833.

In certain instances, a *nunc pro tunc* hearing on the issue of competency is appropriate "if a meaningful inquiry into the defendant's competency" may still be had. In such cases, the trial court is again vested with the discretion of making this decision as it "is in the best position" to do so. This determination must be

decided on a case-by-case basis, under the guidance of Nomey, Snyder, and their progeny. The State bears the burden in the *nunc pro tunc* hearing to provide sufficient evidence for the court to make a rational decision. State ex rel. Seals, 00-2738 at pp. 6-7, 831 So. 2d at 833.

In the instant case, on November 3, 2005, the defense orally moved for the appointment of a sanity commission on the basis that the defendant had indicated he had a mental problem. The court appointed two doctors to the sanity commission and set the matter for hearing on December 8, 2005. The record does not contain either a minute entry or transcript concerning what occurred on December 8, 2005.

On June 16, 2008, the trial court advised the State and the defense that there was an "outstanding sanity commission" on the defendant. The court indicated that the docket of the Judge who heard the sanity commissions in December 2005 (Judge Waguespack) indicated that the motion was "removed." Defense counsel advised the court that the motion had been withdrawn "well over two years ago[,]" after he learned that the defendant had a physical rather than mental disability, and the issue of the defendant's sanity was not pending.

The issue of the defendant's mental incapacity was properly raised in this matter. And although defense counsel withdrew the request for a sanity hearing, once invoked, a defendant cannot simply withdraw the request, but the trial court must make an independent assessment of defendant's capacity to proceed to trial. See State v. Carr, 629 So.2d 378 (La. 1993) (wherein the Louisiana Supreme Court granted the defendant's writ application, in part, to remand the case to the district court for the purpose of "entering a formal ruling as to the defendant's competency."); see also State v. Carr, 618 So.2d 1098, 1103 (La. App. 1st Cir.

1993) (wherein this court had previously rejected the defendant's contention that the district court had erred in failing to redetermine the defendant's competency because the record showed that the defendant had withdrawn the request for a sanity hearing). Thus, the trial court erred in allowing the matter to proceed to trial without holding a contradictory hearing and deciding the issue of the defendant's mental capacity to proceed. See La. C. Cr. P. art. 647; State ex rel. Seals, 00-2738 at p. 5, 831 So. 2d at 831-32.

Accordingly, we will remand this matter to the trial court for the purpose of determining whether a *nunc pro tunc* competency hearing may be possible. If the trial court believes that it is still possible to determine the defendant's competency at the time of the trial on the charges, the trial court is directed to hold an evidentiary hearing. If the defendant was competent, no new trial is required. If the defendant is found to have been incompetent at the time of trial, or if the inquiry into competency is found to be impossible, the defendant is entitled to a new trial.[3] Defendant's right to appeal is reserved. See Snyder, 98-1078 at pp. 31-32 & 43, 750 So. 2d at 855-56 & 863; State v. Mathews, 00-2115, p. 17 (La. App. 1st Cir. 9/28/01), 809 So. 2d 1002, 1016, writs denied, 01-2873 (La. 9/13/02), 824 So. 2d 1191 and 01-2907 (La. 10/14/02), 827 So. 2d 412.

CONCLUSION

Based on our review of the proceedings and evidence presented, we find no error in the trial court's rulings on the various motions urged by the defendant. Accordingly, we conditionally affirm defendant's convictions of second degree murder, attempted armed robbery, and armed robbery and the related sentences.

[3] The defendant could not be retried on count II. On count IV, he could not be retried on armed robbery. See La. C. Cr. P. art. 598(A).

However, we remand this case to the trial court for a *nunc pro tunc* competency hearing. If the trial court finds that a retrospective determination of the defendant's competency is not possible or finds that the defendant was not competent to stand trial, defendant should be granted a new trial.

CONVICTIONS AND SENTENCES ON COUNTS I, III, AND IV CONDITIONALLY AFFIRMED; CASE REMANDED WITH INSTRUCTIONS.

STATE OF LOUISIANA

VERSUS

MEDJOURE CHEFNEY

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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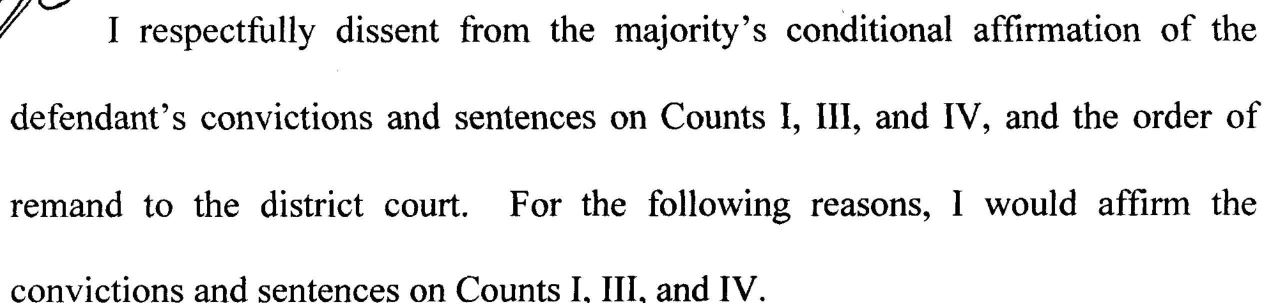
BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

Carter, C.J., dissenting.



I respectfully dissent from the majority's conditional affirmation of the defendant's convictions and sentences on Counts I, III, and IV, and the order of remand to the district court. For the following reasons, I would affirm the convictions and sentences on Counts I, III, and IV.

The defendant did not assign as error a violation of La. Code Crim. P. art. 642; nor in my opinion, did a La. Code Crim. P. art. 920(2) error occur. On November 2, 2005, the defendant appeared before the trial court with counsel. Defense counsel indicated to the court that the defendant had informed him that he was receiving a government check because of a "mental problem." Counsel explained:

> I need to find out what that is before I can go forward, and I don't know whether the best case is to ask for a Sanity Commission or—obviously I need more time to find his records. ... I guess out of an abundance of caution, Judge, I'm going to ask for a Sanity Commission because I—there's no way I can track records down in New Orleans when I don't know where to look for them.

Defense counsel then qualified that he would follow-up with a written motion. Noting that two doctors already had been appointed in this matter, the trial court provided defense counsel with their names and indicated that the sanity return would be on December 8. The written motion for the appointment of a sanity commission was never filed on behalf of the defendant.

During the June 16, 2008, pretrial conference, the trial court asked if there was an outstanding motion to appoint a sanity commission on co-defendant Jerell

Marshall. Counsel explained that the motion the court referred to was on behalf of the defendant (Chefney). The following exchange then occurred on the record.

> Counsel: It was withdrawn.
>
> Court: So we do not have that issue pending?
>
> Counsel: No.
>
> ....
>
> Counsel: Your Honor, what happened was, I was appointed to represent Mr. Chefney. In my original interview with him, he told me that he had been on social security disability his whole life.
>
> So, out of an abundance of caution, because I didn't know what that disability was, I made an oral motion for the commission, because I didn't know [if] it was a mental problem that had him on disability. It turned out, I think, it was a diabetes type thing, so I withdrew the motion.
>
> But, once again, I think that was well over two years ago anyway.

Counsel for the defendant orally moved for the appointment of a sanity commission "out of an abundance of caution" due to his lack of familiarity with his client's health. Counsel indicated to the court that he would follow-up with a written motion; however, counsel never filed a written motion for appointment of a sanity commission because counsel discovered the defendant's disability was physical and not mental. A mental examination of a defendant is required only when there are reasonable grounds to doubt the defendant's mental capacity to proceed. La. Code Crim. P. art. 643; **State ex rel. Seals v. State**, 2000-2738 (La. 10/25/02), 831 So.2d 828, 832.

For the above stated reasons, I respectfully dissent and would affirm the defendant's convictions and sentences.