NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0237

STATE OF LOUISIANA

VERSUS

CHRISTOPHER JOHN GAGE

Judgment Rendered: October 29, 2010

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On Appeal from the 32nd Judicial District Court
In and For the Parish of Terrebonne
Trial Court Number 303,250

Honorable John R. Walker, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Guidry, J. concurs in the result.

HUGHES, J.

The defendant, Christopher John Gage, was convicted of one count of second degree murder (count II), a violation of LSA-R.S. 14:30.1(A)(1); two counts of manslaughter (counts I and III), violations of LSA-R.S. 14:31; and one count of attempted manslaughter (count IV), a violation of LSA-R.S. 14:27 and LSA-R.S. 14:31. On count II, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. On count I, he was sentenced to forty years at hard labor to run consecutively to the sentence imposed on count II. On count III, he was sentenced to forty years at hard labor to run consecutively to the sentences imposed on counts I and II. On count IV, he was sentenced to twenty years at hard labor to run consecutively to the sentences imposed on counts I, II, and III.

On appeal, this court conditionally affirmed the convictions and sentences and remanded to the trial court for the purpose of determining whether a *nunc pro tunc*[1] competency hearing was possible, and if so, for the holding of such an evidentiary hearing. See **State v. Mathews**, 2000-2115, p. 17 (La. App. 1 Cir. 9/28/01), 809 So.2d 1002, 1016, writs denied, 2001-2873 (La. 9/13/02), 824 So.2d 1191, and 2001-2907 (La. 10/14/02), 827 So.2d 412. Upon remand, the trial court found it was possible to hold a *nunc pro tunc* competency hearing[2] and, after holding such a hearing, found the defendant was competent and able to assist counsel at the time of trial. The defendant now appeals, designating the following assignments of error:

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[1] "*Nunc pro tunc*" is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect; in other words, a thing is done now, which has the same legal force and effect as if it had been done at an earlier time. See Black's Law Dictionary 964 (5th ed. 1979).

[2] The defendant challenged this ruling and the trial court's finding that testimony and documents from the defense concerning the defendant's competency were not privileged, in a writ application, which this court denied in an unpublished decision. See **State ex rel. Gage v. State of Louisiana**, 2003-2181 (La. App. 1 Cir. 2/9/04) (unpublished), writ denied, 2004-0606 (La. 11/8/04), 887 So.2d 448.

1. The trial judge erred in his determination that a [*nunc pro tunc*] proceeding was possible when the record contained insufficient evidence that a meaningful assessment of [the defendant's] mental competency could be made retroactively. The judge failed to hold the [S]tate to its burden of proof to demonstrate that non-privileged information was available to make such an assessment.

2. The trial judge erred in compelling the disclosure of privileged case files and in compelling testimony by defense counsel, representatives of the defense team, including a defense expert, and appellate counsel.

3. The evidence established by a preponderance of the evidence that [the defendant] was mentally incompetent to assist counsel at the time of trial. The trial judge's determination of capacity based upon a withdrawal of an insanity plea which does not address the competency issue as well as upon testimony that violated the attorney client privilege was error.

For the following reasons, we unconditionally affirm the convictions and sentences on counts I, II, III, and IV.

FACTS

The facts concerning the offenses were set forth in our original decision in this matter. See **State v. Mathews**, 2000-2115 at pp. 3-4, 809 So.2d at 1007-08.

NUNC PRO TUNC COMPETENCY HEARING

In his first assignment of error, the defendant argues that the trial court erred in finding a *nunc pro tunc* competency hearing was possible, because the record, together with such additional evidence as may be relevant and available, did not permit an accurate assessment of the defendant's condition at the time of the original proceeding.

Nunc pro tunc hearings on the issue of competency are allowed if a meaningful inquiry into the defendant's competency can still be had. The trial court is in the best position to determine whether it can make a retrospective determination of the defendant's competency during his trial and sentencing. The determination of whether a trial court can hold a meaningful retrospective competency hearing is necessarily decided on a case-by-case basis. The State

bears the burden to show the court that the tools of rational decision are available. **State v. Snyder**, 98-1078, pp. 30-31 (La. 4/14/99), 750 So.2d 832, 855.

A "meaningful" determination is possible when the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original State proceeding. Additionally, when determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available. **State v. Snyder**, 98-1078 at p. 31, 750 So.2d at 855.

The detailed written reasons for judgment filed in this matter demonstrate that the trial court did not abuse its discretion in finding that a meaningful retrospective competency hearing was possible. The reasons further reveal that contemporaneous medical evidence and/or medical records were available.

In these reasons, the trial judge indicated that although the defendant was originally charged in Division "A" of the trial court, "where various pleadings were filed and hearings held," his case was transferred to Division "B." The State then amended the indictment on December 27, 1999, to charge the defendant, along with two co-defendants, under Docket Number 303,250. The trial resulting in the defendant's conviction was held January 11-21, 2000.

The trial judge further noted in his reasons that, after transfer of the case to Division "B," defense counsel requested funds for conducting psychiatric examination of the defendant and, on April 12, 1999, the court ordered the expenditure of $4,500 to have the defendant examined by Dr. Sarah Deland, a forensic psychiatrist, Dr. Marc Zimmerman, a forensic psychologist, and Patricia

Percy, a forensic social worker.[3] However, according to the trial judge's reasons, on June 2, 1999, defense counsel Mark Nolting filed a motion to withdraw the defendant's insanity plea stating, "the defense has attained sufficient examination of your mover at this time by qualified medical expert(s) to believe that the burden of proof of an insanity defense cannot be maintained at trial, and, hence, the motion to withdraw same is proper." (Emphasis original.)

The defendant argues that insanity at the time of the offense and competency to proceed to trial are two different things. We agree. We note, however, that an expert determining the defendant's sanity at the time of the offense would be in a position to note the defendant's competency to proceed to trial. The trial court's reasons for judgment also indicate that recollections of non-experts who had the opportunity to interact with the defendant during the relevant period and the court's own recollection of the defendant's behavior at trial were available.[4]

This assignment of error is without merit.

ATTORNEY-CLIENT PRIVILEGE

In his second assignment of error, the defendant argues the trial court erred in denying the defense objection and allowing the State to obtain information from defense counsel and persons hired by the defense concerning the defendant's competency at the time of trial, which violated the attorney-client privilege.

Louisiana Code of Evidence Article 506(B) provides, in pertinent part:

> A client has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication, whether oral, written, or otherwise, made for the purpose of facilitating the rendition of professional legal services to the client, as well as the perceptions, observations, and the like, of the mental, emotional, or physical condition of the client in connection with such a communication, when the communication is:

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[3] The record indicates that only Dr. Deland examined the defendant.

[4] Defendant's competency to proceed to trial is addressed hereinafter in connection with his third assignment of error.

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer.

However, Comment (i) to Article 506 states that the privilege does not include any information that the lawyer may have gotten by reason of his being such legal adviser.

In determining the applicability of a privilege, a court should determine whether the testimony that is claimed to be privileged is in the class whose exclusion will advance the policy sought to be furthered by the privilege. **State v. Taylor**, 94-0696, p. 6 (La. 9/6/94), 642 So.2d 160, 165. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the attorney being fully informed by the client. The privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. See **Upjohn Company v. United States**, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).

Following remand, the State moved for permission to issue a subpoena to the defense attorney of record at the time of trial and to issue a *subpoena duces tecum* for him to produce his file for *in camera* inspection, in order to extract information regarding the competency of the defendant at the time of trial. The defense stated the defendant did not waive any applicable privileges and asserted the attorney-client privilege as to all information, including any personal observations, office file notes, and communications with experts, with respect to the competency of the defendant. The court ruled that if a competency hearing with the State experts had been held, the report of Dr. Deland would have been admissible evidence and

would have been discoverable by the State. The court reasoned that if the report would have been discoverable, it should not be privileged now. The court held all defense information that would reflect the mental status, competency, or the sanity of the defendant at the time the motions were filed until trial was not privileged and ordered the information produced for *in camera* inspection. Additionally, the court ordered that Dr. Deland prepare a written report concerning her observations, findings, and opinions concerning the competency and mental status of the defendant. The defense objected to the trial court's rulings.

Louisiana Code of Evidence Article 506(B) was not violated in this case. The privilege recognized in Article 506(B) protects against disclosure of "confidential communication[s]" and "the perceptions, observations, and the like, of the mental, emotional, or physical condition of the client in connection with such [communications]." A communication is "confidential" if it is not intended to be disclosed to persons other than: (a) those to whom disclosure is made in furtherance of obtaining or rendering professional legal services for the client; (b) those reasonably necessary for the transmission of the communication; and (c) when special circumstances warrant, those who are present at the behest of the client and are reasonably necessary to facilitate the communication. LSA-C. E. art. 506(A)(5).

The trial court in this case ordered production of information concerning the competency and mental status of the defendant prior to trial. This information was not a confidential communication under LSA-C.E. art. 506(B) because, unlike information implicating the defendant in a crime, it was not disclosed in furtherance of obtaining legal services. The information ordered produced in this case included information concerning whether the defendant was fully aware of the nature of the proceedings, such as: whether he understood the nature of the charge and could appreciate its seriousness; whether he understood what defenses were

available; whether he could distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he had an awareness of his legal rights; and whether he understood the range of possible verdicts and the consequences of conviction. It also included facts to determine the defendant's ability to assist in his defense, such as: whether he was able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he was able to assist counsel in locating and examining relevant witnesses; whether he was able to maintain a consistent defense; whether he was able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he had the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he was capable of testifying in his own defense; and to what extent, if any, his mental condition was apt to deteriorate under the stress of trial. See **State v. Bennett**, 345 So.2d 1129, 1138 (La. 1977) (on rehearing). Further, exclusion of information concerning the competency of the defendant prior to trial under the attorney-client privilege would not advance the policy sought to be furthered by that privilege, because the information did not relate to the client's reasons for seeking representation.

This assignment of error is without merit.

MENTAL CAPACITY TO PROCEED TO TRIAL

In his third assignment of error, the defendant argues the trial court erred in finding he had the mental capacity to proceed to trial, because members of his defense team (Robert Pastor, Mark Nolting, and Victoria Monteiro) indicated he lacked orientation as to time and space, failed to participate in preparing a defense, and was disruptive during trial.

Robert Pastor testified at the *nunc pro tunc* competency hearing. He was appointed to represent the defendant when the defendant was charged with three counts of first degree murder. Pastor related that, at that time, the defendant was

preoccupied with other matters and he was unable to impress upon the defendant the meaning of first degree murder and the consequences of a conviction on that charge. Pastor also stated that the defendant was unable to provide him with enough information to look for possible witnesses to subpoena on behalf of the defendant. Pastor had no contact with the defendant after the first degree murder charges against him were reduced.

Mark Nolting also testified at the *nunc pro tunc* competency hearing. Nolting was appointed as the penalty phase attorney for the defendant when he faced first degree murder charges, and he continued as the trial attorney when the charges were reduced. Nolting testified that the defendant, "didn't appear to be orientated to time and space as far as, you know, where he was at a certain time. Particularly, if you get arrested, sometime [sic] after an event, you don't necessarily know where you were." Nolting indicated, however, that the defendant gave him several names of people he knew and saw on a daily basis. Nolting also testified, "I think and I kind of very vaguely remember that there may have been some incidences during the trial where the [d]efendant got kind of hyperventilated and may have made brash statements on the [r]ecord, I don't know." Nolting conceded that "competency can change," and sometimes a defendant's ability to communicate with his attorney can improve once he is in jail and off drugs or alcohol. When asked if during the preparation of the case for trial, and specifically during the week of trial, he felt there was a need for competency tests to be performed on the defendant, Nolting replied, "If I had, I would have had them done."

Victoria E. Monteiro also testified at the *nunc pro tunc* competency hearing. She was a licensed investigator and had assisted the defense in connection with the defendant's case. She indicated the defendant was very vague and she "didn't think" he understood her or Pastor. She further related that the defendant was

unable to tell her the facts relating to the case. Nevertheless, Ms. Monteiro disclosed that she was at the counsel table during trial and did not witness any incidents that would have delayed the trial, any outbursts, or any other inappropriate behavior by the defendant.

Dr. Sarah Deland also testified at the *nunc pro tunc* competency hearing. She was hired by Pastor to determine whether or not there were any mental health issues that would be pertinent for the sentencing phase. She indicated her normal procedure for an examination was to conduct an interview, perform a mental status examination, look at any records provided, and prepare an assessment of competency.

Dr. Deland did not have any independent recollection of interviewing the defendant. She did, however, have pages of notes concerning the interview. Dr. Deland testified that she visited the defendant in jail on May 12, 1999, and that he was able to provide her with his arrest date at that time. The defendant was further able to tell Dr. Deland that he was a single, twenty-year-old black male, that he was born on June 2, 1978 in Charity Hospital in New Orleans, and that he was raised in Thibodaux. He also told her that his father had died in January of 1999, at age sixty-five, after suffering two strokes. The defendant also provided Dr. Deland with the name, age, and address of his mother, and the names and ages of his brothers and sisters. Dr. Deland asked the defendant how he would describe his childhood, and he indicated that he had a fairly happy childhood. The defendant also advised Dr. Deland of his educational history, his criminal history, and that he was twelve years old at the time of his first sexual encounter. The defendant also reported that his mother had taken him "for psych," which Dr. Deland interpreted as psychological testing, because the defendant stated he had to repeat first grade and because he had been psychologically tested at a juvenile detention facility.

The defendant advised Dr. Deland that he was charged with three counts of first degree murder and one count of attempted first degree murder in Thibodaux. He indicated to Dr. Deland that the newspaper said it was a "drug deal that went bad." Dr. Deland asked the defendant to explain the meaning of first degree murder, and he replied that murder meant that "you meant to kill somebody," and that "if it were first degree that you could get death or a life sentence." Dr. Deland asked the defendant to explain the meaning of attempt, and he said that it "means you try, you tried to kill them."

The defendant also told Dr. Deland that his attorney was Robert Pastor and that he had been appointed to represent the defendant. Dr. Deland asked the defendant if he knew how to contact his attorney, and the defendant stated that he had Pastor's phone number. Dr. Deland asked the defendant what his attorney's job was, and he replied, "To defend me – to try to get me off." Dr. Deland's notes also indicated the defendant understood his right to have an attorney and his right to remain silent. Her notes also stated that the defendant understood the concept of alibi.

Dr. Deland asked the defendant what the D.A.'s job was, and he responded, "To prosecute me . . . they want to get a conviction." Dr. Deland asked the defendant what the jury's job was, and he answered that "they see if you are guilty or not guilty." Her notes also recorded that she advised the defendant that, in a first degree murder case, the jury would also decide whether a defendant would receive the death penalty. Dr. Deland asked the defendant what the judge's job was, and he replied that "he's the boss." Dr. Deland asked the defendant about the function of witnesses, and he stated that "witnesses tell what happened." Dr. Deland asked the defendant about audience participation during trial, and he told her that "the audience can't say anything." Dr. Deland asked the defendant about the defendant's role at trial, and he answered that a defendant is "not supposed to

say anything, that the lawyer talks for you." Dr. Deland's notes indicated the defendant also understood that if a witness lied or said something the defendant did not agree with, he could whisper to his attorney during court.

Dr. Deland asked the defendant to explain the meaning of a not guilty plea, and he said that it meant that "he didn't do it." Dr. Deland asked the defendant, "What happens then?" He replied that you "[h]ave a trial." Dr. Deland asked the defendant, "If you are found not guilty at the trial, what happens?" He replied, "You could go home." She also asked the defendant to explain the meaning of being found guilty, and he said that "[g]uilty means you did it." She asked, "And what would happen?" The defendant replied, "You would get time." Dr. Deland asked the defendant if there were any other ways you could plead and he "brought up no contest." Dr. Deland asked if the defendant had ever heard of not guilty by reason of insanity or the insanity plea. The defendant responded that it meant that "you did it, but you didn't know what you were doing." Dr. Deland then asked what he thought the judge would do with somebody in that case, and the defendant said, "[S]end them to the hospital." Dr. Deland's notes also indicated the defendant understood that plea bargaining involved "making a deal," and meant that a defendant would get less time, the district attorney would get a conviction, and that, to plea bargain, a defendant has to plead guilty.

Dr. Deland did not remember having any concerns about what the defendant remembered about the offense or what he could tell his lawyer, but indicated she had not gone into those subjects with the defendant. She further testified that she did not use any standardized tests on the defendant. She also did not specifically discuss with the defendant his right to choose to testify or to remain silent in the courtroom, though she noted the defendant said he should let his lawyer talk for him. Dr. Deland conceded that she had thought about some of the elements considered in a competency hearing, but stated that she did not perform a thorough

competency examination of the defendant. Dr. Deland was then asked, "How comfortable are you right now to say that [you] remember now that Christopher Gage was competent not now but was competent six years ago?" She replied, "I couldn't tell you. I couldn't tell you."

The trial court found that even without considering the evidence adduced at the *nunc pro tunc* hearing, "the record, pleadings, and evidence which [were] available when defendant went to trial" indicated the defendant was competent at the time of trial. The court noted that prior to trial, the defendant and defense counsel Nolting made multiple appearances in connection with the proceedings and "[a]t no time was there a 'hint' or mention of the necessity for the Court to hold any hearings concerning [the] defendant's mental state or his ability to assist counsel." The court also noted that on December 1, 1999, counsel for the defendant filed a written notice of intention to present an alibi defense, alleging that the defendant was visiting his friend, Zondrea Jupiter, at McDonald's, her place of employment. The court found the notice of alibi was clear evidence of the defendant's ability to assist counsel. The court noted there was no motion to continue the trial so that mental examinations could be completed and, "[a]t no time prior to trial, during trial, or during post-trial motions was the issue of defendant's mental competency or ability to assist counsel raised after the June 2, 1999, withdrawal of the insanity plea."

The trial court also noted that it observed the defendant and defense counsel and their interaction with the other defendants and defense counsel during the various proceedings. The court stated that during trial, it had *not* observed childish behavior, such as giggling, laughing, disruptive verbal remarks, or disruptive conduct by the defendant with the codefendants. The defendant disputes the findings of the trial court, arguing the trial transcript indicates he made a "gun"

with his finger during trial. We addressed this issue in our original decision in this matter, noting:

> The one incident referred to by Gage's appellate counsel involved Gage making gestures to a witness, including the gesture of pointing a gun. The record reflects that the [S]tate expressed concern at trial that Gage was attempting to intimidate the witness. This incident suggests a knowledge of the proceedings and the possible consequences of a conviction. Alone, it is insufficient to prove or suggest mental incapacity.

State v. Mathews, 2000-2115 at pp. 17-18, 809 So.2d at 1016-17.

The trial court did not err in finding that the defendant had the mental capacity to proceed to trial. This assignment of error is without merit.

CONVICTIONS AND SENTENCES ON COUNTS I, II, III, AND IV UNCONDITIONALLY AFFIRMED.