NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1590

STATE OF LOUISIANA

VERSUS

RYAN HARRIS

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 12-07-0330, Section VII
Honorable Donald R. Johnson, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered September 14, 2011

PARRO, J.

The defendant, Ryan Harris, was charged by grand jury indictment with two counts of armed robbery (counts one and two), in violation of LSA-R.S. 14:64, one count of attempted armed robbery (count three), in violation of LSA-R.S. 14:64 and 14:27, one count of attempted second degree murder (count four), in violation of LSA-R.S. 14:30.1 and 14:27, and three counts of illegal possession of a firearm by a convicted felon (counts five, six, and seven), in violation of LSA-R.S. 14:95.1. He pled not guilty to all charges. On the day set for trial, the defendant filed a pro se application for appointment of a sanity commission, combined with a request to change his not guilty pleas to pleas of not guilty and not guilty by reason of insanity. After two hearings, the trial court denied the combined application. The defendant then waived his right to be tried by a jury and elected to proceed with a bench trial. The defendant was convicted as charged on counts one, two, three, and four. He was acquitted on counts five, six, and seven. The defendant was sentenced to fifteen years of imprisonment at hard labor on count one, fifteen years of imprisonment at hard labor on count two, five years of imprisonment at hard labor on count three, and twenty years of imprisonment at hard labor on count four, with all sentences to be served without benefit of probation, parole, or suspension of sentence.[1] The court ordered the sentences to be served concurrently with each other, and consecutive to any other sentence the defendant was then serving.

The state then filed a bill of information seeking to have the defendant adjudicated and sentenced under the Habitual Offender Law, LSA-R.S. 15:529.1. Following a hearing, the defendant was adjudicated a third-felony habitual offender and sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence.[2] The defendant now appeals, urging in a single assignment of

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[1] There is a discrepancy between the sentencing transcript, the court minutes, and the commitment order regarding the sentence on count four (attempted second degree murder). The transcript reflects that the court imposed a twenty-year sentence on this count, but the minutes and commitment order indicate the sentence was fifteen years. It is well settled that in the event of a discrepancy between the minutes and the transcript, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[2] The defendant's habitual offender status was based upon prior convictions for aggravated battery and illegal possession of a firearm by a convicted felon.

error that the trial court erred in denying his application for the appointment of a sanity commission and his request to change his pleas. We affirm the defendant's convictions and multiple offender adjudication. We vacate the multiple offender sentence and remand for further proceedings.

FACTS

On October 30, 2007, the defendant entered the Gameware store on College Drive in Baton Rouge and held Drue Creekmore, a Gameware employee, at gunpoint. The defendant demanded money and Playstation 3 gaming systems. Creekmore was aware that Security Guard Kirk Snearl was in the area and would be coming around shortly, so he stalled the defendant and did not immediately turn over the money. When Snearl arrived at the store, the defendant ran out of the door and fired a shot at him. Snearl returned fire, and the defendant was eventually wounded. Snearl disarmed the defendant and held him at gunpoint until the police arrived. A nylon cap was found at the scene. A white van registered to the defendant was found parked directly behind the Gameware store. The entire robbery attempt was captured on video surveillance.

Inside the defendant's van, the investigating police found a small GameStop bag containing cash and rolled coins. Alan Klenke, an employee at GameStop on Andrea Drive in Baton Rouge, testified that, on the same date, he was also robbed at gunpoint. The perpetrator entered the GameStop store, pointed a gun at Klenke, and demanded money and a Playstation 3 gaming system. Klenke placed the money from the register (cash and rolled coins) inside a small GameStop bag and gave it to the gunman. Klenke later viewed the surveillance footage from the Gameware robbery. The gunman in the Gameware robbery matched the description of the individual who robbed Klenke. Klenke also identified the bag found inside the defendant's van as the same type of bag that he gave to the gunman when he was robbed.

The defendant was also connected with the armed robbery of Ahmed Alarde at Po-Boy Express on Cedarcrest Avenue in Baton Rouge approximately one week earlier,

on October 24, 2007. The armed robbery at Po-Boy Express was also captured on video surveillance.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in denying his application for a sanity commission and his request to change his pleas. Specifically, the defendant contends his history of mental illness constituted good cause for allowing a change in his pleas. He argues that the trial court's refusal to allow him to change his pleas violated state law and deprived him of due process of the law.

Louisiana Code of Criminal Procedure article 561 provides that a defendant has the right to withdraw a plea of "not guilty" and to enter a plea of "not guilty and not guilty by reason of insanity," within ten days after arraignment. Thereafter, the trial court may, for good cause shown, allow such a change of plea. "Good cause" within the meaning of Article 561 has been found where the evidence indicated a defendant was suffering from a mental disorder, such as schizophrenia, or was undergoing psychiatric treatment and there was no suggestion that the defendant's motion for a change of plea was merely a delay tactic. See **State v. Taylor**, 254 La. 1051, 229 So.2d 95, 97-98 (1970); **State v. Delpit**, 341 So.2d 876, 879 (La. 1977). In **State v. Miller**, 05-1826 (La. 6/29/07), 964 So.2d 911, the Louisiana Supreme Court noted that Article 561 was never intended to prevent the defendant from changing his plea where a non-frivolous insanity defense exists. "Rather, the intent of the article, and as it has been consistently applied for almost forty years, was to prevent the defendant from filing a last minute change of plea so as to gain a strategical and tactical advantage." **State v. Miller**, 964 So.2d at 923. A defendant's burden of showing good cause for a change of plea logically increases each day that his trial date nears. **Id.** Therefore, the closer in time to trial the change in plea is filed, the greater the risk good cause will not be shown. **State v. Miller**, 964 So.2d at 922 n.21. "In sum, 'good cause' of Article 561 is shown when the defendant produces an indicia of insanity and shows the plea is not changed as a dilatory tactic to achieve a strategic advantage." **State v. Miller**, 964 So.2d at 923.

In the instant case, the defendant assigns error to the trial court's refusal to permit the defendant to change his pleas or to order a sanity commission.[3] The record reflects that the defendant was arraigned and pled not guilty on December 14, 2007. On October 5, 2009, the first day of his scheduled trial, the defendant filed a pro se motion to recuse his trial counsel.[4] He also filed the application for appointment of a sanity commission and his request to change his not guilty pleas to combined pleas of not guilty and not guilty by reason of insanity. In the motion to recuse his counsel, the defendant claimed his counsel was preventing him from constructing a "creditable defense." The defendant asserted his counsel was made aware of his history of mental illness but counsel refused to properly investigate the matter or to pursue an insanity defense on his behalf, despite having been advised by the defendant to do so. In the application for appointment of a sanity commission and a request for a change of plea, the defendant noted a lengthy history of mental illness dating back to childhood. He also claimed that he was currently under the care of a mental health professional at Dixon Correctional Institute.

On October 5, 2009, the court held a status conference on the record. In response to the request for a sanity commission, the court first inquired whether the defendant's counsel previously filed a similar motion on the defendant's behalf. While acknowledging that the defendant had disclosed adolescent mental health issues, his former counsel explained:

> No, your honor. He informed us that he had been seen as a juvenile adolescent in New Orleans at New Orleans Adolescent, at Coliseum Medical Center, and in Mandeville at Southeastern Hospital there. My personal knowledge of Southeastern, it's been closed for over ten years in Mandeville, because I attempted on – on a private case to get some files from there. New Orleans Adolescent has been closed, and Coliseum Medical was torn down years ago. So – and he will not allow us to contact his family. He doesn't want any contact with his family, so other than what he said, there is no way for us to follow up on that. I don't have a problem conversing, nor has Mr. Labranche or Mr. Lawrence [current counsel], conversing and discussing aspects of his case, so we had no reason to believe – and I think he doesn't understand competency

[3] Although the defendant's assignment of error notes the court's denial of his request for a sanity commission, his argument, which tracks the identical language of the supreme court's decision in **Miller,** relates only to whether good cause was shown to warrant a change of his pleas.

[4] The trial court denied the defendant's request to "recuse" his counsel. The defendant has not challenged this ruling.

> versus sanity – that he was incompetent to proceed. Now, he says in his motion that he's a paranoid schizophrenic. I'm not aware of that. I'm not aware of what doctor made that diagnosis. I don't know of any psychotropic medications he's on, but he also went to trial in Ascension Parish on armed robbery last summer that happened the same week these happened, and he didn't bring up any of those issues in Ascension.[5]

Thereafter, the defendant then advised of a more recent period of mental health treatment. He noted that he also received mental health treatment while incarcerated at David Wade Correctional Center from 2000 to 2007. The defendant's written motion also reflected that he was under the care of a mental health professional at the correctional facility where he was then housed (Dixon Correctional Center). The defendant presented argument to the court regarding his request to change his pleas, but he did not introduce any evidence in support of the motion. Counsel for the defendant advised that they were not aware that the defendant was currently being treated for mental illness. The state opposed the motion for a change of plea, arguing that it was merely a dilatory tactic by the defendant. The state noted that trial of the matter had been set and continued three times previously. The state further noted that this was the first time the defendant ever mentioned the possibility of a sanity commission or that he wanted to "recuse" his counsel. The state vigorously argued that the defendant was attempting to manipulate the system and delay the trial.

At this point in the transcript of the status conference, the court ruled that an adequate threshold to justify a factual basis for the appointment of a sanity commission had not been met. The court agreed to allow the defendant a one-day delay to assert additional facts and present proof in support of his requests.

The following day, a hearing was held on defendant's application for appointment of a sanity commission and his request for a change of pleas. At the beginning of the hearing, it was noted that the district attorney had been able to obtain the defendant's mental health records, consisting of fifty pages, from the David Wade Correctional Center. These records covered a period starting on February 3, 2009, which was the admission date to the state correctional system after being sentenced to forty years for armed robbery in Ascension Parish, and ending on October 5, 2009.

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[5] See **State v. Harris**, 10-2029 (La. App. 1st Cir. 5/6/11) (unpublished opinion).

After hearing argument from the parties and considering the mental health records, the trial court denied the request to change pleas and refused to appoint a sanity commission.

The combined plea of "not guilty and not guilty by reason of insanity" serves to put the court and the prosecutor on notice of the defendant's intention to rely on the defense of insanity at the time of the offense. Likewise, the request for the appointment of a sanity commission may raise the issue of the defendant's mental condition at the time of the offense or the defendant's mental capacity to proceed, or both. See LSA-C.Cr.P. arts. 641 through 658. Although the defendant claimed he previously advised his counsel of his adolescent mental health history and his desire to change his pleas, the record reflects that the defendant waited until the first day of his trial to file his pro se application to appoint a sanity commission and a request to change his pleas.

Based on the arguments of the parties and the record, it appears that no party disputed the fact that the defendant had mental health issues. However, the record supports a finding that the defendant had the mental capacity to proceed and, furthermore, the defendant testified in an articulate manner that he was competent to proceed. Accordingly, we cannot conclude that the trial court erred or abused its discretion in refusing to appoint a sanity commission to consider the defendant's mental capacity to proceed.

Moreover, nothing in the mental health records available to the court at the hearing on October 6, 2009, indicated that the defendant was unable to determine right from wrong on October 24 or 30, 2007. Therefore, the defendant failed to produce evidence of an indicia of insanity at the time of the offenses. When we consider the record and the totality of the circumstances in this matter, especially the fact that the subject pleadings were not filed until the first day of trial, we cannot conclude that the trial court erred or abused its discretion in denying the defendant's request to change his pleas. This assignment of error lacks merit.

REVIEW FOR ERROR

In accordance with our review for error pursuant to LSA-C.Cr.P. art. 920(2), we note a sentencing error. In this case, after being convicted of two counts of armed robbery, one count of attempted armed robbery, and one count of attempted second degree murder, the defendant was billed as a habitual offender. In the habitual offender bill, the state listed all four of these convictions. At the conclusion of the habitual offender hearing, the trial court failed to vacate any of the previously imposed sentences. See LSA-R.S. 15:529.1(D)(3). The court imposed a single enhanced sentence of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. Therefore, it is unclear whether the court intended to enhance one or all of the sentences. Notably, if the court intended to enhance all of the sentences, but then imposed only a single sentence, this is error. It is well settled that sentencing error occurs when a trial court, in sentencing for multiple counts, does not impose a separate sentence for each count. See **State v. Russland Enterprises, Inc.**, 542 So.2d 154, 155 (La. App. 1st Cir. 1989). Therefore, we vacate defendant's multiple-offender sentence and remand for resentencing. See **State v. Perkins**, 01-1092 (La. App. 5th Cir. 2/26/02), 811 So.2d 997, 1002, writ denied, 02-0929 (La. 11/15/02), 829 So.2d 422.

Considering the foregoing, we affirm the defendant's convictions and multiple offender adjudication. We vacate the multiple offender sentence and remand for further proceedings consistent with this opinion.

CONVICTIONS AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; HABITUAL OFFENDER SENTENCE VACATED; REMANDED FOR FURTHER PROCEEDINGS.