NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0415

STATE OF LOUISIANA

VERSUS

TEVIN CROCKETT

Judgment Rendered: NOV 14 2012

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Trial Court No. 08-09-0432

The Honorable Richard Anderson, Judge Presiding

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BEFORE: PARRO, HUGHES, AND WELCH, JJ.

HUGHES, J.

The defendant, Tevin Crockett, was charged by grand jury indictment with one count of armed robbery (Count I), a violation of LSA-R.S. 14:64(A), and one count of second degree murder (Count II), a violation of LSA-R.S. 14:30.1.[1] He pled not guilty to both counts. Following a jury trial, he was found guilty as charged on both counts. On Count I, he was sentenced to fifty years at hard labor without benefit of probation, parole, or suspension of sentence. On Count II, he was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The trial court ordered that the sentences would run concurrently with each other. The defendant moved for reconsideration of sentence, but the motion was denied. He now appeals, contending the trial court erred in denying a motion to sever the offenses and in sentencing him to life without parole. For the following reasons, we affirm the convictions on Counts I and II, affirm the sentence on Count I, vacate the sentence on Count II, and remand for resentencing on Count II.

FACTS

Frederick Wright, the victim of Count I, testified at trial. On April 24, 2009, at approximately 4:24 p.m., Wright stated that he was walking near the Brandywine Apartments on Darryl Drive, in Baton Rouge, when he was approached by a man. The man asked Wright to come to him, and he went "to see what he wanted." The man asked Wright what he needed. Wright told the man, "I don't need a thing." The man stated, "Well, look, I don't got time to play. What do you want?" Wright replied, "Don't want nothing.

[1] Rondale Simpson was charged by the same indictment with the same counts. However, his motion to sever the co-defendants was granted, and he was not tried with the defendant.

I'm cool. I'm straight." The man stated, "What do you need, what do you need? I don't have time to play." Wright replied, "I don't have time to play neither." The man then stated, "Well, give me your money." Wright saw the man had a gun, so he gave the man money from his pocket. Thereafter, a second man grabbed Wright from behind, pulled him down to the ground, and started hitting him. The first man also began beating Wright with a gun. A third man then pulled Wright's wallet out of his pants and ran away with the wallet. The robbers took approximately $240 from Wright.

The first man then threw Wright's shoes into the grass and ordered him to take off his clothes. Wright refused to take off his clothes, and the first man tried to "cock [his gun] and [tried] to get it to go." The weapon did not fire, and the man told Wright to leave. Wright retrieved his shoes and ran until he saw a police officer. Before Wright could finish reporting the robbery to the police officer, the officer received a call of "an incident at Brandywine."

Wright testified the robbers "looked like kids." He stated that the first man was wearing a white shirt and blue jeans. Wright indicated the second man was wearing a black or blue-colored shirt and a baseball cap. Wright stated that the third man was wearing a white shirt and khaki pants. Wright selected the defendant's photograph from a six-person photographic line-up as the second man, who had worn the black or blue-colored shirt and the baseball cap. Additionally, he identified the defendant in court as the second man.

Kelan Bridgewater and his roommate were moving out of the Brandywine Apartments at the time Wright was robbed. Bridgewater saw three men on top of Wright, "taking his wallet and things, holding him down, punching him." He indicated two of the robbers were wearing white

t-shirts, and the third was wearing a black shirt and a black cap. After Wright ran off, the robbers walked in the direction of Bridgewater's apartment.

Thereafter, Bridgewater saw a blue pickup truck enter the apartment complex. One of the robbers talked to the driver of the pickup truck, and the other robbers started to walk off. The first robber called the other two robbers back, stating, "Say, bro, go get the pistol. Go get the pistol." One of the robbers wearing a white t-shirt opened the passenger door of the truck. The robber wearing the black t-shirt began arguing with the driver and then pulled out a pistol and shouted, "Give it up, give it up. You not going to give it up?" The driver of the truck put the vehicle in reverse to "get out of there," but the robber on the passenger side "slap[ped]" the truck into neutral and the engine revved "really loud." The robber in the black t-shirt then stated, "You still not going to give it up?" He then shot the driver. Bridgewater testified the "same exact three people" robbed Wright and shot the driver of the truck. He stated the crimes were "a series of events back to back."

Bridgewater's roommate, Warren Lands, also testified at trial. Lands verified the testimony of Bridgewater, that they watched, from the second-floor balcony outside their apartment, the three assailants, two of whom were wearing white shirts and one was wearing a blue or black shirt and a cap, rob the first victim (Wright). The assailant with the blue or black shirt was identified as the one who had a gun. The three assailants then approached the area where Lands and Bridgewater were standing, and Lands, who had armed himself with a shotgun, told the males, "[Y]'all got to get from around here with that." The three assailants walked off, and the assailant who was wearing a white shirt got into the second victim's truck;

the white-shirted assailant then called out for one of his cohorts to bring the gun. The blue or black-shirted assailant approached the truck and yelled at the victim to "give it up"; he then shot the victim.

The driver of the truck, the victim of Count II, was later identified as Theodore Edward Lange. He suffered a fatal gunshot wound to the left side of his chest, which lacerated his aorta and liver.

JOINDER OF OFFENSES

In his first assignment of error, the defendant asserts that the trial court erred in denying his motion to sever the offenses because they arose at different places, involved different victims, did not arise out of the same transaction or occurrence, and did not contain the same elements of proof or intent.

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial. LSA-C.Cr.P. art. 493. If it appears that a defendant or the State is prejudiced by a joinder of offenses in an indictment or bill of information or by such joinder for trial together, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires. LSA-C.Cr.P. art. 495.1.

In ruling on a motion for severance, the trial court should consider a variety of factors in determining whether prejudice may result from the joinder: whether the jury would be confused by the various counts; whether the jury would be able to segregate the various charges and the evidence;

whether the defendant could be confounded in presenting his various defenses; whether the crimes charged would be used by the jury to infer a criminal disposition; and whether, considering the nature of the offenses, the charging of several crimes would make the jury hostile. A severance need not be granted if the prejudice can effectively be avoided by other safeguards. In many instances, the trial judge can mitigate any prejudice resulting from joinder of offenses by providing clear instructions to the jury. The State can further curtail any prejudice with an orderly presentation of evidence. **State v. Allen**, 95-1515 (La. App. 1 Cir. 6/28/96), 677 So.2d 709, 713, writ denied, 97-0025 (La. 10/3/97), 701 So.2d 192.

A motion for severance is addressed to the sound discretion of the trial court, and its ruling should not be disturbed on appeal absent a showing of an abuse of discretion. A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever. Factual, rather than conclusory, allegations are required. Evidence of a crime other than the one charged, which may not, for some reason, be admissible under **Prieur**[2] in a separate trial of that charge, does not prevent the joinder and single trial of the charge of multiple crimes, if the joinder of the crimes is otherwise permissible. **State v. Allen**, 677 So.2d at 713.

Prior to trial, the defendant filed a motion for severance of the offenses, arguing a joint trial of the offenses would confuse the jury because it would not be able to segregate the evidence of each count. He also claimed a joint trial would confound the presentation of defenses. Additionally, he argued that the evidence of each offense would be inadmissible in a trial of the other. He also claimed the charges did not arise out of the same transaction or

[2] **State v. Prieur**, 277 So.2d 126 (La. 1973).

occurrence, and, if the counts were tried together, the jury would necessarily infer a criminal disposition on his part. The State argued that Counts I and II were part of a "crime spree" and occurred within one hour of each other. The State further argued that the investigations of Counts I and II overlapped. Additionally, the State argued the offenses were easily distinguishable, involved two different victims, and their joinder would not confuse the jury. Following a hearing, the trial court denied the motion to sever the offenses, and the defendant objected to the trial court's ruling.

At the hearing on the motion, the State presented testimony from Baton Rouge Police Department Officer Larry Maples. Officer Maples investigated the armed robbery of Frederick Wright and the homicide of Theodore Lange. Both offenses occurred on April 24, 2009. Wright "flagged down" a police officer to report the armed robbery at 4:24 p.m. Thereafter, at 4:36 p.m., officers were dispatched in regard to the homicide. Both offenses occurred in the same location - the Brandywine Apartment complex at 10950 Darryl Drive in Baton Rouge. Officer Maples testified it would only take 30 to 45 seconds to walk from the location of the armed robbery to the location where Lange and his vehicle were found. Additionally, eyewitnesses at the scene, Bridgewater and Lands, testified that they saw the same three people commit both offenses. Wright identified the defendant as the assailant who had worn the blue or black shirt and who had a gun during the attack (the other two assailants wore white shirts). Bridgewater and Lands testified that the assailant who had worn the blue or black shirt was one of the individuals involved in the homicide of Lange. A gun was used to rob Wright, and Lange died as a result of a gunshot wound. Officer Maples also indicated that Rondale Simpson, who was also indicted on Counts I and II, provided information concerning both offenses.

There was no abuse of discretion in the denial of the motion to sever the offenses. Joinder of Counts I and II in a single indictment was proper under LSA-C.Cr.P. art. 493. The offenses were based upon acts or transactions connected together or constituting parts of a crime spree and were triable by the same mode of trial, i.e., a jury composed of twelve jurors, ten of whom must concur to render a verdict. See LSA-Const. art. I, § 17(A); LSA-C.Cr.P. art. 782(A); LSA-R.S. 14:64(B); LSA-R.S. 14:30.1(B); **State v. Brown**, 504 So.2d 1025, 1029-30 (La. App. 1 Cir.), writ denied, 507 So.2d 225 (La. 1987). Further, any prejudice resulting from joinder of the offenses was mitigated by the orderly presentation of evidence by the State and by the court providing the jury with separate verdict forms and separate responsive verdicts.[3]

This assignment of error is without merit.

UNCONSTITUTIONAL SENTENCE

In his second assignment of error, the defendant contends that his sentence of life without parole on Count II is unconstitutional under **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). He does not challenge the sentence imposed on Count I.

In **Miller v. Alabama**, the Supreme Court held that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. ___ U.S. at ___, 132 S.Ct. at 2469. **Miller** does not, however, establish a prohibition against life imprisonment without possibility of parole for juvenile homicide offenders in every case, but rather requires a sentencing court to consider the offender's youth and attendant characteristics as mitigating circumstances before deciding to impose the harshest possible penalty for juveniles. **Miller**, ___

[3] The jury charge was not made part of the record.

U.S. at ___, 132 S.Ct. at 2467-69; **State v. Graham**, 2011-2260 (La. 10/12/12), ___ So.3d ___. In **Miller**, the Supreme Court further stated:

> "A State is not required to guarantee eventual freedom," but must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation[.]" [**Graham v. Florida**, ___ U.S. ___, ___, 130 S.Ct. 2011, 2030, 176 L.Ed.2d 825 (2010).] By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in **Roper**, **Graham**, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in **Roper** and **Graham** of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." **Roper** [**v. Simmons**, 543 U.S. 551, 573, 125 S.Ct. 1183, 1197, 161 L.Ed.2d 1 (2005)]; **Graham** [**v. Florida**, ___ U.S. at ___, 130 S.Ct. at 2026-27]. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Miller v. Alabama, ___ U.S. at ___, 132 S.Ct. at 2469. The Supreme Court enumerated the following individual circumstances of a juvenile defendant as pertinent for consideration by a sentencing court: consideration of his chronological age and its hallmark features - among them, immaturity, impetuosity, and failure to appreciate risks and consequences; the family and home environment that surrounds him - and from which he cannot usually extricate himself - no matter how brutal or dysfunctional; the circumstances of the offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him; whether he might have been charged and convicted of a lesser offense if not for

incompetencies associated with youth - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys; and the possibility of rehabilitation when the circumstances suggest it. See **Miller v. Alabama**, ___ U.S. at ___, 132 S.Ct. at 2468.

In the instant case, during a hearing on a post-verdict motion for acquittal, under LSA-C.Cr.P. art. 821, and following the denial of the motion, the defendant waived sentencing delays through the following colloquy:

> **THE COURT**: Is he going to waive any sentencing delays?
>
> [**DEFENSE COUNSEL**]: You want your sentence today?
>
> **THE DEFENDANT**: (Defendant nods head.)
>
> [**DEFENSE COUNSEL**]: Waive delays, Your Honor.

The trial court then sentenced the defendant, for the crime of second degree murder, to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The trial court did not order a presentence investigation, as authorized by LSA-C.Cr.P. art. 875, or otherwise inquire "into the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, his family situation and background, economic and employment status, education, and personal habits," as would have been accomplished by a presentence investigation. See LSA-C.Cr.P. art. 875(A)(1). Nor was there any mention of the requirements set forth in **Miller v. Alabama** for juvenile offenders.

The defendant in this case was born on June 24, 1993. He committed the crime charged in Count II, second degree murder, on April 24, 2009, and was under the age of eighteen on that date. Therefore, we find that the defendant's sentence of life imprisonment at hard labor, without parole, on

Count II, violates **Miller v. Alabama**, and this assignment of error has merit. Accordingly, we hereby vacate the sentence on Count II and remand for resentencing on that count in accordance with **Miller v. Alabama** and **State v. Graham**.

CONVICTIONS ON COUNTS I AND II AFFIRMED; SENTENCE ON COUNT I AFFIRMED; SENTENCE ON COUNT II VACATED; REMANDED FOR RESENTENCING ON COUNT II WITH INSTRUCTIONS.