NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

JAP

NUMBER 2007 KA 0368

STATE OF LOUISIANA

VERSUS

BRANDI BROWN

Judgment Rendered: September 14, 2007

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 10,190

Honorable Alvin Turner, Jr., Judge

* * * * * * *

Anthony G. Falterman, District Attorney
Donald D. Candell, Assistant District Attorney
Gonzales, LA

Attorney for
State – Appellee

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Attorney for
Defendant – Appellant
Brandi Brown

* * * * * *

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

Carter J. concurs with reasons

WELCH, J.

The defendant, Brandi Brown, was charged by a grand jury indictment with first degree murder, a violation of La. R.S. 14:30. The defendant pled not guilty. At the commencement of trial, during the selection of jury, the State amended the original indictment and charged the defendant with second degree murder, a violation of La. R.S. 14:30.1.[1] The jurors in this trial became deadlocked, and the trial court declared a mistrial. The defendant was retried, and following a second jury trial, he was found guilty as charged. The defendant was sentenced to life at hard labor. The defendant now appeals, designating two assignments of error. We affirm the conviction, amend the sentence, and affirm as amended.

FACTS

On February 20, 1997, at about 1:00 a.m. at the Christine Apartments in Prairieville, Ascension Parish, the defendant, also known as "Rock Hard," shot and killed Gerald Henry, also known as "Turtle." One eyewitness to the shooting testified at trial. Three other witnesses who spoke to Henry shortly before he died testified at trial that Henry identified "Rock Hard" or "Hard Rock" as the person who shot him.[2]

Jason Hill, a co-defendant in this case, who was granted complete immunity for his testimony, testified that he was at the Christine Apartments sitting in his car talking to Henry. Donald Ray West ("Quack") was also in Hill's car. Hill saw the defendant approach Henry. The defendant had a shotgun and told Henry to "give it up." Henry put his hands in the air. From about two feet away, the defendant shot Henry in the stomach. Another person was with the defendant. Hill attempted to

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[1] The defendant was rearraigned on the amended charge of second degree murder and entered a plea of not guilty.

[2] Of the witnesses who spoke to Henry before he died, two testified that Henry said "Rock Hard," and one testified that Henry said "Hard Rock."

drive away, but the defendant and this unidentified person jumped in Hill's car. The defendant told Hill to drive away.

Tyrus Jackson testified at trial that he lived at the Christine Apartments, and he knew Henry. Jackson found Henry lying on the ground, shot but still alive. When Jackson asked Henry who shot him, Henry replied, "Rock Hard from China Town."

Brandy Shaheen, who lived with Jackson, testified at trial that Jackson told her that Henry had been shot. When Shaheen approached Henry, Henry said that he could not believe that "Rock Hard" shot him.

Captain Ward Webb[3] with the Ascension Parish Sheriff's Office testified that he was dispatched to the scene. When he approached Henry, who was lying face down, he asked him if he had been shot. Henry replied he had been shot in the stomach. Captain Webb then asked Henry if he knew who shot him. Henry replied it was "Rock Hard from China Town."

Major Benny Delaune[4] with the Ascension Parish Sheriff's Office testified at trial that he was present during the booking process of the defendant. The defendant informed one of the officers that his alias or a/k/a/ was "Rock Hard." Major Delaune further testified that the defendant lived on Bluebird Street in Gonzales, an area known as "China Town."

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to quash for failure to timely prosecute. Specifically, the defendant contends that the amended charged offense should govern the period within the time trial must be commenced.

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3 Captain Webb was a lieutenant at the time of the shooting.

4 Major Delaune was a lieutenant at the time of the shooting.

During the applicable time period, La. C.Cr.P. art. 578 provided in pertinent part:

> A. Except as otherwise provided in this Chapter, no trial shall be commenced:
>
> (1) In capital cases after three years from the date of institution of the prosecution;
>
> (2) In other felony cases after two years from the date of institution of the prosecution; and
>
> * * *
>
> The offense charged shall determine the applicable limitation.

Louisiana Code of Criminal Procedure article 582 provides:

> When a defendant obtains a new trial or there is a mistrial, the state must commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer.

The defendant was indicted on March 27, 1997, for first degree murder. Trial commenced on May 27, 1998. On this date, the State amended the charge of first degree murder to second degree murder. On the following day, the jury was deadlocked, and the trial court declared a mistrial. The State made an oral motion to refix the trial for June 16, 1998. However, no trial was set for this time, and on September 22, 1999, the defendant filed a motion to quash for failure to timely prosecute, seeking to have the indictment quashed under La. C.Cr.P. art. 582. The defendant suggested that since the offense charged was second degree murder, the State had until March 27, 1999, to commence prosecution. On the other hand, if the one-year period from the day mistrial was ordered was applied, then the State had until May 28, 1999, to commence prosecution (since mistrial was ordered May 28, 1998).

In its memorandum in opposition to the motion to quash, the State countered that under La. C.Cr.P. art. 578, the offense charged determined the applicable time

limitation and that since the defendant was "initially charged" with first degree murder, under Subsection (1) of Article 578, the State had until March 27, 2000, to commence prosecution. On January 18, 2000, the trial court denied the motion to quash and scheduled the trial for the next day (January 19, 2000). The defendant moved for a continuance, which was apparently granted as the defendant's second trial commenced on September 19, 2000.

In **State v. Wilson**, 363 So.2d 481, 483 (La. 1978), the supreme court stated, "We have repeatedly held that the State may abandon the greater crime charged in an indictment and proceed to trial only on a lesser offense." Thus, the State's decision to amend the indictment from aggravated rape to attempted aggravated rape "had no effect on the three-year time limitation." *Id.*; see also **State v. Peters**, 546 So.2d 557, 559 n.1 (La. App. 1st Cir. 1989).

Accordingly, absent any periods of suspension or interruption, the State had until March 27, 2000, to commence trial. Two months prior to this date (January 18, 2000), the trial court denied the motion to quash.

Louisiana Code of Criminal Procedure article 580 provides:

> 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.

One year after the ruling on the motion to quash on January 18, 2000, would have been January 18, 2001. Thus, the State had until January 18, 2001, to commence trial. Accordingly, on September 19, 2000, the second trial was timely commenced.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant argues the trial court erred

in allowing the prosecutor to treat Nelson Howard, Jr. as an adverse witness. The defendant further argues the trial court erred in allowing the prosecutor in his closing argument to make references to Howard's refusal to testify, as well as Donald Ray West's failure to appear at trial.

Prior to Howard taking the stand at trial, the prosecutor, with the jury present, informed the trial court that Howard was a co-defendant in this case and that Charles "Chuck" Long, the original prosecutor, granted Howard "complete immunity for his testimony here today." As such, he "does not have the right to plead the 5th Amendment or the right to not say anything on the grounds of self-incrimination." The trial court then informed Howard that he had no exposure regarding self-incrimination. The trial court advised Howard that because of the grant of immunity, "there cannot be any prosecution against [him] whatsoever insofar as any statements asked of [him] in this case."

Howard took the stand and gave his name and address. He then stated that he did not want to testify. The prosecutor assured Howard that he would "not be prosecuted for this case or for [his] involvement in this case whatsoever." The prosecutor resumed questioning, and Howard testified that he knew the defendant and identified him in court. When Howard refused to answer the next question, the trial court retired the jury. The trial court explained to Howard that he had been granted immunity and that he could not be prosecuted. The trial court pointed out that Howard was a subpoenaed witness and that if he refused to testify, he could be held in contempt. Also, since Howard was a witness, and not on trial, he did not have the right to remain silent.[5]

The jury returned, and the prosecutor resumed questioning. Howard

[5] At this point, the trial court took a brief recess. When it returned, the trial court stated that it spoke to defense counsel and the State, and that it "was informed by your counsel that he's told you to testify in that you have been granted immunity and it's my understanding that you are going to testify."

answered the first few questions, but then refused to answer the next several questions. The prosecutor requested that he be allowed to treat Howard as an "adverse witness," and the trial court granted the request. The prosecutor proceeded to ask leading questions based on a previous statement Howard had given to the police. Following is some of that exchange between the prosecutor and Howard:

> Q. Do you remember telling Mr. Laland[6] that on that particular night, the late night of February 19, early morning of February 20, that you, Brandi Brown, Donald West and Jason Hill were riding around in Jason Hill's vehicle? . . . (footnote added)
>
> . . . .
>
> A. I don't want to answer the question.
>
> . . . .
>
> Q. Do you remember saying as you were driving through the complex, they spotted a person known as Turtle coming from one of the hallways in the complex?
>
> Do you remember telling him that?
>
> A. I don't want to answer.
>
> . . . .
>
> MR. TILLEY [defense counsel]:
> Still object to the whole line of questioning. It's hearsay.
>
> THE COURT:
> Let the objection be noted. Overruled.
>
> . . . .
>
> Q. You also remember telling him that they knew he, Turtle, was dealing illegal drugs? . . .
>
> A. I don't want to answer.
>
> Q. Do you remember telling him that Jason Hill continued driving through the complex . . . he stopped and . . . you and Brandi Brown

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[6] The only other reference to Laland is a question asked by the prosecutor shortly before Howard was identified as a hostile witness: "Let me ask you this, Nelson. Do you remember giving a statement to Mr. Ronald Laland on May 24, 2000?"

got out of the car?

You remember telling him that?

A. I don't want to answer.

Q. That Hill . . . stopped in the drive . . . as Turtle came from the apartment and walked to the Hill vehicle?

Do you remember telling him that?

A. I don't want to answer.
Q. You also remember telling him that it was about that time that Brandi Brown went running to the vehicle shouting, quote, Give it up, give it up. And then he shot Turtle with a shotgun.

Do you remember telling him that?

A. I don't want to answer.

MR. TILLEY:
Still note my objection as hearsay, Your Honor.

THE COURT:
That's a continuing objection?

MR. TILLEY:
Continuing, yeah. Continuing objection.

. . . .

Q. You also remember telling him that Brandi Brown made the suggestion that they rob Turtle of his money? Do you remember telling him that?

A. I don't want to answer it.

At this point, the jury was retired, and the trial court found Howard in contempt. Defense counsel made no request to the trial court for a mistrial or for the jury to be admonished.

The defendant contends that the prosecutor "implicated" his Fifth Amendment right to due process and Sixth Amendment right to confront and cross-examine witnesses against him. While the defendant concedes that no evidence was introduced while Howard was on the stand, "the prosecutor made it

very clear to the entire jury that he was going sentence by sentence of a statement Howard had given to investigators." The defendant contends that it was reversible error for the prosecutor, through leading questions, to read to the jury Howard's statement to the police, which implicated the defendant in Henry's killing. In support of this contention, the defendant relies on **Douglas v. Alabama**, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

In **Douglas**, the defendant and Loyd, co-defendants, were tried separately for assault with intent to murder. Loyd was tried first and found guilty. The State called Loyd as a witness at the defendant's trial. Since Loyd's conviction was not final, his lawyer advised him to claim the privilege of self-incrimination and not answer questions. When Loyd took the stand, he invoked the privilege and refused to answer any questions regarding the alleged crime. The trial judge ruled that Loyd could not rely on the privilege because of his conviction and ordered him to answer. Still refusing to answer, the judge declared Loyd a hostile witness, giving the prosecutor the privilege of cross-examination. Under the guise of cross-examination, the prosecutor read Loyd's entire written confession, a seven-page document. Loyd's confession read to the jury named the defendant as the person who fired the shotgun that wounded the victim. **Douglas**, 380 U.S. at 415-417, 85 S.Ct. at 1075-1076.

In noting that Loyd's alleged statement constituted the only direct evidence that the defendant fired the shot, the **Douglas** court found the defendant's "inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." **Douglas**, 380 U.S. at 419, 85 S.Ct. at 1077. The **Douglas** court further found that since "the [prosecutor] was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be

cross-examined on a statement imputed to but not admitted by him." *Id.* Finding the defendant was unfairly prejudiced, the **Douglas** court reversed his conviction. **Douglas**, 380 U.S. at 420-423, 85 S.Ct. at 1077-1079.

The **Douglas** decision is distinguishable from the instant matter. In **Douglas**, Loyd was not lawfully compelled to testify, whereas Howard was granted full immunity and, as such, was compelled to testify. An individual can be compelled to give testimony incriminating himself if he is granted immunity from prosecution and punishment as a quid pro quo for compelled testimony. **In re Parker**, 357 So.2d 508, 512 (La. 1978). The prosecutor in the instant matter had been informed by the previous prosecutor of the first trial that Howard had been granted full immunity in exchange for his testimony. Further, the trial court informed the parties that it spoke with Howard's attorney, who told Howard to testify because he had been granted immunity. The trial court further noted its understanding that Howard was going to testify. Moreover, during the prosecutor's examination of Howard, Howard intermittently answered several questions. The prosecutor, therefore, could not have known that Howard would simply refuse to testify at some point during his examination. Given Howard's repeated refusal to answer questions, the prosecutor quite properly had Howard declared an "adverse witness" so that he would be able to ask leading questions. See La. C.E. art. 611(C), which allows leading questions of "a witness who is unable or unwilling to respond to proper questioning." There is nothing in the record to suggest that the State acted improperly or, as suggested by the defendant, "secured an unfair advantage by running roughshod" over his Sixth Amendment rights. See **State v. Smith**, 96-261, pp. 16-21 (La. App. 3rd Cir. 12/30/96), 687 So.2d 529, 542-545, writ denied, 97-0314 (La. 6/30/97), 696 So.2d 1004.

The foregoing analysis regarding the propriety of the prosecutor's

examination of Howard notwithstanding, there remains the question of whether the defendant's right to confrontation was violated. However, we find it unnecessary to decide the issue since, even if we were to determine there was a confrontation error, such error would be harmless. Confrontation errors are subject to a **Chapman v. California**, 386 U.S. 18, 23, 87 S.Ct. 824, 827-828, 17 L.Ed.2d 705 (1967) harmless error analysis. The correct inquiry is whether the reviewing court, assuming that the damaging potential of the cross-examination were fully realized, is nonetheless convinced that the error was harmless beyond a reasonable doubt. Factors to be considered by the reviewing court include: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. **State v. Butler**, 93-1317, pp. 9-10 (La. App. 1st Cir. 10/7/94), 646 So.2d 925, 930-931, writ denied, 95-0420 (La. 6/16/95), 655 So.2d 340 (quoting **Delaware v. Van Arsdall**, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.23 674 (1986)).

In the instant matter, Captain Webb and Shaheen testified that Henry identified the person who shot him as "Rock Hard" or "Rock Hard from China Town." Jackson testified that Henry identified the person who shot him as "Hard Rock from Chinatown." It was clearly established at trial through the testimony of Major Delaune that the defendant lived in an area of Gonzales known as "China Town" and his alias was "Rock Hard." Furthermore, Hill testified that he witnessed the defendant shoot Henry. According to his testimony, Hill was sitting in his car talking to Henry when the defendant approached with a shotgun and told Henry to give it up. When Henry put his hands in the air, the defendant shot Henry in the stomach from about two feet away. The defendant then got into Hill's car

and Hill drove away. Hill dropped off the defendant on Marchand Lane. Hill gave three different statements to the police. In his first statement, Hill did not tell the police what happened because he did not want to be involved. In his second and third statements, he told the police what he had testified to at trial because he felt it would be best for him to tell the truth.

Thus, a total of four witnesses, including an eyewitness to the actual shooting, identified the defendant as the person who shot Henry. Accordingly, we find that the prosecutor's leading questions[7] to Howard, which implicated the defendant as the shooter, were cumulative to and corroborative of the in-court testimony of Jackson, Shaheen, Captain Webb, and Hill. We conclude that the prosecutor's unanswered examination of Howard did not materially strengthen the State's case against the defendant, and the jury did not rely on it in determining the defendant's guilt. The instant guilty verdict was surely unattributable to any error in the prosecutor's examination of Howard. See La. C.Cr.P. art. 921; **Butler**, 93-1317 at p. 11, 646 So.2d at 931. See also **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). Accordingly, we find no reversible error.

The defendant further contends that the prosecutor in his rebuttal closing argument exploited Howard's refusal to testify. Following are the complained of excerpts:

> Nelson Howard. He's so scared to testify, ladies and gentlemen . . . he hyperventilates and the veins were sticking out in his neck, pulsing. He refused to testify and he's going to suffer the consequences for that refusal to testify. Direct contempt. You can go to jail for a long time for that. He has complete immunity. I didn't offer him that immunity. Another district attorney did. He's got immunity, he knows he can't be prosecuted and he still refuses to

[7] While the prosecutor asked Howard several questions, we note that only one question directly implicated the defendant as the shooter: "You also remember telling him that it was about that time that Brandi Brown went running to the vehicle shouting, quote, Give it up, give it up. And then he shot Turtle with a shotgun. Do you remember telling him that?"

> testify. That tells me that that's a bad man. He's scared. He's going to go to jail for that.
>
> . . . .
>
> . . . Quack has got charges against him. Quack is a street term that he's in the wind. I would also venture to say that that's a reasonable hypothesis if Nelson Howard is going to hyperventilate and go to prison perhaps for testifying against this man. What's reasonable is is [*sic*] that Quack is hiding out because he may have to testify against Brandi Brown too.
>
> . . . .
>
> If his co-hearts [sic] are so scared of him that they didn't testify and he actually kills people, the fear is real and I grant you, he needs to be in prison.

According to the defendant, the prosecutor was not arguing from testimony, but the lack of testimony, which "leads the jury to speculate not on the evidence, but upon the evidence not presented and a witness' reasons for not doing so, all without the test of cross-examination." The defendant cites **State v. Haddad**, 99-1272 (La. 2/29/00), 767 So.2d 682, cert. denied, 531 U.S. 1070, 121 S.Ct. 757, 148 L.Ed.2d 660 (2001) and asserts that the "Louisiana Supreme Court has made it clear that it is impermissible to knowingly call to the stand a witness who will exercise a privilege, just to impress upon the jury the fact of the claim of privilege."

As previously discussed above, there is nothing in the record that suggests that the prosecutor called Howard to the stand knowing that he would exercise his privilege against self-incrimination. To the contrary, it was clear to the trial court, defense counsel, and the prosecutor that Howard had no such privilege because of his grant of immunity from prosecution. Moreover, defense counsel made no objections to these statements by the prosecutor. The issue as to the propriety of remarks made in closing argument is not preserved for review where defense counsel makes no objection to the statement either during argument or after the

argument. In addition, there was no request for an admonition or motion for mistrial. Therefore, the defendant is deemed to have waived any such error on appeal. La. C.Cr.P. art. 841; **State v. Burge**, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), writ denied, 532 So.2d 112 (La. 1988).

We note that despite the lack of objection, extremely inflammatory and prejudicial remarks may require reversal. **Burge**, 515 So.2d at 505. After review, we do not find any remarks so inflammatory or prejudicial so as to require reversal.

This assignment of error is without merit.

SENTENCING ERROR

The trial court sentenced the defendant to the Department of Corrections for life "with" benefit of probation, parole, or suspension of sentence. The sentence for second degree murder is life at hard labor *without* benefit of parole, probation, or suspension of sentence.[8] Accordingly, the sentence imposed by the trial court was an illegally lenient sentence. Under La. C.Cr.P. art. 882(A), an illegally lenient sentence may be corrected at any time by an appellate court on review.[9] We find that correction of this illegal sentence does not involve the exercise of sentencing discretion, and as such, there is no reason why this court should not simply amend the sentence. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc). Accordingly, since a sentence without parole eligibility was the only sentence that could be imposed, we correct the sentence by providing that it be served without the benefit of parole, probation, or suspension of sentence.

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[8] The minutes indicate the defendant was sentenced to life at hard labor "without benefit of probation, parole, or suspension of sentence." However, when there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[9] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." La. C.Cr.P. art. 882(A).

CONCLUSION

For the foregoing reasons, the defendant's conviction is affirmed; the sentence is amended to provide that it be served without the benefit of parole, probation, or suspension of sentence; and if necessary, remanded for the correction of commitment order.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AS AMENDED, AFFIRMED; AND REMANDED FOR CORRECTION OF COMMITMENT ORDER, IF NECESSARY.

STATE OF LOUISIANA

VERSUS

BRANDI BROWN

NUMBER 2007 KA 0366

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

CARTER, C.J., CONCURRING.

I respectfully concur. No corrective action is necessary for the trial court's failure to impose the defendant's sentence without benefit of parole, probation, or suspension of sentence. Louisiana Revised Statutes 15:301.1A makes the statutory restrictions self-activating. **State v. Clesi**, 06-1250 (La. App. 1 Cir. 2/14/07), 959 So.2d 957, 960.