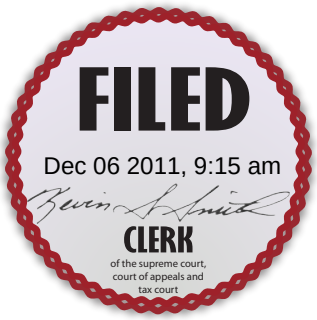

ATTORNEY FOR APPELLANT:

PATRICIA CARESS MCMATH
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana
Indianapolis, Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CAMERON JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-1103-CR-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0906-MR-053670

DECEMBER 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant Cameron Jones appeals his conviction of murder, a felony. Ind. Code § 35-42-1-1 (2007). We affirm.

ISSUE

Jones raises one issue, which we restate as: whether the trial court abused its discretion by denying Jones' motion for a mistrial.

FACTS AND PROCEDURAL HISTORY

On June 3, 2009, Jones and his brother, Chris Smith, went to an automotive repair shop in Indianapolis. In the garage, Jones and Smith discussed paint colors with Anthony Whitley, one of the shop's employees. Next, Jones and Smith went outside, and Jordan Matthews came into the garage. As Whitley and Matthews talked, Smith reentered the garage and asked Matthews about money that Matthews had "run off with a while back." Tr. p. 38. Matthews asked Smith to clarify, and Smith said that Matthews knew which money he was asking about. Smith then went back outside. A few minutes later, Jones reentered the garage, pulled out a gun, and shot Matthews several times. Matthews fell to the ground, and Jones shot Matthews several more times as he tried to crawl away. Jones and Smith left, and Matthews died as a result of the shooting.

The State charged Jones with murder, and Jones filed a notice that he intended to argue self-defense. At trial, one of the State's witnesses, Darrel Price, testified that he saw Jones leave the garage after firing several shots at Matthews, then return and say, "F**k it, I'm going to finish the job" before shooting Matthews several more times. *Id.* at 245. During Jones' cross-examination of Price, the State stipulated in the presence of

the jury that Price had not mentioned Jones' statement in his initial statement to the police or during his deposition. On the next day of the trial, Jones filed a motion for mistrial, asserting that the State knew about Price's additional testimony prior to trial but failed to disclose that testimony to Jones. The trial court denied Jones' motion. During Jones' presentation of evidence, Smith testified that Matthews pulled out a pistol and tried to shoot Jones before Jones shot Matthews. The jury determined that Jones was guilty of murder, and the trial court sentenced him accordingly. This appeal followed.

DISCUSSION AND DECISION

The denial of a motion for mistrial lies within the sound discretion of the trial court, and this Court reviews the trial court's decision for an abuse of discretion. *Lucio v. State*, 907 N.E.2d 1008, 1010 (Ind. 2009). The key inquiry is whether the defendant was so prejudiced that he or she was placed in a position of grave peril. *Id.* The gravity of peril is measured by the probable persuasive effect on the jury's decision. *Oliver v. State*, 755 N.E.2d 582, 585 (Ind. 2001). The trial judge is in the best position to gauge the surrounding circumstances and the potential impact on the jury when deciding whether a mistrial is appropriate. *Id.* Mistrial is an extreme remedy and should be granted only when no other action can be expected to remedy the situation at the trial level. *Lucio*, 907 N.E.2d at 1010-11.

In this case, Jones failed to contemporaneously object to Price's previously-unrevealed testimony that Jones left the garage after shooting Matthews, returned, and said "F**k it, I'm going to finish the job" before shooting Matthews again. Tr. p. 245. Instead, Jones filed a motion for mistrial on the next day of trial. Accordingly, Jones'

claim of error is waived. *See Brooks v. State*, 934 N.E.2d 1234, 1244 (Ind. Ct. App. 2010) (determining that the defendant waived his challenge to the admission of testimony by failing to contemporaneously object to the testimony), *trans. denied*.

Waiver notwithstanding, Jones asserts that Price's previously-undisclosed testimony placed him in grave peril because it "substantially impeded" his theory of self-defense. Appellant's Br. p. 5. Although the State's other eyewitnesses did not precisely corroborate Price's account of what Jones said, their testimony strongly contradicted Jones' theory of self-defense. Whitley testified that Matthews was not carrying a gun when Jones shot him. Billy Scott was also in the garage, and he testified that after Matthews fell to the ground and tried to crawl away, Jones walked up to Matthews and kept shooting him. Scott did not see a weapon in Matthews' hands before the shooting. Dean Alley was also in the garage. He heard gunshots and turned to see Matthews fall to the ground. Next, he heard Jones say, "F**k you, n****r" during a pause in shooting and saw Jones resume shooting Matthews as he lay on the ground. Tr. p. 295. Alley did not see a gun in Matthews' hands at the time of the shooting. Furthermore, Robert Rodgers was also in the garage. Rodgers saw Jones turn away from Matthews after shooting him "four or five" times. *Id.* at 333. Next, Rodgers saw Jones stop, walk back to Matthews, say "F**k you," and shoot Matthews again as he lay on the ground. *Id.* Rodgers saw a mobile phone, and nothing else, in Matthews' hands at the time of the shooting. In light of the sheer volume of this testimony, which parallels Price's testimony in many respects, the probable persuasive effect of Price's previously-unrevealed testimony on the jury is small, and Jones was not placed in grave peril. *See Gill v. State*, 730 N.E.2d 709, 712

(Ind. 2000) (determining that a mistrial was not appropriate because the improperly admitted character evidence against the defendant would not have had a probable persuasive effect on the jury in light of other evidence against the defendant).

Furthermore, where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated. *Braswell v. State*, 550 N.E.2d 1280, 1283 (Ind. 1990). In this case, the prosecutor determined on the evening before trial began that Price had not mentioned in his prior statement to the police or during his deposition that Jones temporarily left the garage or said he would finish the job in the course of killing Matthews. The State did not inform Jones of Price's additional testimony before the trial began or before Price's testimony. Nevertheless, after Price testified, Jones cross-examined Price about his additional testimony, and during cross-examination the State stipulated that Price had not previously revealed Jones' statement. The trial court determined that the State's stipulations "diminished the value" of Price's testimony to the State, and that Jones was able to effectively cross-examine Price as to his additional testimony. Tr. p. 280. Furthermore, although the trial court determined, and Jones agreed, that a continuance would not remedy the discovery violation, the trial court offered Jones the opportunity to recall any witnesses to question them about Price's testimony. The trial court also offered Jones the opportunity to speak with the State's remaining eyewitnesses prior to their testimony. Jones declined both remedies.

Jones cites *Beauchamp v. State*, 788 N.E.2d 881 (Ind. Ct. App. 2003), but that case is distinguishable. In that case, Beauchamp took the deposition of the State's expert witness, and at that time the expert stated that he had no opinion on how the victim had been injured. During trial, Beauchamp presented the expert's testimony in his case-in-chief. However, the State called the same expert as a rebuttal witness, and the expert provided "new and substantially different" opinions that undermined Beauchamp's theory of the case. *Id.* at 885. The State had not supplemented its discovery responses to reveal the expert's new opinions. This Court determined that a continuance would not have remedied the discovery violation because Beauchamp had already provided the jury with the expert's prior testimony that he had not formed any opinions on how the victim was injured. Furthermore, the State's surprise rebuttal evidence undermined Beauchamp's theory of defense with no way to proceed. Consequently, the admission of the expert's rebuttal testimony was erroneous, and a new trial was necessary.

In *Beauchamp*, the new testimony was presented on rebuttal. Here, Price's previously-undisclosed testimony was revealed during the State's case-in-chief, and as a result Jones had the opportunity to cross-examine Price and to make adjustments in his own presentation of evidence. *See Childress v. State*, 938 N.E.2d 1265, 1269 (Ind. Ct. App. 2010) (determining that the admission into evidence of a sweatshirt that was disclosed to the defense on the day of trial did not impair the defendant's right to a fair trial because the defendant had the opportunity to cross-examine the relevant witness and could have adjusted his trial strategy), *trans. denied*.

Furthermore, Beauchamp had presented the expert's testimony during his case-in-chief, which rendered the expert's subsequent change of testimony on rebuttal especially damaging to Beauchamp's defense. Conversely, in this case Price was a witness for the State, not Jones. Consequently, *Beauchamp* is not controlling. Jones was not placed in grave peril by Price's testimony, and in any event the trial court's proposed remedy was appropriate to address the discovery violation. The trial court did not abuse its discretion by denying Jones' motion for a mistrial.

CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

MATHIAS, J., and CRONE, J., concur.