NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 KA 0945

STATE OF LOUISIANA

VERSUS

AQUENDIUS CHRISTOPHER WALKER

Judgment Rendered: DEC 23 2015

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 654,715

The Honorable John R. Walker, Judge Presiding

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McClendon, J. concurs with the result reached by the majority

THERIOT, J.

Defendant, Aquendius Christopher Walker, was charged by grand jury indictment with first degree murder, a violation of La. R.S. 14:30(A)(1).[1] He pled not guilty and, following a jury trial, was found guilty as charged. The trial court denied defendant's motions for new trial and post-verdict judgment of acquittal, and sentenced defendant to life imprisonment at hard labor, with the possibility of parole in accordance with La. R.S. 15:574.4(E).[2] The trial court denied defendant's motion for reconsideration of sentence. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

During the late evening hours of January 24, 2013, or the early morning hours of January 25, 2013, Freddie Goodwin met up with a friend of his, Bernard "B.J." Baker, Jr. (the victim), in the area of Johnson Ridge Lane in Terrebonne Parish. Goodwin asked Baker to give him some money because it was his birthday. Baker told Goodwin that he did not currently have any money, but would give him some a little later.

Shortly before 1:30 a.m. (based on the timing of eventual 911 calls), Goodwin called Baker and told him that he was coming to "holler" at him. Goodwin saw Baker in the area of 156 Johnson Ridge Lane, talking or "fussing" with Derrick James, a mutual cousin of both Goodwin and Baker. Goodwin explained at trial that Baker said James and some people from Marydale, a nearby neighborhood, were "playing" with him because they had taken his phone. Goodwin testified that James said he had taken Baker's phone because Baker had never paid him for a gun. Despite the

[1] A codefendant, Derrick Patrick James, was charged in the same instrument. However, he was not tried with defendant, nor is he a party to the instant appeal.

[2] Defendant was 17 years old at the time of the offense.

somewhat contentious issue, Goodwin stated that James simply appeared to be "clowning" Baker in an attempt to get on his nerves. Baker stated that he knew where James brought his phone, and he turned to walk to James's home, which was nearby. James told Baker that he might not want to do that, or else he would "sic" his "little goons" on him.

When James mentioned his "little goons," an individual who Goodwin identified at trial as defendant pulled out a handgun. Still, Baker and James laughed at the situation, and defendant briefly held his weapon down near his side. Baker walked back toward James and defendant, and he told James that he was going to "power up"[3] and wanted his phone when he returned. At that time, defendant drew his gun again and told Baker that he can go power up, but he can get "powered down, too." Though James and Baker continued to laugh, defendant became serious and told Baker that he wanted his money. Defendant then began to count down from "five," and another, unidentified individual told Baker that defendant was not playing with him. When defendant got to "one," he shot Baker in the leg. Goodwin ran from the scene as Baker fell to the ground. As he ran, Goodwin heard Baker yelling, "Take it," followed by what he estimated to be four or five more gunshots. He then saw defendant get into a white car and drive away. Though Goodwin was not familiar with defendant at the time of the shooting, he later learned defendant's name after describing him to another individual. He testified unequivocally that defendant was the person who shot Baker.

After being shot, Baker staggered to a nearby trailer belonging to Allen Harold. Baker entered the door of Harold's trailer before collapsing to

[3] Goodwin testified that he understood this term to mean that Baker was going to take some sort of drugs.

the floor. Harold and his girlfriend, Deshira Williams, both called 911, and Williams attempted to render aid to Baker.

Officer Seth Boudreaux, of the Terrebonne Parish Sheriff's Office, was the first person to respond to the scene. He walked into Harold's trailer and saw the victim lying on the ground with several apparent gunshot wounds. As Baker drifted in and out of consciousness, Officer Boudreaux asked him who shot him. Baker responded, "Quen and Derrick James." When asked who actually shot him, Baker repeated only, "Quen." When paramedics arrived, Officer Boudreaux ceased his questioning of the victim.

Captain Dawn Foret, assistant chief of detectives with the Terrebonne Parish Sheriff's Office, also responded to the scene of the shooting. After meeting with the other responding detectives and giving them their assignments, Captain Foret relocated to Thibodaux Regional Medical Center to see if she could interview the victim. Captain Foret was allowed into the trauma room as medical personnel cared for the victim. During a brief conversation, Baker told her that "Derrick and Quenton" shot him. When pressed for more specifics, Baker said that "Derrick" was Derrick James, his cousin. He identified "Quen" or "Quenton" as a young black male, approximately 16 or 17 years old, from Marydale. Later in the conversation, Baker clarified that Derrick James had stolen his phone, and Quen shot him. Captain Foret was unable to record this conversation because of a nurse's instruction that no electronics were allowed in the trauma room.

After this initial conversation, Captain Foret left the trauma room to inform the other detectives regarding Derrick James and to look through the property that medical personnel had removed from Baker. In her search of Baker's clothing, Captain Foret found a cell phone. She believed this discovery to be significant because of Baker's statement that James had

stolen his cell phone. Captain Foret reentered the trauma room and again spoke with Baker. He again repeated that Derrick James had robbed him and that Quen shot him. When Captain Foret showed Baker the cell phone she had recovered, Baker explained that he had two cell phones, and James had stolen the other one. Captain Foret finished this second conversation by asking Baker to verify the number for each phone.

Following their conversation with Captain Foret, the detectives remaining at the scene arrested Derrick James, whom they located in his girlfriend's trailer in the same neighborhood. The detectives were eventually able to determine that "Quen" was Aquendius Walker, defendant. He was arrested on January 29, 2013, with the assistance of the U.S. Marshals. At the time of his arrest, defendant made a brief statement to Terrebonne Parish Sheriff's Detective Donald Bourg that he was "ready to take his lick for what had happened." Defendant did not testify at trial.

Baker died from his injuries on January 26, 2013. An autopsy revealed that the victim had been shot four times – once in the hand, once in the abdomen/back, and once in each leg. Wounds to Baker's abdomen/back and left leg were the main contributors to his death.

VIOLATION OF RIGHT TO PRESENT A DEFENSE

In his first assignment of error, defendant argues that the trial court violated his right to present a defense. Specifically, defendant contends the trial court improperly limited the scope of his intended closing argument that the state failed to present any witnesses to corroborate Officer Boudreaux's and Captain Foret's claims that the victim told them "Quen" shot him.

A criminal defendant has the constitutional right to present a defense. See U.S. Const. Amend. VI; La. Const. Art. I, § 16. Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of

evidence, to conclusions of fact that may be drawn therefrom, and to the law applicable to the case. La. Code Crim. P. art. 774. The trial judge has broad discretion in controlling the scope of closing arguments. See **State v. Prestridge**, 399 So.2d 564, 580 (La. 1981); **State v. Craddock**, 435 So.2d 1110, 1121 (La. App. 1st Cir. 1983).

Following its presentation of the evidence, the state made an oral motion in limine, seeking to prohibit defense counsel from making any reference to the state's failure to call certain witnesses during its case, particularly with respect to witnesses who might have been able to corroborate the victim's dying declarations. Defense counsel opposed this motion, contending he should be able to argue that the state failed to corroborate Officer Boudreaux's and Captain Foret's stories by pointing to numerous witnesses – namely, medical personnel – who were not called to testify. The trial court explained to defense counsel the state's concern that if defense counsel would "open the door" regarding who the state failed to call to testify, then the state would be put in a position where it might "improperly" comment on defendant's failure to call those same witnesses. The trial court also pointed out that the state was not required to corroborate these dying declarations from outside sources.

In **State v. Vansant**, 2014-1705 (La. App. 1st Cir. 4/24/15), 170 So.3d 1059, this court was presented with a situation similar to that in the instant case. In **Vansant**, however, defense counsel actually commented during closing arguments on the state's failure to call a particular witness at trial. During its rebuttal argument, the state pointed out that both parties had the power of subpoena, and the defendant could have called the at-issue witness himself. Defense counsel objected to this argument and subsequently moved for a mistrial, arguing that the trial court's failure to

sustain the objection left the jury with the impression that the defendant failed to present evidence he was responsible for presenting. See **Vansant**, 170 So.3d at 1061-63.

In finding the trial court's overruling of the objection and denial of the motion for mistrial to be correct, we noted that the trial court was correct in its assertion that the defendant had the right to subpoena just as well as the state, and that once that issue is raised, the state can point it out. See **Vansant**, 170 So.3d at 1063. Other courts have ruled identically in similar situations. See **State v. Williams**, 2014-0040 (La. App. 5th Cir. 9/24/14), 151 So.3d 79, 82-85, writ denied, 2014-2250 (La. 6/19/15), 172 So.3d 649; **State v. Uloho**, 2004-0055 (La. App. 5th Cir. 5/26/04), 875 So.2d 918, 927-28, writs denied, 2004-1640 (La. 11/19/04), 888 So.2d 192 & 2008-2370 (La. 1/30/09), 999 So.2d 753.

The instant case involves a slightly different situation because of the fact that the trial court foreclosed defense counsel from arguing about the state's failure to call certain witnesses during its presentation of the evidence. As a result, the state was never put into a position whereby it was "forced" into commenting on defendant's ability to call these same witnesses. Based on the trial court's articulations of its own (and the state's) concerns regarding defense counsel's intended closing argument, it is apparent that the trial court wanted to avoid a situation similar to that in **Vansant**, where defense counsel might seek an unwarranted mistrial.

Considering the totality of the circumstances and the unique facts of this case, we find that the trial court did not err or abuse its discretion in limiting defense counsel's intended closing argument with respect to the state's failure to call corroborating witnesses regarding the victim's dying

declarations. This limitation did not deny defendant his right to present a complete defense.

This assignment of error is without merit.

DENIAL OF MISTRIAL – DISCOVERY VIOLATION

In his second and final assignment of error, defendant argues that the trial court erred in failing to order any remedy or to grant a mistrial based on an alleged discovery violation. He argues that the state failed to provide him with a report from the Louisiana State Police Crime Lab concerning DNA testing until the morning of trial.

The purpose of pretrial discovery procedures is to eliminate unwarranted prejudice to a defendant that could arise from surprise testimony. **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), writ denied, 501 So.2d 228 (La. 1987). The state's failure to comply with discovery procedures will not automatically demand a reversal. **State v. Gaudet**, 93-1641 (La. App 1st Cir. 6/24/94), 638 So.2d 1216, 1220, writ denied, 94-1926 (La. 12/16/94), 648 So.2d 386. If a defendant is lulled into a misapprehension of the strength of the state's case by the state's failure to fully disclose, such a prejudice may constitute reversible error. **Roy**, 496 So.2d at 590.

The defendant has no general constitutional right to unlimited discovery in a criminal case. **State v. Lynch**, 94-0543 (La. App. 1st Cir. 5/5/95), 655 So.2d 470, 478, writ denied, 95-1441 (La. 11/13/95), 662 So.2d 466. Under the United States Supreme Court decision in **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the state, upon request, must produce evidence that is favorable to the accused where

it is material to guilt or punishment. **Brady**, 373 U.S. at 87, 83 S.Ct. at 1196–97. This rule has been expanded to include evidence that impeaches the testimony of a witness, when the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. United States**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). The test for determining materiality was firmly established in **United States v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and has been applied by the Louisiana Supreme Court. See **State v. Rosiere**, 488 So.2d 965, 970-71 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Kyles v. Whitley**, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995) (citing **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383).

Late disclosure, as well as nondisclosure, of evidence favorable to the defendant requires reversal if it has significantly impacted the defendant's opportunity to present the material effectively in his case and compromised the fundamental fairness of the trial. The impact on the defense of late disclosure of favorable evidence must be evaluated in the context of the entire record. **State v. Harris**, 2001-2730 (La. 1/19/05), 892 So.2d 1238, 1250, cert. denied, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005). The state's constitutional obligation to disclose exculpatory evidence does not relieve the defense of its obligation to conduct its own investigation and prepare a defense for trial as the state is not obligated under **Brady** or its progeny to furnish the defendant with information he already has or can obtain with reasonable diligence. **State v. Harper**, 2010-0356 (La. 11/30/10), 53 So.3d 1263, 1271.

The state called Detective Lieutenant Edgar Authement, Jr., of the Terrebonne Parish Sheriff's Office, to testify at trial. Detective Authement testified that he processed the scene of the shooting as a crime scene investigator by taking pictures and collecting evidence. During cross-examination of Detective Authement, the state and defense stipulated to the contents of two scientific analysis reports. The first of these reports, state's exhibit 9, indicated that the seven 9-millimeter cartridge casings recovered at the scene were fired from the same unknown firearm. The second of these reports, state's exhibit 10, concerned DNA testing that was performed on certain items of clothing using reference samples from the victim, defendant, and Derrick James.[4] This testing did not produce any positive results.

Defense counsel began to cross-examine Detective Authement about whether the shell casings recovered at the scene had been tested for DNA. To clear up some confusion among the state, the defense, the witness, and the court, the jury was excused so that the parties could discuss the issue. During this discussion, the prosecutor indicated that the shell casings had not been tested for DNA. Detective Authement stated that the DNA testing was conducted on "some clothing," but he did not know the results because he did not have the report. Defense counsel, despite earlier stipulating to the only two scientific analysis reports that were entered into evidence, stated that he did not have the report. The state then asked if defense counsel wanted the report, and defense counsel replied, "I don't know." Following this discussion, court was adjourned for the day, with Detective Authement still subject to cross-examination.

The following day, defense counsel resumed his cross-examination of Detective Authement, again asking about DNA testing. After an off-the-

[4] As described below, this report was not formally introduced into evidence until the following day.

record discussion, the trial court reopened the state's direct examination so that Detective Authement could be asked about the DNA testing. During the reopened direct examination, Detective Authement testified that no DNA testing was requested with respect to the shell casings, and the only items submitted for comparison testing were pieces of clothing belonging to Derrick James. At this time, the state formally offered, filed, and introduced the DNA scientific analysis report as state's exhibit 10. On cross-examination, Detective Authement answered that Detective Bourg was ultimately responsible for requesting the tests that were performed on the evidence.

Following a recess, defense counsel raised a "housekeeping" issue to the court, out of the presence of the jury. He stated that on the day before, the court had recessed after realizing that some tests were performed by the Louisiana State Police Crime Lab. Defense counsel said that, "Nobody seemed to have been able to know what happened to that report or if it [sic] was even a report made." He then stated that when he showed up for trial that day, the state handed him the scientific analysis report concerning the DNA testing. Defense counsel requested that this report be put into the record as a defense exhibit and that an instanter subpoena be issued for the crime lab technician who prepared the report, arguing that the jury should hear why DNA testing of the shell casings is important. In response, the state indicated that the report had already been entered into the record as state's exhibit 10. The trial court agreed. The state also opposed defendant's request for a subpoena of the technician, arguing that defendant could have secured his own expert and that the technician would have nothing to add about a DNA test that was not performed. The trial court denied defense counsel's request for a subpoena, noting the absence of any

evidence linking defendant to the shell casings and that defendant had open-file discovery leading up to trial. The trial court also pointed out to defense counsel that he would be free to argue the lack of DNA evidence to the jury.

Following the trial court's denial of his objection to the state's purported late disclosure, defense counsel then moved for a mistrial. He again argued late disclosure because he had no idea any DNA test existed until the day before. The state reiterated the fact that defense counsel had open-file discovery available to him. The trial court ruled that defendant's motion for a mistrial was premature because the state had not yet finished presenting all of its evidence. After the state rested, defendant again asked for a mistrial on the basis of the late disclosure of the report. The trial court again pointed out to defendant that he was free to argue that there was no DNA testing on the shell casings. Defense counsel argued that he was prejudiced because he was unable to subpoena anyone who could testify regarding the report. The trial court noted defense counsel's objection for the record.

A mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. Moreover, determination of whether a mistrial should be granted is within the sound discretion of the trial court, and the denial of a motion for mistrial will not be disturbed on appeal absent an abuse of that discretion. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 449, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603.

We find that defendant failed to show that the state suppressed any exculpatory evidence in this case. While defense counsel repeatedly argued that he did not receive the scientific analysis report until the second day of

testimony in defendant's trial, we note the trial court's recognition that defendant had been provided with open-file discovery in the proceedings leading up to trial. The report itself indicates that it was released on August 14, 2013, well in advance of May 19, 2014, when jury selection began in defendant's trial. Moreover, defense counsel stipulated to the introduction of this scientific analysis report, even on the day he claims to have been confused about its existence. When the state asked him that day whether he wanted a copy of the report, defense counsel replied, "I don't know." Moreover, defense counsel was effectively able to cross-examine both Detective Authement and Detective Bourg regarding the decision not to test the shell casings for DNA. Finally, defense counsel was repeatedly told that he could argue to the jury regarding the lack of DNA testing on the shell casings, and he did, in fact, elect to do so. We further note that even if a delay in discovery or a **Brady** violation did occur, it would not constitute reversible error without actual prejudice to defendant's case. See **State v. Francis**, 2000-2800 (La. App. 1st Cir. 9/28/01), 809 So.2d 1029, 1033. In this case, defendant has failed to show how he was prejudiced or denied a fair trial. Further, the record does not reflect any manner in which defendant might have been lulled into a misapprehension of the strength of the state's case. There was substantial evidence of defendant's guilt, as related to the jury through the victim's dying declarations and Freddie Goodwin's eyewitness testimony. Defendant has failed to raise any substantial claim of suppression of evidence by the state that would create a reasonable doubt which would not exist in the context of the whole record. Thus, he has not shown any substantial prejudice such that he was deprived of any reasonable expectation of a fair trial. We find that the trial court did not err or abuse its discretion in denying the motion for a mistrial.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.