

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

NO. 2002-KA-1079

VERSUS

COURT OF APPEAL

NOEL BROOKS

FOURTH CIRCUIT

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 352-970, SECTION “E”
Honorable Calvin Johnson, Judge

* * * * *

Judge Miriam G. Waltzer

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(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin and Judge Miriam G. Waltzer)

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CONVICTION AND SENTENCE AFFIRMED.

STATEMENT OF THE CASE

On 31 October 1991, the State charged Noel Brooks with a violation of La. R.S. 14:30.1, relative to the 20 August 1991, second-degree murder of Calvin Williams. Defendant pled not guilty as his arraignment in November 1991. Following a hearing on 16 March 1992, the court denied defendant's motion to suppress the identification. On 16 July 1992, prior to commencement of trial, the court heard defendant's motions to suppress the evidence and confession, and denied the motion to suppress the evidence. On 17 July 1992, the court continued the motion hearing, and denied defendant's motion to suppress the confession, after which the trial resumed, and the jury returned a verdict of guilty as charged. Prior to sentencing on 23 July 1992, defendant filed a motion for new trial, which the court denied. After waiving the twenty-four hour delay imposed by La. C.Cr.P. art. 873, defendant was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The trial court granted defendant's motion for appeal on 23 July 1992. On 22 October 1993, an appellate brief was filed on defendant's behalf seeking only an errors patent review. His

conviction and sentence were affirmed in an unpublished decision rendered on 27 January 1994. *State v. Brooks*, 92-2180 (La. App. 4 Cir. 1994), *unpub.* Defendant filed an application for post-conviction relief. Following a hearing on 12 April 2002, the trial court granted him an out-of-time appeal.

STATEMENT OF FACTS

At trial NOPD Detective Norman McCord testified that when he answered a homicide call at 8:57 p.m. on 20 August 1991, at Derbigny and Art Streets, he found the body of Calvin Williams on the sidewalk. He interviewed several people on the street who witnessed the crime and who told him defendant was the assailant.

Donnie Ray Clay, the victim's cousin, testified that he was with Calvin Williams from 3 p.m. until the time of the murder. Clay said that several young men including the defendant and Williams were lifting weights and then drinking beer from 3 until 6 p.m. on the corner of Art and Derbigny Streets. Clay saw the defendant had a gun. Later, as Clay and Williams were driving to a nearby park, they saw the defendant at the bus stop. The defendant asked Williams to give his girlfriend a ride, but Williams refused and pulled off. After spending twenty minutes at the park, Clay and Williams returned to the corner of Art and Derbigny Streets. Clay then saw Williams speaking to a girl in a jeep as the defendant drove up in a

blue car. The defendant got out, approached Williams, and began speaking. Clay walked toward them and heard the defendant ask, "Why you had pulled off in my face?" Williams answered, "This is my car. I do what I want with it." Then the defendant pushed Williams, and when Williams pushed back, the defendant shot him in the chest from a distance of about two and one-half feet. Williams spun away as though to run and when the defendant shot again, Williams collapsed. Clay and Matthew Short, who had run to Williams' side, caught him and then set him down on the sidewalk. The police came almost immediately, and Clay named the defendant as the assailant. Later, Clay picked the defendant's picture from a photo line-up.

Matthew Short, another friend of both the victim and the defendant, corroborated Clay's testimony, naming the defendant as the killer.

Dr. Paul McGarry, an expert in forensic pathology, testified that when he performed the autopsy on Calvin Williams, he found two gunshot wounds. He said that one wound was surrounded by gunpowder indicating that the gun was within ten inches of the body when fired. That bullet penetrated both lungs and the aorta. The second bullet pierced the soft tissue of the right thigh. Neither bullet remained in the body.

St. James Parish Deputy Ryan Bourgeois testified that in the early morning of 21 August 1991, he was involved in an automobile chase that

ended with the arrest of Noel Brooks. Deputy Bourgeois said he followed a brown Oldsmobile at speeds of up to 100 miles per hour until the Oldsmobile went into a ditch. When the car stopped four men jumped out and ran into a sugar cane field. Hours later the defendant was arrested after he was found hiding under a truck.

Detective Sanders Harris, a criminal investigator in St. James Parish, testified that he questioned the defendant after his arrest. Harris asked the defendant if he had a gun, and the defendant answered that he had thrown his gun over his head into the cane field as he ran. The defendant took Harris to the place where he threw the gun, and Harris found a loaded gun there.

David Moore, a friend of Williams and the defendant, testified for the defense that he owned the weights that the young men came by to use each afternoon. Moore said that during the afternoon of 20 August 1991, he did not see the defendant with a gun. Moore declared that he did not see the shooting.

The defendant testified on his own behalf. He related that after lifting weights with his friends on 20 August 1991, he visited a woman who told him "some guys" had passed around the area, asking her if she knew Calvin. The defendant then went to the corner of Art and Derbigny Streets where he

saw Calvin Williams standing. As the defendant approached Williams to warn him, two men walked up and the defendant pushed Williams out of the way. The defendant said that when he realized one of the men was reaching for a gun, he ran. Shortly thereafter, he heard shots and also heard Matthew Short scream, "Noel shot dog." The defendant said he was frightened because of what Short said, so he ran. The defendant went with some friends to St. Charles Parish later that evening. He denied having a gun that evening, shooting Williams, or telling a deputy where he threw a gun.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

FIRST ASSIGNMENT OF ERROR: The trial court erroneously permitted hearsay testimony from Joanne Snyder, the victim's aunt.

When questioned by the prosecutor: "When did you first hear that something had happened to Calvin and how did you first hear about?" Ms. Snyder described hearing two gunshots, whereupon her other nephew, eleven-year old Larry, who lives with her, ran inside. Ms. Snyder began to relate what Larry told her, but was interrupted by an objection from the defense. The trial judge initially sustained the objection as to hearsay. However, after the prosecutor urged the excited utterance exception to the hearsay rule, the judge conducted an in-camera inspection of the potential

testimony. Following prosecution questioning of Ms. Snyder and the court, the judge admitted the hearsay testimony. The defense objected, claiming the State should call Larry to the stand to testify. Ms. Snyder then testified that Larry ran into her house shouting, "Jo, Jo, Jo, Noel shooting Calvin!" The defendant argues that the trial court's ruling allowing Ms. Snyder's hearsay testimony denied him his sixth amendment right to confront his accusers.

Article 803 of the Louisiana Evidence Code provides that excited utterances are not excluded by the hearsay rule.

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." La. C.E. article 803(2). . . . Furthermore, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *State v. Henderson*, 362 So.2d 1358 (La.1978).

In determining whether the declarant was under stress of an excited event, the time span between the event and the statement is considered the most important factor. *State v. Reaves, supra*. The trial court must determine whether the interval between the event and the statement was of sufficient duration to permit a subsidence of emotional upset and a restoration of a reflective thought process. *State v. Henderson, supra*.

Nevertheless, the erroneous admission of hearsay evidence is subject to the harmless error analysis. See *State v. Allen*, 2000-0346 (La.App. 4 Cir. 10/17/01, 800 So.2d 378, 399, citing a concurrence in *State v. Veals*, 576 So.2d 566, 568 (La.App. 4 Cir.1991). In *Veals*, this court set forth the following factors to be considered in determining whether the error was harmless:

1) the importance of the witness's testimony; 2) the cumulative nature of the testimony; 3) the existence of corroborating or contradictory evidence regarding the major points of the testimony; 4) the extent of cross-examination permitted; and 5) the overall strength of the State's case. *State v. Wille*, 559 So.2d 1321, 1332 (La.1990). *Veals*, 576 So.2d at 568.

State v. Lee, 2001-2082, p. 12 (La. App. 4 Cir. 8/21/02) 826 So.2d 616, 626 citing *State v. Dalton*, 99-0902, p. 3 (La.App. 4 Cir. 3/29/2000), 759 So.2d 180, 181.

In the present case, Larry's excited utterance when he saw the defendant shoot the victim was a spontaneous reaction. The statement was made in immediate response to the defendant's actions without any reflective thought. The elapsed time between the event and the utterance was just enough time for Larry to run from the site of the shooting to his aunt's house. Ms. Snyder's testimony established that the elapsed time was very brief. She heard a little girl knock at her door, and as she answered it, she heard gunshots. Fearing for their safety, Ms. Snyder grabbed the child, and ran away from the door toward the back of her house. Just after she passed the living room, Larry burst through the door. Then he called out: "Jo, Jo, Jo, Noel shooting Calvin." Ms. Snyder estimated it was at most two or three minutes from the gunshots to Larry's arrival. The record shows that Larry was under the stress and excitement of having seen the defendant shoot the victim. The statement was clearly an excited utterance in the form of a spontaneous response to actions, not words. Therefore, the statement is

admissible as an exception to the hearsay rule.

This assignment is without merit.

SECOND ASSIGNMENT OF ERROR: The trial court erred by denying his motions for mistrial and new trial.

At sentencing, defense counsel urged a motion for new trial asserting that the State failed to prove beyond a reasonable doubt that the defendant had the specific intent to kill or inflict great bodily harm upon the victim, and that the State introduced a weapon without giving adequate notice of its intent to do so.

At a pre-trial hearing on the admissibility of the weapon, defense counsel acknowledged that he had received notice of the State's intent to introduce the gun "two days prior to trial". Counsel moved that the weapon be suppressed, arguing that it had no connection with this prosecution. The trial court overruled the motion, finding that the weapon was connected to the prosecution, was relevant because it was alleged to belong to the defendant, and was similar to the gun that eyewitnesses saw the defendant use to kill the victim.

At the motion hearing, defense counsel also complained that he should have been notified of the weapon in the State's answer to discovery. The prosecutor responded that he had recently been assigned the case, that he had

gone to St. James Parish as part of his preparation for trial, and that he notified defense counsel of the statement and gun as soon as he had knowledge of them and knew that he wanted to introduce them at trial. The trial judge accepted the prosecutor's explanation as that of an officer of the court and noted there was no contradictory evidence.

The defendant challenges the trial judge's credibility determination, insisting that he should have relied upon the testimony of Det. Sanders Harris that "when we checked NCIC they had a warrant out on [defendant] . . . and they told us that he was involved in an incident down here and if we had a weapon. And we told them where – we exchanged information." Under cross-examination, defense counsel failed to ask Det. Sanders to identify the "they" who had a warrant out on the defendant or the "them" with whom he exchanged information.

The defendant's reliance upon Det. Harris' statement as conclusive evidence that the New Orleans District Attorney had the defendant's statement and gun at the time the defense filed its discovery request is misplaced. The NCIC is a police operation, not part of the District Attorney's office, and it is the police, not the District Attorney, who obtained an arrest warrant for the defendant. Furthermore, Det. Harris also testified that he personally recovered the gun on 27 August 1991, and that he

had not spoken to any New Orleans District Attorney about it other than the prosecutor, and had not spoken to him prior to the visit to St. James Parish only days before trial. Harris' testimony was corroborated by Maj. Charles Jasmin, who testified that while he had spoken with NOPD about the defendant, he had not been contacted by the trial prosecutor or anyone in the New Orleans District Attorney's office until the week before the trial. This testimony refutes the defendant's suggestion that Harris or anyone in St. James Parish had advised the prosecutor of the gun and statement in August of 1991.

A determination of credibility lies within the sound discretion of the trial court, and like all questions of fact, is entitled to great weight and will not be disturbed unless clearly contrary to the evidence. *State v. Vessell*, 450 So.2d 938, 943 (La.1984).

In this case, the defendant has not presented any evidence that would support a finding of error in this credibility determination, and the record contains ample testimony to support the reasonable conclusion that the district attorney did not have the statement and/or gun in August 1991.

Defense counsel made an oral motion for a mistrial based on La. C.Cr.P. art. 775(6) regarding prejudicial conduct in or outside the courtroom making it impossible for the defendant to obtain a fair trial. In denying the

motion, the judge re-iterated that the gun was relevant and therefore admissible because it looked like the gun the eyewitnesses testified that they saw the defendant use, pointing out that the weight to be given this testimony would be left to the jury, who would hear defense arguments that there was no physical evidence directly connecting the gun to the shooting of the victim. The judge also limited the reference to the gun in relation to other bad acts by the defendant.

In *State v. Harris*, 2000-3459 (La. 2/26/02), 812 So.2d 612, the Louisiana Supreme Court addressed the issue of mistrial following a discovery violation, holding:

The failure of the State to comply with discovery rules does not bring automatic reversal; rather, prejudice must be shown. *State v. Sanders*, 93-0001 (La.11/30/94), 648 So.2d 1272, 1281, *cert. denied*, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996); *State v. Schrader*, 518 So.2d 1024, 1031-32 (La.1988). When the defendant is lulled into misapprehension of the strength of the State's case through the failure of the prosecution to timely or fully disclose and the defendant suffers prejudice, basic unfairness results which constitutes reversible error. *State v. Mitchell*, 412 So.2d 1042, 1044 (La.1982). Although a mistrial is among the sanctions which the trial court could have chosen if it had viewed the circumstances in this case as a discovery violation, a mistrial is a drastic remedy and, except in instances in which the mistrial is mandatory, is warranted only when a trial court error results in substantial prejudice to the defendant, depriving him of a reasonable expectation of a fair trial. *State v. Comeaux*, 514 So.2d 84, 96 (La.1987).

Id. at 617.

In this case, the defendant has shown no prejudice arising from the

admission of the gun. The State's case was very strong, based upon the testimony of two eyewitnesses who identified the defendant as the person they saw shoot the victim. The defense consisted of the defendant's testimony that the witnesses and police officers were lying, and that he had never been in possession of the gun. The jury heard the conflicting testimony, and weighed it in favor of the State. In light of the strength of the State's case against the defendant, it is unreasonable to conclude that the jury decided this case on the basis of the gun. The trial court did not err in denying the defendant's motions for mistrial and new trial. This assignment is without merit.

THIRD ASSIGNMENT OF ERROR: The trial court erred in overruling defense objections to allegedly improper comments made by the prosecution during closing argument.

The scope of closing argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw there from, and to the law applicable to the case. The argument shall not appeal to prejudice. The state's rebuttal shall be confined to answering the argument of the defendant. La.C.Cr.P. art. 774. However, a prosecutor retains considerable latitude when making closing arguments. *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364, 374. The trial judge has broad

discretion in controlling the scope of closing arguments. *State v. Casey*, 99-0023, (La.1/26/2000), 775 So.2d 1022. Even if the prosecutor exceeds the bounds of proper argument, the court will not reverse a conviction unless thoroughly convinced that the argument influenced the jury, and contributed to the verdict. *Id.*; *State v. Ricard*, 98-2278, 99-0424 (La.App. 4 Cir. 1/19/2000), 751 So.2d 393, 395.

In this case, during the prosecution's rebuttal argument, defendant objected to the prosecutor's remark that murders in this city are committed in front of many, many people, just like this one was, which was committed in front of the girl who was in a white jeep. The trial court sustained the defendant's objection. However, defense counsel did not move for a mistrial or request an admonition after the trial court sustained his objection to the remark. Accordingly, he cannot now complain of error regarding the question. See *State v. Cager*, 97-1877, (La.App. 4 Cir. 3/24/99), 732 So.2d 97, 105. Nevertheless, the defendant complains that the comment was so prejudicial as to warrant reversal of his conviction. To that end, the defendant must show that the prosecutor's remarks influenced the jury and contributed to the verdict. *State v. Ricard, supra*.

The remark complained of was made in rebuttal to defense counsel's argument that the State had put on only two eyewitnesses even though there

were many others; specifically, the defense counsel argued:

They [the State] had showed you all these pictures. And they talked about this white jeep. And they talked about Calvin talking to a lady in a white jeep. And those pictures show the white jeep there. And that's where Calvin was supposed to be talking. Why didn't they bring her in? Donny Clay knew her name. He said it's Judy. Matthew Short said yeah. Her and Calvin were good friends. She came down there three or four times a week. But those prosecutors chose not to bring her in. Why? Because she would have told you that Matthew Short was not out there. She was talking to Calvin. Donny Clay wasn't out there. She was talking to Calvin. Neither was William Kelley.

While the prosecutor perhaps should not have couched his rebuttal in the context of other murders in which witnesses had not come forward to testify, any such reference was cured by the judge's repeated instruction to the jury that its decision was to be based upon testimony and evidence, not on the lawyer's arguments. The prosecutor had the right to rebut the defense argument that the prosecution chose not to have "the woman in the white jeep" testify because she would have said the State's eyewitnesses were liars. See La. C.Cr.P. art. 774; *State v. Adams*, 98-2062 (La. App. 4 Cir. 8/4/99), 752 So.2d 186. In rebuttal closing argument, the State has the right to answer the arguments of defendant.

Next, the defendant complains of the State's comment that David Moore was 'scared' when Moore testified at trial. The defendant did not lodge a contemporaneous objection to this comment; therefore, it was not

preserved for appellate review. La. C.Cr.P. art. 841.

Defendant concludes this assignment by complaining that the prosecutor questioned the credibility of Ricky Moore by stating that he was testifying solely out of fear, and intimated that he, himself, knew what Ricky Moore would say at trial and that such testimony would be damaging to the defense. There was no contemporaneous objection made to this comment; therefore, it was not preserved for appellate review. La. C.Cr.P. art. 841.

In the instances complained of by the defendant in this case, the prosecutor was speaking in rebuttal as allowed by law, and the trial judge offset any prosecutorial misstatement with his repeated reminder to the jury that the evidence, not the arguments, was the only basis for their decision. This assignment of error is without merit.

FOURTH ASSIGNMENT OF ERROR: Defendant received ineffective assistance of counsel through counsel's failure to request a continuance of trial when the judge denied his motion to suppress the gun recovered in St. James Parish.

The defendant herein is once again arguing that he did not receive a fair trial because of the introduction of the gun recovered in St. James Parish. He claims his counsel should have demanded a continuance in order to undertake unspecified trial preparation to offset the alleged prejudice he

suffered by the admission of the gun into the proceedings.

In *State v. Bright*, 98-0398 (La. 4/11/2000), 776 So.2d 1134, 1157, the Louisiana Supreme Court set forth the standard for reviewing ineffective assistance of counsel claims:

To establish a claim of ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, that counsel's professional errors resulted in prejudice to the extent that it undermined the functioning of the adversarial process and rendered the verdict suspect. *Strickland v. Washington, supra; Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). . . .

A claim of ineffectiveness is generally relegated to post-conviction, unless the record permits definitive resolution on appeal. E.g., *State v. Prudholm*, 446 So.2d 729 (La.1984). However, when the record is sufficient for review, this Court will reach the merits of complaints about counsel's performance and grant relief when appropriate. E.g., *State v. Hamilton*, 92-2639 (La.7/1/97), 699 So.2d 29, 32-35.

Bright, 776 So.2d at 1157.

In this case as to the first *Strickland* prong, deficient performance, the defendant makes only the conclusory statement that counsel was unprepared to go to trial. However, the record indicates that counsel acknowledged that he had two days notice prior to trial of the State's intention to introduce the gun into evidence. Moreover, counsel had the benefit of a pretrial motion on the admissibility of the defendant's statement and gun, during and after which he argued vigorously and knowledgeably for exclusion on the basis of late discovery violation and relevance. The defendant does not provide any

facts to support the claim that failure to request a continuance standing alone demonstrates deficient performance. In light of the entire record and the legal standard of proof required for an ineffective assistance claim, the defendant has failed the first prong of the *Strickland* test.

The defendant further contends that counsel's deficient performance exposed him to a life sentence. However, the defendant was exposed to a life sentence when he was indicted by the grand jury, and cannot meet the second prong of *Strickland* by pointing to the consequences of the law under which he was charged. The defendant was convicted by the two eyewitnesses' testimony that they saw the defendant kill the victim. Defense counsel attacked the witnesses' credibility through thorough and effective cross-examination, and demonstrated that he was prepared to bring out any and all inconsistencies in their account of events. The defendant was convicted by the overwhelming evidence of his guilt, not through any act or omission of his counsel. This assignment is without merit.

CONCLUSION

For the foregoing reasons, we affirm the conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED

