

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1745

STATE OF LOUISIANA

VERSUS

KENNETH R. MORGAN

DATE OF JUDGMENT: APR - 1 2010

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 1545-07, DIV. D, PARISH OF IBERVILLE
STATE OF LOUISIANA

HONORABLE WILLIAM C. DUPONT, JUDGE

Richard J. Ward
Elizabeth A. Englio
Plaquemine, Louisiana

Counsel for Appellee
State of Louisiana

Shannon L. Battiste
Plaquemine, Louisiana

Counsel for Defendant-Appellant
Kenneth R. Morgan

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Defendant, Kenneth R. "Bo" Morgan, was charged by an Iberville Parish Grand Jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty. Following a jury trial, defendant was convicted as charged. Defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. He now appeals, urging two assignments of error:

1. The State's late disclosure of the witnesses' prior statements which exculpated the defendant impacted the fundamental fairness of the proceedings leading to the defendant's conviction, thus violating his right to a fair trial.
2. The defendant was denied his right to effective assistance of counsel under the Sixth Amendment of The United States Constitution and Article I, Section 13 of The Louisiana Constitution.
 - A. As a result of ineffective assistance of counsel, the defense at trial allowed Detective Ponson to testify to hearsay without stating any objection.
 - B. As a result of ineffective assistance of counsel, the defense at trial allowed Assistant District Attorney Clayton to refer to items not entered into evidence in the State's [rebuttal] closing argument.

Finding no merit in the assigned errors, we affirm defendant's conviction and sentence.

FACTS

On the evening of June 29, 2007, the victim, Lewis James, was shot and killed outside a residence on the corner of Barrow Street and Vessel Street in Iberville Parish. Defendant subsequently was identified as the shooter. Brandon Riley and Charles Smith testified that they were outside the residence when defendant approached and asked if the victim was around. Riley advised the

victim that someone was looking for him. The victim exited the residence and approached defendant near the street where they conversed shortly. Shortly thereafter, defendant pulled out a gun and shot the victim. Defendant chased the victim and continued to shoot him as he attempted to run away. The victim sustained gunshot wounds to his right posterior scalp, posterior left shoulder, left lower buttock, and epigastric region. Defendant fled the scene.

Before the police were able to question him in connection with the shooting, defendant left the state. Approximately three months later, defendant was apprehended in Houston, Texas, with the assistance of the United States Marshals Service. He was returned to Iberville Parish and subsequently indicted for the victim's murder.

ASSIGNMENT OF ERROR #1
BRADY VIOLATION

In his first assignment of error, defendant contends he was unfairly prejudiced by the State's failure to timely disclose evidence favorable to him, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, defendant complains that the State did not reveal, until after the trial started, that Riley and Smith, the two alleged eyewitnesses to the shooting, made initial statements to the police wherein they did not identify defendant as the shooter.

By this assignment of error, defendant again seeks review of the trial court's ruling denying his motion for a mistrial. We previously reviewed the trial court's denial of defendant's mistrial motion under our supervisory jurisdiction in *State v. Morgan*, 2009-0252 (La. App. 1st Cir. 2/4/09) (unpublished), and reversed the

trial court's ruling. The State sought review of this court's ruling with the Louisiana Supreme Court. The supreme court granted the writ application and held:

There is no showing that the defendant was prejudiced by the late disclosure of the witnesses' statements; thus, the trial court did not abuse its discretion in denying the motion for a mistrial. Accordingly, the court of appeal's ruling is hereby vacated and the ruling of the district court denying the motion for a mistrial is reinstated. Case remanded to district court for further proceedings.

State v. Morgan, 2009-0261 (La. 2/5/09), 999 So.2d 766. This assignment of error presents no new argument. Because the supreme court has already considered the merits of the mistrial motion and specifically held that no prejudice was shown (overruling this court's previous decision on the issue), there is nothing left for this court to review.

ASSIGNMENT OF ERROR #2
INEFFECTIVE ASSISTANCE OF COUNSEL

In this assignment of error, defendant asserts he received ineffective assistance of counsel at trial. In support of this claim, defendant recounts two instances in which he contends that failure of his trial counsel to properly represent him affected the outcome of his case. He claims his counsel's performance was deficient when he allowed Detective Eric Ponson to provide hearsay testimony without objection; and he failed to object to the prosecutor's reference, during closing argument, to items not entered into evidence.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, if the record discloses the evidence needed to decide the issue of ineffective assistance of counsel, and that issue has been

raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. *State v. Williams*, 632 So.2d 351, 361 (La. App. 1st Cir. 1993), writ denied, 94-1009 (La. 9/2/94), 643 So.2d 139.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient, and (2) the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Felder*, 2000-2887, pp. 10-11 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. *State v. Serigny*, 610 So.2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

In this case, defendant first maintains that Det. Ponson was allowed to provide hearsay testimony when he was questioned regarding a particular crime-scene photograph. Defendant urges that Det. Ponson's testimony regarding what an alleged witness indicated the photograph depicted constituted inadmissible hearsay and should not have been allowed.

Hearsay evidence is evidence of an unsworn, out-of-court statement made by a person other than the testifying witness, which is introduced for the truth of its content. If such a statement is offered for any other purpose, however, then the statement is not hearsay. *State v. Valentine*, 464 So.2d 1091, 1093 (La. App. 1st Cir.), writ denied, 468 So.2d 572 (La. 1985).

Under certain circumstances, the testimony of a police officer may encompass information provided by another individual without constituting hearsay if offered to explain the course of a police investigation and the steps leading to the defendant's arrest. *State v. Smith*, 400 So.2d 587, 591 (La. 1981); *State v. Young*, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005. However, in *State v. Broadway*, 96-2659, pp. 8-9 (La. 10/19/99), 753 So.2d 801, 809, cert. denied, 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000), the Louisiana Supreme Court discussed the limitations on the admission of such testimony:

Information about the course of a police investigation is not relevant to any essential elements of the charged crime, but such information may be useful to the prosecutor in "drawing the full picture" for the jury. However, the fact that an officer acted on information obtained during the investigation may not be used as an indirect method of bringing before the jury the substance of the out-of-court assertions of the defendant's guilt that would otherwise be barred by the hearsay rule.

The *Broadway* court, quoting the supreme court's earlier opinion of *State v. Hearold*, 603 So.2d 731, 737-38 (La. 1992), further stated:

Absent some unique circumstances in which the explanation of purpose is probative evidence of a contested fact, such hearsay evidence should not be admitted under an "explanation" exception. The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted.

Broadway, 96-2659 at p. 9, 753 So.2d at 809.

A review of the trial transcript in this case reveals that Det. Ponson did, in fact, testify about the substance of information related to him during his investigation of the image depicted in State's exhibit 10. When asked to identify the photograph, Det. Ponson replied, "[t]his is a photo of where the witnesses say the suspect ran after the shooting." The testimony, while it does include an out-of-court statement, was not offered for the truth of the matter asserted, i.e., that the suspect actually fled to the area in the picture. The explanation about the photograph was offered to identify the crime scene and to explain the reason it had been taken. Furthermore, eyewitness testimony placed defendant at the scene of the shooting and established his identity as the shooter. Det. Ponson's testimony established that the shooter was not immediately apprehended. Therefore, even if the testimony in question was to be considered inadmissible hearsay, we find it to be harmless beyond a reasonable doubt because it was cumulative and corroborative of other testimony about the circumstances surrounding the shooting. See La. C.Cr.P. art. 921. Defendant has failed to make the required showing of sufficient prejudice and, as such, his claim of ineffective assistance of counsel on this issue fails.

Insofar as defendant's assertion that his counsel failed to object to the prosecutor's statement during closing argument that bullets were found "in his house" (a statement the evidence does not support), we note that the trial court advised the jury on several occasions to decide the case on the evidence, not the argument. In opening remarks, the trial court emphasized, "[w]hat the attorneys say in closing argument is not evidence." Later, in its final instruction to the jury,

the court cautioned the jurors to “decide the facts from the testimony and other evidence.” Therefore, while it would have been prudent for defendant’s counsel to object to this statement for which there was no evidentiary support, considering the trial court’s specific instruction regarding argument by counsel, it is clear that defendant suffered no prejudice from this comment. This ineffective assistance of counsel claim also lacks merit.

DECREE

For these reasons, the conviction and sentence of defendant, Kenneth R. Morgan, is affirmed.

CONVICTION AND SENTENCE AFFIRMED.