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NO. COA11-285
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Durham County
No. 06 CRS 59344

ANGEL LUIS IRIZAR RICHARDSON,
Defendant.

Appeal by defendant from judgment entered 15 February 2010
by Judge Cressie Thigpen, Jr., in Durham County Superior Court.
Heard in the Court of Appeals 28 September 2011.

*Attorney General Roy Cooper, by Assistant Attorney General
Derrick C. Mertz, for the State.*

*Glover & Petersen, P.A., by Ann B. Petersen, for defendant-
appellant.*

HUNTER, Robert C., Judge.

Angel Luis Irizar Richardson ("defendant") appeals from the
judgment entered after a jury found him guilty of first degree
murder. Defendant argues the trial court erred in denying his
motion for mistrial based upon the State's suppression of
exculpatory evidence in violation of *Brady v. Maryland*, 83

S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Defendant also argues the trial court erred in denying his motion to dismiss and in instructing the jury on the theory of murder by lying in wait as the charge and the instruction were unsupported by the evidence. After careful review, we find no error.

Background

The State's evidence tended to establish the following: On 4 December 2006, Marlon Rand ("Rand") was at his grandmother's house with his girlfriend and his niece. In the late afternoon, Rand walked out of the house and got into his car, which was parked on the street. Rand left the driver's door open as he sat in the car with the radio on. From inside the house Rand's niece was looking out the front door when she saw a man with a gun and wearing a black hoodie, black jeans, and green "Jordan" shoes run from the direction of the abandoned house next door to Rand's car. As the man raised his gun, Rand began kicking his legs in an apparent attempt to fend off the attack. The man fired two shots into the car and ran. Rand exited the car and fled across the street as the man fired two more shots before running from the scene. Rand collapsed in a neighbor's yard having suffered one gunshot wound to the upper chest with the bullet exiting through his neck and he died at the scene.

The Durham Police Department's ("DPD") investigation into the murder focused on several suspects. One suspect was Lemuel

Sherman, whom the police arrested and charged with murder. Custodial interviews with Sherman lead the DPD to conclude that Sherman did not kill Rand, but that he had driven the perpetrator to and from the area of the shooting. Sherman told the DPD the shooter was a person known as "Rock." Sherman's attorney later told the DPD that Rock was, in fact, defendant.

Shortly thereafter, the DPD arrested defendant for the murder of Rand and obtained defendant's consent to search his residence. As a result of the search, the police found a pair of florescent green Nike Air Jordan shoes and a black hooded coat in defendant's bedroom.

On 16 January 2007, defendant was indicted by a Durham County Grand Jury for the murder of Marlon Rand. Six days later, while in custody, defendant contacted a DPD investigator and, after waiving his *Massiah* rights, provided a signed written confession to the murder. In his confession, defendant provided multiple details that corroborated evidence discovered by the DPD, including that the shooter took a rocking chair from a neighbor's porch and placed it by a window in the vacant house next door where the shooter waited overnight for the opportunity to attack. As he waited, defendant smoked cigarettes and drank a beer. Defendant's confession corroborated the brand of beer and cigarettes found in the vacant house; the description of the clothing the shooter was wearing (which matched the clothing

seized from defendant's bedroom); the caliber of the murder weapon; that Rand was kicking his feet during the attack and that he was shot in the neck while seated in his car. Defendant also stated in his confession that immediately prior to pulling the trigger, Rand grabbed the front of defendant's gun and attempted to reach under the driver's seat.

An agent of the State Bureau of Investigation analyzed the DNA left on the beer can and cigarette butts found in the vacant house and determined it matched defendant's DNA. Additionally, the right arm of the black coat seized from defendant's bedroom tested positive for gunshot residue.

When the case came on for trial on 19 January 2010 in Durham County Superior Court, defendant presented a defense theory that the wrong man was on trial—that the perpetrator of the murder was Reginald Jones, a mutual acquaintance of defendant and Rand. However, during the second week of the trial, and during the State's case-in-chief, the State provided defendant with evidence that could be interpreted to support a defense theory that Lemuel Sherman confessed to the murder of Rand.

The evidence at issue was a statement from Khalid Abdallah, an inmate in federal prison in Colorado. On 28 October 2008, Abdallah was interviewed by a dually-sworn DPD officer and FBI agent, Jonathan Butler, as part of a FBI narcotics investigation

into a Durham-based organized crime family. During the interview with Officer Butler, Abdallah stated that Lemeul Sherman told him (Abdallah), "'I'm real. I killed that n[----] Smut.'" (Smut was Marlon Rand's alias.)

Upon request by the prosecution for any exculpatory evidence related to defendant, the FBI provided the Durham County District Attorney's Office with this statement (the "Abdallah statement") on 29 January 2010. The prosecution delivered the statement to defendant's counsel the same day. Officer Butler later testified, however, that he gave the Abdallah statement to the DPD in October 2008, although he could not recall to whom he had provided the statement.

The trial court recessed from 3 February 2010 to 8 February 2010 to allow defendant time to make effective use of the newly disclosed evidence. Defendant was given the opportunity to interview Abdallah, who was transferred to North Carolina for questioning, and to interview Lemeul Sherman, who lived in Durham. On 4 February 2009, defendant made a motion for mistrial arguing the State had been aware of the Abdallah statement since October 2008, that the statement was material exculpatory evidence, and the State's failure to disclose the evidence to defendant until the second week of his trial was a violation of his constitutional right to due process, citing the

United States Supreme Court's holding in *Brady*, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218.

The trial court acknowledged the Abdallah statement was favorable to defendant in that it was exculpatory evidence. The trial court further noted that there was evidence of suppression, albeit inadvertent suppression, in that there was testimony that the statement was provided to the DPD, but the DA's Office was unaware of its existence until after defendant's trial began. Thus, the trial court concluded the dispositive issue was whether defendant was prejudiced by the late disclosure of the statement. After permitting defendant's counsel to provide an *ex parte* statement as to what defendant would have done differently had the statement been provided prior to trial, the trial court concluded defendant was not prejudiced by its late disclosure. The trial court denied defendant's motion, noting that defendant provided a detailed confession to the crime, which corroborated much of the State's evidence of defendant's guilt. The trial court concluded the Abdallah statement, or additional leads resulting therefrom, would not result in a different outcome in the jury's deliberation.

At the conclusion of the State's evidence, defendant made a motion to dismiss the charge for insufficient evidence, which the trial court denied. Defendant also renewed his motion for

mistrial, which was denied. Defendant then elected to present evidence, and before doing so, requested that he be able to preserve his right to give the last closing argument to the jury despite his intention to introduce evidence. The trial court indicated it was inclined to deny the request, and ultimately, the State gave the last closing argument.

At the conclusion of all the evidence, defendant renewed his motion to dismiss the charge against him for insufficient evidence and his motion for mistrial. Both motions were denied. During the charge conference, defendant objected to instructing the jury on the theory of murder by lying in wait, but was overruled. The trial court instructed the jury that it could find defendant guilty of murder based on the theory of premeditation and deliberation, or lying in wait, or both. The jury found defendant guilty of first degree murder by lying in wait. The trial court sentenced defendant to imprisonment for life without parole. Defendant gave notice of appeal in open court.

Discussion

A. Brady Violation

Defendant argues that the State's late disclosure of the Abdallah statement was a violation of his right to due process pursuant to the holding of *Brady*, 83 S. Ct. at 1196-97, 10 L.

Ed. 2d at 218, and, consequently, the trial court erred in denying his motion for mistrial. We disagree.

We review the trial court's legal conclusion as to whether there was a *Brady* violation *de novo* and its decision to deny defendant's motion for mistrial based on the alleged *Brady* violation for abuse of discretion. *See, e.g., United States v. Cole*, 293 F.3d 153, 163 (4th Cir. 2002) (reviewing alleged *Brady* violation *de novo* and trial court's denial of the defendant's motion for mistrial for abuse of discretion); *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 857 (1995).

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. In subsequent cases, the Court established that the prosecutor's duty to disclose favorable and material evidence under *Brady* applies even in the absence of a request for such evidence by an accused and encompasses evidence known only to police or other individuals acting on behalf of the government in the accused's case. *Strickler v. Greene*, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 298 (1999). Thus, there are three components to a *Brady* violation: (1) suppression by the State, whether willfully or inadvertently; (2) of evidence

that is favorable to the defendant, because it is exculpatory or impeaching; and (3) is "material" to the defendant in that it prejudiced the defendant to the extent there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See *Strickler*, 119 S. Ct. at 1948-49, 144 L. Ed. 2d at 302 (explaining the determinative issue in *Strickler* was whether the petitioner established prejudice necessary to satisfy the "materiality" inquiry for his *Brady* claim).

Here, in denying defendant's motion for mistrial, the trial court concluded the Abdallah statement appeared to be favorable to defendant and "material." However, defendant was granted a continuance to allow for his effective use of the evidence, and, in the trial court's opinion, the statement and any leads resulting therefrom would not result in a different verdict. We note that while the trial court found the statement was "material," in light of its ultimate conclusion that the evidence would not result in a different verdict, we conclude the trial court did not determine it was "material" under *Brady* and its progeny, as defendant contends. See *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (explaining that for an alleged *Brady* violation, "[e]vidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed" (citation omitted)). Rather, it is

reasonable to conclude the trial court used "material" pursuant to the term as used in section 15A-910 of our General Statutes, which defendant cited in support of his motion for mistrial. N.C. Gen. Stat. § 15A-910 (2009) (providing that prior to imposing sanctions for a party's failure to comply with discovery requirements in superior courts "the court shall consider both the *materiality* of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article") (emphasis added). Regardless, upon our *de novo* review, we conclude the Abdallah statement was not material under *Brady*.

While prosecutors have a broad duty to disclose favorable evidence prior to trial, our Supreme Court has held that "due process and *Brady* are satisfied by the disclosure of the evidence *at trial*, so long as disclosure is made in time for the defendant to make effective use of the evidence." *State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996) (emphasis added) (concluding the defendants were not entitled to mistrial for alleged *Brady* violation where defendants had "ample opportunity" to make effective use of evidence disclosed during trial; the evidence was provided four days before the State rested its case, the State provided contact information for new witnesses, and the defendants did not ask for a continuance); *cf. State v. Canady*, 355 N.C. 242, 252, 559 S.E.2d 762, 767

(2002) (concluding the State's failure to disclose names of informants denied the defendant the opportunity to make effective use the information—i.e., acquire from informants names of others involved in the crimes charged—and created a reasonable probability of a different outcome at trial).

On appeal, defendant argues the State's late disclosure of the Abdallah statement was a *Brady* violation because he was not able to make effective use of the information. Had he known of the Abdallah statement prior to trial, defendant argues he would have modified his jury *voir dire*, used a different defense theory, given a different opening statement, and questioned witnesses differently.

We note the trial court made several accommodations to allow defendant effective use of the evidence including a continuance to permit defendant time to interview Abdallah and Sherman; a special instruction to the jury explaining the late disclosure of the Abdallah statement and that the statement should have been turned over to defendant prior to trial; and a second opening statement to the jury. In arguing his motion for mistrial, defendant's counsel conceded that the Abdallah statement could be interpreted to support the State's theory that Sherman meant that he *had* Rand killed, not that he killed Rand himself. Defendant's counsel also acknowledged that despite knowing prior to trial that Sherman was a "viable

suspect," and despite knowing there was evidence in the State's discovery files that Sherman was hired to murder Rand, counsel made a "strategic decision" to utilize a defense theory that did not implicate Sherman as the perpetrator.

Moreover, in light of defendant's detailed written confession, and other substantial evidence of his guilt, defendant's arguments do not persuade us that there is a reasonable probability that had the State provided the Adballah statement to defendant prior to trial the jury would have reached a different verdict. Defendant's confession corroborated many details of the State's evidence, including that defendant hid in a vacant home next door to his victim's house drinking beer and smoking cigarettes before committing the crime. The State identified defendant's DNA on the beer can and cigarette butts left in the vacant house.

With this substantial evidence of his guilt, the late disclosure of the Abdallah statement does not undermine our confidence in the verdict. We conclude no *Brady* violation occurred and the trial court did not abuse its discretion in denying defendant's motion. See *Strickler*, 119 S. Ct. at 1954, 144 L. Ed. 2d at 309 (concluding the record provided "strong support for the conclusion that petitioner would have been convicted" even if the suppressed evidence had been made available to the defendant and rejecting the petitioner's

allegation of a *Brady* violation); *State v. Campbell*, 133 N.C. App. 531, 541-42, 515 S.E.2d 732, 739 (1999) (concluding the suppressed evidence's effect, if any, was "vastly diminish[ed]" by defendant's confession and other evidence of his guilt and was therefore not material under *Brady* and its progeny).

Defendant further contends that because of the late disclosure of the Abdallah statement he was forced to introduce evidence after the State rested its case and, consequently, he was improperly denied his right to the last closing argument. See *State v. Macon*, 346 N.C. 109, 114, 484 S.E.2d 538, 541 (1997) (explaining that when the defendant introduces evidence he loses his right to give the last closing argument); *State v. English*, 194 N.C. App. 314, 321, 669 S.E.2d 869, 873 (2008) (concluding the defendant was entitled to a new trial where the trial court wrongly denied the defendant his right to give the last closing argument). Defendant argues that had the Abdallah statement been disclosed prior to trial he could have preserved his right to give the last closing argument. This is because the witnesses called by defendant were initially called during the State's case-in-chief. Consequently, defendant could have elicited the necessary testimony from these witnesses during cross-examination and done so without introducing evidence—with the exception of a few defense exhibits.

The record reveals that when the State rested its case defendant requested he be allowed to give the last closing argument despite the fact that he intended to introduce evidence. The State objected. Defendant requested the accommodation as a sanction pursuant to N.C. Gen. Stat. § 15A-910 in light of the State's late disclosure of the Abdallah statement. The trial court stated it was inclined to deny the request in light of the other accommodations it had provided defendant, but that it would give the request consideration. Our review of the record, however, does not disclose a ruling by the trial court on defendant's request. By not obtaining a ruling on his request, defendant waived his right to appeal the issue. N.C. R. App. P. 10(a)(1) (2009).

In sum, we conclude defendant has failed to establish that the Abdallah statement was material; he has not demonstrated a reasonable probability that had he been provided the Abdallah statement prior to trial that the jury would have reached a different verdict.

B. Motion to Dismiss

Defendant also appeals the trial court's denial of his motion to dismiss the charge of first degree murder on a theory of lying in wait, arguing the evidence was insufficient to permit a reasonable juror to conclude beyond a reasonable doubt

that defendant committed the crime by lying in wait. We disagree.

In order to deny defendant's motion the State must have presented sufficient evidence to convince a rational jury, beyond a reasonable doubt, that each element of the crime was committed and that defendant was the perpetrator of the crime. *See State v. Leroux*, 326 N.C. 368, 375-76, 390 S.E.2d 314, 320-21 (1990). Additionally, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the State. *Id.* at 377, 390 S.E.2d at 321.

In *Leroux*, our Supreme Court described the crime of murder by lying in wait as follows:

Murder perpetrated by lying in wait 'refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim.' The assassin need not be concealed, nor need the victim be unaware of his presence. 'If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.'

326 N.C. at 375, 390 S.E.2d at 320 (citations omitted).

In the present case, the record reveals ample evidence to permit a rational jury to conclude that defendant committed murder by lying in wait. This evidence included defendant's confession that he hid in the vacant house next door to Rand's

home and waited until Rand was reclining in his car before defendant ran from his hiding place to shoot him. Defendant emphasizes, however, that Rand had sufficient time to perceive defendant, grab defendant's gun, and begin kicking his legs in defense. Defendant contends Rand's actions evidence an awareness of the attack, and a defense from the same, which negate the essential elements of lying in wait.

In support of his argument defendant cites to *Leroux* for the proposition that to support a charge of murder by lying in wait the victim must be *unaware* of the impending attack. 326 N.C. at 376, 390 S.E.2d at 320 ("Even a moment's deliberate pause before killing *one unaware of the impending assault* and consequently 'without opportunity to defend himself' satisfies the definition of murder perpetrated by lying in wait." (emphasis added) (citations omitted)). While we agree that our case law requires an element of surprise in the attack, *State v. Lynch*, 327 N.C. 210, 218, 393 S.E.2d 811, 816 (1990) ("[S]ome sort of ambush and surprise of the victim are required."), we conclude the case law requires the attack be unexpected, not that the victim be completely unaware of what is occurring. See *State v. Allison*, 298 N.C. 135, 148, 257 S.E.2d 417, 425 (1979) ("The fact that [the assailant] reveals himself or the victim discovers his presence will not prevent the murder from being perpetrated by lying in wait."); *State v. Richardson*, 346 N.C.

520, 536-37, 488 S.E.2d 148, 158 (1997) (concluding evidence that the defendant waited 15 minutes for his murder victim to exit her workplace before abducting her and that the victim did not see her assailant until "he was right up to her" was sufficient to support a charge of murder by lying in wait), *cert. denied*, 118 S. Ct. 710, 139 L. Ed. 2d 652 (1998).

Similarly, defendant's insistence that his victim's brief attempt to deflect the imminent attack negates the propriety of a charge for murder by lying in wait is unsupported by our case law. See *Leroux*, 326 N.C. at 376, 390 S.E.2d at 320 (concluding charge of murder by lying in wait was not defeated by evidence that victim perceived the defendant and had time to tell other police officers to take evasive actions before the victim was shot). We conclude the evidence was sufficient for the trial court to instruct the jury on murder by lying in wait. Defendant's argument is overruled.

C. Jury Instruction

Defendant next argues the trial court erred by instructing the jury on a theory of murder by lying in wait. As with his motion to dismiss, defendant contends the evidence was insufficient to permit a reasonable juror to conclude beyond a reasonable doubt that defendant committed the crime by lying in wait. We disagree.

We review the trial court's decision regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). The trial court "should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974). If a jury instruction is given that is not supported by the evidence, the defendant is entitled to a new trial. *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

For the same reasons we have outlined in our discussion of defendant's motion to dismiss, we conclude there was sufficient evidence to instruct the jury on a theory of murder by lying in wait. Defendant's argument is overruled.

Conclusion

For the reasons stated herein, we conclude the trial court did not err in denying defendant's motion for mistrial, in denying defendant's motion to dismiss, or in charging the jury with an instruction on first degree murder by lying in wait.

No error.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).