NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1236

STATE OF LOUISIANA

VERSUS

ROBERT A. MAGIDSON

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 371799, Division "F"
Honorable Martin E. Coady, Judge Presiding

Walter P. Reed
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and

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State of Louisiana

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Covington, LA

Attorney for
Defendant-Appellant
Robert A. Magidson

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered March 23, 2007

PARRO, J.

The defendant, Robert Magidson, was charged by bill of information with second degree injuring public records, a violation of LSA-R.S. 14:132(B). He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The defendant was sentenced to imprisonment at hard labor for one year. The trial court suspended the sentence and placed the defendant on supervised probation for two years. The defendant now appeals, urging the following assignments of error:

1. The failure by the state to produce through discovery all exculpatory evidence constitutes reversible error since there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. Specifically, the state failed to provide Magidson a copy of the credentials marked "RETIRED" submitted in conjunction with his application for renew of his pass.

2. The failure by the state to produce through discovery all exculpatory evidence constitutes reversible error since there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. Specifically, the state failed to provide Magidson a copy of the applications submitted by and issued to approximately three hundred individuals who did not meet the Commission's criteria to be eligible for passes.

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

FACTS

At all times pertinent to this case, passage onto the Lake Pontchartrain Causeway (Causeway) on the northshore required payment of a $3 toll. Certain individuals, however, were issued a nonrevenue-generating pass, which allowed them to cross the Causeway without charge. Typically, the nonrevenue passes were reserved for 1) full-time paid law enforcement officials with arrest powers, 2) full-time paid firefighters, 3) organized state militia, and 4) persons with service-connected disability. The nonrevenue Causeway passes were good for one year. A notice contained on the reverse side of the GNOEC (Greater New Orleans Expressway Commission) Form 101 application specifically provided that the nonrevenue Causeway pass was not to be used in the event of retirement or termination of employment.

In April of 2003, Anthony Zito, a customer service representative with the

Greater New Orleans Expressway Commission (Commission), received a call from an unidentified female regarding the issuance of nonrevenue Causeway passes to ineligible individuals. Zito referred the call to his supervisor. Shortly thereafter, the Causeway Police launched an investigation involving the nonrevenue Causeway passes and their verification. The defendant became a subject in this investigation.

The investigation revealed that on May 7, 2002, the defendant, a retired Special Agent with the U.S. Immigration and Naturalization Service (USINS), went to the Commission office to renew his nonrevenue Causeway pass.[1] The defendant had received the pass several years earlier after relocating to Louisiana from Chicago. On the employment portion of the application form, the defendant selected the option indicating that he was "Full-Time Paid Law Enforcement with Arrest Powers." He listed the employment agency as "USINS," and provided #0744 as his badge number and "Craig Robinson" as his supervisor. The defendant signed the form indicating that he read, understood, and agreed to be bound by the terms and conditions on the reverse side of the application.

At trial, Chante Silvan, a customer service representative at the Commission's office, testified regarding the procedure she utilized for issuance of the nonrevenue Causeway passes. Silvan testified that first she asked to see the credentials and badge of the requesting individual to determine if they met any of the employment criteria. If, upon examining the credentials and badge for authenticity, Silvan determined that the requesting individual did meet the employment criteria, the individual was issued an application form to complete. If the individual did not meet the criteria, Silvan advised that they were ineligible for the pass and did not issue an application. Silvan further testified that she only inspected the credentials and badge. It was not standard procedure to photocopy either item.

[1] A memorandum from the Assistant District Director for Investigations of the USINS established that the defendant officially retired on October 30, 2000.

The application submitted by the defendant on May 7, 2002, listed Silvan as the issuing representative. Silvan testified that although she did not personally recall her interaction with the defendant, she was confident that the defendant did not present an identification card indicating that he was "RETIRED." Silvan testified, because there was no provision authorizing the issuance of a nonrevenue Causeway pass to retired police officers, presentation of credentials indicating that the requesting individual was retired would have ended the application process. The defendant, on the other hand, testified that he showed Silvan his identification card which was clearly stamped "RETIRED." The defendant did not recall whether Silvan photocopied his credentials. The defendant admitted that he marked the "full-time law enforcement with arrest powers" option. He explained that the agent who initially told him how to obtain a nonrevenue Causeway pass had advised him to select this particular category. The defendant testified that he had also been told to list "Craig Robinson" as his supervisor. The defendant denied ever reading the reverse side of the application. The defendant was issued a nonrevenue Causeway pass, which he used four times between May 2002 and April 2003.

James Johnston, of the Immigration and Customs Enforcement (formerly the USINS) Office in New Orleans, testified that the defendant never worked for Craig Robinson. Robinson was the Assistant Director for Deportation and Removal in New Orleans. Johnston testified that prior to his retirement, the defendant worked as an agent in Chicago. He never worked in New Orleans. The defendant moved to the New Orleans area after his retirement.

Robert James Lambert, the general manager of the Commission, testified that the Commission is a public entity and the application form for the nonrevenue Causeway pass is a public record. According to Lambert, the Commission keeps the forms on file indefinitely. Lambert further testified that it was his understanding that, as was the procedure with any written record, the issuing representative was to photocopy the applicant's credentials in connection with the application process.

Lambert was unsure whether the photocopied credentials were then attached to the application. Silvan denied photocopying the defendant's credentials in connection with his application.

ASSIGNMENTS OF ERROR
BRADY VIOLATIONS

In these assignments of error, the defendant contends the state withheld or suppressed information favorable to him, in violation of open-file discovery and **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). First, the defendant asserts the state erred in failing to produce a copy of the credentials he presented in connection with his application for renewal of his nonrevenue Causeway pass. The defendant also argues the state failed to produce copies of the applications submitted by approximately three hundred individuals who, like the defendant, did not meet the Commission's criteria to be eligible for nonrevenue Causeway passes. He argues that the state's failure to disclose these items warrants reversal of his conviction.

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). If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such a prejudice may constitute reversible error. **State v. Ray**, 423 So.2d 1116, 1118 (La. 1982).

Under the United States Supreme Court decision of **Brady,** the state, upon request, must produce evidence that is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. U.S.**, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Where a specific request is made for such

information and the subject matter of such a request is material, or if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the information to the trial judge for an in camera inspection. See **U.S. v. Agurs**, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); **State v. Cobb**, 419 So.2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in **U.S. 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 (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. **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

In the instant case, the defendant filed a written discovery motion on December 23, 2003. The record further reflects that the state, by way of open-file discovery, fulfilled all of its discovery obligations. On the day of trial, defense counsel declared to the court that the discovery motion had been satisfied. Counsel for the defense did not urge any additional discovery requests.

Initially we note, without considering whether the state violated discovery, the defendant failed to seek an appropriate remedy in the trial court. The record does not show that defense counsel moved for a mistrial, a continuance, or any of the other remedies as set forth in LSA-C.Cr.P. art. 729.5(A), which provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.

The defendant did not raise any objection to the discovery in the trial court. If the defendant did not avail himself of the remedies available to him in the trial court, he effectively waived his right to raise the issue on appeal. See **State v. Quimby**, 419

So.2d 951, 958 (La. 1982). See also **State v. Lovick,** 00-1833 (La. App. 5th Cir. 5/16/01), 788 So.2d 565, 570-71, writ denied, 01-1836 (La. 5/10/02), 815 So.2d 833.

Moreover, we note that the defendant has failed to establish that the items in question were exculpatory and/or even existed. The testimony at the defendant's trial showed that while the defendant's credentials and badge were inspected for authenticity, no copies were made. Silvan further testified that the credentials and badge presented did not reflect the defendant's "RETIRED" status. The state could not disclose what did not exist. Insofar as the applications of other retired individuals are concerned, the record is devoid of any evidence that such applications ever actually existed. The alleged applications were only referenced by defense counsel in connection with his argument that the Commission routinely issued nonrevenue Causeway passes to retired individuals. Defense counsel did not provide any support for this assertion. On appeal, the defendant cites only the unsupported argument of defense counsel during the trial. Furthermore, even if the alleged applications existed, there was no proof that the applications were in the possession of the state or that they were relevant in the instant case wherein the defendant admittedly presented inaccurate information regarding his employment status to secure the nonrevenue Causeway pass.

We find no merit in these assignments of error.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.