

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

October 21, 2003

No. 240480

Wayne Circuit Court

LC No. 99-005605

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

This case is before this Court for the second time after being remanded to the trial court for further consideration as relates to issues involving the production of a *res gestae* witness following defendant's appeal of right from his jury convictions for first-degree premeditated murder, MCL 750.316, and felony firearm, MCL 750.227b. See *People v Hamilton*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2002 (Docket No. 224954).<sup>1</sup> We affirm.

In the prior appeal, this Court held:

Defendant claims that James Lloyd would have testified that he was being attacked with a blunt object, that he was in fear of his life, and that he was saved from his attackers by defendant's gunshots. Defendant argues that the prosecutor should have produced Lloyd as a *res gestae* witness. Apparently, the prosecutor filed an amended witness list with Lloyd's name removed and defendant objected, arguing that he relied on the prosecutor's stated intention to produce Lloyd. The trial court ruled that the prosecutor was not obligated to produce Lloyd. In the alternative, defendant argues that his counsel was ineffective for failing to call Lloyd as a witness on defendant's behalf.

[This Court found that] these arguments deserve[d] consideration and remand[ed] this case to the trial court for a hearing on whether Lloyd would have provided

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<sup>1</sup> Jurisdiction was not retained.

exculpatory evidence, whether the prosecutor should have produced him as a res gestae witness, and whether defense counsel's failure to call Lloyd as a witness constituted ineffective assistance of counsel. [*Hamilton, supra*, slip op at 4.]

The trial court conducted a post-conviction hearing on remand and denied defendant's motion for new trial.

On appeal, defendant argues that the trial court abused its discretion when it denied his motion for a new trial because the prosecutor should not have been permitted to delete Lloyd, a res gestae witness, from the witness list. We disagree. A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002). "The trial court's decision to permit the prosecutor to add or delete witnesses to be called at trial is reviewed for an abuse of discretion." *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). "An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Id.* at 326. "Moreover, to establish that the trial court abused its discretion, defendant must demonstrate that the court's ruling resulted in prejudice." *Id.* at 328.

MCL 767.40a(4) provides that "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." Eight days before trial, the prosecutor filed the amended witness list, stating that the only difference between it and the original witness list was that he was "unendorsing" Lloyd at that time. Defense counsel replied, "[w]ell, I've never really heard the term unendorsed. I guess it's appropriate. My understanding, the appropriate procedure would be a motion to strike a witness, and this is just . . . simplistic." No other discussion about the amended witness list occurred until the first day of trial. On the first day of trial, before jury selection began, defense counsel brought up the amended witness list again. Defense counsel asserted "the appropriate motion would be a motion to strike the witnesses on the original list." When the court asked the prosecutor why Lloyd was removed from the witness list, the prosecutor replied, "Judge, that was a decision made, judgment decision on my part." The prosecutor also added, "I believe [Lloyd is] in custody at this point, so it's--that was one of the concerns of mine." The court stated that it "has permitted that witness to be struck from the witness list" and agreed to make Lloyd available to defense counsel.

Defendant claims that the prosecutor did not show "good cause" for amending the witness list. However, even if we agreed with defendant, his argument is unpersuasive because defendant has failed to establish prejudice. See *Callon, supra*. The prosecutor provided reasonable notice that Lloyd would not be called as a prosecution witness, provided assistance in locating Lloyd, defense counsel had an opportunity to interview Lloyd before the trial, and Lloyd was made available for defendant to call as a defense witness although he failed to do so. In sum, defendant has failed to show that the trial court abused its discretion when it permitted the prosecutor to delete Lloyd from the witness list and denied defendant's motion for a new trial. See *id.* at 326, 328.

Next, defendant argues that he was entitled to a new trial because his attorney was ineffective for failing to call Lloyd, a res gestae witness, at trial. We disagree. The

determination whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's representation fell below the standard of reasonableness, a "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

After interviewing Lloyd and reading Lloyd's police statement, defense counsel made the decision not to call Lloyd as a defense witness. Defense counsel had strategic reasons for not wanting Lloyd to testify. First, defendant and Lloyd had been involved in a shooting on the way to Belle Isle, and defense counsel did not want that evidence to be admitted at trial. Although defense counsel believed the prior shooting to be irrelevant and acknowledged that he could have filed a motion to prevent its admission, he believed that the trial court would likely have admitted the evidence. Second, Lloyd had recently been convicted of armed robbery which would have been admissible for attacking Lloyd's credibility. See MRE 609; *People v Rodgers*, 248 Mich App 702, 715-716; 645 NW2d 294 (2001); *People v Cross*, 202 Mich App 138, 146-147; 508 NW2d 144 (1993). Third, defense counsel acknowledged that Lloyd's testimony about being struck with a blunt object would have been relevant to defendant's defense of others claim, but he believed it would be more damaging than helpful to the defense. As discussed below, Lloyd could not identify the object or the man who struck him with the object. In sum, defendant did not overcome the strong presumption that defense counsel's decision not to call Lloyd to testify constituted sound trial strategy. See *Toma*, *supra* at 302. We will not assess defense counsel's performance with the benefit of hindsight. See *Rice (On Remand)*, *supra*.

Further, if defendant had overcome the presumption that defense counsel's decision not to call Lloyd to testify constituted sound trial strategy, he still could not prove that this failure deprived him of a substantial defense and thus prejudiced his right to a fair trial. See *Carbin*, *supra* at 600; *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, *supra*. Accordingly, defendant must show that, if Lloyd had testified, it is reasonably probable that the jury would not have convicted defendant of first-degree murder.

Defendant's defense against the charges was that he acted in defense of Lloyd, who was involved in an altercation with several men, including the victim. Defendant argues that, because none of the witnesses testified that Lloyd had been hit with a blunt object, Lloyd's testimony was the only evidence supporting the reasonable use of deadly force to protect the

victim of an assault from death or great bodily harm. Although Lloyd would have testified that he was struck with a blunt object, he could not identify the object or the man who struck him with the object. Defendant shot the victim twice in the back, and drove over his head with the Explorer. Deadly force may be used in defense of others, but one may not use more force in defense of the third person than reasonably believed necessary to prevent harm to the defended person. *People v Heflin*, 434 Mich 482, 511-512, n 26; 456 NW2d 10 (1990); *People v Kurr*, 253 Mich App 317, 321; 654 NW2d 651 (2002). When acting in defense of another, “the third party steps into the shoes of the individual threatened.” *Heflin, supra*. Lloyd was involved in a fistfight, and may have been in danger. However, even if defendant steps into Lloyd’s shoes, shooting the victim twice in the back and driving over his head does not constitute force “reasonably believed necessary to prevent harm.” See *id*. Consequently, even if Lloyd had testified about the blunt object, it is not reasonably probable that the jury would have reached a different verdict. Further, we agree with the trial court that, because the jury viewed a videotape of the beating and heard testimony from several eyewitnesses, the jury was not prevented from considering the substance of Lloyd’s testimony regarding the beating. In sum, defendant did not establish his ineffective assistance of counsel claim and the trial court did not abuse its discretion when it denied defendant’s motion for a new trial on this ground.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Mark J. Cavanagh  
/s/ Michael J. Talbot