STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. DANFORTH,

Defendant-Appellant.

UNPUBLISHED
February 4, 2000

No. 203619
Genesee Circuit Court
LC No. 95-052933-FC

Before: Markman, P. J., Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to life in prison. We affirm.

Defendant's conviction arises from the bludgeoning death of Lovell Roberts, also known as "Vee." His body was found by police wrapped in a comforter with a plastic bag pulled over the head in a bus parked in the driveway of a house in Genesee County in which Travis Bowles lived with his girlfriend. Around the time of the crime, defendant and John Roberts[1] were both without a permanent address and had stayed several days in the basement of Bowles' house. Vee worked for a drug dealer in Detroit named Tom Carter, who had worked out a deal by which Vee was allowed to stay at Bowles' house and sell drugs in return for payments to Bowles in cash or drugs.

Bowles, Roberts and defendant testified at trial. According to Bowles and Roberts, the events leading to Vee's murder began late Monday night, February 6, 1995. Bowles stated the following: While the three were in the basement that night, defendant mentioned that he wanted to "roll" or rob Vee. Bowles then said that it would have to be done soon, since Vee was supposed to return to Detroit the next day. Roberts suggested, in a joking manner, suffocating Vee by placing a bag over his head. After this discussion, Bowles went upstairs to sleep, passing Vee sleeping in a lounge chair in the front living room on his way. Between 12:00 and 3:00 a.m. Tuesday morning, he awoke when he heard a thumping noise. He went into the living room to see Roberts sitting in a chair watching defendant hit Vee, who was reclining in a chair, about the head and upper body with a guitar. Bowles left the room

to change his son's diaper and was joined after ten or fifteen minutes by defendant, who had already moved Vee's body into the basement. Roberts had left the house, but returned soon after defendant entered the bedroom, and was present when defendant divided Vee's drugs, cash and food stamps among the three. Roberts and defendant left the house soon after. Bowles stated that the body remained in the basement until Thursday night, when he and Cort Bates moved it to a bus in the driveway. Bowles pleaded guilty to second-degree murder prior to the instant trial.

Roberts similarly inculpated defendant, but his story differed from that of Bowles. Although Roberts admitted being present during the discussion about robbing Vee, he recalled that between 2:00 and 4:00 a.m., Tuesday morning, both defendant and Bowles joined Roberts in the basement. He said that defendant said they were going to "roll Vee," i.e., rob him. When Bowles arrived, he suggested that Vee should be killed, but defendant disagreed. Roberts denied suggesting suffocating Vee with a bag and said that Bowles brought up this subject. When Bowles and defendant left the basement, Roberts saw defendant grab a guitar and take it with him. A short time later, Roberts heard a pounding noise from upstairs. When he went to the living room, he saw defendant hitting Vee with the guitar. After three swings, he saw defendant pull Vee's body from the chair by his ankles and he saw Bowles walk toward Vee holding a black cord and a bag. When Bowles began to place the plastic bag over Vee's head, Roberts left the house, then returned shortly thereafter because it was very cold outside. He admitted that he was given some of Vee's drugs and food stamps. Roberts and defendant were gone Tuesday night, but Roberts returned to spend Wednesday night in the basement with Vee's body. On Thursday, Roberts borrowed Bowles' car and discovered a guitar in the trunk that he thought might be the murder weapon. Roberts was subsequently involved in a traffic accident, was taken to the hospital and the car was impounded. When Roberts was released, he telephoned the police to inform them about the murder and the probable location of the murder weapon. Although Roberts was arrested for the murder, the charges were not pursued by the prosecutor.

Defendant testified also, but his statement was significantly different from those of both Bowles and Roberts. He stated that he and Roberts were at Bowles' house for most of Saturday, February 4, 1995 and Sunday, February 5, 1995. On Sunday, he testified, he and Roberts were in the basement when Bowles came down and they all smoked marijuana and had a conversation. Although defendant did not testify regarding the content of this conversation because of hearsay objections, he stated that he left the house because he did not want any part of the content of the conversation. He said that he left at about 11:00 p.m. on Sunday and stayed with friends at a nearby house on Becker Street from Sunday night through Thursday, February 9, 1995. Defendant claimed that he did not return to Bowles' house until Tuesday morning, the morning after the murder, in order to pick up Roberts for breakfast. Defendant denied all connection to the murder. However, the jury found defendant guilty of second-degree murder.

According to defendant's trial attorney, a sixteen year old who also lived in Bowles' home for a time named William Aldred came to him with information regarding Vee's murder shortly after the verdict. Defense counsel stated that Aldred told him that he lived in Bowles' house at the time the murder took place and believed that he was sleeping in the front room, where Vee was supposedly

murdered, on the night of the murder. Defense counsel told the trial court that Aldred said that Bowles and Cort Bates talked to him about robbing Vee the day before the murder, but Aldred did not take their talk seriously since they were smoking crack-cocaine. Aldred said that he had not seen defendant around Bowles' house in the days before the murder after the Saturday before the murder when defendant cooked a meal for everyone. Aldred did not see defendant at the house during the conversation about robbing Vee, nor when he awoke around 4:00 a.m. on Tuesday morning to find Bowles, Cort Bates, Tammy Summerfield and "some one legged guy," apparently Roberts, playing monopoly with crack-cocaine rocks, which surprised him because none had possessed drugs when Aldred went to sleep several hours before. Aldred also told defendant's attorney that, when he asked where Vee was on Wednesday, Bowles said, "We killed him and he's in the bus." About one month after the murder, Aldred contacted Sergeant Charles Woods and offered a statement regarding the murder. However, Aldred's name was never listed on the information or on any witness lists and he was not called to trial.

Defendant filed a motion to dismiss or for a new trial based on the prosecution's failure to disclose Aldred to the defense. At the hearing on the motion, Sergeant Woods testified that he did interview Aldred on March 29, 1995 because Aldred had been arrested on an unrelated drug charge and wanted to trade information about the murder case for help in his drug case. However, Woods said, Aldred did not tell him the same things that Aldred apparently later told defense counsel: Instead of offering any pertinent information about the murder, Aldred instead asked Woods questions about the murder such that Woods felt that Aldred was trying to gain information rather than give it. According to Woods, Aldred never said that he could provide an alibi for defendant, never said that defendant was not there the day prior to the killing, never said anything about a conversation between Cort Bates and Bowles about killing Vee, never said anything about finding people playing monopoly with crack-cocaine rocks the morning after the murder, never said that he was sleeping in the front room when the murder took place, and never said anything generally to rebut the evidence against defendant. Thus, Woods believed that Aldred did not have anything pertinent to add to the investigation and he did not include Aldred's name or statement with the information he passed on to the prosecutor's office or the information that the defense was provided during discovery.

One of defendant's previous attorneys, Gary Lengyel, also testified during the hearing and confirmed that he was never given notice about Aldred from the police or prosecutor. However, he did know about Aldred's presence in the house and his possible knowledge of events surrounding the murder. Before the trial, in September 1996, defendant informed Lengyel about Aldred. Apparently, Aldred's father had a conversation with someone while in jail about his son having a connection to the instant case, but the father did not want his son involved. Defendant heard about this conversation while in jail. Lengyel testified that he knew at this point that Aldred had either been in the house or around the house the week or the time of the murder. Although Lengyel was able to find some addresses for Aldred's father through the jail, no one was at the addresses when visited, the defense never located Aldred or his father, and the defense never asked the police or the prosecution for help in locating Aldred.

After Lengyel's testimony, the trial court granted defendant's motion for a polygraph with regard to Aldred. Although the polygraph report only listed five "relevant" questions, the report concluded that Aldred had been telling the truth. The trial court ultimately denied defendant's motion for a new trial, stating that "a possible involvement of Mr. Aldred was known to Mr. Danforth prior to trial and defendant "could have made a specific request for the Court to get involved in finding Mr. Aldred and he just didn't do it." The court also remarked:

> [I]f Mr. Aldred's testimony was entirely true, if it was true that he was in the home previous to the killing and that Mr. Danforth was never there, and if it was true that he never saw Mr. Danforth on the date of the killing, that still does not negate other witnesses who testified that they saw him there because during the times that Mr. Aldred was not at the home things could have happened. If Mr. Aldred was there and was asleep, things could have happened.

Defendant offers two arguments regarding the trial court's denial of his motion for a new trial based on the basis of evidence of a witness that was not disclosed to defendant by the prosecutor. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

First, defendant argues that the trial court's denial of his motion for a new trial was improper because he was denied due process when the prosecutor withheld exculpatory information regarding the existence and statement of William Aldred. A court's ruling on the prosecutor's duty to produce evidence pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963) is reviewed de novo. *United States v Monroe*, 943 F2d 1007, 1012 (CA 9, 1991). A *Brady* claim of a violation of a criminal defendant's due process rights arises "where the government failed to volunteer exculpatory evidence never requested, or requested only in a general way . . . although only when suppression of the evidence would be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Kyles v Whitley*, 514 US 419, 433; 115 S Ct 1555; 131 L Ed 2d 490 (1995). A prosecutor is under a duty to disclose any material evidence regardless whether the defendant requests it. *Kyles, supra* at 433; *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998); *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Information is material if there is a reasonable probability that the result of the proceeding would have been different if the information had been disclosed to the defendant. *Kyles, supra* at 433; *Fink, supra*, at 454. A 'reasonable probability' is a probability sufficient to undermine confidence in the verdict. *Kyles, supra* at 434; *Lester, supra* at 282. "Accordingly, undisclosed evidence will be deemed material if it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Lester, supra* at 282 (quoting *Kyles, supra* at 434). Thus, in order to establish a *Brady* violation, a defendant must prove: (1) that the prosecutor possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could he have obtained it himself with reasonable diligence; (3) that the prosecutor suppressed the favorable evidence; and (4) that a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed to the defendant. *Lester, supra* at 281-282.

In this case, regardless whether the evidence, either before or after Aldred's post-trial discussion with the defense, was actually 'favorable' to defendant, whether the prosecutor can be said to have 'suppressed' it, it is clear that no *Brady* violation can be established here.[2] Although we do not need to address favorability, we note that, according to Sergeant Woods, Aldred said nothing pertinent to the case, and certainly nothing exculpatory. Thus, since the evidence possessed by Woods was not favorable to defendant, he was not entitled to it under *Brady*. First, under the second prong of the four-prong test from *Lester, supra*, it is clear that defendant did possess knowledge of Aldred's identity, his presence at Bowles' house around the time of the murder and even several locations at which he might be found. Defendant's trial attorney admitted that he was aware of this information as early as September 1996. In addition to the information obtained from Aldred's father's conversation while in jail, defendant would have known of Aldred's presence at Bowles' house in the days preceding the murder, since defendant himself admitted being there prior to the murder. Although defendant may not have known the exact thrust of Aldred's testimony without first speaking to him, certainly he could have obtained this knowledge with reasonable diligence--by requesting help from the police and prosecutor in locating Aldred. Apparently, the defense took no steps to determine whether Aldred and/or his father were actually living at the addresses they obtained from the jail; Lengyel testified that he simply determined that no one was home during the times when the addresses were visited. The prosecutor and investigating officer must provide the defense with help in locating witnesses when the defense requests such help, but defendant here did not do so. MCL 767.40a(5); MSA 28.980(1)(5). It further appears from the testimony of Sergeant Woods and defense attorney Lengyel that the defendant actually possessed more information about Aldred's relation to the murder case than did the police or prosecutor prior to trial. Thus, it appears that defendant would not have benefited by the disclosure of Sergeant Woods' interview with Aldred any more than if he had simply sought help in locating Aldred.[3]

Second, and perhaps more importantly, under the fourth prong of the *Brady* test, it was not reasonably probable, in our judgment, that the outcome of the proceedings would have been different if the evidence regarding Aldred possessed by the investigating officer had been disclosed to defendant. In addressing this issue, we assume, without making a determination regarding Aldred's credibility, that Aldred would have testified to the same events that defendant's attorney relayed to the trial court at the hearing on the motion for a new trial. Thus, we assume that Aldred's testimony would have been that he lived in the house at the time the murder took place and believed that he was sleeping in the room where Vee was supposedly murdered at the exact time of the murder; that he had been approached by Bowles and Cort Bates the day before the murder and they talked to him about robbing Vee;[4] that he had not seen defendant around Bowles' house for two to three days before the murder; that he did not see defendant at the house during the conversation about robbing Vee, nor when he awoke around 4:00 a.m. on Tuesday morning to find several people playing monopoly with crack-cocaine rocks; and that the next day, when asked where Vee was, Bowles told him, "We killed him and he's in the bus."

However, as noted by the trial court, there were two eyewitnesses to the murder of Vee by defendant. While defendant attacked their credibility, and they were admittedly not ideal witnesses for the prosecutor, and their testimony differed in certain respects, the trial court found that their testimony

was direct and clear and the jury accepted it. Aldred's testimony would not contradict either Bowles' or Roberts' account of the murder, because Aldred did not witness the murder. Aldred could only testify that he did not see defendant at the house around the time of the murder, not that defendant was not there. At trial, the jury had to sift through the partially conflicting stories of defendant, Roberts, Bowles and Cort Bates. In our judgment, Aldred's testimony would simply add one more story of the events surrounding the murder that partially conflicts with other witnesses' stories, but would not directly challenge the basic elements of murder proved against defendant. In addition, we note that the conflict between the testimony of Roberts and Bowles undermines any notion that they were acting in tandem to place the blame falsely upon defendant. Although Aldred's claim that he was sleeping on the night of the killing in the front room where Roberts and Bowles' claimed that Vee was killed is initially compelling, it does not necessarily follow that there is a reasonable probability that the result of the trial would have been different with this evidence. It is clear that the inhabitants of the house that night were affected by drugs, there is no clear time of the murder, no other witnesses mentioned Aldred's presence in the house during the murder, and there were questions raised at trial about whether the murder even took place in the front room because of the lack of blood. Thus, Aldred could have slept through the murder, could have left the room at the time of the murder, or perhaps the murder did take place in another room of the house. The important point is that Aldred's testimony does not directly dispute the two eyewitnesses to the murder, which the jury believed despite the contradictions already present in the case. In addition, Aldred's credibility is undermined by Sergeant Woods' testimony that Aldred told him a different story when he had a motivation to provide details of the murder in order to make a deal on his own criminal case than the one subsequently offered by the defense. Accordingly, we do not believe that Aldred's proposed testimony is such that it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Lester*, *supra* (quoting *Kyles*, *supra* at 434). Therefore, we conclude that defendant did not establish a *Brady* violation in this case.

Next, defendant argues that the trial court's denial of his motion for new trial was improper because the prosecutor violated the res gestae witness statute when he failed to endorse or call Aldred as a res gestae witness. "As has been often said by this Court, there is no precise definition for a 'res gestae witness.'" *People v Abdo*, 81 Mich App 635, 642; 265 NW2d 779 (1978). A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts. *People v O'Quinn*, 185 Mich App 40, 44: 460 NW2d 264 (1990). This Court has broadly defined a res gestae witness to include not only one who witnesses a crime but one who is present at the time and place of the crime, observes the surroundings, and sees nothing." *Abdo, supra* at 643. The res gestae witness statute provides as follows:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and *all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers*.
>
> (2) The prosecuting attorney shall be under a *continuing duty to disclose the*

names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

* * *

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, *upon request*, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request. [MCL 767.40a; MSA 28.980(1) (emphasis added).]

This statute was amended effective July 1, 1986 and no longer requires the prosecutor to endorse on the information the names of the witnesses known to him. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Instead, the lesser burden on the prosecutor is simply to list the witnesses that might be called at trial and all res gestae witnesses known to the prosecutor. MCL 767.40a(1); MSA 28.980(1)(1). This Court held that this "listing" requirement makes necessary a new inquiry into whether the defendant knew of the res gestae witnesses despite a failure to list them:

Since the amended statute requires the defendant to make a request before the prosecution must assist in locating the res gestae witnesses, the purpose of the "listing" requirement is merely to notify the defendant of the witness' existence and res gestae status. Therefore, if the defendant knew of the res gestae witness in any event, the prosecutor's failure to list the witness would be harmless error.

* * *

If defendant knew of [the unlisted witness'] possible res gestae status prior to trial and failed to seek assistance in locating her, defendant's convictions should be affirmed. [*Calhoun, supra* at 523.][5]

In the case at hand, it appears from Aldred's statement to defendant's attorney that Aldred was indeed a res gestae witness. He was at Bowles' house around and perhaps at the very time that the murder took place. He knew the main witnesses and defendant and reported conversations about robbing and then the murder of Vee. However, Aldred's status before he provided this information to defendant is more questionable, since Sergeant Woods testified that Aldred told him nothing pertinent to the investigation. Certainly there is no duty to list people who could not provide any evidence in the

trial, even if they were peripherally connected to the case in some manner. However, we need not make a firm determination whether Aldred was a res gestae witness: Even assuming that he was, defendant's prior counsel, Lengyel, testified that he knew before the trial of Aldred's existence and possible presence at Bowles' house around the time of the murder. Defendant informed Lengyel of a reported conversation in the jail in which Aldred's father told another person about his son's involvement with Vee's murder. Moreover, defendant himself should have known that Aldred might have some knowledge of the murder since both were living in Bowles' house immediately before the murder. Defendant even tried to find Aldred prior to trial on his own. However, defendant did not attempt to seek the assistance that he was entitled to under the res gestae statute from the prosecutor or investigating officer in locating Aldred. Although defendant's knowledge of possible res gestae witnesses would not dispel the prosecutor's duty to list the res gestae witnesses according to the statute, the knowledge would fulfill the purpose of the listing requirement of the statute. Defendant knew as much information in this case without Aldred being listed as a res gestae witness as he would have had the prosecutor listed him on the information. Since defendant did not ask for assistance pursuant to the statute in locating Aldred, any error in not listing him was harmless, in our judgment. *Calhoun, supra* at 523.

Next, we address defendant's additional arguments, filed in propria persona pursuant to MCR 7.216(A). Defendant claims that (1) his testimony regarding the substance of the conversation among Bowles, Roberts and himself preceding the murder was improperly excluded; (2) the prosecutor intimidated witness Larry Lige (also known at Tom Carter) into relying on his Fifth Amendment right to refuse to testify by telling him that his testimony would be used against him; (3) evidence of a handgun, gruesome photos and a polygraph taken by Roberts were improperly admitted; (4) the search of the house and bus violated the Fourth Amendment because it was without a warrant, consent or probable cause; (5) the prosecutor violated due process by commenting upon defendant's failure to offer exculpatory testimony after he was arrested; (6) the trial court abused its discretion by finding due diligence by the prosecutor in attempting to produce witness Lawanda Robles at trial; and (7) his trial attorney, Kevin Rush, was ineffective. We conclude that these claims do not merit reversal. Nor do most merit even a brief discussion.

Nevertheless, we will briefly address several of defendant's issues. First, with regard to defendant's testimony about the conversation among Bowles, Roberts and himself, defendant fails to state why the substance of statements by Bowles and Roberts was not properly excluded as hearsay. Even if improperly excluded, the case against defendant did not rely upon a conspiracy, as defendant suggests, but instead relied upon the testimony of two eyewitnesses who said that they saw defendant beat the victim to death, making any error harmless. Second, we conclude that it is certainly not "intimidation" for a prosecutor to suggest that a witness be advised of his Fifth Amendment right, and Mr. Lige decided to exercise his right not to testify in response to his own attorney's counsel, not any "intimidation" by the prosecutor. Third, defendant does not have standing to contest a search of either Bowles' house or the bus parked in the driveway, especially where defendant himself claims that he did not live in the house or the bus, and had not even stayed there for several days before the murder and

the search. *People v Parker*, 230 Mich App 337, 341; 584 NW2d 336 (1986). Fourth, defendant's mere failure to mention certain events during his post-Miranda interrogation to which he later testified at trial was not an invocation of his Miranda right to remain silent with respect to which a prosecutor cannot comment. See *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976).

Finally, defendant claims that he was denied effective assistance of counsel. After remanding for a *Ginther*[6] hearing, because defendant claimed that his trial attorney, Kevin Rush, failed to investigate defendant's claim that there were five alibi witnesses, we conclude that defendant was not denied the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficiency. *People v Lloyd*, 459 Mich 433, 450; 590 NW2d 738 (1999), citing *Strickland v Washington*, 455 US 668, 687; 104 S Ct 2052; ;80 L Ed 2d 674 (1984). Stated another way, defendant must show that his "counsel's performance fell below an objective standard of reasonableness," and that there is a reasonable probability that, but for the errors, "the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). For the reasons set forth in our discussion of defendant's *Brady*-violation argument, we find that defendant was not prejudiced by counsel's failure to call William Aldred as a witness. Aldred provided no testimony at the *Ginther* hearing that we have not already considered in our analysis of the alleged *Brady* violation.

Turning next to defendant's allegation that counsel failed to investigate other alibi witnesses, attorneys Rush and Lengyel testified with respect to their attempts to locate Sara Shuerer, Charles or Chuck Taylor, and others who allegedly could have provided defendant with an alibi. As the trial court explained in denying defendant's request for a new trial, mail searches, jail searches, and personal searches were conducted by the attorneys without success, and employment of a private investigator was equally unsuccessful. Defendant had the burden of creating a testimonial record supporting his claims of ineffective assistance and excluding "hypotheses consistent with the view that his trial lawyer[s] represented him adequately." *Ginther, supra* at 442-43. Defendant has failed to show that any additional effort by trial counsel would have produced the witnesses. In fact, neither defendant nor his appellate counsel was able to locate the missing witnesses to obtain their testimony or affidavits for purposes of the *Ginther* hearing, even after that proceeding was continued at least three times to facilitate obtaining additional evidence. Thus, defendant has provided no evidence to overcome the presumption that trial counsel performed adequately. Even more significant is defendant's failure to provide admissible evidence that the witnesses would have corroborated his claimed alibi. There is simply no evidence that the witnesses would have testified that defendant was with them at the time of the murder. Therefore, defendant has failed to show any prejudice with regard to counsel's failure to locate or call these witnesses.

For these reasons, we affirm the trial court's order denying defendant's motion for a new trial and thus affirm defendant's conviction.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin

/s/ Kathleen Jansen

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[1] There is no apparent relationship between the victim and John Roberts.

[2]The trial court addressed this issue as a motion for a new trial on the basis of newly discovered evidence. However, even though the trial court couched its ruling in terms newly discovered evidence, many of its determinations are similarly applicable to a determination of whether there was a *Brady* violation in this case, since a new trial on the basis of newly discovered evidence requires that the evidence be newly discovered, that it could not have been discovered with reasonable diligence, and that it would render a different result probable on retrial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). These factors are similar to those required to show a *Brady* violation.

[3] The record did not disclose whether the addresses for Aldred possessed by the defense and by Sergeant Woods were the same or different.

[4] Cort Bates testified that he walked in on a conversation in the basement of Bowles' house among defendant, Roberts and Bowles in the days before the killing. Although he did not testify as to the content of the conversation, he stated that he responded by telling them not to do that when he was around, and when he found a body in the basement later, it was obvious that it was Vee because of the conversation that he had overheard previously. Bates did not testify that he himself was involved in this or any similar conversation, nor did he mention Aldred's presence in the house.

[5] The holding in *Calhoun, supra* at 523, is similar to the pre-amendment conclusions of this Court that "if a defendant knows of the existence of a res gestae witness and fails to move for endorsement of that witness until after the completion of the prosecution's case, he waives his right to endorsement and production of the witness." *People v Leggions*, 149 Mich App 612, 617; 386 NW2d 614 (1986) (citing numerous cases also finding waiver in this circumstance).

[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).