

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD P. HODGSON, JR.,

Defendant-Appellant.

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UNPUBLISHED  
February 12, 2002

No. 227319  
Wayne Circuit Court  
LC No. 98-005750

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

A jury convicted defendant Richard Hodgson of two counts of assault with intent to commit murder<sup>1</sup> and possession of a firearm during the commission of a felony (felony-firearm) for shooting fourteen-year-old Alicia (Maria) Hernandez and her friend, Scott Anderson.<sup>2</sup> The trial court sentenced Hodgson to concurrent prison terms of sixteen to forty years' for the assault convictions and a consecutive two-year prison term for the felony-firearm conviction. Hodgson appeals by delayed leave granted. We affirm.

I. Basic Facts And Procedural History

According to Maria Hernandez, she knew Hodgson because he had dated her aunt and because her brother, Lorenzo Hernandez, had been in an altercation with Hodgson. Maria Hernandez stated that, on the evening in question in April 1998, she was standing with her brother when Hodgson and a group of individuals approached them. Lorenzo Hernandez walked away, and Hodgson approached her. Hodgson asked about her brother's whereabouts and, when she refused to answer, they argued. Maria Hernandez said that, as they were arguing, she heard someone yell, "[s]hoot this bitch." Hodgson then reached into his waistband and pulled out a gun, which prompted her to begin running. She heard shots, and then she realized that a bullet had hit her in the leg. Maria Hernandez blacked out momentarily and, when she regained consciousness, saw Hodgson jumping up and down while saying, "I'm a crazy motherf-----r."

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<sup>1</sup> MCL 750.83.

<sup>2</sup> MCL 750.227b.

Scott Anderson's account of the incident was highly similar. He stated that he was with his brother, Thomas Anderson, and Maria Hernandez when Hodgson approached them with three or four other individuals and began arguing with Maria Hernandez. Anderson heard Hodgson say, "I'm the baddest motherf---r on the face of the earth" and that he would shoot Maria Hernandez. Immediately before Hodgson pulled a gun from his pants, Scott Anderson said, Hodgson stated, "[s]hoot this bitch." At that point, Scott Anderson turned to run, but bullets hit his leg, his temple, and both of his arms.

Thomas Anderson confirmed that he was with Maria Hernandez and his brother, Scott Anderson, when Hodgson and his friends approached. Thomas Anderson heard Hodgson tell Maria Hernandez that he was looking for her brother and heard Maria Hernandez refuse to tell him her brother's whereabouts. He then saw Hodgson pull out a gun, at which time he grabbed his brother. They ran until Scott Anderson was shot.

Sometime later, Ubaldo Mendoza was in a Friend of the Court office when he overheard Hodgson bragging to someone else that he had just been released from the Fourth Precinct, where he had been brought in because of a child support issue and a murder charge, evidently related to the two shootings. Mendoza recounted that Hodgson (who was unaware that Maria Hernandez was Mendoza's daughter) said that he had been looking for Lorenzo Hernandez. Hodgson said that when he saw Maria Hernandez, she refused to reveal where Lorenzo Hernandez was, which made Hodgson angry. Then, Hodgson indicated, someone told him to shoot Maria Hernandez. Mendoza said that Hodgson

got a 9mm and say he just went to scare her, you know, shot at her leg and you know, he didn't want to kill her, he just shot at the leg and you know, she fell down and somebody else came out and he said you want some too, and he shot at him, too, you know.

According to Mendoza, Hodgson said that he planned to tell the police that he did not know who was doing the shooting and that the real assailant shot at him as well.

At trial, the testimony concerning who shot Maria Hernandez and Scott Anderson was somewhat varied. In addition to Maria Hernandez' testimony, two police officers stated that she had identified Hodgson as the shooter. On direct examination, Scott Anderson retold his version of the shooting and said that he saw Hodgson with a gun. Defense counsel then impeached Scott Anderson with a portion of his preliminary examination testimony in which he said that he did not actually see Hodgson with a gun, prompting the prosecutor to rehabilitate Scott Anderson's testimony with his other statements at the preliminary examination. Other witnesses to the shooting generally corroborated what Maria Hernandez and Scott Anderson said occurred, but two witnesses indicated that Hodgson did not have a gun and one witness testified that he saw a man, apparently not Hodgson, step out from between two houses and shoot.

At the close of the prosecution's case, Hodgson moved for a directed verdict, which the trial court denied. After his conviction, Hodgson moved for a new trial, arguing that the trial court should grant the motion because of newly discovered evidence. In the alternative, he contended that he was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel at trial. The trial court denied this motion as well.

In May 2000, Hodgson filed a delayed application for leave to appeal, arguing that he was entitled to a new trial because he received ineffective assistance of counsel, there was newly discovered evidence, and evidence of his prior bad acts had been erroneously admitted at trial. This Court granted Hodgson's application for delayed leave to appeal limited to the issues raised in the application. While retaining jurisdiction, the Court remanded the matter for a *Ginther*<sup>3</sup> hearing on Hodgson's claim that he was denied effective assistance of counsel.

At the *Ginther* hearing, Hodgson called his trial counsel, Kerri Mitchell, to testify. Mitchell recalled having a number of conversations with Hodgson concerning trial strategy and which witnesses would be called to testify. Mitchell also recalled visiting the scene of the shooting and concluding that the place where police found spent bullet casings did not match the testimony incriminating Hodgson, which meant that it was physically impossible for Hodgson to be the shooter, a point he presented and argued to the jury. Mitchell could not specifically remember why certain witnesses did not testify, but explained that he would ordinarily make a determination concerning which witnesses to call according to the facts specific to each witness, taking into consideration whether the witnesses were incarcerated, involved with gangs, or likely to appear at trial.

Of the six other witnesses who testified on behalf of Hodgson at the *Ginther* hearing, two witnesses, Michael Hinton and Virginia Smith, said that they did not see Hodgson with a gun at the time of the shooting. Smith, who was subpoenaed to testify at trial, said that Maria Hernandez indicated that she did not know who shot her immediately after the shooting; she never testified because, though she appeared at court on the first day, she overslept the next day because she had been drinking the previous night. Edwardo Hinton, his brother, Michael Hinton, and Joseph Probe all claimed to have seen Robert ("Fat Rob" or "Big Rob") Wyatt with a gun before and after the shooting, though none of the men saw Wyatt shoot the gun. Henry Fields was the only witness at the *Ginther* hearing to claim that he saw Wyatt pull out a gun and shoot at Hodgson and Maria Hernandez. Edwardo Hinton, Probe, and Fields all claimed to have heard Wyatt make statements incriminating himself after the shooting. Each of these three men were also embroiled in their own trouble with the law and were incarcerated, evidently soon after the shooting. None of these men approached the attorneys or the police to reveal their knowledge of the shooting.

Hodgson also called Lieutenant Vickie Close to testify at the *Ginther* hearing to explain what she had seen while working as a security threat coordinator at Standish Correctional Facility. According to Close, she was assigned to monitor mail of known gang members. One of those individuals was Michael Hodgson, Hodgson's brother. She had an opportunity to see two or three letters a person named "Rob" or "Fat Rob" had sent to Michael Hodgson sometime in 1999. In this letter, the author purported to be the shooter and suggested that he was going to reveal this information. Close photocopied the letters and sent them to a Central Office, but could not be certain whether Wyatt actually signed or sent the letters. Wyatt could not confirm this supposed confession because he died before the *Ginther* hearing.

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The trial court denied Hodgson's motion for new trial, concluding that Hodgson had not met his burden of showing by the preponderance of the evidence that Mitchell's performance was deficient because there was no proof that he knew any of the witnesses other than Smith existed. Other than Close, the trial court did not believe that any of the witnesses would have actually testified if called to do so, noting the history of incarceration that a number of the men had and Smith's drinking problem. Further, Mitchell engaged a logical tactic at trial by challenging the prosecution testimony with the physical evidence suggesting Hodgson could not have been the shooter.

## II. Ineffective Assistance Of Counsel

### A. Standard Of Review

Hodgson argues that he is entitled to a new trial because Mitchell failed to subpoena and call the Hinton brothers, Smith, Close, Probe, and Fields as witnesses at trial. He claims that the Hintons, Probe, and Fields all would have testified that Rob Wyatt, not Hodgson, was the shooter, and that Smith and Close would have also given relevant information tending to exonerate him. He also contends that Mitchell was ineffective for failing to ask the trial court to require the prosecutor to produce Smith to testify or to instruct the jury pursuant to CJI2d 5.12 when Smith failed to appear after the first day of trial. We review constitutional questions de novo,<sup>4</sup> a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not require us to defer to the trial court to any extent.

### B. Legal Standards

As this Court explained in *People v Knapp*,<sup>5</sup>

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

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<sup>4</sup> See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

<sup>5</sup> *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

### C. Failure To Present Witnesses

Case law settles that failing to present a witness can constitute ineffective assistance of counsel if the failure to do so deprives the defendant of a “substantial defense.”<sup>6</sup> However, decisions concerning which witnesses to call and what evidence to present are often considered part of trial strategy.<sup>7</sup>

We agree with the trial court that the record is devoid of any evidence that Mitchell was made aware of or could have discovered the witnesses who would have allegedly identified Wyatt as the shooter. At the *Ginther* hearing, Mitchell said that he discussed strategy and which witnesses to call with Hodgson. Though Mitchell could not give much detail concerning these discussions because of the time that had passed since they occurred, during which he had also transferred Hodgson’s case to another attorney, the record does not indicate that these potential witnesses’ names came to light. Though their motivations were varied, the Hinton, Fields, and Probe each had reasons for not revealing that they had arguably relevant information regarding the crime before trial when Wyatt may have still been alive. This makes us question how even diligent inquiry would have allowed Mitchell to find them. Further, Close did not discover the letters until after trial in this case, and Smith had been subpoenaed, but failed to appear.

Even setting aside all the reasons that Smith, the Hinton, Probe, and Field, made poor witnesses – including their relationships with Hodgson, each man’s criminal history, and two witnesses’ intoxication at the time of the shooting – Mitchell clearly chose to pursue a specific strategy at trial. While these witnesses’ testimony may have bolstered the defense theory that the physical evidence was incompatible with the prosecution testimony, thereby eliminating Hodgson as the shooter, the defense still existed without their participation in the trial. Further, that Mitchell’s strategy failed is not reason enough to conclude that he was ineffective.<sup>8</sup>

### D. Missing Witness

Hodgson also claims that Mitchell was ineffective for failing to insist that the prosecutor present Smith as a witness or request that the jury be instructed pursuant to CJI2d 5.12, the instruction concerning a missing endorsed witness. The prosecutor no longer has a duty to endorse or produce *res gestae* witnesses.<sup>9</sup> In any event, contrary to Hodgson’s claim, the prosecutor did not endorse Smith as a witness. Further, Hodgson has failed to establish that, but for Mitchell’s failure to secure Smith’s presence at trial, the result of his trial would have been different. The thrust of Smith’s testimony at the *Ginther* hearing was that she was standing near Hodgson and the victims when the shots were fired, that Hodgson did not have a gun, and that the gunshots originated from down the street. This testimony, however, was cumulative to other trial testimony that Hodgson did not have a gun.

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<sup>6</sup> *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

<sup>7</sup> *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

<sup>8</sup> *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

<sup>9</sup> MCL 767.40a; *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).

In sum, Hodgson has failed to demonstrate that Mitchell's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for the failure to introduce the evidence, the result of the proceedings would have been different. Accordingly, he is not entitled to a new trial on this basis.

### III. Newly Discovered Witnesses

#### A. Standard Of Review

Hodgson argues that, in the alternative, he should be granted a new trial because the witnesses and letters incriminating Wyatt were newly discovered evidence. This Court reviews a trial court's post conviction ruling denying a new trial when new evidence becomes known for an abuse of discretion.<sup>10</sup>

#### B. Reasonable Diligence And Effect On The Outcome

A court may grant a motion for new trial involving newly discovered evidence when the defendant demonstrates:

(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial.<sup>11</sup>

Hodgson, however, has failed to satisfy the second and third of these requirements.

With respect to Hodgson's argument, apparently concerning all the defense witnesses at the *Ginther* hearing except Mitchell and Close, he has failed to prove that they could not be discovered with reasonable diligence. Smith had been subpoenaed, and therefore discovered. Hodgson contends that concluding he was afforded the effective assistance of counsel because Mitchell could not discover the Hinton brothers, Probe, and Hines also logically requires us to conclude that their testimony was newly discovered. However, Hodgson personally knew these men. Hodgson's failure to reveal their existence to Mitchell excuses Mitchell's failure to call them to testify. This failure also suggests that if Hodgson had been reasonably diligent in preparing his own defense with Mitchell, Mitchell would have been able to find and produce at trial most, if not all, of these men because they were incarcerated and therefore possible to produce at trial with a writ of habeas corpus.

While we seriously consider Hodgson's argument that the letters from "Rob" or "Big Rob" were newly discovered, having been sent after trial, and therefore impossible to produce at trial, we question what effect they would have had on the outcome of this case. Though the letters did not include precisely the same information conveyed through other witnesses at trial, the jury was well-aware that the defense theory was that another person was the shooter.

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<sup>10</sup> *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

<sup>11</sup> *Id.*

Hodgson's point that the letters would have given a name to this other person is valid. However, Maria Hernandez and Scott Anderson both gave vivid and compelling testimony, which a number of other witnesses corroborated. Thus, we cannot say that it is reasonably probable that this additional piece of information from a witness who could not be examined because he is dead and who also had a criminal history, would have tipped the scales in favor of Hodgson.

#### IV. Prior Bad Acts Evidence

##### A. Standard Of Review

Hodgson argues that the trial court committed error requiring reversal when it admitted Mendoza's testimony that he heard Hodgson say that he was brought into the Fourth Precinct for child support payments and a murder charge. Because Hodgson failed to object to this evidence, this Court reviews this claim for plain error affecting his substantial rights.<sup>12</sup>

##### B. Mendoza's Testimony

In *People v Hawkins*,<sup>13</sup> this Court explained:

MRE 404(b)(1) governs a trial court's decision to admit or exclude prior bad acts evidence, providing:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

The majority in *People v VanderVliet*, [444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994)] set out a four-legged test for a court to follow when determining whether to admit prior bad acts evidence at trial. Prior bad acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, defendant in this case. A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence. The Michigan Supreme Court revisited MRE 404(b)

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<sup>12</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>13</sup> *People v Hawkins*, 245 Mich App 439, 447-448; 628 NW2d 105 (2001) (footnotes omitted).

recently in *People v Sabin (After Remand)*, [463 Mich 43; 614 NW2d 888 (2000)] emphasizing not only that *VanderVliet* continues to state the law accurately, but that MRE 404(b) is a rule of inclusion and courts should adopt a flexible approach when ruling on the admissibility of prior bad acts evidence.

With respect to Mendoza's testimony referring to Hodgson's contact with the police for "child support payments," the transcripts make clear that the prosecutor was attempting to elicit Mendoza's recollection of Hodgson's confession to the charged offense, which was a proper line of inquiry. While this nonresponsive answer may have warranted an objection from Mitchell, there was no such objection or request for a curative instruction.<sup>14</sup> This was also an "incidental" part of the "complete story" of the offense and its aftermath as Hodgson decided to relate it in a public place where he risked being overheard.<sup>15</sup> More importantly, the prosecutor did not ask any further questions regarding child support nor discuss the issue during closing argument. Thus, we cannot conclude that this remark was at all prejudicial, much less that it affected Hodgson's substantial rights.

Further, with respect to Mendoza's testimony referring to Hodgson's statement about his police contact related to murder charges, this was not a prior, or *other*, bad act. Instead, this murder charge was for the criminal conduct at issue in this case, which Mendoza related as Hodgson described it. This was specifically admissible against Hodgson at trial as an admission.<sup>16</sup> Therefore, Hodgson has again failed to demonstrate a plain error affecting his substantial rights.

Affirmed.

/s/ William C. Whitbeck  
/s/ Donald E. Holbrook, Jr.

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<sup>14</sup> See *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

<sup>15</sup> See *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

<sup>16</sup> See MRE 801(d)(2).