

1 order to get out of the vehicle.

2 Q And there were a number of people who were doing this?

3 A There was a couple of females and Van Fledering and
4 the other off-duty officer; yes, I ordered them out
5 of the vehicle.

6 Q But Officer Van Fledering was subsequently allowed
7 to ride to the hospital with you; is that correct?

8 A After the victim was placed in the vehicle Van
9 Fledering and his partner was in the vehicle, I
10 didn't really have time to stop the argument then by
11 getting them out of the vehicle; we just went to the
12 hospital, everybody in the vehicle.

13 MR. EVELYN: I have nothing further.

14 MR. BEST: Nothing further.

15 THE COURT: Thank you, Officer, you may step
16 down.

17 (Witness excused.)

18 THE COURT: Does that conclude the witnesses?

19 MR. BEST: Yes, your Honor, it does.

20 THE COURT: Argument?

21 MR. BEST: Your Honor, the purpose of this
22 hearing was a Pearson Hearing, res gestae witnesses, and I
23 have already provided a factual basis for this Court and I
24 won't do so again at this time. What I would like to do is
25 very briefly review the testimony of the five officers that

1 we've heard.

2 On the night that the homicide took place
3 three police units responded. One of the officers, Officer
4 Lorraine Williams, whose partner was Joseph Grayer, testified
5 at the first trial and the second trial. Her testimony in
6 the first trial is found at pages 37 to 47, and at the second
7 trial it's found at page 227 beginning with direct
8 examination. Her testimony was to the effect that she
9 received information that a police officer had been shot,
10 that she and her partner Joseph Grayer responded to the
11 scene, that they saw a body on the street, that the body had
12 a head wound, that there was a crowd, that she talked to
13 Van Fledering, that she helped put the body into a wagon and
14 that they conveyed the victim to St. Johns Hospital. That is
15 the sum and substance of the testimony at both the first
16 trial and the second trial.

17 Officer Grayer also testified at the first
18 trial. At the second trial he did not testify because he was
19 on furlough, he was determined not available. The Court
20 determined that Officer Grayer was unavailable at that time.
21 The Court allowed Defendant and Defense Counsel the
22 opportunity of having his prior testimony read into the
23 record. Mr. Arduin, his Defense Counsel, talked with
24 Defendant and they said they didn't want that, so his
25 testimony was not read into the record.

1 Officer Yaklin, who testified at this hearing,
2 testified at the first hearing, he did not testify at the
3 second.

4 Police Officer Kudla, Yaklin's partner, didn't
5 testify at the first trial and there was discussion about
6 whether or not he should be produced at the second trial.

7 Officer O'Connor didn't testify at either
8 trial. His partner, Officer Kuklack, testified at the first
9 trial but not the second trial.

10 The testimony that these officers provided to
11 this Court on both Friday and today is very simple, it's very
12 concise, it's very clear. They all received information that
13 a police officer had been shot early in the morning. They
14 responded to the scene. They witnessed the crowd. They
15 witnessed the victim on the street with a head wound. They
16 all testified, each and every one, that the primary concern
17 was getting that officer into the emergency vehicle and to
18 the hospital. One unit conveyed witnesses to the Homicide
19 Section, didn't take any statements from them. So both of
20 **the officers** assisted in placing the victim on a stretcher
21 **and putting him** in the emergency wagon. They didn't witness
22 **the shooting**, they didn't hear any gun shots, they didn't see
23 any flash from a gun, they didn't see any assailants, they
24 didn't arrest anyone at the scene. We heard testimony from
25 several of the officers that they didn't arrest anybody at

1 any time, it wasn't there function. Their function was to
2 get to the scene, see what was going on, and when they did
3 that they saw the victim and they conveyed him to the
4 hospital. That was their function and that was exactly what
5 they did.

6 At the beginning of this hearing I made a
7 motion to ask this Court to determine that these witnesses
8 were not in fact res gestae witnesses. This Court took that
9 motion under advisement. At this point I will again argue to
10 the Court that based on the testimony of these officers, on
11 what they observed and what they did, they are not res gestae
12 witnesses.

13 The case I cited to this Court was People
14 versus Hadley, at 67 Mich. App. 688. And I'll repeat that
15 citation again because I think it is very important.

16 "A res gestae witness is one who is an eye-
17 witness to some event in the continuum of a criminal trans-
18 action and whose testimony will aid in developing a full
19 disclosure of the facts surrounding the alleged commission of
20 **the charged offense.**" That "and" is a very important word,
21 **your Honor.** It provides a two-part test. In order to
22 **determine whether** witnesses are res gestae or not they have
23 to be an eye-witness to an event in a criminal transaction.
24 These officers were not. They arrived on the scene after the
25 transaction had transpired and they conveyed the victim to

1 the hospital.

2 The second part of the Hadley test is that
3 their testimony would aid in the disclosure of all the facts.
4 It is our position, your Honor, that their testimony, while
5 interesting, does not aid in the disclosure of the facts.
6 Lorraine Williams testified as to what she did when she got
7 there. She testified at the first and the second trial. Her
8 partner testified at the first trial. Two of the other
9 officers testified at the first trial. Their partners were
10 waived by Defendant and Defense Counsel at the second trial
11 where no one had any reason to suspect that their testimony
12 would be any different, so we didn't produce them. Defense
13 Counsel demanded their production, the Court said you can
14 have them if you want them. Defense then rested. It appears
15 it was an attempt to build in error in this case, and in the
16 facts of this case, your Honor, that doesn't work. Hadley
17 has been referred to by several other Court of Appeals cases.
18 There is People versus Carter, at 87 Mich. App. 778 at 783,
19 there is People versus Reynolds, at 93 Mich. App. 516 at 521.
20 **The thrust** of these cases goes to establish the principle
21 **that a witness** is res gestae if he is in a position to
22 **observe** the criminal transaction, the offense, if he was
23 present during the entire transaction and if the testimony of
24 the potential res gestae witness could or might protect the
25 accused from false accusations.

1 I would also cite to the Court People versus
2 Hernandez, 84 Mich. App., People versus Harrison, 44 Mich
3 App. 578, the Carter Case, which I have already cited. The
4 witness going to the res gestae was not present at the
5 commission of the offense, neither were the officers who
6 testified before this Court. In Carter the witness was not
7 an eye-witness to the offense. He had received a tip,
8 relayed the information to the police. He had no personal
9 knowledge of any part of the criminal transaction. The Court
10 said he was not res gestae.

11 From the testimony that was offered before
12 this Court, and in accord with People versus Pearson and
13 People versus Carter, it is the position of the People that
14 only one conclusion can be drawn; the testimony was at the
15 very most cumulative to that offered by Officer Williams at
16 the first trial and by the officers who testified at the
17 first trial.

18 I would indicate to this Court that actions of
19 Defense Counsel at the second trial waived any question that
20 **these witnesses** were res gestae or that there was error or
21 **that we should** have produced them. Counsel said to the
22 **Court, "I want them here."** The Court said, "You can have
23 them." Defense Counsel then waived them. All of this takes
24 place in a five or ten-page spread of the trial transcript;
25 it can't be more than five minutes. He then rested. That is

1 a waiver; had he wanted these witnesses he could have had
2 them. His conduct indicates he didn't want them because he
3 knew what they would testify to. He knew nothing they could
4 say would be of any benefit to the Defendant.

5 Even if this Court determines that these
6 witnesses are res gestae, even if this Court determines that
7 they should have testified at the trial but didn't, the
8 testimony in the last two days establishes that even if that
9 would have been an error it would have been a harmless error.
10 There was overwhelming evidence in this case against this
11 Defendant, and I think the key evidence was the testimony
12 offered by his companions in this event, two of whom were in
13 the same vehicle. The testimony from his companions came in,
14 "Yes, we stole two cars. The delivery man got shot because
15 he didn't raise his hands fast enough when we said, 'Give me
16 your money.'" Then he went on to state that as they were on
17 their way home this Defendant was in the back seat with a
18 sawed-off shotgun, he had rolled the window down, saw the
19 victim on the street at one-thirty in the morning, said,
20 'Give me your wallet,' which he did. As the victim reached
21 towards his rear the Defendant fired a shotgun blast which
22 killed the officer. That is the testimony that convicted
23 this Defendant. There is not one word that these officers
24 testified before this Court that will change that fact.
25 There is nothing that these officers testified to that can in

1 any way be of any assistance to this Defendant. And those
2 are the tests specified in Pearson.

3 The final consideration, and one that is
4 undeniable and inescapable, is that the question is, is there
5 prejudice to the Defendant for non-production of witnesses,
6 that is if the Court finds them to be res gestae. Quoting
7 from Pearson at pages 714 and 715, the language appears, "The
8 purpose of the Robinson Hearing is two-fold: It is not only
9 to determine the reason for a failure to endorse or a failure
10 to produce, but also to determine whether a defendant has
11 been prejudiced by the non-production of the witnesses."
12 Pearson goes on at page 723 to state, "The key issue in
13 determining proper remedy for defendant when the prosecution
14 has failed to fulfill his responsibilities of whether the
15 defendant is prejudiced, is either a post-remand hearing or a
16 Robinson Hearing. We would have the trial court determine
17 whether the defendant actually suffered any prejudice. This
18 is not a potentiality of a prejudice, it is an actual
19 prejudice."

20 We believe that the testimony of these
21 officers establishes there was no prejudice. The testimony
22 that convicted this Defendant was the testimony of his
23 companions, it was the testimony of Dr. Werner Spitz, the
24 Medical Examiner for Wayne County, who testified as to the
25 nature of the wound.

1 The aim of the criminal justice system is to
2 **ascertain the** truth, to attain justice, to insure that the
3 guilty are punished and the innocent go free and are
4 protected. The People are responsible to insure a fair trial
5 to a defendant; not a perfect trial, a fair trial. Part of
6 the responsibility of that goes to defense counsel. Attempts
7 to build in error detracts from that and should not benefit
8 either defense counsel or defendant, especially where there's
9 no prejudice to defendant.

10 In this case, your Honor, there is no
11 prejudice, and we would ask the Court to so find.

12 Thank you, your Honor.

13 MR. EVELYN: May it please the Court, before
14 we begin, based upon some differences I had with my client
15 pursuant to those discussions, I would ask that the Court
16 review the testimony of Officer Williams that has been
17 cited. If not, read into the record the testimony.

18 Now, with respect to the claims of the
19 Prosecution, Mr. Best did give a recitation of the facts at
20 **the beginning** of this hearing on Friday, it was not a
21 **complete recitation** of the facts and I understand he was
22 **leaving certain things.**

23 One of the things Mr. Best left out was that,
24 as the Prosecutor indicated, in the second trial apparently
25 there were two sets of witnesses, or what he referred to as

1 two sets of witnesses. The first set I believe he called the
2 confusion witnesses; and he called them the confusion
3 witnesses, your Honor, because these people were located at
4 or near the scene where the alleged offense was supposed to
5 have taken place, and these people were confident that they
6 saw the shots emanate from the vehicle; that they were clear
7 it was a white Monte Carlo. They were so confident that some
8 of them even participated in the chase of a white Monte
9 Carlo. They gave that information to the police. I'm sorry,
10 it was a white Mark IV.

11 The Prosecutor in the first trial, obviously
12 consistent with the testimony, had to explain that in an
13 endeavor to explain the difference in the testimony of the
14 accomplices between the testimony of the eye-witnesses by
15 telling people that they were confused, by endeavoring to
16 convince the Court and the Jury that they were confused. And
17 that's part of the reason for this hearing, your Honor, that
18 there was prejudice to the Defendant, and that the prejudice
19 flowed directly from the Jury's determination in this case
20 that in effect they didn't believe all the testimony of the
21 eye-witnesses in this case.

22 Now, Mr. Best has discussed and suggested to
23 the Court definitions of res gestae witnesses, and I have no
24 quarrel with People v. Hadley. I will only say that I think
25 the law in Michigan is clear that the definition of res

1 **gestae** witnesses is a broad definition, and if it were as
2 **simple** as Mr. Best has put to the Court in his excerpt from
3 Hadley, that is to say that there had to be eye-witnesses,
4 first off, then I would submit to the Court that there would
5 be no need for Robinson Hearings or Pearson Hearings. If a
6 person was not there and not able to see what was going on,
7 if they were not what we call eye-witnesses, then we wouldn't
8 need a hearing to determine whether their testimony was such
9 that would bring them to the level of *res gestae*. One such
10 definition was given in People versus Abdul, which is a
11 Michigan Appeals case, where the Court stated, "That
12 although the term *res gestae* witness includes all eye-
13 witnesses to an alleged crime, a person need not be an actual
14 eye-witness to be presumed to be a *res gestae* witness."

15 In People versus Rapoon, your Honor, which is
16 located at 78 Mich. App. 348, the Court indicated that "*Res*
17 *gestae* witnesses, among other things, are those whose
18 testimony will aid in developing a full disclosure of the
19 facts surrounding the alleged commission of a charged
20 **offense.**

21 Now, your Honor, I think it is important that
22 the Court take note of the purpose of the *res gestae* statute.
23 The purpose of the *res gestae* statute is to aid in the full
24 development of the truth. As Mr. Best so aptly put it at one
25 point in his argument, it is to protect the defendant.

1 Now, it is from that foundation, that
2 **perspective**, that you must start when you examine the
3 testimony of any perspective witness, and it's got to be
4 examined in context, I think, your Honor. And by examining
5 the witnesses who have testified at this hearing in context,
6 this Court can conclude, I think appropriately, that they are
7 res gestae witnesses.

8 As the Court of Appeals stated in People
9 versus Abrago, 72 Michigan Appeals, 176, (phonetic spelling)
10 "res gestae witnesses includes, among other things, one whose
11 testimony is necessary to protect the defendant against false
12 accusation or without whose testimony any part of the
13 transaction may remain undisclosed."

14 And in this case the Prosecution has two
15 versions. One version says that a man was shot from a car
16 with three occupants, yellow Torino Ford, black vinyl top.
17 But all the witnesses don't say that. The people, for the
18 most part, who are in the best position to see, the closest
19 thing they have to eye-witnesses in this case, testified and
20 **they believed**, especially in the case of Officer Van
21 **Flödering**, that the shots emanated from a white Mark IV which
22 **was chased** and which engaged others to chase.

23 I might also add, your Honor, in the case of
24 People versus Abrago the Court also stated that every
25 reasonable doubt in arriving at this conclusion as to whether

1 ~~it is~~ a res gestae witness or not, that every reasonable
2 ~~doubt~~ should be resolved in the favor of endorsing and
3 producing a res gestae witness when the defendant insists on
4 his rights, as the Prosecutor referred to in the second trial
5 and this Defendant's lawyer having waived his right to have
6 these witnesses produced. I don't think that that was done,
7 your Honor. I think that when an attorney or defendant
8 indicates that they would like to exercise a standing right
9 that there has to be a fair waiver of that right. And I
10 think that the formal request on the record, failing anything
11 else, is such a clear statement of intention to exercise that
12 right, your Honor.

13 Now, against this backdrop, your Honor, this
14 broad definition that I think the courts in Michigan have
15 articulated in determining and outlining perimeters for res
16 gestae witnesses, I think that the witnesses here are res
17 gestae witnesses, and they are res gestae witnesses for a
18 particular reason. That is, Officer Williams, in a portion
19 of her testimony that was offered by Mr. Best, testified that
20 ~~there was confusion~~ at this particular scene when she arrived
21 ~~and that Officer Van Fledering~~ was intoxicated, that he was
22 ~~out of his mind~~, that he did not know what he was saying and
23 doing. At least that is my recollection of the testimony
24 from a reading of the transcript of the second trial, your
25 Honor. And she in fact served to impeach one of the

1 Prosecution's own witnesses by suggesting that him, in
2 conjunction with the other witnesses at the scene, were in
3 fact confused, buttressing the Prosecution's theory that the
4 shots did not come from a white Mark IV, they came from this
5 yellow Torino with a black vinyl top.

6 And mind you, your Honor, there was further
7 testimony that Officer Van Fledering and at least two other
8 witnesses saw the white Mark IV, having an unobstructed view
9 of that location and actually saw the flash of the gun.

10 So it was particular necessary in this case
11 for the Prosecution to explain that reality. And the
12 Prosecutor in this particular case endeavored to do that, as
13 he outlined in his opening statement, by suggesting that the
14 witnesses who were at the scene who were in a position to see
15 what occurred and who he was bound to bring in as witnesses
16 by statute, that he was going to endeavor to explain their
17 testimony by impeachment, and that is what Officer Williams'
18 testimony in fact did. She was the person who supposedly had
19 closest contact with Officer Van Fledering. She was the
20 person who testified that Officer Van Fledering didn't know
21 what he was doing, that he had to be restrained, that he
22 fought with her and that he was visibly intoxicated and
23 because he was not aware of what was going on, and that as a
24 consequence his testimony was not to be believed in this
25 critical testimony, your Honor.

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continued.

Your Honor, I think that the res gestae

statute should be invoked to the fullest in this instance,

that this Defendant's rights should be protected and that his

delayed motion for a new trial should be granted. The only

possible way he can be given these protections he's entitled

to, your Honor, is for him to have another trial and that

these officers be allowed to testify.

Thank you.

THE COURT: Thank you, Mr. Evelyn.

Mr. Best, I don't think I have to hear any

other argument.

In terms of the testimony that I've heard I

would like an opportunity to review the notes that I have.

(Discussion off the record.)

THE COURT: We'll adjourn this matter to

January 22.

(Matter adjourned to December

22, 1981.)

* * *



Charles Lewis # 150709
LAKELAND CORRECTIONAL FACILITY
141 FIRST STREET
COLDWATER, MICHIGAN 49036



Judge Nancy Edmunds
US DISTRICT COURT
EASTERN DISTRICT
Theodore Lewis vs. ~~THEODORE~~ ~~LEWIS~~
231 W. LATHROP
DETROIT MICHIGAN 48226

