

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs

Michigan Supreme Court No. 154814

DARRELL JOHN WILDER,
Defendant-Appellant.

Court of Appeals No. 327491
Circuit Court No. 14-004600

PLAINTIFF-APPELLEE'S ANSWER OPPOSING
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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The People of the State of Michigan – through Kym L. Worthy, Prosecuting Attorney, County of Wayne and Jason W. Williams Chief of Research, Training, and Appeals – ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the arguments made in the Court of Appeals.
2. The People's brief on appeal in the Court of Appeals adequately addresses the issue, and is incorporated in this answer. See Appendix 1.
3. The Court of Appeals did not clearly err in rejecting defendant's argument and affirming his conviction. MCR 7.305(B)(5).
4. Defendant's application does not demonstrate any of the other grounds for granting leave to appeal. MCR 7.305(B)(1)-(3).

5. In sum, defendant's application raises no issues worthy of this Court's review, and it should be denied.

RELIEF

THEREFORE, the People request that this Honorable Court deny defendant's application for leave to appeal.

Respectfully submitted,

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/s/ Jason W. Williams

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Dated: December 12, 2016

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Appendix 1
People's Brief on Appeal to the Court of Appeals

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DARRELL WILDER

Defendant-Appellant.

Circuit Court No.: 14-004600-01-FH

PLAINTIFF – APPELLEE’S BRIEF ON APPEAL
ORAL ARGUMENT NOT REQUESTED

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COUNTERSTATEMENT OF JURISDICTION

The People do not contest jurisdiction for purposes of this brief on appeal.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

A trial court's admission of impeachment evidence will not warrant reversal without a showing of abused discretion. Here, as a witness may be impeached on any issue, including credibility, the trial court allowed the prosecutor to impeach Defendant's wife with evidence of her knowledge of Defendant's prior weapons convictions after she testified that she did not know defendant to carry weapons. Was the trial court's decision outside the range of principled outcomes?

The People say:	No
Defendant would say:	Yes
The Trial Court would say:	No

II.

The veil of judicial impartiality is not pierced unless the trial court's comments or conduct are of such a nature as to unduly influence the jury and deprive a defendant of his right to a fair trial. Here, the trial court's questions served to clarify and probe underdeveloped facts, and the court instructed the jury to disregard its perception of the court's opinions. Did the trial court's questions deprive Defendant of his right to a fair trial or provide a foundation for ineffective assistance of counsel?

The People say:	No
Defendant would say:	Yes
The Trial Court would say:	No

III.

The Equal Protection Clause prohibits potential jurors from being dismissed solely on account of their race. Here, the trial court apparently credited the prosecutor's explanation that she excused two African-American jurors because they showed apathy, bias, or confusing legal pasts as a legitimate and race-neutral reason for exercising the challenges. Can Defendant show the trial court's factual findings were clear error?

The People say:	No
Defendant would say:	Yes
The Trial Court would say:	No

COUNTERSTATEMENT OF FACTS

Save for those arguments Defendant presents as facts, and as otherwise noted herein, the People rely on the facts both adduced in Defendant's Brief on Appeal, and upon those which are included in the following text.

ARGUMENT

I.

A trial court's admission of impeachment evidence will not warrant reversal without a showing of abused discretion. Here, as a witness may be impeached on any issue, including credibility, the trial court allowed the prosecutor to impeach Defendant's wife with evidence of her knowledge of Defendant's prior weapons convictions after she testified that she did not know defendant to carry weapons. The trial court's decision was not outside the range of principled outcomes.

Standard of Review

Defendant alleges that the trial court erred in admitting evidence of Defendant's prior convictions to impeach Defendant's wife and, alternatively, denying Defendant's motion for a mistrial upon the grounds of that allegedly inappropriate evidentiary admission. Both of Defendant's arguments on appeal were preserved in the trial court.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.¹ More specifically, this court will not reverse a trial court's decision to allow impeachment by evidence of a prior conviction absent the showing of such an abuse.² Similarly, the trial court's decision to grant or deny a motion for a mistrial is also reviewed for an abuse of discretion.³ An abuse of discretion occurs when a trial court chooses an outcome outside the range of principled outcomes.⁴

Regarding Defendant's ineffective assistance of counsel claim, this Court reviews a trial court's findings of fact, if any, for clear error, and reviews *de novo* the ultimate constitutional

¹ *People v. Burns*, 494 Mich. 104, 110 (2013)

² *People v. Hicks*, 185 Mich. App. 107, 110 (1990)

³ *People v. Schaw*, 463 Mich. 43, 57 (2000)

⁴ *People v. Babcock*, 469 Mich. 247, 269-270 (2003); *People v. Schaw*, 463 Mich. 43, 57 (2000); It should also be noted that the admission of inadmissible evidence is necessarily an abuse of discretion. See *People v. Dobek*, 274 Mich. App. 58, 93 (2007)

question whether a defendant was denied effective assistance of counsel.⁵ Because defendant did not move for a new trial or an evidentiary hearing on his ineffective assistance claim, this Court's review is limited to the facts contained in the record.⁶

Discussion

Defendant is not entitled to relief, here, as his criticisms of the trial court's decision to admit impeachment evidence are without merit. The trial court's decision to admit impeachment evidence against Defendant's wife, Tameachi Wilder (herein referred to as Wilder), was not outside the range of principled outcomes. Similarly within the range of principled outcomes was the trial court's decision to deny Defendant's motion for mistrial. Finally, Defendant did not receive ineffective assistance of representation when counsel called his wife. Wilder's testimony was necessary to provide a complete chronology of the day's events – where Defendant was unarmed – to counter the prosecution's theory of guilt. Counsel's actions were objectively reasonable and do not constitute ineffective assistance. Defendant's convictions and sentences should be affirmed.

- A. The trial court did not err in allowing the trial prosecutor to impeach Defendant's wife with evidence of Defendant's prior convictions.

Michigan Rule of Evidence (MRE) 611(c) allows a witness to be cross-examined on any matter relevant to any issue in the case, including matters of credibility; this is what the trial court allowed the prosecutor to do here.

On direct-examination of Defendant's wife, Tameachi Wilder, Defendant asked several pointed questions regarding Defendant's ownership of a gun and the presence of weapons in the house the two shared.⁷ On cross-examination, the prosecutor confirmed the length of time

⁵ *People v. Trakhtenberg*, 493 Mich. 38, 47 (2012)

⁶ *People v. Heft*, 299 Mich. App. 69, 80 (2012)

⁷ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 75

Wilder had been married to Defendant – nine years.⁸ Using the witness’s direct-examination answers regarding Defendant’s firearm ownership as a foundation, the trial prosecutor asked Wilder if she knew Defendant to carry weapons or guns, both generally and during the nine years they had shared.⁹ To each of these questions, Wilder stated she had no such knowledge.¹⁰

The trial prosecutor then questioned the witness about whether Defendant had twice during the nine years of their marriage—once in 2007¹¹ and again in 2010¹²—been convicted of having or carrying a weapon. Wilder stated that she knew of the convictions, but did not know the explicit circumstances of those crimes.¹³

Simply because the matter at hand deals with the use of a prior conviction for impeachment purposes does not automatically implicate MRE 609. Defendant, at trial, suggested that the lack of dishonesty, theft, etc., invalidated the use of this testimony under 609.¹⁴ MRE 609, however, does not apply to this case.

In *People v Taylor*,¹⁵ the Supreme Court explained: “MRE 609 is not applicable when evidence of prior convictions is offered to rebut specific testimony rather than to attack credibility in general.” In *Taylor*, two men forced the victim into a car and drove him through the neighborhood. One of the men beat and choked the victim in the backseat before the car stopped. The victim was shot, and his money and jewelry stolen. Both men then fled on foot. Testifying in his own defense in his trial on felony murder and other charges, defendant claimed that he did not know of his codefendant’s intent to rob the victim before codefendant forced defendant at gunpoint to drive the car. Defendant claimed that he was hysterical and did not

⁸ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 77

⁹ *Id.* at page 81

¹⁰ *Id.*

¹¹ *Id.* at page 85

¹² *Id.* at page 86

¹³ *Id.* at pages 85, 86

¹⁴ *Id.* at page 82

¹⁵ See *People v. Taylor*, 422 Mich. 407, 417 (1985)

understand what his codefendant intended to do with the gun to explain why he did not flee when codefendant was in the backseat with the victim. The trial court then permitted the prosecutor to impeach defendant with evidence of defendant's prior conviction of assault with intent to commit robbery while armed. The Supreme Court held that the trial court did not abuse its discretion in determining that the evidence was relevant, reasoning that the evidence showed defendant's awareness of an armed robbery attempt in the past. The Court further determined that the prejudicial effect of the evidence did not substantially outweigh its probative value in discrediting defendant's claim of force participation in the crime.

Similarly, here, the trial court did not abuse its discretion in admitting the evidence for purposes other than to attack defendant's credibility in general.¹⁶ The prosecutor used evidence of the witness' *knowledge of* defendant's convictions to impeach her testimony that she did not know Defendant to have carried weapons during their relationship.¹⁷ The evidence was relevant because it demonstrated Wilder was being untruthful – or at least not as forthcoming – in her testimony. A jury properly could deem her not credible based on that lack of truthfulness and discount her testimony that defendant did not have a gun on the day of the crime. Because Wilder's testimony was a key component of the defense, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Defendant's chief criticism of the trial court's ruling appears to center around the issue of whether the prosecution or defendant "opened the door" to evidence on a purported collateral matter.¹⁸ This criticism is meritless.

¹⁶ For the same reason, the evidence does not implicate MRE 404(a) because it is not offered "for the purpose of proving action in conformity therewith on a particular occasion." MRE 404.

¹⁷ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 82

¹⁸ *Id.*

First, though the court stated it did not remember who opened the door to the weapons ownership testimony¹⁹ it is clear that the door opened to this testimony when trial counsel asked Defendant's wife the questions about weapon ownership and possession on direct examination. Counsel's first question about a gun, at page 75 of the April 2nd transcript, was specifically bounded to the day of the crime. Counsel then asked:

Q To your knowledge, do (sic) he [Defendant] own a gun?

A No.

This question was not as explicitly time-bounded as the one which preceded it and even if one were to read the question in complete context, such a limiting chronological anchor still is not readily apparent. Thus, when the trial court explained that she believed the defense opened the door when – at the time it ruled on this matter – it stated:

THE COURT: Well I'm going to allow and that's what happens when you put witnesses on the stand and open the door. I mean she got on the stand, and you asked her on direct examination if she's ever seen with a gun, if there were any guns in the house, if he owned any weapons and if he had a gun that day, so that doesn't mean that once on cross-examination, and you talked about the length of their relationship. That doesn't mean that on cross-examination that she can't challenge that, challenge the voracity of him. (sic) In essence she becomes like a character witness and so I believe you've opened the door and I'm going to allow it. Your objection is overruled. Your objection is preserved for this record.²⁰

The trial court's finding, though it exhibited some waffling later on – as Defendant points-out – was solidly based on an accurate memory of the record. Though the prosecution would eventually ask the specific question of whether Wilder ever knew Defendant to carry guns, it was only after the Defense opened the door regarding Defendant's gun ownership. The trial court did not err.

¹⁹ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 95

²⁰ *Id.* at page 83

Second, impeachment and issues of Wilder's credibility were decidedly not collateral matters since – as Defendant writes – this case became a credibility contest between police and civilian witnesses. Accordingly, the credibility of Defendant's wife became a key issue. Moreover, as the defense placed his weapon possession and ownership at issue via Defendant's wife, the impeachment on this specific issue could not be reasonably considered collateral.

The prosecutor sought to impeach this already inherently biased testimony of Defendant's wife by suggesting that she knew of Defendant's prior associations with weapons despite testifying – outside the chronological scope of the date of the crime – that Defendant did not own a gun or possess weapons in the home. Though the trial court did not clearly articulate a MRE 403 analysis²¹ on the record, there is no indication that this impeachment evidence confused the issues, misled the jury, or did anything to unfairly prejudice Defendant via improper propensity evidence. Though the jury was not instructed on this issue, the trial prosecutor used the impeachment evidence for the reasons she first articulated:

You also heard from Mr. Wilder's wife and Mr. Wilder's wife testified that she did not know her husband to carry a firearm. She testified however that she's been with him for 16 years and that she had been married to him for nine years, and she testified that she was just not familiar with that. Why would she say that? She would say that just for the same reason that Carlos Wilder would come in here and say that the police searched that vehicle and that other person were handcuffed. They say that to help or try to protect Darrell Wilder. We know, based on the question that I asked Mrs. Wilder, that the defendant had had some contact with weapons in the past and she knew about it. She lied to you. She knew about those things.²²

The evidence came in and it was used for the impeachment purpose which the prosecutor intended. The prosecutor did not argue improper propensity purposes with this evidence, nor did she exceed the proper use of this testimony authorized by the court.

²¹ See *People v. Blackston*, 481 Mich. 451, 461 (2008)

²² *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 153

In light of this, Defendant's chief criticisms are entirely without merit and the trial court's decision to admit this evidence was neither outside the range of principled outcomes, nor erroneous.

- B. The trial court did not err in denying Defendant's Motion for Mistrial because of its decision to allow the prosecutor to impeach Defendant's wife with evidence of Defendant's prior convictions.

Here, Defendant requested a mistrial, asserting that the impeachment evidence was unfairly prejudicial and irrelevant.²³ Counsel, addressing the court's prior rationale, indicated that her narrowly tailored questions failed to open the door as the court suggested.²⁴ The court "stood by" its analysis and concluded that the defense did, in fact, open the door to this testimony.²⁵ As the People have demonstrated in the foregoing argument, the court's conclusion was based on the court's accurate recollection of the record. Defendant opened the door to this testimony and Defendant's wife was properly presented with this impeachment evidence. The trial court's decision was not outside the range of principled outcomes and, accordingly, the trial court did not err in denying Defendant's mistrial motion.

- C. Trial counsel was not ineffective for calling Defendant's wife as a witness and "opening the door" to this impeachment testimony.

Though not presented in the statement of facts as an issue to be determined by this Court, Defendant asserts that trial counsel was ineffective for opening the door to this testimony.²⁶ Counsel's decision to present the Defendant's wife, as a witness, an objectively reasonable one.

To establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's

²³ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 93

²⁴ *Id.* at page 94

²⁵ *Id.* at pages 94-95

²⁶ Defendant's Brief on Appeal, pages 12-13

deficient performance, there is a reasonable probability that the outcome would have been different.”²⁷

Effective assistance of counsel is presumed, and the defendant bears a heavy burden in proving otherwise.²⁸ “Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.”²⁹ Counsel’s strategic judgments are afforded deference;³⁰ “[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.”³¹ Counsel is not ineffective simply because his strategy was unsuccessful.³²

Calling Defendant’s wife as a witness was an objectively reasonably strategic move. This case was a credibility contest between Defense and Prosecution witnesses and claiming that the police were bullies who exaggerated testimony and were unworthy of belief was only part of the defense theory. To add weight to the strategy, counsel needed Wilder—in conjunction with defense witness Carlos Wilder and prosecution witness Charmell Richardson—to provide an uninterrupted timeline of events in which Defendant was unarmed. Carlos Wilder could testify that Defendant was not armed when he got in the truck and they travelled to the crime scene. Richardson could testify that Defendant had no gun as he helped Carlos around her car. Only Wilder, however, could testify that Defendant did not have a weapon when he left their home. As this testimony was vital to the defense theory and relevant to the facts at issue, Wilder’s testimony was required and calling her was objectively reasonable.

²⁷ *People v. Trakhtenberg*, 493 Mich. 38, 51 (2012)

²⁸ *People v. Vaughn*, 491 Mich. 642, 670 (2012)

²⁹ *People v. Russell*, 297 Mich. App. 707, 716 (2012)

³⁰ *Wiggins v. Smith*, 539 U.S. 510, 521–522, 528 (2003)

³¹ *People v. Rocky*, 237 Mich. App. 74, 76–77 (1999)

³² *People v. Heft*, 299 Mich. App. 69, 84 (2012)

Moreover, counsel undoubtedly knew the potential danger of calling Defendant's wife, with her knowledge of Defendant's prior convictions, and weighed this against the known information she could bring regarding Defendant's disarmed posture the day of the crime. Given counsel's narrowly tailored questions, and the relatively short period of time she spent on the subject of Defendant's possession of firearms, it is clear that counsel sought to make her point as briefly as possible. There was, however, no way for counsel to know (1) what the prosecutor would do with the testimony or (2) how the court would rule if the prosecutor wished to turn Wilder's testimony against Defendant's case. Counsel cannot have been ineffective, here, for failing to be clairvoyant enough to foretell the actions of the People and the Court.

Counsel's representation was objectively reasonable and Defendant has failed to show otherwise. Accordingly, Defendant has not surmounted his burden to surmount the presumption of effective representation and he is not entitled to relief.

II.

The veil of judicial impartiality is not pierced unless the trial court's comments or conduct are of such a nature as to unduly influence the jury and deprive a defendant of his right to a fair trial. Here, the trial court's questions served to clarify and probe underdeveloped facts, and the court instructed the jury to disregard its perception of the court's opinions. The trial court's questions did not deprive Defendant of his right to a fair trial or provide a foundation for ineffective assistance of counsel.

Standard of Review

Defendant did not object to the trial court's questioning either during the court's interrogation or at the next available opportunity when the jury was not present.³³ This issue is unpreserved and review is limited to the plain error standard of review.³⁴ Similarly unpreserved is Defendant's ineffective assistance of counsel argument; Defendant failed to move for a new trial or an evidentiary hearing on this issue in the trial court.³⁵ Furthermore, this Court's review for ineffective assistance of counsel is limited to mistakes of fact and law. Whether counsel was effective raises question of facts and law which are reviewed for clear error and *de novo* respectively.³⁶

Discussion

First, Defendant claims the trial court erred in questioning all of the witnesses.³⁷ Defendant's argument is without merit as the court's questions were aimed at either probing insufficiently developed testimony – in search of substantive proof – or clarifying confusing issues. Moreover, error, if any, was sufficiently firewalled as the jury was repeatedly instructed on disregarding the court's comments or its perception of the court's opinions.

³³ See MRE 614(c)

³⁴ *People v. Carines*, 460 Mich. 750, 763 (1999)

³⁵ *Heft*, 299 Mich. App. at 80

³⁶ *Id.*

³⁷ Defendant's Brief on Appeal, page 16

Second, Defendant claims that trial counsel should have objected to the court's questions. This claim is similarly without merit because the court's questions were appropriate and, in some cases, even helped Defendant. Since the questions were appropriate, objecting to them would have been futile. Accordingly, counsel cannot be ineffective for failing to object to that which is unobjectionable.

A. The trial court's interrogation was not plain error.

Defendant argues that the trial court's questions to all of the witnesses pierced the veil of impartiality and denied him a fair trial. Though the court did examine all six witnesses – both prosecution and defense – Defendant only takes issue with the questions posed to the four prosecution witnesses. Defendant is not entitled to relief, here, as none of the questions the court asked deprived Defendant of a fair trial.

A trial court has wide discretion and power in matters of trial conduct; this includes the ability to call and cross-examine witnesses.³⁸ This is not, however, an unlimited power. As the Michigan Supreme Court recently held, if a court pierces the veil of judicial impartiality, a defendant's conviction must be reversed.³⁹

“A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct influenced the jury by creating the appearance of advocacy or partiality against a party.”⁴⁰ This inquiry is a fact-specific one⁴¹ in which the totality of the circumstances is reviewed for a variety of factors that includes – but is not limited to:

“the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the

³⁸ See MRE 614(a) and (b)

³⁹ *People v. Stevens*, 498 Mich. 162 (2015)

⁴⁰ *Id.* at page 171

⁴¹ *Id.*

length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions."⁴²

Here, the conduct Defendant complains of is the court's questioning of all the witnesses.⁴³ This is an appropriate inquiry into the trial court's conduct under *Stevens*.⁴⁴ Citing to the binding Michigan precedence, the Michigan Rules of Evidence, and portions of the Code of Judicial Conduct, the Supreme Court in *Stevens* noted that "the central object of judicial questioning should be to clarify. Therefore it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional information."⁴⁵ The court is not, however, limited to solely clarifying questions.

A "trial court should conduct a trial with a view to eliciting the truth and to attaining justice between the parties."⁴⁶ A trial court possesses good reason to interject itself into the trial

(1) when the trial is lengthy and complex, (2) when attorneys are unprepared or obstreperous, or if the facts become confused and neither side is able to resolve the confusion, and (3) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness, or if a witness becomes confused.⁴⁷

Moreover, if "attorneys for both sides avoid asking a material question" the trial court may question a witness in order to enhance the role of the criminal trial as a search for substantive truth.⁴⁸

1. The trial court's questions to Officer Fultz.

Defendant first criticizes Judge Lillard's questioning of Officer Fultz about the drum-style ammunition magazine and the magazines issued to the officer by the Detroit Police

⁴² *People v. Stevens*, 498 Mich. 162, 171 (2015)

⁴³ Defendant's Brief on Appeal, page 16

⁴⁴ See *Stevens*, 498 Mich. at 173-174

⁴⁵ *Id.* at 173, citations omitted

⁴⁶ *People v. Davis*, 216 Mich. App. 47, 49 (1996) (internal quotation and citation omitted)

⁴⁷ *Id.* at 49-50

⁴⁸ *Id.* at 50

Department.⁴⁹ The Court's questions, here, were appropriate because they clarified the already-established anatomy of the drum-magazine and provided an objective comparison for what was, presumably, a jury with little or no knowledge of firearms and their attendant equipment.⁵⁰

During Officer Fultz's direct examination, Defendant's drum magazine was admitted as evidence⁵¹ and the number of cartridges recovered from the drum – 43 – was testified-to.⁵² The Court's questions explicitly built-upon this when Judge Lillard asked about the total number of cartridges that the magazine could hold. The total number of cartridges confirmed the size of the magazine, but this, alone, would have meant almost nothing and additional context was required.

To lend some relative value to the fifty-round drum magazine, the trial court's questions to Officer Fultz about his police-issue magazines offered a like-for-like comparison between the two ammunition-holding devices. Then, to ensure that her questions had not muddied the waters, inadvertently provided reasonable doubt, or otherwise pierced the veil of judicial impartiality, the Court asked Officer Fultz if he, himself, possessed the drum.

Defendant's argument fails to consider – or dispel – the possibility that the court's questions were intended to clarify the testimony about the drum magazine and then maintain the court's impartiality. Moreover, one can only surmise that the trial judge, who later repeatedly called the magazine a “barrel”⁵³ – and thereby confused firearm anatomy – might have asked questions for her own edification. If so, then the trial court's lack of knowledge of firearms could have mirrored that of the jury and the questions asked provided the required clarification. Either way, there can be no suggestion that the trial court asked the questions in order to skew

⁴⁹ See Defendant's Brief on Appeal, pages 16-17

⁵⁰ This is not an unreasonable conclusion. If Officer Fultz, a fully-trained and firearm equipped policeman, had limited exposure to drum magazines (*People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 161); what possible experience could a juror – with no record police, military, or weapons experience – have?

⁵¹ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 159

⁵² *Id.* at page 163

⁵³ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, pages 193, 197, 233; *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 64

the jury's perception, steer the trial in a way the trial court desired, or deprive Defendant of a fair trial. Ultimately, the trial court's questions, when viewed in light of the balance of Officer Fultz's testimony, provided illuminatingly descriptive context designed to meet a perceived lack of firearm and magazine knowledge which did not enter the record on direct examination. The court's questions, here, did not deprive Defendant of a fair trial or pierce the veil of impartiality.

2. The trial court's questions to Officer Shaw.

Defendant next criticizes the trial court's questions to Officer Shaw which allegedly highlighted Defendant's "abnormally dangerous"⁵⁴ weapon, the need for police back-up, and the police's desire to open the car's trunk.⁵⁵ As before, these questions were asked to clarify contextual facts only briefly touched-on in re-direct examination.

The trial court's question to Officer Shaw about Detroit's Special Response Team was appropriate. Officer Shaw testified that he was no longer with the 5th Precinct, but assigned to the Special Response team.⁵⁶ This final question from the prosecutor's re-direct examination concluded a line of questions about the duties he and his ex-partner, Officer Fultz, shared.⁵⁷ These questions, in turn, stemmed from the People's inquiry about the time the officers were working on May 16, 2014, and references to the report written in conjunction with this matter.⁵⁸ The trial prosecutor did not elicit testimony explaining what the Special Response Team was.

⁵⁴ As a tangential issue, the People object to the use of the term "abnormally dangerous" weapon to describe Defendant's pistol and drum magazine. There is nothing in this record to suggest the prosecution, defense, or the court – properly or improperly – considered or even elicited testimony that the firearm was somehow made more dangerous by the mere presence of a drum magazine. Defendant's unsupported classification of his weapon is a conclusion outside the record of this case and should be disregarded.

⁵⁵ Defendant's Brief on Appeal, page 17

⁵⁶ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 229

⁵⁷ *Id.* at pages 228-229

⁵⁸ *Id.* at page 227-228

Instead of allowing the triers of fact to speculate, or rely on their assumption that this was Detroit's special weapons and tactics unit, the court used Officer Shaw to establish this.⁵⁹

Furthermore, defendant does not adequately explain how the court's question – "As a member of the S.W.A.T. do you carry guns with those barrels like that?"⁶⁰ – highlighted the dangerousness of the firearm. At most, the question and answer – in which Officer Shaw said, "no"⁶¹ – reinforced the comparative analysis the trial court already obtained from Officer Fultz's testimony and thus was appropriately clarifying in scope. Additionally, the question also cut in the favor of the defense.

Just as Officer Fultz had no personal experience with drum magazines, it could be concluded that because Officer Shaw was not issued this item – either as a regular officer or in the Special Response Team – his familiarity and identification of the magazine as he drove by Defendant⁶² could have been suspect. Thus, if the court pierced the veil of impartiality with this question, it favored Defendant and he could not have suffered unfair prejudice from it.

Similarly, the trial court asked Officer Shaw her question about back-up, not to prejudicially highlight Defendant's dangerousness, but to provide a full account of the officer's actions for the defense's benefit.

On direct examination, Officer Shaw was partnered with Officer Fultz⁶³ and Shaw confirmed Fultz's testimony⁶⁴ that back-up had been requested.⁶⁵ Neither party addressed the condition that required the request for assistance; the unanswered question persisted. Instead of letting the jurors speculate to whether this was police procedure or – worse – that Defendant was

⁵⁹ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 233

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Id.* at pages 200-201

⁶³ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 199

⁶⁴ See *Id.* at page 162

⁶⁵ See *Id.* at page 211

acting in a threatening manner, the trial court appropriately tied-off this loose end. The trial court's question did not highlight Defendant's harmfulness, but dispelled it by enabling the jury to learn that assistance was called for Defendant-neutral reason, that being the police officers' numerical inferiority. As the court may ask material questions that the parties fail to ask,⁶⁶ this question was appropriate and did not deprive Defendant of a fair trial.

Finally, regarding Officer Shaw, Defendant takes exception to the trial court's question concerning the reason for entering the car's trunk.⁶⁷ This was an appropriate question as neither party asked Officer Shaw why he had to get into the trunk. The prosecution established that Shaw had seen Defendant place a weapon in the trunk and the defense established that the police were determined to get into the trunk, but the sides did not actually explore the reason(s) for entering the trunk. From the direct and cross examinations, the parties were content with accounting for the words and actions of the encounter and letting the jury make the conclusory leap to why the police wanted obtain access. The court, however, was not. The trial court's question filled out the picture of events and accounted for the police officer's motivation. This provided more information for the jury from which to judge the facts. This question was appropriate and neither pierced the veil of judicial impartiality, nor deprived Defendant of a fair trial.

3. The trial court's questions to Detective Mays.

After explaining a perceived inadequacy in the police investigation – that being derived from the evidence submission and analysis policy of the Michigan State Police Crime Lab – Detective Mays discussed the absence of police scout car video.⁶⁸ Though Defendant now objects to the court's questions to Detective Mays about the scout car video, a review of the

⁶⁶ *Davis*, 216 Mich. App. at 50

⁶⁷ Defendant's Brief on Appeal, page 17

⁶⁸ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, pages 42-43, 52-56, 57

record shows they were meant for clarification and contextualization purposes and, therefore, were appropriate.

The defense thoroughly cross-examined Detective Mays on the investigation into “dash-cam video, in-car video” as well as the functionality of the car video system.⁶⁹ The prosecutor, on redirect, established that there was no request for the scout car video,⁷⁰ and moved onto a different subject. There were no questions about the total number of cameras, the locations of those cameras, what that equipment could record given their mounting, or if the officers were equipped with body cameras. Whether these factual failures resulted from an unprepared prosecutor or parties that wished to avoid these areas is unclear in the record. Instead of allowing these evidentiary holes, the court fleshed-out the subject.

First, the court clearly established that there were no body camera videos available and only the car-mounted cameras were available.⁷¹ Then the court elicited testimony that there were two interior cameras in the car – one that records the backseat and another that records the front of the vehicle.⁷² Since Detective May already identified the scope of the rear-mounted camera – that being the backseat – a similar scope had to be identified for the front camera; the court accomplished this and elicited testimony that showed such a camera would record only a limited front-facing view from “fender to fender.”⁷³

Defendant uses a self-serving interpretation of the court’s questions and categorizes it as rehabilitation from the bench and suggests that it was done to mitigate the import of the video.⁷⁴ The totality of the court’s questions, here, suggests the opposite. The court drew no conclusions

⁶⁹ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, pages 55-57

⁷⁰ *Id.* at page 57

⁷¹ *Id.* at page 58

⁷² *Id.* at page 59

⁷³ *Id.* at pages 59-60

⁷⁴ Defendant’s Brief on Appeal, page 18

for the jury, nor did she inappropriately emphasize some fact over another to the defendant's detriment. The court's questions determined the objective facts concerning the presence or absence of police cameras and, if they existed, where they were pointed and what they would have seen. Such questions appropriately supplemented the insufficient context established by the parties. The questions did not deprive Defendant of a fair trial or pierce the veil of judicial impartiality.

4. The trial court's questions to Charmell Richardson.

Defendant finds issue with the trial court's questions to Charmell Richardson; specifically, Defendant finds that the court inappropriately emphasized its own doubt in the witness's testimony.⁷⁵ Defendant provides an abridged version of the court's colloquy with Richardson to support his argument.⁷⁶ Had Defendant taken into account all of the Richardson's testimony, he would have concluded the questions were, in fact, clarifying the order of events in which Richardson saw the gun and magazine (PX 2 and 3).

Richardson testified on direct that she saw a gun when the police said they found a gun in her car's trunk.⁷⁷ Despite this, she next testified that did not see a gun or magazine "on the date that the police arrested" Defendant or ever before.⁷⁸ Richardson testified to two different positions in almost as many pages and then further confused the issue when she indicated that she did not own the weapon and magazine.⁷⁹ Neither counsel clarified this confusion in either cross-examination or re-direct; thus it fell to the court to do. In fact, Richardson, again, testified that she had "never seen the gun."⁸⁰

⁷⁵ Defendant's Brief on Appeal, page 18

⁷⁶ *Id.*

⁷⁷ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, page 12

⁷⁸ *Id.* at pages 13-14

⁷⁹ *Id.*

⁸⁰ *Id.* at page 29

In doing so, the court asked the following:

THE COURT: Now you said that that object, exhibit two and three, that Ms. Stanford, the Prosecutor, showed you you (sic) never saw that gun or that big thing, exhibit three, that's on the corner of the table, you never saw that?

THE WITNESS: No.

THE COURT: At all that day?

THE WITNESS: I seen that, well, I really didn't actually see it, but when I was at the police car with him, when I was trying to get my keys, and he was in the trunk so I seen him in the trunk with it but I didn't actually know what -- how it looked. I just seen it. I just seen it was black.

THE COURT: In what trunk?

THE WITNESS: The trunk of the police car.

THE COURT: He was in the trunk of the police car with that object?

THE WITNESS: Yes.

THE COURT: Before or after your cousin had been arrested?

THE WITNESS: It was after.⁸¹

In light of all Richardson's testimony, it becomes evident that Richardson meant to say that the first time she saw a gun in this matter was not on Defendant's person, but only after it had been recovered and Defendant arrested. Stated another way, the court resolved the apparent discrepancy in Richardson's account in a way which benefitted Defendant. Accordingly, Defendant could not have been prejudiced, here, by the court's reasonable question that was clearly designed to clarify confusing testimony.

⁸¹ *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, pages 34-35

Defendant finally claims that the court's questions inappropriately emphasized Defendant's interaction with Richardson's vehicle and presence at the crime scene.⁸² These questions could not have deprived Defendant of a fair trial as this information had already been established by the prosecution witnesses. The Defendant's presence and reason for being at the car was neither in doubt, nor at issue.⁸³ Both the People and Defense established Defendant's presence at the vehicle on the day of the crime.⁸⁴ Moreover, Defendant's defense theory was that the police were randomly harassing people on the street and had either lied or were mistaken about seeing the drum magazine and firearm. Counsel, in her closing, even confirmed Defendant's presence; she had to in order for the police-harassment strategy to work.⁸⁵ Accordingly, the court's questions about Defendant's presence did not pierce the veil of judicial impartiality or deprive Defendant of a fair trial. If the questions and answers had any impact on the case at all, it dovetailed with the foundation of Defendant's defense strategy. Defendant could not have suffered any prejudice

5. The trial court's instructions cured any possible error arising from her questions.

Curative instructions were not required in this case because, as the People have demonstrated in the foregoing section, no error prejudicing Defendant occurred. If, however, the questions were erroneous, the court sufficiently instructed the jury that her opinions or comments should not be considered in their decision.

Before proofs, the court nonetheless instructed the jury:

⁸² Defendant's Brief on Appeal, page 19

⁸³ It appears the only point of contention was whether Defendant possessed the gun the police discovered.

⁸⁴ Notable is Defendant's witness – and brother – Carlos Wilder who testified that he accompanied Defendant to look at Charmell Richardson's car and when they got there, they began working on the vehicle. (See *People v. Darrell Wilder*, Jury Trial Transcript – April 2, 2015, pages 97-101)

⁸⁵ Defendant could not have been the focus of police harassment on Eastlawn Street if he had not been there in the first place.

- 1) that her statements are not intended to reflect her own opinions of the case;⁸⁶
- 2) that the court's questions "are not meant to reflect my own opinion about the evidence" and are asked only to "fully explore[]" the testimony;⁸⁷ and
- 3) to disregard any thoughts they might have about the court's opinion about the case facts as they are immaterial.⁸⁸

Similarly, after proofs, the court instructed the jury:

- 1) that her comments, rulings, questions and instructions were not evidence and not intended to influence the juror's vote or express a personal opinion; and
- 2) that if they believed the court had an opinion about the case, they should disregard it.⁸⁹

Jurors are presumed to follow their instructions and instructions are presumed to cure most errors.⁹⁰ Defendant has not argued any fact or circumstance that would give rise to a conclusion that would suggest the jurors failed to follow the court's instructions. Accordingly, the presumption remains in place, unassailed.

6. The trial court's questions do not constitute plain error.

In light of the foregoing arguments, the trial court's questions – though many – were appropriate and did not deprive Defendant of a fair trial. Where the trial court did not err, there can be no outcome determinative prejudice. Thus, Defendant is not entitled to relief. Assuming *arguendo* that some of the court's questions might have pierced the veil of impartiality, the questions did so in the Defendant's favor; Defendant cannot, therefore, have suffered prejudice. Finally, in the event the court's questioning was error that did not benefit Defendant, the jury

⁸⁶ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2016, page 129

⁸⁷ *Id.* at pages 131-132

⁸⁸ *Id.* at page 133

⁸⁹ *Id.* at page 172

⁹⁰ See *People v. Abraham*, 256 Mich. App. 265, 279 (2003)

was properly instructed to disregard the court's comments and, according to the record, did so. Defendant is not entitled to relief on this issue; his argument should be rejected.

B. Trial counsel is not ineffective for failing to object to the trial court's questions.

Defendant briefly claims trial counsel was ineffective for not objecting to the trial court's questions which interfered with defense strategy.⁹¹ Counsel's representation was not objectively unreasonable as an objection to the court's questions would have been without merit and futile.

To prove counsel's ineffectiveness, a defendant must show that (1) defense counsel's deficient performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant. A defendant is prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.⁹² There is a strong presumption that defense counsel's conduct constituted sound trial strategy.⁹³ "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel."⁹⁴

Here, Defendant fails to surmount the presumption of effective assistance. For counsel's premise to succeed, he would have to demonstrate prejudicial error originating the court's questions. The foregoing section of the People's argument shows that this task cannot be accomplished. Since Defendant cannot demonstrate that the trial court erred in asking her questions, any objection to those questions would have been both meritless and futile. Counsel cannot be ineffective for failing to advance a meritless or futile objection. Accordingly, counsel was not ineffective, here. Defendant has failed to meet his burden and his argument should be rejected. Defendant is not entitled to relief.

⁹¹ Defendant's Brief on Appeal, pages 19-20

⁹² *People v. Heft*, 299 Mich. App. 69, 80-81 (2012) (citations omitted)

⁹³ *Id.* at 83

⁹⁴ *People v. Ericksen*, 288 Mich. App. 192, 201 (2010)

III.

The Equal Protection Clause prohibits potential jurors from being dismissed solely on account of their race. Here, the trial court apparently credited the prosecutor’s explanation that she excused two African-American jurors because they showed apathy, bias, or confusing legal pasts as a legitimate and race-neutral reason for exercising the challenges. Defendant cannot show that the trial court’s factual findings were clear error.

Standard of Review

A preserved challenge to the use of a preemptory challenge on the basis of a violation of the Equal Protection Clause is a mixed question of fact and law.⁹⁵ As the *Batson* analysis requires a three part test which must be meticulously followed,⁹⁶ the first part is a mixed question of law and fact that is subject to both a clear error and *de novo* review; the second step is subject to *de novo* review; and the third is examined for clear error.⁹⁷ “Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made.”⁹⁸ A trial court’s determination that a race-neutral explanation is not a pretext – being a matter involving credibility and context – may only be reversed if clearly erroneous.⁹⁹

Discussion

Defendant argues that the prosecution’s exercise of two preemptory challenges to dismiss two African-Americans – Ms. Taylor and Mr. Lewis – denied him a fair trial pursuant to *Batson*. The record does not support Defendant’s claim and, so, reversal is unwarranted.

The Equal Protection Clause prohibits potential jurors from being challenged solely on account of their race or upon “the assumption that black jurors as a group will be unable

⁹⁵ *People v. Armstrong*, 305 Mich. App. 230, 237 (2014)

⁹⁶ See *People v. Knight*, 473 Mich. 324, 339 (2005)

⁹⁷ *Id.* at pages 342-345

⁹⁸ *Pepole v. McDade*, 301 Mich. App. 343, 356 (2013) (citation omitted)

⁹⁹ *Knight*, 473 Mich. at 345

impartially to consider the States case against a black defendant.”¹⁰⁰ To determine if such a violation of the Equal Protection Clause has occurred, a trial court uses a three-step process.¹⁰¹

There are three steps to a *Batson* challenge, all of which must be met – in order – for error to be found:

- First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. To establish a prima facie case of race-based discrimination, the opponent must show:
 - A. the prospective juror is a member of a cognizable racial group;
 - B. the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and
 - C. all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race – if the sum of the proffered facts gives rise to an inference of discriminatory purposes, the first step is satisfied.
- Second, if the trial court determines that a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. This does not require an explanation that is persuasive, or even plausible; rather, the issue is whether the proponent’s explanation is facially valid as a matter of law. A neutral explanation is one which is based on something other than the prospective juror’s race. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race-neutral.
- Third, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination.¹⁰²

Here, the trial prosecutor moved to dismiss four African-American individuals,¹⁰³ but trial counsel only based her *Batson* challenge on three of them.¹⁰⁴ Without ruling on whether the defense had established a prima facie case, the court demanded the prosecutor give reasons for

¹⁰⁰ *Batson v. Kentucky*, 476 US 79, 80 (1986); see also *People v. Armstrong*, 305 Mich. App. 230, 237 (2014)

¹⁰¹ *Id.*

¹⁰² *Knight*, 473 Mich. at 337-338

¹⁰³ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 114

¹⁰⁴ *Id.*

the excusals¹⁰⁵ and the prosecutor did so.¹⁰⁶ On appeal, Defendant chose not to contest all the proffered rationales, but only challenged two – the removal of Ms. Taylor and Mr. Lewis¹⁰⁷ - alleging the trial prosecutor’s race-neutral explanation for the strikes were afterthoughts and “pretext for discrimination.”¹⁰⁸ Defendant is not entitled to relief and his position must fail since his argument is, itself, based upon an insufficiently and self-serving recitation of the record.

Defendant first challenges the reason given for the dismissal of the potential juror named Ms. Taylor; Taylor had been a victim of a crime and had a brother convicted of carjacking.¹⁰⁹ Defendant then contrasts Ms. Taylor with another potential juror, Mr. Stewart, who had been the victim of a crime and had a nephew “who had ‘possibly been in and out of the criminal system.’”¹¹⁰ Both jurors testified that they could put these experiences aside and be fair in this matter, Defendant notes, but only Taylor was released.¹¹¹

Defendant’s recitation of the trial prosecutor’s reason for dismissing Ms. Taylor is incomplete. Defendant fails to include the prosecutor’s statement that Ms. Taylor “would not look up at me or look at the Court when answering questions.”¹¹² Whether Taylor’s failure to look was the outward demonstration of voluntary contempt for the court or a genuine disinterest is irrelevant; either way, the prospective juror’s behavior suggested some inability to participate. The record does not suggest any similar behavior with Mr. Stewart. Thus, apparent juror apathy

¹⁰⁵ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 114

¹⁰⁶ *Id.* at pages 114-115

¹⁰⁷ Defendant’s Brief on Appeal, page 24

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 114

– and possibly anti-law enforcement bias – set Taylor apart from an otherwise similarly situated Stewart and provided an on-the-record race-neutral reason¹¹³ for Taylor’s dismissal.

Defendant next challenges the justification for Mr. Lewis’s excusal. Just as with Ms. Taylor, Defendant’s argument is based upon an incomplete articulation of the prosecutor’s reasons. Specifically, Defendant alleges that “the prosecutor states that Mr. Lewis ‘just had a lot going on’ including ‘catching cancer,’ a justification that is not “clear and reasonably specific.”¹¹⁴ In reality, the trial prosecutor’s stated the following:

MS. STANFORD: ...and Mr. Lewis just had a lot going on.

THE COURT: Mr. Lewis just had a lot going on?

MS. STANFORD: Mr. Lewis was the one that caught cancer in jail and had the lead case. He was a party to a lead case and had a drug case that disappeared.¹¹⁵

Though Defendant frames the prosecutor’s reasons to suggest a silly pre-textual substantiation, the prosecutor only re-used Mr. Lewis’s words—he twice said that his drug trafficking charge had gotten thrown out because he “caught cancer in jail.”¹¹⁶ Furthermore, the prosecutor’s statement that Mr. Lewis had been party to a “lead case” was also an accurate synopsis of Mr. Lewis’s prior *voir dire* testimony:

THE COURT: Have you ever been a witness or given testimony in any type of case?

PROSPECTIVE JUROR NO. 9:¹¹⁷ Yes.

THE COURT: Tell me more about that.

¹¹³ See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (excluding a potential juror for being biased against the police is not an implausible justification)

¹¹⁴ Defendant’s brief on Appeal, page 24

¹¹⁵ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, page 115

¹¹⁶ *Id.* at page 44

¹¹⁷ See *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, pages 19 and 40 which places Mr. Lewis in seat number 9 and identifies him as Prospective Juror No. 9.

PROSPECTIVE JUROR NO. 9: I was in a case, well, let me rephrase it. It was a lead case and I took a deposition or whatever you call it.

THE COURT: For lead poisoning?

PROSPECTIVE JUROR NO. 9: Yeah, for my two nephews.

THE COURT: Is there anything about that experience that would cause you to be unfair to either side in this case?

PROSPECTIVE JUROR NO. 9: No.

THE COURT: Have you ever been party to a lawsuit?

PROSPECTIVE JUROR NO. 9: Yes.

THE COURT: Tell me more about that?

PROSPECTIVE JUROR NO. 9: The lead stuff.

THE COURT: With your nephews?

PROSPECTIVE JUROR NO. 9: Yes.

THE COURT: So you were a party to a lawsuit involving lead poisoning for your nephews?

PROSPECTIVE JUROR NO. 9: Yeah, because I got lead poisoned too so.

THE COURT: So you were lead poisoned as well?

PROSPECTIVE JUROR NO. 9: Uh-huh.

THE COURT: All right. Is there anything about that experience that would cause you to be unfair to either side in this case?

PROSPECTIVE JUROR NO. 9: No.¹¹⁸

¹¹⁸ *People v. Darrell Wilder*, Jury Trial Transcript – April 1, 2015, pages 41-42

Accordingly, the trial prosecutor's reason for dismissing Mr. Lewis was more detailed than Defendant would lead this Court to believe. The trial prosecutor articulated the potential juror's health concerns, litigation and poisoning in the lead case, and the somewhat mysterious circumstances concerning the disappearance of Lewis's drug prosecution as race-neutral reasons to support the use of a peremptory challenge.

The trial prosecutor gave race-neutral reasons for the dismissal of potential jurors which the trial court impliedly credited as valid.¹¹⁹ Since the trial court took no remedial action in favor of Defendant's motion, the court found no merit in it and failed to find the presence of purposeful discrimination. Accordingly, this Court need not review the trial court's decision – or rather non-decision – that Defendant established a prima facie case of racial discrimination.¹²⁰ Attention, therefore, turns to steps two and three of the *Batson* analysis: whether the proponent of the peremptory challenge – the prosecution – articulated a race-neutral explanation as a matter of law, and whether the race-neutral explanation is a pretext and if the opponent of the challenge – Defendant – proved purposeful discrimination.¹²¹

In this case, the prosecutor articulated reasons – health concerns, prior contact with the police, and specific conduct – which suggested inattention and, at best, bias. These reasons were “clear and reasonably specific explanation[s] of the legitimate reasons for exercising the challenges.”¹²²

¹¹⁹ While the record shows that the trial court did not explicitly rule on Defendant's *Batson* motion, the trial progressed as if the court had denied Defendant's motion – selection concluded, the jury was sworn, opening statements made, and proofs begun. Throughout this, the defense did not object again on *Batson* grounds and did not seek clarification of the court's actions. Had the court found Defendant's *Batson* motion meritorious, it would have said so and taken some remedial action. This did not occur and, so, one is left to conclude that the court did not agree with Defendant's position and would have outright denied it in light of the prosecutor's reasons.

¹²⁰ See *Knight*, 473 Mich. at 338

¹²¹ *Id.* at 345

¹²² *Batson*, 476 US at 98 n20 (citation omitted)

Furthermore, the trial court, in presiding over the *voir dire*, had the advantage of observing the juror's behavior, demeanor, and tonal inflection as they replied to the questions, as well as questioning the prosecutor when she explained the reasons for excusing the jurors. Although the jurors maintained they could be fair and impartial to both sides, this is immaterial. If the jurors had admitted they could not be fair, the prosecutor could have challenged them for cause.¹²³ A primary purpose of peremptory challenges is to allow a party to remove jurors whose claim to impartiality is suspect.¹²⁴ Moreover, the record does not reflect facial expressions, body language, and manner of answering questions. An "evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province."¹²⁵

Here, the prosecutor gave race-neutral reasons, justified by the record facts, for dismissing Lewis and Taylor, despite what Defendant alleges based upon his erroneous recitation of that record. Defendant fails to demonstrate that the trial prosecutor's reasons were an inappropriate pretext for procedural racism. Defendant is not entitled to relief.

¹²³ See MCR 2.511(D)(2) and (3)

¹²⁴ *Blount v. Plovdba*, 567 F2d 583, 587 (CA 3, 1977) (Hunter, J., dissenting) ("The peremptory challenge can eliminate a juror when the litigant suspects a bias which cannot be exposed sufficiently to merit a challenge for cause.")

¹²⁵ *Knight*, 473 Mich. at 364

RELIEF

WHEREFORE the People request this Court to first reject Defendant's meritless arguments and deny his requested relief.

Respectfully submitted,

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