

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DARRELL JOHN WILDER

Defendant-Appellant

Supreme Court No. \_\_\_\_\_

Court of Appeals No. 327491

Lower Court No. 14-004600-01 FH

\_\_\_\_\_/

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

\_\_\_\_\_  
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APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Defendant-Appellant.

\_\_\_\_\_ /

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**APPLICATION FOR LEAVE TO APPEAL**

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/Adrienne N. Young

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November 22, 2016

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Darrell John Wilder

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## **JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Before acquitting Mr. Wilder of carrying a concealed weapon and finding him guilty of felon-in-possession and felony-firearm, the jurors deliberated loudly, yelling and screaming and stating that they could not reach a unanimous decision. T3, 3. In a case as contested as this, using Mr. Wilder's prior convictions to impeach his wife, Mrs. Wilder, in an overbroad cross-examination warranted a new trial.

The Court of Appeals observed that it was the prosecutor who broadened the questions to Mrs. Wilder, first repeating defense counsel's question "whether or not [defendant] had a weapon with him on that day?" then independently broadening that inquiry to "do you know of [defendant] to carry weapons?...guns?" *People v Wilder*, unpublished opinion of the Court of Appeals, entered September 27, 2016 (Docket No. 327491) 4. The prosecutor concluded this line of questioning by directly asking Mrs. Wilder about Mr. Wilder's 2007 and 2010 gun possession convictions. The Court of Appeals found the prosecutor's cross-examination permissible because jurors are "entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *Id.* The Court of Appeals cited only to cases where a defendant's priors were used against the defendant himself and not to impeach a defense witness.

Mr. Wilder's case came down to a credibility contest about whether Mr. Wilder possessed a gun. As a result, it was highly influential to the jury when the prosecutor brought in evidence of Mr. Wilder's prior felony firearm convictions—the very same offense he faced in the present trial.

**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE TRIAL COURT ERR IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF MR. WILDER'S PRIOR FELONY FIREARM CONVICTIONS IN A TRIAL WHERE HE WAS CHARGED WITH FELONY FIREARM?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. DID THE JUDGE'S QUESTIONING PIERCE THE VEIL OF JUDICIAL IMPARTIALITY, DENYING MR. WILDER A FAIR TRIAL? WAS DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE IMPROPER JUDICIAL QUESTIONING DEFICIENT PERFORMANCE WHICH PREJUDICED MR. WILDER?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

Defendant-Appellant Darrell John Wilder was acquitted of carrying a concealed weapon, MCL 750.227, and was convicted of felon in possession of a firearm (FIP), MCL 750.224f, and felony-firearm, MCL 750.227b following a jury trial in Wayne County Circuit Court, before the Honorable Qiana Lillard. Jury Trial Transcript 4/3/15 (T3), 10-11. On April 28, 2015, Judge Lillard sentenced Mr. Wilder to the statutorily-mandated 10 years in prison for felony-firearm (third offense) and five years of probation for FIP, to run concurrently. Mr. Wilder appealed by right and the Court of Appeals affirmed his convictions. *People v Wilder*, unpublished opinion of the Court of Appeals, entered September 27, 2016 (Docket No. 327491).

The entirety of this case is not whether a gun was actually found in the trunk of a car but whether it was Mr. Wilder that placed that gun into the trunk upon seeing the police driving by. The police discovered the gun, which was never fingerprinted, only after driving by a vacant lot crowded with so many people, all males excepting the seller of the car, the police called for backup. Jury Trial Transcript 4/1/15 (T1), 233.

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In the afternoon of May 16, 2014, Mr. Wilder was at home with his wife and children. His wife was in the middle of braiding his hair when Mr. Wilder received a call from his brother, Carlos. T2, 69-70. Carlos asked Mr. Wilder to accompany him to potentially purchase a car from their cousin, Charmell Richardson. Charmell was selling her 2003 Monte Carlo from a vacant lot adjacent to 2175 Eastlawn in Detroit. Jury Trial Transcript 4/2/15 (T2), 7.



Hair only half-done, Mr. Wilder agreed to accompany his brother to look at his cousin's car. When Mr. Wilder left his house, he was not carrying a gun and the home he shared with his wife, children, and grandmother did not have weapons in it. T2, 75.

When Carlos and Mr. Wilder arrived at the vacant lot, they began to do some mechanical work on Charmell's car. It was in a wreck previously and the fender and bumper were in disrepair, and the car itself would not start. T2, 98-100. In addition to Mr. Wilder, Carlos, and Charmell, there were 3-5 more people in the vacant lot, possibly other interested buyers. T1, 202.

Shortly after Carlos and Mr. Wilder arrived, Officers Steven Fultz and David Shaw, who were on duty and patrolling the neighborhood, stopped their car and observed the group from about two houses away. T1, 188. Fultz testified that he "observed a large bulge on [Mr. Wilder's] right side. It was like a cylinder. I recognize that as a drum that attaches to a handgun." T1, 149.

Fultz said the "drum" he spotted was in Mr. Wilder's pocket or in his waistband. T1, 153, 160, 165. Fultz testified that he then saw Mr. Wilder "casual[ly] walk" to the trunk of Charmell's car and "pull[] a handgun up" and place it in the trunk of the car. T1, 152.

Charmell testified that she never gave her car keys to Mr. Wilder. T2, 22. Carlos testified that his brother was working on the car alongside him the entire time, T2, 107, and he never saw the trunk open "until the officer opened it." T2. 122.

Fultz and Shaw exited their vehicle and walked towards the vacant lot. Seeing the oncoming police officers, two or three men walked off the vacant lot. T2, 19 and 106. These men were not given chase and were never questioned. Officer Fultz asked Charmell for her car keys. She initially refused but after Officer Fultz retrieved a large crowbar from the police vehicle and threatened to "bash," T2, 12, or "bust up" the car, T2, 111, Charmell gave the officer her keys.

T1, 156, 223. Officer Fultz opened the trunk and saw a “handgun with a large drum attached to it.” T1, 157.

Only Mr. Wilder was arrested. The officers testified that Mr. Wilder was cooperative with police, complied with the request to raise his hands (T1, 154) and never threatened the officers. T1, 235.

The gun discovered that day was never tested for fingerprints. T2, 42-43. No in-car or dash-cam video was requested or reviewed by the detective assigned to the case. T2, 55. The Firearms Report filed by Shaw was incomplete and contained the wrong location of the incident, stating that it occurred “across the street from 2157 Eastlawn” rather than in the vacant lot next to the home. T1, 225, 227. Emphasizing these gaps in the investigation, defense counsel, who had already placed a *Batson* challenge on the record for the prosecutor’s dismissal of four African-American jurors (T1, 114), moved for a directed verdict. T2, 61-62. The motion was denied. T1, 62.

To further the theory that the gun could have belonged to another, defense counsel called Mr. Wilder’s wife of nine years, Tameachi Wilder (hereinafter “Mrs. Wilder”). She and defense counsel had the following exchange:

T2, 75. *Defense Counsel*: Okay. And when you see your husband leave the house did you see him with a gun?

*Witness*: No.

*Defense Counsel*: To your knowledge, do he own a gun?

*Witness*: No.

*Defense Counsel*:: Do you have any weapons in your house?

*Witness*: No.

On cross-examination, the prosecutor followed up with:

*Prosecutor:* Do you know of Mr. Wilder to carry weapons?

*Witness:* No.

*Prosecutor:* Do you know of him to carry guns?

*Witness:* No.

*Prosecutor:* You've been with him for nine years and you don't know of him to carry guns?

*Witness:* No.

T2, 81.

Only after asking these broad questions herself did the prosecutor then move to admit Mr. Wilder's two prior gun possession convictions, which the court allowed. T2, 82-83.

*Prosecutor:* Ms. Wilder, you were with him [(Mr. Wilder)] in 2007, correct?

*Witness:* Yes.

*Prosecutor:* And you know that he was convicted of carrying a weapon back then, correct?

*Witness:* Yes.

*Prosecutor:* So you knew that he carried weapons, right?

*Witness:* No. I didn't know but he was convicted.

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*Prosecutor:* Did he [(Mr. Wilder)] live in your home?

*Witness:* For what year?

*Prosecutor:* 2010?

*Witness:* 2010, yes.

*Prosecutor:* He was in your home?

*Witness:* Yes.

*Prosecutor:* But you guys weren't together?

*Witness:* No.

*Prosecutor:* And you know that he was convicted of having a weapon back in August of 2010 too, right?

*Witness:* Yes.

*Prosecutor:* Was that gun in your home?

*Witness:* No.

Following this testimony, defense counsel made a motion for a mistrial stating that “those questions that were asked were inadmissible...I do not believe that the questions I asked Ms. Wilder, the wife, with respect to whether she saw him leave out the house with a gun or whether he had—whether they had a gun in the house opened the door to bring in those prior convictions.” T2, 93. The court denied the motion for mistrial. T2, 94. The prosecutor emphasized the above testimony later in her closing, telling the jury that Mrs. Wilder “lied to you. She knew about those things.” T2, 153.

Throughout trial, the judge “asked needlessly excessive and irrelevant questions of the witnesses.” *Wilder*, unpub op at 6.

The jury deliberated for two days and the deliberations were loud and contentious. T3, 4-6. On the second day of deliberations, the jury sent a note that they could not reach a decision. T3, 4. Both parties agreed to an *Allen*<sup>1</sup> instruction, which the judge gave. T3, 6. About an hour after the instruction, the jury reached their verdict.

Mr. Wilder appealed by right, raising the issues presented herein. The court of appealed affirmed Mr. Wilder’s conviction. *Wilder*, unpub op at 11.

Other facts will be discussed herein as relevant to the issues presented.

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<sup>1</sup> *Allen v. United States*, 164 U.S. 492 (1896)

**I. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE EVIDENCE OF MR. WILDER'S PRIOR FELONY FIREARM CONVICTIONS IN A TRIAL WHERE HE WAS CHARGED WITH FELONY FIREARM.**

**Issue Preservation/Standard of Review:**

Trial counsel preserved this issue with a specific objection to the admission of the prior convictions and by moving for a mistrial. T2, 82, 93. The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607, 609-10 (1999). The “abuse of discretion” standard also applies to a trial court’s decision whether to grant a mistrial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

**Argument:**

Mr. Wilder’s case came down to a credibility contest about whether Mr. Wilder possessed a gun. It was highly influential to the jury when the prosecutor brought in evidence of Mr. Wilder’s prior felony firearm convictions—the very same offense he faced in the present trial. The court erred by admitting this evidence against Mr. Wilder in and further erred by denying defense counsel’s subsequent motion for mistrial on these grounds.

The Court of Appeals concluded that, although this evidence was “reflective of a defendant’s character” it was admissible for the noncharacter purpose of impeaching Mrs. Wilder. *People v Wilder*, unpublished opinion of the Court of Appeals, entered September 27, 2016 (Docket No. 327491) 4. To that end, the Court of Appeals cited MRE 611(c): “[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” *Id.* The credibility of a witness is “almost always relevant.” *Id.*, citing *People v Layher*, 464 Mich 756, 764-765; 631 NW2d 281(2001).

Here, *Mr. Wilder’s* prior criminal record was allowed in on *cross-examination of his wife*. These are important distinctions. Affirming Mr. Wilder’s convictions, the Court of Appeals relied on MRE

404(b). But MRE 404(b) provides for the admissibility of other crimes, wrongs, or act as evidence **against the defendant:**

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.

Likewise, MRE 609<sup>2</sup> limits impeachment of a witness with prior criminal convictions:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless...

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and...

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility .....

Michigan statutory law also limits the admission of evidence of a defendant's other crimes as evidence against the defendant. MCL 768.27 provides:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

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<sup>2</sup> MRE 609 does not apply where "evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial." *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). In the present case, Mr. Wilder did not testify and evidence of prior convictions were used to rebut his wife's cross-examination testimony.

In fact, the cases cited by the Court of Appeals involve a witness impeached with his or her *own* prior crimes. *People v Layher*, 464 Mich 756; 631 NW2d 281 (2001) (Witness' prior arrest for criminal sexual conduct and subsequent acquittal were allowed in as evidence of witness' potential bias during the investigation and at trial.); *People v Crawford*, 458 Mich 376; 562 NW2d 785 (1998) (This Court reversed defendant's convictions and remanded for new trial where defendant's prior drug convictions were "unfairly prejudicial" and "marginally probative."). Additionally, in the one case relied on by the Court of Appeals where the evidence was admissible, *Layher*, it was the witness' testimony *on direct examination* that contradicted the victim's and thus necessitated the introduction of the witness' priors. Here, the prosecutor wrongfully used, and the court permitted over objection, irrelevant character evidence to be placed before the jury. Nevertheless, should this Court find that a defendant's criminal history can be used to impeach a witness other than the defendant himself, the prosecution cannot strike first with evidence that is obviously character in nature.

In *People v Hammond*, 394 Mich 627; 232 NW2d 174 (1975), much like Mr. Wilder's own strategy, the defendant did not take the stand and called his wife as an alibi witness. In cross-examination and over defense counsel's objection, the prosecution asked questions to bring out evidence of defendant's poverty and unemployment. In closing, the prosecutor used defendant's unemployed status as evidence of motive for armed robbery. This Court found that a prosecutor's character examination must be kept within "reasonable bounds" and that the questioning of Mr. Hammond's wife exceeded those bounds.

Applying the above principles to the present case, Mr. Wilder's 2007 and 2010 felony-firearm convictions were plainly inadmissible. Defense witness Mrs. Wilder **never** testified on direct examination as to Mr. Wilder's general character for not carrying a weapon. Mrs. Wilder served only as a fact witness. She testified about Mr. Wilder's actions before he left the house on the day of his arrest, the clothing he wore, and his left-handedness, facts that were relevant responses to police testimony. T2, 72, 75 (responding to police testimony at T1, 204, 207, 221). Additionally, Mrs. Wilder merely testified that Mr.

Wilder did not carry a gun on the day in question “when he left the house” and that there were not weapons in the home she shared with Mr. Wilder. T2, 75. It was not until cross-examination that the prosecution inquired about Mr. Wilder’s character generally:

*Prosecutor:* Do you know of Mr. Wilder to carry weapons?

*Witness:* No.

*Prosecutor:* Do you know of him to carry guns?

*Witness:* No.

T2, 81.

The trial court seemed to acknowledge that it may have been the prosecution, and not the defense, that brought out evidence of defendant’s character:

*The Court:* ...At some point, I don’t remember if it was you, Ms. James, or you, Ms. Stanford, who asked if she ever seen the Defendant carry guns or ever knew him to carry guns but she said “no,” and once she says that the veracity of her testimony becomes [sic] in question...

T2, 95.

Under these circumstances, the jury heard improper character evidence improperly elicited by the prosecution on cross-examination. Although defense counsel objected and MRE 611(c) permits the judge to “limit cross-examination with respect to matters not testified to on direct examination,” the court failed to act.

This error likely affected the jury’s decisions on felony-firearm and felon-in-possession (the jury acquitted Mr. Wilder of carrying a concealed weapon) because the case came down to a credibility contest between defense and prosecution witnesses that made for intense, heated jury deliberations. T3, 4.

The court ultimately read an *Allen* instruction because the jurors initially thought they would be unable to reach a unanimous verdict. This credibility contest was unfairly manipulated by the prosecutor’s own questioning to get Mr. Wilder’s prior convictions— the exact same offense in question at trial— admitted to the jury and by the prosecutor’s later use of this testimony in her closing where she referred to



Mrs. Wilder as a liar for failing to be more forthcoming regarding Mr. Wilder's (inadmissible) propensity to carry a gun. T2, 153.

Where a court improperly admits evidence, a motion for mistrial should be granted for "an irregularity that is prejudicial to the rights of the defendant ... and impairs his ability to get a fair trial" *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003) (citation omitted). Due process requires a new trial for Mr. Wilder. Const 1963, art 1, § 17; US Const, Am XIV.

Alternatively, if this court finds that defense counsel opened the door to prior offense evidence by putting Mrs. Wilder on the stand, then defense counsel's performance was deficient and her deficient performance prejudiced Mr. Wilder. To show that he was denied the effective assistance of counsel, Mr. Wilder must demonstrate that, considering all of the circumstances, his counsel's performance fell below the objective standard of reasonableness and so prejudiced Mr. Wilder that a reasonable probability exists that, but for counsel's conduct, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984).

It was deficient performance to call a character witness to testify regarding Mr. Wilder's good behavior and decision-making with respect to weapons possession where trial counsel knew of Mr. Wilder's prior convictions. For the same reasons stated above, this deficient performance influenced the outcome of trial where Mr. Wilder's two prior convictions are identical to the offense for which he was charged. For these reasons, Mr. Wilder is alternatively entitled to a new trial on grounds of ineffective assistance of counsel.

**II. THE JUDGE’S QUESTIONING PIERCED THE VEIL OF JUDICIAL IMPARTIALITY, DENYING MR. WILDER A FAIR TRIAL. DEFENSE COUNSEL’S FAILURE TO OBJECT TO THE IMPROPER JUDICIAL QUESTIONING WAS DEFICIENT PERFORMANCE WHICH PREJUDICED MR. WILDER.**

**Issue Preservation/Standard of Review:**

“The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo.” *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). However, defense counsel did not object to the judge’s questioning of witnesses so this issue is not preserved on appeal. Because this issue was unpreserved by trial counsel and therefore must meet the standard for plain error. *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999).

**Argument:**

A criminal defendant has the right to an impartial judge no matter what the evidence against the defendant may be. *Tumey v Ohio*, 273 US 510, 535; 47 SCt 437; 71 L Ed 749 (1927). The right to an impartial adjudicator, be it judge or jury, is a right so basic to a fair trial that its infraction can never be treated as harmless error. *Gray v Mississippi*, 481 US 648, 668; 107 SCt 2045; 95 LEd2d 622 (1987).

“Judicial misconduct is found where the judge's remarks clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties, or where the judge ... abandons his proper role and assumes the role of an advocate.” *United States v Blood*, 435 F3d 612, 629 (CA 6, 2006) (citations and quotation marks omitted).

MRE 614(b) expressly permits a trial judge to “interrogate witnesses, whether called by itself or by a party.” *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). However, there are limits to the trial court’s ability to question a witness. The court “must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial.” *Id.* The courts have recognized the potential danger to fair trial where a trial judge abuses that discretion, and improperly injects himself into the litigation by showing bias or taking over the role of one of the attorneys. Here, the Court of Appeals labeled the trial courts questioning as “needlessly and excessive and irrelevant,” but found that it “did not evidence impropriety.” *Wilder*, unpub op at 6.

This Court reversed convictions for second degree murder and second degree child abuse, based on judicial impartiality exhibited in questioning a defense expert witness in *People v Stevens*, 498 Mich 162, 869 NW2d 233 (2015). In *Stevens*, this Court articulated a new standard for determining whether the trial court’s impartiality results in deprivation of the right to a fair trial:

A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. 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 improperly influenced the jury by creating the appearance of advocacy or partiality against a party. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the 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, either at the time of an inappropriate occurrence or at the end of trial. When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review.

Rather, the judgment must be reversed and the case remanded for a new trial.

*Stevens*, 498 Mich at 172.

One of the factors to consider is the nature or type of judicial conduct itself. This Court noted that, while judicial questioning is permissible, the “central object of judicial questioning should be to clarify.” *Id.* at 173. Where the court unduly interfered with the examination of witnesses, it “may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.” *Id.* at 174, quoting Michigan Code of Judicial Conduct, Canon 3(A)(8).

In this case, unlike in *Stevens*, none of the witnesses were experts because none of the topics covered by defense counsel and the prosecutor were “convoluted, technical, scientific, or otherwise difficult for a jury to understand.” *Id.* at 176. Judge Lillard’s repeated interference at trial is even more unjustified when considering that her comments and questions were directed at advancing the prosecution’s case. *Id.* 176-7.

In an effort to expound upon the dangerousness of the weapon found, a factor irrelevant to the charges, the judge questioned Officer Fultz, comparing the amount of bullets found in the recovered weapon to standard-issue police guns.

*The Court:* ...how many rounds does your magazine hold?

*Witness:* Our magazine holds 15 rounds.

*The Court:* And when you go on do you think as a Detroit Police Officer how many magazines do you take with you?

*Witness:* One in the gun, two on my belt.

*The Court:* So you have a total of three magazines...Each holding how many rounds?

*Witness:* 15.

*The Court:* Now that exhibit number three I believe, you said that held how many rounds?

*Witness:* The drum, I believe had 43 live rounds.

*The Court:* Do you know if that, if that exhibit three will hold more than 43?

*Witness:* It holds 50

\*\*\*\*\*

*The Court:* Is that something that you've ever used as a police officer?

*Witness:* No, ma'am

*The Court:* Did you have that drum with you that day?

*Witness:* No ma'am.

This exchange emphasizes that the gun the police found was an extraordinary weapon with even more firepower than the police routinely carry. In a case where no harm was done and the only crime involved having a weapon, such questioning served to exacerbate an unrelated and prejudicial fact not relevant to any determination the jury was making.

After the prosecutor's second witness, Officer Shaw, the Court again highlights the dangerousness of the weapon recovered by the officers:

*The Court:* As a member of the SWAT do you carry guns with those barrels like that?

*Witness:* No, ma'am.

\*\*\*\*\*

*The Court:* Why did you request backup?

*Witness:* Just because of the amount of the people. It was just me and my partner...it's just, I guess, a natural thing to request backup. You get as many people as you have there and, you know, you do what you have to do.

T1, 233.

The court goes on to remind the jury, through her questioning, that it was Mr. Wilder who placed this abnormally dangerous weapon into his cousin's vehicle:

*The Court:* Was it important for you to get into that trunk?

*Witness:* Yes, ma'am.

*The Court:* Why?

*Witness:* Because we seen him put the pistol in the trunk.

T1, 234.

Later at trial, defense counsel highlighted some errors in the Detroit Police Department's investigation of this case. Specifically, counsel drew out the fact that Detective Mays never fingerprinted the weapon found in the trunk of the car and never requested dash-cam video or in-car video, despite the recording capabilities of the 2013 Dodge Charger driven by Officers Fultz and Shaw. T2, 54-56. After defense counsel's cross-examination, the prosecutor attempted to rehabilitate the witness by asking:

*Prosecutor:* Detective Mays, was there ever a request for a scout car video?

*Witness:* No.

*Prosecutor:* You did have to do some type of verifying on the information that was presented, didn't you sir?

*Witness:* Yes.

*Prosecutor:* Did you find out who the vehicle was registered to?

*Witness:* Yes.

*Prosecutor:* Did you find out the address for the person who it was registered to?

*Witness:* Yes.

*Prosecutor:* Did you find out the status of the weapon, whether or not it was stolen or not?

*Witness:* Yes.

T2, 57-58.

The Court was apparently not convinced that the rehabilitation done by the prosecutor was enough and independently asked whether the Detroit Police officers have body cameras, a question that never came up in prior questioning of the witness. Detective Mays replied that they do not. T2, 58. The Court then turned questioning to the car camera, questioning the helpfulness of video to this case had it been recovered:

*The Court:* Okay. So no matter which direction the car is pointing if something is happening to the left of the vehicle outside the scope of fender to fender does the camera record that?

*Witness:* To my knowledge, no, ma'am.

*The Court:* What about the rear camera?

*Witness:* No, ma'am.

T2, 59-60.

Likewise, when Mr. Wilder's cousin, Charmell Richardson, testified that she had never seen the gun that was placed in evidence at trial, the court questioned her story, emphasizing the doubt the court itself had in her testimony:

*The Court:* Now you said that object, exhibit two and three, that Ms. Stanford, the Prosecutor, showed you you never saw that gun or that big thing, exhibit three, that's on the corner of the table, you never saw that?

*Witness:* No.

*The Court:* At all that day?

T2, 34-35

The court also used questioning to highlight that the weapon was found in the trunk of the vehicle that Mr. Wilder was working on (T2, 35) and to emphasize Mr. Wilder's presence at the scene:

*The Court:* Why was your cousin there at that house...?

*Witness:* Because my cousin, Carlos, was going to buy the car.

*The Court:* And is you [sic] cousin, Carlos, related to your cousin Mr. Wilder?

*Witness:* Yes.

*The Court:* How are they related?

*Witness:* Brothers.

*The Court:* So were both Carlos and Mr. Wilder out there that day?

*Witness:* Yes.

T2, 36.

At the close of trial, the court offered the standard curative instructions explaining to the jury that “my questions to the witnesses are also not evidence.” T2, 172. However, the trial court in this case never gave a curative instruction immediately in response to the above conduct that could give rise to bias. *Stevens*, 498 Mich at 177. And further, this seems to be a case like that contemplated by this Court in *Stevens* where judicial conduct “so overstep[ped] its bounds that no instruction can erase the appearance of partiality.” *Id.* at 177-178.

The trial court pierced the veil of judicial impartiality. The only issue at trial was who had the gun and placed it in the trunk. The trial court did everything she could to undermine defense counsel’s attempts to call into question the credibility of the police officer’s ability to actually see and identify Mr. Wilder as that person given the officers’ distance from the scene and the number of people at the scene.

It cannot be disputed that a video from the dash cam might have been the best evidence, but defense counsel’s attempts to use the lack of that evidence and lack of other investigative measures as an argument was taken away by the judge’s interference. Where the defense theory is so undermined by judicial interference and defense counsel nevertheless fails to object,



defense counsel's performance is deficient. And where, as here, the judicial interference would have amounted to structural error, that failure to object was prejudicial to Mr. Wilder. Nevertheless, the judicial interference in this case also rises to the level of plain error affecting Mr. Wilder's substantive right to a fair and impartial trial. Thus, the only appropriate remedy under the circumstances is reversing the judgment and remanding the case for new trial.

**SUMMARY AND RELIEF**

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court either peremptorily reverse his conviction and grant Mr. Wilder a new trial or grant leave to appeal.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Adrienne N. Young

BY: \_\_\_\_\_

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Dated: November 22, 2016