

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVAUGHN MICHAEL WILSON,

Defendant-Appellant.

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UNPUBLISHED

May 1, 2007

No. 269033

Oakland Circuit Court

LC No. 2005-203202-FC

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 180 to 360 months' imprisonment for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. For the reasons set forth in this opinion we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The 18-year-old defendant lived with his father, Wayne Wilson, and several others at 313 Fisher in Pontiac. On June 11, 2005, defendant was standing in front of his house with other men when a burgundy Monte Carlo pulled up. According to several witnesses, the occupants of the Monte Carlo and defendant and his associates had a brief verbal altercation. Defendant and two or three males then stepped out into the street, and five to seven shots were fired at the Monte Carlo, which sped away. Two of the bullets hit defendant's neighbor Isis Martin, who was sitting on her front porch. Neighbors testified that defendant and his associates fled after hearing that Martin had been shot.

Defendant's neighbor, Mary Garner Jackson, testified that she has known defendant since he was an infant, and was certain that he was the shooter. Jackson further testified that defendant was wearing a black shirt and black jeans, and the other individuals in his group were wearing blue jeans and white T-shirts. Martin and another neighbor, Levoy Gardner, could not see the face of the shooter, but testified that the shooter was wearing all dark clothing. Garner explained that the other males in the street with the shooter were wearing white T-shirts.

The police recovered five spent shell casings that were fired from the same semi-automatic weapon. When the police went to 313 Fisher, defendant was not there. Hours later, defendant came to the police station wearing blue jeans and a white T-shirt. Cal Clark lived at

313 Fisher with his mother, who was dating defendant's father. Clark testified that he was with defendant and Quinell Buggs when the shooting occurred, and did not see defendant with a gun, and was unaware of who did the shooting. He indicated that at the time of the shooting, defendant was standing in the driveway talking on a cell phone. Clark indicated that both he and defendant were wearing jeans and white T-shirts, and Buggs had on black jeans, but Clark could not recall the color of his shirt.

Twelve-year-old Justin Jones indicated that he was visiting his relatives at 313 Fisher on the day of the shooting. He testified that after the verbal altercation, Buggs, defendant, "Nash," and Chris Stokes walked from the porch toward the street. Jones saw Nash pull a "big gun," and saw Buggs pull and fire three shots from a "little gun." Jones claimed that defendant was not involved in the shooting, and had not made it into the street when the shots were fired. Jones could not recall what defendant and Buggs were wearing, but recalled that Nash was wearing black pants and a white T-shirt.

Defendant's sole issue on appeal is that a new trial is required because defense counsel was ineffective for failing to object to prejudicial testimony of two police officers and for failing to move for a mistrial. Defendant alternatively argues that remand is necessary to enable him to develop this claim.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

During the prosecutor's direct examination of Officer Casey Crampton, the following exchange occurred:

*Q.* When you received a dispatch and you left the station, where did you go?

*A.* To Fisher Street.

*Q.* And can you describe what happened when you rolled up onto Fisher Street?

\* \* \*

*Q.* What happened when the black male approached you?

A. He informed me that a black male teenager wearing a black colored T-shirt had ran from that scene to a house over here on Fisher, 313.

Q. When you hear that information what, if anything, did you do?

A. 313 Fisher is a well-known address amongst the Pontiac police officers so I proceeded to that address, staging the area, took up a position in front, and I broadcast that information to my dispatch and fellow officers.

Subsequently, during the prosecutor's direct examination of Deputy Jeff Buchmann, the following exchange occurred:

Q. And at some point did you or other detectives attempt to talk to individuals at 313 Fisher?

A. Yes.

Q. Can you explain that to the jury?

A. Detective McDougal he had - - for lack of a better term, he was familiar with Mr. Wilson [defendant's father]. We had gotten information from Mrs. Jackson saying what she saw so we went down there to speak to [defendant].

Q. And when you went down there to speak with [defendant], did you find [defendant] at that address?

Defendant correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). In both instances, the responses were unsolicited answers to properly asked questions. Although defense counsel did not object to the testimony, defendant has not overcome the presumption that defense counsel's failure to object was reasonable trial strategy. Given the brief and isolated references, defense counsel may have reasonably determined that an objection would have drawn more attention to the improper testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995), reh den 448 Mich 1225 (1995). Further, defense counsel apparently chose to address Deputy Buchmann's testimony during cross-examination by reiterating that the officer was only familiar with defendant's father, *not defendant*. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999), lv den 461 Mich 941 (1999). Moreover, given the weight of the evidence produced at trial, no reasonable likelihood exists that the brief references, with no indication regarding the circumstances under which the police were familiar with 313 Fisher or defendant's father, affected the outcome of the case. Therefore, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to object, the outcome would have been different. *Effinger, supra*.

Defendant has also failed to demonstrate that, had defense counsel moved for a mistrial, it would have been successful. See *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003), lv den 469 Mich 873 (2003) (a mistrial should be granted only for an irregularity that is

prejudicial to the rights of the defendant and impairs his ability to receive a fair trial). Generally, “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), lv den 450 Mich 931 (1995). In addition, there were no repeated references to the matters, or indication that defendant was involved in any previous criminal activity or had a prior criminal record, and any such inference based on the prosecutor’s questions and the witnesses’ responses is tenuous. Because there was no reasonable basis to move for a mistrial, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000) (counsel is not required to make a futile objection).

For these reasons, we reject defendant’s claim that defense counsel was ineffective and are not persuaded that a remand is necessary.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello