No. 16-2498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK ELLIOTT,

Petitioner-Appellant,

v.

CARMEN DENISE PALMER, Warden,

Respondent-Appellee.

ORDER

Mark Elliott, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Elliott has applied for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1). He has also filed two letters citing supplemental authorities. *See* Fed. R. App. P. 28(j).

On or about June 21, 2009, Elliott struck Sylvester Green and Jimmy Tyner with his truck outside of a bar in downtown Detroit. Both Green and Tyner were seriously injured, and Green later succumbed to his injuries. A jury convicted Elliott of second degree murder, *see* Mich. Comp. Laws § 750.317, and felonious assault, *see* Mich. Comp. Laws § 750.82. The trial court sentenced him to twenty-seven to fifty years of imprisonment for the murder conviction and two to four years for the assault conviction. The Michigan Court of Appeals affirmed, *People v. Elliott*, No. 301186, 2012 WL 516064 (Mich. Ct. App. Feb. 16, 2012) (per curiam), and the Michigan Supreme Court denied leave to appeal. Elliott then moved unsuccessfully for state post-conviction relief.

In 2015, Elliott filed a federal habeas petition, raising thirteen grounds for relief: (1) the state suppressed audio recordings of his 911 calls; (2) the trial court violated his right to a public trial by closing the courtroom during jury selection; (3) the trial court violated his confrontation

rights by admitting hearsay medical expert testimony; (4) the state introduced perjured testimony; (5) trial counsel was ineffective for failing to obtain audio recordings of Elliott's 911 calls; (6) the trial court examined Elliott in a prejudicial manner; (7) the trial court violated Elliott's right to be present at critical stages of his trial by replying to a jury note outside of his presence; (8) the trial court violated Elliott's due process rights by failing to enter a jury request into the record; (9) trial counsel was ineffective for failing to object to the violations asserted in Grounds 1 through 8; (10) appellate counsel was ineffective for failing to argue Grounds 1 through 9; (11) the trial court erred in instructing the jury on first-degree murder; (12) the trial court erred in refusing the jury's request to review witness testimony; and (13) the sentencing guidelines were improperly scored. In September 2016, the district court denied Elliott's petition, in part on the merits and in part as procedurally defaulted, and declined to issue a COA.

In his COA application, Elliott reasserts the merits of Grounds 1 through 10. Because Elliott does not argue Ground 12 or 13 in his COA application, he has waived review of these claims. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's adjudication of the claim resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). In the COA context, this court asks whether the district court's application of the AEDPA is debatable by reasonable jurists. *See Miller-El*, 537 U.S. at 336-37. To obtain a

COA when the district court has denied a habeas petition on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As an initial matter, to the extent that Elliott alleges that his rights under state law were violated, reasonable jurists could not disagree that his claims were not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991).

As for Elliott's federal claims, the district court found that Elliott procedurally defaulted Grounds 1 through 9. A federal habeas court ordinarily will not review a petitioner's claims if he "has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "To determine whether the state court rejected a petitioner's claim on procedural grounds, we must look to 'the last reasoned state court opinion to determine the basis for the state court's rejection of the petitioner's claim.'" *Amos v. Renico*, 683 F.3d 720, 733 (6th Cir. 2012) (quoting *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc)). This court presumes that, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Guilmette*, 624 F.3d at 291-92 (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). The Michigan Court of Appeals' order denying Elliott leave to appeal the trial court's order denying his motion for state post-conviction relief was the last reasoned state court opinion to reject Grounds 1 through 9. The state appellate court rejected these claims under Michigan Court Rule 6.508(D)(3), "which is an independent and adequate state ground sufficient for procedural default that required [Elliott] to raise these claims during his direct appeal." *Amos*, 683 F.3d at 733. Accordingly, reasonable jurists would not find it debatable whether the district court was correct in ruling that Elliott procedurally defaulted Grounds 1 through 9. *See Slack*, 529 U.S. at 484.

If a petitioner has procedurally defaulted his claims, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. In Ground 10, Elliott argues that appellate counsel's ineffectiveness caused his procedural default of Grounds 1 through 9. The district court addressed Ground 10 on the merits and found that Elliott had failed to demonstrate that he was denied the effective assistance of appellate counsel. "We may not turn directly to the merits of the claim, however, because the Supreme Court has . . . made clear that 'an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted.'" *Monzo v. Edwards*, 281 F.3d 568, 577 (6th Cir. 2002) (quoting *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)). It is at least arguable that Ground 10 was procedurally defaulted. However, even assuming that Elliott could establish cause and prejudice to excuse his procedural default of Ground 10, *see id.* at 578-79, reasonable jurists could not disagree that Ground 10 did not entitle him to a writ of habeas corpus.

To establish an ineffective-assistance claim, a habeas petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness" and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). There is "a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Id.* at 689. Habeas review also mandates the application of a second layer of deference: a habeas court analyzes only whether the state court was reasonable in its determination that counsel's performance was adequate. *See Burt v. Titlow*, 134 S. Ct. 10, 13, 18 (2013); *Abby v. Howe*, 742 F.3d 221, 226 (6th Cir. 2014). To establish deficient performance in the appellate context, a petitioner "must demonstrate his appellate counsel made an objectively unreasonable decision by choosing to raise other issues instead of [the challenged] issue, meaning that issue 'was clearly stronger than issues that counsel did present.'" *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 285, 288 (2000)). The "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely

to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). To establish prejudice in the appellate context, a petitioner "must demonstrate 'a reasonable probability that, but for his counsel's unreasonable failure to' raise [the challenged] issue on appeal, 'he would have prevailed.'" *Webb*, 586 F.3d at 399 (quoting *Robbins*, 528 U.S. at 285).

After citing the applicable *Strickland* standard, the trial court noted that, "on appeal, counsel challenged [Elliott's] conviction on two grounds: (1) the trial court should not have submitted the charge of first-degree murder to the jury, and (2) the trial court abused its discretion by foreclosing the jury's opportunity to review testimony of witnesses by informing the jury that transcripts would not be available for 2 weeks." The trial court found that, "[o]n the basis of the record," it was "evident" that Elliott had "enjoyed a fair trial and full appeal." The trial court concluded that Elliott had "failed to overcome the presumption that appellate counsels' decisions constituted sound strategy," emphasizing that "[a]ppellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments that are most likely to prevail." The district court conducted what was effectively a de novo review and concluded that Ground 10 failed because Grounds 1 through 9 were not clearly stronger than the claims appellate counsel raised. Reasonable jurists could not disagree with the district court's determination.

In Ground 1, Elliott argues that the state suppressed audio recordings of 911 calls that he placed on the night of the offense, in which he stated that the victims had robbed and assaulted him and the dispatcher told him to remain at the scene to wait for police. Elliott claims that this evidence would have undercut the prosecution's theory of premeditation. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. A *Brady* claim contains three elements: (1) the evidence "must be favorable to the accused"

because it is exculpatory or impeaching; (2) the state must have suppressed the evidence, whether "willfully or inadvertently," and (3) the evidence must be material, meaning "prejudice must have ensued" from its suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A defendant is prejudiced "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The district court found that Elliott failed to establish he was prejudiced because "the verdict rendered by the jury shows that it did not accept that [Elliott] acted with . . . premeditation because it only found [Elliott] guilty of second-degree murder," and concluded that Ground 1 was not clearly stronger than the claims appellate counsel raised. Reasonable jurists could not disagree. *See Kyles*, 514 U.S. at 433-34; *Webb*, 586 F.3d at 399.

In Ground 2, Elliott argues that the trial court violated his right to a public trial by closing the courtroom during jury selection. The district court found that Elliott waived this claim by failing to raise a contemporaneous objection to the closure, and concluded that this claim was therefore not clearly stronger than the claims appellate counsel raised. Reasonable jurists could not disagree. *See Levine v. United States*, 362 U.S. 610, 618 (1960) ("Had petitioner requested, and the court denied his wish, that the courtroom be opened to the public . . . we would have a different case."); *Webb*, 586 F.3d at 399; *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) (citing *Levine* for the proposition that "failure to object to closing of courtroom is waiver of right to public trial").

In Ground 3, Elliott argues that the trial court violated his confrontation rights by admitting hearsay medical expert testimony. Specifically, he challenges the medical examiner's reading into evidence of a police report that concluded Green's homicide was intentional. The Confrontation Clause prohibits admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Davis v. Washington*, 547 U.S. 813, 821 (2006). However, a court cannot grant habeas relief on a confrontation violation if the state court's ruling was harmless error.

Jordan v. Warden, Lebanon Corr. Inst., 675 F.3d 586, 598 (6th Cir. 2012). In determining whether an error was harmless, this court looks to the following factors: "(1) 'the importance of the witness' testimony in the prosecution's case,' (2) 'whether the testimony was cumulative,' (3) 'the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points,' (4) 'the extent of cross-examination otherwise permitted,' and (5) 'the overall strength of the prosecution's case.'" *Vazquez v. Jones*, 496 F.3d 564, 574 n.8 (6th Cir. 2007) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). The district court concluded that the alleged confrontation violation was harmless because "[t]he eyewitnesses testified that [Elliott] purposely accelerated his truck into the . . . victims," Elliott's "defense was basically self-defense," "[t]he medical examiner's testimony that he relied on statements that were also testified-to at trial did not increase the evidence in the prosecutor's case," and defense counsel used the medical examiner's hearsay testimony to undermine the medical expert's conclusion that Green's homicide was intentional. Reasonable jurists could not disagree with the district court's conclusion that Ground 3 was therefore not clearly stronger than the claims appellate counsel raised. *See Webb*, 586 F.3d at 399; *Vazquez*, 496 F.3d at 574 n.8.

In Ground 4, Elliott argues that the state introduced perjured testimony. Specifically, he claims that Sergeant Kevin Hannus perjured himself by testifying that eyewitnesses told him Elliott "circled the block" before striking the victims. He also claims that eyewitness Samuel McCree perjured himself by testifying that he was at the intersection where and when the victims were struck, when in fact he was over one block away. "The burden is on [Elliott] to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Peoples v. Lafler*, 734 F.3d 503, 516 (6th Cir. 2013) (quoting *Brooks v. Tennessee*, 626 F.3d 878, 894-95 (6th Cir. 2010)). The district court found that Ground 4 was based on minor inconsistencies in Hannus and McCree's testimony, and was therefore not clearly stronger than the claims appellate counsel raised. Reasonable jurists could not disagree. *See Peoples*, 734 F.3d at 516; *Webb*, 586 F.3d at 399.

In Ground 5, Elliott argues that trial counsel was ineffective for failing to obtain audio recordings of his 911 calls. The district court found that Ground 5 was not clearly stronger than the claims appellate counsel raised because, "as explained above, the failure to obtain the recordings was not prejudicial." Reasonable jurists could not disagree. *See Strickland*, 466 U.S. at 692; *Webb*, 586 F.3d at 399.

In Ground 6, Elliott argues that the trial court examined him in a prejudicial manner, pointing to a brief exchange in which the trial court asked him about his photography business and whether he took pictures on the night of the offense. The district court found that Elliott's "argument as to why this was prejudicial [was] too speculative to merit discussion," and concluded that Ground 6 was not clearly stronger than the claims appellate counsel raised. Reasonable jurists could not disagree. *See Webb*, 586 F.3d at 399.

In Ground 7, Elliott argues that he was denied his right to be present at all critical stages of his trial when the trial court replied to a jury note outside of his presence. A defendant has a due process "right 'to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.'" *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). The district court found that Ground 7 was not clearly stronger than the claims appellate counsel raised because the record did "not show that [Elliott] was not present when the response to the note was given and initialed by the attorneys." Reasonable jurists could not disagree. *See Webb*, 586 F.3d at 399.

In Ground 8, Elliott argues that his due process right to appeal was violated "when the trial court failed to record [the] jury request proceeding" at issue in Ground 7. "[I]n order to demonstrate denial of a fair appeal, [a] petitioner must show prejudice resulting from the missing transcripts." *Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir. 1986). The district court found that, "[a]lthough the exchange does not appear in the transcripts, as indicated above, a copy of the [trial court's] responsive note shows that both the prosecutor and defense counsel were aware of the requests, as they initialed the response sent to the jury from the court." The district court

concluded that Ground 8 was not clearly stronger than the claims appellate counsel raised because Elliott "failed to show how he was prejudiced by the omission of [the jury request proceeding] in the transcripts." Reasonable jurists could not disagree. *See Webb*, 586 F.3d at 399; *Bransford*, 806 F.2d at 86.

In Ground 9, Elliott argues that trial counsel was ineffective for failing to object to the violations undergirding Grounds 1 through 8. As to trial counsel's failure to object to the violations asserted in Grounds 1, 3, 4, 5, 6, 7, and 8, reasonable jurists could not disagree with the district court's conclusion that Ground 9 was not clearly stronger than the claims appellate counsel raised because, "as explained, none of the alleged errors were sufficiently prejudicial to merit relief on appeal." *See Strickland*, 466 U.S. at 692. As to trial counsel's failure to object to the violation asserted in Ground 2—that is, the closure of the courtroom during jury selection—reasonable jurists could not disagree that Ground 9 was not clearly stronger than the claims appellate counsel raised because trial counsel's decision was owed deference as a strategic choice. *See id.* at 689. Federal courts have recognized that agreeing to a closure during jury selection can result in potential jurors being more forthcoming and, consequently, may aid in selecting desirable jurors. *See Horton v. Allen*, 370 F.3d 75, 82-83 (1st Cir. 2004) (finding that counsel's agreement to a closed voir dire was "objectively reasonable strategy designed to elicit forthcoming responses from the juror"); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 515 (1984) (Blackmun, J., concurring) (recognizing the defendant may have an "interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions"). Counsel's decision was therefore not unreasonable under the circumstances. *See Strickland*, 466 U.S. at 689.

Based on the foregoing, reasonable jurists could not disagree with the district court's rejection of Ground 10 under what was effectively a de novo review, a standard more favorable to Elliott than that of § 2254(d), and reasonable jurists therefore could not disagree that Ground 10 did not entitle Elliott to a writ of habeas corpus. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("[A] habeas petitioner will not be entitled to a writ of habeas corpus if his or her

claim is rejected on *de novo* review."). For similar reasons, reasonable jurists could not disagree with the district court's conclusion that appellate counsel was not ineffective for failing to raise Grounds 1 through 9 and, therefore, that Ground 10 did not provide cause to excuse Elliott's procedural default of Grounds 1 through 9. *See Slack*, 529 U.S. at 484; *Monzo*, 281 F.3d at 579.

In his final preserved claim, Ground 11, Elliott argues that the trial court erred in instructing the jury on first-degree murder, *see* Mich. Comp. Laws § 750.316, because the state presented insufficient evidence to establish that he acted with premeditation. The relevant question in reviewing this jury-instruction claim is whether "there was sufficient evidence from which to conclude that [Elliott] was guilty of first degree murder"; if so, then Ground 11 "must fail." *Daniels v. Burke*, 83 F.3d 760, 765 (6th Cir. 1996). Habeas review of a sufficiency-of-the-evidence claim centers on whether the district court erred in concluding that the state courts reasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jackson* established that, when reviewing a sufficiency challenge, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. *Jackson* and the AEDPA command deference to both the jury's verdict and the state court's consideration of that verdict. *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011).

In rejecting Ground 11, the Michigan Court of Appeals summarized the state's evidence as follows: On the night of the offense, Elliott was involved in a bar fight with Green and Tyner. *Elliott*, 2012 WL 516064, at *1. After the fight was broken up, Elliott left the bar but remained in the area for over an hour, circling the block in his truck and then parking in front of the bar. *Id.* When Green and Tyner left the bar, Elliott accelerated and struck both men with his truck, causing serious injuries to Green and Tyner that later resulted in Green's death. *Id.* The state appellate court concluded that Elliott's "actions after the bar fight and before the murder and assault supported a reasonable inference that the defendant had more than enough time to take a second look at his actions," and found that the state "therefore presented sufficient evidence of premeditation and deliberation." *Id.* Reasonable jurists could not disagree with the district

court's conclusion that the state appellate court's decision was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1), (2).

Finally, because Elliott's citations of supplemental authority go only to the merits of his procedurally defaulted claims, these decisions do not entitle him to the requested relief.

For these reasons, the COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 16-2498

UNITED STATES COURT OF APPEALS
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MARK ELLIOTT,

Petitioner-Appellant,

v.

CARMEN DENISE PALMER, Warden,

Respondent-Appellee.

ORDER

Before: COLE, Chief Judge; MERRITT and BOGGS, Circuit Judges.

Mark Elliott, a Michigan prisoner proceeding pro se, petitions for rehearing of this court's June 14, 2017, order denying him a certificate of appealability. The application for a certificate of appealability arose from a district court's judgment denying Elliott's petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon careful consideration, this panel concludes that the court did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a). Accordingly, Elliott's petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk