No. 18-1060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERMAN WASHINGTON, aka Sherman Lance Washington,

Petitioner-Appellant,

v.

CARMEN DENISE PALMER, Warden,

Respondent-Appellee.

FILED
May 09, 2018
DEBORAH S. HUNT, Clerk

ORDER

Sherman Washington, a pro se Michigan prisoner, appeals a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He has applied for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

Washington attempted to represent himself at a jury trial on a charge of first-degree home invasion. However, the trial court granted the prosecutor's motion for a mistrial based on comments that Washington made during his opening statement. At retrial, Washington was represented by counsel and was convicted as charged. He was sentenced to twenty to forty years in prison as a fourth habitual offender.

At the retrial,

> [t]he victim testified that she woke up when she heard someone in her home and discovered defendant in her daughter's bedroom going through a dresser drawer. Defendant was holding a bottle of vodka apparently taken from the victim's refrigerator and had a pair of sunglasses from the victim's car. Later the victim found keys that were also in her car near the dresser through which defendant was rummaging. When the victim approached defendant, he asked if "Chelsea" was there several times. The victim told defendant to leave her home and asked for her sunglasses back. Defendant gave her the sunglasses and left the house with the vodka. The victim called the police and reported the incident. She described defendant as wearing gray or dark pants and a cream or white hooded sweatshirt. She also stated that defendant was wearing a multi-colored backpack. The victim

> indicated that she noticed three or four bottles of beer were also missing from her refrigerator, and several months after the incident she found three bottles of the same type of beer in her backyard.

People v. Washington, No. 310969, 2013 WL 2319476, at *1 (Mich. Ct. App. May 28, 2013), *perm. app. denied*, 838 N.W.2d 549 (Mich. 2013) (mem.). Washington was arrested a few hours later after a 911 caller reported that a man wearing a white hooded sweatshirt was trying to open car doors in the same neighborhood. *Id.* Washington did not testify at trial, but defense counsel suggested in opening argument that Washington had entered the house looking for a party.

The Michigan Court of Appeals affirmed Washington's conviction on direct appeal, *Washington*, 2013 WL 2319476, at *12, and the Michigan Supreme Court denied leave to appeal. Washington did not pursue post-conviction relief in state court.

In his § 2254 petition, dated September 25, 2014, Washington asserted that (1) he was denied a fair trial by the admission of (a) "other bad acts" testimony, (b) irrelevant evidence unconnected to the home invasion, (c) testimony implying that he had a criminal past, and (d) testimony that there was a warrant out for his arrest; (2) trial counsel rendered ineffective assistance by failing to object to the admission of the aforementioned evidence; and (3) Washington was denied a fair trial due to cumulative error. The State filed an answer, arguing that Washington's claims were procedurally defaulted, lacked merit, or both.

A magistrate judge did not consider whether any claims were procedurally defaulted and recommended denying the § 2254 petition on the merits. Over Washington's objections and upon de novo review, the district court adopted the magistrate judge's report and denied the petition. The court declined to issue a COA.

An individual seeking a COA is required to make "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) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Washington argued that he was denied a fair trial by the admission of "bad acts" evidence regarding his alleged attempts to enter cars, an irrelevant photo showing the beer bottles discovered by the victim, and a police officer's testimony that implied that Washington had a criminal history and expressly indicated that he had an outstanding warrant.

The Michigan Court of Appeals held that the claims lacked merit. After acknowledging that the testimony regarding Washington's interaction with cars constituted propensity evidence, the court nonetheless concluded that the testimony was properly admitted to show that Washington's intent was to commit crimes of opportunity, rather than to attend a party. The court found that the photo of the beer bottles was relevant because the victim testified about missing beer and that it was the jury's responsibility to assess the victim's credibility and accord the proper weight to the evidence. Next, the court reasoned that the police officer's testimony was relevant and not prejudicial. The officer testified that she had identified Washington from a police database that contained the names of witnesses, victims, and those accused of crimes, but she did not indicate that Washington had been previously accused of crimes. The court did not address the police officer's alleged testimony regarding a warrant.

The evidentiary claims addressed by the Michigan Court of Appeals do not deserve encouragement to proceed further. Claims regarding state evidentiary law are generally non-cognizable on habeas review, and Washington did not make a substantial showing that the admission of evidence was fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012). "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Likewise, "the Supreme Court has never held (except *perhaps* within the capital sentencing context) that a state trial court's admission of *relevant* evidence, no matter how prejudicial, amounted to a violation of due process." *Blackmon v. Booker*, 696 F.3d 536, 551 (6th Cir. 2012) (citations omitted).

Washington's claim regarding the warrant also does not deserve encouragement to proceed further. He alleged that the police officer stated that there was a warrant for Washington but that the court reporter failed to transcribe the officer's full sentence. Although testimony about a warrant could be a violation of Michigan law, Washington has not made a substantial showing that the admission of the statement, if it was actually made and heard by the jury, was fundamentally unfair and had a substantial and injurious effect on the verdict in light of the overall strength of the State's case. *See* Mich. R. Evid. 404(b); *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007); *People v. Luesing*, No. 330507, 2017 WL 1422833, at *7 (Mich. Ct. App. Apr. 20, 2017) (unpublished opinion).

Jurists of reason would agree with the district court's determination that Washington did not receive ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). As discussed above, the underlying claims lacked merit, and counsel cannot be deemed ineffective for failing to make frivolous objections. *See Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011).

The third claim does not deserve encouragement to proceed further because this court does not recognize claims of cumulative error on habeas review. *See Hill v. Mitchell*, 842 F.3d 910, 948 (6th Cir. 2016).

In addition to the claims discussed above, Washington presents several new arguments in his COA application regarding his first trial and his retrial. The court declines to consider these arguments because they were not raised below and no exceptional circumstances exist that merit their consideration for the first time on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006); *Seymour v. Walker*, 224 F.3d 542, 561 (6th Cir. 2000).

Accordingly, the court **DENIES** Washington's COA application.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk