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No. 16-3872

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

ARIF MAJID,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE
JEFF NOBLE, Warden,	)	NORTHERN DISTRICT OF
	)	OHIO
Respondent-Appellee.	)	
	)	

BEFORE: **SUHRHEINRICH, CLAY, and GIBBONS, Circuit Judges.**

JULIA SMITH GIBBONS, Circuit Judge. Arif Majid appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Majid was convicted in Ohio state court of murder and attempted murder. Majid's conviction depended largely on eyewitness testimony, and his distinctive religious tattoos, including the word "Jihad" stretched across his shoulder blades, played a significant role in said eyewitness identification. Majid argues that over the course of his trial, the prosecutor engaged in several instances of misconduct by improperly directing the jury to Majid's Islamic faith. He also argues that the trial court improperly admitted irrelevant and prejudicial evidence of the meaning of certain Islamic terms. The Ohio Court of Appeals rejected these arguments, and the district court concluded that the state court decision was entitled to AEDPA deference. We affirm the judgment of the district court.

I.

A.

The events in question took place at a Euclid, Ohio bar called Milton's Lounge on the evening of Saturday, September 3, 2005, and the early morning hours of Sunday, September 4, 2005. Witnesses at trial generally agreed that there was a crowd of between 40 to 60 people at the bar. Amid this crowd was a group of three to four men who were on the dance floor, taking off their shirts, and behaving in a rowdy manner. One of the men, described by witnesses as a light skinned African-American with a muscular build, had several noticeable tattoos. The tattoos included an AK-47 or assault rifle tattooed on the man's torso, the word "Jihad" tattooed across his upper back with crossed swords beneath, and additional tattoos on his arms. The shirtless man with tattoos was identified in court as Arif Majid.

Christopher Core, an acquaintance of Majid, testified that he was at Milton's Lounge with Majid[1] and LeCarlton Parker, Majid's brother, on the night in question. He confirmed that Majid was dancing with his shirt off and stated that Majid and his brother are easily distinguishable. While Majid has tattoos, light brown skin, and a muscular build, Parker is shorter with darker skin and a less muscular frame. Core also testified that of the men in the group, Core was the only one who wore his hair in braids.

The group soon attracted the attention of the bar's management, including Milton P. Franklin Jr., the owner of Milton's Lounge, who went to speak to the DJ about enforcing the bar's shirts-on policy. The group put their shirts back on, but the man with the distinctive tattoos soon took his off again. After one of the men dropped a drink, Franklin Jr. spoke with bar employees about getting the group to leave Milton's Lounge. One of the employees was his son, Milton P.

[1] Core knew Majid by his given name, Cedric Parker, and thus referred to Majid during his testimony as "Cedric."

Franklin III, who was working at Milton's Lounge as a bartender. Franklin III asked the group to leave, and they were escorted out of the bar.

Instead of leaving the premises, though, the group continued to loiter in front of the bar. The man with tattoos was still with the group and had his shirt off again. Franklin Jr. told the men that loitering was not permitted, but they ignored him. Then, one of the bar's other employees came outside and reiterated that the men needed to leave; they ignored him as well. At that point, Franklin III noticed the situation and joined the group outside. He also asked the group to move along and testified that one of the members "got in [his] face" and said "threatening" things. DE 8-9, Trial Tr. Vol. 7, Page ID 2479. Franklin Jr. saw that the situation was deteriorating and told his son to go back inside the bar.

Franklin Jr., Franklin III, and the other bar employees went inside the bar, and Franklin Jr. closed the front door and searched through his key chain for the key to lock the door. As his father searched for the key, Franklin III retrieved his gun from the back of the bar. At that moment, someone punched the window in the front door and cracked it.[2] Although Franklin Jr. tried to hold his son back, Franklin III opened the front door, where he saw Majid and another man, and fired two shots. Franklin III was then pulled back inside the bar, and Franklin Jr. quickly locked the door. At that point, the front door window broke completely, and the glass fell onto the floor. Core, who was in the parking lot with Parker and Majid, heard Majid say, "Somebody tried to shoot my brother." DE 8-8, Trial Tr. Vol. 6, Page ID 2287–88.

An arm holding a gun then came through the front-door window to the inside of the bar; witnesses testified that the arm was tattooed and appeared to be that of a light-skinned African-

[2] Blood was later found on the window, with DNA belonging to LeCarlton Parker. A witness testified that the man who punched the front door was a "dark-skinned gentleman," not the lighter-skinned man with tattoos. DE 8-10, Trial Tr. Vol. 8, Page ID 2620.

American man. The gun was fired through the window into the bar. One of the bouncers attempted to grab the arm, but the shooter was able to twist free. The shooter then withdrew his arm from the front-door window.

A few seconds later, more gunshots were fired through the larger, main window of the bar (the "picture window"). Rayshawn Whitsett, one of the victims injured by the shooting, testified that he was standing up to leave the bar after the first set of gunshots and could see clearly out of the picture window. He stated that he saw "[a] light-skinned cocky fellow" of indeterminate height wearing a "wife beater" with tattoos on his arm. DE 8-6, Trial Tr. Vol. 4, Page ID 1647. Whitsett recognized the shooter as "[t]he guy with the Jihad on his back," and identified Majid in court as the shooter. *Id.* at 1647, 1676–77. Another witness, Michelle Johnson, had been a customer at the bar when the incident occurred. She looked out the picture window and "clearly" recognized the man who had been dancing shirtless earlier in the night. DE 8-8, Trial Tr. Vol. 6, Page ID 2152. She too saw his face and identified Majid in court as the shooter. Johnson's friend, Nickeesha Robinson, also saw the shooter through the picture window and identified him in court as Majid. She recognized him from the dance floor. Finally, Franklin III testified that he saw the shooter come to the picture window, duck behind the brick wall next to the window, and shoot through the window six times. Franklin stated that he clearly saw the shooter's face and identified him in court as Majid.

Three bar patrons were struck by bullets during the shooting, and one victim, Jerome Thomas, died as a result of his wounds. *See State v. Majid*, No. 96855, 2012 WL 986127, at *3 (Ohio Ct. App. Mar. 22, 2012). One of the initial officers on the scene was able to obtain a "very vague description" of the shooter on the night of the incident from several witnesses, who described him as "a light-skinned black male." DE 8-10, Trial Tr. Vol. 8, Page ID 2581–82.

Another officer obtained a description of the suspect as a "[l]ight-skinned black male with, possibly with braids and with tattoos." *Id.* at 2670. The specific description recorded on the suspect sheet was: "Five-six to five-eight, medium, light-skinned, unknown eyes, black male, Jihad on back, and other unknown tattoos. Possibly 25 to 35. Possible goatee, braids, brown hair, blue jeans." *Id.* at 2681. Franklin III gave a very short statement the night of the shooting: "Guy with Jihad tattooed on his back busted out window and then him and four other guys started shooting in the window." DE 8-9, Trial Tr. Vol. 7, Page ID 2497. He later admitted that there were not multiple shooters and that he had been trying to keep his statement as brief as possible before he was arrested for his role in the shooting. Franklin III subsequently made more detailed statements to the police, describing the Jihad tattoo with the two swords beneath it.

Franklin Jr. was contacted by the police the day after the shooting and agreed to make a written statement. In his statement he described the tattooed individual and mentioned that one of the tattoos was the word "Jihad." Whitsett also made a written statement to the police and sketched out the placement of the shooter's tattoos; he drew a man's back with "Jihad" across the shoulders and a cross underneath the word. Similarly, Johnson provided a written statement seven months later where she described the shooter and provided a rough drawing of his tattoos and their locations. Several witnesses also identified Majid out of a photo lineup.

B.

Majid was charged with one count of aggravated murder carrying two firearm specifications, three mass murder specifications, one repeat violent offender specification, and a notice of prior conviction; one count of having a weapon while under disability; and three counts of attempted murder carrying two firearm specifications, one repeat violent offender specification, and a notice of prior conviction. *Majid*, 2012 WL 986127, at *1. He pled not guilty and was tried

by a jury on all counts save for the Count 2 weapons under a disability charge, for which he waived his right to a jury trial. He was convicted by the jury of murder and two counts of attempted murder with the attendant specifications, and the court found him guilty of having a weapon under disability. *Id.* He appealed his convictions, and the Ohio Court of Appeals reversed because a juror had been sleeping through portions of the trial. *State v. Majid*, 914 N.E.2d 1113, 1114 (Ohio Ct. App. 2009).

C.

Majid was retried, with the second trial beginning on April 25, 2011. *Majid*, 2012 WL 986127, at *1. Before retrial, the state of Ohio dismissed several specifications from the indictment, and Majid once again waived his right to a jury trial for the weapon under disability count. *Id.* The issues in this appeal concern the prosecutor's conduct in parts of the second trial and the trial court's admission of certain evidence in that trial. Specifically, the prosecutor made comments and engaged in lines of questioning that drew attention to Majid's Islamic faith and to his "Jihad" tattoo. The prosecutor first asked about the significance of the term "Jihad" when questioning Whitsett about Majid's tattoos:

> Q: What do you remember about what was on his back?
> A: Across the top part it said Jihad, and above was a cross.
> Q: Being in the military, did Jihad have significance to you?
> [Defense counsel]: Objection
> The court: Approach the bench, bring the record.
> The court [sidebar with counsel]: State your objection, please.
> [Defense counsel]: The question of whether a man in the United States military that the word Jihad has any significance has no relevance with respect to the matter before this Court. It's simply to inflame the jury with respect to the fact that it means holy war and that has nothing to do with any religious beliefs here. And this witness is not competent to comment on whether or not what that significance of a tattoo means on a person's back.
> The court: Mr. Thomas
> Mr. Thomas [prosecution]: I believe it's relevant.

> The court: Well, I believe the only thing relevant is whether or not he remembers that tattoo and why he remembers that tattoo not any editorializing on your behalf. But it would be relevant as to the test of memory as to why a person remembers any fact, be it a tattoo or any other fact. But you should not lead the witness, nor editorialize on what you think is the basis of his memory on any point.

DE 8-6, Trial Tr. Vol. 4, Page ID 1638–40. After the court's instructions, the prosecution did not ask Whitsett about the significance of "Jihad" again, and the witness never answered the question whether the term was meaningful to him. The prosecutor's next question was, "You saw Jihad where on the person's body?" *Id.* at 1640. Whitsett then described the location of the tattoos in more detail.

The prosecutor engaged in a much more in-depth line of questioning about Islam during the direct examination of Franklin III, who was a practicing Muslim at the time of trial and at the time of the shooting. The prosecutor first asked Franklin III about his appearance:

> Q: Sir, as you appear before us today you're wearing something on your head; is that correct?
> A: Yes.
> Q: What is that item?
> A: It's a Kufi.
> Q: Does it have religious significance to you?
> A: Yes.
> Q: Why?
> A: I'm a Muslim.
> Q: And you're wearing a beard, correct?
> A: Yes.
> Q: Is that for religious reasons also?
> A: Yes, it is.

DE 8-9, Trial Tr. Vol. 7, Page ID 2449. A bit later into his direct examination, the prosecutor asked Franklin III more detailed questions about Islam:

> Q: Do you have any words [tattooed on your body] that would reference your religion such as Islam or Islamic Nation or anything of that nature?
> A: No.
> Q: Do you have anything on your body like, Military Mind?

A: No.

Q: There is an Arabic greeting, and I don't know, maybe you can place it in context for me because I don't pretend to be knowledgeable about it, I just know of it. It begins with, I believe, Salam and another word?

A: Assalamu Alaikum.

Q: Can you slow that down and sound it out please?

A: Assalam U Alaikum.

Q: What does that mean?

A: Peace be onto you.

Q: Can you spell that for us, please?

A: A-S-S-L-A-A-M, U, A-L-A-I-K-U-M.

Q: And for practitioners of Islam, how is it used?

A: As a greeting to other Muslims.

Q: Peace be unto you?

A: Yes.

Q: Are you familiar with the term Mujahid?

A: Yes.

Q: What does it mean to you?

[Defense counsel]: Objection.

The court: Overruled. He may answer.

A: One who is struggling with things in the world. It could be your addiction to, you know, things that you know are outside of Islam. And it can also be interpreted as a soldier, but that's really an incorrect definition.

Q: Are you familiar with the term Jihad, J-I-H-A-D?

A: Yes.

[Defense counsel]: Objection.

The court: Overruled.

Q: What does it mean to you?

A: Jihad is actually like the root word of Mujahid which means struggle to which you are trying to overcome. It could be strife in your nation, it could be, like I said, your addiction of doing things that you know are contrary to your beliefs of Islam. But it's also a lot of times misconstrued to mean war.

[Defense counsel]: Objection.

The court: Sustained.

Q: Do you have the word "Jihad" on your body?

A: No.

Q: Do you have the word "Mujahid" on your body?

A: No.

Q: I'm referencing when I say on your body, I mean tattoos?

A: No, I don't.

Q: You don't have any swords on your body, sir?

A: No.

Id. at 2458–60. Finally, when Franklin III was describing Majid dancing shirtless at Milton's, the prosecutor asked:

> Q: The tattoos that you saw, did they have any meaning for you?
> A: Yes.
> Q: In what way?
> A: They were Islamic terms, Arabic terms.
> Q: Is there anything about that, given what we have already discussed, your religious orientation, does that have any role here in what we're going to cover?
> A: No.
> Q: So, although you're seeing these religiously themed tattoos, we can agree there is no sort of religious undertone to this problem?
> A: No.

Id. at 2467.

There was no further discussion of Islam until closing arguments. During his closing argument, Majid's defense attorney argued that witnesses and law enforcement had zeroed in on Majid not because he was guilty, but because "he had odd Islamic tattoos." DE 8-11, Trial Tr. Vol. 9, Page ID 2809. Defense counsel repeatedly emphasized this theme throughout his closing, calling Majid's tattoos "the very pivotal point" and making comments such as, "We're shortly past the 9-11 period in 2005, and yet we have to focus on that part of the case," *id.* at 2809, and "the Nation of Islam, all of those people who are Islamic in this country are bad people. That's how we have to focus on the guy with the Jihad tattoo," *id.* at 2813–14. In fact, the defense attorney repeated the phrase "guy with the Jihad tattoos" several times to stress his theory that Majid was identified and charged because of his "different body art that was offensive to the sensibility of decent Americans." *Id.* at 2809–10.

In rebuttal, the prosecutor seemed to address the defense attorney's accusations about anti-Islamic bias by first speculating about the reason why someone would choose such unusual tattoos:

> What do you think it takes, from your life experiences, to place this body art on yourself as a person; what statement are you trying to make? Stop and ask yourself that question. Mujahid, a rifle, swords, Jihad. Is that a statement of self expression of don't mess with me. I'm a warrior, I'm dangerous. I'm something you don't want to mess with. I think the average person would agree with those statements.

Id. at 2832–33. The prosecutor then clarified that the tattoos were relevant because they were unusual and stood out to witnesses, enabling them to remember Majid's face and identify him as the shooter:

> There is nothing that identifies him before you as some sort of Islamic warrior other than the photos that you've seen in evidence, but they are not offered for that purpose. . . . [T]his is unique trait identification. This is not religious prejudice. This is about who did what, and who fired the shots.

Id. at 2833. The prosecutor later implied that Majid was not even a true adherent of the Muslim faith because "he didn't care about the rest of the occupants in the bar, innocent women, it didn't matter to him. If he's this Islamic warrior, if he's got some sort of honor, he should have called Milton Franklin, III out and said, business outside." *Id.* at 2840. The prosecutor concluded his rebuttal by emphasizing the numerous eyewitness identifications of Majid, stressing that "the consistent point is light-skinned black male with tattoos is the shooter." *Id.* at 2844.

The jury found Majid guilty of murder and two counts of attempted murder, along with the charged firearm specifications. The court found him guilty of having a weapon while under disability. He was sentenced to fifteen years to life on the murder count with three years added for the firearm specification, to be served consecutively, ten years on each of the attempted murder counts, and five years for having a weapon while under disability. All sentences were to run consecutively.

D.

On April 15, 2013, Majid filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising thirteen grounds of error. The magistrate judge recommended that the

district court dismiss the petition, and the district court agreed, adopting the Report and Recommendation over Majid's objections.

The district court granted a certificate of appealability on Majid's claim that the prosecutor engaged in misconduct by (1) questioning Whitsett about the meaning of certain Islamic terms, (2) examining Franklin III about his religion and asking him to define certain Islamic terms, and (3) suggesting to the jury during closing that Majid was an "Islamic warrior" whose tattoos were evidence of guilt. This court expanded the certificate of appealability to include the issue "whether the trial court denied Majid a fair trial by admitting Franklin [III]'s testimony about the meanings of certain Islamic terms," DE 41, Order, Page ID 3492, and appointed counsel for Majid.

II.

This court "review[s] the district court's legal conclusions in a habeas proceeding de novo and its factual findings under the clear-error standard." *Davis v. Lafler*, 658 F.3d 525, 530 (6th Cir. 2011) (citing *Awkal v. Mitchell*, 613 F.3d 629, 638 (6th Cir. 2010) (en banc)). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we may not grant a state prisoner habeas relief unless the state court's determination:

> (1) 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
> (2) resulted in 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). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

III.

A.

Majid argues that the prosecutor's questions and comments about Islam violated his right to due process and rendered his conviction "fundamentally unfair." Before this court are three instances of potentially improper conduct: (1) the prosecutor's questioning of Whitsett about Islamic terms, (2) the prosecutor's questioning of Franklin III about Islamic terms, and (3) the prosecutor's comments about Islam during closing arguments.[3]

On habeas review of alleged prosecutorial misconduct, we must evaluate the totality of the circumstances surrounding each trial to determine if the challenged conduct rendered the trial fundamentally unfair. *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) and *Hayton v. Egeler*, 555 F.2d 599, 604 (6th Cir. 1977)). Due process is the touchstone here: "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). Instead, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *DeChristoforo*, 416 U.S. at 643). This standard "is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'" *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (alteration in original) (quoting *Alvarado*, 541 U.S. at 664). "That leeway increases in assessing a state court's ruling under

[3] In his brief, Majid seems to challenge a question that the prosecutor asked during voir dire as well. Specifically, the prosecutor, while trying to illustrate that individuals tend to remember traumatic events more clearly, asked the jurors whether they remembered where they were on September 11, 2001. Majid argues that because of this question "the juror's recollections of 9/11 hung over the start of proceedings." CA6 R. 25, Appellant Br., at 17. But Majid has procedurally defaulted this claim since he raises it for the first time before this court. *See Coles v. Smith*, 577 F. App'x 502, 511 (6th Cir. 2014). Moreover, Majid's certificate of appealability does not include consideration of prosecutorial statements made during voir dire.

AEDPA," as this court "cannot set aside a state court's conclusion on a federal prosecutorial-misconduct claim unless a petitioner cites . . . other Supreme Court precedent that shows the state court's determination in a particular factual context was unreasonable." *Stewart v. Trierweiler*, 867 F.3d 633, 638–39 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1998 (2018) (alteration in original) (quoting *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015)).[4]

A prosecutorial misconduct claim "is evaluated in light of the record as a whole." *United States v. Dakota*, 197 F.3d 821, 828 (6th Cir. 1999). "To warrant a new trial, . . . prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *United States v. Causey*, 834 F.2d 1277, 1284 (6th Cir. 1987) (internal quotation marks and citation omitted).

B.

The word "Jihad" carries strong negative connotations in the United States and had the potential to be highly inflammatory at Majid's trial. Here, Majid's "Jihad" tattoo was crucial to eyewitnesses' identification of him, and therefore it became a necessary part of the trial. Having reviewed the lengthy trial transcript, we conclude that Majid was not denied due process by the prosecutor's references to Islam. While some of the prosecutor's challenged questioning and comments were improper, Majid has not shown that they so infected the trial with unfairness as to make the resulting conviction a denial of due process.

[4] The district court order and both parties apply a test previously employed by this circuit that asks whether the challenged conduct was "improper" and "flagrant," with a four-factor analysis used to determine flagrancy. *See, e.g.*, *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005). However, this test was expressly rejected by the Supreme Court in *Parker v. Matthews*, 567 U.S. 37 (2012). *Id.* at 48 (calling it an "elaborate, multistep test employed by the Sixth Circuit" that "bears scant resemblance" to *Darden*); *see also Ross v. Pineda*, 549 F. App'x 444, 449 (6th Cir. 2013) ("[Petitioner] cannot rely on the two-part test for prosecutorial misconduct articulated by this Court . . . which asks if the prosecutor's conduct is improper and flagrant. *See Parker*, 132 S. Ct. at 2155 (rejecting the use of this test).").

1.

The first instance of challenged conduct is the question the prosecutor asked Whitsett about the significance of the word Jihad: "Being in the military, did Jihad have significance to you?"[5] In his appeal to the Ohio Court of Appeals, Majid argued that this question violated his right to due process, but the Ohio Court of Appeals did not specifically address whether the questioning of Whitsett constituted prosecutorial misconduct. It addressed all other specific instances of misconduct alleged in Majid's petition, and Majid's challenge to the questioning of Whitsett comprised of one sentence out of forty total pages. It is therefore likely that the state court "inadvertently overlooked" this claim, so we review it *de novo* instead of giving the state court decision AEDPA deference. *See Johnson v. Williams*, 568 U.S. 289, 303 (2013) ("When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge."); *see also Brown v. Romanowski*, 845 F.3d 703, 711 (6th Cir. 2017). Even under the *de novo* standard of review, the prosecutor's question to Whitsett did not violate Majid's constitutional rights.

We agree with the district court that this question was likely improper because it "directed the jury to focus, not on whether the nature of Majid's tattoo made it more likely that Whitsett was testifying accurately, but on what 'Jihad' signified to Whitsett in his capacity as an American

[5] In his brief to the Ohio Supreme Court, Majid did not specifically discuss the questioning of Whitsett as an instance of prosecutorial misconduct. The district court noted that the claim would therefore be "subject to a clear procedural default," except the Warden failed to invoke the default in his answer. DE 36, Order, Page ID 3400. The district court therefore concluded that the Warden forfeited the defense. In his brief, the Warden asks that this court *sua sponte* dismiss the argument as procedurally defaulted. He argues that the failure to raise the defense was "an inadvertent error." CA6 R. 32, Appellee Br., at 35. "[F]ederal appellate courts have discretion, in 'exceptional cases,' to consider a nonexhaustion argument 'inadverten[tly]' overlooked by the State in the District Court." *Wood v. Milyard*, 566 U.S. 463, 471 (2012) (second alteration in original) (quoting *Granberry v. Greer*, 481 U.S. 129, 132, 134 (1987)). However, the Warden has not given any reason to believe that this case involves exceptional circumstances, so we deem the defense forfeited.

service member." DE 36, Order, Page ID 3403. However, although the question was improper, it did not rise to the level of a due process violation. Its impact was mitigated by defense counsel's objection and the trial court's subsequent instruction to the prosecution not to "editorialize." Indeed, Whitsett never actually answered the prosecutor's question about the term's significance to him, and the prosecutor did not ask the question again. Instead, he moved on to the specific location of the tattoo, asking, "You saw Jihad where on the person's body?" DE 8-6, Trial Tr. Vol. 4, Page ID 1640. The remarks were also isolated, even considered in conjunction with the other instances of challenged prosecutorial conduct. Majid's trial lasted for six days, and the transcript spans over 1,500 pages. The questioning of Whitsett about the meaning of "Jihad" lasted for half of a page, and all the challenged remarks combined take up no more than fifteen pages—one percent of Majid's trial. Finally, the other evidence against Majid was strong. Four eyewitnesses stated that they could see Majid clearly through the picture window, recognized him from the dance floor, and saw him shoot into the bar. We therefore affirm the district court's judgment on this claim.

2.

Next, Majid argues that the prosecutor engaged in misconduct by questioning Franklin III about certain aspects of Islam; namely, Franklin III's Kufi and beard, the meaning of "Assalamu Alaikum," the meaning of "mujahid," and the meaning of "jihad." The Ohio Court of Appeals concluded that although the prosecutor's questions were "of minimal relevance and straddling the line of impropriety," the questions and answers from Franklin III did not deprive Majid of a fair trial. *Majid*, 2012 WL 986127, at *8. Since the state court fully adjudicated Majid's challenge to the questioning of Franklin III, AEDPA deference applies. We hold that the state court was reasonable in its determination that these questions did not deprive Majid of a fair trial, since there is room for fairminded jurists to disagree on this issue. *Richter*, 562 U.S. at 101.

Doubtless the questions were misleading, deliberate, and elicited irrelevant information. The meaning of "Assalamu Alaikum" and "mujahid" had no bearing whatsoever on this case, and the association between "jihad" and "war" was inflammatory and irrelevant. Furthermore, the prosecutor's question to Whitsett also linked "jihad" with violence, so this was the second time that the prosecutor made such a connection to the jury. Perhaps Franklin III's own adherence to Islam is tangentially relevant, as it goes to his familiarity with Islamic terms and therefore his recognition of Majid's tattoos; but even this is a stretch. Unfortunately, the trial court overruled every objection defense counsel made to the questions, only sustaining an objection after Franklin III had provided a lengthy explanation of the meaning of "jihad" as he understood it.

Nonetheless, Majid has not shown that "the state court's determination . . . was unreasonable." *Stewart*, 867 F.3d at 639 (quoting *Trimble*, 804 F.3d at 783). As stated above, the trial transcript here numbered over 1,500 pages, and the pages with potentially improper questions or remarks number less than one percent of the total transcript. And four separate eyewitnesses testified that Majid was the shooter. Moreover, the prosecutor mitigated his questioning somewhat by eliciting Franklin III's confirmation that "although you're seeing these religiously themed tattoos, we can agree there is no sort of religious undertone" to the shooting. DE 8-9, Trial Tr. Vol. 7, Page ID 2467. We cannot say that the state court's decision was unreasonable or contrary to clearly established federal law. *See Stewart*, 867 F.3d at 638–39; 28 U.S.C. § 2254(d). We therefore affirm the district court on this claim.

3.

Finally, Majid argues that the prosecutor's comments during his rebuttal closing arguments denied him due process and were calculated to prejudice the jury against the defendant. The state court acknowledged that some of the prosecutor's comments during rebuttal closing arguments were improper but found no constitutional violation had occurred because "such comments did not

pervade the entire trial, let alone the closing argument." *Majid*, 2012 WL 986127, at *10. Viewed alongside the prosecutor's questioning of Whitsett and Franklin, the impropriety of the comments made during rebuttal is a close call, but fairminded jurists could disagree about the outcome. *See Richter*, 562 U.S. at 101. Thus, the state court's conclusion is entitled to deference under AEDPA.

At the outset, we note that Majid's defense opened the door to some of the prosecutor's comments in rebuttal by repeatedly saying that law enforcement targeted Majid because he was the "guy with the Jihad tattoo," and the investigators and witnesses harbored anti-Islamic bias. "The prosecution necessarily has wide latitude during closing argument to respond to the defense's strategies, evidence and arguments." *Wogenstahl v. Mitchell*, 668 F.3d 307, 329 (6th Cir. 2012) (quoting *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir. 2009) (internal quotation marks omitted)); *see also Clarke v. Warren*, 556 F. App'x 396, 408 (6th Cir. 2014).

However, not all of the prosecutor's comments can be justified as responses to the defense strategy. His use of the phrase "Islamic warrior," DE 8-11, Trial Tr. Vol. 9, Page ID 2833, and his speculation that "the average person would agree" that Majid's body art signified an intention to show that he was "dangerous" and a "warrior," *id.* at 2832–33, were prejudicial and did nothing to rebut the defense's accusations that Majid was unfairly targeted because of his religion. We agree with the state court that these arguments were improper. *See Majid*, 2012 WL 986127, at *10. But the state court did not unreasonably conclude that the prosecutor's rebuttal did not rise to the level of a due process violation. While the comments were both deliberate and prejudicial, they were relatively isolated, and abundant eyewitness testimony supported Majid's conviction. *Cf. Slagle v. Bagley*, 457 F.3d 501, 523 (6th Cir. 2006) (concluding that a total of "fifteen improper comments taken together did not render [the plaintiff's] trial unfair"). The prosecutor also made other comments in rebuttal that tended to mitigate the inflammatory nature of his "Islamic warrior"

remarks; for instance, he stated that "this is unique trait identification. This is not religious prejudice. This is about who did what, and who fired the shots." DE 8-11, Trial Tr. Vol. 9, Page ID 2833. Because Majid has not shown that the state court's decision was unreasonable or contrary to clearly established federal law, we affirm the district court's denial of this claim.

IV.

In his petition, Majid argued that the trial court denied him a fair trial by allowing the prosecutor to elicit testimony from Franklin III about the meaning of certain Islamic terms. By admitting the meanings of these terms into evidence, Majid claimed, the trial court admitted irrelevant evidence that served only to inflame the jury's passions. The Ohio Court of Appeals held that the trial court did not abuse its discretion in admitting the testimony because Franklin III's understanding of Islamic terms "was relevant to establish why the witness[] remembered appellant and his distinctive tattoos." *Majid*, 2012 WL 986127, at *10. While the state court's conclusion about relevance is shaky at best, admission of the testimony did not rise to the level of a constitutional violation.

A.

"[E]rrors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus." *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983) (citing *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976) and *Reese v. Cardwell*, 410 F.2d 1125 (6th Cir. 1969)); *see also Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Instead, "[f]ederal habeas courts review state court evidentiary decisions only for consistency with due process." *Coleman v. Mitchell*, 268 F.3d 417, 439 (6th Cir. 2001) (citing *Patterson v. New York*, 432 U.S. 197, 202 (1977)). "State court evidentiary rulings do not rise to the level of due process violations unless they 'offend . . . some principle of justice so rooted in the traditions and conscience of our

people as to be ranked as fundamental.'" *Id.* (alteration in original) (quoting *Patterson*, 432 U.S. at 202).

B.

This court almost never grants habeas relief based on state court evidentiary decisions, and this is not the exceptional case where the court's decision was so unfair as to amount to a due process violation. As the state court noted, Franklin III's understanding of the term "jihad" was tangentially relevant, since his familiarity with the word made it more likely that he would remember it. *Majid*, 2012 WL 986127, at *10. Admission of the remaining proof about Franklin's understanding was minimally damaging. In *Walker*, where we did find that evidentiary errors violated the petitioner's due process rights, there were numerous pieces of irrelevant and damaging evidence admitted at trial, including insinuations that defense witnesses were being improperly coached, improper speculations, and prejudicial newspaper clippings. 703 F.2d at 962–68. There, we concluded that "the *cumulative* effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness." *Id.* at 968 (emphasis added). Here, Majid only challenges on due process grounds the admission of the meaning of certain Islamic terms, and the evidence was presented to the jury over two pages of the 1,500-plus page trial transcript. Since at least some of the evidence had some relevance to Franklin III's identification of Majid, and the evidence played a minimal role in the state's case, its admission did not violate due process. We therefore affirm the district court's denial of this claim.

V.

Even assuming that there was constitutional error, Majid is not entitled to habeas relief unless he can show that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A "substantial or injurious effect or influence" means "actual

prejudice." *See id.* at 637–38; *see also, e.g.*, *Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Gover v. Perry*, 698 F.3d 295, 299 (6th Cir. 2012). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (emphasis removed) (quoting *Kotteakos*, 328 U.S. at 764–65). We do not think that Majid meets *Brecht*'s "substantial and injurious effect" requirement.

If there was error in Majid's trial, it was not "so pronounced and persistent that it permeate[d] the entire atmosphere of the trial." *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (quoting *United States v. Thomas*, 728 F.2d 313, 320 (6th Cir. 1984)). Even assuming that all of the challenged questions and remarks were constitutionally erroneous, they played a miniscule role in Majid's entire trial. Moreover, although discussion of "Jihad" had the potential to inflame the jury, Majid's "Jihad" tattoo was central to his identification by multiple witnesses and therefore necessitated at least some discussion. Additionally, during closing arguments, Majid's attorney repeatedly stressed the theory that Majid was unfairly targeted because of anti-Muslim bias, meaning the jurors were made aware of the potential for anti-Muslim bias to infect their verdict. While awareness of bias does not, of course, eliminate it, we think that the defense succeeded in putting the jury "on notice" that convicting Majid based on any perceived offensiveness of his tattoos or his religious beliefs was improper. Finally, while a bare sufficiency of the evidence inquiry is not appropriate in actual prejudice analysis, this court does consider the strength of the case against the defendant in determining whether the *Brecht* standard is met. *See Cristini v. McKee*, 526 F.3d 888, 902 (6th Cir. 2008) (finding harmless error in part because "the case against the Petitioner was strong"); *Pritchett*, 117 F.3d at 964–65 (finding harmless error

where, among other considerations, "the competent proof of Petitioner's guilt was abundant"). Here, there was strong evidence against Majid and consequently, we conclude that any error was harmless.[6]

VI.

For the foregoing reasons, we affirm the judgment of the district court.

[6] Majid argues that the court should consider the prosecutor's comments in light of President Obama's announcement of Osama bin Laden's death the night before closing arguments. The prosecutor did not mention Osama bin Laden or bring news of his death into the trial in any way. Any role that the news of bin Laden's death played in the jury's deliberations would be pure speculation. Also, Majid raises this argument for the first time on appeal. We therefore do not consider it here.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Arif Majid,

Petitioner

v.

D. Morgan, Warden,

Respondent

Case No. 1:13CV843

ORDER

This is a state prisoner's habeas case under 28 U.S.C. § 2254.

After a 2011 trial in the Common Pleas Court of Cuyahoga County, Ohio, a jury convicted the petitioner, Arif Majid, of murder, attempted murder, and having a weapon while under a disability. *State v. Majid*, 2012-Ohio-1192 (Ohio App.).

The evidence showed that Majid fired six gunshots into a crowded bar after fighting with the management, killing one patron and wounding two others:

> [O]n the night of September 3, 2005 and the early morning hours of September 4, 2005, [Majid] went to Milton's Lounge in Euclid, Ohio. The bar had a crowd of approximately fifty people at the time, slightly under maximum capacity. [Majid], described as a light skinned African American male, was accompanied by his brother, Lecarlton Parker, who was described as a dark skinned African American male and two of Lecarlton's friends, Christopher Core and Clifton Harris. Witnesses inside the bar described [Majid] and his group as "rowdy." While on the bar's dance floor, [Majid] twice removed his shirt and was asked by bar employees to re-dress. A number of witnesses reported taking notice of distinctive tattoos on [Majid]'s bare torso, including a prominent "jihad" tattoo across his back and shoulders. [Majid]'s group was eventually asked to leave by bar management after an unknown member of the group dropped a drink on the dance floor. While witness accounts at trial were conflicting as to whether [Majid]'s group left the bar on their own accord, which bar employees escorted the group out, whether the group left with or without making a

disturbance and whether threats were made as the group was leaving, all witnesses agreed that the group did exit the bar.

[Majid] and Lecarlton remained on the sidewalk outside the bar, visible through the bar's front picture window. Milton Franklin, Jr., the bar's owner, asked the men not to loiter outside the bar but his request was ignored. Milton Franklin III, the son of Milton Franklin, Jr., and an employee of the bar, joined the confrontation just outside the bar's door and angry words were exchanged between Milton Franklin III and the men. Christopher Core testified that he and Clinton Harris had walked back to their car while [Majid] and Lecarlton remained. Core testified that he heard Lecarlton exchange angry words with another man. Milton Jr. brought Milton III back inside the bar and began to close and lock the front door when someone outside of the bar punched the small square window in the bar's door, causing it to crack. A witness in the parking lot indicated that a darker skinned man punched the door's window and D.N.A. evidence was introduced that Lecarlton had left traces of blood on the small window.

Milton III responded by pulling a gun and, from the bar's doorway, firing what he described as warning shots in the direction of [Majid] and Lecarlton. Christopher Core testified that after he heard gunshots he heard [Majid] shout, "somebody tried to shoot my brother" and [Majid] and Lecarlton retreated into the parking lot while Milton III went into the bar and Milton Jr. locked the door.

[Majid] and his brother were seen running back to the bar and shortly thereafter the small window in the bar door was fully knocked out and a light skinned arm was extended through the window holding a gun and at least two shots were then fired into the bar. The bar's bouncer, Wesley Williams, struggled with the gun arm until it was retracted through the door. Paulette Shelton testified that she was able to see through the window of the door and she identified [Majid] as the shooter to whom the gun arm belonged.

Witnesses testified that after the arm holding a gun was extracted from the window they saw [Majid], outside the bar's front picture window point his gun at the bar and begin firing. Witnesses recognized [Majid]'s face due to the attention he drew to himself earlier on the dance floor. Milton III testified that at the time of the shooting through the picture window, he was standing in front of the window inside of the bar when [Majid] saw him through the window and began shooting in his direction.

Three bar patrons were struck by bullets as a result of the shooting. Jerome Thomas was shot twice and died as a result of his wounds. Rayshawn Whitsett was shot in the hip and Marcus Barnes was shot in both legs.

Id. at ¶¶7–12.

The Ohio Court of Appeals affirmed Majid's convictions, but remanded for resentencing. On remand, the trial court imposed an aggregate sentence of forty-three years' to life imprisonment. The Ohio Supreme Court declined Majid's ensuing application for discretionary review. *State v. Majid*, 132 Ohio St. 3d 1464 (2012) (Table).

Majid then filed a habeas petition in this court, raising twelve grounds for relief. (Doc. 1).

Pending is Magistrate Judge Knepp's Report and Recommendation (R&R), which recommends that I deny relief. (Doc. 22). Majid has filed a one-hundred-and-thirty-three-page objection. (Docs. 35, 35–1, 35–2, 35–3).

For the following reasons, I overrule the objections, adopt Magistrate Judge Knepp's R&R as the order of the court, and deny the petition. I also issue a certificate of appealability on Majid's prosecutorial-misconduct claim.

Discussion

Because the R&R contains a comprehensive discussion of the evidence, Majid's claims, and the relevant law, I presume the reader's familiarity with it and proceed directly to Majid's objections.

A. Claims 1 and 11: Sufficiency of the Evidence

Majid's first claim is that the evidence was insufficient to convict him of murder.

He contends no reasonable jury could have found him guilty because: 1) the blood found on the bar's broken window did not match his blood type; 2) the eyewitnesses' descriptions of the shooter did not match his appearance; 3) one witness heard gunshots at the same time he saw Majid sitting in a car, not firing a gun; and 4) there was no evidence of intent to kill. (Doc. 1 at 7).

In his eleventh claim, Majid contends the evidence does not support his conviction for the attempted murder of Marcus Barnes. Because Barnes did not testify, Majid argues the jury had no basis on which to convict him of attempted murder. (Doc. 1 at 27–28).

Magistrate Judge Knepp concluded Majid procedurally defaulted his first claim in part, as he did not present the first three factual bases of the claim to the Ohio Supreme Court. (Doc. 22 at 14–15). The Magistrate Judge then found that, to the extent Majid preserved the claim, the state appellate court reasonably concluded that ample evidence supported the convictions. (*Id.* at 30–35).

Majid objects to the default ruling on two grounds. He contends that: 1) he raised this claim as a federal claim during his direct appeal; and 2) his appellate brief presented all factual bases of the claim to the state courts. (Doc. 35 at 18–22).

On the merits, Majid argues that "[t]he jury could only extract a reasonable speculation as oppose[d] to sufficient evidence that [he] is guilty of the crime." (Doc. 35–2 at 14–17).

These objections lack merit.

First, there is no question that Majid's sufficiency-of-the-evidence claim raised a federal question, and the Magistrate Judge never suggested otherwise. Majid's objection is beside the point.

Second, there is likewise no question that Majid did not fairly present the first three factual bases of his sufficiency claim to the Ohio Supreme Court. *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (purpose of fair-presentment requirement is to "provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim") (internal quotation marks omitted).

In attempting to show otherwise, Majid relies, not on his Ohio Supreme Court pleadings, but on the *pro se* brief he filed in the Court of Appeals. (Doc. 35 at 22). My review of the former pleading confirms what the Magistrate Judge found, and I therefore adopt his default ruling.

Third, I agree with the Magistrate Judge that it was reasonable for the Ohio Court of Appeals to conclude there was sufficient evidence for a conviction on the murder and attempted-murder charges.

As the Court of Appeals found, "[f]our separate witnesses . . . testified to seeing [Majid] fire the gunshots that came into the bar through the picture window." *Majid*, *supra*, 2012-Ohio-1192, at ¶21. Another witness testified she saw Majid "fire the shots that came through the window in the bar's door." *Id.* All had seen Majid before the shooting, when his rowdy behavior on the dance floor, and his unique tattoos, drew the crowd's attention to him.

Moreover, the prosecution introduced evidence that Majid "fired specifically at Milton Franklin III[.]" *Id.* at ¶25. It was Franklin III who had fired several "warning shots" in Majid and his brother Lecarlton's direction after Lecarlton broke one of the bar's windows. This testimony supplies some evidence of Majid's motive and intent.

That Majid's bullet happened to strike and kill Jerome Thomas, rather than Franklin III, does not undermine the conviction, given Ohio's transferred-intent doctrine. *See id.* ("an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim").

Finally, the Court of Appeals concluded that, notwithstanding the absence of Barnes's testimony, the testimony of eyewitness Rayshawn Whitsett, the testimony of the lead detective, and

medical records sufficed to show "Barnes received gunshot wounds to both his legs as a result of this shooting." *Id.* at ¶27.

This evidence, taken in the light most favorable to the prosecution, established Majid's guilt of murder and attempted murder beyond a reasonable doubt. Because the state court acted reasonably in affirming the convictions, I overrule Majid's objection.

B. Claim 2: Suggestive Identification

Majid's second claim is that the out-of-court identification procedure by which several witnesses identified him as the shooter was unduly suggestive. (Doc. 1 at 9).

Magistrate Judge Knepp concluded that this claim is defaulted because the state appellate court rejected it on an independent and adequate state-law ground: Majid did not include in the record on appeal a transcript of the hearing on his motion to suppress the identification. (Doc. 22 at 17).

The state appellate court ruled that it was Majid's burden "when urging on appeal that evidence was improperly admitted . . . to include in the record a transcript of all evidence relevant to the findings or conclusions and to illustrate any error by reference to them in the record." *Majid*, *supra*, 2012-Ohio-1192, at ¶35 (quoting Ohio App. R. 9). Given the missing record, the appellate court held that it had "no choice but to presume the validity of the lower court's proceedings, and affirm." *Id.* at ¶36.

Majid's objection does not provide a plausible basis for rejecting Magistrate Judge Knepp's ruling, nor does he suggest there are grounds on which to excuse his default. (Doc. 35 at 23–24).

I therefore hold that the state court's reliance on Appellate Rule 9 was an independent and adequate ground of decision that blocks habeas review of the suggestive-identification claim. *Braun*

v. Morgan, 2014 WL 814918, *33 (N.D. Ohio) (Nugent, J.) (non-compliance with Ohio App. R. 9 constitutes procedural default).

C. Claim 3: Prosecutorial Misconduct

In his third ground for relief, Majid alleges the prosecutor engaged in pervasive misconduct. (Doc. 1 at 10–11). He contends the prosecutor:

- misused a photo array while questioning witness Robert Sanders;
- withheld a "[m]issing photo array" and was otherwise responsible for "[s]uppression and missing of [*sic*] evidence" (*id.* at 11);
- insinuated that the defense's expert on eyewitness identifications, Dr. Solomon Fulero, had "engaged in some alleged coercion with defense counsel" and "was a drug dealer" himself (*id.*);
- asked witness Rayshawn Whitsett about his understanding of the concept of "jihad" and witness Milton Franklin III to define "[I]slamic terms" and discuss his father's religion (*id.*);
- argued to the jury that the tattoos on Majid's back, including the terms "Mujahid" and "Jihad" and a depiction of a sword, were evidence of guilt and dangerousness (*id.*); and
- characterized Majid as an "Islamic warrior," a "coward," and "an embarrassment to the religion he professes to serve." (*Id.*).

The Magistrate Judge rejected this claim as defaulted in part and meritless in part. (Doc. 22 at 18–20).

Magistrate Judge Knepp first concluded that the state appellate court rejected Majid's claim *vis-a-vis* the questioning of Sanders on the independent and adequate state-law ground that Majid did not make a contemporaneous objection. (*Id.* at 18–19). The Magistrate Judge then determined Majid did not fairly present his claim concerning the allegedly suppressed or missing evidence to either the state appellate court or the state supreme court. (*Id.* at 19–20).

Finally, the Magistrate Judge ruled that the Ohio Court of Appeals reasonably rejected Majid's claims regarding the questioning of Dr. Fulero, the prosecutor's examination of Franklin III, and the prosecutor's references to Majid's tattoos in summation. (*Id.* at 35–40).

1. Use of Photo Array while Questioning Sanders

Majid first objects that, contrary to statements in the Court of Appeals's opinion and the R&R, he did, in fact, object to the prosecutor's use of a disputed photo array while questioning Sanders. (Doc. 35 at 27–30). According to Majid, his trial lawyer made a "continuing objection" to all "identification" testimony, including Sanders's testimony. (*Id.* at 27–28).

Like the Magistrate Judge, I find that the parts of the record on which Majid relies (*see* Doc. 8–7 at 160–61) do not substantiate his continuing-objection argument.[1] Accordingly, the state appellate court's invocation of the contemporaneous-objection rule to reject this claim worked a procedural default. *Scott v. Mitchell*, 209 F.3d 854, 873 (6th Cir. 2000).

In any event, the state court's rejection of the claim on the alternative ground that Majid did not show plain error was reasonable. *Cf. Fleming v. Metrish*, 556 F.3d 520, 530–32 (6th Cir. 2009) (Ohio Supreme Court's review of defaulted *Miranda* claim for plain error was a merits adjudication for purposes of § 2254(d)); *accord Frazier v. Jenkins*, 770 F.3d 485, 506 (6th Cir. 2014) (Sutton, J., concurring in judgment).

According to the state appellate court:

> Appellant argues that the prosecutor took from appellant's counsel a photocopy of a photo array containing a picture of appellant and his tattoos, marked it State's

[1] Indeed, the record shows that defense counsel's continuing objection had nothing to do with Majid's current prosecutorial-misconduct claim. Rather, counsel objected that: 1) the prosecutor should not publish any exhibit to the jury before the court had ruled on its admissibility; and 2) the identification process violated Ohio law. (Doc. 35 at 28).

> Exhibit 241, and improperly used the exhibit during Robert Sanders's testimony. Furthermore, Sanders confusingly testified that pencil markings on the exhibit were his own. Appellant's counsel did not object to the prosecutor's use of this document.
>
> * * *
>
> Even accepting as true appellant's contention that the prosecutor's actions in using the appellant's exhibit were improper, neither his rights were affected nor was he prejudiced because State's Exhibit 241 was a photocopy of the photo array originally shown to Sanders by the police and appellant's attorney cross-examined Sanders on the matter. Although Sanders initially testified that the pencil markings were his own, he eventually agreed that they may not be his markings. He was nonetheless positive that he chose the appellant in the original photo array.

Majid, *supra*, 2012-Ohio-1192, at ¶¶44, 46.

The state court found, in other words, that defense counsel had a full opportunity to question Sanders about the "improper" photo array. This was not, moreover, a close case: several eyewitnesses identified Majid as the shooter after getting a good look at him shortly before the shooting. In short, the prosecutor's conduct neither compromised the integrity of the trial nor prejudiced Majid. The state court's no-plain-error determination was accordingly reasonable and precludes habeas relief. *E.g. Bobby v. Dixon*, — U.S. —, 132 S. Ct. 26, 27 (2011) (habeas relief unavailable unless state court "erred so transparently that no fairminded jurist could agree with that court's decision").

2. Suppressed or Missing Evidence

I also agree with the Magistrate Judge that Majid's appellate-court brief "raised only the allegations that the initialed photo arrays were missing from the evidence produced [before trial] and that two different police reports existed." (Doc. 22 at 19–20). In the Ohio Supreme Court, however, Majid abandoned his claim about the missing police report and argued only that the initialed photo

arrays (i.e., photo arrays on which certain witnesses had written their initials) were "missing." (Doc. 8–2 at 223–24).

Accordingly, I concur in the R&R's recommendation that Majid defaulted all claims respecting suppressed or missing evidence, save for his challenge to the initialed photo arrays.

That claim, however, has no merit, as Magistrate Judge Knepp correctly found:

> Last is Petitioner's allegation that initialed photo arrays were missing from the evidence produced to the Petitioner before trial as a result of prosecutorial misconduct; a failure which ultimately led to a violation of his due process rights. (Doc. 19, at 46–48). In support of this argument, Petitioner cites to the trial transcript, however upon reviewing the transcript citations the Court can find no mention of missing initialed photo arrays at the citations marked. Nor is there any evidence that these alleged missing photo arrays were purposefully excluded by the direction or with the knowledge of the prosecutor or the police, in fact the Detective in charge of the investigation stated he turned over all related documents. (Doc. 1–4, at 106–07).

(Doc. 22 at 40–41).

Majid's objection provides no basis for overturning the Magistrate Judge's recommendation. Indeed, his objection to the R&R likewise fails to cite any part of the record that establishes the prosecution suppressed evidence. (Doc. 35–1 at 4–6).

I therefore overrule Majid's objection and adopt the Magistrate Judge's recommendation.

3. Cross-Examination of Dr. Fulero

The state appellate court rejected Majid's claim that the prosecutor had "insinuat[ed] that . . . Dr. Fulero[ ] was coerced during cross-examination":

> Appellant next argues that the cross-examination of his expert witness, Dr. Soloman [*sic*] Fulero, was improper. In the cross-examination of Dr. Fulero, the prosecutor challenged Dr. Fulero's bias and character traits.
>
> Under Evid. R. 611(B), "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." "The limitation of * * * cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular

> facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre*, 6 Ohio St. 3d 140, 145, 451 N.E.2d 802 (1983). However, "[i]t is improper for an attorney, under the pretext of putting a question to a witness, to put before a jury information that is not supported by the evidence." *State v. Smidi*, 88 Ohio App.3d 177, 183, 623 N.E.2d 655 (6th Dist. 1993).
>
> The prosecutor asked Dr. Fulero if his step-son was currently serving a prison sentence for committing a homicide and if he ever shipped marijuana in the 1970's in order to determine whether he had a potential bias against the state. The scope of cross-examination of an expert on "questions of the expert's bias and pecuniary interest and the admissibility of evidence relating thereto are matters that rest in the sound discretion of the trial court." *Calderon v. Sharkey*, 70 Ohio St. 2d 218, 436 N.E.2d 1008, at syllabus (1982). Evid. R. 616(A) includes certain acceptable methods of impeaching witnesses: "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."
>
> Because the prosecutor's cross-examination questions were made in order to determine Dr. Fulero's potential biases, the issue remains within the discretion of the trial court. We find no abuse of discretion based upon the record.

Majid, *supra*, 2012-Ohio-1192, at ¶¶47–50.

In concluding that this decision was a reasonable application of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Darden v. Wainwright*, 477 U.S. 168 (1986), Magistrate Judge Knepp emphasized two points.

First, he noted that Majid had no evidence suggesting that the predicates of the prosecutor's questions were untrue. (Doc. 22 at 38). Second, he noted that the focus of the prosecutor's questioning was a permissible one: to probe the doctor's supposed bias against the prosecution. (*Id.*).

Majid's objection simply repeats his argument to the Magistrate Judge that this questioning was improper. (Doc. 35–3 at 12–14).

He offers no proof – and, more importantly, points to no evidence in the record before the state appellate court, *cf. Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) – that the prosecutor

knew or should have known that the predicates of his questions were untrue. Indeed, Dr. Fulero admitted that his son was in prison for homicide, but he denied having shipped marijuana in the 1970s.

Although Fulero demurred to the latter question, Ohio law permitted the prosecutor to inquire into that area provided he had a good-faith basis for doing so. *E.g.*, *State v. Gillard*, 40 Ohio St. 3d 226, 231 (1988). Once again, however, Majid has not shown the prosecutor lacked a good-faith basis to ask the question.

It was therefore reasonable for the state court to reject the prosecutorial-misconduct claim, and proper for the Magistrate Judge to recommend that § 2254(d) barred Majid from relitigating the claim in this court.

4. Examination of Whitsett

Majid's next contention is that the prosecutor improperly questioned Rayshawn Whitsett about his religion.

In his answer, the Warden recognized that Majid alleged that the prosecutor engaged in misconduct by questioning "Rayshawn Whitsett about his emotional view of the word jihad." (Doc. 8 at 15). Yet the Warden's brief ignored that claim and presented the Magistrate Judge with no basis for rejecting it. (*Id.* at 29–31) (procedural-default arguments in opposition to prosecutorial-misconduct claim); (*id.* at 53–59) (merits arguments in response to prosecutorial-misconduct claim).

The Warden's error, of course, does not permit me simply to issue the writ. Instead I must review the record to determine whether, as a result of the prosecutor's actions, Majid is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

First, a review of Majid's state-court briefs shows that he presented this claim to the Ohio Court of Appeals (Doc. 8–2 at 86–87), but not to the Ohio Supreme Court (*id.* at 223–25). The claim is therefore subject to a clear procedural default that, had the Warden invoked it, would bar me from addressing the claim. But the Warden, having failed to raise that default in his answer, has forfeited the defense. *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004).

Federal courts "have discretion, in exceptional cases, to consider a nonexhaustion argument inadverten[tly] overlooked by the State in the District Court." *Wood v. Milyard*, — U.S. —, 132 S. Ct. 1826, 1830 (2012). Unfortunately, this type of attorney error is hardly exceptional; it is, in fact, all too common.[2] I therefore decline to overlook the Warden's forfeiture.

Second, even though Majid presented his claim about Whitsett to the Court of Appeals, that court did not address it on the merits. *See Majid*, *supra*, 2012-Ohio-1192, at ¶¶38–56. Accordingly, my review is de novo. *Carter v. Mitchell*, 693 F.3d 555, 562 (6th Cir. 2012).

Whitsett, one of the attempted-murder victims, testified that he had spent two years in the United States Air Force. At the time of the shooting and the trial, he was on Reserve status. (Doc. 8–6 at 19). On the night of the shooting, he saw a group of patrons at Milton's Lounge causing a disturbance. As a bouncer escorted the group from the bar, Franklin III noticed that one member of the group was not wearing a shirt:

Q: Was everyone wearing a shirt or something covering their upper body?

A: Came to a point where one gentleman wasn't wearing a shirt any more.

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[2] *E.g.*, *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis*, --- F. Supp. 3d ----, 2015 WL 3505793 (S.D. Ohio 2015) (Carr, J., sitting by designation) (failure to raise affirmative defense in counterclaim); *Coupled Prods., LLC v. Modern Mach. Tool Co.*, 2014 WL 293659, *6 (N.D. Ohio) (Carr, J.) (failure to raise affirmative defense in answer); *Brooks v. Rudolph-Libbe, Inc.*, 2014 WL 1515546, *2 (N.D. Ohio) (Carr, J.) (same).

Q: During what period of the events are you covering?

A: On his way out he didn't have a shirt on.

Q: Okay. And was this the only individual without a shirt?

A: Yes. I can – yes.

Q: Do you recall anything unusual about that person's upper body?

A: Yes.

Q: What do you recall?

A: He had, he was a built guy. He had some tattoos.

* * *

Q: And you said tattoos?

A: Yes.

Q: What do you recall about the tattoos?

A: He had some on his, between his shoulder, elbow, a couple there.

* * *

Q: Any other tattoos besides on the upper arm?

A: It was on his back.

Q: Did you get a view of what was on his back?

A: Yes.

Q: What do you remember about what was on his back?

A: Across the top part it said Jihad, and above was a cross.

Q: Being in the military, did Jihad have significance to you?

[Defense counsel]: Objection.

The Court: Approach the bench, bring the record.

State your objection, please.

[Defense counsel]: The question of whether a man in the United States military that the word Jihad has any significance has no relevance with respect to the matter before this Court. It's simply to inflame the jury with respect to the fact that it means holy war and that has nothing to do with any religious beliefs here. And this witness is not competent on whether or not what that significance of a tattoo means on a person's back.

The Court: Mr. [prosecutor]?

[The prosecutor]: I believe it's relevant.

The Court: Well, I believe the only thing relevant is whether or not he remembers that tattoo and why he remembers that tattoo not any editorializing on your behalf. But it would be relevant as to the test of memory as to why a person remembers any fact, be it a tattoo or any other fact.

But you should not lead the witness, nor editorialize on what you think is the basis of his memory on any point.

[The Prosecutor]: Thank you, Your Honor.

Q: You saw Jihad where on the person's body?

A: Yea.

Q: Where was it?

A: Top part – top part of the back.

(*Id.* at 36–39).

Majid contends the prosecutor's question was improper, as the prosecutor intended it to stoke the jury's prejudice against him.

As Magistrate Judge Knepp recognized, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Majid must do more than show that the prosecutor's conduct was "undesirable or even universally condemned." *Darden*, *supra*, 477 U.S. at 181. He must instead show that the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

Majid has not carried that burden.

As the trial court suggested, the prosecutor was likely "editorializing" – injecting, in other words, his own opinion into the case – when he asked whether the word "Jihad" held any special significance for Whitsett, a member of the Armed Forces. Indeed, Whitsett never testified that it was the supposed "significance" of the word "Jihad" to him, as a serviceman, that helped him remember seeing the tattoo.

The question also directed the jury to focus, not on whether the nature of Majid's tattoo made it more likely that Whitsett was testifying accurately, but on what "Jihad" signified to Whitsett in his capacity as an American service member. Had Whitsett answered the question, his response would have been entirely irrelevant[3] and quite likely prejudicial.

The question was, in short, problematic.

But even if the question were improper, Majid has not proved that the question amounts to "flagrant" misconduct. *U.S. v. Al-Din*, 631 F. App'x 313, 334 (6th Cir. 2015).

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[3] This is especially so, given the prosecutor's later acknowledgment that there was "no sort of religious undertone" to the dispute between Majid and the management of Milton's Lounge. (Doc. 8–9 at 150).

Most importantly, the trial court effectively sustained defense counsel's objection. That is, the court heard the lawyers at sidebar and suggested that the prosecutor move on, and not "editorialize." When the prosecutor resumed his examination of Whitsett, Whitsett did not answer the prior question, and the prosecutor did not repeat it.

Furthermore, this was the only question during the prosecutor's examination of Whitsett that Majid challenges as misconduct. At the same time, the question was obviously a deliberate one, and it was of a piece with the prosecutor's examination of Milton Franklin III, *infra*, at pp. 17–25, and his comments during closing argument, *infra*, at pp. 25–28.

Finally, the evidence against Majid was compelling and corroborated.

For all these reasons, I conclude Majid has not proved that the prosecutor's questioning of Rayshawn Whitsett amounted to "flagrant" misconduct. I therefore deny this claim for habeas relief.

5. Examination of Franklin III

Majid's next claim is that the prosecutor improperly questioned witness Milton Franklin III about certain Islamic terms, his beard and the Kufi he wore at Majid's trial, and his father's religious affiliation. According to Majid, these questions were part of a larger scheme "to associate [him] with Muslim 'Islamic Warriors' of the current political nature of wars in Iraq, Syria, Afghanistan, and other terrorists[.]" (Doc. 35–3 at 8).

a. Background

My review of the state-court record shows that the complained-of questions fell into two categories.

When the prosecutor began questioning Franklin III, he asked him to explain why he was wearing "prison orange" – i.e., a prisoner's orange jumpsuit. (Doc. 8–9 at 130). Franklin III

responded by describing his lengthy criminal record and the charges for which he was then serving a substantial prison term. (*Id.* at 130–33).

The prosecutor then veered, for reasons that are not apparent, into questions about Franklin III's adherence to Islam. He elicited the fact that Franklin was a Sunni Muslim. (*Id.* at 132). He inquired into whether Franklin III's Kufi had "religious significance" for him. (*Id.*) He asked whether Franklin III's faith motivated him to wear a beard. (*Id.*). And he established that Franklin III's father was a Christian. (*Id.* at 132–33).

The second category of Islam-related questions came when the prosecutor asked Franklin III to describe his own tattoos. (*Id.* at 141). Franklin III testified that he did not have "any words [tattooed on him] that would reference your religion." (*Id.*). The prosecutor then had this exchange with him:

> Q: Do you have anything on your body like, Military Mind?
>
> A: No.
>
> Q: There is an Arabic greeting, and I don't know, maybe you can place it in context for me because I don't pretend to be knowledgeable about it, I just know of it. It begins with, I believe, Salam and another word?
>
> A: Assalamu Alaikum.
>
> Q: Can you slow that down and sound it out please?
>
> A: Assalam U Alaikam.
>
> Q: What does that mean?
>
> A: Peace be onto you.
>
> Q: Can you spell that for us, please?
>
> A. A-S-S-L-A-A-M, U, A-L-A-I-K-U-M.

Q: And for practitioners of Islam, how is it used?

A: As a greeting to other Muslims.

Q: Peace be unto you?

A. Yes.

Q: Are you familiar with the term Mujahid?

A: Yes.

Q: What does it mean to you?

[Defense counsel]: Objection.

The Court: Overruled. He may answer.

A: One who is struggling with things in the world. It could be your addiction to, you know, things that you know are outside of Islam. And it can also be interpreted as a soldier, but that's really an incorrect definition.

Q: Are you familiar with the term Jihad, J-I-H-A-D?

A: Yes.

[Defense counsel]: Objection.

The Court: Overruled.

Q: What does it mean to you?

A: Jihad is actually like the root word of Mujahid which means struggle to which you are trying to overcome. It could be strife in your nation, it could be, like I said, your addiction of doing things that you know are contrary to your beliefs of Islam. But it's also a lot of times misconstrued to mean war.

[Defense counsel]: Objection.

The Court: Sustained.

(*Id.* at 141–43).

Franklin III went on to testify that a man inside Milton's Lounge, whom he later identified as Majid, took off his shirt off and had "Islamic terms, Arabic terms" tattooed on his body. (*Id.* at 150). He did not testify as to what specific "Islamic terms" he saw on Majid's back, though he did say, in two pretrial statements he gave to police, that he saw a "Jihad tattoo" and "two swords on [Majid's] back." (*Id.* at 185, 189).

After taking the jury on this detour into Franklin III's understanding of his own religion, the prosecutor wrapped-up this part of the examination by emphasizing that the case had nothing to do with religion:

> Q: Is there anything about that, given what we have already discussed, your religious orientation, does that have any role here in what we're going to cover?
>
> A: No.
>
> Q: So, although you're seeing these religiously themed tattoos, we can agree there is no sort of religious undertone to this problem?
>
> A: No.

(*Id.* at 150).

b. State Court's Decision

On direct appeal, Majid challenged the propriety of the prosecutor's examination of Franklin III. The Ohio Court of Appeals was agnostic on that question, but concluded that the comments were not prejudicial:

> Appellant next argues that the state engaged in prosecutorial misconduct when the prosecutor questioned Milton Franklin III concerning his Kufi and beard, his father's religious association and the definitions of Islamic terms, including Assalaamu Alaykum, Mujahid and Jihad. "[I]t is improper for the state to rouse the jury to convict merely by exciting their indignation against the defendant, against defense

> counsel, or against the crime itself." *State v. Sawyer*, 8th Dist. No. 79197, 2002–Ohio–1095.
>
> Although we find the prosecutor's line of questioning to be of minimal relevance and straddling the line of impropriety, on this record we cannot find that Milton Franklin III's answers rise to the level of reversible error, as these comments did not deprive appellant of a fair trial.

Majid, *supra*, 2012-Ohio-1192, at ¶¶45–46.

The Magistrate Judge found that this decision was not an unreasonable application of the Supreme Court's prosecutorial-misconduct cases:

> The Eighth District appropriately found that while the prosecutor's questioning of Milton Franklin III was of "minimal relevance and straddling the line of impropriety", it did not rise to the level of egregiousness necessary to deny Petitioner a fair trial. A reviewing court must analyze the alleged misconduct in light of the entire record and the undersigned cannot find the questioning of Mr. Franklin, as to Islamic terms, so outrageous as to pervade the fairness of the entire trial. Mr. Franklin's testimony regarding the tattoos and his acknowledgment that the terms held meaning within his religion are relevant to supporting the credibility of his eyewitness identification. Petitioner's tattoos, as his primary identifier, are relevant regardless of what the tattoos said or stood for, and eliciting testimony regarding the tattoos did not infect the entire trial with unfairness.

(Doc. 22 at 38).

c. Analysis

As already noted, the test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they were "flagrant." *Al-Din*, *supra*, 631 F. App'x at 334.

On the first prong, not even the Warden contends the questions were proper. (Doc. 8 at 57). The state appellate court, for its part, recognized that the questions elicited only marginally relevant information and were almost out-of-bounds. *Majid*, *supra*, 2012-Ohio-1192, at ¶46. And the trial court sustained defense counsel's objection to the question about the meaning of "Jihad," thereby ruling that at least that question was improper.

I therefore conclude that the prosecutor's questions about the meaning of "Mujahid," "Jihad," and "Assalaamu Alaykum" were improper. The closer question is whether the Ohio Court of Appeals's decision that these questions were not flagrantly improper was reasonable.

Under that flagrancy prong, a court considers four factors: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberate or accidentally made; and (4) whether the evidence against the defendant was strong." *Al-Din*, *supra*, 631 F. App'x at 334.

According to the Warden, "[i]t cannot be said that the questions so infected the trial with unfairness so as to make the resulting conviction a denial of due process." (Doc. 8 at 57). To support that conclusion, he argues, somewhat inconsistently with his refusal to defend the questions as proper, that Franklin's answers were relevant because the fact that certain Islamic terms "had meaning for him supported his eyewitness identification of Majid." (Doc. 8 at 57).

If that were true, one might expect to find the prosecutor making an argument along those lines in summation.

But the prosecutor made no such argument. He was apparently content to argue that it was the multiple identifications of Majid – based in part on his unique tattoos, and entirely apart from whatever significance the tattooed terms might have had for Franklin III – that proved his case. (Doc. 8–11 at 62–63; *see also id.* at 29 ("And why did he stand out? There was the manner of the dance in which the group was performing, but there was also the tattoos on the defendant. You also heard that he had multiple tattoos on his chest and his stomach and on his back.")).

The state appellate court gave no explanation for its conclusion that the prosecutor's questions "did not deprive appellant of a fair trial opinion." *Majid*, 2012-Ohio-1192, at ¶46.

But § 2254(d) requires only that the state court do its homework, not that it also show its work. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). And though neither the Court of Appeals nor the Warden identified a reasonable basis for rejecting Majid's claim, it is nevertheless possible to discern one from the record.

First, as I have already noted, the case against Majid was weighty: five eyewitnesses saw Majid standing outside of Milton's bar and firing a gun into the crowded space. Majid's tattoos provided a unique identifier, bolstering the reliability of those identifications. And there was evidence of Majid's motive to harm or kill Franklin III

Second, it is hard to see how the challenged testimony could have misled the jury.

The danger it posed was, instead, of inflaming the jury's passions against Majid.

There were, for example, the questions about "Assalaamu Alaykum," a phrase that means "Peace be unto you" – and one that Majid notably did not have tattooed on his back. From there, the prosecutor segued into questions about "Mujahid" and "Jihad," questions that were all but certain to elicit – and in fact elicited – a response about a holy war or struggle.

Of great concern, the prosecutor seemed to harken back to the question about Jihad in summation, when he asked the jury to conceive of Majid as an "Islamic warrior." (Doc. 8–11 at 66).

Yet the trial judge promptly, and properly, sustained the defense's objection to that question, thereby alleviating some of the prejudicial effect of Franklin III's answer. *E.g.*, *Young v. Curley*, 2016 WL 3027205, *3 (W.D. Mich.) (recognizing that court's sustaining of objection can cure prejudice).

The questions about Franklin III's own faith are less troubling. They introduced evidence that was, even by the prosecutor's estimation, irrelevant. (Doc. 8–9 at 150). But while the evidence was irrelevant, I do not see how it was prejudicial to Majid or linked him to "terrorists." (Doc. 35–3 at 8).

Third, there is no question that the prosecutor's conduct was deliberate: the examination of Franklin III about his faith and his understanding of Islamic terminology took up several pages of the transcript. The prosecutor pursued the issue, moreover, despite a prior objection, during his examination of Whitsett, to a nearly identical question, notwithstanding the trial court's instruction to refrain from that kind of "editorializing" about the basis of a witness's memory.

Fourth, the challenged evidence was not exactly extensive, at least in the context of the trial as a whole. Twenty-one witnesses testified at trial, and the transcript of the proceedings runs to some thirteen-hundred pages. (Doc. 8–3 at 3) (index of trial transcript).

But neither was it isolated. It echoed the prosecutor's questioning of Whitsett, and it presaged his closing argument.

In the end, I am unsure whether, had I been sitting on the panel that heard Majid's direct appeal, I would have voted to reject this claim. But the test is not whether the state court's decision was correct; it is whether the decision was "objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, — U.S. —, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks omitted).

The strength of the evidence and the absence of pervasive prejudice are grounds on which a reasonable judge could reject Majid's claim that the prosecutor's misconduct deprived him of a fair trial.

6. Closing Argument

Majid's final contention is that the prosecutor used his closing argument to inflame the jury's passions against him. In particular, Majid challenges the prosecutor's comments about his "Jihad" and "Mujahid" tattoos.

During his rebuttal argument, the prosecutor asked the jury to consider why Majid had tattooed the word "Jihad" on his back:

> What do you think it takes, from your life experiences, to place this body art on yourself as a person; what statement are you trying to make? Stop and ask yourself that question. Mujahid, a rifle, swords, Jihad. Is that a statement of self expression of don't mess with me. I'm a warrior, I'm dangerous. I'm something that you don't want to mess with. I think the average person would agree with those statements.

(Doc. 8–11 at 58–59).

Despite these comments, in which he linked Majid's dangerousness to his Islamic tattoos, the prosecutor immediately acknowledged that "[t]here is nothing that identifies him before you as some sort of Islamic warrior other than the photos that you've seen in evidence, but they are not offered for that purpose." (*Id.* at 59).

Yet, toward the end of the summation, the prosecutor did something of an about-face by asking the jury to picture Majid as "some sort of Islamic warrior":

> No, let's look at [Majid] because the evidence before you is that he fired those shots into that crowd indiscriminately in the sense that he didn't care who was at or near Milton Franklin, III, he didn't care about the rest of the occupants in the bar, innocent women, it didn't matter to him.
>
> If he's this Islamic warrior, if he's got some sort of honor, he should have called Milton Franklin, III, out and said, business outside.

(*Id.* at 65–66).

On direct appeal, the Court of Appeals held that the prosecutor's argument was improper but did not merit a new trial:

> The prosecutor's insinuation that appellant intended his tattoos to express that he was "dangerous" or "something that you don't want to mess with" improperly indicated that appellant was an "Islamic warrior." However, the fact that the prosecutor engaged in some improper argument does not warrant reversal unless the remarks prejudicially affected substantial rights of the accused. *State v. Onunwor*, 8th Dist. No. 93937, 2010–Ohio–5587, ¶ 36. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *Id.*, citing *State v. Lott*, 51 Ohio St. 3d 160, 166, 555 N.E.2d 293 (8th Dist.1990). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St. 3d 358, 2004–Ohio–6548, 819 N.E.2d 1047, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L.Ed.2d 78 (1982).
>
> Using these standards, we see no basis for reversing appellant's conviction based on the prosecutor's comments. Even though some of the prosecutor's argument may have been improper, such comments did not pervade the entire trial, let alone the closing argument. We are unconvinced that the result of appellant's trial would have been different without the above excerpts of improper commentary by the prosecution. We conclude that the improper statements made by the prosecutor during closing arguments did not substantially prejudice appellant so as to deny him a fair trial.

Majid, *supra*, 2012-Ohio-1192, at ¶¶53–55.

Magistrate Judge Knepp concluded that this was a reasonable decision:

> [T]he Petitioner takes issue with the prosecutor's comments during closing arguments that insinuated Petitioner's Islamic tattoos proved he was dangerous, violent, and likened him to a terrorist. (Doc. 19, at 47-50). Upon reviewing the comments made, it certainly appears as if the prosecutor was drawing improper inferences from Petitioner's religion and tattoos; however to find prosecutorial misconduct, the Court does not look to the acts of the prosecutor but rather their effect on the entire trial's fairness. *See Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Lundy v. Campbell*, 888 F.2d 467, 472–73 (6th Cir. 1989). The Court of Appeals concluded that the prosecutor's comments did not rise to the level of reversible error because they did not pervade even the closing argument, let alone the trial as a whole. (Exhibit 1, at 20-21). The Petitioner has not proven that these comments jeopardized the fairness of the judicial process or led the jurors to misconstrue the evidence before them. While the prosecutor's comments were unwarranted, this Court agrees

> that the comments had neither a "substantial [n]or injurious effect or influence on the jury verdict" such that the outcome would have been different had the prosecutor not made those comments.

(Doc. 22 at 39).

I concur with the Magistrate Judge and the Ohio Court of Appeals that the prosecutor's closing argument was improper.

The prosecutor himself took the position that religious stereotypes had nothing to do with the case against Majid. (Doc. 8–9 at 150; Doc. 8-11 at 59). Yet his argument invited the jury to find that Majid was dangerous, and even guilty, because of the Islamic phrases tattooed on his back. The argument was notably untethered to the issue on which evidence of Majid's tattoos was relevant: the identification, by multiple witnesses, of Majid as the shooter.

Later in his rebuttal argument, the prosecutor continued trying to have it both ways.

He told the jury that, while Majid's tattoos arguably "identifie[d] him . . . as some sort of Islamic warrior," the prosecution itself was not taking such position. (Doc. 8–11 at 59). Only a few moments later, however, the prosecutor asked the jury to consider why, if Majid were "this Islamic warrior" – a position the prosecutor just said had no basis in the evidence – he did not ask Milton Franklin III to step outside, instead of firing a gun into Milton's Lounge. (*Id.* at 66).

This misconduct notwithstanding, the state court's judgment that Majid still enjoyed a fair trial was not objectively unreasonable.

As discussed above, the case against Majid was substantial, and, as with the prosecutor's earlier improprieties, the closing argument did not misrepresent evidence or risk misleading the jury. The closing arguments themselves, moreover, were exceedingly brief in relation to the length of the

trial (fewer than forty-five pages for the prosecutor's closing argument, the defense's response, and the prosecutor's rebuttal).

These grounds provide an objectively reasonable, if not entirely convincing, basis for concluding that the prosecutor's misconduct did not violate Majid's right to a fair trial.[4]

* * *

Majid is not entitled to relief on his prosecutorial-misconduct claim.

Nevertheless, I believe that reasonable judges could disagree whether I correctly resolved this issue, and that Majid's claim deserves encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); 28 U.S.C. § 2253(c)(2).

I will therefore grant a certificate of appealability on Majid's claim that the prosecutor engaged in misconduct by: 1) questioning Whitsett about the meaning that certain Islamic terms had for him; 2) examining Franklin III about his religion and asking him to define various Islamic terms; and 3) suggesting to the jury during summation that Majid was an "Islamic warrior" whose tattoos were evidence of dangerousness and guilt.

D. Claim 4: Admission of Prejudicial Evidence

Majid's fourth claim is that the trial court erred by admitting six types of irrelevant and inflammatory evidence:

[4] Majid has also alleged the prosecutor committed misconduct by calling him a "coward" and "an embarrassment to the religion he professes to serve." The prosecutor indeed made these comments, though to the court at sentencing, and not to the jury in closing statements. (Doc. 8–11 at 119–20). These were curious remarks for the prosecutor to make, having previously conceded there was no evidence that Majid was an "Islamic warrior" and that the case had nothing to do with religion. But it is apparent that the prosecutor's statement did not influence the trial court's sentencing decision. (*Id.* at 121–25). Accordingly, Majid is not entitled to relief on this claim, either.

- A questionnaire that the prosecutor "snatched" from the defense table and held in his hand while cross-examining Dr. Fulero;
- Milton Franklin III's testimony about the meaning of certain Islamic terms;
- A photo array that the prosecutor showed to Franklin III that he had not seen before;
- A picture of Majid naked from the waist up;
- The absence of evidence that the prosecution sought to produce Marcus Barnes, one of the attempted-murder victims; and
- A reference to Majid's prior trial.[5]

(Doc. 1 at 12–13).

The Magistrate Judge concluded Majid defaulted the bulk of this claim because, in the Ohio Supreme Court, he challenged only the admission of Franklin III's testimony. (Doc. 22 at 20). Magistrate Judge Knepp then determined Majid could not show cause to excuse the default. (*Id.*).

I agree with both rulings.

First, the only improper evidence that Majid challenged in the Ohio Supreme Court was the testimony of Franklin III. (Doc. 8–2 at 224–25).

Second, Majid's claim that appellate counsel was ineffective for not challenging the five other pieces of evidence in the Ohio Supreme Court cannot excuse that default.

For one thing, Majid has not exhausted that appellate-counsel claim in the Ohio courts. *Cf. Edwards v. Carpenter*, 529 U.S. 446 (2000).

[5] The State of Ohio had previously tried Majid for these crimes and obtained convictions on the majority of charges. But the Court of Appeals tossed out the convictions after finding "extensive evidence . . . that at least one of the jurors slept through numerous portions of the trial[.]" *State v. Majid*, 182 Ohio App. 3d 730, 731 (2009).

For another, Majid had no constitutional right to counsel in pursuing a discretionary appeal in the state supreme court – and thus no right to the effective assistance of counsel. "[A]ttorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which the petitioner was not constitutionally entitled to counsel, including a discretionary appeal." *Tanner v. Jeffreys*, 516 F. Supp. 2d 909, 916 (N.D. Ohio) (Katz, J.).

As for Majid's preserved claim concerning Franklin III's testimony, the state appellate court held that most of that testimony was relevant and properly admitted:

> Appellant argues that the State's questioning of Milton Franklin III regarding the meanings of certain Islamic terms was irrelevant and unduly prejudicial. We disagree. Milton Franklin III testified at trial that he is a Sunni Muslim. Franklin III testified that because of his religious background he recognized the Islamic terms tattooed on appellant's torso when he observed appellant dancing without his shirt and the terms had meaning to him. Appellant further testified that religion had no role in the events of the evening. Franklin III's testimony, as well as other witnesses' testimony regarding appellant's tattoos, was relevant to establish why the witnesses remembered appellant and his distinctive tattoos. As previously discussed, appellant's actions inside the bar, including his behavior on the dance floor and the removal of his shirt to display his tattoos, were the reasons that witnesses took notice of his face and remembered him. This is particularly true of Milton Franklin III, for whom appellant's tattoos had meaning. We cannot say that the trial court abused its discretion in allowing Franklin III's testimony.

Majid, *supra*, 2012-Ohio-1192, at ¶59.

I am in complete agreement with the state court's conclusion that Majid's "actions inside the bar, including his behavior on the dance floor and the removal of his shirt to display his tattoos, were the reasons that witnesses took note of his face and remembered him." *Id.*

But I remain unconvinced that Franklin III's familiarity with the terms "Mujahid," "Jihad," and "Assalaamu Alaykum" – the latter of which Majid did not have tattooed on his body – made

his identification of Majid any more credible or reliable. Franklin III never testified to that effect, nor did the prosecutor ask the jury to draw that inference.

Perhaps, as the state appellate court seemed to suggest, the jury could have drawn that inference from Franklin III's testimony on its own. But that elides the question of whether it was proper for the jury to do so. After all, the Court of Appeals acknowledged that the prosecutor's questions about Islam were of "minimal relevance and straddl[ed] the line of impropriety." *Majid*, *supra*, 2012-Ohio-1192, at ¶46.

At bottom, I do not believe the state court acted unreasonably in rejecting this claim, as the admission of the evidence was, for the reasons discussed in connection with Majid's prosecutorial-misconduct claim, unlikely to deprive Majid of a fundamentally fair trial.

E. Claims 5, 6, 7, 8, and 9: Improper Jury Instructions

Majid's petition raises five jury-instruction claims:

- In his fifth ground for relief, he contends the court's instruction on transferred intent was erroneous and constructively amended the indictment. (Doc. 1 at 16–18).

- Claim six alleges the trial court's use of the phrase "and/or" in the transferred-intent instruction permitted the jury to convict Majid of murder even if the jury did not believe he had an intent to kill. (*Id.* at 17–18).

- Majid's seventh claim alleges that the court issued a causation instruction that "permitt[ed] the defendant to be convicted even if the jury determined that the defendant was innocent[.]" (*Id.* at 20).

- In claim eight, Majid alleges the court instructed the jury that it could convict him of murder or attempted murder even if it determined the shootings were accidental. (*Id.* at 21–22).

- Claim nine alleges the court erred by refusing to tender a lesser-included-offense instruction on involuntary manslaughter and negligent assault. (*Id.* at 24).

The Magistrate Judge concluded that claims five and eight were non-cognizable state-law claims. (Doc. 22 at 26–28). He then determined that the Ohio Court of Appeals's decision rejecting claim six was neither contrary to, nor an unreasonable application of, Supreme Court precedent. (*Id.* at 40–41).

As for claim seven, Magistrate Judge Knepp ruled that the state court had rejected it on independent and adequate state-law grounds, thereby working a procedural default. (*Id.* at 21).

Finally, the Magistrate Judge determined claim nine was defaulted because: 1) the state appellate court held Majid waived the claim by failing to request the instructions at trial; and 2) Majid failed to raise the claim in the Ohio Supreme Court.

Majid objects to each of these rulings, but none of the objections has merit.

1. Transferred-Intent Instruction

First, Majid's objections (*see* Doc. 35-22 at 7–13) are insufficient to show that the transferred-intent instruction to which he objects in claims five and eight was so "undesirable, erroneous or universally condemned" as to give rise to a cognizable claim. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

As the Court of Appeals explained, the trial court's instructions on transferred intent and causation were accurate statements of Ohio law and appropriate given the nature of the prosecution's evidence:

> In his fifth and thirteenth assignments of error appellant asserts that the trial court erroneously instructed the jury on transferred intent. Appellant claims that the trial court's instruction on transferred intent also constituted a constructive amendment of his indictment. We disagree.

> This court has previously rejected the argument that an instruction on transferred intent constitutes a constructive amendment of a defendant's indictment. *State v. Jackson*, 8th Dist. No. 76141, 2000 WL 426556, *13 (Apr. 20, 2000).
>
> Contrary to appellant's arguments, the transferred intent language used by the trial court is consistent [with] transferred intent instructions we have previously upheld. *Id.*; *see also Whiteside v. Conroy*, 10th Dist. No. 05AP–123, 2005–Ohio–5098, ¶ 5, 55; *State v. Scott*, 7th Dist. No. 02–CA–215, 2004–Ohio–5117, ¶ 21, 28.
>
> The evidence presented at trial established that appellant fired his gun into the bar's picture window with the intent to kill Milton Franklin III but, due to his poor aim, appellant killed Jerome Thomas and wounded Rayshawn Whitsett and Marcus Barnes. The instruction given by the trial court informed the jury that if the defendant intended to kill when he pulled the trigger, it did not matter whether he killed the intended target or an innocent bystander. Based on this evidence, an instruction on transferred intent was supported by the evidence in this case. Accordingly, appellant's fifth and thirteenth assignments of error are without merit and overruled.
>
> In his sixth assignment of error appellant argues that the trial court's instruction on transferred intent allowed the jury to convict him of murder based only on proof that he injured someone rather than caused a death. Appellant seizes solely upon the trial court's instruction regarding transferred intent. Appellant was charged not only with murder but also with two counts of attempted murder of those injured. The trial court provided a single instruction on transferred intent applicable to all counts. The trial court's instruction on transferred intent fit the circumstances of appellant's case. Furthermore, a single challenged jury instruction may not be reviewed piecemeal or in isolation but must be reviewed within the context of the entire charge. *State v. Shopshire*, 8th Dist. No. 85063, 2005–Ohio–3588, ¶ 23, citing *State v. Hardy*, 28 Ohio St. 2d 89, 276 N.E.2d 247 (1971). Appellant's argument completely ignores the court's detailed instructions regarding the murder charge that explicitly required that the jury find that appellant caused the death of Jerome Thomas before he could be convicted of murder.

Majid, *supra*, 2012-Ohio-1192, at ¶¶66–71.

In these circumstances, I agree with the Magistrate Judge that claims five and eight are non-cognizable state-law claims that provide no basis for habeas relief.

Second, assuming that Majid's claim respecting the "and/or" language in the transferred-intent instruction raises a cognizable claim, I agree with the Magistrate Judge that § 2254(d) precludes relief.

The transferred-intent instruction stated that:

> If you find that the defendant did have a purpose to cause the death of a particular person, and that the shooting accidentally caused the death and/or injury of another person, then the defendant would be just as guilty as if the gunfire had taken effect upon the person intended.

(Doc. 8–11 at 1903–04).

As Magistrate Judge Knepp recognized, this was a general instruction that stood, not on its own, but applied to both the murder and attempted-murder charges. (Doc. 22 at 41). Its purpose was simply to tell the jury that if Majid intended to kill but, in firing his weapon, struck someone besides the intended victim, Majid had nevertheless committed murder (if the person struck died) or attempted murder (if the victim survived).

Whether considered on its own or in the context of the charge as a whole, the instruction created no likelihood of confusion or unfairness. Because the state court's rejection of the claim was reasonable – indeed, it was entirely correct – Majid is not entitled to habeas relief.

2. Causation Instruction

The portions of the record on which Majid relies (*see* Doc. 35–1 at 13–16) do not show he made a contemporaneous objection to the causation instruction. I therefore concur in Magistrate Judge Knepp's conclusion that the state court, in rejecting the claim for want of an objection at trial, denied relief on independent and adequate state-law grounds.

3. Lesser-Included-Offense Instructions

Finally, there is no merit to Majid's objection that he requested lesser-included-offense instructions on involuntary manslaughter and negligent assault. (Doc. 35–1 at 19–20). To be sure, Majid's trial counsel requested a number of lesser-included instructions, but he did not seek instructions on these two offenses. *Majid*, *supra*, 2012-Ohio-1192, at ¶¶74–88.

Moreover, Majid does not dispute the Magistrate Judge's finding that he failed to raise the lesser-included-offense claim in the Ohio Supreme Court. That provides an independent basis on which to reject the claim. *E.g.*, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

F. Claim 10: Merger of Allied Offenses

In his tenth claim, Majid contends the trial court should have merged his attempted-murder and firearms convictions – and the sentences imposed for those offenses – with his murder conviction and sentence. (Doc. 1 at 25–26).

The Magistrate Judge ruled that the claim was defaulted in light of the Court of Appeals's holding that Majid "failed to object to the court's imposition of multiple sentences and has, therefore, waived all but plain error" review of the claim. *Majid*, *supra*, 2012-Ohio-1192, at ¶90.

Majid's objections address the merits of his merger claim, but do not respond to the threshold procedural-default ruling. (Doc. 35–1 at 25–30.). Because there is no question the state court rejected the merger claim on independent and adequate state-law grounds, I concur in Magistrate Judge Knepp's finding that Majid defaulted this claim.

G. Claim 12: Ineffective Assistance

Finally, Majid alleges that trial counsel was ineffective. (Doc. 1 at 29–30). To support the claim, Majid identifies ten acts or omissions on counsel's part that supposedly fell below an objective standard of reasonableness. (*Id.*).

Magistrate Judge Knepp found that Majid defaulted this claim in part.

He explained that Majid had argued in the Ohio Court of Appeals that counsel was ineffective for only three reasons: 1) he failed to request an accidental-death instruction; 2) he did not object to the prosecutor's inflammatory questions and comments regarding Islam; and 3) he failed to object to the court's responses to certain jury questions. (Doc. 22 at 23). The Magistrate Judge then pointed out that Majid failed to raise the jury-question issue in the Ohio Supreme Court.

The Magistrate Judge therefore found the claim defaulted to the extent it depended on the eight errors or omissions Majid had not fully and fairly presented to the Ohio courts. (*Id.*).

As for the preserved part of the claim, Magistrate Judge Knepp ruled that the Ohio Court of Appeals reasonably rejected Majid's allegations. (*Id.* at 43–45).

1. Default

Majid objects to the default ruling, apparently on the ground that his ineffective-assistance claim is sufficiently meritorious that failing to consider it on the merits would be a miscarriage of justice. (Doc. 35–1 at 30; Doc. 35–2 at 1–4).

This misstates the law. Because the Magistrate Judge correctly ruled that Majid defaulted eight bases of his ineffective-assistance claim, I may not review those allegations, however meritorious, unless Majid shows cause and prejudice or establishes actual innocence. Majid has not

attempted, however, to make either showing. (*See id.*). Therefore, I reject the bulk of the ineffective-assistance claim on the same default grounds that Magistrate Judge Knepp identified.

2. Merits

Majid's first preserved theory of ineffective assistance is that counsel should have requested an "accidental death" instruction.

The Court of Appeals rejected the claim, holding that Majid's argument "confuses the trial court's use of the term 'accidentally' in its transferred intent instruction with the defense of accident" that is available under Ohio law. *Majid*, *supra*, 2012-Ohio-1192, at ¶99. Because there was "absolutely no evidence that appellant's shooting was the result of an accident instead of an intentional shooting with unintended victims," the state court held that the instruction was unwarranted in Majid's case.

Majid's objection neither acknowledges this holding nor cites any evidence suggesting an accident instruction was warranted. (Doc. 35–3 at 24–27).

Accordingly, in the absence of any basis on which the jury could have found that Majid accidentally fired the gun, there was no reasonable probability that the court, if asked, would have tendered the accident instruction. Likewise, even if the court had given the instruction, there is no probability that the jury would have reached a different result.

Majid's second preserved ineffective-assistance claim is that counsel should have objected to the prosecutor's questions about Islam. But counsel did object:

> We note that appellant's counsel did in fact repeatedly object to the prosecutor's questioning of Milton Franklin III, regarding the meaning of these terms. As addressed in appellant's third and fourth assignments of error, this evidence was relevant to establish why various witnesses remembered appellant from the bar prior to the shooting and no prejudice to appellant resulted.

Majid, *supra*, 2012-Ohio-1192, at ¶100.

It therefore follows that Majid cannot show that counsel performed deficiently, and I reject the claim on that basis.

Conclusion

It is, therefore,

ORDERED THAT:

1. Majid's objections to the R&R (Docs. 35, 35–1, 35–2, 35–3) be, and the same hereby are, overruled;
2. The R&R (Doc. 22) be, and the same hereby is, adopted as the order of the court;
3. The petition for a writ of habeas corpus (Doc. 1) be, and the same hereby is, denied; and
4. A certificate of appealability be, and the same hereby is, granted on Majid's claim that the prosecutor engaged in misconduct by: 1) questioning Whitsett about the meaning that certain Islamic terms had for him; 2) examining Franklin III about his religion and asking him to define various Islamic terms; and 3) suggesting to the jury during summation that Majid was an "Islamic warrior" whose tattoos were evidence of dangerousness and guilt.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARIF MAJID,	Case Number 1:13 CV 843
Petitioner,	Judge James G. Carr
v.	Magistrate Judge James R. Knepp, II
WARDEN D. MORGAN,	
Respondent.	REPORT AND RECOMENDATION

INTRODUCTION

Pro se Petitioner Arif Majid ("Petitioner"), a prisoner in state custody, filed a petition seeking a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act ("AEDPA") codified as 28 U.S.C. § 2254 ("Petition"). (Doc. 1). Respondent Warden Morgan filed a Return of Writ (Doc. 8) with attached exhibits[1], and Petitioner filed a Traverse (Doc. 19).[2] The district court has jurisdiction according to § 2254(a). This matter has been referred to the undersigned for a Report and Recommendation pursuant to Local Rule 72.2(b)(2). (Non-document entry dated August 27, 2013). For the reasons discussed below, the undersigned recommends the Petition be denied.

FACTUAL BACKGROUND

For purposes of habeas corpus review of state court decisions, findings of fact made by a state court are presumed correct and can only be contravened if the habeas petitioner shows, by clear and convincing evidence, that the state court's factual findings were erroneous. §

1. It bears mentioning that the Transcript provided to the Court was unindexed and did not provide a uniform system for exhibit identification. Thus, the Court was required to identify the exhibits on its own, a wholly improper exercise.
2. Traverse is now termed a Reply. *See* Advisory Committee Notes (1976) to Rule 5 of Rules Governing Section 2254.

2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013); *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). This presumption of correctness applies to factual findings made by a state court of appeals based on the state trial court record. *Mitzel*, 267 F.3d at 530. Ohio's Eighth District Court of Appeals set forth the following findings of fact:

> [¶7] It was the state's evidence at trial that on the night of September 3, 2005 and the early morning hours of September 4, 2005, appellant went to Milton's Lounge in Euclid, Ohio. The bar had a crowd of approximately fifty people at the time, slightly under maximum capacity. Appellant, described as a light skinned African American male, was accompanied by his brother, Lecarlton Parker, who was described as a dark skinned African American male and two of Lecarlton's friends, Christopher Core and Clifton Harris. Witnesses inside the bar described appellant and his group as "rowdy." While on the bar's dance floor, appellant twice removed his shirt and was asked by bar employees to re-dress. A number of witnesses reported taking notice of distinctive tattoos on appellant's bare torso, including a prominent "jihad" tattoo across his back and shoulders. Appellant's group was eventually asked to leave by bar management after an unknown member of the group dropped a drink on the dance floor. While witness accounts at trial were conflicting as to whether appellant's group left the bar on their own accord, which bar employees escorted the group out, whether the group left with or without making a disturbance and whether threats were made as the group was leaving, all witnesses agreed that the group did exit the bar.
>
> [¶8] Appellant and Lecarlton remained on the sidewalk outside the bar, visible through the bar's front picture window. Milton Franklin, Jr., the bar's owner, asked the men not to loiter outside the bar but his request was ignored. Milton Franklin III, the son of Milton Franklin, Jr., and an employee of the bar, joined the confrontation just outside the bar's door and angry words were exchanged between Milton Franklin III and the men. Christopher Core testified that he and Clinton Harris had walked back to their car while appellant and Lecarlton remained. Core testified that he heard Lecarlton exchange angry words with another man. Milton Jr. brought Milton III back inside the bar and began to close and lock the front door when someone outside of the bar punched the small square window in the bar's door, causing it to crack. A witness in the parking lot indicated that a darker skinned man punched the door's window and D.N.A. evidence was introduced that Lecarlton had left traces of blood on the small window.
>
> [¶9] Milton III responded by pulling a gun and, from the bar's doorway, firing what he described as warning shots in the direction of appellant and Lecarlton. Christopher Core testified that after he heard gunshots he heard appellant shout, "somebody tried to shoot my brother" and appellant and Lecarlton retreated into the parking lot while Milton III went into the bar and Milton Jr. locked the door.

> [¶10] Appellant and his brother were seen running back to the bar and shortly thereafter the small window in the bar door was fully knocked out and a light skinned arm was extended through the window holding a gun and at least two shots were then fired into the bar. The bar's bouncer, Wesley Williams, struggled with the gun arm until it was retracted through the door. Paulette Shelton testified that she was able to see through the window of the door and she identified appellant as the shooter to whom the gun arm belonged.
>
> [¶11] Witnesses testified that after the arm holding a gun was extracted from the window they saw appellant, outside the bar's front picture window point his gun at the bar and begin firing. Witnesses recognized appellant's face due to the attention he drew to himself earlier on the dance floor. Milton III testified that at the time of the shooting through the picture window, he was standing in front of the window inside of the bar when appellant saw him through the window and began shooting in his direction.
>
> [¶12] Three bar patrons were struck by bullets as a result of the shooting. Jerome Thomas was shot twice and died as a result of his wounds. Rayshawn Whitsett was shot in the hip and Marcus Barnes was shot in both legs.

(Doc. 10-1, at 5-8).

PROCEDURAL BACKGROUND

The relevant procedural history is undisputed by the parties and was accurately summarized in Respondent's brief, therefore it is incorporated herein with only minor changes. (Doc. 8, at 5-20; Doc. 19, at 8).

State Trial Court

The September term of the 2005 Cuyahoga County Grand Jury issued an indictment charging Petitioner with: one count of aggravated murder (R.C. § 2903.01 (A)), (Count 1), carrying 2 firearm specifications, 3 mass murder specifications, one repeat violent offender specification and a notice of prior conviction; one count of having weapons while under disability (R.C. § 2923.13(A)(3)), (Count 2); and three counts of attempted murder (R.C. §§ 2923.02/2903.02(A), (Counts 3-5), carrying 2 firearm specifications, one repeat violent offender specification and a notice of prior conviction. Petitioner pleaded not guilty to the indictment.

Prior to trial, Petitioner waived his right to a jury trial on the Count 2 weapons under a disability charge and the repeat violent offender specifications, and he elected to have the issues tried to court. On August 1, 2007, the jury found Petitioner not guilty of aggravated murder but guilty of the lesser included charge of murder, with all the attached specifications; not guilty of the original Count 4 (now renumbered Count 3) attempted murder charge, and guilty of the remaining attempted murder charges, with the accompanying specifications. The court also found Petitioner guilty on the weapons under a disability charge and the repeat violent offender specification. On August 30, 2007, the court sentenced Petitioner to fifteen years to life for the aggravated murder, ten years on the weapons under a disability, and ten years and five years, respectively, on the two attempted murders. The court also merged the firearms specifications into one three-year sentence. These were all to be served consecutively for an aggregate sentence of 43 years to life in prison.[3]

Direct Appeal

On September 28, 2007, Petitioner, through new counsel, filed a notice of appeal with the Eighth District Court of Appeals, Cuyahoga County under Case No. 90491. Petitioner raised sixteen assignments of error in his brief. (Doc. 10-1). The State filed a responsive brief, to which Petitioner replied.

On June 25, 2009, the Court of Appeals reversed and remanded the case, addressing only Petitioner's second assignment of error: "Defendant was denied his right to a fair and impartial jury." The reversal was based on the court's determination that a juror was sleeping through testimony. *State v. Majid*, 182 Ohio App.3d 730 (8th Dist. 2009). The State moved the court to reconsider its reversal and remand. The court denied the motion.

3. Shortly after the verdict, Majid had filed a *pro se* motion for a new trial which the State opposed and the court denied.

On September 4, 2009, the State of Ohio, filed a notice of appeal to the Ohio Supreme Court under Case No. 2009-1591. The State's sole proposition of law was: "When in the course of a trial a judge addresses the matter of a sleeping juror to the satisfaction of the parties, a criminal defendant's right to due process is not violated."[4] Petitioner through counsel opposed the jurisdiction. On December 2, 2009, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question.

Retrial (2011)

Prior to retrial, Petitioner was evaluated by a psychiatrist. He was in court with counsel present on September 28, 2010. Defense counsel accepted on the record that Petitioner was found to be sane at the time of the act and also found to be competent to stand trial.

In November 2010, Petitioner filed several *pro se* motions. The first was a motion to dismiss or grant appropriate relief. Petitioner alleged there were Brady violations, especially concerning information about the credibility of witnesses. He also alleged his counsel had recently been told of a new investigation concerning a "get-away van" that had been concealed for over 5 years. Petitioner next requested all of his motions be heard on the record. Petitioner also filed a motion entitled "Motion to Move for Corrective Judicial Process from Wrongful Prosecution, Conviction and Lost [sic] of Liberty without Due Process of Law," pursuant to Crim. R. 12. Petitioner raised multiple claims of prosecutorial involvement in a tainted investigation. Petitioner further alleged he was deprived of liberty without due process as the prosecutor deliberately used perjured testimony and withheld evidence.

At a hearing held November 17, 2010, the court went through a box of records that were produced to defense counsel purporting to be the complete investigation of the case. The Court

4. The State also asked for a stay of the lower court proceedings, which the Ohio Supreme Court denied. Majid *pro se* moved the Court to either suspend his sentence or grant bail, which the Court denied.

wanted to document exactly what discovery was produced and so Bates-stamped the documents. (Doc 8-1, 8-2, at 66-346). Detective Pestak testified he had produced the entire original police file, except for the actual physical evidence. (Doc.8-2, at 345-46).

On January 6, 2011, the State requested a pre-trial Daubert hearing regarding Petitioner's expert witness, Dr. Solomon Fulero on "eyewitness misidentification." After hearing, the court ruled that Dr. Fulero could testify as an expert per *State of Ohio v. Echols* and could testify generally as to variables affecting eyewitness identification, but he could not discuss the credibility of an individual's identification.

In April 2011, just prior to his retrial, Petitioner filed three more *pro se* motions. The first was another motion to dismiss due to prosecutorial misconduct. He again accused the prosecutors of obstructing justice and knowingly promoting a hypothesis that did not comport with material evidence. The second was another motion to dismiss on double jeopardy grounds, multiple punishments, and prosecution without an indictment. Petitioner complained he was not indicted by the grand jury on the murder charge that he would be tried for. The last motion filed was a "Statement of Subject Matter and Jurisdiction," which was another attempt to attack the indictment by saying the court had no jurisdiction due to lack of a valid grand jury indictment.

On April 25, 2011, all parties agreed the indictment would be renumbered as followed:

Count 1 – Murder of Jerome Thomas (Originally Count 1)
Count 2 – Attempt Murder of Marcus Barnes (Originally Count 3)
Count 3 - Attempt Murder of Rashawn Whitsett (Originally Count 5)
Count 4 – Having Weapons Under Disability (Originally Count 2)

Petitioner then filed a *pro se* Motion to Suppress Evidence, specifically the photo array used in Milton Franklin III's identification.[5] He also wanted to suppress the identifications made by Robert Sanders and Morris Sickles that were based on Petitioner's tattoos. Counsel for

5. Majid had filed a motion to suppress prior to his first trial, and a hearing had been held on that motion.

Petitioner also filed a Motion to Suppress the Photographic Lineup that was used for out-of-court and in-court identification of Petitioner by various witnesses. In a short hearing prior to trial, the court reviewed its prior ruling from the first trial, where a similar motion to suppress had been denied. The court also denied the current motion to suppress. (Doc. 8-3, at 408-411).[6]

Petitioner proceeded to trial, again waiving the jury on the having weapons under disability charge only. The court overruled Petitioner's Rule 29 motion for acquittal. On May 3, 2011, the jury found Petitioner guilty on all counts and specifications and the court found him guilty on the having weapons under disability charge as well.

On May 5, 2011, the court sentenced Petitioner to fifteen years to life on Count 1, plus three years for the firearms specifications; ten years each on counts 2 and 3; and five years on count 4. All terms were to be served consecutively to each other for an aggregate sentence of 43 years to life in prison.

Petitioner, proceeding *pro se*, filed a Motion for New Trial and Affidavit on May 19, 2011. Petitioner claimed: that he was denied due process by the court's refusal to suppress the identification procedure; prosecutorial misconduct; police misconduct in withholding documents; and that the verdict was against the manifest weight of the evidence. On August 4, 2011, the trial court ruled that since Petitioner had filed a timely notice of appeal of his conviction prior to the trial court's ruling on the motion for new trial, the motion was nullified and denied it as moot.

Direct Appeal 2011 Conviction

On June 2, 2009, Petitioner, through different counsel, filed a notice of appeal with the Eighth District Court of Appeals, Cuyahoga County. *State v. Majid*, 2012 WL 986127 (8th Dist. Ohio Ct. App.). In his brief filed *pro se* on October 13, 2011, Petitioner raised the following assignments of error:

6. Majid, through counsel, also filed an objection to having to display his tattoos at trial.

1. Defendant was denied a fair and impartial trial in violation of due process of law, when the jury found defendant guilty of murder based upon insufficient evidence.

2. Defendant was denied due process of law when the Court overruled defendant's motion to suppress the identification procedure.

3. Defendant was denied due process of law when the Court conceded Prosecutor's use of impropriety, improper calculations and prosecutorial misconduct.

4. Defendant was denied due process of law when the trial court committed plain error by admitting and allowing irrelevant and prejudicial evidence.

5. Defendant was denied due process of Law when the court amended the statue [sic] and indictment by instructing on transferred intent.

6. Defendant was denied due process of law when the he [sic] was allowed to be convicted for causing an injury rather than death.

7. Defendant was denied due process of law when the court instructed on causation.

8. Defendant was denied due process of law when the court refused to instruct on lesser included offense of reckless homicide and negligent homicide.

9. Defendant was denied due process of law and subjected to unconstitutional Multiple Punishments when he was consecutively sentenced for Murder, Attempted Murder and a weapons violation.

10. Defendant was denied due process of law when he was allowed to be convicted of attempted murder without the testimony of the victim.

11. Defendant was denied due process of law when his motion for judgment of Acquittal was overruled.

12. Defendant was denied effective assistance of counsel.

13. Defendant was denied due process of law when the court informed the jury the defendant could be convicted of accidental death or injury.

(Doc. 10-1). The State filed a brief in response, to which Petitioner filed a reply brief. On March 22, 2012, the Court of Appeals issued an opinion overruling Petitioner's assignments of error and affirming the trial court's judgment. However the court found the trial court in its sentencing entry neglected to impose sentences on each of the firearms specifications. The court only

sentenced on the three-year specification and not the one-year specification. The appellate court reversed and remanded for the limited purposes of resentencing Petitioner on each of the firearms specifications. *State v. Majid*, 2012 WL 986127 (8th Dist. Ohio Ct. App.).[7] [8]

Ohio Supreme Court

On April 30, 2012, Petitioner, through counsel, filed a notice of appeal with the Ohio Supreme Court under Case No. 2012-0733. In his memorandum in support of jurisdiction, he set forth the following propositions of law:

I. A defendant has been denied due process of law when his identification results from a suggestive identification procedure.

II. A defendant has been denied a fair trial where there are numerous instances of prosecutorial misconduct in suppression of evidence.

III. A defendant has been denied a fair trial when a court admits irrelevant and inflammatory evidence.

IV. A defendant has been denied due process of law when the court amended a criminal statute by instructing on transferred intent.

V. A defendant has been denied due process of law when he is allowed to be convicted for causing an injury rather than death.

VI. A defendant has been denied due process of law when the court improperly instructs the jury on causation.

VII. A defendant has been denied due process of law when he was convicted of an attempted murder count where there is no testimony from the intended victim.

VIII. A defendant has been denied due process of law when a motion for judgment of acquittal has been overruled where there is insufficient evidence to permit a rational factfinder to return a verdict of guilty.

IX. A defendant has been unconstitutionally subjected to multiple punishments where consecutive sentences are imposed for murder, attempted murder and weapons violation involving the same firearm.

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7. The State filed a motion for reconsideration of the remand for re-sentencing, which the court denied.

8. *State v. Majid*, 2012 WL 986127 (8th Dist. Ohio Ct. App.) hereinafter Exhibit 1.

> X. A defendant has been denied his Sixth Amendment right to effective assistance of counsel where errors and omissions by trial counsel had deprived defendant of a fair trial.

The State waived a response. On July 5, 2012, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question.

2012 Resentencing

On December 20, 2012 the trial court re-sentenced Petitioner according to the Court of Appeals remand, imposing one-year and three-year sentences on all of the firearms specifications. These sentences were then merged into one three-year sentence to be served consecutively and prior to the fifteen years to life sentence of Count 1. The aggregate sentence for Petitioner remained 43 years to life in prison.

FEDERAL HABEAS CORPUS

Petitioner filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in this Court. He represented that he provided it to the prison staff for mailing on April 9, 2013. (Doc. 1). Petitioner alleged the following grounds in support of the Petition:

> **GROUND ONE**: Denied due process of law when motion for judgement of acquittal was overruled where there is insufficient evidence.
>
> **GROUND TWO:** Denial of due process of law when identification results from a suggestive identification. And where the court overruled hearing on motion to suppress identification.
>
> **GROUND THREE***:* Denied due process of law and a fair trial where there are a cumulative (sic) of prosecutorial misconduct and improprieties.
>
> **GROUND FOUR:** Denied a fair trial and a impartial jury when the court committed plain error by admitting irrelevant and inflammatory evidence.
>
> **GROUND FIVE:** Denied due process of law when the court amended the statute and the indictment by instructing on transferred intent.
>
> **GROUND SIX:** Denied due process of law when the court instructions allowed petitioner to be convicted for causing a injury.

> **GROUND SEVEN:** Denied due process of law when the court instructed on causation.
>
> **GROUND EIGHT:** Denied due process of law when the court instructed the jury defendant could be convicted of accidental death.
>
> **GROUND NINE:** Denied due process of law and a fair trial when the court refused to instruct on lesser included offenses.
>
> **GROUND TEN:** Unconstitutionally subjected to multiple punishment where consecutive sentences are imposed for murder, two attempted murder and weapons violation.
>
> **GROUND ELEVEN:** Denied due process of law when defendant was convicted of attempted murder count where there is no testimony from intended victim.
>
> **GROUND TWELVE:** Denied constitutional right to effective assistance of counsel where errors, omissions and failure to object by trial counsel deprived defendant of a fair trial.

(sic.) (Doc. 1).

JURISDICTIONAL ISSUES

Respondent argues part of ground one, all of ground two, part of ground three, part of ground four, all of ground seven, all of ground nine, all of ground ten, and part of ground twelve of the Petition should be dismissed as procedurally defaulted. (Doc. 8, at 21-39).

Procedural Default

Reasons of federalism and comity generally bar federal habeas corpus review of "contentions of federal law . . . not resolved on the merits in the state proceeding due to [the petitioner's] failure to raise them there as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). Generally, a claim may be procedurally defaulted in two ways. *See Lovins v. Parker*, 712 F.3d 283, 294 (6th Cir. 2013) (citing *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). First, a claim is defaulted when the state court remedies have been exhausted but the state court declines to address the merits of petitioner's claim due to failure to comply with a state procedural rule. *Williams*, 460 F.3d at 806; *Harris v. Reed*, 489 U.S. 255, 265 (1989).

Second, a claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule. *Williams*, 460 F.3d at 806.

If a petitioner fails to fairly present his claims through the state courts, and if no avenue of relief remains open or if it would otherwise be futile for the petitioner to continue to pursue his claims in the state courts, the petition is subject to dismissal with prejudice on the ground that the petitioner has waived his claims for habeas corpus relief. *See Harris v. Reed*, 489 U.S. 255, 260–62 (1989); *McBee v. Grant*, 763 F.2d 811, 813 (6th Cir. 1985); *see also Weaver v. Foltz*, 888 F.2d 1097, 1099 (6th Cir. 1989). To determine whether a claim is barred from habeas review, and if so, whether the procedural default may be excused, the court must conduct a four-step analysis:

> 1. The Court determines whether there is a procedural rule applicable to the claim at issue, and whether the petitioner in fact failed to follow it;
>
> 2. The Court then determines whether the state courts actually enforced their procedural sanction;
>
> 3. The Court then decides whether the state's procedural forfeit is an "adequate and independent ground" on which the state can rely to foreclose federal review; and
>
> 4. Finally, in order to avoid default, the petitioner can demonstrate that there was "cause" for him to neglect the procedural rule, and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986).

Demonstrating "cause" requires a petitioner to "show that 'some objective factor external to the defense' prevented the petitioner's compliance with a state procedural rule." *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Demonstrating prejudice requires a petitioner to show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial

disadvantage, infecting his entire trial with error of constitutional dimensions." *U.S. v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original); *Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012).

A procedural default will also be excused if the petitioner demonstrates that not excusing the default "will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). This is a power derived from the court's equitable discretion. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). The Supreme Court has held that such an inquiry requires a petitioner "supplement[] a constitutional claim with a 'colorable showing of factual innocence.'" Id. at 495 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)). Maintaining this exception to the rule against reviewing procedurally defaulted claims serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty". *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 492–93 (1976)).

Exhaustion

A federal court may not grant a writ of habeas corpus unless the petitioner has exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). A state defendant with federal constitutional claims must fairly present those claims to the state courts before raising them in a federal habeas corpus action. 28 U.S.C. § 2254(b), (c); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *see also Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir.2006) (quoting *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003)) ("[f]ederal courts do not have jurisdiction to consider a claim in a habeas petition that was not 'fairly presented' to the state courts"). A constitutional claim for relief must be presented to the state's highest court in order to satisfy the fair presentation requirement. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845–48 (1999); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990).

In order to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts. *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000); *Solether v. Williams*, 527 F. App'x 476, 483 (6th Cir. 2013). This means that the petitioner must present his claims to the state courts as federal constitutional issues and not merely as issues arising under state law. *See e.g.*, *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987); *Prather v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987). In determining whether a petitioner presented his claim in such a way as to alert the state courts to its federal nature, a federal habeas court should consider whether the petitioner: (1) relied on federal cases employing constitutional analysis; (2) relied on state cases employing constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *McMeans*, 228 F.3d at 681.

Subparts One through Three of Ground One

In ground one, Petitioner alleges the denial of his motion for acquittal was a violation of due process because the ruling was based on insufficient evidence. (Doc. 1, at 7). This claim is based on four factual and legal theories: (1) the blood on the glass door was not Petitioner's; (2) witness descriptions of the assailant do no match Petitioner; (3) Chris Core testified that he heard shots as Petitioner drove past him; and (4) the State did not prove purpose and intent to cause death. Respondent claims Petitioner waived and abandoned the first three subclaims because they were not fairly presented to the Ohio Supreme Court. (Doc. 8, at 26).

Respondent is correct in asserting that Petitioner has waived the first three subclaims because he failed to raise them to the Ohio Supreme Court. While Petitioner alleges otherwise, it is clear from a review of his Memorandum in Support of Jurisdiction that he raised only the

fourth subclaim to the Ohio Supreme Court.[9] (Exhibit 2, at 17-18). Petitioner did not fairly present all of his subclaims to the highest state court and thus, he failed to exhaust his state remedies. 28 U.S.C. § 2254(b), (c); *Anderson,* 459 U.S. 4, 6 (1982). Further, Petitioner has not proven cause for his failure to raise these subclaims to the Ohio Supreme Court. Thus, subclaims one through three of ground one should be dismissed.

Ground Two

Petitioner alleges in his second ground for relief that he was denied due process when the court denied his motion to suppress the identifications which resulted from a suggestive identification procedure. (Doc. 1, at 9). Respondent argues this claim was waived when the Eighth District did not have the ability to review the claim because Petitioner did not provide the court with the necessary transcripts from the 2007 suppression hearing for review. (Doc. 8, at 27-29). In response, Petitioner claims that he should not be held responsible for this failure because he requested that the entire record be forwarded to the Court of Appeals. (Doc. 19, at 12).

The Eighth District found:

> [¶29] Appellant argues in his second assignment of error that the out-of-court identification procedure used to identify him was suggestive and conducive to misidentification, because the procedure included showing witnesses' photographs of the appellant's naked torso covered with distinctive tattoos.
>
> [¶30] This court set forth the scope of our review regarding a motion to suppress in *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist. 1994):
>
> > In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard. (Internal citations omitted.)
>
> [¶31] In *State v. Burnside*, 100 Ohio St.3d 152, 2003 Ohio 5372, 797 N.E.2d 71, ¶ 8, the Ohio Supreme Court found that:

9. Petitioner's Memorandum in Support of Jurisdiction hereinafter Exhibit 2.

> [A]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. (Internal citations omitted.)
>
> In determining the admissibility of challenged identification testimony, a reviewing court applies a two-prong test: (1) did the defendant demonstrate that the identification procedure was unduly suggestive; and, if so, (2) whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *State v. Mills*, 8th Dist. No. 95837, 2011 Ohio 3837, ¶ 16, citing *State v. Harris*, 2d Dist. No. 19796, 2004 Ohio 3570, ¶ 19. "Stated differently, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Wills*, 120 Ohio App. 3d 320, 324-325, 697 N.E.2d 1072 (8th Dist.1997).

[¶32] Appellant filed a motion to suppress identification on February 2, 2007, prior to his first trial. The record reflects that the trial court held a hearing on appellant's motion to suppress and denied the motion on July 11, 2007. Counsel raised the issue again prior to appellant's second trial and the trial court noted appellant's objection but held that its prior ruling on the matter would stand.

[¶33] In support of the present assignment of error appellant repeatedly cites the suppression hearing from July 9, 2007. However, a copy of the transcript from that 2007 hearing has not been included in the record.

[¶34] It is axiomatic that the party challenging a judgment has the burden to file an adequate record with the reviewing court to exemplify its claims of error. *Tabbaa v. Raslan*, 8th Dist. No. 97055, 2012 Ohio 367, ¶ 10.

[¶35] App.R. 9 requires the appellant, when urging on appeal that evidence was improperly admitted, or that a judgment is unsupported by the evidence, to include in the record a transcript of all evidence relevant to the findings or conclusions and to illustrate any alleged error by reference to them in the record. *State v. Wheeler*, 8th Dist. No. 61335, 1992 Ohio App. LEXIS 5592, 1992 WL 328802, *1.

[¶36] When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the

> validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

(Doc. 8, at 27-29).

Here, the Eighth District cited non-compliance with Ohio App.R. 9 as the basis for its decision to overrule Petitioner's assignment of error. While Petitioner alleges he requested the entire record be transferred to the Eighth District for review, it is still his responsibility to ensure the information necessary to review his assignment of error is provided to the court. Ohio App.R. 9(C) and (D) offer appellants who do not have the transcripts of court proceedings alternative forms of evidence to submit in support of their claims. There is no evidence that Petitioner attempted to comply with the other available options to provide the appellate court with the necessary evidence to prove his case. The state court relied upon a procedural rule which Petitioner failed to follow and thus, the first prong of the *Maupin* standard is satisfied.

As for the second prong, it is apparent from the Eighth District's opinion that it enforced a sanction on Petitioner because it declined to discuss the merits of his assignment of error due to his failure to comply with Ohio App.R. 9. (Doc. 8, at 27-29). Further the third *Maupin* prong is met because Ohio App.R. 9 is a rule with a "discernible standard of application" and is, thus, "an adequate and independent state rule which bars federal review." *Banks v. Bradshaw*, 2008 WL 4356955, at *11 (N.D. Ohio); *see also Braun v. Morgan*, 2014 WL 814918, at *33 (N.D. Ohio).

Petitioner argues the cause of his default was actually the error of the clerk of court in not submitting the requested transcript, however, as noted above, Petitioner had other options available to establish his argument. Thus, because the Petitioner has not shown adequate cause to waive his procedural default, this Court need not address whether prejudice resulted. Moreover, he has not claimed actual innocence. Accordingly, the undersigned recommends the Court dismiss ground two of the Petition because it is procedurally defaulted.

Subclaims One and Two of Ground Three

One subclaim in ground three alleges that the prosecutor engaged in misconduct by misusing a photo array. (Doc. 1, at 11). The Eighth District considered this claim as such:

> [¶42] Appellant argues that the prosecutor took from appellant's counsel a photocopy of a photo array containing a picture of appellant and his tattoos, marked it State's Exhibit 241, and improperly used the exhibit during Robert Sanders's testimony. Furthermore, Sanders confusingly testified that pencil markings on the exhibit were his own. Appellant's counsel did not object to the prosecutor's use of this document.
>
> [¶43] Because the appellant failed to raise this objection during his trial, "he now waives all but plain error." *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677, ¶ 33, citing *State v. Childs*, 14 Ohio St.2d 56, 263 N.E.2d 545 (1968). An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Under Crim.R.52(B), plain error requires an obvious defect in the trial court proceeds that affected "substantial rights." *State v. Posa*, 8th Dist. No. 94255, 2010-Ohio-5355, ¶ 6. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).
>
> [¶44] The analysis of a plain error and prosecutorial misconduct both require the conduct to affect appellant's substantial rights. Even accepting as true appellant's contention that the prosecutor's actions in using the appellant's exhibit were improper, neither his rights were affected nor was he prejudiced because State's Exhibit 241 was a photocopy of the photo array originally shown to Sanders by the police and appellant's attorney cross-examined Sanders on the matter. Although Sanders initially testified that the pencil markings were his own, he eventually agreed that they may not be his markings. He was nonetheless positive that he chose the appellant in the original photo array.

(Exhibit 2, at 16-17).

The Eighth District applied the contemporaneous objection rule to dispose of Petitioner's subclaim because he failed to raise an objection at the time of trial and thus, waived appellate review of the issue. Ohio Crim.R. 30(a), *see Scott v. Mitchell*, 209 F.3d 854, 865 (6th Cir. 2000). Petitioner claims he did object, however the objection cited in his Reply was referring to different exhibits, State Exhibits 9 and 239, and was during the examination of Raymond Whitsett, not Robert Saunders. (Doc. 19, at 15); (Doc. 8-6, at 59-60). A review of the record

shows that Petitioner's counsel made no objection to the Prosecutor utilizing the defense's copy of Exhibit 241. (Doc. 8-7, at 160-61).

The court of appeals enforced the contemporaneous objection rule by proceeding into a plain error review of the issue. Importantly, "[a] state court's review of an issue for plain error is considered by the Sixth Circuit as the enforcement of a procedural default." *Jalowiec v. Bradshaw*, 2008 WL 312655, at *23 (N.D. Ohio), *aff'd*, 657 F.3d 293 (6th Cir. 2011) (citing *Williams v. Bagley*, 380 F.3d 932, 968 (6th Cir. 2004)). Thus, the appellate court clearly relied upon procedural bars in denying Petitioner's assignment of error. "The Sixth Circuit has held that Ohio's contemporaneous objection rule constitutes an adequate and independent state ground barring federal review absent a showing of cause for the waiver and resulting prejudice". *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Jalowiec*, 2008 WL 312655, at *23 (citing *Williams*, 380 F.3d at 968). Accordingly, the first three prongs of the *Maupin* standard have been met. Lastly, Petitioner has not made a showing of cause and prejudice or a miscarriage of justice, thus, subclaim one of ground three should be dismissed.

Also within ground three is a somewhat confusing subclaim relating to what the Court construes to be a claim that the prosecutor failed to turn over potentially exculpatory evidence to the Petitioner before trial. (Doc. 1, at 11; Doc. 19, at 37). Petitioner alleges the suppression of the following pieces of evidence: 1) video of crime scene; 2) photo array supposedly initialed by prosecution witness; 3) two different police reports; and 4) a new investigation five years after a wrongful conviction. (Doc. 19, at 37).

As stated above, to be eligible for habeas relief a Petitioner must fairly present his claims to the state court utilizing the same factual and legal theories as he does to the federal habeas court. *Solether*, 527 F. App'x at 483. In his brief to the Court of Appeals, Petitioner raised only the allegations that the initialed photo arrays were missing from the evidence produced and that

two different police reports existed. (Doc. 1-2, at 24). On appeal to the Ohio Supreme Court he raised only the issue of the missing initialed photo arrays. (Exhibit 2, at 5). Thus, because he failed to present the other factual theories to the state courts, Petitioner has abandoned all other allegations related to missing or suppressed evidence. *See Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003). Petitioner has not alleged any cause for his failure to raise these issues on appeal and therefore it is recommended that the second subclaim, except as to the missing photo arrays, of ground three be dismissed because they were not fairly presented to the state courts.

All but the Second Subclaim of Ground Four

In his Petition, Petitioner alleges he was denied a fair trial because inflammatory evidence was admitted at trial; he proposes six subclaims within this allegation. (Doc. 1, at 13). Respondent argues in response that all but the second subclaim, inflammatory questioning regarding his religion to Milton Franklin III, have not been fairly presented to the state courts and thus, were waived. (Doc. 8, at 31). Petitioner noted in his brief to the Court of Appeals all six grounds for relief (Doc. 1-2, at 63-66), but on appeal to the Ohio Supreme Court he raised only the definitions of Muslim terminology in his assignment of error. (Exhibit 2, at 5-6). It is well-established that Petitioner must present the factual and legal claims to the state court before presenting them in a petition for habeas relief. *Solether*, 527 F. App'x at 483. Here, Petitioner failed to do so; however, he alleges ineffective assistance of counsel is the cause of his failure. (Doc. 19, at 15).

While "ineffective assistance of counsel may constitute cause," an attorney's error or failure to raise a claim does not. *Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Instead, Petitioner must identify "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488. Here, Petitioner alleges no such impediment. First, Petitioner's

trial counsel did repeatedly object to the questioning of Milton Franklin III regarding the definition of Islamic terms and was found to not to be ineffective by the Court of Appeals. (Tr. 1510); (Exhibit 1, at 37-38). Second, Petitioner did not provide any argument or evidence beyond perhaps a vague allegation that his appellate counsel, who was different from his trial attorney, was ineffective. (Doc. 19, at 15-16). Thus, because Petitioner failed to show an external factor to prove adequate cause to waive his procedural default, this Court need not address whether prejudice resulted. Moreover, he has not claimed actual innocence. Accordingly, the undersigned recommends the Court dismiss all subclaims of ground four except as to do with the questioning of Milton Franklin III about religious terminology.

Ground Seven

Next, Petitioner argues the trial court improperly instructed the jury on the definition of causation in violation of due process of law. (Doc. 1, at 19-20). The Eighth District held that Petitioner had waived this argument because he did not object to it at trial and thus, only reviewed the issue for plain error. (Exhibit 1, at 27). As stated above, failure to contemporaneously object to an issue at trial waives the issue for habeas review if, like here, the court applies and enforces a procedural rule against a petitioner who failed to follow it. Petitioner claims defense counsel objected at trial, however the citation provided does not support his claim and is in fact a reference to the jury charge. (Doc. 19, at 20); (Doc. 8-11, at 81-98). Further, Petitioner failed to make a showing of cause or miscarriage of justice, and therefore ground seven should be dismissed as procedurally defaulted.

Ground Nine

In ground nine, Petitioner alleges the trial court erred when it refused to instruct the jury on lesser included offenses. (Doc. 1, at 24). Respondent argues Petitioner has procedurally defaulted this claim both for failure to contemporaneously object at trial and by not raising the

issue to the Ohio Supreme Court. (Doc. 8, at 34). In fact, defense counsel did request these instructions be given to the jury, (Doc. 8-11, at 22-26), but it is of no consequence because Petitioner failed to present this issue on appeal to the Ohio Supreme Court. (Exhibit 2).

Petitioner attempts to argue the lesser included offense claim was subsumed in his argument regarding the sufficiency of evidence, however the Court finds his argument without merit. (Doc. 19, at 21-22). It is not the job of the courts to develop arguments or speculate as to assignments of error; rather the petitioner must explicitly and specifically raise grounds for relief to the court. *See Magnum Towing & Recovery v. City of Toledo*, 287 F. App'x 442, 449 (6th Cir. 2008). Petitioner failed to specifically raise the claim on appeal or exhaust his state remedies therefore, the issue is waived. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845–48 (1999); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990). Furthermore, Petitioner has not asserted adequate cause for his failure to raise this issue before the Ohio Supreme Court and thus, Petitioner's ninth ground for relief should be dismissed.

Ground Ten

Next, Petitioner asserts his sentences should have been merged because they are allied offenses. (Doc. 1, at 25-26). The Eighth District found Petitioner failed to object at his sentencing in violation of the contemporaneous objection rule, and reviewed the issue for plain error. (Exhibit 1, at 33-35). Petitioner argues the Court of Appeals waived the procedural bar by entering into a plain error review. (Doc. 19, at 33). However, a plain error review is not a waiver of the procedural bar, but rather an acknowledgement of it. *See, e.g., Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Application of the contemporaneous objection rule is an adequate and independent state ground which results in dismissal of a claim unless Petitioner can show cause and prejudice or a miscarriage of justice, neither of which was demonstrated in

this instance. Therefore, ground ten of the Petition should be dismissed as procedurally defaulted.

All but Subclaims Five and Six of Ground Twelve

In his claim for ineffective assistance of counsel, Petitioner brought ten subclaims. (Doc. 1, at 29-30). On direct appeal Petitioner only raised three subclaims: (1) trial counsel erred by not requesting accidental death jury instruction; (2) trial counsel erred by failing to object to inflammatory questions and comments relating to Islam; and (3) trial counsel erred by not objecting to the court's responses to jury questions. (Doc. 1-2, at 77-79). However, in his application to the Ohio Supreme Court for jurisdiction, Petitioner only raised the first two subclaims and abandoned the third. (Exhibit 2, at 20-21). As previously stated, Petitioner is limited to raising only the claims of ineffective assistance of counsel which were presented to the state courts. *See Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1989).

The additional subclaims were not included in his appeal despite being discoverable in the record and having different appellate counsel. *See Edwards v. Carpenter*, 529 U.S. 446 (2000); (*See also* Doc. 1, at 33; Doc. 1-2, at 36). Petitioner did not show any cause for his failure to raise these other issues on appeal, thus all other subclaims, except as to the accidental death jury instruction and the inflammatory questioning, are waived. *See Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

Non-Cognizable Claims

The Court will not have jurisdiction over Petitioner's claims for purposes of habeas corpus review if they do not "challenge the legality of his custody" based on a "violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254. Indeed, "[t]he writ of habeas corpus is not available to remedy errors of only state law." *Smith v. Morgan*, 371 F. App'x 575, 582 (6th Cir. 2010) (citing 28 U.S.C. § 2254(a)); *see also Norris v. Schotten*, 146

F.3d 314, 328 (6th Cir. 1998) ("[a] claim based solely on an error of state law is not redressable through the federal habeas process.") (quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)).

Nevertheless, habeas relief may be available if an alleged error of state law subjected the petitioner to a "fundamentally unfair" criminal process. *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). "[T]he category of infractions that violate fundamental fairness is defined very narrowly", and includes only state rulings that "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Bey v. Bagley*, 500 F.3d 514, 521 (6th Cir. 2007) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1977) (citations omitted)); *see also Wright v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993). The habeas petitioner bears the burden to show "the principle of procedure violated by the rule (and allegedly required by due process)" is fundamental. *Bey*, 500 F.3d at 521.

Second Subclaim of Ground Four

The only remaining subclaim of ground four alleges Petitioner was denied a fair trial because the prosecutor elicited and the trial court allowed inflammatory and improper evidence to be admitted regarding his Islamic-themed tattoos. (Doc. 1, at 13; Doc. 19, at 54-56). The Eighth District rejected this claim as follows:

> **[¶57]** In his fourth assignment of error appellant argues that the trial court committed plain error by admitting irrelevant and prejudicial evidence.
>
> **[¶58]** As a basic principle, all relevant evidence is admissible, unless the probative value of that evidence is substantially outweighed by its prejudicial effect. Evid.R. 403. "Relevant" evidence is defined as evidence having any tendency to make a fact of consequence to the determination of the action more or less probable than it would be without the evidence. See Evid.R. 401. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343 (10th Dist.1987). "[A] trial court's decision to admit or exclude evidence 'will not be reversed unless there has been a clear and prejudicial abuse of discretion.'" *State v. Hancock*, 108 Ohio St.3d 57, 2006 Ohio 160, 840 N.E.2d 1032, ¶ 122, quoting *O'Brien v. Angley*, 63 Ohio St.2d 159, 407 N.E.2d 490 (8th Dist.1980). "The term 'abuse of discretion' connotes more than an error of law or judgment; it

> implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140 (9th Dist.1983).
>
> **[¶59]** Appellant argues that the State's questioning of Milton Franklin III regarding the meanings of certain Islamic terms was irrelevant and unduly prejudicial. We disagree. Milton Franklin III testified at trial that he is a Sunni Muslim. Franklin III testified that because of his religious background he recognized the Islamic terms tattooed on appellant's torso when he observed appellant dancing without his shirt and the terms had meaning to him. Appellant further testified that religion had no role in the events of the evening. Franklin III's testimony, as well as other witnesses' testimony regarding appellant's tattoos, was relevant to establish why the witnesses remembered appellant and his distinctive tattoos. As previously discussed, appellant's actions inside the bar, including his behavior on the dance floor and the removal of his shirt to display his tattoos, were the reasons that witnesses took notice of his face and remembered him. This is particularly true of Milton Franklin III, for whom appellant's tattoos had meaning. We cannot say that the trial court abused its discretion in allowing Franklin III's testimony.

(Exhibit 1, at 22-23).

The undersigned agrees with the Court of Appeals' conclusion that the testimony related to the tattoos and their definitions was relevant to supporting Mr. Franklin III's testimony and eyewitness identification. The evidence elicited was relevant and within the proper bounds of the proceeding such that the trial court did not create fundamental unfairness by admitting it into evidence. *See Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983). The Court would only be entitled to overrule the state court's evidentiary ruling if it was found to "offend the principles of justice" to such a degree that a due process violation occurred, but that is not the case here. *See Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) (citing *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). Furthermore, Petitioner cited no federal cases in support of his allegation that the admission of this evidence created an unfair process which violated his fundamental rights. The remaining subclaim in ground four is non-cognizable and should be dismissed.

Grounds Five and Eight

In grounds five and eight, Petitioner claims he was denied due process of law on the basis of various jury instructions. Specifically, in ground five he challenges the instruction on transferred intent as an amended indictment and in ground eight he alleges the instructions allowed him to be convicted on the basis of accidental death. (Doc. 1, at 16-18, 21-22). The state Appeals Court reviewed the jury instructions and found:

> **[¶62]** Appellant's fifth, six, seventh and thirteenth assignments of error assert various errors in the trial court's jury instructions. We address these errors together.
>
> **[¶63]** We review a trial court's issuance of a jury instruction for an abuse of discretion. *State v. Bagwell*, 8th Dist. No. 96419, 2011 Ohio 5841, ¶ 20, citing *State v. Williams*, 8th Dist. No. 90845, 2009 Ohio 2026. Further, jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 13 Ohio B. 521, 469 N.E.2d 939 (8th Dist. 1984).
>
> **[¶64]** The trial court instructed the jury as follows:
>
> > Before you can find the defendant guilty of murder, you must find beyond a reasonable doubt that on or about the 4th day of September, 2005 and in Cuyahoga County, Ohio, the defendant purposely caused the death of Jerome Thomas.
> >
> > Purpose is an essential element of the offense of murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of Jerome Thomas.
> >
> > Purpose is a decision in the mind to do an act with a conscious objective of producing a specific result.
> >
> > To do [an] act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.
> >
> > The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means or weapon used, and all of the other facts and circumstances in evidence.

> If you find that the defendant did have a purpose to cause the death of a particular person, and that the shooting accidentally caused the death and/or injury of another person, then the defendant would be just as guilty as if the gunfire had taken effect upon the person intended.
>
> The purpose required is to cause the death of another, not any specific person. If the gunfire missed the person intended but caused the death of another, the element of purpose remains and the offense is as complete as though the person for whom the gunfire was intended had died.
>
> However, if there was no purpose to cause the death of anyone, the defendant cannot be found guilty of murder.
>
> The state charges that the act or failure to act of the defendant caused the death of Jerome Thomas. Cause is an essential element of the offense of murder. Cause is an act or failure to act which in the natural and continuous sequence directly produces the death of another, and without which it would not have occurred.
>
> The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.
>
> There may be * * * one or more causes of an event. However, if a defendant's act or failure to act was one cause, then the existence of other causes is not a defense.

[¶65] Specifically, in regards to Counts 2 and 3, the court instructed:

> Before you find the defendant guilty of attempted murder in either one or both of these counts, you must find beyond a reasonable doubt that on or about the 4th day of September, 2005, and in Cuyahoga County, Ohio, the defendant did attempt to purposely cause the death of Marcus Barnes in the case of Count 2, and/or Rayshawn Whitsett in the case of Count 3.
>
> Murder is the principle offense in the crime of attempted murder. Murder is purposely causing the death of another.
>
> An attempt occurs when a person knowingly engages in conduct that, if successful, would result in the commission of the offense of attempted murder.

[¶66] In his fifth and thirteenth assignments of error appellant asserts that the trial court erroneously instructed the jury on transferred intent. Appellant claims that the trial court's instruction on transferred intent also constituted a constructive amendment of his indictment. We disagree.

> **[¶67]** This court has previously rejected the argument that an instruction on transferred intent constitutes a constructive amendment of a defendant's indictment. *State v. Jackson*, 8th Dist. No. 76141, 2000 Ohio App. LEXIS 1741, 2000 WL 426556, *13 (Apr. 20, 2000).
>
> **[¶68]** Contrary to appellant's arguments, the transferred intent language used by the trial court is consistent transferred intent instructions we have previously upheld. *Id.*; see also *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005 Ohio 5098, ¶ 5, 55; *State v. Scott*, 7th Dist. No. 02-CA-215, 2004 Ohio 5117, ¶ 21, 28.
>
> **[¶69]** The evidence presented at trial established that appellant fired his gun into the bar's picture window with the intent to kill Milton Franklin III but, due to his poor aim, appellant killed Jerome Thomas and wounded Rayshawn Whitsett and Marcus Barnes. The instruction given by the trial court informed the jury that if the defendant intended to kill when he pulled the trigger, it did not matter whether he killed the intended target or an innocent bystander. Based on this evidence, an instruction on transferred intent was supported by the evidence in this case. Accordingly, appellant's fifth and thirteenth assignments of error are without merit and overruled.

(Exhibit 1, at 23-27).

Here, the Court of Appeals definitively stated that Ohio law did not support Petitioner's theories regarding constructive amendment of the indictment or the infirmity of the transferred intent instruction. It is clear from the instruction that "accidentally" referred to the victim and not to the act of firing the weapon, which is consistent with a transferred intent instruction. Further, Petitioner argues no federal law in support of these grounds for relief but rather only cites to Ohio law to persuade this Court that the instructions were incorrect. Petitioner's alleged errors relate to the application and interpretation of state law, a non-cognizable basis for a federal habeas petition. *See Bagby v. Sowders*, 894 F.2d 792, 795 (6th Cir. 1990); *see also Smith v. Morgan*, 371 F. App'x 575, 582 (6th Cir. 2010) (citing 28 U.S.C. § 2254(a)). Petitioner did not present grounds five or eight as a claim for relief under the Constitution or laws of the United States, nor did the alleged errors create fundamental unfairness to the Petitioner and thus, they are non-cognizable and should be dismissed.

STANDARD OF REVIEW

When the basis for a federal habeas claim has been previously adjudicated by the state courts, AEDPA provides the writ shall not issue unless the state decision "was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." § 2254(d)(1). A federal court may grant habeas relief if the state court arrives at a decision opposite to that reached by the Supreme Court of the United States on a question of law, or if the state court decides a case differently than did the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The appropriate measure of whether a state court decision unreasonably applied clearly established federal law is whether that state adjudication was "objectively unreasonable" and not merely erroneous or incorrect. *Williams*, 529 U.S. at 409–11; *see also Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000). To obtain "habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011). The Supreme Court explicitly requires federal habeas courts to review state court decisions with "deference and latitude" and specifically stated relief under the habeas corpus standard is intentionally difficult. *Id.* at 785-86.

Insufficiency of Evidence

To defeat a claim of insufficient evidence, the court must find that "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." *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard

"gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Consistent with the deference given to the trier of fact's resolution of conflicts in evidence, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume-even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326; *see also Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983).

As such, the reviewing court is not permitted to reweigh evidence or in any way substitute its own opinion for that of the trier of fact. *United States v. Fisher*, 648 F.3d 442, 450 (6th Cir. 2011) (citing *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009)). Due process is satisfied as long as such evidence is enough for a rational trier of fact to make a permissible inference of guilt, as opposed to a reasonable speculation that the petitioner is guilty of the charged crime. *Newman v. Metrish*, 543 F.3d 793, 796-97 (6th Cir. 2008). "[T]he *Jackson v. Virginia* standard is so demanding that '[a] defendant who challenges the sufficiency of the evidence to sustain his conviction faces a nearly insurmountable hurdle.'" *Davis*, 658 F.3d at 534 (quoting *United States v. Oros*, 578 F.3d 703, 710 (7th Cir. 2009)).

Further it is important to note the double deference applicable in this case; first, the deference accorded to the trier of fact's verdict by *Jackson*, and second, the deference to the state court's consideration of the verdict under AEDPA. *See Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008).

Fourth Subclaim of Ground One

In the last remaining subclaim of ground one, Petitioner alleges he was denied due process of law when his motion for judgment of acquittal was denied, specifically because the

State did not prove purpose and intent to murder or attempt murder. (Doc. 1, at 7). This claim is addressed on the merits.

The Court of Appeals rejected Petitioner's insufficiency argument as follows:

> [¶18] An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, (superseded by statute and constitutional amendment on other grounds). A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997 Ohio 52, 678 N.E.2d 541 (Cook, J., concurring).
>
> **[¶19]** The elements of murder and attempted murder are set forth in statute. R.C. 2903.02(A) provides: "[n]o person shall purposely cause the death of another * * * " and R.C. 2923.02(A), the "attempt" statute provides that "no person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."
>
> **[¶20]** Pursuant to R.C. 2901.22(A), a person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.
>
> **[¶21]** In the case sub judice, the state presented sufficient evidence at trial to support appellant's convictions for murder and attempted murder. Four separate witnesses, Rayshawn Whitsett, Michelle Johnson, Nickeesha Robinson and Milton Franklin III, testified to seeing appellant fire the gunshots that came into the bar through the picture window. Paulette Shelton testified to seeing appellant fire the shots that came through the window in the bar's door. Each of the witnesses recognized appellant's face due to the attention he drew to himself from his rowdy behavior earlier in the evening on the bar's dance floor, including removing his shirt and displaying distinctive tattoos.
>
> [¶22] In his first and eleventh assignments of error appellant argues that the state failed to introduce evidence that he acted purposely in causing the

death of Jerome Thomas or attempting to cause the deaths of Rayshawn Whitsett and/or Marcus Barnes.

[¶23] Whether a defendant had the specific intent to kill must be determined by the facts and circumstances surrounding the crime, "including the instrument used, its tendency to destroy life if designed for that purpose, and the manner of inflicting the wound." *State v. Pound*, 2d Dist. No. 16834, 1998 WL 636996, *3, citing *State v. Robinson*, 161 Ohio St. 213, 218-219, 118 N.E.2d 517 (1954). The specific intent to kill may be reasonably inferred from the fact that a firearm is an inherently dangerous instrument, the use of which is likely to produce death, coupled with relevant circumstantial evidence. *State v. Searles*, 8th Dist. No. 96549, 2011-Ohio-6275, at ¶ 11, citing *State v. Widner*, 69 Ohio St.2d 267, 431 N.E.2d 1025 (1982). "[P]ersons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *State v. Garner*, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995). "The act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence." *State v. Brown*, 8th Dist. No. 68761, 1996 WL 86627, *6 (Feb. 29, 1996).

[¶24] As an initial matter, we note that the evidence at trial was that appellant fired into a crowded bar that was operating at slightly under its maximum capacity. Courts have previously held that evidence that a defendant shot a gun into a crowd of people was sufficient to establish the purposefulness element of R.C. 2903.02(A). *State v. Williamson*, 8th Dist. No. 95732, 2011-Ohio-4095, at ¶ 19, citing *State v. Carter*, 115 Ohio App.3d 770, 686 N.E.2d 329 (7th Dist. 1996); *State v. Smith*, 89 Ohio App.3d 497, 624 N.E.2d 1114 (10th Dist. 1993); *State v. Cottrell*, 8th Dist. No. 81356, 2003-Ohio-5806.

[¶25] The state introduced evidence, however, that appellant fired specifically at Milton Franklin III, who was positioned at the time of the shooting inside the bar and in front of the bar's picture window. "[U]nder the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim." *In re T.K.*, 109 Ohio St.3d 512, 514, 2006-Ohio-3056, 849 N.E.2d 286, at ¶ 15. We have previously applied the doctrine of transferred intent to "bad aim" cases such as the present case to find sufficient evidence of purposeful conduct to support both murder and attempted murder convictions. *State v. Wheeler*, 8th Dist. No. 66923, 1995 WL 322247, *4 (May 25, 1995).

[¶26] The state's evidence was that appellant fired six shots through the bar's front picture window intending to kill Milton Franklin III, and due to his poor aim, Jerome Thomas, Rayshawn Whitsett and Marcus Barnes were shot instead. We find that the state introduced sufficient evidence of appellant's purposeful conduct to support his convictions for murder and attempted murder.

(Exhibit 1, at 8-11).

Upon review, the Court finds the Eighth District's recitation and application of the law to be without error. It is evident in this case that this conduct was purposeful; Petitioner is responsible for the natural and probable consequences of his actions, in this case, the death and injury of three individuals. Further, if Petitioner was aiming for Milton Franklin, III as theorized by the prosecution, and accepted by the jury, the doctrine of transferred intent clearly applies to shift the result —or probable consequence of Petitioner's actions— intended for Mr. Franklin to Misters Whitsett, Barnes, and Thomas. There is no question in this Court's opinion that firing a weapon in a crowded bar in the direction of humans satisfies the purpose and intent element of murder and attempted murder.

It is also clear that the jury chose to accept that Petitioner was intending to shoot Mr. Franklin and the account of the four witnesses who testified that Petitioner fired the gun on the night in question. Petitioner argues this Court should set aside the accepted evidence because it is "patently incredible"; however the Court finds no basis for this argument and will not overturn the jury's determination on witness credibility. (See Doc. 19, at 43) (citing *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). Petitioner did not prove the jury's decisions were in any way unreasonable or unfounded; therefore considering the facts in the record, a "rational trier of fact [could] make a permissible inference of guilt" from the evidence presented. *Newman*, 543 F.3d at 796-97.

Thus, giving full credit to the jury's evidentiary determinations and the state courts' reasonable application of the law in this case, the Court finds Petitioner failed to overcome his burden in proving the insufficiency of the evidence or the lower courts were objectively unreasonable in their application of the law. As such, the undersigned recommends the final subclaim of ground one be found without merit and be dismissed.

Ground Eleven

Ground eleven also challenges the sufficiency of evidence to prove the attempted murder of Marcus Barnes, particularly because Mr. Barnes was not present at trial to testify. (Doc. 1, at 27-28). The Court of Appeals rejected this claim as well:

> [¶26] The state's evidence was that appellant fired six shots through the bar's front picture window intending to kill Milton Franklin III, and due to his poor aim, Jerome Thomas, Rayshawn Whitsett and Marcus Barnes were shot instead. We find that the state introduced sufficient evidence of appellant's purposeful conduct to support his convictions for murder and attempted murder.
>
> **[¶27]** In his tenth assignment of error appellant challenges the sufficiency of his attempted murder conviction of Marcus Barnes and argues that his constitutional right to confrontation was denied because Barnes did not testify at trial. At trial, the state sought to introduce prior testimony of Marcus Barnes regarding this incident due to Barnes's unavailability. As an initial matter, it is unclear whether Barnes previously testified in a civil case regarding this shooting incident or at appellant's prior criminal trial. Appellant's argument is without merit because the trial court denied the introduction of Barnes's prior testimony, whatever the source. The testimony of Rayshawn Whitsett, Euclid Detective Robert Pestak and medical records from Hillcrest Hospital established that Barnes received gunshot wounds to both his legs as a result of this shooting.

(Exhibit 1, at 11-12).

As previously stated, to bring a successful claim for sufficiency of evidence the Petitioner must prove that a jury could not have found Petitioner guilty beyond a reasonable doubt, even after reviewing all the evidence in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319. Further, the reviewing court must apply a double deference to the findings of the trier of fact and the state court before relief can be granted. *See Tucker*, 541 F.3d at 656.

Petitioner alleges that without Mr. Barnes' testimony, the evidence was insufficient to prove his injuries through Rayshawn Whitsett, Detective Robert Pestak, and medical records; this assertion is incorrect. (Doc. 19, at 60-64). The testimony of an eyewitness, the investigating officer, and Mr. Barnes medical records documenting gunshot wounds in both legs are sufficient evidence to prove attempted murder, and the jury accepted this evidence. The Petitioner has not

overcome the double deference accorded under *Jackson* and AEDPA, nor has he shown that the Court of Appeals' application of the law was objectively unreasonable. Ground eleven is without merit and should be dismissed.

Prosecutorial Misconduct

To prevail on a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Even if the prosecutor's conduct was 'undesirable or even universally condemned,' this Court can only provide relief if the [conduct was] so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process violation." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In evaluating fairness, it is not the prosecutor's culpability but the fairness of the whole trial taken "within the context of the entire record." *See Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989). Lastly, in a federal habeas corpus proceeding challenging a state conviction, the Court may not grant relief unless that error "had a substantial and injurious effect or influence in determining the jury's verdict." *See Calderon v. Coleman*, 525 U.S. 141, 145 (1998) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Ground Three

Remaining in ground three are the following subclaims of prosecutorial misconduct: (1) questioning of Milton Franklin, III about Islamic terms; (2) insinuating that his expert witness Dr. Fulero was coerced during cross-examination; (3) making biased and prejudicial comments during closing argument; and (4) initialed photo arrays never produced to defense. The Court of Appeals addressed Petitioner's remaining claims for relief as follows:

> [¶41] Our focus upon review is whether the prosecutor's comments violated appellant's substantial rights, thereby depriving appellant of a fair trial such that

there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *Hicks* at ¶ 30; *State v. Onunwor*, 8th Dist. No. 93937, 2010-Ohio-5587, at ¶ 42, citing *State v. Loza*, 71 Ohio St.3d 61, 641 N.E.2d 1082 (1994), overruled on other grounds. "We note, however, that a defendant's substantial rights cannot be prejudiced when the remaining evidence, standing alone, is so overwhelming that it constitutes defendant's guilt and the outcome of the case would have been the same regardless of evidence admitted erroneously." *Hicks* at ¶ 30, citing *State v. Williams*, 38 Ohio St.3d 346, 528 N.E.2d 910 (1988).

*****

[¶45] Appellant next argues that the state engaged in prosecutorial misconduct when the prosecutor questioned Milton Franklin III concerning his Kufi and beard, his father's religious association and the definitions of Islamic terms, including Assalaamu Alaykum, Mujahid and Jihad. "[I]t is improper for the state to rouse the jury to convict merely by exciting their indignation against the defendant, against defense counsel, or against the crime itself." *State v. Sawyer*, 8th Dist. No. 79197, 2002-Ohio-1095.

[¶46] Although we find the prosecutor's line of questioning to be of minimal relevance and straddling the line of impropriety, on this record we cannot find that Milton Franklin III's answers rise to the level of reversible error, as these comments did not deprive appellant of a fair trial.

[¶47] Appellant next argues that the cross-examination of his expert witness, Dr. Soloman Fulero, was improper. In the cross-examination of Dr. Fulero, the prosecutor challenged Dr. Fulero's bias and character traits.

[¶48] Under Evid.R. 611(B), "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." "The limitation of * * * cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983). However, "[i]t is improper for an attorney, under the pretext of putting a question to a witness, to put before a jury information that is not supported by the evidence." *State v. Smidi*, 88 Ohio App.3d 177, 183, 623 N.E.2d 655 (6th Dist. 1993).

[¶49] The prosecutor asked Dr. Fulero if his step-son was currently serving a prison sentence for committing a homicide and if he ever shipped marijuana in the 1970's in order to determine whether he had a potential bias against the state. The scope of cross-examination of an expert on "questions of the expert's bias and pecuniary interest and the admissibility of evidence relating thereto are matters that rest in the sound discretion of the trial court." *Calderon v. Sharkey*, 70 Ohio St.2d 218, 436 N.E.2d 1008, at syllabus (1982). Evid.R. 616(A) includes certain acceptable methods of impeaching witnesses: "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."

[¶50] Because the prosecutor's cross-examination questions were made in order to determine Dr. Fulero's potential biases, the issue remains within the discretion of the trial court. We find no abuse of discretion based upon the record.

[¶51] Finally, appellant takes issue with comments made by the prosecutor during closing arguments. In general, prosecutors are given considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St. 3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369. In closing argument, a prosecutor may comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990), quoting *State v. Stephens*, 24 Ohio St. 2d 76, 82, 263 N.E.2d 773 (1970):

> Prosecutors are granted wide latitude in closing argument to urge that the evidence presented and the only reasonable inferences to be drawn from that evidence point to the guilt of the accused. However, it is improper for the state to rouse the jury to convict merely by exciting their indignation against the defendant, against defense counsel, or against the crime itself. *State v. Nobles*, 106 Ohio App.3d 246, 270, 665 N.E.2d 1137 (2d Dist. 1995).

[¶52] Furthermore, a prosecutor may not express his personal belief or opinion as to the credibility of a witness, the guilt of an accused or allude to matters that are not supported by admissible evidence. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The wide latitude given the prosecution during closing arguments "does not 'encompass inviting the jury to reach its decision on matters outside the evidence adduced at trial.'" *State v. Hart*, 8th Dist. No. 79564, 2002-Ohio-1084, citing *State v. Freeman*, 138 Ohio App.3d 408, 419, 741 N.E.2d 566 (1st Dist.2000).

[¶53] Appellant claims the prosecutor made biased and prejudicial remarks about the appellant's tattoos in order to inflame the jury. During his closing argument, the prosecutor stated: "What do you think it takes, from your life experiences, to place this body art on yourself as a person; what statement are you trying to make? Stop and ask yourself that question. Mujahid, a rifle, swords, Jihad. Is that a statement of self-expression of don't mess with me. I'm a warrior, I'm dangerous. I'm something that you don't want to mess with. I think the average person would agree with those statements."

[¶54] The prosecutor's insinuation that appellant intended his tattoos to express that he was "dangerous" or "something that you don't want to mess with" improperly indicated that appellant was an "Islamic warrior." However, the fact that the prosecutor engaged in some improper argument does not warrant reversal unless the remarks prejudicially affected substantial rights of the accused. *State v. Onunwor*, 8th Dist. No. 93937, 2010-Ohio-5587, ¶ 36. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *Id*., citing *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (8th Dist.1990). "The touchstone of

> analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).
>
> **[¶55]** Using these standards, we see no basis for reversing appellant's conviction based on the prosecutor's comments. Even though some of the prosecutor's argument may have been improper, such comments did not pervade the entire trial, let alone the closing argument. We are unconvinced that the result of appellant's trial would have been different without the above excerpts of improper commentary by the prosecution. We conclude that the improper statements made by the prosecutor during closing arguments did not substantially prejudice appellant so as to deny him a fair trial.

(Exhibit 1, at 15-21).

The Eighth District appropriately found that while the prosecutor's questioning of Milton Franklin III was of "minimal relevance and straddling the line of impropriety", it did not rise to the level of egregiousness necessary to deny Petitioner a fair trial. A reviewing court must analyze the alleged misconduct in light of the entire record and the undersigned cannot find the questioning of Mr. Franklin, as to Islamic terms, so outrageous as to pervade the fairness of the entire trial. Mr. Franklin's testimony regarding the tattoos and his acknowledgment that the terms held meaning within his religion are relevant to supporting the credibility of his eyewitness identification. Petitioner's tattoos, as his primary identifier, are relevant regardless of what the tattoos said or stood for, and eliciting testimony regarding the tattoos did not infect the entire trial with unfairness. *See Darden*, 477 U.S. at 180.

As to the cross-examination of Dr. Fulero, Petitioner alleges the line of questioning regarding his past experience with law enforcement was improper. Following the reasoning of the Court of Appeals, the undersigned cannot find that these questions, or even the inference that Dr. Fulero was biased, so pervaded the trial as to render it a due process violation. Furthermore, Petitioner provided no proof that the prosecutor's questions were knowingly based on incorrect information or falsehoods such that presenting these questions to the jury would be illegal. The rules of evidence allow for questioning of witnesses to reveal potential areas of bias or prejudice

and the limits of these questions are governed by the discretion of the trial court. The Court of Appeals correctly applied the law to their review in so much as it cannot be found to be an unreasonable application of the law.

Next, the Petitioner takes issue with the prosecutor's comments during closing arguments that insinuated Petitioner's Islamic tattoos proved he was dangerous, violent, and likened him to a terrorist. (Doc. 19, at 47-50). Upon reviewing the comments made, it certainly appears as if the prosecutor was drawing improper inferences from Petitioner's religion and tattoos; however to find prosecutorial misconduct, the Court does not look to the acts of the prosecutor but rather their effect on the entire trial's fairness. *See Smith v. Phillips*, 455 U.S. 209, 219 (1982); *Lundy v. Campbell*, 888 F.2d 467, 472-73 (6th Cir. 1989). The Court of Appeals concluded that the prosecutor's comments did not rise to the level of reversible error because they did not pervade even the closing argument, let alone the trial as a whole. (Exhibit 1, at 20-21). The Petitioner has not proven that these comments jeopardized the fairness of the judicial process or led the jurors to misconstrue the evidence before them. While the prosecutor's comments were unwarranted, this Court agrees that the comments had neither a "substantial [n]or injurious effect or influence on the jury verdict" such that the outcome would have been different had the prosecutor not made those comments. *See Calderon*, 525 U.S. at 145.

Last is Petitioner's allegation that initialed photo arrays were missing from the evidence produced to the Petitioner before trial as a result of prosecutorial misconduct; a failure which ultimately led to a violation of his due process rights. (Doc. 19, at 46-48). In support of this argument, Petitioner cites to the trial transcript, however upon reviewing the transcript citations the Court can find no mention of missing initialed photo arrays at the citations marked. Nor is there any evidence that these alleged missing photo arrays were purposefully excluded by the direction or with the knowledge of the prosecutor or the police, in fact the Detective in charge of

investigation stated he turned over all related documents. (Doc. 1-4, at 106-07). As stated before, it is not the Court's responsibility to develop arguments or identify evidence in the record in support of Petitioner's claims. Because Petitioner has not provided proof of his claim of prosecutorial misconduct the Court has nothing to review for error and thus, recommends that ground three be dismissed as without merit.

Jury Instructions

Normally, alleged errors in jury instructions do not rise to the level of federal constitutional violations. *See Engle v. Isaac*, 456 U.S. 107 (1982). The petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). If an instruction is ambiguous, but perhaps not erroneous, a due process violation occurs if it is determined that there is a "reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution." *Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991) (quoting *Boyd v. California*, 494 U.S. 370, 380 (1990).

Ground Six

Here, Petitioner alleges the phrase "and/or" injury within the transferred intent instruction caused confusion in the jury because it allowed him to be convicted of murder based on the intent to injure. (Doc. 19, at 57-58) (citing *Schad v. Arizona*, 501 U.S. 624, 651 (1999) (plural opinion)). The trial court gave the following relevant instruction on transferred intent:

> If you find that the defendant did have a purpose to cause the death of a particular person, and that the shooting accidentally caused the death and/or injury of another person, then the defendant would be just as guilty as if the gunfire had taken effect upon the person intended. (Doc. 8-11, at 1903-04).

The Court of Appeals ruled as follows regarding the transferred intent instruction:

> **[¶70]** In his sixth assignment of error appellant argues that the trial court's instruction on transferred intent allowed the jury to convict him of murder based only on proof that he injured someone rather than caused a death. Appellant seizes

> solely upon the trial court's instruction regarding transferred intent. Appellant was charged not only with murder but also with two counts of attempted murder of those injured. The trial court provided a single instruction on transferred intent applicable to all counts. The trial court's instruction on transferred intent fit the circumstances of appellant's case. Furthermore, a single challenged jury instruction may not be reviewed piecemeal or in isolation but must be reviewed within the context of the entire charge. *State v. Shopshire*, 8th Dist. No. 85063, 2005 Ohio 3588, ¶ 23, citing *State v. Hardy*, 28 Ohio St.2d 89, 276 N.E.2d 247 (1971). Appellant's argument completely ignores the court's detailed instructions regarding the murder charge that explicitly required that the jury find that appellant caused the death of Jerome Thomas before he could be convicted of murder.

(Exhibit 1, at 26-27).

The Eighth District found that the transferred intent instruction was general and intended to apply to both charges facing Petitioner, murder and attempted murder. While it is certainly possible to construe the instruction as Petitioner alleges, the trial court went on to specifically state in its instructions that to find Petitioner guilty of murder and attempted murder, his actions had to be done with the intent to kill. (Doc. 8-1, at 1900-1906). When reviewing the instructions as a whole, it is evident that the jury had to find an intent to kill; then and only then, could they transfer that intent to Misters Thomas, Barnes, and Whitsett. The instruction did not create a reasonable likelihood of confusion nor did it infect the entire trial such that a due process violation occurred. The Eighth District's application of the law was not contrary to Supreme Court precedent and therefore, ground six is without merit and should be dismissed.

Ineffective Assistance of Counsel

Effective assistance of trial counsel is guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To prevail on an ineffective assistance of counsel claim, a petitioner must satisfy both prongs of the test set forth in *Strickland*: that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and unreliable. *Strickland*, 466 U.S. at 698; *Harries v. Bell*, 417 F.3d 631, 636 (6th Cir. 2005) (citing *Strickland*, 466 U.S. at 686–692). This Court may dispose of an ineffective

assistance of counsel claim by finding that petitioner made an insufficient showing on either ground. *Id.* at 697.

To meet the deficient performance prong, counsel's representation must fall below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. To meet the prejudice prong, there must exist a reasonable probability that, absent counsel's unprofessional errors, the results of the proceeding would have been different. *Id.* at 694. It is not enough to show error had "some conceivable" effect on the outcome but rather that it is "reasonably likely [the decision would] have been different absent the errors". Id. at 693, 695. When considering the prejudice element, the focus is on whether counsel's errors undermined the reliability of and confidence in the result. *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993)). This is a high burden:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 689.

Review of a *Strickland* claim is doubly deferential in a § 2254 proceeding. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) ("Judicial review of a defense attorney[] . . . is . . . highly deferential – and doubly deferential when conducted through the lens of federal habeas."). This double deference arises because the *Strickland* standard is a general standard, giving a state court even more latitude to reasonably determine that a defendant has not satisfied the standard.

Knowles v. Mirzayance, 556 U.S. 11, 123 (2009). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington*, 131 S. Ct. at 785. Accordingly, the pivotal question in any § 2254 action that presents an ineffective assistance claim, is "whether the state court's application of the *Strickland* standard was unreasonable." *Id.* at 785.

Ground Twelve

As stated before, Petitioner must raise the same theories of ineffective assistance of counsel on habeas review as were presented to the Ohio appellate courts. *See Wong*, 142 F. 3d. at 322. Petitioner only has two remaining grounds for ineffective assistance of counsel, failure to request an accidental death instruction and failure to object to improper questioning regarding Islamic terms; all others were not fairly presented to the state courts and thus, are unexhausted. The Eighth District Court of Appeals addressed Petitioner's ineffective assistance claim as follows:

> **[¶99]** Appellant argues that his counsel was ineffective for failing to object to the trial court's jury instruction regarding transferred intent. However, the record reveals that appellant's counsel did, in fact, object to the transferred intent instruction. Furthermore, as discussed above in our resolution of appellant's fifth, sixth, seventh and thirteenth assignments of error, the instruction was proper. In connection with this instruction appellant, citing *State v. Underdown*, 124 Ohio App.3d 675, 707 N.E.2d 519 (10th Dist. 1997), argues that his counsel was ineffective for failing to request a jury instruction on the defense of accident. Appellant confuses the trial court's use of the term "accidentally" in its transferred intent instruction with the defense of accident referenced in *Underdown*. Unlike *Underdown*, the present case contains absolutely no evidence that appellant's shooting was the result of an accident instead of an intentional shooting with unintended victims.
>
> **[¶100]** Appellant next argues that his trial counsel was ineffective for failing to object to the prosecutor's questions and closing arguments regarding his tattoos and the meaning of various Islamic terms. We note that appellant's counsel did in fact repeatedly object to the prosecutor's questioning of Milton Franklin III, regarding the meaning of these terms. As addressed in appellant's third and fourth assignments of error, this evidence was relevant to establish why various witnesses remembered appellant from the bar prior to the shooting and no prejudice to appellant resulted.

(Exhibit 1, at 36-37).

Upon review of the Court of Appeals decision, the Court agrees that Petitioner's trial counsel was not deficient, a conclusion that is entitled to deference. The "Constitution guarantees only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Issac*, 456 US 104, 133-34 (1982).

Here, Petitioner argues he was entitled to an instruction on accidental death however, as succinctly stated by the Eighth District; there is absolutely no evidence to suggest these shootings were "the result of an accident instead of an intentional shooting with unintended victims." (Exhibit 1, at 37). It is not inadequate representation to fail to suggest a jury instruction for a defense that is not supported by the evidence, in fact it is the opposite. *See Bagby v. Sowders*, 894 F.2d 792, 795 (6th Cir. 1990). Furthermore, as the Court of Appeals decided the transferred intent instruction giving rise to Petitioner's claim was appropriate.

In his second argument, Petitioner claims his counsel was ineffective for failing to object to the prosecutor's questions regarding Islam. Yet a review of the transcript reveals that counsel did in fact object; counsel cannot be held responsible for the trial court's exercise of discretion in overruling the objection. Petitioner continues on stating that counsel failed to object to the prosecutor's personal comments and insinuations, however as stated above the Sixth Amendment does not guarantee the right to perfect counsel. *Engle*, 456 at 133-34. Lastly, the Court of Appeals found, and this Court agrees, that allowing testimony as to the Islamic terms was not contrary to established law and the prosecutor's inappropriate characterizations of Islam did not infect the entire trial with fundamental unfairness.

Petitioner has not carried his burden of proving deficient performance, and thus this Court need not address prejudice. The Court of Appeals' determination of the facts on the record

and its application of the *Strickland* test were reasonable, and are therefore entitled to deference. Petitioner's assertion to the contrary is without merit and ground twelve should be dismissed.

CONCLUSION AND RECOMMENDATION

Following review, and for the reasons stated above, the undersigned recommends the Court dismiss the Petition.

s/James R. Knepp II
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

[Cite as *State v. Majid*, 2012-Ohio-1192.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 96855

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ARIF MAJID

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-474447

BEFORE: E. Gallagher, J., Rocco, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: March 22, 2012

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Arif Majid ("appellant"), a.k.a. Cedric Parker, appeals convictions entered in the Cuyahoga County Court of Common Pleas on May 3, 2011. Appellant sets forth 13 assignments of error arguing that the trial court erred in (1) permitting the jury to find the appellant guilty of murder based on insufficient evidence; (2) by overruling appellant's motion to suppress the identification procedure; (3) by "conceding" prosecutorial misconduct; (4) by admitting and allowing prejudicial evidence; (5) by providing a transferred intent jury instruction; (6) by allowing convictions for causing an injury rather than death, instructing the jury on causation and refusing to instruct on lesser included offenses; (7) in subjecting appellant to unconstitutional multiple punishments; (8) in allowing a conviction for attempted murder without the testimony of the victim; (9) by overruling appellant's motion for judgment of acquittal and (10) by informing the jury that appellant could be convicted of accidental death or injury. For the following reasons, we affirm but remand for resentencing.

{¶2} On December 6, 2005, appellant was charged in a five count indictment stemming from a shooting incident that occurred in the early morning hours of September 4, 2005 at Milton's Lounge in Euclid, Ohio. Specifically, appellant was charged with aggravated murder in violation of R.C. 2903.01 with one- and three-year firearm specifications, three mass murder specifications, a notice of prior conviction and a repeat violent offender specification. Appellant was also charged with having a weapon while

under disability, three counts of attempted murder with one- and three-year firearm specifications, a notice of prior conviction and a repeat violent offender specification. Appellant pled not guilty to the charges.

{¶3} The case proceeded to a jury trial[1] and under Count 1 appellant was found guilty of murder in violation of R.C. 2903.02(A) with specifications for firearms and mass murder, the notice of prior conviction and the repeat violent offender specification. The jury also found appellant guilty of attempted murder in Counts 2 and 4 along with one- and three-year firearm specifications, the notice of prior conviction and the repeat violent offender specifications. The jury found appellant not guilty of attempted murder in Count 3. The court found appellant to be guilty of having a weapon while under disability. On August 30, 2007, appellant was sentenced to a cumulative prison term of 43 years to life.

{¶4} This court reversed appellant's convictions and remanded the case for a retrial due to jury misconduct in *State v. Majid*, 182 Ohio App.3d 730, 2009-Ohio-3075, 914 N.E.2d 1113, at ¶ 33 (8th Dist.) ("Majid I").

{¶5} A second trial commenced April 25, 2011. Prior to trial, the trial court again renumbered the counts of the indictment and the state of Ohio dismissed several specifications. Appellant waived his right to a trial by jury as to Count 4 only.

[1]Appellant waived his right to a trial by jury on the charge of having a weapon while under disability (Count 2) and the court renumbered the charges set forth in the indictment.

{¶6} In this second trial the charges presented were Count 1 — murder with one- and three-year firearm specifications; Count 2 — attempted murder with one- and three-year firearm specifications; Count 3 — attempted murder with one- and three-year firearm specifications; and Count 4 — having a weapon while under disability.

{¶7} It was the state's evidence at trial that on the night of September 3, 2005 and the early morning hours of September 4, 2005, appellant went to Milton's Lounge in Euclid, Ohio. The bar had a crowd of approximately fifty people at the time, slightly under maximum capacity. Appellant, described as a light skinned African American male, was accompanied by his brother, Lecarlton Parker, who was described as a dark skinned African American male and two of Lecarlton's friends, Christopher Core and Clifton Harris. Witnesses inside the bar described appellant and his group as "rowdy." While on the bar's dance floor, appellant twice removed his shirt and was asked by bar employees to re-dress. A number of witnesses reported taking notice of distinctive tattoos on appellant's bare torso, including a prominent "jihad" tattoo across his back and shoulders. Appellant's group was eventually asked to leave by bar management after an unknown member of the group dropped a drink on the dance floor. While witness accounts at trial were conflicting as to whether appellant's group left the bar on their own accord, which bar employees escorted the group out, whether the group left with or without making a disturbance and whether threats were made as the group was leaving, all witnesses agreed that the group did exit the bar.

{¶8} Appellant and Lecarlton remained on the sidewalk outside the bar, visible through the bar's front picture window. Milton Franklin, Jr., the bar's owner, asked the men not to loiter outside the bar but his request was ignored. Milton Franklin III, the son of Milton Franklin, Jr., and an employee of the bar, joined the confrontation just outside the bar's door and angry words were exchanged between Milton Franklin III and the men. Christopher Core testified that he and Clinton Harris had walked back to their car while appellant and Lecarlton remained. Core testified that he heard Lecarlton exchange angry words with another man. Milton Jr. brought Milton III back inside the bar and began to close and lock the front door when someone outside of the bar punched the small square window in the bar's door, causing it to crack. A witness in the parking lot indicated that a darker skinned man punched the door's window and D.N.A. evidence was introduced that Lecarlton had left traces of blood on the small window.

{¶9} Milton III responded by pulling a gun and, from the bar's doorway, firing what he described as warning shots in the direction of appellant and Lecarlton. Christopher Core testified that after he heard gunshots he heard appellant shout, "somebody tried to shoot my brother" and appellant and Lecarlton retreated into the parking lot while Milton III went into the bar and Milton Jr. locked the door.

{¶10} Appellant and his brother were seen running back to the bar and shortly thereafter the small window in the bar door was fully knocked out and a light skinned arm was extended through the window holding a gun and at least two shots were then fired into

the bar. The bar's bouncer, Wesley Williams, struggled with the gun arm until it was retracted through the door. Paulette Shelton testified that she was able to see through the window of the door and she identified appellant as the shooter to whom the gun arm belonged.

{¶11} Witnesses testified that after the arm holding a gun was extracted from the window they saw appellant, outside the bar's front picture window point his gun at the bar and begin firing. Witnesses recognized appellant's face due to the attention he drew to himself earlier on the dance floor. Milton III testified that at the time of the shooting through the picture window, he was standing in front of the window inside of the bar when appellant saw him through the window and began shooting in his direction.

{¶12} Three bar patrons were struck by bullets as a result of the shooting. Jerome Thomas was shot twice and died as a result of his wounds. Rayshawn Whitsett was shot in the hip and Marcus Barnes was shot in both legs.

{¶13} On May 3, 2011, the jury returned a verdict of guilty as to murder with one- and three-year firearm specifications (Count 1); attempted murder with one- and three-year firearm specifications (Count 2) and attempted murder with one- and three-year firearm specifications (Count 3).

{¶14} On May 4, 2011, the court rendered a guilty verdict as to Count 4 — having weapons while under disability.

{¶15} The appellant was sentenced to a cumulative prison term of 43 years to life as follows:

> Defendant sentenced to 18 years to life on Count 1; (3 years on the gun specification to run prior to and consecutive to 15 years to life on Count 1); All gun specifications merge for sentencing purposes. 10 years on each of Counts 2 and 3; 5 years on Count 4; All counts to run consecutive for a total of 43 years to life.

{¶16} Appellant's first, tenth and eleventh assignments of error challenge the legal sufficiency of the evidence to support his convictions for murder and attempted murder and the trial court's denial of his Crim.R. 29(A) motion. We, therefore, address these errors together.

{¶17} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶18} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, (superseded by statute and constitutional amendment on other grounds). A reviewing

court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541 (Cook, J., concurring).

{¶19} The elements of murder and attempted murder are set forth in statute. R.C. 2903.02(A) provides: "[n]o person shall purposely cause the death of another * * * " and R.C. 2923.02(A), the "attempt" statute provides that "no person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶20} Pursuant to R.C. 2901.22(A),

> a person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶21} In the case sub judice, the state presented sufficient evidence at trial to support appellant's convictions for murder and attempted murder. Four separate witnesses, Rayshawn Whitsett, Michelle Johnson, Nickeesha Robinson and Milton Franklin III, testified to seeing appellant fire the gunshots that came into the bar through the picture window. Paulette Shelton testified to seeing appellant fire the shots that came through the window in the bar's door. Each of the witnesses recognized appellant's face due to the attention he drew to himself from his rowdy behavior earlier in the evening on the bar's dance floor, including removing his shirt and displaying distinctive tattoos.

{¶22} In his first and eleventh assignments of error appellant argues that the state failed to introduce evidence that he acted purposely in causing the death of Jerome Thomas or attempting to cause the deaths of Rayshawn Whitsett and/or Marcus Barnes.

{¶23} Whether a defendant had the specific intent to kill must be determined by the facts and circumstances surrounding the crime, "including the instrument used, its tendency to destroy life if designed for that purpose, and the manner of inflicting the wound." *State v. Pound*, 2d Dist. No. 16834, 1998 WL 636996, *3, citing *State v. Robinson*, 161 Ohio St. 213, 218-219, 118 N.E.2d 517 (1954). The specific intent to kill may be reasonably inferred from the fact that a firearm is an inherently dangerous instrument, the use of which is likely to produce death, coupled with relevant circumstantial evidence. *State v. Searles*, 8th Dist. No. 96549, 2011-Ohio-6275, at ¶ 11, citing *State v. Widner*, 69 Ohio St.2d 267, 431 N.E.2d 1025 (1982). "[P]ersons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *State v. Garner*, 74 Ohio St.3d 49, 60, 656 N.E.2d 623 (1995). "The act of pointing a firearm and firing it in the direction of another human being is an act with death as a natural and probable consequence." *State v. Brown*, 8th Dist. No. 68761, 1996 WL 86627, *6 (Feb. 29, 1996).

{¶24} As an initial matter, we note that the evidence at trial was that appellant fired into a crowded bar that was operating at slightly under its maximum capacity. Courts have previously held that evidence that a defendant shot a gun into a crowd of people was

sufficient to establish the purposefulness element of R.C. 2903.02(A). *State v. Williamson*, 8th Dist. No. 95732, 2011-Ohio-4095, at ¶ 19, citing *State v. Carter*, 115 Ohio App.3d 770, 686 N.E.2d 329 (7th Dist. 1996); *State v. Smith*, 89 Ohio App.3d 497, 624 N.E.2d 1114 (10th Dist. 1993); *State v. Cottrell*, 8th Dist. No. 81356, 2003-Ohio-5806.

{¶25} The state introduced evidence, however, that appellant fired specifically at Milton Franklin III, who was positioned at the time of the shooting inside the bar and in front of the bar's picture window. "[U]nder the doctrine of transferred intent, an offender who intentionally acts to harm someone but ends up accidentally harming another is criminally liable as if the offender had intended to harm the actual victim." *In re T.K.*, 109 Ohio St.3d 512, 514, 2006-Ohio-3056, 849 N.E.2d 286, at ¶ 15. We have previously applied the doctrine of transferred intent to "bad aim" cases such as the present case to find sufficient evidence of purposeful conduct to support both murder and attempted murder convictions. *State v. Wheeler*, 8th Dist. No. 66923, 1995 WL 322247, *4 (May 25, 1995).

{¶26} The state's evidence was that appellant fired six shots through the bar's front picture window intending to kill Milton Franklin III, and due to his poor aim, Jerome Thomas, Rayshawn Whitsett and Marcus Barnes were shot instead. We find that the state introduced sufficient evidence of appellant's purposeful conduct to support his convictions for murder and attempted murder.

{¶27} In his tenth assignment of error appellant challenges the sufficiency of his attempted murder conviction of Marcus Barnes and argues that his constitutional right to

confrontation was denied because Barnes did not testify at trial. At trial, the state sought to introduce prior testimony of Marcus Barnes regarding this incident due to Barnes's unavailability. As an initial matter, it is unclear whether Barnes previously testified in a civil case regarding this shooting incident or at appellant's prior criminal trial. Appellant's argument is without merit because the trial court *denied* the introduction of Barnes's prior testimony, whatever the source. The testimony of Rayshawn Whitsett, Euclid Detective Robert Pestak and medical records from Hillcrest Hospital established that Barnes received gunshot wounds to both his legs as a result of this shooting.

{¶28} Appellant's first, tenth and eleventh assignments of error are without merit and overruled.

{¶29} Appellant argues in his second assignment of error that the out-of-court identification procedure used to identify him was suggestive and conducive to misidentification, because the procedure included showing witnesses' photographs of the appellant's naked torso covered with distinctive tattoos.

{¶30} This court set forth the scope of our review regarding a motion to suppress in *State v. Curry*, 95 Ohio App.3d 93, 96, 641 N.E.2d 1172 (8th Dist. 1994):

> In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard. (Internal citations omitted.)

{¶31} In *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8, the Ohio Supreme Court found that:

> [A]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. (Internal citations omitted.)
>
> In determining the admissibility of challenged identification testimony, a reviewing court applies a two-prong test: (1) did the defendant demonstrate that the identification procedure was unduly suggestive; and, if so, (2) whether the identification, viewed under the totality of the circumstances, is reliable despite its suggestive character. *State v. Mills*, 8th Dist. No. 95837, 2011-Ohio-3837, ¶ 16, citing *State v. Harris*, 2d Dist. No. 19796, 2004-Ohio-3570, ¶ 19. "Stated differently, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Wills*, 120 Ohio App.3d 320, 324-325, 696 N.E.2d 1072 (8th Dist.1997).

{¶32} Appellant filed a motion to suppress identification on February 2, 2007, prior to his first trial. The record reflects that the trial court held a hearing on appellant's motion to suppress and denied the motion on July 11, 2007. Counsel raised the issue again prior to appellant's second trial and the trial court noted appellant's objection but held that its prior ruling on the matter would stand.

{¶33} In support of the present assignment of error appellant repeatedly cites the suppression hearing from July 9, 2007. However, a copy of the transcript from that 2007 hearing has not been included in the record.

{¶34} It is axiomatic that the party challenging a judgment has the burden to file an adequate record with the reviewing court to exemplify its claims of error. *Tabbaa v. Raslan*, 8th Dist. No. 97055, 2012-Ohio-367, ¶ 10.

{¶35} App.R. 9 requires the appellant, when urging on appeal that evidence was improperly admitted, or that a judgment is unsupported by the evidence, to include in the record a transcript of all evidence relevant to the findings or conclusions and to illustrate any alleged error by reference to them in the record. *State v. Wheeler*, 8th Dist. No. 61335, 1992 WL 328802, *1.

{¶36} When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶37} Appellant's second assignment of error is overruled.

{¶38} Appellant asserts in his third assignment of error that the prosecutor at trial engaged in prosecutorial misconduct.

{¶39} Appellant argues that the prosecutor engaged in misconduct by (1) misusing a photo copy of the photo array exhibit used by Robert Sanders to identify appellant, (2) questioning Milton Franklin III about his religious association and the definitions of Islamic terminology, (3) insinuating that the appellant's expert witness, Dr. Solomon Fulero, was coerced during cross-examination and (4) making biased and prejudicial comments during closing argument thereby intensifying the relationship between the content of his tattoos and his guilt.

{¶40} The test for prosecutorial misconduct is whether the prosecutor's remarks or questions were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Hicks*, 194 Ohio App.3d 743, 2011-Ohio-3578, 957 N.E.2d 866, ¶ 30 (8th Dist.). A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). The focus of that inquiry is on the fairness of the trial, not on the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 496, 1999-Ohio-283, 709 N.E.2d 484. "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, th*ere can be no such thing as an error-free, perfect trial*, and * * * the Constitution does not guarantee such a trial." *United States v. Hasting* (1983), 461 U.S. 499, 508-09, 103 S.Ct. 1974. (Emphasis added.)

{¶41} Our focus upon review is whether the prosecutor's comments violated appellant's substantial rights, thereby depriving appellant of a fair trial such that there is a

reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *Hicks* at ¶ 30; *State v. Onunwor*, 8th Dist. No. 93937, 2010-Ohio-5587, at ¶ 42, citing *State v. Loza*, 71 Ohio St.3d 61, 641 N.E.2d 1082 (1994), overruled on other grounds. "We note, however, that a defendant's substantial rights cannot be prejudiced when the remaining evidence, standing alone, is so overwhelming that it constitutes defendant's guilt and the outcome of the case would have been the same regardless of evidence admitted erroneously." *Hicks* at ¶ 30, citing *State v. Williams*, 38 Ohio St.3d 346, 528 N.E.2d 910 (1988).

{¶42} Appellant argues that the prosecutor took from appellant's counsel a photocopy of a photo array containing a picture of appellant and his tattoos, marked it State's Exhibit 241, and improperly used the exhibit during Robert Sanders's testimony. Furthermore, Sanders confusingly testified that pencil markings on the exhibit were his own. Appellant's counsel did not object to the prosecutor's use of this document.

{¶43} Because the appellant failed to raise this objection during his trial, "he now waives all but plain error." *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677, ¶ 33, citing *State v. Childs*, 14 Ohio St.2d 56, 263 N.E.2d 545 (1968). An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Under Crim.R. 52(B), plain error requires an obvious defect in the trial court proceeds that affected "substantial rights." *State v. Posa*, 8th Dist. No. 94255, 2010-Ohio-5355, ¶ 6. Notice of

plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶44} The analysis of a plain error and prosecutorial misconduct both require the conduct to affect appellant's substantial rights. Even accepting as true appellant's contention that the prosecutor's actions in using the appellant's exhibit were improper, neither his rights were affected nor was he prejudiced because State's Exhibit 241 was a photocopy of the photo array originally shown to Sanders by the police and appellant's attorney cross-examined Sanders on the matter. Although Sanders initially testified that the pencil markings were his own, he eventually agreed that they may not be his markings. He was nonetheless positive that he chose the appellant in the original photo array.

{¶45} Appellant next argues that the state engaged in prosecutorial misconduct when the prosecutor questioned Milton Franklin III concerning his Kufi and beard, his father's religious association and the definitions of Islamic terms, including Assalaamu Alaykum, Mujahid and Jihad. "[I]t is improper for the state to rouse the jury to convict merely by exciting their indignation against the defendant, against defense counsel, or against the crime itself." *State v. Sawyer*, 8th Dist. No. 79197, 2002-Ohio-1095.

{¶46} Although we find the prosecutor's line of questioning to be of minimal relevance and straddling the line of impropriety, on this record we cannot find that Milton

Franklin III's answers rise to the level of reversible error, as these comments did not deprive appellant of a fair trial.

{¶47} Appellant next argues that the cross-examination of his expert witness, Dr. Soloman Fulero, was improper. In the cross-examination of Dr. Fulero, the prosecutor challenged Dr. Fulero's bias and character traits.

{¶48} Under Evid.R. 611(B), "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." "The limitation of * * * cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre*, 6 Ohio St.3d 140, 145, 451 N.E.2d 802 (1983). However, "[i]t is improper for an attorney, under the pretext of putting a question to a witness, to put before a jury information that is not supported by the evidence." *State v. Smidi*, 88 Ohio App.3d 177, 183, 623 N.E.2d 655 (6th Dist. 1993).

{¶49} The prosecutor asked Dr. Fulero if his step-son was currently serving a prison sentence for committing a homicide and if he ever shipped marijuana in the 1970's in order to determine whether he had a potential bias against the state. The scope of cross-examination of an expert on "questions of the expert's bias and pecuniary interest and the admissibility of evidence relating thereto are matters that rest in the sound discretion of the trial court." *Calderon v. Sharkey*, 70 Ohio St.2d 218, 436 N.E.2d 1008, at syllabus (1982). Evid.R. 616(A) includes certain acceptable methods of impeaching

witnesses: "[b]ias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."

{¶50} Because the prosecutor's cross-examination questions were made in order to determine Dr. Fulero's potential biases, the issue remains within the discretion of the trial court. We find no abuse of discretion based upon the record.

{¶51} Finally, appellant takes issue with comments made by the prosecutor during closing arguments. In general, prosecutors are given considerable latitude in opening and closing arguments. *State v. Ballew*, 76 Ohio St. 3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369. In closing argument, a prosecutor may comment on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293 (1990), quoting *State v. Stephens*, 24 Ohio St. 2d 76, 82, 263 N.E.2d 773 (1970).

> Prosecutors are granted wide latitude in closing argument to urge that the evidence presented and the only reasonable inferences to be drawn from that evidence point to the guilt of the accused. However, it is improper for the state to rouse the jury to convict merely by exciting their indignation against the defendant, against defense counsel, or against the crime itself. *State v. Nobles*, 106 Ohio App.3d 246, 270, 665 N.E.2d 1137 (2d Dist. 1995).

{¶52} Furthermore, a prosecutor may not express his personal belief or opinion as to the credibility of a witness, the guilt of an accused or allude to matters that are not supported by admissible evidence. *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The wide latitude given the prosecution during closing arguments "does not

'encompass inviting the jury to reach its decision on matters outside the evidence adduced at trial.'" *State v. Hart*, 8th Dist. No. 79564, 2002-Ohio-1084, citing *State v. Freeman*, 138 Ohio App.3d 408, 419, 741 N.E.2d 566 (1st Dist.2000).

{¶53} Appellant claims the prosecutor made biased and prejudicial remarks about the appellant's tattoos in order to inflame the jury. During his closing argument, the prosecutor stated:

> What do you think it takes, from your life experiences, to place this body art on yourself as a person; what statement are you trying to make? Stop and ask yourself that question. Mujahid, a rifle, swords, Jihad. Is that a statement of self expression of don't mess with me. I'm a warrior, I'm dangerous. I'm something that you don't want to mess with. I think the average person would agree with those statements.

{¶54} The prosecutor's insinuation that appellant intended his tattoos to express that he was "dangerous" or "something that you don't want to mess with" improperly indicated that appellant was an "Islamic warrior." However, the fact that the prosecutor engaged in some improper argument does not warrant reversal unless the remarks prejudicially affected substantial rights of the accused. *State v. Onunwor*, 8th Dist. No. 93937, 2010-Ohio-5587, ¶ 36. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *Id*., citing *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (8th Dist.1990). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the

prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶55} Using these standards, we see no basis for reversing appellant's conviction based on the prosecutor's comments. Even though some of the prosecutor's argument may have been improper, such comments did not pervade the entire trial, let alone the closing argument. We are unconvinced that the result of appellant's trial would have been different without the above excerpts of improper commentary by the prosecution. We conclude that the improper statements made by the prosecutor during closing arguments did not substantially prejudice appellant so as to deny him a fair trial.

{¶56} Appellant's third assignment of error is overruled.

{¶57} In his fourth assignment of error appellant argues that the trial court committed plain error by admitting irrelevant and prejudicial evidence.

{¶58} As a basic principle, all relevant evidence is admissible, unless the probative value of that evidence is substantially outweighed by its prejudicial effect. Evid.R. 403. "Relevant" evidence is defined as evidence having any tendency to make a fact of consequence to the determination of the action more or less probable than it would be without the evidence. *See* Evid.R. 401. The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (10th Dist.1987). "[A] trial court's decision to admit or exclude evidence 'will not be reversed unless there has been a clear and prejudicial abuse of discretion.'"

State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 122, quoting *O'Brien v. Angley*, 63 Ohio St.2d 159, 407 N.E.2d 490 (8th Dist.1980). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (9th Dist.1983).

{¶59} Appellant argues that the State's questioning of Milton Franklin III regarding the meanings of certain Islamic terms was irrelevant and unduly prejudicial. We disagree. Milton Franklin III testified at trial that he is a Sunni Muslim. Franklin III testified that because of his religious background he recognized the Islamic terms tattooed on appellant's torso when he observed appellant dancing without his shirt and the terms had meaning to him. Appellant further testified that religion had no role in the events of the evening. Franklin III's testimony, as well as other witnesses' testimony regarding appellant's tattoos, was relevant to establish why the witnesses remembered appellant and his distinctive tattoos. As previously discussed, appellant's actions inside the bar, including his behavior on the dance floor and the removal of his shirt to display his tattoos, were the reasons that witnesses took notice of his face and remembered him. This is particularly true of Milton Franklin III, for whom appellant's tattoos had meaning. We cannot say that the trial court abused its discretion in allowing Franklin III's testimony.

{¶60} Finally, appellant reiterates several arguments previously addressed in the preceding three assignments of error and that do not appropriately fall under this

assignment of error. Appellant asserts that the trial court committed plain error during voir dire when the court referenced a prior trial's jury list in front of a juror. The record, however, reveals that the ambiguous reference occurred during a sidebar discussion between the court, counsel and the single juror and out of the hearing of the other jurors. Furthermore, at the request of appellant's counsel, and out of an abundance of caution, the trial court excused the juror for cause.

{¶61} Appellant's fourth assignment of error is overruled.

{¶62} Appellant's fifth, six, seventh and thirteenth assignments of error assert various errors in the trial court's jury instructions. We address these errors together.

{¶63} We review a trial court's issuance of a jury instruction for an abuse of discretion. *State v. Bagwell*, 8th Dist. No. 96419, 2011-Ohio-5841, ¶ 20, citing *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026. Further, jury instructions are reviewed in their entirety to determine if they contain prejudicial error. *State v. Fields*, 13 Ohio App.3d 433, 469 N.E.2d 939 (8th Dist. 1984).

{¶64} The trial court instructed the jury as follows:

> Before you can find the defendant guilty of murder, you must find beyond a reasonable doubt that on or about the 4th day of September, 2005 and in Cuyahoga County, Ohio, the defendant purposely caused the death of Jerome Thomas.
>
> Purpose is an essential element of the offense of murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the

mind of the defendant a specific intention to cause the death of Jerome Thomas.

Purpose is a decision in the mind to do an act with a conscious objective of producing a specific result.

To do [an] act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the means or weapon used, and all of the other facts and circumstances in evidence.

If you find that the defendant did have a purpose to cause the death of a particular person, and that the shooting accidentally caused the death and/or injury of another person, then the defendant would be just as guilty as if the gunfire had taken effect upon the person intended.

The purpose required is to cause the death of another, not any specific person. If the gunfire missed the person intended but caused the death of another, the element of purpose remains and the offense is as complete as though the person for whom the gunfire was intended had died.

However, if there was no purpose to cause the death of anyone, the defendant cannot be found guilty of murder.

The state charges that the act or failure to act of the defendant caused the death of Jerome Thomas. Cause is an essential element of the offense of murder. Cause is an act or failure to act which in the natural and continuous sequence directly produces the death of another, and without which it would not have occurred.

The defendant's responsibility is not limited to the immediate or most obvious result of the defendant's act or failure to act. The defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act.

> There may be * * * one or more causes of an event. However, if a defendant's act or failure to act was one cause, then the existence of other causes is not a defense.

{¶65} Specifically, in regards to Counts 2 and 3, the court instructed:

> Before you find the defendant guilty of attempted murder in either one or both of these counts, you must find beyond a reasonable doubt that on or about the 4th day of September, 2005, and in Cuyahoga County, Ohio, the defendant did attempt to purposely cause the death of Marcus Barnes in the case of Count 2, and/or Rayshawn Whitsett in the case of Count 3.
>
> Murder is the principle offense in the crime of attempted murder. Murder is purposely causing the death of another.
>
> An attempt occurs when a person knowingly engages in conduct that, if successful, would result in the commission of the offense of attempted murder.

{¶66} In his fifth and thirteenth assignments of error appellant asserts that the trial court erroneously instructed the jury on transferred intent. Appellant claims that the trial court's instruction on transferred intent also constituted a constructive amendment of his indictment. We disagree.

{¶67} This court has previously rejected the argument that an instruction on transferred intent constitutes a constructive amendment of a defendant's indictment. *State v. Jackson*, 8th Dist. No. 76141, 2000 WL 426556, *13 (Apr. 20, 2000).

{¶68} Contrary to appellant's arguments, the transferred intent language used by the trial court is consistent transferred intent instructions we have previously upheld. *Id.*; *see*

also Whiteside v. Conroy, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶ 5, 55; *State v. Scott*, 7th Dist. No. 02-CA-215, 2004-Ohio-5117, ¶ 21, 28.

{¶69} The evidence presented at trial established that appellant fired his gun into the bar's picture window with the intent to kill Milton Franklin III but, due to his poor aim, appellant killed Jerome Thomas and wounded Rayshawn Whitsett and Marcus Barnes. The instruction given by the trial court informed the jury that if the defendant intended to kill when he pulled the trigger, it did not matter whether he killed the intended target or an innocent bystander. Based on this evidence, an instruction on transferred intent was supported by the evidence in this case. Accordingly, appellant's fifth and thirteenth assignments of error are without merit and overruled.

{¶70} In his sixth assignment of error appellant argues that the trial court's instruction on transferred intent allowed the jury to convict him of murder based only on proof that he injured someone rather than caused a death. Appellant seizes solely upon the trial court's instruction regarding transferred intent. Appellant was charged not only with murder but also with two counts of attempted murder of those injured. The trial court provided a single instruction on transferred intent applicable to all counts. The trial court's instruction on transferred intent fit the circumstances of appellant's case. Furthermore, a single challenged jury instruction may not be reviewed piecemeal or in isolation but must be reviewed within the context of the entire charge. *State v. Shopshire*, 8th Dist. No. 85063, 2005-Ohio-3588, ¶ 23, citing *State v. Hardy*, 28 Ohio St.2d 89, 276

N.E.2d 247 (1971). Appellant's argument completely ignores the court's detailed instructions regarding the murder charge that explicitly required that the jury find that appellant caused the death of Jerome Thomas before he could be convicted of murder.

{¶71} Appellant's argument's sixth assignment of error is overruled.

{¶72} In his seventh assignment of error appellant argues that the trial court improperly instructed the jury on the definition of causation. We note that appellant failed to object to this definition at trial. Thus, absent plain error, the failure to object to jury instructions is a waiver of the issue on appeal. *See State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1st Dist.1983), syllabus. Moreover, any error in the jury instructions is not plain error unless, but for the error, the outcome of the trial clearly would have been different. *Id*.

{¶73} Appellant argues that the trial court's causation instructions permitted the jury to convict him even if Jerome Thomas's death was caused by another person. The court's instructions at issue track the language employed in 4 Ohio Jury Instructions 2011. Despite appellant's contentions to the contrary, the trial court's instructions on causation were a proper statement of the law. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061 (5th Dist.2002), ¶ 90. Appellant has not established plain error in this regard and his seventh assignment of error is overruled.

{¶74} In his eighth assignment of error, appellant argues that the trial court erred in failing to instruct the jury on various lesser included offenses.

{¶75} A charge on a lesser included offense is only required where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Collins*, 8th Dist. No. 95415, 2011-Ohio-3241, ¶ 35, citing *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (9th Dist.1988), paragraph two of the syllabus. The court must view the evidence in the light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense. *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339. An instruction is not warranted, however, every time "some evidence" is presented on a lesser included offense. *State v. Smith*, 8th Dist. No. 90478, 2009-Ohio-2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (5th Dist.1992).

> To require an instruction * * * every time some evidence, however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense. *Id.*, quoting *Shane* at 633.

{¶76} A trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on a lesser included offense; we will not reverse that determination absent an abuse of discretion. *State v. Henderson*, 8th Dist. No. 89377, 2008-Ohio-1631, ¶ 10, citing *State v. Wright*, 4th Dist. No. 01 CA2781, 2002-Ohio-1462.

{¶77} At trial, appellant requested that the trial court instruct the jury on reckless homicide in violation of R.C. 2903.041, negligent homicide in violation of R.C. 2903.05,

discharging into a habitation in violation of R.C. 2923.161 and aggravated assault in violation of R.C. 2903.12.

{¶78} As an initial matter, we note that improperly discharging firearm at or into habitation or school safety zone in violation of R.C. 2923.161 is not a lesser included offense of murder. In determining whether an offense is a lesser included offense of another, a court shall consider whether one offense carries a greater penalty than the other, whether some element of the greater offense is not required to prove commission of the lesser offense and whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed. *State v. Cooper*, 8th Dist. No. 96635, 2012-Ohio-355, ¶ 13, quoting *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889. As murder can be committed by means other than discharging a firearm into a habitation, the trial court did not err in refusing to instruct the jury on a violation of R.C. 2923.161.

{¶79} Similarly, we have previously noted that negligent homicide is not a lesser included offense of murder. *State v. Mathis*, 8th Dist. No. 91830, 2009-Ohio-3289, ¶ 14, citing *State v. Koss*, 49 Ohio St.3d 213, 219, 551 N.E.2d 970 (8th Dist.1990). The trial court did not abuse its discretion in refusing to instruct the jury on negligent homicide.

{¶80} Reckless homicide under R.C. 2903.041 is a lesser included offense of murder in violation of R.C. 2903.02. *State v. Benson*, 8th Dist. No. 87655, 2007-Ohio-830, ¶ 112. Reckless homicide differs from murder only in respect to the

culpable mental state. Rather than the "purposely" mental state required to support a conviction of murder, a conviction for reckless homicide requires proof only that the accused acted "recklessly." *Compare* R.C. 2903.02(A) and 2903.041(A). "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶81} As previously discussed in appellant's first assignment of error, the evidence at trial was that appellant acted purposely to cause the death of Milton Franklin III, following the angry confrontation between Franklin III, appellant and his brother that culminated in Franklin III, firing several "warning shots" in the direction of the two men. Even if the jury entirely disregarded the testimony of Milton Franklin III that appellant recognized him through the bar's picture window and began shooting at him, appellant's argument that his conduct was merely reckless fails. The mere act of shooting a gun into a crowd of people is sufficient to establish the purposefulness element of R.C. 2903.02(A). Appellant's purpose was established by the unrefuted testimony that appellant fired into a bar with a crowd slightly under its maximum occupancy. Given the totality of the evidence, we cannot say the jury could have reasonably acquitted appellant of the murder charge and found him guilty of the lesser-included offense of reckless homicide. Consequently, we agree with the trial court that the evidence did not warrant an instruction on reckless homicide.

{¶82} Similarly, appellant's argument that the trial court should have given an instruction on aggravated assault as a lesser included offense of attempted murder is without merit. Aggravated assault occurs only when a person, under extreme emotional stress, brought on by serious provocation, is incited to use deadly force and knowingly causes physical harm to another. *State v. Mabry*, 5 Ohio App.3d 13, 449 N.E.2d 16 (8th Dist. 1982).

{¶83} "Serious provocation" is defined as follows:

> Provocation, to be serious, must be reasonably sufficient to bring on extreme emotional stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of this defendant and the conditions and circumstances that surrounded him at the time. *Id*. at paragraph five of the syllabus.

{¶84} In the present instance, the testimony revealed that after the confrontation between appellant, his brother and Milton Franklin III, appellant and his brother retreated from the bar into the parking lot and Milton Franklin III had enough time to return to the bar and pour bleach on his hands in an effort to conceal any evidence of his discharging a firearm in the parking lot. Only later when the confrontation had completely ceased and Milton Franklin returned to the front of the bar intending to get into his car and leave, did appellant return and act purposefully in attempting to kill Milton Franklin III. Under these circumstances, we can cannot say that the trial court abused its discretion in refusing to instruct on aggravated assault.

{¶85} Appellant argues for the first time on appeal that the trial court should have instructed the jury on involuntary manslaughter in violation of R.C. 2903.13 and negligent assault in violation of R.C. 2903.14.

{¶86} As appellant offered no objections at trial to the trial court's failure to instruct on these offenses, he has waived all errors except plain error regarding these instructions. Crim.R. 52(B). Plain error as to jury instructions is proven when the outcome of the trial would have been different but for the alleged error. *State v. Campbell*, 69 Ohio St.3d 38, 1994-Ohio-492, 630 N.E.2d 339. We conclude plain error did not occur.

{¶87} Involuntary manslaughter is a lesser included offense of murder. *State v. Thomas*, 40 Ohio St.3d 213, 215, 533 N.E.2d 286 (1988). However, "an instruction on the lesser included offense of involuntary manslaughter will be given in a murder trial only when, on the evidence presented, the jury could reasonably find against the state on the element of purposefulness and still find for the state on the defendant's act of killing another." *Id*. at 216. As previously discussed, the element of purposefulness was established at trial. Therefore, an instruction on involuntary manslaughter would have been inappropriate.

{¶88} Finally, appellant's argument that the trial court committed plain error by failing to instruct on negligent assault is without merit. At least one court has held that negligent assault is not a lesser-included offense of attempted murder under Ohio law.

State v. Egolf, 11th Dist. No. 2000–L–113, 2003-Ohio-601, ¶ 35. The evidence at trial established that appellant acted purposely, not negligently in firing his weapon.

{¶89} Appellant's eighth assignment of error is without merit and overruled.

{¶90} In his ninth assignment of error appellant argues that the trial court erred in failing to merge his convictions as allied offenses of similar import. The record reflects that appellant failed to object to the court's imposition of multiple sentences and has, therefore, waived all but plain error.

{¶91} The Ohio Supreme Court has expressly held that the imposition of multiple sentences for allied offenses of similar import is plain error, *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96–102, and established the proper analysis for determining whether offenses qualify as allied offenses subject to merger pursuant to R.C. 2941.25 in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48-50:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind."

> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶92} Appellant argues that his convictions for murder and attempted murder should have merged because Jerome Thomas, Marcus Barnes and Rayshawn Whitsett were not intended victims of the shooting and that the state's theory was that appellant intended to shoot only Milton Franklin III. In this argument, appellant relies upon this court's decision in *State v. Cartellone*, 3 Ohio App.3d 145, 444 N.E.2d 68 (8th Dist.1981). The defendant in *Cartellone* was charged with three counts of felonious assault as a result of shots fired at one particular victim while two potential victims arguably stood within range of the gunfire. In finding that the defendant in *Cartellone* lacked a separate animus for all three felonious assault convictions we explained,

> Under our facts, there is no evidence that Cartellone had any purpose or motive to harm anyone beside [the sole intended victim]. Nor is there any evidence that he had any knowledge of the presence of [bystanders] in the doorway. Since there was no consequential harm resulting to these two innocent bystanders, we cannot transfer the animus to harm [the intended victim] to [the bystanders], as we would have been called upon to decide had either [of the bystanders] been struck, in view of the well-established legal doctrine that a defendant is responsible for the natural and probable consequences of his acts. *Id.* at 149.

{¶93} We find appellant's reliance on *Cartellone* to be misplaced in the present instance. We specifically noted in *Cartellone* that we were not considering a situation analogous to the present case where, despite the shooter intending to strike only one victim who was in a crowded bar, other victims were struck by his poor aim. Appellant is correct

that under the theory of transferred intent his animus or intent is the same as to each of the victims. However, the Ohio Supreme Court has recognized that where a defendant commits the same offense against different victims during the same course of conduct and the offense is defined in terms of conduct towards another, then there is a dissimilar import for each person affected by the conduct. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48; *State v. Jones*, 18 Ohio St.3d 116, 480 N.E.2d 408 (1985). As such, appellant's argument that he was improperly convicted of allied offenses is without merit.

{¶94} Finally, appellant contends that having weapons while under disability is an allied offense of similar import to a firearm specification. This exact argument has been considered and rejected by this Court. *State v. Williams*, 8th Dist. No. 81949, 2003-Ohio-3950, ¶ 21; *State v. Whittsette*, 8th Dist. No. 70091, 1997 WL 67764 (Feb. 13, 1997), *6, citing *State v. Blankenship* (1995), 102 Ohio App.3d 534, 547, 657 N.E.2d 559 (12th Dist.1997).

{¶95} Appellant's ninth assignment of error is overruled.

{¶96} In his twelfth assignment of error appellant asserts that his trial counsel provided ineffective assistance of counsel. In order to prevail on a claim for ineffective assistance of counsel, the defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80

L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Counsel's performance may be found to be deficient if counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687. To establish prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley* at 143.

{¶97} In determining whether counsel's performance fell below an objective standard of reasonableness, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland* at 689. Because of the difficulties inherent in determining whether counsel rendered effective assistance in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶98} In considering a claim of ineffective assistance of counsel, an appellate court need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *Bradley* at 143. "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.*

{¶99} Appellant argues that his counsel was ineffective for failing to object to the trial court's jury instruction regarding transferred intent. However, the record reveals that appellant's counsel did, in fact, object to the transferred intent instruction. Furthermore, as discussed above in our resolution of appellant's fifth, sixth, seventh and thirteenth

assignments of error, the instruction was proper. In connection with this instruction appellant, citing *State v. Underdown*, 124 Ohio App.3d 675, 707 N.E.2d 519 (10th Dist.1997), argues that his counsel was ineffective for failing to request a jury instruction on the defense of accident. Appellant confuses the trial court's use of the term "accidentally" in its transferred intent instruction with the defense of accident referenced in *Underdown*. Unlike *Underdown*, the present case contains absolutely no evidence that appellant's shooting was the result of an accident instead of an intentional shooting with unintended victims.

{¶100} Appellant next argues that his trial counsel was ineffective for failing to object to the prosecutor's questions and closing arguments regarding his tattoos and the meaning of various Islamic terms. We note that appellant's counsel did in fact repeatedly object to the prosecutor's questioning of Milton Franklin III, regarding the meaning of these terms. As addressed in appellant's third and fourth assignments of error, this evidence was relevant to establish why various witnesses remembered appellant from the bar prior to the shooting and no prejudice to appellant resulted.

{¶101} Appellant also submits that his trial counsel was ineffective for failing to object to the trial court's response to a jury question. During deliberations, the jury asked the trial court if it could review a transcript of the testimony of Morris Sickles along with all of the witnesses' statements. Without objection from the state or appellant's counsel, the trial court instructed the jury to rely on their collective and individual memories of the

testimony along with the exhibits accepted into evidence. The Ohio Supreme Court has held that "[a]fter jurors retire to deliberate, upon request from the jury a court may, in the exercise of sound discretion, cause to be read all or part of the testimony of any witness * * *." *State v. Berry*, 25 Ohio St.2d 255, 267 N.E.2d 775 (1st Dist.1971). The trial court is under no mandatory obligation to do so, however, and we find no abuse of discretion in this instance. *State v. Moss*, 8th Dist. No. 81582, 2003-Ohio-3327, ¶ 29. Appellant's argument is without merit.

{¶102} Finally, appellant argues that his trial counsel was ineffective for failing to object to the trial court allowing the jury to review the statements of Rayshawn Whitsett and Milton Franklin, Jr., contained in exhibits 239 and 240. The record reflects that appellant's counsel did object to the admission of exhibits 239 and 240 and the state withdrew the exhibits. Appellant's argument is without merit.

{¶103} Appellant's twelfth assignment of error is overruled.

{¶104} Although not raised as an assignment of error, we find that the trial court neglected to impose sentences on each of the firearm specifications for which appellant was convicted.

{¶105} The trial court, in its sentencing entry, addressed only a "3-year sentence on the gun specification to run prior to and consecutive to 15 years to life in Count 1. All gun specifications merge for sentencing purposes."

{¶106} The appellant, however, was convicted of one- and three-year firearm specifications on each of the counts for which he was found to be guilty as to murder and attempted murder.

{¶107} We, therefore, remand this case to the trial court for the limited purpose of resentencing the appellant as to each of the firearm specifications.

{¶108} The judgment of the trial court is affirmed in part and reversed in part.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said lower court to carry this judgment into execution. The defendant's convictions having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR

APPENDIX

Assignment of Error No. 1:

"Defendant was denied a fair and impartial trial in violation of due process of law, when the jury found the defendant guilty of murder based upon insufficient evidence."

Assignment of Error No. 2:

"Defendant was denied due process of law when the court overruled defendant's motion to suppress the identification procedure."

Assignment of Error No. 3:

"Defendant was denied due process of law when the court conceded the prosecutor's use of impropriety, improper calculations and prosecutorial misconduct."

Assignment of Error No. 4:

"Defendant was denied due process of law when the trial court committed plain error by admitting and allowing irrelevant and prejudicial evidence."

Assignment of Error No. 5:

"Defendant was denied due process of law when the court amended the statute and indictment by instructing on transferred intent."

Assignment of Error No. 6:

"Defendant was denied due process of law when the [sic] he was allowed to be convicted for causing an injury rather than death."

Assignment of Error No. 7:

"Defendant was denied due process of law when the court instructed on causation."

Assignment of Error No. 8:

"Defendant was denied due process of law when the court refused to instruct on reckless homicide, and negligent homicide."

Assignment of Error No. 9:

"Defendant was denied due process of law and subjected to unconstitutional multiple punishments when he was consecutively sentenced for murder, attempted murder, and a weapons violation."

Assignment of Error No. 10:

"Defendant was denied due process of law when he was allowed to be convicted of attempted murder without the testimony of the victim."

Assignment of Error No. 11:

"Defendant was denied due process of law when his motion for judgment of acquittal were overruled."

Assignment of Error No. 12:

"Defendant was denied effective assistance of counsel."

Assignment of Error No. 13:

"Defendant was denied due process of law when the court inform [sic] the jury defendant could be convicted for an accidental death or injury."

No. 16-3872

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 15, 2018
DEBORAH S. HUNT, Clerk

ARIF MAJID,

Petitioner-Appellant,

v.

JEFF NOBLE, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: SUHRHEINRICH, CLAY, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

The Supreme Court of Ohio

State of Ohio

v.

Arif Majid

Case No. 2012-0763

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 96855)

Maureen O'Connor
Chief Justice