NOT RECOMMENDED FOR PUBLICATION
File Name: 18a0555n.06

No. 17-1012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY D. PHILLIPS,

Petitioner-Appellant,

v.

BONITA HOFFNER, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: MOORE, KETHLEDGE, and STRANCH, Circuit Judges.

JANE B. STRANCH, Circuit Judge. Anthony D. Phillips appeals the decision of the United States District Court for the Eastern District of Michigan denying his petition for relief under 28 U.S.C. § 2254. On appeal, Phillips requests that his jury conviction be set aside because: (1) the trial court's limitations on his cross-examination of several witnesses deprived him of the right to present a defense; (2) a police officer who testified for the prosecution violated the Confrontation Clause by relying on a report authored by someone else; (3) the prosecutor engaged in misconduct by eliciting false testimony; and (4) he was denied effective assistance of counsel. Although we find the conduct of both Phillips's trial counsel and the prosecutor troubling, we are nevertheless constrained by the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). For the reasons set forth below, we **AFFIRM** the judgment of the district court.

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I. BACKGROUND

A. Factual Background

Lacey Tarver's dead body was discovered in his Detroit home by his brother on March 4, 1987. *People v. Phillips*, No. 300533, 2013 WL 2223388 at *1 (Mich. Ct. App. May 21, 2013) (per curiam). Tarver's house was in disarray—the lights were on, and it appeared to have been "ransacked." *Id.* Tarver's brother found Tarver fully clothed, leaning against a bedroom wall and surrounded by blood. *Id.* The house's rear basement window was shattered, and several items were missing, including a computer, television, VCR, cassette player, wallet, car keys, and stereo system. *Id.* There was blood around the broken window, indicating that an intruder had entered the house there and had been cut by the broken glass in the process. *Id.*

Tarver had previously dated Phillips's sister, Carmen Allen. *Id.* Allen and Tarver had lived together in the house where Tarver was murdered, but Allen moved out when the two broke up around Thanksgiving 1986. *Id.* In addition to Allen, Phillips has another sibling, a brother named Bobby. *Id.* Allen testified at trial that her mother and Phillips had been frequent visitors when she lived with Tarver, but Bobby had been unwelcome after a prior break-in. *Id.* Allen did not know of any conflict between Tarver and Phillips, and Phillips had helped the couple with household repairs. *Id.* Allen also sent Phillips to Tarver's house on at least two occasions after the 1986 breakup, including sending Phillips to pick up a stove hood from Tarver's house the week Tarver was murdered. *Id.*

Dr. Marilee Frasier conducted an autopsy on Tarver the day his body was found in 1987. *Id.* at *2. Dr. Frasier passed away before Petitioner's trial in 2013, so Deputy Chief Medical Examiner Cheryl Loewe used Dr. Frasier's records to testify at trial. *Id.* She testified that Tarver appeared to have died from blows to the head and that the marks were consistent with wounds from both the head and claw ends of a hammer. *Id.*

Detroit Police Department (DPD) Officer Carl Kimber served as an evidence technician and, in March 1987, he collected evidence, fingerprints, and blood samples from Tarver's house. *Id.* DPD forensic serologist Paula Lytle tested the blood on the items Kimber collected, including a tissue found on the kitchen table, a checkbook found in a bedroom drawer, and a shard of glass from the basement window. *Id.* Lytle also tested blood samples from Phillips and Tarver. *Id.* According to Lytle, both Phillips and Tarver had Type O blood, and the tissue and checkbook each tested positive for Type O blood. *Id.* The trial testimony about the shard of glass indicates that Lytle could not conclusively determine what type of blood was on it.[1] *Id.*

DPD's Latent Fingerprint Unit analyzed nine fingerprints that Kimber collected during the 1987 investigation. *Id.* Marcia McCleary, a latent fingerprint expert, testified at trial about the print comparisons run by other DPD employees back in 1987. *Id.* She stated that three of the nine prints were unusable and that five prints did not match Phillips. *Id.* The ninth print, however, aligned with 14 different identification points on Petitioner's left thumb and thus was a match. *Id.* This print came from a Band-Aid box in one of Tarver's bathrooms, where investigators also found peeled strips from a Band-Aid on the floor. *Id.* at *1, *3. Although an April 1987 memo from one of the investigating officers, David Kramer, indicated that Phillips was a suspect in Tarver's murder, Kramer mentioned that the prosecutor had determined that there was insufficient evidence to arrest him.[2]

In 2008 or 2009, the DPD sent the evidence collected from Tarver's house for additional testing. Like Lytle, Michigan State Police forensic scientist Jennifer Summers confirmed the presence of human blood on the tissue, checkbook, and shard of glass. *Id.* at *2. Summers

[1] This testing occurred in 1987, when DNA technology was not yet available.

[2] Officer Kramer was a homicide officer and was apparently involved with the search at Petitioner's residence in March 1987. He passed away before trial. We refer to his April 16 memorandum as the Kramer Memo.

determined that the blood on the glass was too faint to submit for further testing. *Id.* Catherine Maggert, a DNA expert with a Northville, Michigan crime laboratory, conducted DNA testing on the tissue and checkbook. *Id.* at *3. Both tested positive for a genetic marker indicating that the blood belonged to a male. *Id.* The tissue carried reportable data for 12 of the 13 loci (i.e., markers) from which Summers built DNA profiles, and the checkbook had reportable data for 3 of the 13 loci. *Id.* The three reportable DNA loci from the checkbook matched the corresponding loci of the DNA collected from the tissue. *Id.*

Another forensic scientist at the Northville crime lab, Andrea Halvorson, then compared the DNA profiles from the tissue and checkbook against Petitioner's DNA.[3] *Id.* The 12 reportable loci from the tissue matched the corresponding 12 loci in Petitioner's DNA profile. *Id.* The probability of selecting a random, unrelated, African-American male with the same degree of matching loci was one in four quadrillion. *Id.* The three reportable loci from the checkbook likewise matched the corresponding loci in Petitioner's DNA profile. *Id.* The probability of selecting a random, unrelated, African-American male with the same degree of matching loci was one in 211.7. *Id.*

B. Petitioner's Trial

Phillips was charged with first-degree felony murder following the DNA testing, approximately 22 years after Tarver's murder. *Id.* at *1 & n.1 (citing Mich. Com. Laws § 750.316(1)(b) and explaining that Phillips was not charged with the underlying offense of breaking and entering). At the August 2010 trial, Prosecutor Augustus Hutting presented the above-described blood, DNA, and fingerprint evidence through the testimony of Kimber, Lytle, Maggert, Summers, Halvorson, and McCleary. *Id.* Several other DPD officers testified about

[3] The DPD collected Petitioner's DNA for testing in 2009.

responding to the scene and collecting evidence, including Officer David Newkirk and Sergeant James A. Bivens, the latter of whom oversaw the crime scene investigation. Lieutenant Charles Braxton testified about executing a search warrant at Petitioner's residence in March 1987. His testimony included the following exchange with Hutting:

> [Hutting:] Okay. All right. And does the file also reflect that a search warrant was executed at 9074 Westwood in the city of Detroit?
>
> [Braxton:] Yes.
>
> [Hutting:] Okay. And was a jacket seized during the course of the execution of that search warrant?
>
> [Braxton:] Yes.
>
> [Hutting:] Okay. And was that turned over to anybody?
>
> [Braxton:] That was taken to the crime lab as well.

Officer Barbara Kozloff from DPD's Cold Case Squad testified about testing the evidence collected in 1987 for DNA and about the collection of a buccal swab from Phillips for DNA testing. Kozloff also explained that the jacket mentioned by Braxton had been destroyed by the time her unit became involved with the Tarver case. Finally, the prosecution presented as witnesses Tarver's daughter (Erica Ridley), Tarver's girlfriend at the time of his death (Debra Moorer), and Tarver's brother (Edgar Tarver). Phillips was represented at trial by Sequoia DuBose, who called only one witness: Phillips's sister, Ms. Allen.

During his closing statement, DuBose argued that the evidence had been contaminated and was not properly analyzed. He also implied that Petitioner's brother Bobby could be a suspect, because his DNA would likely be similar to Petitioner's DNA. DuBose brought up the jacket to say that it was unclear who owned the jacket and whose blood was on the jacket. Hutting responded to these arguments about the jacket during his rebuttal closing statement:

> And then, of course, we have the jacket and the clothes. He says, well, where is the murder weapon? That got tossed away. Plenty of time to get that tossed away.

> Where is the clothes? You know, why doesn't the prosecutor have the bloody clothes that Mr. Phillips had on and connect it up that way. That's because if you saw blood and you got blood on you during the course of this beating, the last thing that you're gonna do, okay, is keep those clothes. You're gonna get rid of them. You're gonna get rid of them.
>
> But maybe he made a mistake because [of] that jacket. You know, we got the jacket. First of all, it comes out of the defendant's home. That's where he was living. It's a large size jacket. And what do we have on the inside of it? We have O blood. We have O blood. Is it the deceased['s] blood or is it the defendant's blood? I really can't tell you that. It's possible it could be either one of those, all right.
>
> It's possible that it could very well be the defendant's blood after he was cut and everything, stuck his hand back in the jacket and got it there. Something that you would overlook. But Paula Lytle didn't overlook it. She found it. But, of course, then it's not the defendant's jacket because even though it came out of his house, even though that's where he lived, all right, that's just not his jacket. That's not his jacket.

The jury returned a guilty verdict for first-degree felony murder, and Phillips received a mandatory sentence of life without parole.

C. Post-Conviction Proceedings

Phillips, represented by different counsel, filed a motion for a new trial in March 2011, which prompted a series of post-conviction evidentiary hearings before the trial judge. The motion explained that the jacket discussed at trial had actually been seized in 1986, the year before Tarver's murder, during an entirely different investigation:

> Defendant attached documentation to his motion to support his argument that police did not seize the jacket from his residence after the murder. Specifically, a DPD laboratory technician report indicated that the laboratory received the jacket on March 12, 1987, from Officer Kramer. Police executed a search warrant at defendant's home on March 11, 1987, at 9074 Westwood. However, the search warrant return indicated that police did not seize anything during the search. In addition, Officer Kramer wrote a memorandum on April 16, 1987, wherein he indicated that police did not seize anything during the search.

Phillips, 2013 WL 2223388, at *4. Although not made part of the record or discussed by the Michigan Court of Appeals, it appears that another document, a property card from a September 11, 1986 DPD search of the 9074 Westwood address, confirms that the jacket was seized at that time.

The trial court acknowledged the jacket error at the first post-conviction hearing. At the second post-conviction hearing, Braxton stated that the "file" he referred to during his trial testimony was the laboratory report created by the forensic serologist, Paula Lytle. He also stated that he could not specifically recall the events of 1987 and thus depended on Lytle's laboratory report at trial. On cross-examination, Braxton confirmed that nothing in the report indicated when the jacket was seized, only the date on which it arrived at the laboratory for testing. Defense counsel DuBose also testified at the evidentiary hearing. He asserted that he had tried to object to the introduction of the jacket because it was unrelated to Tarver's death, and he explained the ways in which the prosecution used the jacket at trial to connect Phillips to Tarver's murder.[4]

Prosecutor Hutting testified at the third post-conviction hearing. He acknowledged that he had seen the March 1987 search warrant return for Petitioner's residence, which stated that nothing was taken and thus seemed to contradict Lytle's laboratory report, but he believed this to be a mistake by the DPD.[5] Hutting maintained that he did not know when the jacket had actually been seized until reading Petitioner's motion for a new trial.

Phillips testified at the fourth post-conviction hearing. He stated that he informed his trial counsel, DuBose, that the jacket had been seized in 1986, before Tarver's death, but that DuBose

[4] DuBose also discussed why he did not call a rebuttal DNA expert or other witnesses, but the testimony does not bear on the issues in the COA.

[5] The laboratory report is not necessarily wrong; it merely indicates that the jacket *arrived* for testing on March 12, 1987. But the Kramer Memo and the search warrant return from March 11 state that nothing was taken from Phillips's home. The inconsistencies between these documents raise questions about how and why the jacket ended up at the laboratory the day after the search warrant was executed.

"did nothing about it." Phillips also stated that DuBose knew the jacket was unrelated because DuBose had represented him in relation to a 1986 assault charge, the investigation of which resulted in the jacket's seizure. DuBose resumed his testimony at the fifth post-conviction hearing. He provided very little new information, however, because he invoked attorney-client privilege and refused to disclose anything Phillips told him in the course of the Tarver investigation.

The trial court denied the motion for a new trial in its entirety. Phillips appealed on the same grounds asserted in his motion for a new trial, and the Michigan Court of Appeals affirmed his conviction in May 2013. *Phillips*, 2013 WL at 2223388, at *17. The Michigan Supreme Court denied leave to appeal in October 2013. *People v. Phillips*, 838 N.W.2d 151 (Mich. 2013) (mem.).

Phillips filed a § 2254 habeas petition in the Eastern District of Michigan on January 21, 2015. Applying AEDPA to its review of the decision of the Michigan Court of Appeals, the district court denied relief and denied Phillips a certificate of appealability (COA). Phillips filed a timely application for a COA, and this court granted the application in part. Now before the panel are Petitioner's claims regarding his right to present a defense, the Confrontation Clause, prosecutorial misconduct, and ineffective assistance of counsel.

II. ANALYSIS

A. Jurisdiction and Standard of Review

The panel has jurisdiction to hear Phillips's appeal because the district court entered a final appealable order and because this court granted Phillips a COA. 28 U.S.C. § 2253. This court reviews a district court's legal conclusions and mixed questions of law and fact de novo and reviews the district court's factual findings for clear error. *Hodges v. Colson*, 727 F.3d 517, 525 (6th Cir. 2013) (citing *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999)).

This case is governed by AEDPA, which permits relief "with respect to any claim that was adjudicated on the merits in State court proceedings" only where the state court resolution was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "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 decision would be considered contrary to established law if it is diametrically different from or opposite in character or nature to federal law as determined by the Supreme Court." *Akins v. Easterling*, 648 F.3d 380, 385 (6th Cir. 2011) (alterations, citation, and internal quotation marks omitted). "[H]abeas relief is available under the unreasonable application clause if the state court unreasonably applies that principle to the facts of the prisoner's case or unreasonably extends or unreasonably refuses to extend a legal principle from the Supreme Court precedent to a new context." *Id.* (citation and internal quotation marks omitted). In order to warrant habeas relief, "the state court's application of clearly established law must be objectively unreasonable" and not just "erroneous[ ] or incorrect[ ]." *Id.* at 385–86 (alteration, citation, and internal quotation marks omitted).

This deferential standard of review applies only to claims that the state court "adjudicated on the merits." 28 U.S.C. § 2254(d). The Michigan Court of Appeals deemed the right to present a defense, Confrontation Clause, and prosecutorial misconduct claims "unpreserved" and applied plain error review. We have reached varying conclusions as to whether plain error review by a state court constitutes adjudication on the merits. *Compare Frazier v. Jenkins*, 770 F.3d 485, 496 n.5 (6th Cir. 2014) ("We have repeatedly held that plain-error review is not equivalent to adjudication on the merits, which would trigger AEDPA deference."), *with Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009) (rejecting dissent's argument that de novo review applies to

claims resolved by state courts via plain error review), *and Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017) (applying AEDPA deference to plain error review and explaining that recent Supreme Court precedent "obligates us to presume that the state court adjudicated the claim on the merits in ambiguous situations" (alteration, citation, and internal quotation marks omitted)). This ambiguity does not affect our decision, however, because none of Petitioner's unpreserved claims can survive even de novo review. *See Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015) ("We need not enter this debate, however, because we hold that under either standard of review, AEDPA deference or de novo, Juror 139 was not an automatic death penalty juror."). The stand-alone claim for ineffective assistance of counsel was properly preserved and raised before the Michigan Court of Appeals and therefore falls within AEDPA's purview.[6]

B. Right to Present a Defense

Phillips argues that the trial court's limitations on his cross-examination of Officer Kimber and his sister, Carmen Allen, prevented him from presenting a complete defense in violation of his Sixth Amendment rights. An accused has the right at trial to present testimony that is "relevant," "material," and "vital to the defense." *Washington v. Texas*, 388 U.S. 14, 16, 23 (1967). This right is not absolute, "but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). State evidentiary rules that exclude evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* (quoting *Rock v. Arkansas*, 483

[6] Michigan asks the court to find Petitioner's right to present a defense, Confrontation Clause, and prosecutorial misconduct claims procedurally defaulted. Even if those claims were defaulted, their default could be excused by Phillips's stand-alone ineffective assistance of counsel claim, which, as explained below, would prevail under de novo review. *See, e.g.*, *Hall v. Vasbinder*, 563 F.3d 222, 236–37 (6th Cir. 2009) ("An argument that ineffective assistance of counsel should excuse a procedural default is treated differently than a free-standing claim of ineffective assistance of counsel. The latter must meet the higher AEDPA standard of review, while the former need not." (citations omitted)); *see also Joseph v. Coyle*, 469 F.3d 441, 462–63 (6th Cir. 2006) ("[E]stablishing Strickland prejudice likewise establishes prejudice for purposes of cause and prejudice."). Because we would reach the merits of those claims regardless of default, we proceed straight there.

U.S. 44, 56 (1987)). The "[e]xclusion of evidence only raises constitutional concerns if it has 'infringed upon a weighty interest of the accused.'" *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004) (quoting *Scheffer*, 523 U.S. at 308). Accordingly, the trial court's limitation on the cross-examinations of Kimber and Allen does not implicate Petitioner's constitutional rights unless the resulting exclusions infringed upon a weighty interest.

Here, Phillips challenges three evidentiary decisions.[7] First, he argues that his cross-examination of Officer Kimber was improperly circumscribed when the trial court excluded a question about possible contamination of the saline solution that was used to collect evidence from Tarver's house. After confirming that other officers shared the same saline solution, trial counsel, DuBose, asked "if somebody accidentally touches some blood or a surface with the saline solution or it drops from someone's hand you have no means of—" before the prosecutor objected. The prosecutor asserted that this question called for "speculation," and the trial court agreed that it was "sort of a meaningless hypothetical." DuBose also asked Kimber where evidence-gathering materials were stored, but the court cut off that line of questioning as "just totally speculative." These rulings might have infringed upon a weighty interest if DuBose had been unable to elicit any testimony about contamination. That was not the case. The trial court permitted DuBose to ask about how things were stored and to what extent investigators wore and changed gloves over the course of collecting blood evidence, both in general and specifically at Tarver's house. DuBose also discussed contamination with Kimber at other points. He elicited fairly thorough testimony about Kimber's collection practices and the various points at which evidence might have been contaminated. This testimony made clear that the evidence kits were shared and that others had access to the same saline solution that Kimber used. DuBose was then able to use Kimber's

[7] The COA noted limited "cross-examination of three witnesses" but analyzed the cross-examination of only two witnesses. Presumably the reference to three comes from the number of challenged limitations.

testimony to make contamination arguments to the jury during his closing statement. Accordingly, the trial court's limitation did not arbitrarily exclude important evidence.

Phillips next challenges two limitations related to his cross-examination of Phillips's sister, Tarver's former girlfriend, Ms. Allen. The first challenge relates to Phillips's defense theory that Tarver's house was disorderly, such that a bloody tissue might not have been thrown away for some time. DuBose asked Allen about the condition of Tarver's house after they broke up, intending to contradict previously elicited testimony that Tarver was a "neat freak." The trial court limited this testimony only insofar as it required DuBose to first lay a foundation. DuBose asked Allen to clarify when, subsequent to the breakup and before the murder, she had last observed Tarver's house. DuBose was then able to elicit testimony from Allen that she observed the house "in disarray" after she moved out because she had done "all the cleaning up." Thus, trial counsel succeeded in questioning Ms. Allen about the condition of Tarver's house.

Third, Phillips sought to question Allen about other instances after the breakup that she knew Phillips to have been in Tarver's house. DuBose asked her, "after you broke up, are you aware of any circumstances under which Mr. Phillips would have been around or Mr. Tarver or [Tarver's] house . . . ?" Upon an objection from the prosecutor and an instruction to avoid "hearsay" from the court, trial counsel added, "[a]nd I'm talking about from your personal knowledge." Allen then testified that she knew Phillips went to Tarver's house to pick up a stove hood the week after the breakup (November 1986) because it was at her request. Trial counsel was therefore able to confirm that Phillips had been inside Tarver's house at least once after the breakup.

All said, the above limitations on cross-examination did not actually prevent Phillips from eliciting testimony in support of his arguments about contamination, the state of Tarver's house,

or whether Phillips had been to the house after the breakup. Petitioner's substantial rights were not implicated by these evidentiary decisions, and therefore none of these limitations rises to the level of a constitutional violation.

C. Confrontation Clause

In his second claim, Phillips argues that Braxton's reliance on the file to testify about the jacket violated the Confrontation Clause of the Sixth Amendment. The Sixth Amendment protects the right of an "accused" to be "confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court has instructed that this clause permits the introduction of testimonial statements from non-testifying witnesses "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (footnote omitted). The "file" on which Braxton relied was Lytle's laboratory report. "Reports memorializing the work performed by laboratory analysts when carrying out forensic duties are testimonial statements subject to the requirements of the Sixth Amendment, as interpreted by *Crawford*." *Holland v. Rivard*, 800 F.3d 224, 243 (6th Cir. 2015) (citing *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009)). Phillips is therefore correct to point out that Officer Braxton's reliance on the laboratory report could conceivably be vulnerable to Sixth Amendment criticism. But his position necessarily fails for one key reason: The declarant who authored the report, Ms. Lytle, testified at trial and was subject to cross-examination. Accordingly, the trial court did not allow in a testimonial statement from a non-testifying declarant, and there is no Confrontation Clause problem.

D. Prosecutorial Misconduct

Phillips argues that the prosecutor elicited "false testimony about a damaged jacket with bloodstains, destroyed by the time of trial," and, in so doing, "had his witness directly mislead the jury." Phillips asserts that prosecutor Hutting's elicitation of false testimony from Braxton was

knowing and deliberate. The State responds by highlighting Hutting's testimony from the post-conviction evidentiary hearing, where he stated that he honestly but mistakenly believed that the jacket was seized just after Tarver's death.

To demonstrate prosecutorial misconduct, a petitioner must show that "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998) (quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)); *see also Rosencrantz v. Lafler*, 568 F.3d 577, 583–84 (6th Cir. 2009) (applying the same standard for a claim arguing that the prosecutor failed to correct false testimony).[8] This case turns on the third element. Everyone agrees that the jacket had nothing to do with Tarver's murder and, for reasons explored below, its admission was material. But nothing in the record supports a finding that Hutting knew that the jacket had been seized in 1986, before Tarver died. He consistently maintained that he learned of the error only after trial, when Phillips disclosed it in his motion for a new trial. Indeed, when questioned by post-conviction counsel, Hutting testified:

> [Counsel:] Okay. Do you now agree that the jacket does not have any genuine legitimate bearing on the question of whether Anthony Phillips committed the charged homicide of Lacey Tarver?
>
> [Hutting:] Yes, I would agree with that. And had I known that at the time of the trial, I would not have put the evidence in about the jacket.

Beyond the actual falsity of the jacket-related testimony, Phillips has not presented any evidence that Hutting knowingly sought to present false evidence, and nothing in the record supports that

[8] This circuit has left open the possibility that a prosecutorial misconduct claim may lie where the record reveals that "any competent prosecutor would have" uncovered the falsity of the witness's testimony, such that actual knowledge of falsity may be imputed. *Thomas v. Westbrooks*, 849 F.3d 659, 667 (6th Cir. 2017). Phillips did not raise or develop this theory of liability, so we decline to address it. *See Schreiber v. Moe*, 596 F.3d 323, 329 (6th Cir. 2010) (deeming waived issues not covered by a party's brief).

conclusion. At most, the record reveals that Hutting was less than diligent in his review of the investigatory file. This carelessness is cause for concern, to be sure, but what Hutting should have known is insufficient to support a prosecutorial misconduct claim in this circuit. *See Thomas*, 849 F.3d at 667 (rejecting a recklessness or "should have known" standard for prosecutorial misconduct claims). Phillips's prosecutorial misconduct claim therefore fails.

E. Ineffective Assistance of Counsel

Finally, Phillips claims DuBose rendered ineffective assistance of counsel. Phillips argues that trial counsel performed deficiently by failing "to investigate, object to, and present counter-evidence to, the claim that the jacket had any connection to the case at all." A claim of ineffective assistance of counsel has two prongs. The deficient performance prong asks whether counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The prejudice prong asks whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Before turning to the merits of this claim, we pause to again consider the level of deference owed to the Michigan Courts of Appeals. That court acknowledged that "counsel's performance in investigating the seizure of the jacket may have fallen below an objective standard of reasonableness," but did not actually evaluate that prong. Instead, the Court of Appeals cabined its analysis to *Strickland*'s prejudice prong. *People v. Phillips*, No. 300533, 2013 WL 2223388, at *15 (Mich. Ct. App. May 21, 2013) (finding that "the jacket evidence did not affect the outcome of the proceedings"). This circuit has explained that "[w]hen a state court relied only on one *Strickland* prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the *Strickland* prong not relied upon by the state court." *Rayner v. Mills*,

685 F.3d 631, 638 (6th Cir. 2012); *see also Moss v. Olson*, 699 F. App'x 477, 481–82 (6th Cir. 2017) (explaining why this split standard still applies by reconciling *Harrington v. Richter*, 562 U.S. 86, 99 (2011), with *Rompilla v. Beard*, 545 U.S. 374 (2005)). Accordingly, AEDPA governs our review of *Strickland* prejudice, but we consider the deficient performance prong de novo.

1. Deficient Performance

We first consider whether DuBose's failure to object to the jacket fell below an objective standard of reasonableness. During the post-conviction proceedings, DuBose asserted that he objected to the admission of the jacket. He testified that he had asked Hutting about the jacket before trial and learned that the jacket "had been destroyed." He also testified that he "was specifically told that that jacket was taken as part of that [March 1987] search, and that it had bullet holes in it and it was blood that was in it." DuBose stated that he pursued more information about the jacket because Phillips had told him "that the jacket had to do with something unrelated to this," so he "tried to challenge the jacket from that point of view." DuBose went on:

> I clearly knew that this jacket had nothing to do with this case whatsoever; that that blood had nothing to do with this case and that it had to do with bullet holes from something totally unrelated. Mr., me and Mr. Phillips and I, we talked about that and I tried to, to—I tried to challenge that.

However, this post-trial testimony is contradicted by the transcript from the trial transcript. DuBose did ask the court to exclude the jacket just before jury selection began, but the transcript reveals that his objection was limited to the tenuous relevance of the blood on the jacket and that he actually described the jacket as being seized at the time of the murder:

> There was a search warrant back in '87 done on the Westwood address. And in that search warrant—and the Westwood address is an address attributed to the family of Mr. Phillips. . . . And when they searched—it didn't dawn on me until really over the weekend, and I apologize for not bringing this issue up earlier. They found a jacket inside the residence that had, the way the report read, appeared, what

> appeared to be bullet holes in it. And the jacket also had some blood on it. . . . The problem I have, your Honor, is I—now, it dawned on me over the weekend is he gonna try to suggest that there's—because there's blood—this jacket had a—the bullet holes has blood on it, that it had to have something to do with the crime that we're dealing with here.

DuBose then raised his concerns with admitting the jacket into evidence, stating that there was "no confirmation that it's Mr. Phillips' jacket" and that "the jacket was destroyed and there's no DNA from the jacket which would pinpoint specifically as Mr. Phillips' DNA." Crucially, DuBose did not mention that the police actually seized the jacket in 1986, in relation to a completely different investigation. Moreover, this morning-of-trial testimony about his "weekend" realization undermines DuBose's post-conviction contentions that he had contacted Hutting about the jacket in advance of trial and that he had tried to exclude the jacket as unrelated to Tarver's murder.

Nothing else in the record indicates that DuBose remembered that the jacket had been seized in 1986, before Tarver's murder, or that he attempted to alert others to the confusion. Hutting testified that no one informed him of any issues with the jacket and that he was entirely unaware of the error until he received Petitioner's motion for a new trial. Hutting also never mentioned any jacket-related conversations with DuBose. Phillips testified that when he raised concerns about the jacket, DuBose "did nothing about it." The record therefore supports the conclusion that DuBose failed to object to the jacket because he failed to apprehend that it was unrelated to Tarver's murder.

To the extent that this misapprehension flows from DuBose's failure to investigate, this conduct fell below the objective standard of reasonableness. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to

counsel's judgments." *Strickland*, 466 U.S. at 691; *see also Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) ("A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." (citations omitted)).

Here, there is no evidence that DuBose even identified, let alone investigated, the discrepancy between the March 11 search warrant return, which matched Officer Kramer's April 16 memo, and the March 12 lab report. The lack of an objection to the jacket's admission stemmed from his ignorance, not from strategic thinking. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (noting, in a pre-AEDPA case, that counsel performed deficiently when the "failure to request discovery . . . was not based on 'strategy'"). DuBose's conduct is therefore "not entitled to deference." *Moss v. Hofbauer*, 286 F.3d 851, 865 (6th Cir. 2002); *see also Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006) (explaining that "where a failure to investigate does not reflect sound professional judgment, such deference is not appropriate"). Indeed, DuBose's oversight is particularly troubling given that DuBose had represented Phillips in relation to the 1986 investigation, when the jacket was actually seized, and that Phillips had reminded him of this fact.

The failure to investigate the discrepancy between the documents is comparable to other conduct that we have placed below the objective standard of reasonableness. For example, in *Couch v. Booker*, the court held that counsel's performance was deficient where counsel failed to read a fire department report that included information critical to a defense available to the petitioner. 632 F.3d 241, 248 (6th Cir. 2011). There, the petitioner brought the report to his counsel's attention, but, just as DuBose apparently failed to heed Phillips when he flagged the jacket, the petitioner's attorney did not pursue it. *Id.* at 246. Timely review of the report "would

have led reasonable counsel to the same evidence that [the petitioner's] postconviction counsel found, which was 'easy to get' and which reasonably diligent trial counsel 'would presumably ha[ve] unearthed.'" *Id.* at 248 (quoting *Rompilla*, 545 U.S. at 391, 393). Similarly, a timely and adequate inquiry into the jacket likely would have revealed the discrepancy between the search warrant return and the lab report, thus giving DuBose a hook to exclude the jacket, just as Petitioner's post-conviction counsel was able to demonstrate the impropriety of its admission. *See Byrd v. Trombley*, 352 F. App'x 6, 10–12 (6th Cir. 2009) (explaining that "[h]ad [the petitioner's] attorney researched the facts and law concerning [his] prior conviction, he likely would have objected to the introduction of the prior conviction as inadmissible" and therefore holding that "defense counsel's performance was deficient because he introduced and failed to object to the previous conviction despite its potential inadmissibility").

We have also acknowledged a line of Supreme Court cases finding deficient performance where "evidence in the record suggested fruitful leads that a reasonable attorney would have pursued." *Jackson v. Warden*, 622 F. App'x 457, 462 (6th Cir. 2015) (citing *Wiggins v. Smith*, 539 U.S. 510, 525 (2003); *Porter v. McCollum*, 558 U.S. 30, 40 (2009)). Here, DuBose had three leads: his own knowledge of the 1986 investigation; Petitioner's recollection of the jacket; and a discrepancy between the key investigative documents in a limited police file. These leads, if followed, would have enabled defense counsel to exclude the only piece of blood evidence collected outside the murder location and therefore would qualify as fruitful. DuBose's failure to investigate these leads in an effort to exclude the jacket rises to the level of deficient performance.

In sum, the record demonstrates that DuBose failed to apprehend that the jacket had no bearing on Tarver's death, even in the face of a discrepancy in the file, Petitioner's explicit warning, and his own knowledge from his 1986 representation of Phillips. Under these

circumstances, DuBose's failure to investigate the jacket and object to its admissibility as unrelated to Tarver's death constitutes deficient performance. *See Richey*, 498 F.3d at 362.

2. Prejudice

The prejudice inquiry asks whether, but for counsel's deficient performance, it is "reasonably likely" the result would have been different. *Strickland*, 466 U.S. at 696. Under AEDPA, federal courts evaluate whether it was "unreasonable" for the state court to conclude that a petitioner's "evidence of prejudice fell short of this standard." *Harrington*, 562 U.S. at 112. A federal court cannot overrule a state court simply because the federal court would reach a different conclusion. *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). In this posture, our inquiry is limited to "whether the [Michigan] Court of Appeals' determination is an unreasonable application of clearly established Federal law." *Id.* (citation and internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 404–05 (2000).

The Michigan Court of Appeals addressed the jacket's effect on the trial multiple times. In rejecting Petitioner's prosecutorial misconduct claim, it explained:

> Here, the jacket was of low probative value. As defense counsel argued, the prosecution could not establish that it belonged to defendant. The jacket had two suspected bullet holes through it, but there was no evidence that Tarver's murder involved the use of a gun or that there was a struggle. Instead, other evidence directly linked defendant to Tarver's murder, including his fingerprint on the Band-Aid box, the bloody tissue, and the blood on the checkbook. This evidence standing alone was more than sufficient to allow a rational juror to convict defendant beyond a reasonable doubt.

Phillips, 2013 WL 2223388, at *12. With regard to DuBose's failure to object to Braxton's testimony, the Michigan Court of Appeals reiterated:

> [C]ounsel's failure to object did not impact the outcome of the trial. Here, evidence of the jacket was of low probative value where there was other evidence that defendant's blood was at the crime scene and where there was no evidence that the murder involved a gun.

Id. at *15 (citation omitted). The court repeated this conclusion yet again when addressing Petitioner's claim that DuBose performed deficiently by failing to object to the prosecution's introduction of the jacket:

> [T]he trial court did not clearly err in finding that admission of evidence regarding the jacket did not affect the outcome of the proceeding. As discussed above, the jacket evidence did not affect the outcome of the proceedings. The evidence was of low probative value and there was significant other evidence that would have allowed the jury to conclude that defendant killed Tarver including DNA and fingerprint evidence. On this record, defendant cannot show that there is a reasonable probability that but for counsel's failure to object to the jacket evidence, the result of the proceeding would have been different.

Id. (citation omitted).

These conclusions are not without flaw. The jacket was the only piece of blood evidence found outside the murder scene, and the trial testimony indicated that it was found at Petitioner's residence in the days after Tarver died. The blood stains on the jacket could have matched either Phillips or Tarver, and the jury could have concluded that the blood related to the murder. Even if the jury instead believed that the blood related to the bullet holes in the jacket—and so was not linked to the murder, which was committed with a hammer—the jacket still contributed to a portrayal of Phillips as a violent person. The State points out that the jacket played a relatively minor role in the trial proceedings. But minimal airtime does not necessarily translate into minimal probative value. Indeed, at least three witnesses—Lytle, Braxton, and Kozloff—were asked about the jacket. The jacket's repeated resurfacing throughout the trial signaled its importance. Additionally, Prosecutor Hutting made creative use of the jacket during his rebuttal closing statement, the last thing jurors heard from either side before receiving the jury instructions and beginning their deliberation. In a trial where the evidence established only that Phillips was very likely bleeding while at Tarver's house at some unknown time, but did not directly link him to the

murder itself, the jacket's addition undermines confidence in the outcome, and thus creates and reasonable probability that the outcome would have been different. For these reasons, if we were reviewing this prong de novo, we would hold that the admission of the jacket prejudiced Phillips.

But the inquiry before us is not whether we agree with the Michigan Court of Appeals, but instead whether that court's resolution was "objectively unreasonable." *Akins*, 648 F.3d at 386. This is a close call, but we ultimately conclude that it was not. The Michigan Court of Appeals considered the jacket at multiple points and noted that, even without the jacket, the rest of the physical evidence directly linked Phillips to the scene of the murder. And given that the murderer's identity was the key issue at trial, it is reasonable to find that the probative value of these direct links outweighed that of the jacket. Put another way, in the face of the other evidence presented at trial, the Michigan Court of Appeals did not unreasonably apply *Strickland* when it determined that the inclusion of the jacket did not prejudice Phillips. *Cf. Peoples v. Lafler*, 734 F.3d 503, 515 (6th Cir. 2013) (finding state court resolution of *Strickland* prejudice unreasonable where the state court "ignored the extent to which the government relied on" false testimony, the impeachment of which "certainly could have led to exoneration"); *Higgins v. Renico*, 470 F.3d 624, 634 (6th Cir. 2006) (finding state court resolution of *Strickland* prejudice unreasonable where the state court rejected it without explanation or analysis).

Because the decision of the Michigan Court of Appeals was not objectively unreasonable, Phillips's ineffective assistance of counsel claim does not warrant relief under AEDPA.

III. CONCLUSION

This case is certainly troubling. The prosecution tried Phillips for a murder that had happened more than twenty years before, even though they had declined to charge him at the time of the murder. The attorneys on both sides, DuBose and Hutting, overlooked a documentary

discrepancy that diligent lawyering should have revealed, and, as a result, the jury heard inculpatory testimony about a jacket that had absolutely nothing to do with the crime alleged. While these errors rest squarely on the lawyers' shoulders, it is Phillips who bears the consequences. Yet because there is no evidence that Hutting knew of the jacket's irrelevance, and because the Michigan Court of Appeals was not unreasonable in its application of *Strickland*—even if it reached the incorrect result—we are bound to **AFFIRM**.

KAREN NELSON MOORE, Circuit Judge, dissenting in part. There were four key pieces of physical evidence introduced at Anthony Phillips's trial for the murder of Lacey Tarver. First, there was his fingerprint on a Band-Aid box in Tarver's bathroom. *People v. Phillips*, No. 300533, 2013 WL 2223388, at *2 (Mich. Ct. App. May 21, 2013). Second, there was a tissue with blood on it in the kitchen; "the probability of selecting an unrelated, random, African-American individual" with the same DNA found on the tissue "was one in four quadrillion." *Id.* at *2–3. Third, there was blood found on a checkbook inside a dresser drawer in the bedroom. *Id.* at *2. "[T]he probability of selecting an unrelated, random, African-American individual with the same DNA profile as the checkbook blood" was much higher: "one in 211.7 people." *Id.* at *3. Finally, there was the jacket. Found in the defendant's house—purportedly during a search by the police following Tarver's murder—the jacket had two suspected bullet holes in the left shoulder and had type O blood on the inside. *Id.* at *4. Both Tarver and Phillips had type O blood. *Id.* at *2.

But, as everyone now agrees, the jacket had nothing to do with Tarver's murder. *Id.* at *4–5. As the majority's reasoned analysis demonstrates, Maj. Op. at 16–20, Anthony Phillips's trial counsel was constitutionally deficient when he failed to investigate the jacket and object to its admissibility. That leads to the next question: If Phillips's trial counsel had properly investigated the jacket and objected to its admission, is there "a reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt"? *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Even under our deferential standard of review, I believe that the answer is yes. I therefore respectfully dissent from Parts II.E.2 and III of the majority opinion and concur in all other parts.

I.

"[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (quoting *Strickland*, 466 U.S. at 694). In determining prejudice, a court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. Because the Michigan Court of Appeals considered the prejudice prong, *Phillips*, 2013 WL 2223388, at *15, our review of its analysis is through "the deferential lens of § 2254(d)." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 121 n.2 (2009)).

II.

If trial counsel had properly investigated and objected to the jacket, it would have been excluded as irrelevant evidence. MICH. R. EVID. 401. Thus, our narrow inquiry on habeas review in evaluating prejudice is: Whether the state court's conclusion—that, even without the jacket, there was no "reasonable probability that . . . the factfinder would have had a reasonable doubt respecting guilt," *Strickland*, 466 U.S. at 695—was "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1). A review of the record reveals that it was.

In its very terse analysis of the prejudice arising from the introduction of the jacket, the Michigan Court of Appeals concluded that the jacket "was of low probative value and there was significant other evidence that would have allowed the jury to conclude that defendant killed Tarver including DNA and fingerprint evidence." *Phillips*, 2013 WL 2223388, at *15. But the

state court's description of the other evidence linking Phillips to the murder as "significant" is a vast overstatement. The other evidence was the tissue found in the kitchen, the checkbook found in a dresser drawer in a bedroom, and the Band-Aid box in the bathroom. *Id.* at *2. Together, this evidence proved that Phillips had been in Tarver's house some time before the murder, and during that time he had touched the Band-Aid box and had bled (although not necessarily on the same visit). But there was no dispute that Phillips had been in Tarver's house before the murder. When Phillips's sister Carmen Allen was dating Tarver, Phillips and his father "did all the plumbing, painting, and other work around the house." *Id.* at *1. When Allen moved out of the house—about four months before the murder—Phillips helped her retrieve her belongings. *Id.* And a week before the murder Phillips went to Tarver's house to retrieve a stove hood. *Id.* During any of these activities, Phillips may have cut himself and may have touched the Band-Aid box. Thus, all of this evidence merely proves that Phillips had been in Tarver's house—a fact not in dispute and not inculpatory. Furthermore, there was fingerprint evidence that an individual—whose prints "neither matched [the] defendant nor Tarver"—had been in the house. *Id.* at *3.

We have previously held that when defense counsel's performance is deficient with respect to a key piece of evidence, it can be an unreasonable application of *Strickland* for the state court to conclude that there was no prejudice. *Peoples v. Lafler*, 734 F.3d 503, 515 (6th Cir. 2013) (finding unreasonable the state court's conclusion that there was no prejudice arising from defense counsel's failure to impeach two key witnesses when the prosecution's case without this testimony was comprised of only circumstantial evidence, namely that the murder weapon was found in a car with the defendant and two others); *Higgins v. Renico*, 470 F.3d 624, 634–36 (6th Cir. 2006) (holding that a state court's conclusion that there was no prejudice was unreasonable when defense counsel failed to cross-examine the key prosecution witness whose credibility was extremely

suspect). This case is analogous. There was very little evidence linking Phillips to the murder. The bloody jacket was the most inculpatory piece of evidence; without it, the prosecution's case is equally as consistent with innocence as with guilt. Thus, there is a reasonable probability that, without the introduction of the jacket, the result of the trial would have been different. *Strickland*, 446 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

The majority holds that the state court's contrary analysis was not unreasonable because "the murderer's identity was the key issue at trial." Maj. Op. at 22. That may be true, but the other evidence does not establish the murderer's identity. The fingerprint and blood establish only that Phillips was in Tarver's house at some point in time—which was not disputed, because Phillips had visited the house frequently and recently for legitimate reasons. There is no connection between this evidence and the murder, except that the items were located at the home where the murder occurred. Mere presence in a murder victim's house at some point in time, however, does not prove guilt of murder beyond a reasonable doubt. This is especially true when the physical evidence also proves that an unidentified third party was also present—again, at an undetermined time—at the scene of the murder. *Phillips*, 2013 WL 2223388, at *3.

Consequently, the state court's conclusion that there was not a "reasonable probability" that the jury "would have had a reasonable doubt," *Strickland*, 466 U.S. at 695, was "an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1). In conducting its analysis, the state court said that the "DNA and fingerprint evidence[] was overwhelming" evidence of Phillips's guilt, without considering what this evidence actually shows. The evidence speaks overwhelmingly to the fact that Phillips was in Tarver's house at some point in time and is entirely silent as to whether Phillips was the

murderer. Furthermore, the fingerprint evidence demonstrates that there was an unidentified third ssparty at the murder scene as well. In sum, the state court's consideration of the evidence unreasonably inflated the probative nature of the remainder of the prosecution's case against Phillips and was, therefore, an unreasonable application of *Strickland*. *Cf. Porter v. McCollum*, 558 U.S. 30, 42–44 (2009) (holding that the state court "unreasonably discounted" relevant mitigation evidence and thus its conclusion that the defendant was not prejudiced by his counsel's constitutional deficiencies was an unreasonable application of clearly established federal law). Thus, I respectfully dissent from the majority's denial of habeas relief on Phillips's ineffective-assistance-of-counsel claim.

KETHLEDGE, Circuit Judge, concurring in the judgment. Although I agree with much of the majority's analysis, I respectfully part ways on a couple of points. First, I think that our decision in *Stewart v. Trierweiler*, 867 F.3d 633 (6th Cir. 2017), resolves the ambiguity mentioned at page 10 of the majority opinion. Specifically, I think that *Stewart* makes clear that plain-error review by a state court counts as an adjudication on the merits for purposes of 28 U.S.C. § 2254(d). *See* 867 F.3d at 638. Second, I respectfully disagree with the majority's dicta that DuBose performed deficiently when he failed to object to the jacket's admission on the ground that it had been seized in 1986 rather than 1987. According to DuBose, the prosecutor told him the jacket was seized in the 1987 search, which is consistent with the prosecutor's post-conviction testimony about what he believed at the time. Moreover, DuBose himself never said that Phillips told him that the jacket had been seized in 1986; only Phillips himself suggested as much, and we are in no position to make a credibility determination on that point. And DuBose testified that he did ask the prosecutor about the discrepancy between the March 11 search-warrant return and the March 12 lab report, and that the prosecutor said the jacket had been seized in 1987. In short, everyone assumed at trial that the jacket had been seized in 1987; DuBose did try to exclude it; and the jacket itself was not crucial to the case. DuBose's performance on this point therefore was not constitutionally deficient.

No. 17-1012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 12, 2018
DEBORAH S. HUNT, Clerk

ANHONY D. PHILLIPS,

Petitioner-Appellant,

v.

BONITA HOFFNER, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: MOORE, KETHLEDGE, and STRANCH, 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

*Judges Griffin, White and Larsen recused themselves from participation in this ruling.

Appendix C

Order

Michigan Supreme Court
Lansing, Michigan

October 28, 2013

Robert P. Young, Jr.,
Chief Justice

147423

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 147423
COA: 300533
Wayne CC: 10-002233-FC

ANTHONY DIQUET PHILLIPS,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the May 21, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

t1021

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 28, 2013

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DIQUET PHILLIPS,

Defendant-Appellant.

UNPUBLISHED
May 21, 2013

No. 300533
Wayne Circuit Court
LC No. 10-002233-FC

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree felony murder, MCL 750.316(1)(b).[1] He was sentenced to life imprisonment without the possibility of parole. For the reasons set forth in this opinion, we affirm.

I. FACTS

This case arises from the 1987 murder of Lacey Tarver in Detroit. Tarver's body was discovered in his home on Piedmont (Piedmont house) on March 4, 1987. Several items were missing, including a computer, a small television, a VCR, a cassette player, Tarver's wallet, the keys to Tarver's car, and a stereo system. A basement window in the rear of the house was broken and appeared to be the intruder's point of entry. There was blood on the wall beneath the window and on some of the broken pieces of glass, indicating that the intruder cut himself while entering.

The prosecution introduced evidence regarding the facts and circumstances surrounding the murder. Tarver and Carmen Allen, f/k/a Carmen Phillips, dated and were engaged for about four years. They lived together in the Piedmont house. Allen's daughter from a previous relationship also lived in the home. Tarver and Allen ended their relationship around Thanksgiving of 1986 and she subsequently moved out.

[1] The underlying felony was breaking and entering of a dwelling. Defendant was not charged with that offense.

Appendix E

Defendant is Allen's brother. Allen also has a brother named Robert, or "Bobby." Allen testified that defendant, her mother, and her sister came over to the Piedmont house frequently when she and Tarver lived there together. Bobby visited less often. About a year before Allen and defendant broke up, someone broke into the Piedmont house. After the break-in, Allen's brother Bobby was not welcome at the house.

Allen testified that she did not know of any problems between Tarver and defendant; defendant was welcome in her home. Defendant and her father did all the plumbing, painting, and other work around the house. When Allen returned to Tarver's house about two weeks after their break-up to retrieve some of her belongings, defendant went with her to help. Allen testified that the week Tarver was murdered, she sent defendant to Tarver's house to retrieve a stove hood that Tarver did not want.

Erica Ridley, Tarver's daughter, was 11 years old when her father was killed. She recalled that her father was supposed to attend a birthday party for her great-aunt on Saturday, February 28, 1987, but he never arrived at the party. The family called Tarver's house all day but was unable to contact him. Debbie Moorer, Tarver's girlfriend at the time, was the last person to see Tarver alive; she was at his house on Thursday, February 26, 1987. After Moorer had not heard from Tarver for a few days, she left a note with Tarver's brother, Edgar Tarver. Edgar found the note in his mailbox in the early morning hours of March 4, 1987, and he went to Tarver's house to check on him. When Edgar arrived, he noticed that Tarver's car was in the driveway and there were lights on inside the house.

Edgar walked around the back of the house and saw that a basement window was broken. The back door was locked, but the front door was not. Inside, the house was in disarray and appeared as if someone ransacked the home. The lights in the hallway and kitchen were on. Edgar called for Tarver but got no response. He went further into the house and saw Tarver's feet sticking out of the northeast bedroom. Edgar then saw Tarver leaning against the wall with lots of blood all around him. Tarver appeared to be dead. He was still wearing a jacket. Edgar called his wife, who called the police. Edgar also noticed that some things were missing from the house, including some electronics and Tarver's wallet and car keys.

On March 4, 1987, Dr. Marilee Frasier conducted an autopsy on Tarver. Dr. Frasier died before the 2010 trial, so Deputy Chief Medical Examiner Cheryl Loewe testified with the assistance of Dr. Frasier's records from the autopsy. Referencing Dr. Frasier's records, Dr. Loewe testified regarding the manner in which Tarver died. Specifically, she explained that Tarver suffered multiple blows to the head that were consistent with blows inflicted by both the head and claw end of a hammer. Tarver had a fractured left eye socket; there were no signs of defensive injuries on his hands or arms. Dr. Loewe testified that there was no way to tell when Tarver was actually killed, but she estimated that he was probably killed a few days before March 4, 1987, based on the degree of rigor mortis and lack of decomposition.

Sergeant James A. Bivens from the Detroit Police Department (DPD) Homicide Section was part of the initial investigative team that responded to the murder scene at 11318 Piedmont. He arrived there at approximately 2:30 a.m. on March 4, 1987, and found Tarver sitting on the floor, slumped against the wall. Sergeant Bivens noticed blunt force injury near Tarver's left ear, a puncture wound on the right side of his neck and lacerations to his right ear. A rear basement

window showed evidence of forced entry. Someone removed the outer storm window and placed it on the ground. In the bathroom, a Band-Aid box was on the sink and the peeled strips of a Band-Aid (the part that is peeled off before applying the Band-Aid) were on the floor.

Officer Carl Kimber, an evidence technician, worked the crime scene at the Piedmont house. He collected items with suspected blood on them, took samples of blood from the walls and other immovable objects, and dusted for fingerprints.

The window in the basement bathroom was broken. There was glass on the floor in the basement bathroom, indicating that the window was broken from the outside. The southeast bedroom, right across the hall from Tarver's body, appeared ransacked. Items were on the floor and drawers were pulled out of the nightstand.

Paula Lytle, who worked as a senior forensic serologist in the DPD Crime Lab in 1987, tested the items that Office Kimber collected for blood and blood type. Lytle testified that she tested blood samples from defendant and Tarver and determined that they both had type O blood. Lytle testified that a piece of broken glass found beneath the broken basement window tested positive for blood. At one point, it appeared Lytle testified that she wrote "type B" somewhere on or near the item, but she testified that her test results were inconclusive with respect to the blood on the glass and she could not determine the blood type. In addition, a tissue found on the kitchen table and a blue checkbook found inside a dresser drawer in a bedroom both tested positive for type O blood.

In 2008, police tested some of the evidence recovered from the crime scene at the Piedmont house for DNA. Jennifer Summers, an expert in serology at the Michigan State Police Forensic Science Division in the Biology Unit, confirmed the presence of blood on the tissue found on the kitchen table. Summers also confirmed the presence of blood on the blue checkbook. She submitted a sample of both of these items to the Michigan State Police Northville Crime Laboratory for DNA testing. Summers also confirmed that the piece of shattered glass from the basement window contained human blood on it. There was a very faint stain in the corner. Summers did not send this sample for further testing because "it appeared to be such a faint stain in concentration," and there were other samples with stronger bloodstains.

Catherine Maggert, an expert in DNA profiling and forensic scientist with the crime laboratory in Northville, conducted DNA testing on the blood on the tissue and on the checkbook. Maggert explained that to develop a DNA profile, she assembles data from 13 different areas, or loci, of a DNA sample. A 14th marker indicates gender. When she tested the blood on the tissue, Maggert was able to obtain reportable data for 12 of the 13 loci. With respect to the checkbook blood, Maggert obtained reportable data for only three of the 13 loci, along with the gender area. The three loci with reportable data matched the corresponding loci in the DNA profile of the tissue blood. Maggert was also able to conclude that both DNA samples were from a male. Maggert explained that degradation or breakdown of DNA could cause the lack of reportable data from a locus.

Andrea Halvorson, another forensic scientist who performs DNA analysis at the Northville crime lab, compared the DNA profiles from the tissue blood and checkbook with a DNA profile developed from a buccal swab obtained from defendant. With respect to the tissue

blood, the 12 loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson testified that the probability of selecting an unrelated, random, African-American individual with 12 out of 13 loci matching the corresponding loci in the tissue blood DNA was one in four quadrillion. With respect to the checkbook blood, the three loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson explained that the probability of selecting an unrelated, random, African-American individual with the same DNA profile as the checkbook blood was one in 211.7 people.

On cross-examination, Halvorson testified that "the DNA from a sibling or . . . even a cousin, an uncle, something like that would be more similar. Those DNA types would be more likely to be found in a member of your family than they would in just a random person." She explained that, "any sort of comparisons to [a] related individual would be a completely different statistic," and she agreed that the only way to eliminate a brother is to run a comparison test of the brother's DNA. Halvorson agreed that she did not receive any blood samples from defendant's brother. However, she explained that only identical twins have ever been found to have the same DNA profile and she agreed that two siblings should have different DNA profiles even though they share the same parents.

In March 1987, the DPD's Latent Fingerprint Unit received nine photographs of print lifts, which Officer Kimber lifted during his investigation at the Piedmont house. Officer John Frelich compared the lifted prints with known prints from defendant, and Fred Moore, a senior technician, verified Officer Frelich's work. Marci McCleary, an expert in latent fingerprint examination and comparison and current employee of the Latent Fingerprint Unit, reexamined the prints in 2010. She testified that of the nine print lifts received, three were unusable because they did not have at least nine different characteristics. A fourth print was from a Band-Aid box, found on the sink in the bathroom on the first floor. McCleary concluded that this print matched defendant's left thumb; she matched 14 different identification points between defendant's known print and the Band-Aid box print. None of the other prints matched defendant and there were some prints that neither matched defendant nor Tarver.

Finally, the prosecution called Officer Charles Braxton to testify that police seized a waist-length, black and yellow size large jacket from defendant's house during a search after Tarver's murder. The jacket had two suspected bullet holes in the left shoulder area. However, on cross-examination, Officer Braxton clarified that he was probably just an observer during the execution of the search warrant and that he did not remember if he actually saw the jacket. Officer Braxton and Lytle testified that there was blood on the inside of the jacket near the left shoulder area. Lytle testified that the jacket tested positive for type O human blood.

During rebuttal argument, the prosecutor referenced that police seized the jacket from defendant's home and mentioned that it had type O blood inside. The prosecutor argued:

> Is it the deceased['s] blood or is it the defendant's blood? I really can't tell you that. It's possible it could be either one of those, all right.
>
> It's possible that it could very well be the defendant's blood after he was cut and everything, stuck his hand back in the jacket and got it there.

Following four days of trial testimony, the jury convicted defendant and the trial court sentenced him as set forth above. Thereafter, defendant filed a claim of appeal in this Court and subsequently moved for a new trial, an evidentiary hearing, and judgment notwithstanding the verdict. In his motion, defendant raised the same issues that he now raises on appeal including his argument that the prosecutor admitted false evidence when it introduced evidence of the jacket at trial. Defendant attached documentation to his motion to support his argument that police did not seize the jacket from his residence after the murder. Specifically, a DPD laboratory technician report indicated that the laboratory received the jacket on March 12, 1987, from Officer Kramer. Police executed a search warrant at defendant's home on March 11, 1987, at 9074 Westwood. However, the search warrant return indicated that police did not seize anything during the search. In addition, Officer Kramer wrote a memorandum on April 16, 1987, wherein he indicated that police did not seize anything during the search.

As noted above, at trial, the prosecution presented the testimony of Officer Braxton to establish that police seized the jacket with blood on the inside from defendant's home after Tarver's murder. Following defendant's motion for a new trial, the prosecution acknowledged that police did not seize the jacket during the search warrant related to this case. Police actually seized the jacket on September 11, 1986, in an unrelated incident before Tarver was murdered. However, the prosecution argued that the improper introduction of the evidence did not deny defendant a fair trial or affect the trial's outcome.

The trial court held an evidentiary hearing on June 2, 2011. Officer Braxton testified that he reviewed a laboratory analysis report for the jacket before testifying at trial. The report indicated that police seized the jacket from 9074 Westwood and that the laboratory received the jacket for analysis on March 12, 1987. Based on the information in the report, Officer Braxton assumed that police seized the jacket during the March 11, 1987 search of defendant's residence. Officer Braxton denied speaking with the trial prosecutor about deceiving the jury with his testimony. He explained that he did not discuss his testimony before trial with the prosecutor; the prosecutor just asked him to review the laboratory report.

The trial prosecutor also testified that he thought police seized the jacket during their execution of the search warrant on March 11, 1987 based on the date of the search warrant and the laboratory report. The test results for the jacket were included on the same report as the other evidence from the Tarver murder scene. He did not discover that his assumption was incorrect until he read appellate counsel's motion for a new trial. The prosecutor testified that he did not intend to make Officer Braxton testify to something that was not true, and if he had known the truth, he would not have introduced the jacket evidence. Furthermore, he did not reference the jacket in his opening statement or initial closing argument and only mentioned the jacket during rebuttal in response to defense counsel's closing argument. There was nothing in the case file to indicate why Officer Kramer brought the jacket to the lab on March 12, 1987.

As discussed in more detail below, the trial court also heard testimony concerning defendant's ineffective assistance of counsel claim. The trial court denied defendant's motion for a new trial and for judgment notwithstanding the verdict.

B. ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Defendant contends that that there was insufficient evidence to support his conviction. We review a challenge to the sufficiency of the evidence de novo. *People v Parker*, 288 Mich App 500, 503; 795 NW2d 596 (2010). We construe the evidence in the light most favorable to the prosecution in determining if a rational trier of fact could find that all of the essential elements of the crime were proven beyond a reasonable doubt. *People v Jackson*, 292 Mich App 583, 587; 808 NW2d 541 (2011). In conducting our review, we must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011) (internal quotations omitted). To demonstrate that the evidence presented at trial was sufficient to convict the defendant, the prosecution does not need to "negate every reasonable theory consistent with innocence." *Id.* Furthermore, we "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012) (internal citations omitted). Circumstantial evidence and reasonable inferences from the evidence can provide enough proof to support the elements of an offense. *Kissner*, 292 Mich App at 534.

The elements of first-degree (felony) murder are:

> (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. . . . [*People v Seals*, 285 Mich App 1, 12; 776 NW2d 314 (2009) (quotation and citation omitted.]

The trial court instructed the jury on felony murder with breaking and entering a dwelling as the underlying felony. "Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission." *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002).

In this case, the only issue in dispute was the identity of Tarver's murderer. Having reviewed the record, we conclude that the prosecutor presented sufficient evidence that would allow a reasonable juror to find defendant guilty of felony murder beyond a reasonable doubt. The evidence showed that someone entered Tarver's house by breaking a basement window. During this process, that individual cut himself, as there was blood on the shattered window glass. A tissue with blood on it was on the kitchen table. Expert testimony showed that defendant's DNA matched the DNA on the bloody tissue on 12 of 13 loci. Defendant's fingerprint was on a box of Band-Aids in the bathroom, and it appeared that a Band-Aid was recently used. The box was sitting on the bathroom sink and there were the peeled strips from the back of the Band-Aid on the bathroom floor. In addition, there was blood on a checkbook in the dresser drawer in the southeast bedroom of the home. Expert testimony showed that the defendant's DNA matched the DNA on the checkbook on 3 of 13 loci. While any of this evidence alone might not be sufficient to support defendant's conviction, taken as a whole and drawing all reasonable inferences in favor of the jury verdict, it was sufficient. See *Kissner*, 292 Mich App at 534. It was reasonable for the jury to infer that defendant left the bloody tissue on

the kitchen table after he cut himself breaking into Tarver's basement, used a Band-Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after killing Tarver.

Defendant argues that there was insufficient evidence because the prosecution must negate all reasonable theories of innocence. However, our Court has specifically rejected that proposition and instead held that evidence is sufficient "if the prosecution proves its theory beyond a reasonable doubt *in the face of whatever contradictory evidence the defendant may provide.*" *Kissner*, 292 Mich App at 534 (emphasis added). Here, the prosecution proved defendant's guilt beyond a reasonable doubt given the evidence presented by defendant. See *id.*

II. GREAT WEIGHT OF THE EVIDENCE

Defendant also claims that his conviction was against the great weight of the evidence. Defendant moved in the trial court for a new trial based, in part, on these grounds. The trial court denied defendant's motion. We review for an abuse of discretion a trial court's decision to grant or deny a new trial on the basis that the verdict was against the great weight of the evidence. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). A court abuses its discretion, "when its decision falls outside the range of principled outcomes." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (quotation and citation omitted).

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

In this case, the trial court did not abuse its discretion in finding that defendant's conviction was not against the great weight of the evidence. Here, the evidence did not "preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* As discussed above, there was sufficient evidence to allow a rational trier of fact to infer that defendant broke into Tarver's home, murdered Tarver, and, in the process, left blood DNA and fingerprint evidence at the crime scene.

III. RIGHT TO PRESENT A DEFENSE

Defendant contends that the trial court denied him the right to present a defense and confront the witnesses when the court limited his ability to cross-examine witnesses. Defendant failed to preserve these issues for review because he did not object on the same basis in the lower court. *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004).

Whether defendant was denied the rights of confrontation and to present a defense involve questions of constitutional law that we review de novo. *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012); *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, a defendant must establish that a plain error occurred that affected his substantial rights in that it "affected the outcome of the lower court proceedings." *Id.*

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Unger*, 278 Mich App at 249 (quotation and citation omitted). However, this right is not absolute, and states generally have the power "to establish and implement their own criminal trial rules and procedures." *Id.* at 250.

Defendant contends the trial court denied him the right to present a defense on four separate occasions. First, defendant argues that the trial court precluded his counsel from questioning Officer Kimber about possible contamination of a saline solution kit that he used at the crime scene. However, even assuming that the trial court improperly struck the question, defendant cannot show that any error affected the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, defense counsel was able to ask most of the question about the potential contamination, which made his argument; he did not actually need Officer Kimber to answer. Defense counsel was also able to ask Officer Kimber other questions about his procedures at the crime scene and possible contamination.

Second, defendant argues that the court improperly prevented him from questioning Allen about Tarver's cleaning habits. Defendant contends that the prosecutor was allowed to solicit evidence that Tarver was a "neat freak," but he was prohibited from rebutting that assertion. Defendant does not explain why this evidence was relevant. Furthermore, the trial court merely required defendant to provide a foundation for his questioning. Once defendant established that Allen had been back to Tarver's house after moving out, defendant was free to question her about the condition of Tarver's house during those visits.

Third, defendant claims that the court prevented counsel from questioning Allen about defendant's visits to Tarver's house, which were relevant to explain why defendant's blood was on the tissue on the kitchen table. In this instance, the court precluded the questioning because defendant failed to establish that Allen had personal knowledge of how defendant's fingerprint got on the Band-Aid box or how a tissue with his blood got on the kitchen table in Tarver's house. Furthermore, defendant was able to solicit testimony from Allen about instances when defendant was at Tarver's house after she and Tarver stopped dating. Allen testified that defendant helped her move her things out of the house in December 1986 and went to Tarver's house to receive a stove hood the week he was murdered.

Fourth, defendant claims that the trial court precluded counsel from questioning Allen about Bobby's drug addiction and previous arrest for robbery charges. Here, even assuming that the court should have allowed the testimony as evidence of motive, defendant cannot show that any error affected the outcome of the proceedings. *Id.* In this case, the jury heard evidence that would have allowed it to conclude that Bobby committed the murder. Allen testified that someone broke into the victim's home sometime before the murder and that, thereafter, Bobby was not welcome at the victim's home. Moreover, given the significant evidence linking defendant to the crime scene, evidence of Bobby's drug conviction would not have affected the outcome of the proceedings. *Id.*

In sum, the trial court did not deny defendant the right to present a defense where none of the alleged instances of error affected his substantial rights. *Id.*

IV. RIGHT OF CONFRONTATION

Defendant asserts that the trial court denied him his right of confrontation when several witnesses testified regarding the actions and findings of other individuals who did not testify at trial. Defendant failed to preserve this issue for review because he did not object on the same basis in the trial court. *McPherson*, 263 Mich App at 137. We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

An out-of-court testimonial statement is inadmissible under the Confrontation Clause "unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant." *Nunley*, 491 Mich at 698; see also US Const, Am VI. "A pretrial statement is testimonial if the declarant should reasonably have expected the statement to be used in a prosecutorial manner and if the statement was made under circumstances that would cause an objective witness reasonably to believe that the statement would be available for use at a later trial." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010), citing *Crawford v Washington*, 541 US 36, 51-52; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant correctly contends that Dr. Loewe's testimony regarding the autopsy report violated the Confrontation Clause. An autopsy report is testimonial in nature. See *People v Lewis*, 490 Mich 921; 806 NW2d 295 (2011); *Bullcoming v New Mexico*, 564 US ___; 131 S Ct 2705; 180 L Ed 2d 610 (2011). Evidence regarding the content of the report was therefore inadmissible because the author of the report did not appear at trial and testify and defendant did not have a prior opportunity to cross-examine the author. *Nunley*, 491 Mich at 698. As such, Dr. Loewe's testimony was inadmissible and violated defendant's right of confrontation. However, defendant is not entitled to a new trial on this basis because the improper evidence did not affect the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, the cause of Tarver's death was not at issue and defendant did not dispute that a crime occurred. Rather, the only disputed issue was the identity of Tarver's killer and the autopsy report did not shed light on the identity of the killer.

Next, defendant contends that McCleary's testimony regarding fingerprints lifted from the crime scene violated his right of confrontation. Here, McCleary testified that in 1987, Officers Frelich and Moore compared defendant's fingerprints with the prints that another officer lifted at the crime scene. However, McCleary did not testify regarding the results of that comparison. Rather, McCleary did her own comparison and testified with respect to her own conclusions. Accordingly, McCleary's testimony did not violate the Confrontation Clause as she appeared at trial where defendant had the opportunity to cross-examine her regarding her own findings. *Nunley*, 491 Mich at 698.

Defendant also contends that Officer Braxton's testimony regarding the jacket violated his right of confrontation. Specifically, at one point during direct examination, Officer Braxton agreed that the "file" reflected that police executed a search warrant at defendant's residence and that a jacket was seized during the execution of that warrant and was delivered to the police crime laboratory.

To the extent Officer Braxton relied on "the file" to testify that police executed a search warrant at defendant's residence, this was improper because Officer Braxton was relying on a testimonial statement by a declarant that did not appear at trial. However, this error was offset by the fact that Officer Braxton also testified that he participated in executing the search warrant. Thus, this aspect of Officer Braxton's testimony did not amount to plain error affecting defendant's substantial rights.

Similarly, Officer Braxton's reliance on "the file" to testify that police seized a jacket during the search was improper. However, this testimony did not amount to plain error affecting defendant's substantial rights. As discussed in more detail below, the jacket was not highly probative and there was other significant evidence that would have allowed the jury to find defendant guilty beyond a reasonable doubt. Furthermore, on cross-examination, defendant was free to question Officer Braxton regarding what he saw during the search and Officer Braxton acknowledged at one point that he did not recall seeing the jacket. In addition, defense counsel solicited testimony regarding the laboratory report when he asked Officer Braxton what the report said about bullet holes and the jacket's size.

V. EVIDENTIARY ERRORS

Defendant argues that the trial court improperly admitted blood-type evidence and his old prison booking photographs.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). However, interpretation and application of the rules of evidence involve questions of law that we review de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

Defendant incorrectly contends that blood-type evidence is inadmissible in a criminal prosecution. See *People v Punga*, 186 Mich App 671, 672-673; 465 NW2d 53 (1991) (holding that blood-type evidence is relevant and admissible). To the extent that defendant relies on *People v Sturdivant*, 91 Mich App 128; 283 NW2d 669 (1979), we note that *Sturdivant* is not binding precedent. See MCR 7.215(J)(1).

With respect to the prison booking photographs, before trial, the prosecutor stated that he intended to introduce the photographs from defendant's booking in July 1987 on a different matter. The court decided to allow two of the photographs to be admitted if they were cropped. Defense counsel stated that he "could live with that" resolution. "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Therefore, defendant has waived this issue. Nevertheless, even if we were to address the substance of defendant's argument, he would not be entitled to any relief. Here, the photographs were relevant to show that defendant was thin enough in 1987 to gain access to the victim's residence by climbing through the home's small shattered basement window. See MRE 401. Furthermore, the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice" under MRE 403. Here, the photographs were highly relevant in that they tended to show that defendant could have gained entry into the victim's home, which in turn, shed light on the identity of the perpetrator. In addition, there was no danger of unfair prejudice where the

trial court limited the number of photographs, ordered the prosecutor to crop the photographs, and instructed the jury that defendant was presumed innocent.

VI. PROSECUTORIAL MISCONDUCT

Next, defendant argues that the prosecutor engaged in misconduct on several separate occasions. "We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, where, as in this case, a defendant fails to object to the alleged instances of misconduct, his claims are unpreserved and we review for plain error affecting defendant's substantial rights. *Id.*

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *Id.* at 382-383. There is no "error requiring reversal where a curative instruction could have alleviated any prejudicial effect," *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003), and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235.

Defendant argues that the prosecution committed misconduct when he questioned Allen about her request for an attorney. Specifically, the questioning at issue occurred when the prosecutor asked Allen about a statement she gave to police on March 11, 1987. Allen volunteered that she refused to sign the statement "[b]ecause I didn't have a lawyer." To which the prosecutor replied, "if you don't have a lawyer you're not gonna [sic] sign any statement, right?"

Defendant does not cite any law in support of his argument that the prosecution cannot question *a witness* about her refusal to sign a statement to police without an attorney. Rather, defendant cites cases that discuss the rights of *an accused* to remain silent and to request an attorney. Moreover, defendant cannot show that this exchange served to deny him a fair and impartial trial. *Brown*, 294 Mich App at 382. Here, the prosecutor did not ask Allen about her request for counsel. Instead, the prosecutor merely asked if Allen remembered making the statement and refusing to sign it. Allen then volunteered that she refused to sign the statement because she did not have an attorney. The prosecutor responded by asking Allen about her own statement and he did not act improperly in doing so.

Defendant contends that the prosecution improperly subverted the presumption of innocence by arguing that "there's no such thing as a free murder" during his opening statement and closing argument.

It is well-settled that a defendant is presumed innocent and his guilt must be proved beyond a reasonable doubt. *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002). In his opening statement, the prosecutor stated that the "theme of this case" is that "[t]here's no such thing as a free murder . . . Because we're gonna [sic] be going back in time . . . to over 23 years ago." The prosecution reiterated the theme in his closing argument.

Contrary to defendant's assertions, the prosecution was merely remarking on the long passage of time since Tarver's murder and arguing that the jury should not acquit simply because the murder occurred 23 years ago. The prosecutor did not encourage the jury to convict defendant even if it did not find him guilty beyond a reasonable doubt. Finally, any error could have been cured by an objection and curative instruction. See *Callon*, 256 Mich App at 329-330. Indeed, the court instructed the jury that defendant is presumed innocent and must be found guilty beyond a reasonable doubt, and the jury is presumed to have followed its instructions. *Unger*, 278 Mich App at 235.

Next, defendant argues that the prosecutor committed misconduct when he introduced evidence of the jacket and introduced inaccurate testimony that the police seized the jacket after the murder.

A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A prosecutor has a constitutional obligation to report to the defendant and the trial court whenever a government witness lies under oath, *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), and a duty to correct false evidence, *People v Gratsch*, ___ Mich App ___; ___ NW2d ___ (Docket No. 305040, issued February 28, 2013), slip op, p 7.

At the post-trial evidentiary hearing, the trial prosecutor testified that he did not know that police seized the jacket in 1986, before Tarver's murder, until defendant filed his motion for a new trial. The trial court had the opportunity to observe the prosecutor testify at the evidentiary hearing and found his testimony credible. This Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Eisen*, 296 Mich App at 331. Thus, there is no evidence that the trial prosecutor knowingly presented false testimony. See *Aceval*, 282 Mich App at 389.

While improper, the admission of testimony regarding the jacket did not amount to plain error affecting defendant's substantial rights, *Cox*, 268 Mich App at 450-451, in that it did not affect the outcome of the proceedings. *Carines*, 460 Mich at 763. Here, the jacket was of low probative value. As defense counsel argued, the prosecution could not establish that it belonged to defendant. The jacket had two suspected bullet holes through it, but there was no evidence that Tarver's murder involved the use of a gun or that there was a struggle. Instead, other evidence directly linked defendant to Tarver's murder, including his fingerprint on the Band-Aid box, the bloody tissue, and the blood on the checkbook. This evidence standing alone was more than sufficient to allow a rational juror to convict defendant beyond a reasonable doubt.

VII. JURY INSTRUCTION

Defendant contends that the trial court abused its discretion in failing to give the jury the standard instruction on fingerprint evidence.

We review claims of instructional error de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, we review for an abuse of discretion the trial court's determination whether an instruction is applicable to the facts of a case. *Id.* A court abuses its discretion, "when its decision falls outside the range of principled outcomes." *Feezel*, 486 Mich

at 192. When a defendant's requested instruction was supported by the evidence but not given, he has the burden of showing that "the trial court's failure to give the requested instruction resulted in a miscarriage of justice." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003) (quotation and citation omitted).

"A defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence." *Id.* Defendant requested CJI2d 4.15, which provides:

> Before a defendant may be convicted on the basis of fingerprint evidence, the people must prove that the prints correspond to those of the accused and were found in the place where the crime was committed under such circumstance that they could only have been impressed at the time when the crime was committed.

The use note for this instruction states that it should only be given when fingerprint evidence is the only evidence of identity. See Use Note, CJI2d 4.15.

An abuse of discretion does not occur when the trial court's decision "'is within the range of options from which one would expect a reasonable trial judge to select.'" *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), quoting *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995). The trial court's decision to follow the use note's directive was reasonable, and therefore, not an abuse of discretion. Even if the court erred, this error was harmless because the DNA evidence was sufficient for a jury to conclude beyond a reasonable doubt that defendant killed Tarver.

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that counsel rendered ineffective assistance of counsel on several different occasions during the trial.

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review the trial court's findings of fact for clear error and questions of constitutional law de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *Armstrong*, 490 Mich at 289.

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. A defendant bears a heavy burden of overcoming the presumption that counsel rendered effective assistance. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that trial counsel was ineffective for failing to file a motion to quash before trial and for failing to move for a directed verdict after the close of proofs. Generally, counsel has discretion over his method of trial strategy, and we will not substitute our own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

In this case, counsel made a strategic decision not to move to quash or for a directed verdict. This decision did not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302. As discussed above, there was sufficient evidence to allow a jury to conclude that defendant killed the victim including DNA and fingerprint evidence such that motions to quash or for a directed verdict would have been futile. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel").

Next, defendant contends that counsel was ineffective for advising him not to testify in his own defense at trial.

At the post-conviction evidentiary hearing, counsel testified regarding why he advised defendant not to testify. Counsel first stated that he did not have defendant testify because of information defendant told him in privileged conversations. He was not going to "suborn any perjury." Second, trial counsel said that he was concerned about defendant's 1987 conviction for assault with intent to do great bodily harm less than murder. Even though the conviction was more than 10 years old and did not deal with truth or dishonesty, counsel was worried that defendant would "open certain doors on direct examination." For example, defendant might actually say something about being a nonviolent person. In addition, counsel said it would have been "a monumental blunder" to have defendant testify because defendant would not have been able to explain how his blood was in Tarver's house.

The trial court concluded that counsel did not render ineffective assistance in advising defendant not to testify. The court reasoned that counsel's concern about defendant's prior conviction might have been "overly cautious" but was not unsound. In addition, the court reasoned that counsel's advice was much more nuanced than defendant claimed it was and generally concerned the risks of defendant testifying.

"Counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The trial court found trial counsel credible with respect to the reasoning behind his advice. This finding was not clearly erroneous. *Jordan*, 275 Mich App at 667. Trial counsel's testimony at the evidentiary hearing showed that he had valid concerns regarding defendant's testimony. He did not want to "open the door" with respect to defendant's prior conviction and he had concerns about perjury and defendant's inability to explain the presence of his blood at the crime scene. Given counsel's legitimate concerns about defendant taking the stand, counsel made a strategic decision to advise defendant against testifying and the trial court did not clearly err in finding that counsel acted reasonably in making that decision.

Next, defendant contends that counsel rendered ineffective assistance of counsel when he failed to object to the testimonies of McCleary, Officer Braxton, and Dr. Loewe on Confrontation Clause grounds.

In this case, as discussed above, McCleary's testimony did not violate the Confrontation Clause. Therefore, counsel did not act deficiently in failing to object to her testimony on this basis because any objection would have been futile. *Ericksen*, 288 Mich App at 201.

Counsel should have objected to Dr. Loewe's testimony. As discussed above, Dr. Loewe's testimony was inadmissible under the Confrontation Clause and counsel's lack of familiarity with recent United States Supreme Court precedent on the issue amounted to deficient performance. However, as discussed above, Dr. Loewe's testimony regarding the contents of the autopsy report concerned the manner in which the victim died. Cause of death was not at issue in this case. Instead, the critical issue concerned the identity of the killer and Dr. Loewe's testimony did not shed light on the identity of the killer. Accordingly, defendant cannot show there is a reasonable probability that but for counsel's failure to object to Dr. Loewe's testimony the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Similarly, while a portion of Officer Braxton's testimony regarding the jacket was inadmissible under the Confrontation Clause, counsel's failure to object did not impact the outcome of the trial. *Id.* Here, evidence of the jacket was of low probative value where there was other evidence that defendant's blood was at the crime scene and where there was no evidence that the murder involved a gun.

Next, defendant contends that counsel rendered ineffective assistance of counsel in failing to object to the prosecution's introduction of testimony about the jacket.

At the post-conviction evidentiary hearing, defendant testified that he told counsel that police seized the jacket during a search in 1986 in connection with a different case. Defendant testified that counsel knew police seized the jacket before Tarver's murder because counsel represented defendant in the 1986 case. Counsel testified and admitted that he did not object to admission of testimony about the jacket. Counsel indicated that he saw Officer Kramer's memorandum, which indicated that police did not seize anything from defendant's home during the post-murder search of the residence. Counsel stated that the prosecutor informed him that police seized the jacket from defendant's residence during that search.

The trial court found that trial counsel did not render ineffective assistance in failing to object to evidence of the jacket. The court concluded that it was reasonable for counsel to assume, as the prosecutor did, that police seized the jacket during the search on March 11, 1987 because it was delivered to the laboratory the day after the search. Further, the court concluded that admission of evidence of the jacket was not outcome-determinative where the other evidence against defendant, specifically the DNA and fingerprint evidence, was overwhelming.

In this case, while counsel's performance in investigating the seizure of the jacket may have fallen below an objective standard of reasonableness, the trial court did not clearly err in finding that admission of evidence regarding the jacket did not affect the outcome of the proceeding. *Jordan*, 275 Mich App at 667. As discussed above, the jacket evidence did not

affect the outcome of the proceedings. The evidence was of low probative value and there was significant other evidence that would have allowed the jury to conclude that defendant killed Tarver including DNA and fingerprint evidence. On this record, defendant cannot show that there is a reasonable probability that but for counsel's failure to object to the jacket evidence, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600.

Next, defendant contends that counsel rendered ineffective assistance in failing to call a DNA expert to testify and in failing to call other witnesses at trial.

"An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *Payne*, 285 Mich App at 190. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey*, 237 Mich App at 77.

At the post-conviction evidentiary hearing, counsel testified that he retained an independent expert, but learned that the firm's findings were not beneficial to his client. Counsel testified that he discussed strategies with the independent firm for addressing the DNA evidence at trial. At trial, counsel advanced the theory that defendant's brother Bobby could have been the perpetrator. Counsel explained that he did not want to have Bobby's DNA tested because the test could have eliminated Bobby as a potential perpetrator, which would have ruined defendant's defense.

The trial court concluded that counsel did not act deficiently in failing to retain an independent DNA expert. The court found that counsel did retain an expert who advised counsel that the DNA evidence was not favorable to defendant.

In this case, the trial court did not clearly err in finding that counsel rendered effective assistance with respect to his handling of the DNA evidence. Counsel retained an independent DNA expert. When the independent expert's results were not favorable to his client, counsel decided not to obtain a written report or call any expert to testify at trial. This was reasonable strategy given the circumstances. Further, counsel made a reasonable strategic decision not to have Bobby's DNA tested given the results could have destroyed defendant's only defense. It is reasonable trial strategy not to seek further testing when the results could implicate the defendant. See *People v Rao*, 491 Mich 271, 290-291; 815 NW2d 105 (2012). In sum, given all of the facts and circumstances of the case, counsel acted reasonably with respect to his handling of the DNA evidence and in deciding not to call an independent expert witness.

Defendant contends that counsel should have called his mother and sister to testify at trial. Counsel testified that he did not call defendant's mother as a witness because he was able to get all of the information he needed from Allen. The trial court concluded that counsel did not act deficiently in failing to call other witnesses because defendant failed to demonstrate what important testimony other witnesses would have provided.

Defendant claims that his mother and sister would have testified about instances when defendant was at Tarver's house after Tarver and Allen broke up. However, Allen testified about Tarver and defendant's friendship and occasions when defendant visited Tarver's house after Tarver and Allen stopped living together. Presumably, Allen had the most knowledge of Tarver

and defendant's relationship since she dated and lived with Tarver. Therefore, it was reasonable for counsel to decide to call Allen as a witness instead of defendant's mother or sister. To the extent defendant contends that his sister could have offered testimony about seizure of the jacket, as discussed above, admission of the jacket evidence did not affect the outcome of the proceedings. Therefore, defendant cannot show that there is a reasonable probably that but for counsel's failure to call his sister to testify at trial, the result of the proceeding would have been different. *Carbin*, 463 Mich at 600. In sum, the trial court did not clearly err in concluding that counsel did not render ineffective assistance in failing to call other witnesses at trial. *Jordan*, 275 Mich App at 667.

Finally, defendant contends that counsel should have made several other objections at trial. Defendant's arguments lack merit. First, an objection to the admission of the blood-type evidence would have been meritless. As discussed above, this evidence was admissible. Second, an objection to the prosecution's alleged questions to Allen about her request for an attorney would have been meritless. As discussed above, the prosecution did not solicit this information. Allen volunteered the information that she did not want to sign the statement without an attorney. Finally, as discussed above, the prosecution's argument that there is "no such thing as a free murder" did not subvert the presumption of innocence and the trial court instructed the jury that defendant was presumed innocent. In sum, defendant cannot show that counsel acted deficiently in failing to raise any of the above-referenced objections where counsel need not raise a futile objection. *Ericksen*, 288 Mich App at 201.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	ORDER DENYING/GRANTING MOTION	CASE NO. 10002233 01

ORI MI- 8210953 Court Address 1441 St. Antoine, Detroit MI 48226 Courtroom 501 Court Telephone No. 313-224-2417

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Anthony Phillips
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice

at Detroit in Wayne County on JUN 28 2011

PRESENT: Honorable Hon. Michael M. Hathaway

A Motion for: New Trial

having been filed; and

the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for Same

be and

is hereby ☒ denied ☐ granted.

Honorable

83a

STATE OF MICHIGAN
COUNTY OF } SS

SEARCH WARRANT

87 0414

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

On this day 19th MARCH, 1987 P.O. DAVID KRAMER , affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place: THE BODY OF ANTHONY DIQUET PHILLIPS, B/M/ D.O.B. 2-21-65, 6-2, 170, 9074 WESTWOOD.

87 0414

and to seize, secure, tabulate and make return according to law the following property and things:

SALIVA AND A BLOOD SAMPLE.

87 0414

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

ON MARCH 4, 1987 AT APPROXIMATELY 12:40 A. EDGAR TARVER ARRIVED AT HIS HOME, 14113 WARWICK, AND IN HIS MAIL BOX WAS A NOTE FROM HIS BROTHER, LACEY TARVER, GIRLFRIEND DEBBIE MOORE. THE NOTE STATED THAT SHE HAS NOT SEEN LACEY SINCE FEBRUARY 27, 1987 AND ON MARCH 3, 1987 SHE WENT TO LACEY"S HOUSE AND OBSERVED HIS CAR IN THE DRIVEWAY AND SHE CHECKED THE REAR OF THE HOME AND OBSERVED THE BASEMENT WINDOW HAD BEEN BROKEN OUT.

EDGAR THEN WENT TO HIS BROTHERS HOME 11318 PIEDMONT, AND SAW THE BASEMENT WINDOW HAD BEEN BROKEN OUT AND THERE WAS BLOOD ON THE BROKEN PIECES OF GLASS. EDGAR OPENED THE FRONT DOOR WITH HIS KEY AND FOUND HIS BROTHER, LACEY, LYING ON THE HALLWAY FLOOR OBVIOUSly DEAD.

ON MARCH 4, 1987 SGT.JAMES BIVENS OF THE HOMICIDE SECTION ARRIVED AT 11318 PIEDMONT. DURING HIS INVESTIGATION HE OBSERVED THE REAR WINDOW OF THE HOME HAD BEEN BROKEN OUT AND THERE WAS SUSPECTED BLOOD ON THE GLASS. THIS LED SGT. BIVENS TO BELIEVE THAT THE INTRUDER HAD INJURED THEMSELF GAINING ENTRY INTO THE HOME. IN THE FIRST FLOOR BATHROOM WAS A BOX OF BAND AIDSON THE SINK AND ON THE FLOOR WERE FOUR PIECES OF BAND AID ENDS AND THERE WAS BLOOD SPATTERS ON THE BATHROOM WALLS.

P.O. CARL KIMBER, EVIDENCE TECHNICIAN, WILL TESTIFY THAT HE DUSTED THE BAND AID BOX FOR PRINTS AND HE REMOVED THREE LIFTS. HE ALSO TOOK BLOOD SAMPLES FROM THE BATHROOM WALLS AND THE BROKEN BASEMENT WINDOW.

THE PRINT LIFTS WERE TAKEN TO CENTRAL PHOTO, PLACED ON EVIDENCE, PHOTOGRAPHED AND SENT TO THE LATENT PRINT OFFICE.

ON MARCH, 11, 1987 P.O. JOHN FRLICK, LATENT PRINTS, WILL STATE HE NOTIFIED THE AFFIANT THAT HE POSITIVELY IDNTIFIED THE PRINT LIFTS FROM THE BAND AID BOX AS BELONGING TO ANTHONY DIQUET PHILLIPS B/M/2-21-65 DETROIT IDENTIFICATION #462910.

THE AFFIANT IS A MEMBER OF THE DETROIT POLICE HOMICIDE SECTION AND IS THE OFFICER IN CHARGE OF THIS CASE.

I REQUEST THIS BLOOD SAMPLE BE TAKEN FROM MR. PHILLIPS SO WE CAN COMPARE IT WITH BLOOD SAMPLES TAKEN FROM 11318 PIEDMONT.

87 0414

ISSUED UNDER MY HAND THIS 18 DAY OF March, 1987

JUDGE OF 36th District

ORIGINAL SEARCH WARRANT

84a

(2) and that I have been unable to find such goods and chattels.

Municipal Police Officer

~~Sheriff~~ — Deputy Sheriff

DATED AT: SD.

this 11th day of March

A.D., 1987

Address: 9074 Westwood.

ORIGINAL RETURN ON SEARCH WARRANT

85a

DETROIT DEPARTMENT POLICE

D.P.D 568 (Rev. 4-77) C of D-77-ME

INTER-OFFICE MEMORANDUM

Homicide Section

Date: April 16, 1987

To: Commanding Officer, Homicide Section

Subject: PROGRESS REPORT RE: HOMICIDE FILE #87-113, FATAL ASSAULT OF LACEY TARVER, ASSIGNED TO POLICE OFFICER DAVID KRAMER.

1. SYNOPSIS:

On Wednesday, March 4, 1987 at approximately 12:40 AM Edgar Tarver, brother of complainant Lacey Tarver, found a note in his mailbox from Debbie Moore, girlfriend of Lacey Tarver. In the note she stated that she has not seen Lacey for the last couple of days and when she was at the house on March 3, 1987 she observed Lacey's car in the driveway and when she knocked on the door no one answered.

At approximately 12:50 AM Edgar went to his brothers home, 11318 Piedmont, and he saw Lacey's car in the driveway. He knocked on the side door but didn't receive any answer. He went to the front door and tried to put his key in the door but it opened by itself. Inside Edgar observed the stereo cabinet had been moved and the component set was gone. He then looked into the hallway and observed some feet sticking out of one of the bedrooms. He went to the bedroom and observed his brother lying on the floor obviously dead.

2. SUSPECTS:

At the present time the only suspect is Anthony Diquet Phillips B/M/22, 9074 Westwood. He is the brother of Carmeletha Phillips B/F/27, 9074 Westwood. Carmeletha was Lacey's girlfriend until December 1986. She lived with Lacey at his home for the past year or so. Mr. Phillips has two (2) previous contacts with this department. One (1) is for driving while license is suspended and the other is a Felonious Assault which a warrant was issued on September 25, 1986 by Sergeant Lapum #6 IOS.

3. SHOW-UPS: NONE.

4. EVIDENCE:

During the scene investigation by Sergeant James Bivens, Homicide Section, there was blood taken from the basement window that was broken so the perpetrator could gain entrance to the home. There was blood on the window which would indicate that perpetrator injuried themself during the entry. A sample of the blood was taken along with other blood samples from the house. There were also print lifts taken from several items. On E item was a band-aid box which was found on the bathroom sink. On March 10, 1987 Police Officer Jon Frelick of the Latent Print Section positively identified the print on the band-aid box as belonging to Anthony Phillips. On March 11, 1987 a search warrant was executed at 9074 Westwood home of Anthony Phillips. Nothing was taken. Carmeletha Phillips was talked to at this time and she stated that her brother Anthony went to Los Angeles, California on March 7, 1987. On March 17, 1987 Anthony Phillips presented himself at the Homicide Section along with his attorney, Sequoia Dubose, to Sergeant Ralph Woolfolk. After advising Mr. Phillips of his constitutional rights he refused to make a statement under advice from Mr. Dubose. On March 18, 1987 a search warrant was secured for blood sample from Mr. Phillips. After numerous contacts with Mr. Dubose he presented Mr. Phillips on March 27, 1987. At this time Sergeant Braxton took Mr. Phillips to the sixth floor and a blood sample was taken at this time. Sergeant Braxton was going to have palm prints taken from Mr. Phillips but Mr. Dubose stated he did not want prints taken from Mr. Phillips. No prints were taken and Mr. Phillips was allowed to leave. On March 31, 1987 it was learned that Lacey Tarver and Anthony Phillips have the same blood type.

86a

Both Lacey Tarver and Anthony Phillips have the same blood type of "O". All the blood samples taken in the home were type "O".

5. PROGRESSS:

It will be necessary to contact Mr. Sequoia Dubose, and have him bring in Mr. Phillips so he can be palm printed and checked to see if he has any cuts on his body that would appear to have been caused by the broken window in the basement.

6. CONCLUSION:

On March 12, 1987 I presented an investigators report to Mr. Robert Agacinski, Prosecuting Attorney P.R.O.B. Division, Re: Anthony Phillips. At this time Mr. Agacinski refused to issue the warrant on Mr. Phillips because he had access to the complainant's home due to the fact that Lacey and Carmeletha had been living together. The print on the band-aid box could have been there for some time, in 1986.

I strongly beleive that Mr. Phillips is the person who murdered Lacey Tarver but there is not enough evidence to obtain a warrant, according to the Prosecutors Office.

David Kramer

DAVID KRAMER
Police Officer
Homicide Section

87a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY D. PHILLIPS,

Petitioner,

v.

BONITA HOFFNER,

Respondent.
_____/

Civil No. 2:15-CV-10245
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY OR LEAVE TO APPEAL IN FORMA PAUPERIS

Anthony D. Phillips, ("Petitioner"), presently confined at the Lakeland Correctional Facility in Coldwater, Michigan, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, through his attorney James Sterling Lawrence, in which he challenges his conviction for first-degree felony murder, M.C.L.A. 750.316. For the reasons that follow, the petition for a writ of habeas corpus is **DENIED**.

I. Background

Petitioner was convicted following a jury trial in the Wayne County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith,* 581 F.3d 410, 413 (6th Cir. 2009):

> This case arises from the 1987 murder of Lacey Tarver in Detroit. Tarver's body was discovered in his home on Piedmont (Piedmont house) on March 4, 1987. Several items were missing, including a computer, a small television, a VCR, a cassette player, Tarver's wallet, the keys to Tarver's car, and a stereo system. A basement window in the rear of the house was

Appendix F 30a

broken and appeared to be the intruder's point of entry. There was blood on the wall beneath the window and on some of the broken pieces of glass, indicating that the intruder cut himself while entering.

The prosecution introduced evidence regarding the facts and circumstances surrounding the murder. Tarver and Carmen Allen, f/k/a Carmen Phillips, dated and were engaged for about four years. They lived together in the Piedmont house. Allen's daughter from a previous relationship also lived in the home. Tarver and Allen ended their relationship around Thanksgiving of 1986 and she subsequently moved out.

Defendant is Allen's brother. Allen also has a brother named Robert, or "Bobby." Allen testified that defendant, her mother, and her sister came over to the Piedmont house frequently when she and Tarver lived there together. Bobby visited less often. About a year before Allen and defendant broke up, someone broke into the Piedmont house. After the break-in, Allen's brother Bobby was not welcome at the house.

Allen testified that she did not know of any problems between Tarver and defendant; defendant was welcome in her home. Defendant and her father did all the plumbing, painting, and other work around the house. When Allen returned to Tarver's house about two weeks after their break-up to retrieve some of her belongings, defendant went with her to help. Allen testified that the week Tarver was murdered, she sent defendant to Tarver's house to retrieve a stove hood that Tarver did not want.

Erica Ridley, Tarver's daughter, was 11 years old when her father was killed. She recalled that her father was supposed to attend a birthday party for her great-aunt on Saturday, February 28, 1987, but he never arrived at the party. The family called Tarver's house all day but was unable to contact him. Debbie Moorer, Tarver's girlfriend at the time, was the last person to see Tarver alive; she was at his house on Thursday, February 26, 1987. After Moorer had not heard from Tarver for a few days, she left a note with Tarver's brother, Edgar Tarver. Edgar found the note in his mailbox in the early morning hours of March 4, 1987, and he went to Tarver's house to check on him. When Edgar arrived, he noticed that Tarver's car was in the driveway and there were lights on inside the house.

Edgar walked around the back of the house and saw that a basement window was broken. The back door was locked, but the front door was not. Inside, the house was in disarray and appeared as if someone ransacked the home. The lights in the hallway and kitchen were on. Edgar called for Tarver but got no response. He went further into the house and saw Tarver's feet sticking out of the northeast bedroom. Edgar then saw Tarver leaning against the wall with lots of blood all around him. Tarver appeared to be

dead. He was still wearing a jacket. Edgar called his wife, who called the police. Edgar also noticed that some things were missing from the house, including some electronics and Tarver's wallet and car keys.

On March 4, 1987, Dr. Marilee Frasier conducted an autopsy on Tarver. Dr. Frasier died before the 2010 trial, so Deputy Chief Medical Examiner Cheryl Loewe testified with the assistance of Dr. Frasier's records from the autopsy. Referencing Dr. Frasier's records, Dr. Loewe testified regarding the manner in which Tarver died. Specifically, she explained that Tarver suffered multiple blows to the head that were consistent with blows inflicted by both the head and claw end of a hammer. Tarver had a fractured left eye socket; there were no signs of defensive injuries on his hands or arms. Dr. Loewe testified that there was no way to tell when Tarver was actually killed, but she estimated that he was probably killed a few days before March 4, 1987, based on the degree of rigor mortis and lack of decomposition.

Sergeant James A. Bivens from the Detroit Police Department (DPD) Homicide Section was part of the initial investigative team that responded to the murder scene at 11318 Piedmont. He arrived there at approximately 2:30 a.m. on March 4, 1987, and found Tarver sitting on the floor, slumped against the wall. Sergeant Bivens noticed blunt force injury near Tarver's left ear, a puncture wound on the right side of his neck and lacerations to his right ear. A rear basement window showed evidence of forced entry. Someone removed the outer storm window and placed it on the ground. In the bathroom, a Band–Aid box was on the sink and the peeled strips of a Band–Aid (the part that is peeled off before applying the Band–Aid) were on the floor.

Officer Carl Kimber, an evidence technician, worked the crime scene at the Piedmont house. He collected items with suspected blood on them, took samples of blood from the walls and other immovable objects, and dusted for fingerprints.

The window in the basement bathroom was broken. There was glass on the floor in the basement bathroom, indicating that the window was broken from the outside. The southeast bedroom, right across the hall from Tarver's body, appeared ransacked. Items were on the floor and drawers were pulled out of the nightstand.

Paula Lytle, who worked as a senior forensic serologist in the DPD Crime Lab in 1987, tested the items that Office Kimber collected for blood and blood type. Lytle testified that she tested blood samples from defendant and Tarver and determined that they both had type O blood. Lytle testified that a piece of broken glass found beneath the broken basement window tested positive for blood. At one point, it appeared Lytle testified that she wrote "type B"

somewhere on or near the item, but she testified that her test results were inconclusive with respect to the blood on the glass and she could not determine the blood type. In addition, a tissue found on the kitchen table and a blue checkbook found inside a dresser drawer in a bedroom both tested positive for type O blood.

In 2008, police tested some of the evidence recovered from the crime scene at the Piedmont house for DNA. Jennifer Summers, an expert in serology at the Michigan State Police Forensic Science Division in the Biology Unit, confirmed the presence of blood on the tissue found on the kitchen table. Summers also confirmed the presence of blood on the blue checkbook. She submitted a sample of both of these items to the Michigan State Police Northville Crime Laboratory for DNA testing. Summers also confirmed that the piece of shattered glass from the basement window contained human blood on it. There was a very faint stain in the corner. Summers did not send this sample for further testing because "it appeared to be such a faint stain in concentration," and there were other samples with stronger bloodstains.

Catherine Maggert, an expert in DNA profiling and forensic scientist with the crime laboratory in Northville, conducted DNA testing on the blood on the tissue and on the checkbook. Maggert explained that to develop a DNA profile, she assembles data from 13 different areas, or loci, of a DNA sample. A 14th marker indicates gender. When she tested the blood on the tissue, Maggert was able to obtain reportable data for 12 of the 13 loci. With respect to the checkbook blood, Maggert obtained reportable data for only three of the 13 loci, along with the gender area. The three loci with reportable data matched the corresponding loci in the DNA profile of the tissue blood. Maggert was also able to conclude that both DNA samples were from a male. Maggert explained that degradation or breakdown of DNA could cause the lack of reportable data from a locus.

Andrea Halvorson, another forensic scientist who performs DNA analysis at the Northville crime lab, compared the DNA profiles from the tissue blood and checkbook with a DNA profile developed from a buccal swab obtained from defendant. With respect to the tissue blood, the 12 loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson testified that the probability of selecting an unrelated, random, African–American individual with 12 out of 13 loci matching the corresponding loci in the tissue blood DNA was one in four quadrillion. With respect to the checkbook blood, the three loci for which Maggert was able to collect data matched the corresponding loci in defendant's DNA. Halvorson explained that the probability of selecting an unrelated, random, African–American individual with the same DNA profile as the checkbook blood was one in 211.7 people.

33a

On cross-examination, Halvorson testified that "the DNA from a sibling or ... even a cousin, an uncle, something like that would be more similar. Those DNA types would be more likely to be found in a member of your family than they would in just a random person." She explained that, "any sort of comparisons to [a] related individual would be a completely different statistic," and she agreed that the only way to eliminate a brother is to run a comparison test of the brother's DNA. Halvorson agreed that she did not receive any blood samples from defendant's brother. However, she explained that only identical twins have ever been found to have the same DNA profile and she agreed that two siblings should have different DNA profiles even though they share the same parents.

In March 1987, the DPD's Latent Fingerprint Unit received nine photographs of print lifts, which Officer Kimber lifted during his investigation at the Piedmont house. Officer John Frelich compared the lifted prints with known prints from defendant, and Fred Moore, a senior technician, verified Officer Frelich's work. Marci McCleary, an expert in latent fingerprint examination and comparison and current employee of the Latent Fingerprint Unit, reexamined the prints in 2010. She testified that of the nine print lifts received, three were unusable because they did not have at least nine different characteristics. A fourth print was from a Band–Aid box, found on the sink in the bathroom on the first floor. McCleary concluded that this print matched defendant's left thumb; she matched 14 different identification points between defendant's known print and the Band–Aid box print. None of the other prints matched defendant and there were some prints that neither matched defendant nor Tarver.

Finally, the prosecution called Officer Charles Braxton to testify that police seized a waist-length, black and yellow size large jacket from defendant's house during a search after Tarver's murder. The jacket had two suspected bullet holes in the left shoulder area. However, on cross-examination, Officer Braxton clarified that he was probably just an observer during the execution of the search warrant and that he did not remember if he actually saw the jacket. Officer Braxton and Lytle testified that there was blood on the inside of the jacket near the left shoulder area. Lytle testified that the jacket tested positive for type O human blood.

During rebuttal argument, the prosecutor referenced that police seized the jacket from defendant's home and mentioned that it had type O blood inside. The prosecutor argued:

> Is it the deceased['s] blood or is it the defendant's blood? I really can't tell you that.
>
> It's possible it could be either one of those, all right.

34a

> It' possible that it could very well be the defendant's blood after he was cut and everything, stuck his hand back in the jacket and got it there.

Following four days of trial testimony, the jury convicted defendant and the trial court sentenced him as set forth above. Thereafter, defendant filed a claim of appeal in this Court and subsequently moved for a new trial, an evidentiary hearing, and judgment notwithstanding the verdict. In his motion, defendant raised the same issues that he now raises on appeal including his argument that the prosecutor admitted false evidence when it introduced evidence of the jacket at trial. Defendant attached documentation to his motion to support his argument that police did not seize the jacket from his residence after the murder. Specifically, a DPD laboratory technician report indicated that the laboratory received the jacket on March 12, 1987, from Officer Kramer. Police executed a search warrant at defendant's home on March 11, 1987, at 9074 Westwood. However, the search warrant return indicated that police did not seize anything during the search. In addition, Officer Kramer wrote a memorandum on April 16, 1987, wherein he indicated that police did not seize anything during the search.

As noted above, at trial, the prosecution presented the testimony of Officer Braxton to establish that police seized the jacket with blood on the inside from defendant's home after Tarver's murder. Following defendant's motion for a new trial, the prosecution acknowledged that police did not seize the jacket during the search warrant related to this case. Police actually seized the jacket on September 11, 1986, in an unrelated incident before Tarver was murdered. However, the prosecution argued that the improper introduction of the evidence did not deny defendant a fair trial or affect the trial's outcome.

The trial court held an evidentiary hearing on June 2, 2011. Officer Braxton testified that he reviewed a laboratory analysis report for the jacket before testifying at trial. The report indicated that police seized the jacket from 9074 Westwood and that the laboratory received the jacket for analysis on March 12, 1987. Based on the information in the report, Officer Braxton assumed that police seized the jacket during the March 11, 1987 search of defendant's residence. Officer Braxton denied speaking with the trial prosecutor about deceiving the jury with his testimony. He explained that he did not discuss his testimony before trial with the prosecutor; the prosecutor just asked him to review the laboratory report.

The trial prosecutor also testified that he thought police seized the jacket during their execution of the search warrant on March 11, 1987 based on the date of the search warrant and the laboratory report. The test results for the jacket were included on the same report as the other evidence from the Tarver murder scene. He did not discover that his assumption was incorrect

until he read appellate counsel's motion for a new trial. The prosecutor testified that he did not intend to make Officer Braxton testify to something that was not true, and if he had known the truth, he would not have introduced the jacket evidence. Furthermore, he did not reference the jacket in his opening statement or initial closing argument and only mentioned the jacket during rebuttal in response to defense counsel's closing argument. There was nothing in the case file to indicate why Officer Kramer brought the jacket to the lab on March 12, 1987.

As discussed in more detail below, the trial court also heard testimony concerning defendant's ineffective assistance of counsel claim. The trial court denied defendant's motion for a new trial and for judgment notwithstanding the verdict.

People v. Phillips, No. 300533, 2013 WL 2223388, at *1–5 (Mich. Ct. App. May 21, 2013).

Petitioner's conviction was affirmed on appeal. *Id., lv. den.* 495 Mich. 882, 838 N.W.2d 151 (2013).

Petitioner seeks a writ of habeas corpus on the following grounds:

I. The evidence was insufficient to convict petitioner.

II. The court denied the right of confrontation, and the due process right to present a defense, by precluding legitimate questioning of witnesses, in several cases made even worse by allowing the prosecutor to inquire into the same subjects.

III. Petitioner was prejudiced by multiple confrontation violations involving testimony by one person about the actions and findings of another that the testifier did not personally witness.

IV. The prosecutor improperly inquired into the defense witness asking for an attorney.

V. The prosecutor improperly subverted the presumption of innocence.

VI. The prosecutor committed misconduct, denied due process, violated evidentiary rules, and tainted petitioner before the jury by presenting prejudicial false evidence.

VII. Petitioner was prejudiced by ineffective assistance of counsel.

36a

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (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.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 410-11. "[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)(citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Therefore, in order to obtain habeas relief in federal court, a state prisoner is required to show that the state

court's rejection of his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington,* 562 U.S. at 103. A habeas petitioner should be denied relief as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton,* 136 S. Ct. 1149, 1152 (2016).

The Court notes that the Michigan Court of Appeals reviewed and rejected petitioner's second through sixth claims under a plain error standard because petitioner failed to preserve the issues as a constitutional claim at the trial court level.[1]

In *Fleming v. Metrish,* 556 F.3d 520, 532 (6th Cir. 2009), a panel of the Sixth Circuit held that the AEDPA deference applies to any underlying plain-error analysis of a procedurally defaulted claim. In a subsequent decision, the Sixth Circuit held that that plain-error review is not equivalent to adjudication on the merits, so as to trigger AEDPA deference. *See Frazier v. Jenkins*, 770 F.3d 485, 496 n. 5 (6th Cir. 2014). The Sixth Circuit noted that "the approaches of *Fleming* and *Frazier* are in direct conflict." *Trimble v. Bobby*, 804 F.3d 767, 777 (6th Cir. 2015). When confronted by conflicting holdings of the Sixth Circuit, this Court must follow the earlier panel's holding until it is overruled by the United States Supreme Court or by the Sixth Circuit sitting *en banc. See Darrah v. City of Oak Park,* 255 F.3d 301, 310 (6th Cir. 2001). This Court believes that the AEDPA's deferential standard of review applies to these claims, even though they were reviewed

[1] Respondent urges this Court to deny these claims on the ground that they are procedurally defaulted because petitioner failed to object at trial. Petitioner argues in his seventh claim that counsel was ineffective for failing to object. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of petitioner's defaulted claims, it would be easier to consider the merits of these claims. *See Cameron v. Birkett,* 348 F. Supp. 2d 825, 836 (E.D. Mich. 2004).

38a

only for plain error.

III. Discussion

A. Claim # 1. The sufficiency of evidence claim.

Petitioner first contends that there was insufficient identity to establish his identity as the murderer. The Michigan Court of Appeals rejected petitioner's claim as follows:

> In this case, the only issue in dispute was the identity of Tarver's murderer. Having reviewed the record, we conclude that the prosecutor presented sufficient evidence that would allow a reasonable juror to find defendant guilty of felony murder beyond a reasonable doubt. The evidence showed that someone entered Tarver's house by breaking a basement window. During this process, that individual cut himself, as there was blood on the shattered window glass. A tissue with blood on it was on the kitchen table. Expert testimony showed that defendant's DNA matched the DNA on the bloody tissue on 12 of 13 loci. Defendant's fingerprint was on a box of Band–Aids in the bathroom, and it appeared that a Band–Aid was recently used. The box was sitting on the bathroom sink and there were the peeled strips from the back of the Band–Aid on the bathroom floor. In addition, there was blood on a checkbook in the dresser drawer in the southeast bedroom of the home. Expert testimony showed that the defendant's DNA matched the DNA on the checkbook on 3 of 13 loci. While any of this evidence alone might not be sufficient to support defendant's conviction, taken as a whole and drawing all reasonable inferences in favor of the jury verdict, it was sufficient. It was reasonable for the jury to infer that defendant left the bloody tissue on the kitchen table after he cut himself breaking into Tarver's basement, used a Band–Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after killing Tarver.
>
> Defendant argues that there was insufficient evidence because the prosecution must negate all reasonable theories of innocence. However, our Court has specifically rejected that proposition and instead held that evidence is sufficient "if the prosecution proves its theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." Here, the prosecution proved defendant's guilt beyond a reasonable doubt given the evidence presented by defendant.
>
> *People v. Phillips*, 2013 WL 2223388, at *6 (internal footnotes omitted).

It is beyond question that "the Due Process Clause protects the accused against

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). But the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction is, "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). This inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 318-19 (internal citation and footnote omitted)(emphasis in the original).

A federal habeas court may not overturn a state court decision that rejects a sufficiency of the evidence claim simply because the federal court disagrees with the state court's resolution of that claim. Instead, a federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. *See Cavazos v. Smith,* 132 S. Ct. 2, 4 (2011). "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Id.* For a federal habeas court reviewing a state court conviction, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S.Ct. 2060, 2065 (2012).

On habeas review, a federal court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor was observed at trial. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). It is the province of the factfinder to weigh the

40a

probative value of the evidence and resolve any conflicts in testimony. *Neal v. Morris*, 972 F.2d 675, 679 (6th Cir. 1992). A habeas court therefore must defer to the fact finder for its assessment of the credibility of witnesses. *Matthews v. Abramajtys*, 319 F.3d 780, 788 (6th Cir. 2003). The Court does not apply the reasonable doubt standard when determining the sufficiency of evidence on habeas review. *Walker v. Russell*, 57 F.3d 472, 475 (6th Cir. 1995).

Under Michigan law, "[T]he identity of a defendant as the perpetrator of the crimes charged is an element of the offense and must be proved beyond a reasonable doubt." *Byrd v. Tessmer*, 82 F.App'x. 147, 150 (6th Cir. 2003)(citing *People v. Turrell*, 25 Mich. App. 646, 181 N.W.2d 655, 656 (1970)).

Circumstantial evidence alone is sufficient to support a conviction, and it is not necessary for the evidence at trial to exclude every reasonable hypothesis except that of guilt. *Johnson v. Coyle,* 200 F.3d 987, 992 (6th Cir. 2000)(internal quotations omitted). Identity of a defendant can be inferred through circumstantial evidence. *See Dell v. Straub,* 194 F. Supp. 2d 629, 648 (E.D. Mich. 2002). Eyewitness identification is not necessary to sustain a conviction. *See United States v. Brown,* 408 F.3d 1049, 1051 (8th Cir. 2005); *Dell v. Straub,* 194 F. Supp. 2d at 648.

In the present case, there was sufficient circumstantial evidence from which a rational trier of fact could have concluded that petitioner murdered Mr. Tarver. The evidence showed that the person who broke into Mr. Tarver's house cut himself, because there was blood on the shattered window glass. A tissue with blood on it was found on the victim's kitchen table. Petitioner's DNA matched the DNA on the bloody tissue on 12 of 13 loci. Petitioner's thumbprint was recovered from a box of Band–Aids in the bathroom.

41a

It appeared to the police that a Band–Aid was recently used, because the Band-Aids box was sitting on the bathroom sink and there were peeled strips from the back of the Band–Aid on the bathroom floor. Police found blood on a checkbook in the dresser drawer in the southeast bedroom of the home. Expert testimony showed that petitioner's DNA matched the DNA on the checkbook on 3 of 13 loci. The recovery of petitioner's DNA and fingerprint from several sites at the victim's house was sufficient in and of itself to establish petitioner's identity as the perpetrator. *See e.g. U.S. v. Seawood,* 172 F.3d 986, 988 (7th Cir. 1999). As the Michigan Court of Appeals noted, the jury could have reasonably inferred that petitioner left the bloody tissue on the kitchen table after he cut himself breaking into Mr. Tarver's basement, used a Band–Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after murdering the victim.

Because there were multiple pieces of evidence to establish petitioner's identity as the perpetrator, the Michigan Court of Appeals did not unreasonably apply *Jackson v. Virginia* in rejecting petitioner's sufficiency of evidence claim. *See Moreland v. Bradshaw,* 699 F.3d 908, 919-21 (6th Cir. 2012). Petitioner's first claim is without merit.

B. Claim # 2. The right to present a defense claim.

Petitioner next contends that he was denied the right to present a defense.

Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he or she also has the right to present his own witnesses to establish a defense. This right is a fundamental element of the due process of law. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Crane v. Kentucky,* 476 U.S. 683, 690 (1986)("whether rooted directly in the Due Process Clause of the Fourteenth

42a

Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'")(internal citations omitted). However, an accused in a criminal case does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under the standard rules of evidence. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). The Supreme Court has indicated its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane,* 476 U.S. at 689. The Supreme Court gives trial court judges "wide latitude" to exclude evidence that is repetitive, marginally relevant, or that poses a risk of harassment, prejudice, or confusion of the issues. *Id.* (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)). Rules that exclude evidence from criminal trials do not violate the right to present a defense unless they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998)(quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

Under the standard of review for habeas cases as enunciated in § 2254(d)(1), it is not enough for a habeas petitioner to show that the state trial court's decision to exclude potentially helpful evidence to the defense was erroneous or incorrect. A habeas petitioner must show that the state trial court's decision to exclude the evidence was "an objectively unreasonable application of clearly established Supreme Court precedent." *See Rockwell v. Yukins,* 341 F.3d 507, 511-12 (6th Cir. 2003). Additionally, "the Supreme Court has made it perfectly clear that the right to present a 'complete' defense is not an unlimited right to ride roughshod over reasonable evidentiary restrictions." *Id.* at p. 512.

Petitioner first claims that he was denied his right to present a defense because his

43a

counsel was precluded from asking Officer Kimber about possible contamination of the evidence.

Petitioner's counsel questioned Officer Kimber in great detail about the procedures he used when collecting evidence and the possibility that the evidence might have been contaminated. (Tr, 8/24/10, pp. 84-89, 99-104, 106-108, 110-115, 133-136). The judge sustained the prosecutor's objection when counsel, after asking Kimber about what other evidence technicians might have done with saline solution, asked him a hypothetical question about someone touching blood or a surface with saline solution. (*Id.*, p. 105). Because Officer Kimber was the person who collected the evidence and there was no basis in fact for the hypothetical, the question was irrelevant or speculative.

"The inquiry in reviewing a claim of improper exclusion of evidence is whether the evidence was rationally connected to the crime charged and, if its exclusion was so prejudicial as to deprive the defendant of a fundamentally fair trial." *Jones v. Smith,* 244 F. Supp. 2d 801, 814 (E.D. Mich. 2003). The trial court's decision to preclude defense counsel from asking Officer Kimber a hypothetical question did not violate petitioner's right to confrontation or due process, because the evidence was only remotely relevant to raise questions about the possibility of the contamination of the evidence. *See Farley v. Lafler,* 193 F.App'x. 543, 546 (6th Cir. 2006). Although "[t]he Confrontation Clause places meaningful limits on a trial judge's ability to exclude evidence under a state's rules of evidence, those limits are not relevant when the information in question has virtually no probative value[,]." *Id.* at 547. Because defense counsel's hypothetical question was speculative, the trial court's refusal to permit him to ask Officer Kimber the question did not deprive petitioner of a fair trial.

Moreover, the judge's ruling was not so egregious that it effectively denied petitioner a fair trial, in light of the fact that petitioner was not completely barred from questioning Officer Kimber about his procedures at the crime scene and the possible contamination of the evidence. *See Fleming v. Metrish*, 556 F.3d at 535-36. With the quantum of evidence on the defense theory in the record, this Court concludes that the petitioner was afforded "a meaningful opportunity to present a complete defense." *Allen v. Howes,* 599 F. Supp. 2d 857, 873 (E.D. Mich. 2009)(citing *Crane*, 476 U.S. at 690 (citation and internal quotations omitted)).

Petitioner next contends that the judge prevented him from questioning Ms. Allen about Mr. Tarver's house cleaning habits.

As the Michigan Court of Appeals noted in rejecting petitioner's claim, the trial judge initially refused to permit petitioner to ask this question because he had not provided a foundation for his questioning. *People v. Phillips*, 2013 WL 2223388, at *8. Excluding evidence on the ground that the criminal defendant had failed to establish an adequate foundation for its admission under state law does not violate a defendant's right to present a defense. *See U.S. ex rel. Winters v. Mizell,* 644 F. Supp. 782, 793 (N.D. Ill. 1986); *see also Dell v. Straub,* 194 F. Supp. 2d at 644 (Requiring a defendant to lay a foundation for the admissibility of certain evidence does not violate the Confrontation Clause). In any event, once defense counsel demonstrated that Ms. Allen had been back to Mr. Tarver's house after moving out, petitioner was able to question her about the condition of Mr. Tarver's house during those visits. With the quantum of evidence on the defense theory in the record, petitioner was given "a meaningful opportunity to present a complete defense." *Allen v. Howes,* 599 F. Supp. 2d at 873.

45a

Petitioner next claims that the trial judge improperly prevented counsel from questioning Ms. Allen about petitioner's visits to Mr. Tarver's house, in order to give an innocent explanation why petitioner's blood and thumbprint were recovered from the house.

The Michigan Court of Appeals rejected this claim as follows:

> In this instance, the court precluded the questioning because defendant failed to establish that Allen had personal knowledge of how defendant's fingerprint got on the Band–Aid box or how a tissue with his blood got on the kitchen table in Tarver's house. Furthermore, defendant was able to solicit testimony from Allen about instances when defendant was at Tarver's house after she and Tarver stopped dating. Allen testified that defendant helped her move her things out of the house in December 1986 and went to Tarver's house to receive a stove hood the week he was murdered.

People v. Phillips, 2013 WL 2223388, at *8.

In the present case, the trial court's decision to prevent Ms. Allen from testifying about how petitioner's fingerprint got on a Band-Aid box or how his blood got on the tissue did not deprive petitioner of a fair trial, because testimony beyond Ms. Allen's personal knowledge would have violated M.R.E. 602 and was therefore properly excluded under the rules of evidence. *See McCullough v. Stegall,* 17 F.App'x. 292, 296 (6th Cir. 2001).

Fourth, petitioner claims that the trial court precluded counsel from questioning Ms. Allen about their brother Bobby's drug addiction and previous arrest for robbery charges, in order to establish that he was the actual murderer.

The Michigan Court of Appeals rejected petitioner's claim as follows:

> Here, even assuming that the court should have allowed the testimony as evidence of motive, defendant cannot show that any error affected the outcome of the proceedings. In this case, the jury heard evidence that would have allowed it to conclude that Bobby committed the murder. Allen testified that someone broke into the victim's home sometime before the murder and that, thereafter, Bobby was not welcome at the victim's home.

46a

People v. Phillips, 2013 WL 2223388, at *8.

In light of the fact that petitioner was able to present evidence that his brother Bobby might have been the murderer, the trial court's refusal to permit petitioner to question Ms. Allen about Bobby's drug addiction or prior arrest did not deprive petitioner of a meaningful opportunity to present a defense. *See Wynne v. Renico,* 606 F.3d 867, 871 (6th Cir. 2010). Petitioner is not entitled to habeas relief on his second claim.

C. Claim # 3. The Confrontation Clause claims.

Petitioner next claims that he was denied his right of confrontation was violated when several persons testified regarding the actions and findings of other individuals who did not testify at trial.

Out of court statements that are testimonial in nature are barred by the Sixth Amendment Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the court. *See Crawford v. Washington,* 541 U.S. 36, 68-69 (2004).

Petitioner first contends that his right to confrontation was violated when Dr. Loewe was permitted to testify about the findings from the autopsy conducted by Dr. Frasier. The Michigan Court of Appeals agreed that Dr. Loewe's testimony violated petitioner's right to confrontation but found the error to be harmless because the cause of death was not at issue, only the identity of the murderer. *People v. Phillips*, 2013 WL 2223388, at *9.

Confrontation Clause violations are subject to harmless error review. *See Bulls v. Jones,* 274 F.3d 329, 334 (6th Cir. 2001). In *Brecht v. Abrahamson*, 507 U.S. 619, 637

47a

(1993), the U.S. Supreme Court held that for purposes of determining whether federal habeas relief must be granted to a state prisoner on the ground of federal constitutional error, the appropriate harmless error standard to apply is whether the error had a substantial and injurious effect or influence in determining the jury's verdict. In determining whether a Confrontation Clause violation is harmless under *Brecht*, a court should consider the following factors: "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case." *See Jensen v. Romanowski,* 590 F.3d 373, 379 (6th Cir. 2009)(citing *Delaware v. Van Arsdall*, 475 U.S. at 684).

In the present case, the autopsy had no bearing on petitioner's guilt because the cause of death was not at issue, only the identity of the perpetrator, which the autopsy shed no light on. Petitioner has failed to show that the admission of Dr. Frasier's autopsy report through Dr. Loewe' s testimony had a substantial and injurious effect or influence on the verdict. When "[V]iewed through the deferential lens of AEDPA, the state court's harmlessness ruling must stand" because based on the record in this case, the Michigan Court of Appeals reasonably rejected any potential error in the admission of the autopsy report as harmless error. *See Kennedy v. Warren,* 428 F.App'x. 517, 522, 523 (6th Cir. 2011).

Petitioner next contends that Marci McCleary's testimony about the fingerprints lifted from the crime scene violated his right of confrontation. McCleary testified that in 1987, Officers Frelich and Moore compared petitioner's fingerprints with the prints that

another officer lifted at the crime scene. As the Michigan Court of Appeals noted, *People v. Phillips*, 2013 WL 2223388, at *9, Ms. McCleary did not mention the results of that comparison. Instead, Ms. McCleary did her own comparison between the fingerprints and the prints recovered from the crime scene.

Any testimony by Officer McCleary concerning any prior fingerprint comparisons was harmless error at most, in light of the fact that these findings were cumulative of Officer McCleary's testimony, who was subject to cross-examination at petitioner's trial. *See U.S. v. Barnes,* 183 F.App'x. 526, 530-31 (6th Cir. 2006).

Petitioner finally contends that Officer Braxton's testimony regarding the jacket recovered from petitioner's house during an earlier raid violated his right of confrontation. During direct examination, Officer Braxton agreed that the "file" reflected that the police executed a search warrant at petitioner's residence and that a jacket was seized during the execution of that warrant and was delivered to the police crime laboratory. As the Michigan Court of Appeals noted in rejecting petitioner's claim, any error in Officer Braxton's testimony that he reviewed the file for the search warrant was offset by the fact that he actually participated in the execution of the search warrant. Furthermore, petitioner's jacket was not highly probative of petitioner's guilt. *Phillips,* 2013 WL 2223388, at *9. Officer Braxton's testimony about the search warrant and the jacket recovered from petitioner's house was harmless error because the jacket did not implicate petitioner in the murder, particularly where there was other ample evidence linking petitioner to the crime. *See e.g. U.S. v. Driver,* 535 F.3d 424, 428 (6th Cir. 2008). Petitioner is not entitled to relief on his third claim.

D. Claims # 4, 5, and 6. The prosecutorial misconduct claims.

49a

Petitioner claims he was denied his right to a fair trial because of prosecutorial misconduct.

"Claims of prosecutorial misconduct are reviewed deferentially on habeas review." *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004)(citing *Bowling v. Parker*, 344 F. 3d 487, 512 (6th Cir. 2003)). A prosecutor's improper comments will be held to violate a criminal defendant's constitutional rights only if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct will thus form the basis for habeas relief only if the conduct was so egregious as to render the entire trial fundamentally unfair based on the totality of the circumstances. *Donnelly v. DeChristoforo*, 416 U.S. at 643-45. In order to obtain habeas relief on a prosecutorial misconduct claim, a habeas petitioner must show that the state court's rejection of his or her prosecutorial misconduct claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012)(quoting *Harrington*, 562 U.S. at 103).

In his fourth claim, petitioner contends that the prosecutor committed misconduct when he asked Ms. Allen about the fact that she had refused to sign a statement that she made to the police on March 11, 1987 until she spoke with a lawyer.

A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident which gives rise to the criminal charges, implies guilt. A prosecutor must also refrain from suggesting to the jury that a defendant hired an attorney to generate an alibi or to get his or her "story straight". *Sizemore v. Fletcher*, 921 F.2d 667,

50a

671 (6th Cir. 1990)(internal citations omitted). However, the Supreme Court has never held that a prosecutor cannot question a witness other than a defendant about whether he or she consulted with a lawyer. Given the lack of holdings by the Supreme Court on the issue of whether a prosecutor can question a witness about consulting with an attorney, the Michigan Court of Appeals' rejection of petitioner's prosecutorial misconduct claim was not an unreasonable application of clearly established federal law. *See Wright v. Van Patten,* 552 U.S. 120, 126 (2008); *Carey v. Musladin,* 549 U.S. 70, 77 (2006).

In his fifth claim, petitioner contends that the prosecution improperly subverted the presumption of innocence by arguing that "there's no such thing as a free murder" during his opening statement and closing argument. The Michigan Court of Appeals rejected petitioner's claim as follows:

> Contrary to defendant's assertions, the prosecution was merely remarking on the long passage of time since Tarver's murder and arguing that the jury should not acquit simply because the murder occurred 23 years ago. The prosecutor did not encourage the jury to convict defendant even if it did not find him guilty beyond a reasonable doubt. Finally, any error could have been cured by an objection and curative instruction. Indeed, the court instructed the jury that defendant is presumed innocent and must be found guilty beyond a reasonable doubt, and the jury is presumed to have followed its instructions.

People v. Phillips, 2013 WL 2223388, at *11 (internal citations omitted).

Petitioner is not entitled to habeas relief because in the context of his comments, the prosecutor did not undermine the concept of the presumption of innocence. *See Bowling v. Parker,* 344 F.3d at 513. In addition, the prosecutor's comments did not render petitioner's trial fundamentally unfair in light of the fact that the trial court gave the jury the correct instruction on the presumption of innocence. *See Kellogg v. Skon,* 176 F.3d 447, 451 (8th Cir. 1999).

51a

Petitioner next contends that the prosecutor committed misconduct by permitting Officer Braxton to testify falsely that the jacket had been seized from petitioner's house at the time of the murder in 1987, when in fact it had been seized earlier in 1986.

The deliberate deception of a court and jurors by the presentation of known and false evidence is incompatible with the rudimentary demands of justice. *Giglio v. United States*, 405 U.S. 150, 153 (1972). There is also a denial of due process when the prosecutor allows false evidence or testimony to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(internal citations omitted). To prevail on a claim that a conviction was obtained by evidence that the government knew or should have known to be false, a defendant must show that the statements were actually false, that the statements were material, and that the prosecutor knew they were false. *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998). A habeas petitioner must show that a witness' statement was "indisputably false," rather than misleading, to establish a claim of prosecutorial misconduct or a denial of due process based on the knowing use of false or perjured testimony. *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000). Conclusory allegations of perjury in a habeas corpus petition must be corroborated by some factual evidence. *Barnett v. United States*, 439 F.2d 801, 802 (6th Cir.1971).

Petitioner is not entitled to relief on his claim because he failed to show that Officer Braxton intentionally testified falsely about seizing the jacket from petitioner's residence on March 11, 1987. Officer Braxton testified at the post-trial evidentiary hearing that he reviewed a laboratory analysis report for the jacket before testifying at trial. The report stated that police seized the jacket from 9074 Westwood and that the laboratory received the jacket for analysis on March 12, 1987. Officer Braxton testified that he assumed from

52a

reading this report that the police seized the jacket during the March 11, 1987 search of petitioner's home. Officer Braxton denied that he spoke with the trial prosecutor about deceiving the jury with his testimony. Officer Braxton denied even speaking with the prosecutor about his proposed testimony prior to trial. The prosecutor just asked him to review the laboratory report. The trial prosecutor testified at the post-evidentiary hearing that he also thought that the police seized the jacket during their execution of the search warrant on March 11, 1987 based upon on the date of the search warrant and the laboratory report. The test results for the jacket were included on the same report as the other evidence from the Tarver murder scene. The trial prosecutor did not learn that his assumption was incorrect until he read appellate counsel's motion for a new trial. The prosecutor testified that he did not intend to make Officer Braxton testify falsely about this matter. The trial judge, in rejecting petitioner's post-trial motion for a new trial, found the prosecutor's testimony to be credible.

Petitioner is not entitled to habeas relief on his claim because he failed to show that Officer Braxton deliberately testified falsely about the date that the jacket was seized from petitioners home. Petitioner's claim also fails because he failed to show that the prosecutor knew that Officer Braxton testified falsely about the seizure of the jacket from petitioner's residence on March 11, 1987. *See Rosencrantz v. Lafler,* 568 F.3d 577, 587 (6th Cir. 2009). Petitioner is also not entitled to relief because the jacket was not material to petitioner's conviction, because it was not a "crucial link" in the case against petitioner. *See e.g. Foley v. Parker,* 488 F.3d 377, 392 (6th Cir. 2007). The jacket was never linked to the murder or even to petitioner. Accordingly, petitioner is not entitled to relief on his sixth claim.

E. Claim # 7. The ineffective assistance of counsel claims.

Petitioner contends that he was denied the effective assistance of trial counsel.

To show that he or she was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* Petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland,* 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

On habeas review, "the question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable-a substantially higher threshold.'" *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)(quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). "The pivotal question is whether the state court's application of the *Strickland*

54a

standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington v. Richter*, 562 U.S. at 101. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles,* 556 U.S. at 123 (citing *Yarborough v. Alvarado*, 541 U.S. at 664). Pursuant to the § 2254(d)(1) standard, a "doubly deferential judicial review" applies to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[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*, 562 U.S. at 101. "Surmounting *Strickland's* high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

Petitioner first argues that his trial counsel was ineffective for failing to file a motion to quash the information, because he claims that there was insufficient evidence to bind him over to the circuit court for trial. As a related claim, petitioner argues that trial counsel was ineffective for failing to move for a directed verdict.

The Michigan Court of Appeals rejected petitioner's claim as follows:

> In this case, counsel made a strategic decision not to move to quash or for a directed verdict. This decision did not fall below an objective standard of reasonableness. As discussed above, there was sufficient evidence to allow a jury to conclude that defendant killed the victim including DNA and fingerprint evidence such that motions to quash or for a directed verdict would have been futile.

People v. Phillips, 2013 WL 2223388, at *13 (internal citation omitted).

There was sufficient evidence presented at the preliminary examination to support petitioner's bindover to circuit court. Accordingly, petitioner is unable to show that counsel

was ineffective for failing to file a motion to quash the information. *See e.g. Dell v. Straub,* 194 F. Supp. 2d at 649. The evidence was sufficient to prove petitioner's identity as the murderer, thus, counsel's failure to move for a directed verdict did not amount to ineffective assistance of counsel. *Maupin v. Smith*, 785 F.2d 135, 140 (6th Cir. 1986); *see also Hurley v. United States,* 10 F.App'x. 257, 261 (6th Cir. 2001).

Petitioner next contends that trial counsel was ineffective for advising him not to testify in his own defense. The Michigan Court of Appeals rejected this claim as follows:

> At the post-conviction evidentiary hearing, counsel testified regarding why he advised defendant not to testify. Counsel first stated that he did not have defendant testify because of information defendant told him in privileged conversations. He was not going to "suborn any perjury." Second, trial counsel said that he was concerned about defendant's 1987 conviction for assault with intent to do great bodily harm less than murder. Even though the conviction was more than 10 years old and did not deal with truth or dishonesty, counsel was worried that defendant would "open certain doors on direct examination." For example, defendant might actually say something about being a nonviolent person. In addition, counsel said it would have been "a monumental blunder" to have defendant testify because defendant would not have been able to explain how his blood was in Tarver's house.
>
> The trial court concluded that counsel did not render ineffective assistance in advising defendant not to testify. The court reasoned that counsel's concern about defendant's prior conviction might have been "overly cautious" but was not unsound. In addition, the court reasoned that counsel's advice was much more nuanced than defendant claimed it was and generally concerned the risks of defendant testifying.
>
> "Counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment." The trial court found trial counsel credible with respect to the reasoning behind his advice. This finding was not clearly erroneous. Trial counsel's testimony at the evidentiary hearing showed that he had valid concerns regarding defendant's testimony. He did not want to "open the door" with respect to defendant's prior conviction and he had concerns about perjury and defendant' inability to explain the presence of his blood at the crime scene. Given counsel's legitimate concerns about defendant taking the stand, counsel made a strategic decision to advise defendant against testifying and

> the trial court did not clearly err in finding that counsel acted reasonably in making that decision.
>
> *People v. Phillips*, 2013 WL 2223388, at *14 (internal citations omitted).

Although the issue of ineffective assistance of counsel presents a mixed question of law and fact, any underlying historical facts found by the state courts are presumed correct. *West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996). The presumption of correctness also "applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility." *Carey v. Myers*, 74 F.App'x. 445, 448 (6th Cir. 2003)(citing *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996)). The trial judge concluded that trial counsel testified credibly about his reasons for not wanting to put petitioner on the witness stand, including his concern that petitioner would commit perjury. Petitioner has presented no evidence to rebut the trial judge's credibility determination that counsel had valid reasons for not putting petitioner on the witness stand, particularly counsel's belief, based on his privileged conversations with petitioner, that his client would commit perjury. This credibility determination is buttressed by the fact that when trial counsel was recalled to testify during the post-conviction hearing and was ordered by the trial judge to divulge the contents of his privileged conversation with petitioner, counsel refused to do so even though it resulted in him being held in contempt of court and sentenced to jail. (Tr. 6/28/11, pp. 13-15).

A defendant cannot show prejudice based upon his or her counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). Defense counsel's decision to discourage petitioner from testifying was not deficient, as required to support a claim of

57a

ineffective assistance of counsel, because counsel believed that he would have been suborning perjury if petitioner had taken the witness stand. *See e.g. Mann v. Ryan*, 828 F.3d 1143, 1153 (9th Cir. 2016). Petitioner is not entitled to relief on this claim.

Petitioner next claims that trial counsel was ineffective for failing to object to the Confrontation Clause errors that he alleged in Claim # 3, *supra*.

"The prejudice prong of the ineffective assistance analysis subsumes the *Brecht* harmless-error review." *Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009). This Court already determined that the admission of this evidence was harmless error. Because the admission of this evidence was harmless error, petitioner cannot satisfy *Strickland's* prejudice requirement. *See e.g. Bell v. Hurley,* 97 F.App'x. 11, 17 (6th Cir. 2004).

Petitioner next contends that trial counsel was ineffective for failing to call an expert witness to challenge the DNA evidence.

The Michigan Court of Appeals rejected this claim as follows:

> At the post-conviction evidentiary hearing, counsel testified that he retained an independent expert, but learned that the firm's findings were not beneficial to his client. Counsel testified that he discussed strategies with the independent firm for addressing the DNA evidence at trial. At trial, counsel advanced the theory that defendant's brother Bobby could have been the perpetrator. Counsel explained that he did not want to have Bobby's DNA tested because the test could have eliminated Bobby as a potential perpetrator, which would have ruined defendant's defense.
>
> The trial court concluded that counsel did not act deficiently in failing to retain an independent DNA expert. The court found that counsel did retain an expert who advised counsel that the DNA evidence was not favorable to defendant.
>
> In this case, the trial court did not clearly err in finding that counsel rendered effective assistance with respect to his handling of the DNA evidence. Counsel retained an independent DNA expert. When the independent expert's results were not favorable to his client, counsel decided not to obtain a written report or call any expert to testify at trial. This was

58a

> reasonable strategy given the circumstances. Further, counsel made a reasonable strategic decision not to have Bobby's DNA tested given the results could have destroyed defendant's only defense. It is reasonable trial strategy not to seek further testing when the results could implicate the defendant. In sum, given all of the facts and circumstances of the case, counsel acted reasonably with respect to his handling of the DNA evidence and in deciding not to call an independent expert witness.
>
> *People v. Phillips*, 2013 WL 2223388, at *16 (internal citation omitted).

Petitioner is not entitled to relief on his claim for several reasons.

First, trial counsel did retain an expert on DNA, but this expert advised counsel that his findings would not be favorable to petitioner. The constitution does not require counsel to look for more than one expert witness. "Effective assistance does not require counsel to continue contacting experts until he found one...willing to testify against the prosecution's theory of the case." *Flick v. Warren*, 465 F.App'x. 461 465 (6th Cir. 2012)(petitioner's counsel in a second-degree murder prosecution was not ineffective for failing to call an expert to challenge the science underlying Shaken Baby Syndrome, after counsel had contacted three doctors seeking help with the case and had received unfavorable responses from all three).

Secondly, petitioner failed to show that he has an expert witness who could successfully challenge the prosecution's DNA evidence. A habeas petitioner's claim that trial counsel was ineffective for failing to call an expert witness cannot be based on speculation. *See Keith v. Mitchell,* 455 F.3d 662, 672 (6th Cir. 2006). Petitioner has offered no evidence to this Court that there is an expert who would have impeached the DNA evidence offered by the prosecution.

Petitioner next contends that his trial counsel should have called petitioner's mother and other sister to testify as defense witnesses.

The Michigan Court of Appeals rejected petitioner's claim as follows:

> Counsel testified that he did not call defendant's mother as a witness because he was able to get all of the information he needed from Allen. The trial court concluded that counsel did not act deficiently in failing to call other witnesses because defendant failed to demonstrate what important testimony other witnesses would have provided.
>
> Defendant claims that his mother and sister would have testified about instances when defendant was at Tarver's house after Tarver and Allen broke up. However, Allen testified about Tarver and defendant's friendship and occasions when defendant visited Tarver's house after Tarver and Allen stopped living together. Presumably, Allen had the most knowledge of Tarver and defendant's relationship since she dated and lived with Tarver. Therefore, it was reasonable for counsel to decide to call Allen as a witness instead of defendant's mother or sister. To the extent defendant contends that his sister could have offered testimony about seizure of the jacket, as discussed above, admission of the jacket evidence did not affect the outcome of the proceedings. Therefore, defendant cannot show that there is a reasonable probably that but for counsel's failure to call his sister to testify at trial, the result of the proceeding would have been different.

People v. Phillips, 2013 WL 2223388, at *16.

Petitioner was not prejudiced by counsel's failure to call petitioner's mother and other sister to testify because their testimony was cumulative of Ms. Allen's testimony. *Wong,* 558 U.S. at 22-23; *see also United States v. Pierce,* 62 F.3d 818, 833 (6th Cir. 1995); *Johnson v. Hofbauer,* 159 F. Supp. 2d 582, 607 (E.D. Mich. 2001). In this case, the jury had significant evidence presented to it in support of petitioner's claim that he had been a guest at Mr. Tarver's home on multiple occasions, to support his argument that there were innocent reasons for his thumbprint and blood to have been recovered from the victim's house. Because the jury was "well acquainted" with evidence that would have supported petitioner's argument that his blood and thumbprint were not linked to the murder but could have been placed at the victim's house during a prior visit, additional evidence in support of petitioner's defense "would have offered an insignificant benefit, if

60a

any at all." *Wong,* 558 U.S. at 23. Moreover, petitioner was not prejudiced by counsel's failure to call petitioner's other sister to testify about the actual date that the jacket was seized from petitioner's house, because the jacket was not incriminating.

Petitioner next contends that trial counsel was ineffective for failing to object to the prosecutorial misconduct he alleged in Claims # 4 and # 5. To show prejudice under *Strickland* for failing to object to prosecutorial misconduct, a habeas petitioner must show that but for the alleged error of his trial counsel in failing to object to the prosecutor's improper questions and arguments, there is a reasonable probability that the proceeding would have been different. *Hinkle v. Randle,* 271 F.3d 239, 245 (6th Cir. 2001). Because the Court has already determined that the prosecutor's comments did not deprive petitioner of a fundamentally fair trial, petitioner is unable to establish that he was prejudiced by counsel's failure to object to these remarks. *Slagle v. Bagley,* 457 F.3d 501, 528 (6th Cir. 2006).

Petitioner also argues that trial counsel failed to object to Officer Braxton's perjured testimony. Petitioner failed to show that Officer Braxton committed perjury, thus, counsel was not ineffective for failing to challenge this testimony on the ground that it was perjured. *Brown v. Burt*, 65 F.App'x. 939, 942 (6th Cir. 2003).

Petitioner finally contends that trial counsel was ineffective for failing to object to the admission of blood-type evidence. The Michigan Court of Appeals rejected this claim on the ground that this evidence was admissible. *People v. Phillips*, 2013 WL 2223388, at *17.

Federal habeas courts "'must defer to a state court's interpretation of its own rules of evidence and procedure' when assessing a habeas petition." *Miskel v. Karnes*, 397 F.3d

61a

446, 453 (6th Cir. 2005)(quoting *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988)). Because the Michigan Court of Appeals determined that most, not all, of this evidence was admissible under Michigan law, this Court must defer to that determination in resolving petitioner's ineffective assistance of counsel claim. *See Brooks v. Anderson*, 292 F.Appx. 431, 437-38 (6th Cir. 2008). The failure to object to relevant and admissible evidence is not ineffective assistance of counsel. *See Alder v. Burt,* 240 F. Supp. 2d 651, 673 (E.D. Mich. 2003). Petitioner is not entitled to relief on this claim.

IV. Conclusion

The Court will deny the petition for a writ of habeas corpus with prejudice. The Court will also deny a certificate of appealability to petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; *see also Strayhorn v. Booker,* 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

For the reasons stated in this opinion, the Court will deny petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right. *See Allen v. Stovall,* 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001). The Court will also deny petitioner leave to appeal *in forma pauperis*, because the

62a

appeal would be frivolous. *Id.*

IV. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **DENIED WITH PREJUDICE.**

IT IS FURTHER ORDERED That a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that Petitioner will be **DENIED** leave to appeal *in forma pauperis.*

s/ Nancy G. Edmunds
HONORABLE NANCY G. EDMUNDS
UNITED STATES DISTRICT JUDGE

Dated: December 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of this order was served upon the parties and/or counsel of record on this 19th day of December, 2016 by regular U.S. mail and/or CM/ECF.

s/ Carol J Bethel
Case Manager

63a