

No. 17-3492

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

JERMEAL WHITE,

Petitioner-Appellant,

v.

CHARMAINE BRACY, Warden; MIKE DEWINE,  
Attorney General of the State of Ohio,

Respondents-Appellees.

**FILED**  
Mar 13, 2018  
DEBORAH S. HUNT, Clerk

OR D E R

Jermeal White, an Ohio prisoner proceeding pro se, appeals the district court judgment that denied his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. His notice of appeal has been construed as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b). White has also moved for the appointment of counsel and to proceed in forma pauperis.

In 2013, White was convicted of aggravated murder, murder, aggravated burglary, felonious assault, and kidnapping, all with firearm specifications. White and codefendant Richard Harris entered a home by force and threatened the occupants with guns. They had planned to rob Don'Tel Sheeley but killed him and left without taking anything. Harris testified against White pursuant to a plea deal. After a bench trial, the trial court was unable to determine whether White or his codefendant killed the victim but found White complicit in the crimes. He was sentenced to an aggregate sentence of life in prison with the possibility of parole after twenty-eight years. The Ohio Court of Appeals affirmed the convictions but remanded for issuance of a nunc pro tunc sentencing entry. *State v. White*, No. 101576, 2015 WL 3794576 (Ohio Ct. App. June 18, 2015). The Ohio Supreme Court denied further review. On remand, the trial court resentenced White to the same aggregate sentence.

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White filed his federal habeas petition in June 2016, raising four claims: (1) his due process rights were violated when the trial court found Lateef Taylor competent to testify; (2) there was insufficient evidence to support his convictions; (3) his due process rights were violated when the trial court violated Ohio Rule of Evidence 612 by allowing witnesses to use cell phone records to testify without a proper foundation; and (4) his Fourth Amendment rights were violated when his mail was seized without a warrant and used as evidence at trial. The magistrate judge recommended that claims (1), (3), and (4) be dismissed as not cognizable, and that claim (2) be denied on the merits. White filed objections to the magistrate judge's recommendation as to claim (2). The district court adopted the magistrate judge's report and recommendation over White's objections, denied the petition, and denied a COA.

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The applicant must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A federal court may deny a claim on the merits without addressing whether the claim was procedurally defaulted. *See Bales v. Bell*, 788 F.3d 568, 573 (6th Cir. 2015).

Jurists of reason would not disagree with the district court's dismissal and denial of White's claims. White challenged evidentiary rulings in claims (1), (3), and (4). Challenges to the admission of evidence are not cognizable in habeas proceedings unless the alleged errors denied the petitioner a fair trial. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Broom v. Mitchell*, 441 F.3d 392, 406 (6th Cir. 2006).

In claim (1), White alleged that Lateef Taylor was not competent to testify because of his mental capacity. The trial court held a hearing and determined that Taylor was competent because he understood the nature of the proceedings and the importance of telling the truth. The Ohio Court of Appeals upheld the trial court's decision. It found that, although Taylor's testimony was contradictory at times, he understood the questions and may have been trying to

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minimize his and White's involvement in the crimes. *White*, 2015 WL 3794576, at \*9-10. The district court held that the admission of Taylor's testimony did not violate White's due process rights or deny him a fair trial because the record supported the state court's finding that Taylor was competent to testify. White did not rebut the state court's factual finding, *see* 28 U.S.C. § 2254(e)(1), and jurists of reason would not debate the district court's dismissal of this claim.

In claim (3), White alleged that the trial court permitted witnesses to testify about cell phone records without a proper foundation. Witnesses were questioned about whether they recognized phone numbers before the records were introduced, and the records were authenticated by a representative of a phone company. The Ohio Court of Appeals held that the trial court did not abuse its discretion in admitting the records as business records. *White*, 2015 WL 3794576, at \*10-11. The district court held that the introduction of the phone records did not implicate White's rights under the Confrontation Clause because they were not testimonial. *See Crawford v. Washington*, 541 U.S. 36, 56 (2004). Jurists of reason would not debate the district court's dismissal of this claim because the phone records were not introduced as substantive evidence. *See id.*

In claim (4), White alleged that his mail was seized without a warrant and used against him at trial. While White was in jail before trial, he wrote a letter to another inmate asking him to write a letter to Taylor. The inmate did so, and also sent a letter to White. The Ohio Court of Appeals held that neither White nor the other inmate had a reasonable expectation of privacy while in jail and noted that White did not move to suppress the evidence. *White*, 2015 WL 3794576, at \*12. The district court further held that White did not have a Fourth Amendment habeas claim because he had a full and fair opportunity to litigate the claim in state court. *See Stone v. Powell*, 428 U.S. 465, 494 (1976). Jurists of reason would not debate this conclusion.

In claim (2), White alleged that the evidence was insufficient to support the guilty verdicts. Under the Antiterrorism and Effective Death Penalty Act, the issue is whether it was objectively unreasonable for the Ohio Court of Appeals to conclude that a rational trier of fact, after viewing the evidence in the light most favorable to the State, could have found beyond a

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reasonable doubt that the prosecution proved the essential elements of aggravated murder, murder, aggravated burglary, felonious assault, and kidnapping. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Goodwin v. Johnson*, 632 F.3d 301, 312 (6th Cir. 2011).

Aggravated murder under Ohio Revised Code § 2903.01(A) requires the prosecution to prove that the defendant purposely caused the victim's death with prior calculation and design. Aggravated murder under section 2903.01(B) requires that the defendant purposely caused the victim's death while committing or attempting to commit, *inter alia*, aggravated burglary. Murder under section 2903.02(B) requires the prosecution to prove that the defendant caused the victim's death as a result of a violent felony. The Ohio Court of Appeals held that testimony that White and Harris shot the victim while his hands were up showed a preconceived plan to kill him regardless of how the robbery progressed and satisfied the prior calculation and design element of section 2903.01(A). *White*, 2015 WL 3794576, at \*5. The court held that there was overwhelming evidence that White and Harris entered the victim's home without permission, while armed, to rob him. There was also testimony that identified White as the shooter.<sup>1</sup> The court concluded that this evidence, viewed in the light most favorable to the prosecution, established the elements of aggravated murder under section 2903.01(B) and murder under section 2903.02(B). *Id.*

Aggravated burglary requires a showing that the defendant trespassed an occupied structure by force, stealth, or deception, with the purpose to commit a criminal offense and either inflicted or attempted to inflict physical harm or had a deadly weapon. Ohio Rev. Code § 2911.11(A). The Ohio Court of Appeals found that testimony established that White and Harris planned to rob the victim and forced their way into an occupied structure while possessing firearms with the intent to commit felonies while inside. They inflicted and threatened to inflict physical harm. This evidence satisfied the elements of aggravated burglary. *White*, 2015 WL 3794576, at \*5.

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<sup>1</sup> We note that the trial court did not so find, but given the evidence of shared intent this fact is not essential.

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Felonious assault is defined as knowingly causing serious physical harm, or causing or attempting to cause physical harm by means of a deadly weapon. Ohio Rev. Code § 2903.11(A). The Ohio Court of Appeals found that the evidence that White killed Don'Tel Sheeley necessarily included the finding that he caused him serious physical harm with a deadly weapon. The court found that Kimmetta Sheeley's testimony that either White or Harris put a gun to her chest and that White chased her into a bedroom at gunpoint met the elements of felonious assault. *White*, 2015 WL 3794576, at \*6.

The elements of kidnapping are using force, threat, or deception to remove a person from where he is found or to restrain his liberty in order to facilitate a felony or flight thereafter, to terrorize, or to inflict serious physical harm. Ohio Rev. Code § 2905.01. The Ohio Court of Appeals found that White and Harris restrained Kimmetta Sheeley's liberty by threats of violence while committing aggravated burglary and while inflicting serious physical harm on Don'Tel Sheeley, and kidnapped Don'Tel while committing aggravated burglary and attempted theft. The court concluded there was sufficient evidence that White kidnapped Kimmetta and Don'Tel. *White*, 2015 WL 3794576, at \*6.

The district court held that the Ohio Court of Appeals applied the correct standard to White's challenges to the sufficiency of the evidence and that its decision was not unreasonable. The Ohio Court of Appeals cited *State v. Jenks*, 574 N.E.2d 492, 503 (1991), for its standard of review, which in turn relied on *Jackson*, the correct legal standard. *See Goodwin*, 632 F.3d at 312. Jurists of reason would not dispute the district court's denial of these claims.

In his objections to the magistrate judge's report and recommendation, White argued that there was insufficient evidence to prove he intended to facilitate the felonious assault, murder, and aggravated murder of Don'Tel Sheeley, citing *Rosemond v. United States*, 134 S. Ct. 1240 (2014). The trial judge in White's bench trial was unable to determine whether White or Harris shot the victim but found White guilty as an accomplice. Under Ohio law, a defendant who is guilty of complicity can be prosecuted and punished as if he were a principal offender. *See* Ohio Rev. Code § 2923.03(F).

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For the foregoing reasons, the COA application is **DENIED**. The motions for pauper status and for the appointment of counsel are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



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**FILED**  
Jun 18, 2018  
DEBORAH S. HUNT, Clerk

O R D E R

Before: COLE, Chief Judge; STRANCH and LARSEN, Circuit Judges.

Jermeal White, an Ohio prisoner proceeding pro se, petitions for rehearing of this court's March 13, 2018, order denying his application for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying White's motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** White's petition for rehearing.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk