ORDER DENYING MOTION FOR COA

No. 17-2076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL BURNIE WELLBORN,

Petitioner-Appellant,

v.

MARY BERGHUIS, Warden,

Respondent-Appellee.

ORDER

Carl Burnie Wellborn, a former Michigan prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.[1] He has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

Based on his sexual abuse of his granddaughters, A.F. and C.R., a Kent County jury convicted Wellborn of one count of first-degree criminal sexual conduct ("CSC"), in violation of Michigan Compiled Laws § 750.520b(1)(b), and two counts of second-degree CSC, in violation of Michigan Compiled Laws § 750.520c(1)(a) and (b). The trial court imposed prison terms of ten to thirty years and ten to fifteen years, respectively. On direct appeal, Wellborn—who is Caucasian—argued in part that he was denied a jury drawn from a fair cross-section of the community based on a "glitch" in Kent County's jury selection software. That glitch, it was later revealed, had systematically excluded African Americans from the county's jury pool. *See Ambrose v. Booker*, 684 F.3d 638, 640-43 (6th Cir. 2012) ("*Ambrose II*"). The Michigan Court of Appeals found that Wellborn had defaulted his fair cross-section claim by failing to object to the jury venire at trial. The state appellate court affirmed Wellborn's convictions, *People v.*

[1] Wellborn was incarcerated at the time he filed his habeas petition, "which is all the 'in custody' provision of 28 U.S.C. § 2254 requires." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

Wellborn, No. 242229, 2003 WL 22961704 (Mich. Ct. App. Dec. 16, 2003) (per curiam), and the Michigan Supreme Court denied leave to appeal.

In 2005, Wellborn filed a pro se federal habeas petition raising, among other grounds, his fair cross-section claim. The district court referred the matter to a magistrate judge, who found that Wellborn had defaulted his fair cross-section claim and failed to demonstrate cause to excuse his default. The district court adopted the magistrate judge's report and recommendation and denied Wellborn's petition, but granted a COA on his fair cross-section claim.

This court consolidated Wellborn's appeal with the appeals of Joseph Ambrose and Gregory Carter, two similarly situated petitioners, and found that the three petitioners had shown cause to excuse the default of their fair cross-section claims. *Ambrose II*, 684 F.3d at 645-49. This court reversed and remanded the cases for a determination of whether the petitioners could also show actual prejudice to excuse their default. *Id.* at 652. "[P]etitioners must show actual prejudice to excuse their default," this court held, "even if the error is structural." *Id.* at 649. In so holding, this court instructed the lower courts to assess the petitioners' claims using the prejudice standard for ineffective-assistance-of-counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Ambrose II*, 684 F.3d at 652.

On remand, the same counsel was appointed to represent the three petitioners and, although the cases proceeded on separate tracks, petitioner Ambrose's case became the de facto lead case. The district court granted Ambrose habeas relief, finding that he had demonstrated "a reasonable probability that a more diverse jury would have been less likely to convict him" and that he had made a prima facie showing of a fair cross-section violation. The district court based its decision in part on the testimony of Dr. Samuel Sommers, who "essentially testified that a more diverse jury would have been less likely to convict Ambrose because African-American jurors are statistically less likely to convict than their Caucasian counterparts."

On the government's appeal in Ambrose's case, this court again reversed. *Ambrose v. Booker*, 801 F.3d 567, 582 (6th Cir. 2015) ("*Ambrose IV*"). This court held that the district court erred in applying the prejudice standard set forth in *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th

Cir. 1991), rather than the more stringent standard of *Strickland*. *See Ambrose IV*, 801 F.3d at 577-78. This court also found that the district court erred in relying on Dr. Sommers's testimony. *Id.* at 579-80. As properly applied, this court observed, the actual prejudice standard required the district court to "consider whether, in light of the underrepresentation of African Americans in the jury venire, 'there is a reasonable probability that . . . the result of the proceeding would have been different.'" *Id.* at 578 (quoting *Strickland*, 466 U.S. at 694). Concluding that Ambrose had failed to show actual prejudice, this court reversed and remanded for entry of judgment denying Ambrose habeas relief. *Id.* at 580-82. The Supreme Court denied certiorari.

"[A]pplying the actual prejudice standard announced in *Ambrose II*, as clarified in *Ambrose IV*," the magistrate judge entered a report recommending that Wellborn's habeas petition be denied. The magistrate judge reasoned that Wellborn could not demonstrate actual prejudice because "[t]he prosecution's case against [him] was strong" and "the defense evidence was weak." The district court adopted the report and recommendation, denied Wellborn's petition, and declined to issue a COA. The district court also denied Wellborn's subsequent motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59.

In his COA application, Wellborn argues that he was required to show only fundamental unfairness, rather than a reasonable probability of a different outcome, in light of the Supreme Court's decision in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Wellborn argues, in the alternative, that he can satisfy the actual prejudice standard as clarified in *Ambrose IV*.

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). To satisfy this standard when a district court has denied a habeas petition for procedural reasons, "the petitioner must show, 'at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Dufresne v. Palmer*, 876 F.3d 248, 253 (6th Cir. 2017) (per curiam) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

If a petitioner has procedurally defaulted his claims, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). It is undisputed that Wellborn has demonstrated cause for the default of his fair cross-section claim, *see Ambrose II*, 684 F.3d at 649, and the only issue before this court is whether Wellborn can establish actual prejudice, *see Ambrose IV*, 801 F.3d at 578. That inquiry hinges on whether there is "a reasonable probability that a different (*e.g.*, properly selected) jury would have reached a different result, 'a probability sufficient to undermine confidence in the outcome of the trial.'" *Id.* (quoting *Strickland*, 466 U.S. at 694).

Wellborn argues that the Supreme Court's decision in *Weaver* abrogated *Ambrose IV* and articulated a new standard for demonstrating actual prejudice, that is, *Strickland* prejudice. After *Weaver*, he contends, a petitioner can show *Strickland* prejudice by establishing *either* the reasonable probability of a different outcome *or* fundamental unfairness. Not so. The Court in *Weaver* assumed, for analytical purposes only, that the petitioner could show *Strickland* prejudice by establishing that counsel's errors rendered his trial fundamentally unfair. *Weaver*, 137 S. Ct. at 1911. The Court did not, however, decide whether this interpretation was correct. *See id.* *Weaver* thus did not abrogate *Ambrose IV*, and Wellborn's burden remains the same: To demonstrate actual prejudice, he must show "a reasonable probability that a different (*e.g.*, properly selected) jury would have reached a different result." *Ambrose IV*, 801 F.3d at 578 (citing *Strickland*, 466 U.S. at 694).

Reasonable jurists could not debate the district court's conclusion that Wellborn failed to make the required showing. "'The most important aspect to the [actual prejudice] inquiry is the strength of the case against the defendant,' which requires courts to take a 'careful look at the transcripts involved.'" *Id.* at 580 (alteration in original) (quoting *Ambrose II*, 684 F.3d at 652). In this case, the transcripts reveal that the prosecution presented strong evidence of Wellborn's

guilt of first-degree CSC under section 750.520b(1)(b) and second-degree CSC under section 750.520c(1)(a) and (b).

At trial, A.F. testified that Wellborn is her step-grandfather. When she visited him, Wellborn "would use his fingers, he would put his penis in [her] [illegible] and he would use his tongue on [her] vagina." A.F. further testified that Wellborn "would kiss [her], and then he'd use his fingers and put them in [her] vagina." Wellborn also made A.F. "ejaculate him with [her] hands." A.F. testified that she was fourteen at the time of this abuse, which occurred at Wellborn's home in Kent County.

C.R. testified that Wellborn is her grandfather. When she visited him, Wellborn "would try touchin' [C.R.'s] boobs. He would French kiss [her] – well, try to French kiss [her]. He would try to reach down [her] pants." On one occasion, Wellborn reached his hand down the front of C.R.'s pajamas and went "[a] little bit" underneath her underwear. C.R. testified that she was ten or eleven at the time of this abuse, which occurred at Wellborn's home on Big Pine Island Lake (in Kent County). Another of Wellborn's granddaughters, A.R., testified that Wellborn had also sexually abused her. And Wellborn's stepdaughter, A.F.'s mother, testified that Wellborn had sexually abused her as a child, too.

Wellborn and his wife testified in his defense. Wellborn firmly denied A.F.'s and C.R.'s allegations. His theory of the case was that various family members and local officers had manipulated A.F. and C.R. into fabricating their testimony. But Wellborn offered no meaningful support for this theory. "[T]o successfully argue that it is reasonably probable that a different jury would have accepted the defense theory, and thus have reached a different result, a defendant must show that there is some support for that theory." *Ambrose IV*, 801 F.3d at 581. Given the strength of the prosecution's evidence and the tenuous nature of Wellborn's defense, reasonable jurists could not debate the district court's conclusion that he failed to establish actual prejudice.

Finally, Wellborn cannot avail himself of the fundamental-miscarriage-of-justice exception to the prejudice requirement. *See Coleman*, 501 U.S. at 750. That exception applies

when "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986), and generally requires a petitioner to present "new reliable evidence . . . that was not presented at trial," *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Wellborn has failed to identify any such evidence.

Because reasonable jurists could not debate the district court's procedural ruling, Wellborn's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 17-2076, *Carl Wellborn v. Mary Berghuis*
Originating Case No. : 1:05-cv-00346

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Mr. Thomas Dorwin
Ms. Colleen P. Fitzharris
Mr. John S. Pallas

Enclosure

No mandate to issue