No. 18-1735

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEITH WALTER BULLARD,

Petitioner-Appellant,

v.

SHANE JACKSON, Warden,

Respondent-Appellee.

ORDER

Keith Walter Bullard, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Bullard has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2011, a Michigan jury convicted Bullard of one count of second-degree criminal sexual conduct under Michigan Compiled Laws § 750.520c(1)(a), in connection with the sexual assault of his girlfriend's four-year-old daughter. The trial court sentenced Bullard as a habitual offender (fourth offense) to fourteen to thirty years' imprisonment. *See* Mich. Comp. Laws § 769.12. Bullard thereafter filed a delayed application for leave to appeal, in which he argued that the trial court: (1) violated the Michigan Rules of Evidence and his constitutional right to present a defense by prohibiting the admission of expert testimony; (2) violated his due process rights by improperly admitting hearsay evidence; (3) violated his Sixth Amendment right of confrontation by admitting the victim's out-of-court statements and medical report; (4) violated his right to counsel by refusing to appoint new trial counsel following a breakdown in the attorney-client relationship; and (5) denied him a fair trial by denying his motion to appoint an

expert in forensic interviewing. The Michigan Court of Appeals denied Bullard's application "for lack of merit in the grounds presented." *People v. Bullard*, No. 310854 (Mich. Ct. App. Apr. 26, 2013). Bullard then filed a delayed application for leave to appeal in the Michigan Supreme Court, in which he raised the same claims as in the Michigan Court of Appeals, as well as an additional claim that his sentence was unconstitutional in light of *Alleyne v. United States*, 570 U.S. 99 (2013). The Michigan Supreme Court denied Bullard leave to appeal.

In June 2014, Bullard filed a § 2254 petition, which he subsequently amended, raising the following grounds for relief: (1) the trial court violated the Michigan Rules of Evidence and his constitutional right to present a defense by prohibiting the admission of defense expert testimony; (2) the trial court violated his due process rights by improperly admitting hearsay evidence; (3) the trial court violated his Sixth Amendment right of confrontation by admitting the victim's statements; (4) the trial court violated his right to counsel by refusing to appoint new counsel, without adequate inquiry, following a breakdown in the attorney-client relationship; and (5) the trial court denied him a fair trial by denying his motion to appoint an expert in forensic interviewing. The district court denied Bullard's habeas petition on the merits and declined to issue a COA.

Bullard now seeks a COA as to each of his claims. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, the petitioner 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*, 537 U.S. at 327.

Right to Present a Defense Through Expert Testimony

In his first ground for relief, Bullard contended that the trial court violated the Michigan Rules of Evidence and his constitutional right to present a defense by ruling that the testimony of Julie Howenstine, the defense's DNA expert, was inadmissible as irrelevant. With respect to Bullard's argument that the trial court's evidentiary ruling violated the Michigan Rules of

Evidence, reasonable jurists could not debate the district court's determination that such an argument is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

With respect to Bullard's constitutional argument, it is well-settled that a defendant's right to present a complete defense is of vital importance but is not unlimited, *United States v. Scheffer*, 523 U.S. 303, 308 (1998), and it is abridged only "by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve," *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (alteration in original) (internal quotation omitted). An evidentiary ruling, such as the exclusion of testimony, warrants habeas relief "[o]nly if '[it] is so egregious that it results in a denial of fundamental fairness.'" *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004) (quoting *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003)).

The trial court held a hearing outside of the jury's presence in an effort "to establish some scientific basis for the opinion" that Howenstine intended to offer. Howenstine testified that, based on a reasonable degree of scientific certainty, she could think of three hypotheses "as to why sperm would be on underwear and there be a negative result for semen." She further testified that her purpose in testifying for the defense was to address "whether or not the transfer of the cellular material from Mr. Bullard occurred in either of one of [those] three ways and to discuss why it's possible for it to have transferred from a stain on another garment." The trial court disallowed Howenstine's testimony, concluding that it was irrelevant because there was no evidence that the victim's underwear "ever came in contact with any other garment."

The district court determined that the trial court's resolution of this issue was objectively reasonable and also noted that, despite the exclusion of Howenstine's testimony, Bullard was able to present similar testimony by questioning the prosecution's expert witness, Jodi Corsi. Specifically, Corsi, a forensic scientist for the Michigan State Police, testified that the sperm discovered in the victim's underwear could have gotten there in a number of ways, including by being transferred if the sperm was ever commingled with the underwear. Corsi also testified that

the presence of sperm cells in underwear does not necessarily mean that a person committed a sexual act on the person who was wearing the underwear. Based on the foregoing, reasonable jurists would not debate the district court's resolution of this claim. Bullard has not made a substantial showing that the exclusion of the defense expert's testimony was so egregious that it resulted in a denial of fundamental fairness. *See id.*

Hearsay Evidence & Confrontation Clause

In his second ground for relief, Bullard argued that the district court abused its discretion by admitting hearsay testimony, to wit: the victim's out-of-court statements to her uncle and to a nurse, as well as the victim's hospital records. In his third ground for relief, Bullard argued that the district court's admission of these out-of-court statements violated his Sixth Amendment right of confrontation because the victim did not testify at trial.

In this case, the four-year-old victim was watching a children's movie when she spontaneously told her uncle that Bullard "put his pee-pee in me" and demonstrated what had occurred with a stuffed animal. The victim's uncle relayed this information to the victim's grandmother, who in turn called the police and took the victim to the hospital. While the victim was being admitted into the hospital, she told a nurse that Bullard "hurted [her] heart" and "put his pee-pee" on her crotch area. The nurse documented these statements in the victim's medical report and relayed them to the doctor. In ruling upon Bullard's motions in limine prior to trial, the trial court determined that the victim's statements to her uncle and the nurse, as well as the victim's medical record, were admissible under the Michigan Rules of Evidence. The district court declined to grant relief to Bullard on his claim that the trial court improperly admitted certain testimony in violation of the rule against hearsay, reasoning that the admissibility of such testimony under the Michigan Rules of Evidence is not cognizable on federal habeas review. Reasonable jurists could not disagree. *See Estelle*, 502 U.S. at 67-68.

With respect to Bullard's Confrontation Clause argument, the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Requiring that defendants are able to question those who "bear

testimony" against them, this Confrontation Clause bars the "admission of *testimonial* statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 51-54 (2004) (emphasis added). Thus, to trigger a violation, a statement must be both testimonial and hearsay. *United States v. Napier*, 787 F.3d 333, 348 (6th Cir. 2015).

The district court determined that Bullard was not entitled to relief on this claim, in part, because the victim's statements were nontestimonial in nature. Reasonable jurists would not debate the district court's resolution of this claim. The Supreme Court has held that statements made to non-law enforcement officers, like the victim's uncle and the nurse in this case, "are much less likely to be testimonial than statements to law enforcement officers." *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015). This is at least true as to statements made by "very young children," which "will rarely, if ever, implicate the Confrontation Clause." *Id.* at 2182. Because preschool-aged children generally lack an understanding of our criminal justice system, let alone the nuances of a prosecution, it is highly unlikely that a child intends his or her statements to substitute for trial testimony. *Id.* Moreover, this court has held that a patient's statements to a treating nurse who is attempting to elicit information regarding the patient's physical condition are nontestimonial because "[t]he nurse's medically based purpose for talking" with the patient is "entirely devoid of an underlying prosecutorial motive." *United States v. Ayoub*, 701 F. App'x 427, 438 (6th Cir. 2017) (citing *Davis v. Washington*, 547 U.S. 813, 827 (2006); *Giles v. California*, 554 U.S. 353, 376 (2008)).

Substitution of Counsel

In his fourth ground for relief, Bullard contended that the trial court erred by denying his request for substitute counsel. Bullard wrote a letter to the trial judge approximately three weeks before trial, in which he complained about defense counsel's representation and requested substitute counsel. In response to this letter, defense counsel moved to withdraw due to lack of trust and a breakdown in the attorney-client relationship. The trial court subsequently held a hearing on counsel's motion to withdraw, at which the trial court granted the motion on the

condition that counsel remained as standby counsel. Bullard renewed his request for the appointment of substitute counsel the day before trial began, at which time the trial court gave Bullard the option of either representing himself or proceeding with his current attorney. Bullard adamantly stated that he did not trust defense counsel but also stated that he was unable to represent himself. The trial court then determined that defense counsel would represent Bullard at trial. Bullard argued that the trial court improperly denied his motion without adequately inquiring into the nature of the breakdown in communication with his appointed attorney.

"[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). Accordingly, an indigent defendant "must show good cause such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict with his attorney in order to warrant substitution" of counsel. *Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985); *accord Henness v. Bagley*, 644 F.3d 308, 321 (6th Cir. 2011). When evaluating a trial court's denial of a request to substitute counsel, a reviewing court considers the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the conflict between the attorney and the defendant was so great that it resulted in a total lack of communication preventing an adequate defense. *Henness*, 644 F.3d at 321.

The district court concluded that Bullard was not entitled to habeas relief, in part, because he was "unable to show that he was prejudiced by the failure of the trial court to grant substitute counsel, in light of the fact that he received effective assistance of counsel at trial." Reasonable jurists could not debate that conclusion. Bullard did not allege that his attorney's pretrial conduct constituted ineffective assistance, and "a defendant relying on court-appointed counsel has no constitutional right to the counsel of his choice." *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); *United States v. Namer*, 149 F. App'x 385, 394 (6th Cir. 2005).

Expert Witness

In his final ground for relief, Bullard argued that the trial court violated his right to a fair trial by denying his motion for funds to appoint a psychologist in forensic interviewing to assist him in preparing for trial. In *Ake v. Oklahoma*, the Supreme Court held that "when a defendant demonstrates to [a] trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist." 470 U.S. 68, 83 (1985). The Supreme Court, however, has never extended the rule in *Ake* beyond the specific circumstances of that case, *see, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), and *Ake* is unavailing for Bullard given that his sanity was not at issue during his trial and that he also requested a non-psychiatric expert, *see Ake*, 470 U.S. at 83. Reasonable jurists therefore would not debate the district court's conclusion that the trial court's decision on this matter was neither an unreasonable application of clearly established federal law nor an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

Accordingly, Bullard's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.