No. 19-1464

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMERSON L. BEVERLY,

Petitioner-Appellant,

v.

SHERRY L. BURT,

Respondent-Appellee.

FILED
Jul 23, 2019
DEBORAH S. HUNT, Clerk

ORDER

Emerson L. Beverly, a Michigan prisoner proceeding pro se, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. He has applied for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

A jury convicted Beverly of first-degree home invasion and assault with intent to commit murder. The trial court sentenced Beverly as a fourth habitual offender to consecutive prison terms of 20 to 40 years and 30 to 45 years, respectively. The Michigan Court of Appeals affirmed Beverly's convictions but remanded for a sentencing hearing under *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015). *People v. Beverly*, No. 322419, 2015 WL 8538686 (Mich. Ct. App. Dec. 10, 2015) (per curiam). The Michigan Supreme Court denied leave to appeal.

Beverly then filed this federal habeas petition, arguing that: (1) the prosecutor engaged in misconduct during his closing and rebuttal arguments by denigrating defense counsel and commenting on Beverly's failure to testify; (2) the evidence was insufficient to support his convictions; and (3 & 4) the trial court erred in scoring the sentencing variables and imposing consecutive sentences. After the warden filed a response, the district court denied Beverly's petition on the merits and declined to issue a COA. In his COA application, Beverly reasserts the merits of his four grounds for relief.

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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).

Ground 1. Beverly argues that the prosecutor engaged in misconduct by denigrating defense counsel. In his closing argument, the prosecutor characterized the defense as being "like a magician" and "want[ing] to get [the jury's] attention over here when something is really going on, which is the truth over here. Hello, I'm over here, and your attention is here, but what's over there? Common sense." The prosecutor also cautioned the jury "to be careful of red herrings, and . . . smoke and mirrors, hello, I'm over here." The prosecutor later reiterated, "This is where the red herring comes in. Look at me over here, when the truth is over there." The prosecutor then told the jury, "Don't chase the rabbit" and, during his rebuttal argument, again stated, "Hello, I'm over here, but the truth is over here."

Reasonable jurists could not conclude that the prosecutor's remarks were improper. In context, the statements show that the prosecutor characterized certain evidence as misleading and asked the jury to believe its theory of the case, rather than the defense's theory. The prosecutor did not attack the defense attorney, his credibility, or his integrity. *Compare Wogenstahl v. Mitchell*, 668 F.3d 307, 330 (6th Cir. 2012), *with, e.g.*, *United States v. Holmes*, 413 F.3d 770, 774-76 (8th Cir. 2005). And, given the strength of the State's case, discussed below in response to Beverly's second ground, reasonable jurists could not debate the district court's conclusion that, even if the comments were improper, any error was harmless. *See Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997).

Beverly also argues that the prosecutor engaged in misconduct by commenting on Beverly's failure to testify. In his closing argument, the prosecutor stated that the evidence was "uncontroverted" that the victim was assaulted, the victim's injuries were caused by blunt force trauma, the victim's blood was found at the scene of the crime, and the victim was lawfully present

in her home. And, in his rebuttal argument, the prosecutor repeatedly characterized the victim's testimony as uncontroverted. Reasonable jurists could conclude that the latter characterizations, at least, were improper. *See, e.g.*, *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir. 1965). Again, however, given the strength of the State's case, discussed below in response to Beverly's second ground, and the trial court's multiple admonitions to the jury that Beverly had a right not to testify and that his silence could not be used against him, reasonable jurists could not debate the district court's conclusion that any error was harmless. *See Pritchett*, 117 F.3d at 964.

Ground 2. Beverly argues that the evidence was insufficient to support his convictions. In reviewing the sufficiency of the evidence, "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[U]nder *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review." *Schlup v. Delo*, 513 U.S. 298, 330 (1995).

The Michigan Court of Appeals set forth the following elements for the offense of first-degree home invasion:

> (1) the defendant either broke and entered a dwelling or entered a dwelling without permission; (2) the defendant either intended when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling committed a felony, larceny, or assault; and (3) while the defendant was entering, present in, or exiting the dwelling, he was either armed with a dangerous weapon or another person was lawfully present in the dwelling.

Beverly, 2015 WL 8538686, at *2. Beverly challenges only the first element, arguing that he had permission to enter or be within the victim's home. In rejecting this claim, the state appellate court reasoned as follows:

> Defendant stayed at the victim's home periodically, even after he and the victim broke up. However, the victim testified that she was the sole lessee of the home, had never given defendant the right to enter or leave freely, and had never given defendant the alarm code. We conclude that sufficient evidence supported defendant's home invasion conviction because the jury could reasonably conclude from this evidence that defendant entered the victim's home without permission.

Id. A state court's interpretation of state law is binding on federal habeas review, *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). Under these circumstances, reasonable jurists could not debate the district court's conclusion that "[t]he evidence was sufficient to support the jury's verdict, and the state appellate court's conclusion that sufficient evidence existed was not contrary to, or an unreasonable application of[,] federal law."

Next, the Michigan Court of Appeals set forth the following elements for the offense of assault with intent to commit murder: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *Beverly*, 2015 WL 8538686, at *2 (quoting *People v. Plummer*, 581 N.W.2d 753, 759 (Mich. Ct. App. 1998)). Beverly challenges only the second element, "question[ing] whether the injuries reflect intent to murder" and noting that he possessed, but did not use, a knife or knives. In rejecting this claim, the state appellate court reasoned as follows:

> [T]he victim testified that defendant struck her repeatedly in the head with various blunt objects. He did so with enough force to break the handle of a frying pan. Witnesses testified that the victim was covered in blood and there were puddles of blood on the kitchen floor. Defendant struck the victim so forcefully that the victim's mother found blood spatter on the ceiling when she was cleaning the victim's home. Additionally, the victim testified that defendant threatened to kill her before, during, and after the incident. Viewing the evidence in the light most favorable to the prosecution, we conclude that a reasonable jury could find that defendant assaulted the victim with the intent to kill her.

Id. at *3. Again, a state court's interpretation of state law is binding on federal habeas review, *Richey*, 546 U.S. at 76. Under these circumstances, reasonable jurists could not debate the district court's conclusion that "the evidence was sufficient to sustain Petitioner's assault conviction, and the state appellate court's decision upholding the jury's verdict was not contrary to, or an unreasonable application of[,] federal law."

Grounds 3 & 4. Beverly argues that the trial court erred in scoring the sentencing variables and imposing consecutive sentences. In doing so, Beverly argues that the trial court sentenced him in violation of state law. As indicated above, however, alleged violations of state law are not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). And,

although a sentence may violate due process if it is "imposed on the basis of 'misinformation of constitutional magnitude,'" *Roberts v. United States*, 445 U.S. 552, 556 (1980) (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972)), Beverly has failed to rebut the presumption of correctness afforded to the trial court's factual findings, *see* 28 U.S.C. § 2254(e)(1).

Accordingly, the COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B
United States District Court Eastern District of Michigan Opinion

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMERSON LAMONT BEVERLY,

Petitioner,

v. Case No. 16-13783

SHERRY BURT,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Petitioner Emerson Lamont Beverly has filed a *pro se* petition for the writ of habeas corpus under 28 U.S.C. § 2254. The petition challenges Petitioner's convictions and sentences for assault with intent to commit murder, Mich. Comp. Laws § 750.83, and first-degree home invasion, Mich. Comp. Laws § 750.110a(2). Petitioner argues that the prosecutor committed misconduct during closing arguments, the evidence at trial was insufficient, the sentencing guidelines were mis-scored, and the trial court abused its discretion by ordering his sentences to run consecutively. The Government responds that the state appellate court's decision on Petitioner's first two claims was not contrary to federal law, an unreasonable application of federal law, or an unreasonable determination of the facts. The Government also contends that Petitioner's sentencing scoring claims are not cognizable on federal habeas review and that Petitioner procedurally defaulted his claim related to consecutive sentencing. The court finds that Petitioner's claims do not warrant habeas relief. Accordingly, the court will deny the petition.

I. BACKGROUND

Petitioner was tried before a jury in Saginaw County Circuit Court. The Michigan Court of Appeals summarized the facts of the case:

> According to the victim, she and defendant dated from September 2012 until March 2013. Defendant spent five or six nights a week at her home, but he did not store any belongings there. The victim's home was equipped with an alarm system. On the days defendant left the home after the victim did, she gave defendant a key so that he could lock up and she would retrieve the key from him later. She did not give him the code to the alarm system.
>
> The relationship began to deteriorate in March 2013. On March 12, 2013, they had a verbal altercation. Defendant told the victim that he would kill her rather than allow her to be with someone else. On March 19, the victim told defendant that she "wanted to take a step back" in their relationship. As she was getting ready for work, defendant grabbed her around the neck and threw her to the floor. She injured her nose and called 911. After March 19, the victim no longer considered herself in a dating relationship with defendant and no longer gave him a key to her home, but she allowed him to spend the night on a less frequent basis.
>
> The victim testified that in the evening of April 11, 2013, she woke up to the sound of her alarm beeping and saw defendant standing over her bed. Defendant stated "I told you I was going to kill you" and began striking the victim with a hard object. Defendant dragged her out of her bed and struck her with something that broke. He then dragged the victim into the kitchen, over broken glass, and repeatedly struck her on the head with a frying pan. When she lifted her head, the victim saw defendant with two knives in his hands. The alarm siren stopped, defendant dropped the knives, said he was not done with her yet, and left.
>
> According to Saginaw Police Department Officer Anthony Teneyuque, when he made contact with the victim, she was covered in blood. Officer Teneyuque later entered the victim's home, where he found large blood spatters, puddles of blood on the kitchen floor, a broken frying pan with blood on it, and a knife with a bloody handle. Sergeant Mark Scott testified that the victim appeared severely injured. According to paramedic Whitney Gavord, the victim had multiple lacerations to her head, hands, feet, legs, eye, and cheek, but the bleeding was not life-threatening. Dr. Andrew Bazaki prepared a medical report that stated that, among other medical issues, the victim had significant trauma to her left eye, a fractured wrist, and crush injuries to the tips of her fingers. The victim testified that she suffered permanent damage to her eye and now requires eyeglasses.

People v. Beverly, No. 322419, 2015 WL 8538686, at *1 (Mich. Ct. App., Dec. 10, 2015).

Petitioner did not testify or present any witnesses. His theory of the case was that, even though his conduct was inexcusable and unlawful, the charges did not fit the facts. He maintained that he was guilty of less serious offenses because he lacked the intent to kill the victim and had permission to be in the victim's home. (Trial Tr. vol. 2, 110–11, ECF No. 8-8, PageID 269; Trial Tr. vol. 7, 182–84, 186, 188–89, ECF no. 8-13, PageID 581–83.)

On the home-invasion count, the trial court instructed the jury on first-degree home invasion and the lesser offense of third-degree home invasion. On the assault charge, the trial court instructed the jury on assault with intent to commit murder and the lesser offenses of assault with intent to do great bodily harm less than murder and aggravated assault. The jury found Petitioner guilty, as charged, of assault with intent to commit murder and first-degree home invasion. On May 21, 2014, the trial court sentenced Petitioner as a habitual offender to consecutive terms of 30 to 45 years in prison for the assault and 20 to 40 years in prison for the home invasion.

Petitioner moved for a new trial on the basis of insufficient evidence, evidentiary errors, judicial misconduct related to witness questioning, and prosecutorial misconduct. The trial court heard oral arguments on these issues and subsequently denied the motion. (*See* Mot. Hr'g Tr., ECF No. 8-16.)

Petitioner raised then raised these claims on direct appeal. The Michigan Court of Appeals affirmed his convictions and sentences in an unpublished, *per curiam*

opinion. *See Beverly*, 2015 WL 8538686.[1] On May 24, 2016, the Michigan Supreme Court denied leave to appeal. *See People v. Beverly*, 878 N.W.2d 853 (Mich. 2016). On October 19, 2016, Petitioner filed his habeas corpus petition.

II. STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires federal habeas petitioners who challenge

> a matter "adjudicated on the merits in State court" to show that the relevant state court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" 28 U.S.C. § 2254(d). Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims," *Hittson v. Chatman,* 135 S.Ct. 2126, 2126 (2015) (Ginsburg, J., concurring in denial of certiorari), and to give appropriate deference to that decision, *Harrington v. Richter,* 562 U.S. 86, 101–102 (2011).

Wilson v. Sellers, 138 S. Ct. 1188, 1191–92 (2018). When, as in this case, the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* at 1192.

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[1] The Court of Appeals, nevertheless, remanded the case to the trial court for a determination of whether the trial court would have imposed a materially different sentence if the sentencing guidelines had been advisory, rather than mandatory, at the time of Petitioner's sentencing. *Beverly*, 2015 WL 8538686, at *7–*8 (citing *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015)). It is unclear from the record whether the court altered the sentence on remand.

"[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. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotations and citations omitted). In fact, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). To obtain a writ of habeas corpus from a federal court, a state prisoner must show that the state court's ruling on 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." *Id.* at 103.

III. ANALYSIS

A. The Prosecutor's Closing Arguments

Petitioner alleges that the prosecutor denigrated the defense during closing arguments by suggesting that defense counsel intentionally tried to mislead them. Petitioner also alleges that the prosecutor encouraged the jurors to use Petitioner's failure to testify as evidence of guilt. The Michigan Court of Appeals rejected both of Petitioner's prosecutorial-misconduct claims on the merits.

"On habeas review, 'the Supreme Court has clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because constitutional line drawing [in prosecutorial misconduct cases] is necessarily imprecise.'" *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015) (alteration in original) (quoting *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006)). Consequently, even though prosecutors must "refrain from improper methods calculated to produce a wrongful conviction," *Viereck v. United States*, 318 U.S. 236, 248 (1943), prosecutorial-misconduct claims are reviewed deferentially in a federal habeas case. *Millender v. Adams*, 376 F.3d 520, 528 (6th Cir. 2004).

The clearly established federal law related to claims for prosecutorial misconduct is the Supreme Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1986). *See Parker v. Matthews*, 567 U.S. 37, 45 (2012) (*per curiam*) (describing *Parker* as the clearly established law on this issue). In *Darden*, the Supreme Court stated that,

> it "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 699 F.2d [1031, 1036 (11th Cir. 1983)]. The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.*, at 642.

Darden, 477 U.S. at 181.

1. Denigrating the Defense

Petitioner contends that the prosecutor denigrated the defense during closing arguments by referring to the defense arguments as "distractions," "red herrings,"[2] and "smoke and mirrors." The Michigan Court of Appeals disagreed with Petitioner and concluded that the prosecutor's use of those words did not denigrate defense counsel, nor accuse defense counsel of attempting to mislead the jury.

The Supreme Court has made clear that both defense attorneys and prosecutors may not "make unfounded and inflammatory attacks on the opposing advocate." *United States v. Young*, 470 U.S. 1, 9 (1985). Personal attacks on opposing counsel are unprofessional, *United States v.* Collins 78 F.3d 1021, 1040 (6th Cir. 1996), and "[i]t is improper to . . . argue that [defense] counsel is attempting to mislead the jury." *West v. Bell*, 550 F.3d 542, 565 (6th Cir. 2008) (citing *Broom v. Mitchell,* 441 F.3d 392, 412–13 (6th Cir. 2006)). Nevertheless, a prosecutor has wide latitude in responding to the defense's case. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 330 (6th Cir. 2012). "A prosecutor commenting that the defense is attempting to trick the jury is a permissible means of arguing so long as those comments are not overly excessive or do not impair the search for the truth." *United States v. August*, 984 F.2d 705, 715 (6th Cir. 1992).

At issue here are the following remarks made by the prosecutor:

> What this case calls for is a common sense analysis, but if we're not careful, there are things that can cloud our vision. I call these distractions, and sometimes, you know, people over here, it's like a magician. Think about a magician. Sometimes it's not necessarily magic, but they want to get your

[2] The Sixth Circuit has used the phrase "'red herring' to describe a fallacious argument that distracts from the truth." *United States v. Vassar*, 346 F. App'x 17, 25 (6th Cir. 2009).

> attention over here when something is really going on, which is the truth over here. Hello, I'm over here, and your attention is here, but what's over there? Common sense.

(Trial Tr. vol. 7, 135, ECF No. 8-13, PageID 569.)

Later, when discussing the crimes, the prosecutor stated, "I want you to be careful of red herrings, and we talked about red herrings, smoke and mirrors, hello, I'm over here." (*Id.* at PageID 571.) Still later, when addressing the issue of whether Petitioner had permission to enter the victim's house and whether he knew the code to the alarm system, the prosecutor said, "[t]his is where the red herring comes in. Look at me over here, when the truth is over there. . . . Smoke and mirrors." (*Id.* at PageID 573.) Defense counsel objected to the prosecutor's remarks on grounds that "red herring" arguments were impermissible and that the prosecutor was denigrating the defense. But the trial overruled the objections because the remarks were a comment on the evidence. (*Id.*)

Finally, during his rebuttal argument, the prosecutor commented on the victim's injuries and whether, according to the defense's theory, the injuries could have been caused by Petitioner's fist and the crime was actually the lesser offense of aggravated assault. The prosecutor then repeated, "Hello, I'm over here, but the truth is over here." (Trial Tr. vol. 7, 194, ECF No. 8-13, PageID 584.)

According to Petitioner, the quoted remarks suggested that defense counsel was intentionally attempting to mislead the jury and that defense counsel did not believe his own client. Petitioner maintains that the remarks also undermined the presumption of innocence and impermissibly shifted the focus from the evidence to defense counsel.

The prosecutor, however, did not say that defense counsel was trying to mislead the jury. Although he implied that defense counsel was trying to distract the jury and steer them away from the truth, a prosecutor's comment on a "smoke and mirrors defense" is within acceptable bounds. *United States v. Wilson*, 199 F. App'x 495, 498 n.1 (6th Cir. 2006).

A prosecutor's reference to "red herrings" also does not denigrate or improperly disparage defense counsel when, as in this case, the prosecutor's arguments highlight the evidence against the defendant and are designed to persuade the jury to believe the prosecutor's theory of the case. *United States v. Burroughs*, 465 F. App'x 530, 535 (6th Cir. 2012). The disputed remarks, moreover, "were not so much a personal attack on counsel as a commentary on the strength of the merits of [Petitioner's] defense." *United States v. Graham*, 125 F. App'x 624, 634 (6th Cir. 2005). As such, they were not improper. *Id.* at 633–35. These comments did not impair the search for truth or infect the trial with such unfairness as to deprive Petitioner of due process.

Furthermore, the trial court instructed the jury at the beginning and at the close of the case that the jurors should consider only the evidence that was properly admitted in evidence and that the attorneys' arguments were not evidence. The court explained that the attorneys' arguments were only meant to help the jurors understand the evidence and each side's legal theory of the case. (Trial Tr. vol. 2, 87–89, ECF No. 8-8, PageID 263; Trial Tr. vol. 7, 204, ECF No. 8-13, PageID 586.) Jurors are presumed to follow a trial court's instructions to them. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Moreover, the evidence against Petitioner was overwhelming. Therefore, even if the

prosecutor's remarks were improper and rose to the level of a constitutional error, they could not have had a "substantial and injurious effect or influence" on the jury's verdict and were ultimately harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

2. The Comments on Uncontroverted Evidence

During closing arguments, the prosecutor referred to certain evidence as "uncontroverted." According to Petitioner, use of the word "uncontroverted" infringed on his right to remain silent and encouraged the jury to use his failure to testify as substantive evidence. The Michigan Court of Appeals concluded on review of this claim that the prosecutor's argument was within the bounds or propriety and was not improper.

Prosecutors may not comment on an accused's silence, *Griffin v. California*, 380 U.S. 609, 615 (1965), or use a defendant's silence as substantive evidence of guilt. *Hall v. Vasbinder*, 563 F.3d 222, 232 (6th Cir. 2009). This rule "applies to indirect as well as direct comments on the failure to testify." *United States v. Moore*, 917 F.2d 215, 224–25 (6th Cir. 1990). In addressing indirect references to an accused's right to stay silent, the Sixth Circuit has,

> refused to adopt a *per se* rule that comments as to the uncontradicted nature of evidence violated *Griffin* even where the evidence in question could only have been contradicted by the defendant . . . . Rather, the court must conduct a "probing analysis of the context of the comments," in order to determine "[w]hether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

Spalla v. Foltz, 788 F.2d 400, 403–04 (6th Cir.1986) (internal citations omitted). A probing analysis of indirect comments requires consideration of the following

four factors:

> 1) Were the comments "manifestly intended" to reflect the accused's silence or of such a character that the jury would "naturally and necessarily" take them as such;
>
> 2) Were the remarks isolated or extensive;
>
> 3) Was the evidence of guilt otherwise overwhelming;
>
> 4) What curative instructions were given, and when.

Spalla, 788 F.2d at 404–05 (quoting *Hearn v. Mintzes*, 708 F.2d 1072, 1077 (6th Cir. 1983)).

The prosecutor in Petitioner's case said it was uncontroverted that there was an assault, that the injuries were most likely caused by blunt force trauma, and that it was the victim's blood at the crime scene. (Trial Tr. vol. 7, 141–43, ECF No. 8-13, PageID 571.) These comments were not direct comments on Petitioner's failure to testify or even indirect comments on the failure to testify. They simply acknowledged that defense counsel had conceded most of the facts in the case.

During his rebuttal argument, however, the prosecutor said: "Uncontroverted, she tells you, he's standing over [her and saying] bitch, I'm gonna kill you, I told you I was gonna kill you."(*Id.* at 195, PageID 584.) Subsequently, the prosecutor stated:

> You beat this woman up, and you take her phone, and you leave her there with this bloody mess. She's bloodied beaten and bruised, and then you run out and you don't even call the police to try to help her. Because he knows that he's done wrong. But we challenged that and *we submit that the victim's testimony is what's the truth here, and her testimony is uncontroverted. It's uncontroverted.*

(*Id.* at 199, PageID 585) (emphasis added).) At that point defense counsel objected, but the trial court overruled the objection. (*Id.* at 199–200, PageID 585–86.) The prosecutor

then stated two more times that the victim's testimony was uncontroverted. (*Id.* at 200, PageID 585.)

The jury could have interpreted the prosecutor's remarks as comments on Petitioner's failure to testify or to present any evidence contradicting the victim's version of the facts. The remarks were not isolated, but the evidence of Petitioner's guilt was overwhelming, and when defense counsel objected, the trial court pointed out that Petitioner had a right not to testify. (*Id.*) The trial court also informed the jurors at other times during the trial that Petitioner was not required to prove his innocence, to produce any evidence, or to do anything, and that the jurors could find him not guilty if the prosecution did not prove its case beyond a reasonable doubt. (Trial Tr. vol. 1, 33–34, ECF No. 8-7, PageID 200; Trial Tr. vol. 2, 87, ECF No. 8-8, PageID 263; Trial Tr. vol. 7, 131–32, ECF No. 8-13, PageID 568.) During the trial court's charge to the jury, the court was even more specific, stating that, "[e]very defendant has the absolute right not to testify [and] when you decide this case, you must not consider the fact that he did not testify. It must not affect your verdict in any way." (Trial Tr. vol. 7, 203–04, ECF No. 8-13, PageID 586.)

The court concludes that, even assuming the prosecutor's remarks about the victim's uncontroverted testimony were unconstitutional, the error was harmless, given the strength of the evidence against Petitioner and the trial court's instructions to the jurors. Habeas relief is not warranted on Petitioner's claim.

B. The Sufficiency of the Evidence

The second habeas claim alleges that the prosecution failed to prove the charged crimes beyond a reasonable doubt. The Michigan Court of Appeals disagreed with Petitioner and rejected his claim on the merits.

The Due Process Clause of the United States Constitution "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). Following *Winship*, the critical inquiry on review of a challenge to the sufficiency of the evidence supporting a criminal conviction 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." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). This standard permits the trier of fact to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Additionally, circumstantial evidence may be considered and "such evidence need not remove every reasonable hypothesis except that of guilt." *Apanovitch v. Houk*, 466 F.3d 460, 488 (6th Cir. 2006). Moreover, under the AEDPA, the Court's "review of a state-court conviction for sufficiency of the evidence is very limited." *Thomas v. Stephenson*, 898 F.3d 693, 698 (6th Cir. 2018). The Supreme Court has made clear that sufficiency claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (*per curiam*).

First, "it is the responsibility of the jury . . . to decide what conclusions should be drawn from the evidence admitted at trial." *Id.* (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). "And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Id.* (quoting *Cavazos v. Smith*, 565 U.S. at 2). This is a difficult standard to meet on a habeas challenge. *See Thomas*, 898 F.3d at 698.

1. Assault with Intent to Commit Murder

The *Jackson* "standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. In Michigan, "[t]he elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v. Brown*, 703 N.W.2d 230, 236 (Mich. Ct. App. 2005) (internal citations omitted).

Petitioner does not dispute assaulting the victim or the fact that the crime would have been murder if the assault had been successful. The only element in dispute is whether there was insufficient evidence of an intent to kill. In determining a defendant's intent, the jury may consider the nature of the acts, the defendant's temper or disposition, "whether the instrument and means used were naturally adapted to produce death, [the defendant's] conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with

which the assault was made." *People v. Taylor*, 375 N.W.2d 1, 8 (1985) (quoting *Roberts v. People*, 19 Mich. 401, 415–416 (Mich. 1870)).

To support his argument that he lacked the necessary intent to commit murder, Petitioner relies on testimony that the victim was not in physiological shock (Trial Tr. vol. 7, 69, ECF No. 8-13, PageID 553), the CAT scan was negative for bleeding around the brain (*id.* at 49–50, PageID 548), the victim was lucid (*id.* at 16, PageID 539), there was not enough blood loss to cause her blood pressure to drop or to require a transfusion (*id.* at 30, PageID 543), and that the victim's responses to questions were appropriate. (Trial Tr. vol. 5, 113, ECF No. 8-11, PageID 411.) The victim, however,

> testified that defendant struck her repeatedly in the head with various blunt objects. He did so with enough force to break the handle of a frying pan. Witnesses testified that the victim was covered in blood and there were puddles of blood on the kitchen floor. Defendant struck the victim so forcefully that the victim's mother found blood spatter on the ceiling when she was cleaning the victim's home. Additionally, the victim testified that defendant threatened to kill her before, during, and after the incident.

Beverly, 2015 WL 8538686, at *3.

There was other evidence that, about 30 days before the incident for which Petitioner was on trial, the victim informed Petitioner that she no longer wanted to be with him. In response, Petitioner said that he would kill her before letting her be with anybody else. (Trial Tr. vol. 4, 28–29, ECF No. 8-10, PageID 343.) On the night in question, Petitioner said, "I told you I was going to kill you," and then he started to hit her on the head. He pulled her out of bed, dragged her to the kitchen, and continued to beat her. He had a knife in each hand, and he left the house only after the security

alarm sounded. As he was leaving, he said that he was not done yet and would be back. (*Id.* at 43–51, 63–64, 86, PageID 347, 352, 357.)

The victim had lacerations on her face and the back of her head. (Trial Tr. vol. 4, 67, ECF No. 8-10, PageID 353.) She broke her hand and required surgery to reconstruct her knuckles (*id.* at 72, PageID 354), and she sustained permanent damage to her retina (*id.* at 75, PageID 355.) She thought that Petitioner had hit her with a frying pan. (*Id.* at 90, PageID 358; Trial Tr. vol. 5, 46, ECF No. 8-11, PageID 394.) She was in the hospital for approximately three days. (Trial Tr. vol. 4, 74, ECF No. 8-10, PageID 354; Trial Tr. vol. 5, 32, 40–41, 47, ECF No. 8-11, PageID 390, 392–94.) Two weeks after the incident, Petitioner called her and threatened to put a bullet in her head if he saw her on the grounds of the store where she worked. (Trial Tr. vol. 4, at 87–88, ECF No. 8-10, PageID 358.)

A rational trier of fact could have concluded from the extent and severity of the victim's injuries and Petitioner's comments before, during, and after the incident that Petitioner intended to kill the victim. Therefore, the evidence was sufficient to sustain Petitioner's assault conviction, and the state appellate court's decision upholding the jury's verdict was not contrary to, or an unreasonable application of federal law. Petitioner is not entitled to relief on the basis of his challenge to the sufficiency of the evidence on the assault charge.

2. First-Degree Home Invasion

The elements of first-degree home invasion, as charged in this case, were:

> (1) the defendant either broke and entered a dwelling or entered a dwelling without permission; (2) the defendant either intended when entering to

> commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling committed a felony, larceny, or assault; and (3) while the defendant was entering, present in, or exiting the dwelling, he was either armed with a dangerous weapon or another person was lawfully present in the dwelling.

Beverly, 2015 WL 8538686, at *2.

Petitioner takes issue with the first element and argues that he had permission to be in the victim's home on the night in question. He points out that he and the victim rented furniture together a month before the crimes (Trial Tr. vol. 4, 105–06, ECF No. 8-10, PageID 362; 4/8/15 Trial Tr. at 25–26), remained a couple after she told him that their relationship was over (Trial Tr. vol. 4, 29, ECF No. 8-10, PageID 343), and continued to be intimate after he threw her to the floor during a previous occasion. (Trial Tr. vol. 5, 70, ECF No. 8-11, PageID 400.) There was additional evidence that the two of them had slept together as recently as a few days before the crimes (Trial Tr. vol. 4, 105, ECF No. 8-10, PageID 362; Trial Tr. vol. 5, 30, ECF 8-11, PageID 390), and that the victim informed a police officer she had broken up with Petitioner earlier on the day of the crimes. (Trial Tr. vol. 6, 47, 82, ECF No. 8-12, PageID 471, 480.)

The Michigan Court of Appeals, however, pointed out that the victim had testified "she was the sole lessee of the home, had never given defendant the right to enter or leave freely, and had never given defendant the alarm code." *Beverly*, 2015 WL 8538686, at *2. The Court of Appeals concluded that sufficient evidence supported Petitioner's conviction for home invasion because the jury could reasonably conclude from the evidence that Petitioner entered the victim's home without permission. *Id.*

The record supports the state court's conclusions. The victim testified that she rented her residence, that no one else was listed on the lease, and the only other person who lived with her was her daughter. (Trial Tr. vol. 3, 15–16, ECF No. 8-9, PageID 295.) The victim also testified that, in the past, she had given Petitioner a key to her residence, but not on the day in question. (*Id.* at 30, PageID 299.) She never made a duplicate key for him and even though she sometimes gave him her house key before leaving for work in the mornings, she did that so he could lock the house door when he left; she would retrieve the key from him at the end her work day. (*Id.* 34–37, PageID 300; Trial Tr. vol. 5, 24, 27, ECF No. 8-11, PageID 388–89.) Petitioner did not have permission to come and go out of her house, unless it was for a specific purpose, such as allowing a workman to enter the home while she was at work. (Trial Tr. vol. 5, 24, 27–28, PageID 388–89.)

The victim's relationship with Petitioner changed a month before the crimes. At that point, she no longer gave him a key to her place as she had in the past. At no point in their relationship was he permitted to enter her home without her permission, and he did not keep his personal items in her home. On April 12, 2013, the date of the crimes, she did not give him permission to enter her home, and he did not have a key to the house. (Trial Tr. vol. 4, 36–39, ECF No. 8-10, PageID 345–46; Trial Tr. vol. 5, 28–29, 56–57, ECF No. 8-11, PageID 389–90, 396–97.) She terminated the relationship earlier in the week of the crimes. (Trial Tr. vol. 4, 84–85, ECF No. 8-10, PageID 357.)

A rational trier of fact could conclude from this evidence that Petitioner did not have permission to enter the victim's home on the night in question. The evidence was

sufficient to support the jury's verdict, and the state appellate court's conclusion that sufficient evidence existed was not contrary to, or an unreasonable application of federal law.

C. The Sentence

Petitioner's final two claims challenge his sentence.

1. The Offense Variables

Petitioner contends first that the trial court mis-scored offense variables one, three, and seven of the Michigan sentencing guidelines. A state court's alleged misinterpretation and misapplication of state sentencing laws and guidelines is a matter of state concern only. *Howard v. White*, 76 F. App'x 52, 53 (6th Cir. 2003). "It does not implicate any federal rights," *Garcia–Dorantes v. Warren,* 769 F. Supp. 2d 1092, 1112 (E.D. Mich. 2011), and "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *see also Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ [of habeas corpus] on the basis of a perceived error of state law.").

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Consequently, the alleged violations of state sentencing law fail to state a claim for which habeas relief may be granted and are not cognizable on habeas review. *See Tironi v. Birkett*, 252 F. App'x 724, 725 (6th Cir. 2007); *Austin v. Jackson*, 213 F.3d 298, 300 (6th Cir. 2000). Even if Petitioner's claims

were cognizable on habeas corpus review, they do not warrant habeas relief for the following reasons.

a. Offense Variable One

Petitioner received 25 points for offense variable one (aggravated use of a weapon) on the basis that "a victim was cut or stabbed with a knife or other cutting or stabbing weapon." Mich. Comp. Laws § 777.31(1)(a). Petitioner claims that there was no evidence the victim was cut with a knife and that the cuts on her body could have resulted from being dragged over shattered glass, which is not a weapon.

Although the prosecution conceded on direct appeal that the trial court erred by assessing points for offense variable one, the Michigan Court of Appeals noted that, even if Petitioner's total offense variable score were reduced by 25 points, the reduction in points would not change the recommended minimum sentence. *Beverly*, 2015 WL 8538686, at *6. Thus, the alleged error in scoring 25 points for offense variable one was harmless. *See Williams v. United States*, 503 U.S. 193, 203 (1992) (noting that a misapplication of sentencing guidelines is harmless if the error did not affect the trial court's selection of the sentence imposed); *United States v. Cramer*, 777 F.3d 597, 603 (2d Cir. 2015) (stating that an error in calculating sentencing guidelines is harmless if correcting the error would result in no change to the guidelines offense level and sentencing range).

b. Offense Variable Three

Petitioner received 25 points for offense variable three (physical injury to a victim) on the basis that "[l]ife-threatening or permanent incapacitating injury occurred to a

victim." Mich. Comp. Laws § 777.33(1)(c). Petitioner asserts that the victim's injuries merely required medical treatment and, therefore, he should have received only 10 points under Mich. Comp. Laws § 777.33(1)(d).

The victim testified at trial that, as a result of the injury to her hand, a doctor had to reconstruct her knuckles. (Trial Tr. vol. 4, 72, ECF No. 8-10, PageID 354.) She also had permanent damage to her retina. (*Id.* at 75, PageID 355.)

At Petitioner's sentencing, the victim said that, as a result of the assault, she could no longer use her right hand, and she had partial eyesight. She stated that this prevented her from doing the work she loved, and although she had healed physically, she was a changed person and lived with post-traumatic stress disorder. Her extreme anxiety made it difficult on some days to do the simplest of tasks, such as getting out of bed. (Sentencing Tr. 10–11, ECF No. 8-15, PageID 648–49.) The victim's comments support the conclusion that she suffered from a "permanent incapacitating injury," justifying a score of 25 points.

c. Offense Variable Seven

Petitioner received 50 points for offense variable seven (aggravated physical abuse). He claims that this score was unjustified because the incident lasted only a few minutes, and he did not treat the victim "with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Mich. Comp. Laws § 777.37(1)(a).

The trial court stated that the assault was one of the most violent it had seen (Sentencing Tr. 9, 15, ECF No. 8-15, PageID 647, 653), and the Michigan Court of Appeals noted that, according to the victim,

> defendant threatened to kill her before repeatedly striking her in the head with a heavy object, a lamp, and a frying pan. Defendant dragged the victim through broken glass, causing lacerations along her legs. The victim's hand was broken and her fingertips crushed from trying to defend herself. There were puddles of blood in the kitchen and blood spatter on the ceiling.

Beverly, 2015 WL 8538686, at *6.

The Court of Appeals concluded that the evidence "supported the trial court's finding that defendant treated the victim with excessive brutality." *Id.* at *6. This court agrees and also finds that, because the trial court did not rely on "extensively and materially false" information, the score for offense variable seven did not violate Petitioner's constitutional right to due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

To conclude, Petitioner's challenge to the scoring of the sentencing guidelines is not cognizable on habeas review. Even if it were a cognizable claim, the error in scoring offense variable one was harmless, and the other claims lack substantive merit.

2. The Consecutive Sentences

Petitioner asserts that the trial court abused its discretion by ordering the sentence for home invasion to run consecutively to the sentence for the assault. He contends that consecutive sentences were not justified because the victim's injuries were not life-threatening. Petitioner also points out that, because he was 41 years old at

the time of sentencing, his minimum sentence of 50 years—30 years for the assault and 20 years for the home invasion–he will be 91 years old before he is eligible for parole.

The Michigan Court of Appeals reviewed this claim for "plain error" because Petitioner did not object on the same basis in the trial court. The State, therefore, argues that Petitioner's claim is procedurally defaulted. The court cuts to the merits of Petitioner's claim because a procedural default analysis "would only complicate this case." *Thomas v. Meko*, 915 F.3d 1071, 1074 (6th Cir. 2019).

The claim lacks merit because, under state law, trial courts may impose consecutive sentences when a defendant was convicted of first-degree home invasion and another crime arising from the same transaction. *See* Mich. Comp. Laws § 750.110a(8) ("The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction."). Because it was a matter of state law whether Petitioner's sentences ran concurrently or consecutively, Petitioner's challenge to his consecutive sentences is not cognizable in this federal habeas corpus proceeding. *See, e.g.*, *Harrison v. Parke*, 917 F.2d 1304, 1990 WL 170428, at *2 (6th Cir. 1990).

IV. CERTIFICATES OF APPEALABILITY

A certificate of appealability 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). To obtain a certificate of appealability, a habeas petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, 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) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

The court concludes that reasonable jurists would not find the court's assessment of Petitioner's claims debatable or wrong, and the issues do not deserve encouragement to proceed further. The court, therefore, declines to grant a certificate of appealability.

V. CONCLUSION

The state court's adjudication of Petitioner's claims on the merits was objectively reasonable. Petitioner has not articulated any cognizable basis for habeas relief. Accordingly,

IT IS ORDERED that the petition for a writ of habeas corpus (ECF No. 1) is DENIED.

IT IS FURTHER ORDERED that the court DECLINES to issue a certificate of appealability.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: April 5, 2019

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, April 5, 2019, by electronic and/or ordinary mail.

s/Lisa Wagner
Case Manager and Deputy Clerk
(810) 292-6522

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No. 19-1464

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 10, 2019
DEBORAH S. HUNT, Clerk

EMERSON L. BEVERLY,

Petitioner-Appellant,

v.

SHERRY L. BURT,

Respondent-Appellee.

ORDER

Before: MOORE, McKEAGUE, and READLER, Circuit Judges.

Emerson L. Beverly petitions for rehearing en banc of this court's order entered on July 23, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: September 10, 2019

Mr. Emerson L. Beverly
Muskegon Correctional Facility
2400 S. Sheridan Drive
Muskegon, MI 49442

Re: Case No. 19-1464, *Emerson Beverly v. Sherry Burt*
Originating Case No.: 2:16-cv-13783

Dear Mr. Beverly,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. David H. Goodkin
Ms. Laura Graves Moody
Mr. John S. Pallas

Enclosure