APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-6449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAWNTELE CORTEZ JACKSON,	)	
	)	ON APPEAL FROM
Petitioner-Appellant,	)	THE UNITED STATES DISTRICT COURT FOR
	)	THE WESTERN
v.	)	DISTRICT OF
	)	KENTUCKY
KATHY LITTERAL,	)	
Respondent-Appellee.		

O R D E R

Before: BATCHELDER, STRANCH, and LARSEN, Circuit Judges.

Shawntele Cortez Jackson, a Kentucky state prisoner, appeals through counsel a district court judgment denying his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. The parties have

waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2007, a jury convicted Jackson of murder and tampering with evidence, and he was sentenced to fifty years of imprisonment. The murder in this case occurred after midnight on May 16, 2006. Jackson and a friend paid the victim and his girlfriend to drive them to a convenience store to meet someone who owed Jackson money. All the occupants of the victim's car had been taking drugs. On the way back, Jackson and the victim got into an argument. Jackson testified that after they parked, the victim got a gun out of the trunk and threatened him with it. They were struggling over the gun when it went off, hitting the victim in the back of the head. The victim's girlfriend testified that Jackson was pistol whipping the unarmed victim when the gun was fired. Jackson's friend testified that Jackson was hitting the victim when he heard a gunshot, although he had not seen a gun. The murder weapon was not recovered. *Jackson v. Commonwealth*, No. 2007-SC-392-MR, 2010 WL 252244, at *1-2 (Ky. Jan. 21, 2010).

Jackson unsuccessfully pursued a direct appeal and post-conviction relief in the state courts. In this petition for federal habeas corpus relief, he raised ten claims that he had exhausted in his state direct appeal and six claims of ineffective assistance of counsel. A magistrate judge recommended that the petition be denied, and the district court adopted this recommendation over Jackson's objections.

This court granted Jackson a partial certificate of appealability, and he has now briefed claims of a

jury instruction error, the limitation of cross-examination of a witness, and the admission of evidence that he had on an earlier occasion possessed a gun other than the one used in the murder. In addition, he has briefed four claims of ineffective assistance of trial counsel: the failure to present mitigation evidence, counsel's advice to Jackson to testify to claim self-defense, the failure to move for a special verdict form to indicate whether he was convicted of intentional or wanton murder, and the failure to object to the jury taking a video of the crime scene into the jury room.

Where a state court has rejected a claim in a habeas corpus petition on the merits, the petitioner is entitled to relief only if the state court's rejection of his claim is contrary to, or an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). The Kentucky Supreme Court found that the errors alleged in Jackson's first three claims were harmless. *Jackson*, 2010 WL 252244, at *6, *8, *10.

In his first claim, Jackson argued that he was erroneously denied an instruction on self-protection for the lesser-included charges of reckless homicide and second-degree manslaughter. The Kentucky Supreme Court found that this was harmless error because Jackson was convicted of murder and did receive an instruction on self-protection for that charge. Moreover, the state court noted that the instructions, as given, reduced the State's burden of proof on the lesser included offenses, but the jury nevertheless did not convict him of those charges, which the jury was also instructed not to reach unless it found Jackson not guilty of murder. Because the

jury was properly instructed on the offense of conviction, the state court reasonably concluded that the trial court's error did not have a substantial and injurious effect on the verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Next, Jackson argues that his impeachment of a witness was improperly limited. His girlfriend testified that Jackson came to her apartment after she heard the gunshot, looking scared. She claimed not to remember an earlier statement that she made omitting the gunshot and Jackson's appearance, and counsel was not permitted to introduce that statement. To determine if an alleged denial of confrontation was prejudicial, courts examine factors such as the importance of the testimony, the extent to which the witness was otherwise cross-examined, and the strength of the prosecution's case. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The record supports the state court's finding that this testimony was of little importance, the witness was otherwise extensively cross-examined, a similar statement from her was introduced through another witness, and the prosecution's case was strong, including two eyewitnesses to the shooting. *Jackson*, 2010 WL 252244, at *8. Nor was the prior statement evidence of bias or prejudice by the witness. In these circumstances, the state court reasonably concluded that the alleged error was harmless. *See Brecht*, 507 U.S. at 637.

In his third claim, Jackson argued that the trial court erred in admitting testimony that he had been carrying a handgun different from the one described by the victim's girlfriend several days before the murder. The admission of other bad acts evidence is

properly found harmless where the evidence of guilt is overwhelming. *See United States v. Hardy*, 643 F.3d 143, 153 (6th Cir. 2011). The Kentucky Supreme Court explained that the error was harmless because:

> Independent evidence strongly suggested [Jackson]'s guilt. While in custody prior to trial, [Jackson] telephoned [a woman] and a recording of that call was played for the jury. Therein, [Jackson] warned [the woman] not to tell investigators that he was known for having a gun and told her to claim that she was forced or threatened to testify if she could not ignore the subpoena. This evidence taken with the fact that neither [Jackson] nor [the victim] had defensive wounds, that [Jackson] fled the scene of the crime, that no murder weapon was recovered, that [Jackson] attempted to dispose of the clothes he was wearing, and that [the victim's girlfriend] saw [Jackson] threaten and intentionally strike [the] unarmed [victim] with a loaded handgun all demonstrates that [the challenged evidence] had little effect on [Jackson]'s conviction.

2010 WL 252244, at *6. The Kentucky Supreme Court's conclusion that the admission of this testimony was harmless was not contrary to or an unreasonable application of clearly established federal law.

The remaining four claims allege ineffective assistance of trial counsel. In order to establish ineffective assistance, Jackson must show that his counsel's performance was deficient and the result of the trial was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Jackson raised these claims in his post-conviction proceedings, and the trial court

held an evidentiary hearing, but ultimately denied the motion. *Jackson v. Commonwealth*, No. 2013-CA-001727-MR, 2015 WL 1648058, at *4 (Ky. Ct. App. April 10, 2015). Jackson appealed to the Kentucky Court of Appeals, which affirmed the dismissal. *Id.* at *7. Jackson then appealed to the Kentucky Supreme Court, which denied discretionary review.

Jackson's first claim is that counsel failed to present mitigation evidence. Counsel testified that she had Jackson's parents' phone number but was unable to reach them and understood that Jackson was estranged from them. She also testified that she believed that the testimony of Jackson and another witness during trial presented some mitigation. Although Jackson claims that his sisters were available to testify, he does not now explain what testimony they would have presented. The state courts' conclusion that this claim lacked merit is not contrary to or an unreasonable application of clearly established federal law. Jackson's conclusory argument on this issue is insufficient to show deficient performance by counsel or prejudice to his case. *See id.*

Next, Jackson argues that counsel misadvised him to testify to present his self-defense theory. But Jackson fails to point to any elicited testimony that would have contributed to his guilty verdict. Finally, Jackson alleges that counsel "coerced" him into testifying. But at the evidentiary hearing, counsel stated that she left the decision of whether to testify up to Jackson, and Jackson provides no evidence to the contrary. His cursory argument on this issue does not set forth any prejudice from his decision to testify, and the state courts' decision that Jackson failed to

establish this claim of ineffective assistance of counsel has not been shown to be contrary to or an unreasonable application of clearly established federal law.

In his third claim of ineffective assistance, Jackson argues that counsel should have moved for a special verdict form that would indicate whether he was convicted of intentional or wanton murder. Kentucky law provides that murder can be committed intentionally or wantonly. *See* K.R.S. § 507.020. Though Jackson asserts that trial counsel's failure to request a special verdict form "deprived Jackson of the opportunity for the jury to distinguish between intentional murder and wanton murder" he fails to specify how this would have affected his case. Again, Jackson's truncated argument as to this claim fails to establish that the lack of a special verdict form prejudiced the result of his trial, and he therefore fails to show that the state courts' rejection of this claim was unreasonable.

Finally, Jackson argues that counsel should have objected when a video of the crime scene, which had been shown in court without the audio police description, was admitted into evidence and taken into the jury room, where the jury might have watched it with the audio. In the postconviction proceeding, the state court found that this claim was too speculative to establish ineffective assistance because it was not apparent that the jury had watched or listened to the video in the jury room. In addition, the state court noted that the jury already had the benefit of the police officer's live narration. The state court reasonably concluded that Jackson had not established a reasonable probability that counsel's

failure to object had prejudiced the result of the proceeding.

In sum, the state courts' rejection of each of these claims of ineffective assistance has not been shown to be contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). For the above reasons, we **AFFIRM** the district court's judgment denying this petition for federal habeas corpus relief.

ENTERED BY ORDER OF THE COURT

August 16, 2019

APPENDIX B

No. 17-6449

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHAWNTELE CORTEZ JACKSON,	)	
Petitioner-Appellant,	)	O R D E R
v.	)	
KATHY LITTERAL,	)	
Respondent-Appellee.	)	

Shawntele Cortez Jackson, a Kentucky state prisoner, moves for in forma pauperis status and a certificate of appealability from the district court judgment denying his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254.

In 2007, a jury convicted Jackson of murder and tampering with evidence, and he was sentenced to fifty years of imprisonment. Jackson argued that the killing was in self-defense, and he testified at trial. He unsuccessfully pursued a direct appeal and post-conviction relief in the state courts. In this petition for

federal habeas corpus relief, he raised ten claims that he had exhausted in his state direct appeal, and six claims of ineffective assistance of counsel that he had raised in his post-conviction action. A magistrate judge recommended that the petition be denied, and the district court adopted this recommendation over Jackson's objections. *Jackson v. Litteral*, No. 3:16-cv-91, 2017 WL 5148358 (W.D. Ky. Nov. 6, 2017).

In order to be entitled to a certificate of appealability, Jackson must show that reasonable jurists could find the district court's assessment of his claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In his habeas petition, Jackson claims error by the trial court on a number of issues, including jury instructions, evidentiary rulings, a Confrontation Clause issue, failure to strike a juror for cause, and six claims of ineffective assistance of counsel. We grant a certificate of appealability on the following issues: (1) whether Jackson was erroneously denied an instruction on self-protection for the lesser-included charges of reckless homicide and second-degree manslaughter. The Kentucky Supreme Court found that this was harmless error because Jackson was convicted of murder and did receive an instruction on self-protection for that charge. *See Jackson v. Commonwealth*, No. 2007-SC-392-MR, 2010 WL 252244, at *10 (Ky. 2010); (2) whether Jackson's cross-examination of prosecution witness Amber Baker was improperly limited in violation of the Confrontation Clause. Jackson alleges that Baker made prior statements to an investigator that conflicted with her testimony at trial. The Kentucky Supreme Court

found that the trial court erred in its limitation of the cross-examination of Baker, but found the error to be harmless. *Jackson*, 2010 WL 252244, at *8; and (3) Jackson contends that testimony that he had been carrying a different handgun several days before the murder was erroneously admitted. On direct appeal, the Kentucky Supreme Court found that this was harmless error. *Id.* at *6. Other bad acts evidence is only found harmless where the evidence of guilt is overwhelming. *See United States v. Hardy*, 643 F.3d 143, 153 (6th Cir. 2011). Because Jackson has raised a colorable claim of self-defense, we do not find the error harmless. We also grant the motion to expand the certificate of appealability as to all of Jackson's claims of ineffective assistance of counsel.

In general, we find that the trial court hindered Jackson's presentation of his claim of self-defense through questionable evidentiary rulings and the jury instructions. While the Kentucky Supreme Court found any error harmless, we are not convinced. Considering the conflicting versions of events presented by the witnesses, the cumulative effect of these errors may have prejudiced Jackson's right to a fair trial. The motion for a certificate of appealability is granted as to the issues listed above, and the motion for in forma pauperis status is granted.

ENTERED BY ORDER OF THE COURT

November 27, 2018

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

SHAWNTELE CORTEZ JACKSON,	Petitioner,
v.	Civil Action No. 3:16-v-91-DJH-DW
WARDEN KATHY LITTERAL,	Respondent.

* * * * *

MEMORANDUM OPINION AND ORDER

Shawntele Cortez Jackson has filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254, alleging various constitutional violations. (Docket No. 1) Respondent Kathy Litteral opposes Jackson's petition. (D.N. 15) The Court referred this matter to Magistrate Judge Dave Whalin, who issued a report and recommendation on May 24, 2017. (D.N. 29) Judge Whalin recommended that the Court deny Jackson's petition. (*Id.*, PageID # 824) He also concluded that Jackson was not entitled to a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(1)(B). (*Id.*, PageID # 823–24) After the Court granted Jackson additional time (D.N. 33), he filed objections to Judge Whalin's report on July 14, 2017.

(D.N. 34) For the reasons set forth below, Jackson's objections will be overruled. After careful consideration, the Court will adopt in full Judge Whalin's Findings of Fact, Conclusions of Law, and Recommendation.

I.

In 2007, Jackson was convicted by a jury in Jefferson County, Kentucky, of the murder of Richard Lee Washington. (*See* D.N. 15-16) The conviction follows from events that occurred in Louisville, Kentucky, on May 16, 2006. That evening, Jackson, D'Angelo Scott, Dora Ditto, and Ditto's boyfriend, Richard Lee Washington, drove together to a convenience store to collect money from an individual indebted to Jackson. *See Jackson v. Commonwealth* (*Jackson I*), No. 2007-SC-000392-MR, 2010 WL 252244, at *1 (Ky. Jan. 21, 2010). While at the convenience store, Jackson and Washington began arguing and continued to do so as the group reached the apartment of Jackson's girlfriend, Dominique Rudolph. *Id.*

According to Jackson, upon exiting the vehicle, Ditto removed a black handgun from the trunk and handed it to Washington. *Id.* Washington then approached Jackson and threatened to kill him. *Id.* Shoving ensued, and eventually the two men struggled for possession of the handgun. *Id.* Jackson claims that during the entanglement, the gun fired while in Washington's right hand and struck Washington in the back of the head. *Id.*

Ditto's version of events differs markedly. Ditto explained that upon exiting the vehicle, Jackson asked Washington for another ride, which Washington refused. *Id.* at *2. Jackson then hit Washington in the head with a handgun and told him he "ought to kill him." *Id.* Ditto asserted that Jackson proceeded to strike Washington again with the gun, causing it to fire and kill Washington. *Id.* Scott testified similarly, with one notable exception. He testified that although he heard the gun fire, he did not recall seeing either man with a firearm earlier that night. *Id.*

There are likewise differing versions as to the subsequent events. According to Jackson, he ran to his girlfriend Rudolph's apartment immediately after the altercation. *Id.* Jackson asserts that he fell asleep there and did not wake or leave the apartment for thirty-six hours. *Id.* Ditto, on the other hand, stated that Jackson immediately ran from the scene with the gun still in his possession. *Id.* Scott testified that he too went to Rudolph's apartment following the altercation but that Jackson arrived there sometime later in the night. *Id.* At trial, the state also presented the testimony of Amber Baker, Jackson's ex-girlfriend. *See Jackson I*, 2010 WL 252244, at *2. Baker testified that Jackson arrived at her apartment on the night in question looking scared and watching out her screen door. Baker stated that Jackson continued doing so for twenty minutes before leaving. *Id.*

Following Jackson's arrest and indictment by a grand jury, a jury found Jackson guilty of murdering Washington under Ky. Rev. Stat. § 507.020. (*See* D.N.

15-16) Jackson timely appealed his conviction, raising ten allegations of error on appeal. (*See* D.N. 15-4) In an opinion issued January 21, 2010, the Supreme Court of Kentucky affirmed Jackson's conviction. *Jackson I*, 2010 WL 252244, at *13.

Jackson then filed a *pro se* collateral attack pursuant to Kentucky Rule of Criminal Procedure 11.42 in the Jefferson Circuit Court, asserting seven claims of ineffective assistance of counsel and a claim of cumulative error. (D.N. 15-8; D.N. 15-9) When Jackson's appointed counsel declined to supplement Jackson's motion, Jackson filed a supplemental *pro se* motion pursuant to Rule 11.42. There, Jackson raised three additional grounds of ineffective assistance of counsel. (*See* 15-1, PageID # 137) The Jefferson Circuit Court held an evidentiary hearing and ultimately dismissed Jackson's claims. (D.N. 15-8, PageID # 387–97) Jackson appealed five of his claims to the Kentucky Court of Appeals, which affirmed the state trial court's decision. *See Jackson v. Commonwealth* (*Jackson II*), No. 2013-CA-001727-MR, 2015 WL 1648058 (Ky. Ct. App. Apr. 10, 2015). Thereafter, the Kentucky Supreme Court denied Jackson's request for discretionary review. (*See* D.N. 15-10, PageID # 461)

Jackson has now filed a petition for habeas corpus relief in this Court, raising the ten claims from his direct appeal, the five claims of ineffective assistance of counsel from his Rule 11.42 motion, and a claim of cumulative error. (*See* D.N. 1) On May 24, 2017, Magistrate Judge Dave Whalin issued his report and recommendation. (D.N. 29). Jackson timely filed objections to Judge Whalin's findings. (D.N. 34)

Judge Whalin based his conclusion on sixteen separate findings (Grounds 1–16). Jackson objects to all but grounds five, fifteen, and sixteen. (*Id.*) Accordingly, the Court's review will be limited to grounds one through four and six through fourteen. *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (finding that if a party fails to object, the Court need not "review a magistrate's factual or legal conclusions, under a de novo or any other standard.")

II.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides relief to a habeas petitioner if the underlying state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court." 28 U.S.C. § 2254(d). This clause applies "if the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law or if the state court decides a case differently than th[e Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). If fair-minded jurists could disagree as to the correctness of the state court's decision, then Jackson will not be entitled to relief. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

The AEDPA also provides relief if the state-court decision "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). This occurs when "the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies

that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. Under this clause, Jackson must show that "the state court applied [a Supreme Court case] to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

When reviewing a report and recommendation, this Court reviews de novo "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The Court may adopt without review any portion of the report to which an objection is not made. *See Thomas*, 474 U.S. at 150. On review, the Court "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). Accordingly, the Court will review de novo the portions of Judge Whalin's recommendation to which Jackson objects to determine if relief is warranted under the AEDPA.

III.

a. Jackson's Claims from Direct Appeal

1. Failure to Instruct on Self-Protection (Ground One)

Three of Jackson's claims concern trial errors and the issue of whether the Kentucky Supreme Court was correct to conclude that such errors were "harmless." A habeas petitioner is not entitled to relief based on trial error unless he can establish that it resulted in "actual prejudice." *See Brecht v.*

Abrahamson, 507 U.S. 619 (1993). The Court agrees with the Kentucky Supreme Court and Judge Whalin that Jackson has not met this standard.

At issue in ground one of Jackson's petition is the trial court's failure to instruct the jury on a self-protection defense for the lesser-included offenses of second-degree manslaughter and reckless homicide. (D.N. 1-1, PageID # 49) The Kentucky Supreme Court found that the trial court abused its discretion in failing to so instruct. *Jackson I*, 2010 WL 252244, at *9. The court held, however, that the error was harmless, given the fact that the jury chose to convict Jackson under the correctly phrased instruction of murder—a charge that placed an additional burden on the state to disprove Jackson's claim of self-protection. *Id.* at *10.

In his report and recommendation, Judge Whalin agreed, concluding that Jackson could not prove that the failure to instruct the jury on self-protection prejudiced him. (D.N. 29, PageID # 797) Jackson objects to this conclusion, arguing that the failure effectively denied him from utilizing the self-protection defense against the lesser-included charges. (D.N. 34, PageID # 837–38) Even if this is true, however, this goes to show only that the trial court erred. In his objection, Jackson again fails to show that the error was prejudicial, given that he was ultimately convicted under a correctly worded charge. Accordingly, Jackson has failed to meet his burden under *Brecht*, and the Court will adopt Judge Whalin's conclusion as to ground one.

2. Limited Impeachment of Prosecution Witness (Ground Three)

At issue in ground three of Jackson's petition is the trial court's limiting of his counsel's impeachment of Amber Baker, Jackson's ex-girlfriend, who provided testimony adverse to him. (D.N. 1-1, PageID # 54) At trial, the court limited defense counsel's questions regarding a prior and allegedly inconsistent statement Baker had given to investigator Joy Aldrich. The Kentucky Supreme Court found that while the trial court erred in this limitation, the error was harmless because Baker's testimony was later called into question anyway when defense counsel questioned Detective Cohen concerning statements that were substantially similar to the statements Baker allegedly made to Aldrich. *Jackson I*, 2010 WL 252244, at *8.

In his report and recommendation, Judge Whalin agreed with the Kentucky Supreme Court, adding that Jackson's counsel was otherwise granted significant latitude during cross-examination besides the limitation at issue. (D.N. 29, PageID # 799–800) Judge Whalin concluded that under the applicable standard, Baker had not shown that the trial court's error had a "substantial and injurious effect" on Jackson's case and thus it was "harmless" for purposes of his habeas petition. (*Id.*, PageID # 800 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680–81 (1986)))

In his objection, Jackson again contends that the limitation violated his rights under the Confrontation Clause. (D.N. 34, PageID # 839–42) As

in his objection to ground one, however, Jackson cites various Supreme Court cases interspersed with conclusory legal statements regarding his case. (*Id.*) Jackson does not directly address how the trial court's error was "substantial and injurious," besides stating the obvious that Baker's testimony was harmful to Jackson's overall defense. The fact that Baker ultimately gave adverse testimony does not render the trial court's error "substantial and injurious," however—especially when the testimony differed only slightly from the alleged inconsistent statement given to the investigator. (*See* D.N. 29, PageID # 799 (citing *Van Arsdall*, 475 U.S. at 680)) Accordingly, the magistrate judge correctly concluded that Jackson does not state a viable claim in ground three of his petition.

3. Inadmissible Reference to Possession of Handgun (Ground Seven)

At issue in ground seven is the trial court's admission of testimony regarding Jackson's possession of a small, silver handgun. Jackson claims that he was prejudiced by this testimony because the statements from Ditto and Scott indicated that a black handgun was used in the shooting of Washington. (D.N. 1-1, PageID # 63) The Kentucky Supreme Court agreed with Jackson that the testimony had a prejudicial effect that was not outweighed by its probative value, but ultimately concluded that the error was harmless since it did not have a "substantial influence" on the trial given the independent evidence that indicated Jackson's guilt. *Jackson I*, 2010 WL 252244, at *6 (citing *Winstead v. Commonwealth*, 283

S.W.3d 678, 688–89 (Ky. 2009)). Such evidence included the fact that:

> Jackson phoned Baker from prison and warned her not to tell investigators that he was known for having a gun, the fact that neither Washington nor Jackson had defensive wounds, that Jackson fled from the scene of the crime, that no murder weapon was recovered, that Jackson attempted to dispose of his clothes, and that Ditto saw Jackson threaten and intentionally strike an unarmed Washington with a loaded handgun.

(D.N. 29, PageID # 801) In his report and recommendation, Judge Whalin first noted that "[a]dmission of bad-acts evidence constitutes harmless error if the other record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error." (D.N. 29, PageID # 802 (citing *United States v. Hardy*, 643 F.3d 143, 153 (6th Cir. 2011) (internal quotations omitted))) Accordingly, Judge Whalin agreed with the Kentucky Supreme Court that the trial court's admission of the testimony at issue was harmless, given the testimony's brevity and the additional, overwhelming evidence that indicated Jackson's guilt. (*Id.*, PageID # 803)

In his objection, Jackson does not directly counter the magistrate judge's conclusion. Indeed, Jackson begins by recognizing that he undertakes a "daunting task" in seeking habeas relief under this ground. He then proceeds to blame his failure to satisfy his burden on the "facist AEDPA" and "[u]n[A]merican legal principles." (D.N. 34, PageID #

843) Jackson has not demonstrated how the trial court's error was harmful. The Court thus finds that the magistrate judge was correct in his conclusion that ground seven fails to state a viable claim.

4. Admissibility of Testimony Regarding the Position of Victim's Body (Ground Two)

At issue in ground two is the trial court's admission of testimony from two police officers called to the scene of the crime. At trial, the officers testified as to the position of Washington's body, concluding that the position was inconsistent with a fight or a struggle. (*See* D.N. 29, PageID # 803) The Kentucky Supreme Court held that the trial court properly admitted the officers' testimony as lay opinions under Kentucky Rule of Evidence 701. *Jackson I*, 2010 WL 252244, at *5.

In his petition, Jackson argues that because the jury had access to high-quality photographs of Washington's body at the crime scene, the officers' testimony was cumulative and the trial court erred in admitting it. (D.N. 1-1, PageID # 50–54 (citing *Allen v. United States*, 479 U.S. 1077 (1987))) Jackson also argues that the Kentucky Supreme Court based its decision on an unreasonable determination of the facts in light of the evidence presented. (*Id*.)

In his report and recommendation, Judge Whalin noted that Jackson's reliance on *Allen* was misplaced, given the fact that in *Allen* the Supreme Court vacated the lower court's judgment on grounds not involving lay-witness testimony. (D.N. 29, PageID # 805) Accordingly, Jackson pointed to no "clearly

established federal law" to support his argument. (*Id.* (citing *Jones v. Jamrog*, 414 F.3d 585, 591 (6th Cir. 2005))) As to Jackson's second argument, Judge Whalin concluded that the Kentucky Supreme Court could not have unreasonably determined facts as to this issue because the issue involved a straightforward application of law (i.e., Ky. R. Ev. 701) not of fact. (*Id.*)

In objection, Jackson merely parrots his previous arguments. (D.N. 34, PageID # 844–46) The Court need not consider an objection that simply restates the arguments set forth in a habeas petition. *VanDiver v. Martin*, 304 F. Supp. 2d 934, 937 (E.D. Mich. 2004) (observing that "[a]n objection that does nothing more than state a disagreement with a [magistrate judge's] suggested resolution, or simply summarizes what has been presented before, is not an objection" within the meaning of 28 U.S.C. § 636(b)(1)). The only new argument Jackson presents is a citation to *Remmer v. United States*, 347 U.S. 227 (1954). (D.N. 34, PageID # 845) In *Remmer*, however, the petitioner complained that an unnamed person had remarked to a juror during the petitioner's trial that the juror could profit by bringing in a verdict favorable to petitioner. 347 U.S. at 228. The issue of how a bribe purportedly from a defendant in a jury trial would affect a juror's determination of the case is far from the issue presented here. There is simply no evidence that the allegedly cumulative testimony improperly swayed the jury's thoughts. Accordingly, the Court will adopt the magistrate judge's conclusion as to ground two.

5. Initial Aggressor—Provocation Instruction (Ground Four)

At issue in ground four is the trial court's inclusion of a provocation qualification in the jury instruction on self-defense. The Kentucky Supreme Court concluded that the instruction was proper because the evidence indicated that Jackson may have intentionally provoked Washington on the night of the murder. (*See* D.N. 29, PageID # 806) In his petition, Jackson argues that this result is contrary to *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). (D.N. 1-1, PageID # 58–60) Jackson also contends that the provocation instruction stemmed from an unreasonable determination of the facts. (*Id.*)

First, as the magistrate judge noted, "*Estelle* has no holding that undermines the Kentucky Supreme Court's decision." (D.N. 29, PageID # 806) Indeed, *Estelle* states that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." 502 U.S. at 63. Second, as to Jackson's factual challenge, the magistrate judge concluded that the propriety of the provocation instruction was not an unreasonable determination. Specifically, the magistrate judge noted that "[t]he testimony at trial created an issue of fact as to whether Jackson intentionally provoked Washington." (D.N. 29, PageID # 807)

In his objection, Jackson cites several Supreme Court cases to argue that the state court's decision is contrary to established federal law. (D.N. 34, PageID # 847 (citing *Fiore v. White*, 531 U.S. 225 (2001); *Patterson v. New York*, 432 U.S. 197 (1977); *In Re*

Winship, 397 U.S. 358 (1970))) Each case, however, is wholly inapplicable to Jackson's claim. First, *Fiore* fails to even mention the term "jury," "provocation," or "instruction." *See* 531 U.S. 225. In *Patterson*, the Supreme Court held that due process is not violated by placing on a defendant the burden of proving by a preponderance of the evidence any proffered affirmative defenses. 432 U.S. at 206–07. If anything, then, *Patterson* actually hurts Jackson's argument. *Winship* is also inapplicable here. There, the Supreme Court held that the reasonable-doubt standard applies to juvenile defendants. 432 U.S. at 368. Jackson was not a juvenile at the time of his conviction, so it is unclear how *Winship* applies to this case. In sum, Jackson has failed to indicate clearly established federal law supporting his claim. The Court will accordingly adopt Judge Whalin's conclusions as to ground four.

7. Exclusion of Photographic Evidence (Ground Six)

At issue in ground six is the trial court's exclusion of photographic evidence demonstrating bruising to Jackson's wrist. During trial, Jackson sought to introduce a "mug shot," which allegedly showed redness along his wrists and supported his claim that Washington held him by the wrists during their struggle. (*See* D.N. 29, PageID # 809) The trial court concluded that the mug shot was inadmissible due to its poor quality. (*Id.*) The Kentucky Supreme Court affirmed, explaining that the poor quality created a serious danger of misleading the jury. *Jackson I*, 2010 WL 252244, at *9.

As explained in the report and recommendation, Jackson's only basis for challenging the court's ruling on this issue is a wholly inapplicable Supreme Court case. (*See* D.N. 1-1, PageID # 62–63 (citing *California v. Trombetta*, 467 U.S. 479 (1984))) In his objection, Jackson presents no new arguments. (*See* D.N. 34, PageID # 848–49) Accordingly, the Court will adopt the magistrate judge's conclusion as to ground six. *See VanDiver*, 304 F. Supp. 2d at 937.

8. Inadmissible Evidence in Jury Deliberations (Grounds Eight and Fourteen)

At issue in grounds eight and fourteen is Jackson's claim that he was denied due process because the jury allegedly considered during deliberations audio recordings from a crime-scene video that the trial court had excluded from evidence. (*See* D.N. 15-4, PageID # 236–37) As Judge Whalin explained, however, Jackson procedurally defaulted on this claim. (*See* D.N. 29, PageID # 810) Thus, Jackson must show cause for the default and resulting prejudice for the Court to consider the claim for habeas relief. (*Id.*, PageID # 811 (citing *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)))

To excuse the default, Jackson argues that the error was properly preserved due to ineffective assistance of counsel. (D.N. 1-1, PageID # 67–68) To establish ineffective assistance of counsel, Jackson must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness," and

the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 688, 690. The prejudice inquiry compels Jackson "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Judge Whalin concluded that Jackson had not shown prejudice, given that Jackson put forth no evidence that an "extraneous influence on a juror denied him a fair trial." (D.N. 29, PageID # 813) The magistrate judge also noted that Jackson had produced no evidence that the jury even viewed the video at issue. (*Id.*)

In his objection, Jackson largely presents his previous arguments, including caselaw that the magistrate judge correctly distinguished from the case at hand. (D.N. 34, PageID # 850 (citing *Remmer v. United States*, 347 U.S. 227 (1954))) Jackson also maintains that the state court misapplied *Strickland* in reaching its conclusion. (*Id.*) But Jackson has misinterpreted his burden. He failed to show that the recordings, even if listened to by the jury, altered the outcome of his trial. *See Strickland*, 466 U.S. at 694. Accordingly, the Court will adopt the magistrate judge's findings as to grounds eight and fourteen.

9. Failure to Strike Juror for Cause (Ground Nine)

At issue in ground nine is the trial court's denial of Jackson's motion to strike a prospective juror for cause. During voir dire, the juror at issue made

three statements that, according to Jackson, demonstrated the juror's inability to presume Jackson's innocence. Specifically, the juror alluded slightly to the belief that a defendant's possession of a gun or illegal drugs makes it more likely that a defendant committed other crimes. *See Jackson I*, 2010 WL 252244, at *3. The Supreme Court of Kentucky concluded that the trial court acted appropriately in not striking the juror, reasoning that the challenged responses were largely the result of leading hypothetical questions posed by defense counsel and that none of the statements actually revealed an inability to be impartial. *Id.*

Judge Whalin agreed with this analysis, noting that "[n]othing in Juror #24's testimony indicated that he would reject Jackson's presumption of innocence." (*See* D.N. 29, PageID # 816) The juror never explicitly stated that possession of a gun or illegal drugs makes it more likely that an individual has committed other crimes. Indeed, at most the record reflects a series of head nods and inaudible statements in response to defense counsel's leading questions. *See Jackson I*, 2010 WL 252244, at *3 ("Juror #24 nodded his head in agreement with defense counsel's statement that someone carrying a concealed handgun without a permit would be more likely to commit a crime.")

Jackson objects to the magistrate judge's findings, accusing him of "blindly accept[ing] the determination of [the] trial court." (D.N. 34, PageID # 852) But this criticism is misplaced. As Judge Whalin explained, "[t]he resolution of the question of a juror's bias is a finding of fact which is entitled to a 'presumption of correctness' under 28 U.S.C. § 2254(d)

and 'may only be overturned where manifest error is shown.'" (D.N. 29, PageID # 816 (quoting *Holder v. Palmer*, 558 F.3d 328, 339 (6th Cir. 2009))) Judge Whalin concluded that Jackson had not shown that the trial court manifestly erred in not striking the juror. (*Id*.) Jackson does nothing to refute this conclusion, and therefore the Court will adopt Judge Whalin's conclusion as to ground nine.

10. Refusal to Instruct on "No Duty to Retreat" (Ground Ten)

At issue in ground ten is Jackson's claim that the trial court's refusal to instruct the jury on "no duty to retreat" was reversible error. (D.N. 1-1, PageID # 77) The Kentucky Supreme Court held that the trial court did not err in so refusing in light of the court's decision in *Hilbert v. Commonwealth*, 162 S.W.3d 921 (Ky. 2005), which was controlling at the time of Jackson's trial. *See Jackson I*, 2010 WL252244, at *12. In *Hilbert*, the Kentucky Supreme Court held that "when the trial court adequately instructs on self-defense, it need not also give a no duty to retreat instruction." 162 S.W.3d at 926.

In his recommendation, the magistrate judge similarly concluded that the caselaw was against Jackson on this issue. (D.N. 29, PageID # 817) Jackson's objection to this conclusion consists of reiterated previous arguments and conclusory legal statements. Again, the Court need not consider an objection that merely restates the arguments set forth in a habeas petition.

VanDiver, 304 F. Supp. 2d at 937. Accordingly, the Court will adopt the magistrate judge's conclusion as to ground ten.

b. Jackson's Rule 11.42 Claims—Ineffective Assistance of Counsel

1. Failure to Move for a Special Verdict Form (Ground Eleven)

At issue in ground eleven is Jackson's allegation that his trial counsel performed deficiently by failing to move for a separate verdict form, which would have required the jury to specify whether it was finding Jackson guilty of intentional or wanton murder. (D.N. 1-1, PageID # 79–83) Again, to establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Strickland*, 466 U.S. at 687.

Judge Whalin concluded that Jackson failed to establish that the result of his trial would have been different had trial counsel objected to this combination jury instruction. (*See* D.N. 29, PageID # 818 (citing *Strickland*, 466 U.S. at 687)) In his objection, Jackson again primarily reasserts previous arguments, including his citation to *Schad v. Arizona*, 501 U.S. 624 (1991), which the magistrate judge distinguished in his report and recommendation. (*See* D.N. 34, PageID # 854–55) Jackson fails to show how a separate verdict form would have changed the outcome of his trial. Because Jackson has not satisfied *Strickland*'s prejudice prong, the Court will adopt the magistrate judge's conclusions as to ground eleven.

2. Failure to Advise Jackson of the Law of Self-Defense (Ground Twelve)

At issue in ground twelve is Jackson's allegation that his trial counsel was ineffective by coercing him into testifying and by misadvising him as to the law of self-defense. (D.N. 1-1, PageID # 83–86) Specifically, Jackson argues that his trial counsel was deficient when she incorrectly advised him that Kentucky's codification of the "no duty to retreat" doctrine (SB 38) would apply to his trial and thus support a no duty to retreat jury instruction. *Id.* He thus claims that this incorrect advice tricked him into testifying at trial.

The Kentucky Court of Appeals concluded that Jackson failed to establish that his trial counsel was deficient in this regard. *Jackson II*, 2015 WL 1648058, at *5. That court found that "[i]t was not unreasonable for trial counsel, in light of SB 38, to seek a no duty to retreat instruction." *Id.* The court therefore held that trial counsel's performance was not deficient and as such *Strickland*'s performance prong was not satisfied. *Id.*

In his habeas petition, Jackson argues that but for his trial counsel's poor advice regarding the applicability of SB 38, there is a reasonable probability that he would not have testified. (D.N. 1-1, PageID # 83–86) In his report and recommendation, Judge Whalin concluded, however, that Jackson could not establish either prong of *Strickland*. Specifically, Judge Whalin concluded that "tendering a 'no duty to retreat' instruction was reasonable in light of the

uncertain applicability of SB 38." (D.N. 29, PageID # 819) Moreover, the magistrate judge concluded that regardless of whether Jackson's counsel's performance was deficient, Jackson had not established *Strickland*'s prejudice prong. (*Id.*, PageID # 820)

In his objection, Jackson attacks the magistrate judge's conclusion as to prong one of *Strickland*. (D.N. 34, PageID # 855–57) Yet as stated, the magistrate judge also concluded that regardless of deficient performance by Jackson's trial counsel, Jackson had failed to establish that the deficiencies prejudiced his defense. Jackson's only retort to this finding is that "[i]n light of the particular facts of this issue, prejudice must be presumed." (*Id.*, PageID # 857) Jackson has misstated his burden, however, and the Court need not "presume" prejudice where the petitioner has not adequately shown such prejudice. *Strickland* held that prejudice is presumed in limited circumstances only (i.e., denial of the assistance of counsel altogether or when counsel is burdened by an actual conflict of interest). *Strickland*, 466 U.S. at 692. Neither of these situations is applicable here. The Court therefore agrees with the magistrate judge that "Jackson fails to identify how not taking the stand at trial and not testifying to a theory of self-defense would have changed the outcome of his case." (D.N. 29, PageID # 820)

3. Failure to Present Mitigation Witnesses (Ground Thirteen)

Finally, at issue in ground thirteen is Jackson's allegation that his trial counsel rendered ineffective

assistance by failing to call any mitigation witnesses during the sentencing phase of his trial. (D.N. 1-1, PageID # 86–89) In his report and recommendation, Judge Whalin concluded that "[a]fter reviewing the record, the evidence demonstrates that trial counsel attempted to contact mitigation witnesses for Jackson's case but was not able to get into contact with them." (D.N. 29, PageID # 821) Accordingly, the magistrate judge concluded that Jackson had failed to satisfy *Strickland*'s performance inquiry. (*Id.*) *See also Williams v. Lafler*, 494 F. App'x 526, 531 (6th Cir. 2012) (finding that a lawyer's diligent effort to locate favorable witnesses was "reasonable" under *Strickland*).

In objection, Jackson again reasserts his previous arguments. As stated, the Court need not consider an objection that merely restates the arguments set forth in a habeas petition. *See VanDiver*, 304 F. Supp. 2d at 937. Accordingly, the Court will adopt Judge Whalin's conclusion as to ground thirteen.

IV.

After de novo review of the substance behind Jackson's objections to Judge Whalin's Findings of Fact, Conclusions of Law, and Recommendation, the Court concludes that the Findings of Fact, Conclusions of Law, and Recommendation are correct. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) The Findings of Fact, Conclusions of Law, and Recommendation of the magistrate judge (D.N. 29) are **ADOPTED** in full and **INCORPORATED** by reference herein.

(2) Jackson's objections to the Findings of Fact, Conclusions of Law, and Recommendation (D.N. 34) are **OVERRULED**.

(3) A separate judgment will be issued this date.

November 6, 2017

United States District Court
David J. Hale, Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:16CV-00091-DJH

SHAWNTELE CORTEZ JACKSON
PETITIONER/DEFENDANT

VS.

WARDEN KATHY LITTERAL
RESPONDENT/PLAINTIFF

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

Shawntele Cortez Jackson ("Jackson") is a Kentucky prisoner that was convicted by a jury in Jefferson County, Kentucky, for murder and tampering with physical evidence. Jackson has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 for relief from his convictions. (DN 1). Respondent Kathy Litteral ("Warden") has responded (DN 15), and Jackson has replied (DN 26). The District Judge referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §§636(b)(1)(A) and (B) for rulings on all nondispositive motions; for appropriate hearings, if necessary; and for findings of fact, conclusions of law, and recommendations on any dispositive matter. (DN 8). This matter is ripe for review.

FINDINGS OF FACT

A. May 16, 2006 Events

Jackson's convictions arise from the fatal shooting of Richard Lee Washington in the Iroquois housing projects in Louisville, Kentucky, on May 16, 2006. *Jackson v. Commonwealth*, No. 2007-SC-000392-MR, 2010 WL 252244, at *1 (Ky. Jan. 21, 2010).

The events of that night unfolded as follows. Jackson, then twenty-years-old and living off-and-on with his girlfriend, Dominique Rudolph, in an apartment in the Iroquois projects, received a phone call from an individual who owed him money. *Id.* Jackson and his acquaintance, D'Angelo Scott, approached Dora Ditto and her boyfriend, Richard Lee Washington, and offered to pay them ten dollars for a ride to the convenience store. *Id.* Ditto and Washington agreed and drove the foursome to the convenience store. *Id.* Jackson met his debtor and collected the money. *Id.*

Before leaving the convenience store, Jackson and Washington started verbally arguing and continued to argue until the group reached the Iroquois projects. *Id.* Jackson claims that Washington started the argument because he wanted more "dope." *Id.* But both Ditto and Scott testified that the argument involved a missing cell phone. *Id.*

From this point forward, Jackson's account of events differs markedly from Ditto's and Scott's. *Id.* Jackson testified that Washington and Ditto exited the

vehicle first and walked toward the trunk while he and Scott remained in the back seat. *Id.* According to Jackson, Ditto then removed a black handgun from the trunk and handed it to Washington. *Id.* Jackson exited the vehicle, stepped onto the sidewalk, and resumed his argument with Washington. *Id.* Allegedly Washington approached Jackson and threatened to kill him. *Id.* Yelling and shoving ensued. At some point shortly thereafter, Jackson saw Washington draw a handgun. *Id.* Jackson grabbed Washington's wrists, and the two men struggled for possession of the handgun. *Id.* During this struggle, the gun fired while in Washington's right hand and struck Washington in the back of the head.

Ditto, on the other hand, testified that Jackson was the first to exit the vehicle upon returning to Iroquois and that he walked toward a group of apartments before backtracking to inform the group that he had found his cell phone. *Id.* Ditto explains that Jackson then asked Washington for another ride, which Washington refused. *Id.* According to Ditto, Jackson then hit Washington in the head with a handgun, ordered Ditto to get on the sidewalk, and told Washington he "ought to kill him." *Id.* Jackson proceeded to strike Washington again with the gun, causing it fire and kill Washington. *Id.* Similarly, Scott testified that he remembered Jackson and Washington fighting and that Jackson "backed up and charged at Washington, swinging his right arm and hitting Washington in the face." *Id.* Scott stated that he heard the gun fire but did not recall seeing either man with a firearm earlier that night. *Id.*

After Washington was shot, Jackson states that

he ran to Rudolph's apartment because he was scared and high. *Id.* Jackson asserts that he fell asleep and did not wake or leave the apartment for thirty-six hours. *Id.* According to Ditto, Jackson immediately ran from the scene with a gun in his hand. *Id.* Scott testified that he also went to Rudolph's apartment after the shooting and slept but remembered that Jackson arrived sometime later in the night. *Id.* At trial, the Commonwealth presented the testimony of Amber Baker, Jackson's ex-girlfriend, on this point. *Id.* Baker testified that Jackson arrived at her apartment within ten to fifteen minutes of the shooting looking scared and watching out her screen door for approximately twenty minutes before leaving. *Id.*

It was determined that Washington died instantaneously and his cause of death was a gunshot wound to the lower back right part of his skull. *Id.* Although police never recovered a weapon, the bullet in Washington's skull was consistent with a .45 caliber automatic handgun. *Id.* The medical examiner noted that Washington did not have any defensive wounds but did have a contusion over his left eyebrow and lacerations over his left cheekbone. *Id.*

B. Procedural Background

Less than two weeks after these events, a grand jury in Jefferson County, Kentucky, indicted Jackson on charges of (1) murder under KRS § 507.020 and (2) tampering with physical evidence under KRS 524.100 (DN 15-12, at pp. 5-6). The case proceeded to a jury trial in Jefferson County Circuit Court. The jury found Jackson guilty of both charges. (DN 15-16, at pp. 19-20). The trial court sentenced Jackson to fifty years

imprisonment for murder and one year imprisonment for tampering with physical evidence, to run concurrently. (*Id.* at p. 40).

Jackson timely appealed his convictions to the Supreme Court of Kentucky. (DN 15-4). Jackson's counsel raised ten allegations of error on appeal. (*Id.*). The Supreme Court of Kentucky affirmed Jackson's judgment of conviction and sentence in its entirety on January 21, 2010. *Jackson*, 2010 WL 252244, at *13. He did not file a writ of certiorari with the United States Supreme Court.

Jackson next filed a *pro se* RCr 11.42 collateral attack in the Jefferson Circuit Court on January 31, 2011. He alleged seven claims of ineffective assistance of counsel and a claim of cumulative error. (DN 15-8; DN 15-9). The Jefferson Circuit Court appointed Jackson counsel, but his counsel declined to supplement Jackson's RCr 11.42 motion. Instead, Jackson filed a supplemental *pro se* RCr 11.42 motion raising three additional grounds of ineffective assistance of counsel. The Jefferson Circuit Court held an evidentiary hearing on July 19, 2013, where Jackson's trial counsel and Jackson's sister testified, but the court ultimately denied his RCr 11.42 motion. (*Id.* at p. A232). Jackson appealed five of his RCr 11.42 claims to the Kentucky Court of Appeals, which affirmed the state trial court's decision. *Jackson v. Commonwealth*, No. 2013-CA-001727-MR, 2015 WL 1648058 (Ky. Ct. App. Apr. 10, 2015). Jackson then sought discretionary review from the Supreme Court of Kentucky, but his request was denied on February 10, 2016. (DN 15-10, at p. A306).

One week later, Jackson filed the instant petition for writ of habeas corpus, raising the ten claims from his direct appeal, the five claims of ineffective assistance of counsel from his RCr 11.42 motion, and a claim of cumulative error. (DN 1).

CONCLUSIONS OF LAW

A. Standard of Review

The federal habeas statute, as amended in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides relief from a state conviction if the petition satisfies one of the following conditions:

> The [state court's] adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court of the United States has carefully distinguished federal habeas review from review on direct appeal. As to § 2254(d)(1), when the state court articulates the correct legal rule in its

review of a claim, 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." *Williams v. Taylor*, 529 U.S. 362, 411, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Tolliver v. Sheets*, 594 F.3d 900, 916 (6th Cir. 2010). Instead, the Court must ask "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams,* 529 U.S. at 409. The phrase "contrary to" means "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (citing Webster's Third New International Dictionary 495 (1976)). Thus, under the "contrary to" clause of § 2254(d)(1), the Court may grant the petition if (a) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; **or** (b) the state court decides a case differently than the Supreme Court "has on a set of materially indistinguishable facts." *Id.* at 405-06, 412-13.

As to § 2254(d)(2), a federal habeas court may not substitute it's evaluation of the state evidentiary record for that of the state trial court unless the state determination is unreasonable. *Rice v. Collins*, 546 U.S. 333, 341-42, 126 S. Ct. 969, 163 L.Ed.2d 824 (2006). This subsection applies when a petitioner challenges the factual determinations made by the State court. *See Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001) (challenging the state court's determination that the evidence did not support an aiding and abetting suicide instruction); *Clark v. O'Dea*, 257 F.3d 498, 506 (6th Cir. 2001) (challenge to state court's factual determination that Sheriff has not seen letter

prior to Clark's trial).

B. Jackson's Claims from Direct Appeal

1. Harmless Error Claims

Three of Jackson's habeas claims challenge the Kentucky Supreme Court's finding that certain errors committed by the trial court were "harmless." When a state appellate court has determined – consistent with the standard in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) – that a federal constitutional error is harmless beyond a reasonable doubt, both AEDPA's § 2254(d) and the "actual prejudice" requirement first articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L.Ed.2d 352 (1993) impel that deference be given to the state court's decision. *See Davis v. Ayala*, -- U.S. --, 135 S. Ct. 2187, 2197, 192 L.Ed.2d 323 (2015) (quoting *Fry v. Pliler*, 551 U.S. 112, 120, 127 S. Ct. 2321, 168 L.Ed.2d 16 (2007)). The federal habeas court "need not formally apply both" tests because "the *Brecht* standard subsumes the requirements that § 2254(d) imposes . . ." *Id.* at 2198.

A petitioner is not entitled to relief based on trial error, under *Brecht*, unless he can establish that it resulted in "actual prejudice." *Id.* at 2197 (quoting *Brecht*, 507 U.S. at 619) (additional citation omitted). Relief is only proper, "if the federal court has "grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2198 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995)). As the Supreme Court has

summarized, a petitioner "must show that the state court's decision to reject his 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 2198-99 (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011)).

a. Failure to Instruct on Self Protection (Ground 1)

Jackson first takes issue with the Kentucky Supreme Court's harmless error determination regarding the trial court's denial of self-protection jury instructions as to the lesser-included offenses of second-degree manslaughter and reckless homicide. (DN 1-1, at p. 6). At the conclusion of the trial, the court proffered instructions to the jury on the offenses of murder, second-degree manslaughter, and reckless homicide. The murder instruction included an additional element that required the Commonwealth to prove that Jackson did not act in self-protection. Neither the second-degree manslaughter instruction nor the reckless homicide instruction included a self-protection element. Although Jackson challenged this omission, the trial court concluded that self-protection was not an available defense to the "non-intentional" offenses of second-degree manslaughter and reckless homicide.

On appeal, the Kentucky Supreme Court found that the trial court abused its discretion in denying Jackson's self-protection instruction for the instructed offenses of second-degree manslaughter and reckless homicide based on *Elliott v. Commonwealth*, 976

S.W.2d 416, 422 (Ky. 1998) and *Commonwealth v. Hager*, 41 S.W.3d 828, 833 n. 1 (Ky. 2001). *Jackson*, 2010 WL 252244, at *9. But because this error did not have "substantial influence" on Jackson's trial, the Kentucky Supreme Court found the error was harmless. *Id.* at *9-10. The court emphasized that in spite of the error, the jury chose to convict Jackson under "the correctly phrased instruction of murder, one which properly incorporated the Commonwealth's additional burden to disprove [Jackson's] self-protections claim beyond a reasonable doubt." *Id.* at *10.

Now, Jackson claims the Kentucky Supreme Court's finding of harmless error was improper because it denied him the right to present a defense. (DN 1-1, at p. 6; DN 26, at p. 4). As an initial matter, instructional error is subject to harmless error analysis. *See Hedgepeth v. Pulido*, 555 U.S. 57, 60-61, 129 S. Ct. 530, 172 L.Ed.2d 388 (2008). Although the Kentucky Supreme Court did not cite to *Chapman*, 386 U.S. 18, it clearly found the instructional error was harmless beyond a reasonable doubt. In order for Jackson to succeed, therefore, he must demonstrate that he was actually prejudiced by the omission of self-protection instructions for second-degree manslaughter and reckless homicide. Where an alleged error is failure to give an instruction, a petitioner's burden is "especially heavy" because "[a]n omission or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L.Ed.2d 203 (1977).

Although the trial court denied a

"self-protection" element in the second-degree manslaughter and reckless homicide instructions, the jury instructions "as a whole" did not render the instructions or the trial fundamentally unfair. *See Scott v. Mitchell*, 209 F.3d 854, 882 (6th Cir. 2000). The trial court included a self-protection instruction within "Instruction No. 1 - Murder," the charge upon which the jury ultimately convicted Jackson. (DN 15-16, at p. 6). The trial court also included "Instruction No. 5 – Self-Protection," which specified that even if Jackson might otherwise be guilty of an offense described in "Instruction No. 1 [Murder], No. 2 [Manslaughter in the Second Degree], or No. 3 [Reckless Homicide]" that if at the time "Jackson believed that physical force was then and there about to be used upon him, he was privileged to use such physical force as he believed to be necessary in order to protect himself against it . . ." (*Id.* at pp. 10-12). Because Jackson was convicted under the correctly-phrased murder instruction and because Jackson does not otherwise prove that this error prejudiced his entire trial, the Kentucky Supreme Court's harmless error determination does not warrant habeas relief.

b. Limited Impeachment of Prosecution Witness (Ground 3)

Jackson also disagrees with the Kentucky Supreme Court's determination that the trial court's error in limiting his ability to impeach a prosecution witness was harmless. (DN 1-1, at p. 11). At trial, the Commonwealth called Amber Baker, Jackson's ex-girlfriend, to testify that Jackson came to her apartment approximately ten minutes after the

shooting, acting scared and looking out her screen door. Baker testified this occurred between 11:30 pm and 1:30 am. On cross-examination, Jackson's counsel attempted to impeach Baker by asking whether she recalled giving a prior statement to investigator Joy Aldrich, but Baker testified that she could not recall the statement. After a bench conference, the court determined that Aldrich would have to testify as to the contents of the report and Jackson's counsel could not ask Baker about the statement because she could not recall it. The next day, Aldrich testified to the report. After another bench conference, the court ruled that Aldrich could not read Baker's statement aloud to impeach her because Baker's denial was not evasive but rather an inability to recall.

The Kentucky Supreme Court found the trial court erred in limiting Jackson's ability to impeach Baker because Baker's inability to recall speaking with Aldrich constituted inconsistency for purposes of KRE 613. *Jackson*, 2010 WL 252244, at *8. The court, nevertheless, concluded that this error was harmless because "the substantive value of Baker's prior statement was quite low" and because Baker's testimony was later called into question when Jackson's counsel questioned Detective Cohen about Baker's statements that were substantially similar to those she made to Aldrich. *Id.* Based on those considerations, the court found Baker's limited impeachment did not substantially sway Jackson's conviction. *Id.* (citing *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009)).

Jackson presently argues that the Kentucky Supreme Court's opinion is contrary to or involved an

unreasonable application of *Alford v. United States*, 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218 (1931). (DN 1-1, at pp. 11-12). According to Jackson, "[i]t has repeatedly been held that a trial court abuses its discretion when it completely bars exploration of a relevant subject on cross-examination[,]" including the government witness's credibility. (*Id.* at p. 13). Jackson posits that the trial court's limiting of Baker's cross-examination violated his confrontation clause rights by denying a substantial right of a safeguard essential to a fair trial. (*Id.* at pp. 14- 15).

In *Alford*, the Supreme Court held that "[c]ross-examination of a witness is a matter of right." 282 U.S. at 691. It is well-established, however, that the right is not absolute, *see United States v. Beverly*, 369 F.3d 516, 535 (6th Cir. 2004), and trial courts retain wide latitude in imposing reasonable limits on cross-examination. Further, a trial court's limitation of cross-examination is generally subject to the harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-81, 106 S. Ct. 1431, 89 L.Ed.2d 674; *Arizona v. Fulminante*, 499 U.S. 279, 307, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). When conducting harmless-error analysis of Confrontation Clause violations in the Sixth Circuit, courts assess the prejudicial impact under the "substantial and injurious effect" standard in *Brecht* by applying the factors from *Delaware v. Van Arsdall*. *Id.* (citing *Jensen v. Romanowski*, 590 F.3d 373, 379 (6th Cir. 2009)). The *Van Arsdall* factors include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of

cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." 475 U.S. at 684.

Applying these factors, the Court does not have grave doubt as to whether the "error" at Jackson's trial substantially influenced the jury. First, it is important to note that the Kentucky Supreme Court did not find the trial court violated the Sixth Amendment but, rather, found the trial court erred in prohibiting impeachment by prior inconsistent statement under KRE 613 and Kentucky case law. *Jackson*, 2010 WL 252244, at *8. Nonetheless, even if the trial court violated the Sixth Amendment, Jackson cannot prove the error substantially influenced the jury's decision.

The testimony at issue was Baker's interview with Investigator Aldrich, in which Baker stated that Jackson arrived at her house at 11:00 pm and omitted whether she heard gunshots or observed Jackson acting scared. This testimony differed slightly from the testimony Baker gave on direct examination at trial but does not cumulatively render her testimony contradictory. A review of the trial CDs demonstrates that trial counsel was not otherwise limited during her fifteen-minute cross-examination of Baker, as she was permitted to question Baker about Jackson's phone calls to her from prison, about gossip in the Iroquois Park neighborhood, and about her interaction with Jackson on the night of the crime in her apartment. Trial counsel's cross-examination also revealed that Baker first stated that Jackson seemed scared on the night of the crime and that he came to her apartment after the shots were fired on the day before trial to prosecutors. Additionally, the prosecution's case did

not rest solely on Baker's testimony. The prosecution provided testimony from two eyewitnesses to the crime and testimony from Dominque Rudolph, who also had contact with Jackson on the night of the crime.

Taking trial counsel's cross-examination of Baker as a whole, the Court finds the trial court's error did not have a substantial and injurious effect on Jackson's case and, as a result, the Kentucky Supreme Court's harmless error determination is not contrary to or an unreasonable application of clearly established federal law.[1]

c. Inadmissible Reference to Possession of Handgun (Ground 7)

Next Jackson takes issue with the Kentucky Supreme Court's holding that the admission of testimony regarding Jackson's possession of a handgun unrelated to the offense being tried was not reversible error. (DN 1-1, at p. 20). At trial, the court permitted Amber Baker to testify that three to four days before the shooting she had seen Jackson in possession of a small, silver handgun. The statements from Ditto and Scott at trial, however, indicated that a different, black handgun was used in the shooting of Washington.

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[1] Jackson also argues that the Kentucky Supreme Court's decision was "based on an unreasonable determination of the facts[.]" (DN 1-1, at p. 11). Yet Jackson fails to cite to any facts or develop this argument, and the Court will not address this cursory claim. Jackson similarly makes unsupported "unreasonable determination of the facts" arguments in numerous other claims in his petition. This Court will only address Jackson's factual challenges where he has offered support for his claims.

Based on this discrepancy and because a handgun was never recovered, Jackson argued the admission of Baker's testimony was prejudicial.

The Kentucky Supreme Court agreed with Jackson that the probative value of Baker's statement did not outweigh the prejudicial effect. *Jackson*, 2010 WL 252244, at *6. Even though the Kentucky Supreme Court found the trial court abused its discretion in that respect, it decided the effect was ultimately harmless. *Id.* The court noted that the error did not have "substantial influence" upon Jackson's trial and did not "substantially sway" his conviction because independent evidence strongly suggested Jackson's guilt. *Id.* The independent evidence noted by the court included evidence that Jackson phoned Baker from prison and warned her not to tell investigators that he was known for having a gun, the fact that neither Washington nor Jackson had defensive wounds, that Jackson fled from the scene of the crime, that no murder weapon was recovered, that Jackson attempted to dispose of his clothes, and that Ditto saw Jackson threaten and intentionally strike an unarmed Washington with a loaded handgun. *Id.*

In his habeas claim, Jackson argues the Kentucky Supreme Court's determination was contrary to or an unreasonable application of *United States v. McFadyen-Snider*, 552 F.2d 1178 (6th Cir. 1977), *cert. denied,* 435 U.S. 995, (1978). Jackson also provides an in depth discussion of KRE 404, arguing that Baker's testimony about him carrying a silver handgun days before the crime is plainly proscribed by both sections (a) and (b). Neither of these arguments merits relief. Firstly, the Supreme Court denied

certiorari in *McFadyen-Snider v. United States,* and, therefore, it cannot constitute clearly established federal law. *See Jones v. Jamrog*, 414 F.3d 585, 591 (6th Cir. 2005). Secondly, the Kentucky Supreme Court agreed with Jackson's current arguments – specifically that the Commonwealth's proffered reason for introducing Baker's testimony was a use prohibited by KRE 404(b) and that the probativeness of the testimony was minimal under KRE 403. *Jackson*, 2010 WL 252244, at *6. It is also necessary to clarify that because the Kentucky Supreme Court found this was an error in the application of state evidentiary law, it is generally not cognizable on habeas review. *See Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir.2003) (quoting *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983)).

As for the court's harmless error determination, Jackson argues in his reply that whether or not there was sufficient evidence on which he could have been convicted without the prejudicial testimony is not the focus of the harmless error analysis. (DN 26, at p. 20 (quoting *United States v. Desantis*, 134 F.3d 760, 769 (6th Cir. 1998)). Rather, Jackson argues the correct inquiry is "whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." (*Id.* (quoting *Desantis*, 134 F.3d at 769)). He explains that the prior bad-act testimony is particularly damaging in that it only suggests that he was a bad person and threat to society to the jury. (*Id.*). Jackson specifically points out that Juror 24 stated in *voir dire* that if evidence showed Jackson was carrying a gun, he would think Jackson was more likely to commit a crime, and Juror 24 did not say whether he could put those feelings aside to listen to the evidence. (*Id.* at pp. 20-21). To

Jackson, these statements from Juror 24 and the fact that the admissible evidence was far from overwhelming as to who actually had the gun on the night of the murder, demonstrates a reasonable probability that Baker's "unrelated silver handgun" testimony contributed to his conviction.

The Court agrees with Jackson that the proper inquiry on habeas review is whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *See Chapman v. California,* 386 U.S. 18, 25 (1967). Admission of bad-acts evidence "constitutes 'harmless error' if the other record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error." *United States v. Hardy*, 643 F.3d 143, 153 (6th Cir. 2011), *cert. denied,* 565 U.S. 1063 (2011). To answer these questions, the court reviews in detail the trial record and emphasizes the evidence adduced at trial. *Boone v. Marshall*, 591 F. Supp. 172, 175 (S.D. Ohio 1984) (citing *United States v. Hasting*, 461 U.S. 499, 510, 103 S. Ct. 1974, 76 L.Ed.2d 96 (1983); *Chapman*, 386 U.S. at 24) (additional citations omitted)).

Here, there is no reasonable possibility that the evidence complained of might have contributed to Jackson's conviction. Baker's testimony as to the silver handgun was brief and, as the Kentucky Supreme Court noted, the other record evidence of Jackson's guilt was overwhelming. The jury could have readily inferred that Jackson possessed a handgun based on the whole of the trial record. The Court, therefore, believes, beyond a reasonable doubt, that the trial court would have rendered a verdict of guilty, even in

the absence of testimony concerning Jackson's earlier possession of a silver handgun. Having concluded the error was harmless, the Court recommends denying habeas relief for this claim.

2. Admissibility of Testimony Regarding the Position of the Victim's Body (Ground 2)

Jackson disagrees with the Kentucky Supreme Court's determination that Officer King and Detective Cohen's testimony regarding the position of Washington's body was proper lay testimony. (DN 1-1, at pp. 7-8). At Jackson's trial, the Commonwealth called Officer King and Detective Cohen to testify as to their observations at the crime scene and their opinions as to several photographs displaying the positioning of Washington's body. Both Officer King and Detective Cohen testified that the positioning of Washington's body was inconsistent with a fight or a struggle. Jackson objected to this testimony as being based on speculation. Although the trial court overruled Jackson's objections, it required both men to establish a foundation as to their experience.

The Kentucky Supreme Court found that both witnesses' opinions were admissible as lay opinions under Kentucky Rule of Evidence 701 because the witnesses rationally drew inferences from their first-hand perceptions at the crime scene. *Jackson*, 2010 WL 252244, at *5. While recognizing that the jury had photographs of the scene, the Kentucky Supreme Court remarked that Officer King and Detective Cohen's eyewitness testimony on the subject matter could help the jury with their interpretation of the fact at issue – namely, Jackson's claim of

self-defense. *Id.*

Jackson now argues the Kentucky Supreme Court's decision was contrary to or involved an unreasonable application of *Allen v. United States*, 479 U.S 1077, 107 S. Ct. 1271, 94 L.Ed.2d 132 (1987). (DN 1-1, at p. 8). Jackson explains that because the photographs of Washington's body at the crime scene were high quality, clear, and complete, and obviously reveal the characteristics Officer King and Detective Cohen described, their testimony did not aid the jury in determining whether a struggle had occurred. (*Id.* at pp. 8-11).

Jackson's reliance on *Allen* is misplaced. In that case, the defendant Lorenzo Allen was convicted of armed bank robbery and appealed his conviction arguing the testimony of a police officer and parole officer identifying him and his co-defendant as the individuals appearing in bank surveillance photographs was improper. *Allen*, 787 F.2d 933, 935-36 (4th Cir. 1986). The Fourth Circuit found no error in the lay witness testimony and affirmed Allen's conviction. *Id* Allen subsequently petitioned for a writ of certiorari to the Supreme Court, which was granted. *Allen*, 479 U.S. at 1077. The Supreme Court then vacated the Fourth Circuit's judgment on grounds not involving the lay-witness testimony issue and remanded the case for further consideration in light of *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987).[2] *Allen*, therefore, is not "clearly

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[2] In *Griffith*, the United States Supreme Court held that a new rule for the conduct of criminal prosecutions, such as the ruling in

established Federal law, as determined by the Supreme Court" because the Supreme Court did not issue a substantive opinion and remanded the case based on grounds unrelated to the lay witness testimony issue. *See Jones v. Jamrog*, 414 F.3d 585, 591 (6th Cir. 2005) ("A legal doctrine is not 'clearly established federal law, as determined by the Supreme Court' unless it is based on 'holdings, as opposed to the dicta, of the Court's decisions as of the time of the relevant state-court decision.'") (quoting *Williams v. Taylor*, 529 U.S. at 412). No relief is warranted under § 2254(d)(1).

Jackson also believes the Kentucky Supreme Court based its decision on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Specifically, Jackson argues that all of the eye witnesses from the incident testified that he and Washington were shoving each other immediately prior to the gun going off, which controverts the opinions of Officer King and Detective Cohen. (*Id.* at pp. 10-11). There was no "unreasonable determination of the facts," however, because the Kentucky Supreme Court based its decision to admit the lay testimony of Officer King and Detective Cohen on its appropriateness under KRE 701. "Errors in application of state law, especially with regard to the admissibility of the evidence, are usually

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Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d *69* (1986) applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. 479 U.S. at 314. This holding has no bearing on Jackson's habeas claim involving the admissibility of photographic evidence.

not cognizable in federal habeas corpus." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir.2003) (quoting *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983)); *see also Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Further, merely noting inconsistency between eyewitness testimony of the incident and the opinions of law enforcement does not render the state court's factual findings unreasonable. Jackson's § 2254(d)(2) argument is, thus, unsuccessful.

3. Initial Aggressor – Provocation instruction (Ground 4)

Jackson argues the Supreme Court of Kentucky erred in upholding the inclusion of a provocation qualification in the jury instruction on self-defense. (DN 1-1, at p. 15). The trial court included a provocation qualification to "Instruction No. 5 – Self Protection" pursuant to KRS 503.060(2). (DN 15-16, at pp. 10-12). The Kentucky Supreme Court found this instruction was proper because the testimony at trial indicated that Jackson may have intentionally provoked Washington. *Jackson*, 2010 WL 252244, at *10-11.

This determination, Jackson argues, is contrary to or involves an unreasonable application of *Estelle v. McGuire* and was an unreasonable determination of the facts. (DN 1-1, at p. 15). Jackson recognizes that it is well-established that a provocation qualification in a self-defense instruction does not violate due process if the evidence at trial was sufficient to warrant such

an instruction but argues that there was no evidence that he introduced the firearm into the physical altercation and that the evidence demonstrates Washington was actually the initial aggressor. (*Id.* at pp. 16-17).

First, *Estelle* has no holding that undermines the Kentucky Supreme Court's decision. In fact, *Estelle* states "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." 502 U.S. at 63. Second, in order to furnish a ground for habeas relief, a defective jury instruction must impinge on a federal constitutional right. A petitioner seeking habeas relief based on an alleged constitutional error from a jury instruction that quotes a state statute faces an "especially heavy" burden. *See Waddington v. Sarasud*, 555 U.S. 179, 129 S. Ct. 823, 172 L.Ed.2d 532 (2009) (quoting *Henderson* 431 U.S. at 155). The pertinent inquiry is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 400-01, 38 L.Ed.2d 368 (1973) (additional citation omitted)). The Court concludes that including a provocation jury instruction did not result in a conviction that violated due process and the Kentucky Supreme Court's decision was not contrary to or an unreasonable application of *Estelle.*

As for Jackson's factual challenge, the Court finds the propriety of the provocation instruction was not an unreasonable determination of the facts. The testimony at trial created an issue of fact as to whether Jackson intentionally provoked Washington to assault him and precipitate his murder. At trial,

Jackson's testimony regarding the sequence of events during the altercation differed from Ditto's and Scott's. Ditto testified that Jackson and Washington were engaged in a verbal altercation over Jackson getting a ride when Jackson hit Washington in the head with a gun. According to Ditto, Jackson then hit Washington in the head with a gun the second time, causing the gun to fire and kill Washington. Jackson, on the other hand, indicated that he was scuffling with Washington when Washington produced a gun. This testimony clearly created an issue of fact as to whether Jackson intentionally provoked Washington, and, therefore, the Kentucky Supreme Court did not base its decision on an improper determination of the facts.

4. Failure to Instruct on Voluntary Intoxication (Ground 5)

Jackson's next challenge to the jury instructions involves the trial court's denial of his tendered "voluntary intoxication instruction." (DN 1-1, at p. 17). The Kentucky Supreme Court determined that the trial court properly denied his requested voluntary intoxication instruction because "no evidence indicated that he was so impaired or intoxicated at the time the offenses were committed such that he was unable to form the requisite mens rea for murder (KRS 507.040) or tampering with evidence (KRS 524.100)." *Jackson*, 2010 WL 252244, at *11-12. Although testimony indicated that Jackson was "high" when he committed the offenses, the Kentucky Supreme Court found the evidence did not show he was so impaired that he did not know what he was doing. *Id.* at *12. The court pointed out that Jackson's defense actually rested upon his detailed account of exactly what happened

before, after, and during the crime. *Id.*

Jackson again argues that the Kentucky Supreme Court's decision was contrary to or involved an unreasonable application of *Estelle*, 502 U.S. at 62. (DN 1-1, at p. 17). Because "murder" under KRS 507.020 is a specific-intent crime and because there is substantial evidence from trial of his voluntary intoxication at the time of the incident, Jackson maintains the trial court should have instructed the jury as to his voluntary intoxication defense. (*Id.* at pp. 17-18).

Like the provocation instruction, the Kentucky Supreme Court affirmed the trial court's denial of a voluntary intoxication instruction based on Kentucky law, which does not generally fall into the realm of federal habeas review. *Rockwell v. Palmer*, 559 F. Supp. 2d 817, 828 (W.D. Mich. 2008) (a claim based upon an incorrect jury instruction generally is not cognizable on habeas review). Again, the burden on a habeas petitioner is especially heavy when he argues a jury instruction was improperly omitted, because it is less likely to be prejudicial than a misstatement of the law. *See Henderson*, 431 U.S. at 155. Additionally, the United States Supreme Court has held that a criminal defendant is not constitutionally entitled to a voluntary intoxication defense. *Montana v. Egelhoff*, 518 U.S. 37, 56, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); *see also Hill v. Mitchell*, 400 F.3d 308 (6th Cir. 2005) (holding habeas petitioner was not entitled to relief because of trial court's failure to instruct on cocaine intoxication).

In the instant case, under Kentucky law,

voluntary intoxication may be a defense where it negates "the existence of an element of an offense' – most often, the *mens rea*. KRS 501.080(1). Kentucky courts have clarified that to warrant a voluntary intoxication instruction, there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing." *Springer v. Commonwealth*, 998 S.W.2d 439, 451-52 (Ky. 1999) (citation omitted).

After reviewing the trial record, the Court agrees with the Supreme Court of Kentucky's conclusion that while there was some evidence that Jackson ingested Xanax pills prior to shooting Washington, the evidence did not establish that Jackson was so impaired he did not know what he was doing. Based on this analysis, Jackson's argument that "so long as there was some evidence relevant to the issue of voluntary intoxication, the credibility and force of such evidence must be for the jury[,]" is not persuasive. The Court, accordingly, finds the Kentucky Supreme Court's ruling was not contrary to, or an unreasonable application of, firmly established federal law.

5. Exclusion of Photographic Evidence
(Ground 6)

Jackson next disputes the trial court's exclusion of photographic evidence demonstrating bruising to his wrist. (DN 1-1, at pp. 19-20). During his trial, Jackson attempted to introduce his printed "mug shot," which he argued showed redness along his wrists and supported his claim that Washington held him by his wrists as the two struggled over the handgun. The

Commonwealth objected to the low-quality of the print-out and suggested Jackson introduce a similar police photograph from just after his arrest. Jackson refused to stipulate to the police photograph's admission. The trial court ultimately concluded the "mug shot" Jackson sought to enter was inadmissible due to its poor quality.

The Kentucky Supreme Court found the trial court's exclusion of the photograph was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" because the print-out produced a yellowing effect, giving greater contrast to areas of darker pigmentation or low light. *Jackson*, 2010 WL 252244, at *9. The court explained that under KRE 403, the print-out of the "mug shot" left the evidence so inaccurate that its probative value was "substantially outweighed by the danger of . . .misleading the jury." *Id.* (quoting KRE 403).

Now, Jackson argues the Kentucky Supreme Court's decision was contrary to or involved an unreasonable application of *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). (DN 1-1, at pp. 19-20). Jackson feels that because the photograph was properly authenticated under KRE 901(a) and (b)(1), the trial court abused its discretion in excluding it. (*Id.*).

As an initial matter, *Trombetta* is inapplicable to Jackson's case. In *Trombetta*, the Supreme Court addressed whether the due process clause requires law enforcement agencies to preserve breath samples in order to introduce the results of breath-analysis. 467 U.S. at 479-80. Jackson's claim neither involves

preservation of evidence nor breathalyzer samples. Additionally, since the Kentucky Supreme Court decided this issue based on the Kentucky Rules of Evidence, the Court should not consider the claim for habeas relief. Because Jackson otherwise fails to prove the trial court's exclusion of his printed mug-shot was contrary to or an unreason able application of federal law, the Court recommends relief on this claim be denied.

6. Inadmissible Evidence in Jury Deliberations (Grounds 8 and 14)

On direct appeal, Jackson also argued that he was denied due process because during deliberations the jury considered audio recording from a crime scene video that the trial court had specifically excluded from evidence. (DN 15-4, at pp. 37-39). The Kentucky Supreme Court declined to review this claim because Jackson did not preserve the claim of error at trial and did not request palpable error review. *Jackson*, 2010 WL 252244, at *7. Jackson raised the same issue in his RCr 11.42 motion, couching it as an ineffective assistance of counsel claim. (DN 15- 9, at p. 13). Since the jury had already heard the police officer's live narration of the crime scene video and there was more than sufficient evidence presented by the Commonwealth of Jackson's guilt, the Kentucky Court of Appeals found that even if the jury listened to the recording, it did not alter the outcome of his trial. *Jackson v. Commonwealth*, No. 2013-CA-001727-MR, 2015 WL 1648058, at *6 (Ky. Ct. App. Apr. 10, 2015).

Now, Jackson argues the Kentucky Supreme Court's opinion was contrary to or involved an

unreasonable application of *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954). (DN 1-1, at pp. 24-25). Jackson believes these cases mandate a hearing be conducted when an unauthorized private communication or contact with the jury is revealed. (*Id.* at pp. 26-27). Because the trial court did not hold a "*Remmer* hearing" to inquire into the jurors' states of mind, Jackson claims he was deprived of the opportunity to prove juror bias and thereby denied a fair trial. (*Id.* at p. 28).

As noted above, the Kentucky Supreme Court did not evaluate Jackson's claim on the merits because Jackson failed to preserve the error at trial. By failing to preserve the error, Jackson procedurally defaulted this claim. Procedural default bars federal habeas review of this claim unless Jackson "demonstrates cause for the default and prejudice resulting therefrom, or that failing to review the claim would result in a fundamental miscarriage of justice." *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

Although Jackson doesn't specifically discuss "cause" or "prejudice" to excuse his default, he does argue that the error was not properly preserved due to ineffective assistance of his trial counsel. (DN 1-1, at pp. 24-25). It is well-established that ineffective assistance of counsel can serve as cause to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). A claim of ineffective assistance must also be presented to the state courts "before it may be used to establish cause for procedural default." *Id.* at 489. Since Jackson presented his ineffective assistance of counsel claim

based on this same argument in his RCr 11.42 motion to the Kentucky Court of Appeals, this Court can proceed with the cause analysis and Jackson's challenge to the Kentucky Court of Appeal's opinion simultaneously.[3]

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L.Ed.2d 251 (2009); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness," and the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 688, 690. Surmounting *Strickland's* high performance bar is never an easy task. *Premo v. Moore*, 562 U.S. 115, 122, 131 S. Ct. 733, 178 L.Ed.2d 649 (2011) (quoting *Padilla v. Kentucky,* 559 U.S. 356, 371, 130 S. Ct.1473, 1485, 176 L.Ed.2d 284 (2010)). When the Court assesses counsel's performance, it must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689. "The question is whether an attorney's

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[3] In Jackson's habeas petition he alternatively contends that the Kentucky Court of Appeal's opinion denying RCr 11.42 relief was contrary to or involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668. (DN 1-1, at pp. 24-25).

representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 88, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011).

Establishing the required prejudice is a likewise high bar. The prejudice inquiry compels the defendant "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Court need not conduct the two prong inquiry in the order identified above or even address both parts of the test if the defendant makes an insufficient showing on one part. *Id.* at 697.

Even if Jackson could establish trial counsel performed deficiently in failing to properly preserve this evidentiary issue for direct appeal, he cannot demonstrate this failure resulted in actual prejudice. Jackson argues that if the error had been properly preserved, the trial court would have remanded the case for a "*Remmer* hearing" to inquire into the jurors' states of mind. It is not likely that the trial court would not have remanded for a *Remmer* hearing here, however, because Jackson did not put forth any evidence that an extraneous influence on a juror denied him a fair trial. An "extraneous influence" is one "derived from specific knowledge about or a relationship with either the parties of their witnesses." *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998). Examples include "prior business dealings with the defendant, applying to work for the local district

attorney, conducting an out of court experiment, and discussing the trial with an employee." *United States v. Owens*, 426 F.3d 800, 805 (6th Cir. 2005). None of these examples are analogous to the juror's possible exposure to the audio/video of the crime scene DVD during deliberations in this case.

Further, Jackson has not produced evidence that the jury even viewed and listened to the DVD during deliberations or evidence that specific prejudice resulted from the jury's exposure to the audio/video. Jackson's argument is mere speculation. Accordingly, there is not a reasonable probability that but for trial counsel's failure to preserve the error, the result of Jackson's proceeding would be different. Jackson is not entitled to habeas relief on these claims.

7. Failure to Strike Juror for Cause (Ground 9)

Jackson takes issue with the Supreme Court of Kentucky's determination that the trial court did not abuse its discretion in denying his motion to strike a prospective juror for cause. (DN 1-1, at pp. 28-29). On direct appeal, Jackson specifically challenged three isolated responses from Juror #24, which he believed demonstrated that the juror could not presume innocence. The Supreme Court of Kentucky summarized Juror #24's challenged conduct as follows:

> While defense counsel was explaining the presumption of innocence to the panel, she asked whether anyone would agree that a defendant "was a little guilty of something" if his case progressed passed

an indictment and to trial. Juror #24 nodded in agreement and answered that "once a person has gotten this far along, there's bound to be some justification for it to start with." When defense counsel asked the juror whether he could still presume the defendant innocent or treat the parties "on an even-playing field," he first indicated that it would be significant if the evidence showed the defendant carried a handgun, but his statement thereafter was largely inaudible. The juror then agreed with defense counsel's summary of the juror's statement that if the evidence showed that the defendant was carrying a handgun, he would be more likely to commit a crime. Defense counsel subsequently asked the juror whether he could put aside that feeling and still consider the evidence. His response, however, was again mostly inaudible, at one point stating that "it was hard to say." Counsel followed, "because you don't know what the evidence is," to which the juror agreed. Later in voir dire, Juror #24 nodded his head in agreement with defense counsel's statement that someone carrying a concealed handgun without a permit would be more likely to commit a crime. And then, finally, Juror #24, when asked whether a defendant's illegal drug possession would indicate that he would be more likely to commit other crimes, the juror nodded in agreement (with

> many others on the panel) and stated that drug possession often leads to other crimes.

Jackson, 2010 WL 252244, at *3.

The trial court denied Jackson's counsel's motion to excuse Juror #24 for cause because the juror's opinions about drugs and guns, or the mixture of the two, did not determine whether the juror would strip Jackson of his presumption of innocence. Jackson's trial counsel used a peremptory to strike Juror #24.

After reviewing the entire *voir dire*, the Supreme Court of Kentucky concluded that the trial court acted appropriately in not striking Juror #24 for cause because none of his statements revealed an inability to conform his views to the requirement of the law, specifically, the presumption of innocence. *Id.* at *4. The court indicated that Juror #24's challenged responses were to "leading hypothetical questions posed by defense counsel, all of which asked the juror to assume certain facts consistent with criminal behavior." *Id.*

Now, Jackson alleges the Kentucky Supreme Court's opinion violated *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed.2d 759, 85 S. Ct. 824 (1965).(DN 1-1, at p. 29). Jackson believes it was conspicuous for the trial judge to not respond or ask follow-up questions to Juror #24's clear declaration that he did not think he could be a fair juror. (*Id.* at p. 32). This lack of witness rehabilitation by the trial court, Jackson claims, results in actual bias on the part of Juror #24.

The Kentucky Supreme Court's analysis here is not contrary to clearly established federal law. *Swain* held that a "State's purposeful or deliberate denial" to African-Americans of the opportunity to serve as jurors solely because of race violates the right to equal protection under the Fourteenth Amendment. 380 U.S. 202 (1965). *Batson v. Kentucky*, 476 U.S. 79 (1986) subsequently overruled the portion of *Swain* which set forth the necessary evidentiary showing needed to establish a *prima facie* case of racial discrimination. Neither *Swain* nor *Batson* affects Jackson's claim because Juror #24 was not an African-American and Jackson makes no equal protection argument.

More applicable to Jackson's argument is the United States Supreme Court's holding in *Patton v. Yount* that when a juror is challenged for cause, "the relevant question is did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Holder v. Palmer*, 558 F.3d 328, 339 (6th Cir. 2009) (citing *Patton*, 467 U.S. 1025, 2036 (2009)). The resolution of the question of a juror's bias is a finding of fact which is entitled to a "presumption of correctness" under 28 U.S.C. § 2254(d) and "may only be overturned where manifest error is shown." *Id.* (citing *Patton,* 467 U.S. at 1031).

Here, the Court has reviewed the *voir dire* proceedings from Jackson's trial. Nothing in Juror #24's testimony indicated that he would reject Jackson's presumption of innocence. Jackson fails to prove that manifest error occurred in this regard, and the Court finds the Kentucky Supreme Court's

reasoning on this claim is consistent with clearly established federal law. This claim provides no basis for habeas relief.

8. Refusal to Instruct on "No Duty to Retreat" (Ground 10)

Jackson's final claim of error from his direct appeal involves his belief that the trial court's refusal to instruct the jury on "no duty to retreat" was reversible error. (DN 1-1, at pp. 34- 36). The Kentucky Supreme Court found Jackson's argument was meritless based on its decision in *Hilbert v. Commonwealth*, where it previously rejected Jackson's argument that an instruction on retreat was necessary to counter the inference that he was under a duty to avoid the altercation with the victim. *Jackson*, 2010 WL252244, at *12 (citing *Hilbert*, 162 S.W. 3d at 925-26 (Ky. 2005)).

Now, Jackson challenges the Kentucky Supreme Court's decision that the trial court's refusal to instruct the jury on "no duty to retreat" was not error. He argues the decision is contrary to or an unreasonable application of *California v. Trombetta*, 467 U.S. 479 (1984). (DN 1-1, at p. 34). Jackson also emphasizes that the "no duty to retreat" principle is an integral part of the Kentucky law of self-defense and because the jury was not instructed that he had no duty to retreat, "the possibility that some or all of the jurors believed Petitioner was obligated to flee or otherwise avoid the confrontation before defending himself cannot be eliminated." (DN 1-1, at pp. 35-36).

First, because the Kentucky Supreme Court

decided Jackson's "no duty to retreat" argument under state law grounds, the state court's interpretation of state law is binding on this court. *See Bradshaw v. Richey*, 546 U.S. 74, 126 S. Ct. 602, 604, 163 L.Ed.2d 407 (2005); *Estelle*, 502 U.S. at 67-68. Second, as this Court has repeatedly noted, the burden on a habeas petitioner is especially heavy when he argues a jury instruction was improperly omitted, because it is less likely to be prejudicial than a misstatement of the law. *See Henderson*, 431 U.S. at 155. Third, the only "clearly established federal law" that Jackson cites to is *Trombetta*, but he fails to argue how *Trombetta* applies to his case.

Regardless of those considerations, the Court finds Jackson's argument is unsuccessful because *Hilbert* was the applicable law in Kentucky on the "no duty to retreat" instruction at the time of Jackson's trial. In *Hilbert*, the Kentucky Supreme Court held that "when the trial court adequately instructs on self-defense, it need not also give a no duty to retreat instruction." 162 S.W.3d 921, 926 (Ky. 2005). In 2006, the Kentucky legislature codified "the pre-existing 'no duty to retreat'" principle by means of Senate Bill 38. *Hannah v. Commonwealth*, 306 S.W.3d 509, 514 (Ky. 2010); *see also* KRS § 503.055; KRS §503.050(4). In 2009, the Kentucky Supreme Court declared "that the substantive provisions of the 2006 self-defense amendments (including those portions dealing with 'no duty to retreat')" did not operate retroactively. *Id.* As such, the conduct for which Jackson was prosecuted occurred before the effective date of SB 38 and did not apply retroactively to his case. Jackson, therefore, has not demonstrated the Kentucky Supreme Court's decision was contrary to or an unreasonable

application of federal law.

C. Jackson's RCr 11.42 Claims – Ineffective Assistance of Counsel

1. Failure to Move for a Special Verdict Form (Ground 11)

In his RCr 11.42 collateral attack, Jackson argued his trial counsel performed deficiently in failing to move for a separate verdict form, which would require the jury to specify whether it was finding Jackson guilty of intentional or wanton murder. The Kentucky Court of Appeals found that Jackson's trial counsel was not ineffective in this respect because although it may have been a combination jury instruction, it did not violate the unanimous verdict requirement. *Jackson v. Commonwealth*, No. 2013-CA-001727-MR, 2015 WL 1648058, at *4 (Ky. Ct. App. Apr. 10, 2015).

Now, Jackson attempts to renew his argument that trial counsel was ineffective in not objecting to the combined jury instructions for intentional and wanton murder. (DN 1-1, at p. 37). As earlier outlined, to prove ineffective assistance of counsel a petitioner must establish both that counsel performed deficiently and that said deficient performance resulted in actual prejudice. *Strickland*, 466 U.S. at 687. Although Jackson argues generally that the verdict form is unconstitutional and cites to *Schad v. Arizona*, 501 U.S. 624 (1991) and Kentucky case law, he omits any argument that this allegedly deficient performance by trial counsel resulted in actual prejudice. Jackson fails to establish that the result of his proceeding would

have been different had trial counsel objected to the combination jury instruction for intentional or wanton murder. The Court does not recommend habeas relief as to this claim.

2. Failure to Advise Jackson of the Law of Self-Defense (Ground 12)

Jackson also argued in his RCr 11.42 motion that his trial counsel was ineffective by coercing him into testifying and by misadvising him as to the law of self-defense and its related components. The Kentucky Court of Appeals found that "[d]espite trial counsel's incorrect assumption that SB 38 would apply to Jackson's trial," her performance was not deficient because "[i]t was not unreasonable for trial counsel, in light of SB 38, to seek a no duty to retreat instruction." *Jackson*, 2015 WL 1648058, at *5. Based on trial counsel's testimony at the evidentiary hearing that "in her view, it would have been almost impossible to establish a claim of self-defense – of which no duty to retreat is a component . . . –without Jackson's testimony" and that "[s]he ultimately left the decision to testify to Jackson," the court concluded Jackson could not establish the first prong of the *Strickland* standard. *Id.*

In his present motion for habeas relief, Jackson argues that the Kentucky Court of Appeals placed too great a burden of proof on the defendant to show prejudice by "totally removing trial counsel's misadvice from the equation." (DN 1-1, at pp. 42-43). Jackson believes that but for trial counsel's misadvice regarding SB 38, there is a reasonable probability that he would not have testified. (*Id.* at p. 43).

The Court does not agree. Jackson can neither establish deficient performance nor prejudice as to this claim. Trial counsel's incorrect assumption that SB 38 would apply to Jackson's case, which led her to seek a "no duty to retreat" jury instruction, was not deficient performance. Although trial counsel mistakenly believed that SB 38 would apply to Jackson's trial, tendering a "no duty to retreat" instruction was reasonable in light of the uncertain applicability of SB 38 and the 2006 amendments. In fact, in Ground 10 of this same petition, Jackson argued the trial court erred in not accepting trial counsel's "no duty to retreat" instruction.

Jackson's assertion that trial counsel misadvised him for the purpose of inducing him to testify against his will is likewise unsupported. Trial counsel testified at the RCr 11.42 evidentiary hearing that she explained to Jackson that, for a theory of defense to succeed, he would need to testify. She clarified, however, that it was always Jackson's choice to testify and that she left the decision to him. In his habeas petition, Jackson merely states that he testified against his will but fails to support this argument.

Regardless of whether trial counsel performed deficiently, Jackson does not demonstrate there is a reasonable probability that but for trial counsel's errors, the result of the proceeding would have been different. Jackson fails to identify how not taking the stand at trial and not testifying to a theory of self-defense would have changed the outcome of his case. Because Jackson cannot produce any evidence that trial counsel's advice on self-defense prejudiced

his case, habeas relief is not warranted.

3. Failure to Present Mitigation Witnesses (Ground 13)

Jackson next argued on state court collateral review that his trial counsel rendered ineffective assistance by failing to call any mitigation witnesses during the sentencing phase of his trial. The Kentucky Court of Appeals recognized that its suspicions were heightened when trial counsel chose not to call any mitigation witnesses during the penalty phase of trial. *Jackson*, 2015 WL 1648058, at *5-6. But the court noted trial counsel's testimony at the evidentiary hearing that she was not aware of any mitigation witnesses, that she believed Jackson was estranged from his parents, and that she was unable to get into contact with some of Jackson's other family members. *Id.*

Now Jackson alleges that because trial counsel uncovered information about his traumatic childhood experience, she had reason to suspect that worse details existed, but decided not to interview or contact his sisters, parents, other family members, neighbors, or teachers. (DN 1-1, at pp. 46-47). The Warden counters that Jackson had an opportunity to present witnesses at his RCr 11.42 evidentiary hearing, but Jackson only called his sister Rokia Cain, and her testimony did not support his claim of error. (DN 15-1, at pp. 17-18).

After reviewing the record, the evidence demonstrates that trial counsel attempted to contact mitigation witnesses for Jackson's case but was not

able to get into contact with them. Trial counsel explained that mitigation evidence had already been presented during the guilt phase through Jackson's own testimony and the favorable testimony of Jackson's so-called "godmother." Based on these considerations, it was not unreasonable for the court to conclude that counsel's decisions were consistent with reasonable trial strategy based on her investigation under *Strickland*. 2012 WL 3309398 at *5. Jackson additionally fails to fulfill the prejudice prong from *Strickland*. Although Jackson broadly references that counsel should have called his "sisters, parents, any other family members, neighbors, or teachers" to "narrate the true story of [his] childhood experiences[,]" he fails to provide any specific names of the mitigation witnesses who should have been called and does not specify the substance of their testimony. The Court does not recommend habeas relief as to this claim.

4. Failure to Move for Cautionary Instruction as to Police Officer Testimony (Ground 15)

Jackson also feels that the Kentucky Court of Appeals on collateral review incorrectly found his trial counsel was not ineffective in failing to request a cautionary instruction when a police officer offered both lay and expert testimony at trial. (DN 1-1, at p. 47). The Kentucky Court of Appeals denied Jackson's claim on two bases. First, Jackson failed to provide, and the court could not locate, any Kentucky authority requiring a cautionary instruction be given when a witness offers both opinion and expert testimony. *Jackson*, 2015 WL 1648058, at *7. Second, there was no evidence in the case that any witness actually

testified during Jackson's trial as both a lay and expert witness. *Id.*

Jackson currently argues that this determination is contrary to *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and *Strickland*. (DN 1-1, at p. 47; DN 26, at p. 37). He claims counsel's failure to request a cautionary instruction was deficient performance, which threatened the fairness and integrity of his proceedings. (*Id.* at p. 50).

Once again, the Court here finds that Jackson cannot establish either prong of the *Strickland* standard. Jackson cites to Sixth Circuit case law demonstrating that an officer's dual testimony is generally allowed when an adequate cautionary instruction is permitted, but he does not establish that his counsel's failure to request such a cautionary instruction resulted in constitutionally deficient performance. Likewise, Jackson has not identified specific testimony from trial that constituted both lay and expert testimony. He fails to prove that there is a reasonable probability that a cautionary instruction would have changed the outcome of his proceeding. Relief is not warranted under § 2254(d)(1).

5. Cumulative Error (Ground 16)

Jackson lastly takes issue with the Kentucky Court of Appeals' determination that his trial did not result in cumulative error. (DN 1-1, at pp. 50-53). Because none of Jackson's claimed errors raised any real questions of prejudice, the Kentucky Court of Appeals denied his cumulative error claim. *Jackson*, 2015 WL 1648058, at *7.

Jackson now contends that the Kentucky Court of Appeals found several errors in trial counsel's actions and considered the prejudicial effect of each error alone but did not consider the cumulative effect of those errors. (DN 1-1, at p. 53). Jackson is mistaken. In addressing four of Jackson's five ineffective assistance of counsel claims, the Kentucky Court of Appeals specifically noted that Jackson could not meet the first prong of the *Strickland* standard, meaning the Court did not find error in trial counsel's actions. In the remaining claim, involving the audio recording of the crime scene video, the Kentucky Court of Appeals addressed the second prong of *Strickland*, stating, "[e]ven assuming that trial counsel performed deficiently . . . [w]e are not convinced that the recorded narration of the crime scene video, even if viewed by the jury, altered the outcome of Jackson's case." *Jackson*, 2015 WL 1648058, at *6. The Kentucky Court of Appeals did not find any of Jackson's ineffective assistance of counsel claims resulted in error or harmless error and, as such, the doctrine of cumulative error did not apply to warrant relief.

Jackson's habeas petition does not demonstrate that the Kentucky Court of Appeals' finding of no cumulative error is contrary to or an unreasonable application of well-established federal law, and the Court recommends no relief as to this claim.

D. Certificate of Appealability

The final question is whether Jackson is entitled to a Certificate of Appealability ("COA") pursuant to 28 U.S.C. § 2253(c)(1)(B) on any or all of the sixteen grounds raised in his petition. When the Court rejects

a claim on the merits, the petitioner must demonstrate that reasonable jurists would find the Court's assessment of the constitutional claim debatable or wrong in order for this Court to issue a COA. *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Here, none of the grounds raised by Jackson could be reasonably debated. The Kentucky Supreme Court's harmless error determinations regarding the self-protection jury instructions, the limited impeachment of a prosecution witness, and the admission of testimony that Jackson carried a handgun are all well in-line with the controlling precedent of the United States Supreme Court in *Brecht* and *Chapman*. Jackson does not explain otherwise or cite to any decision that would call these conclusions into question. The Court, therefore, does not recommend a COA issue as to Grounds 1, 3, and 7 of his petition.

Jackson's other claims his from direct appeal, including three claims involving jury instructions, three claims relating to the admissibility of evidence, and one claim of failing to strike a juror for cause, are also not likely to be found debatable or wrong by reasonable jurists. Jackson has not made a substantial showing of the denial of a constitutional right in any of these claims, and the Court does not recommend a COA issue as to Grounds 2, 4, 5, 6, 8, 9, and 10 of his petition.

Likewise, the Court finds its assessment of Jackson's ineffective assistance of counsel claims under *Strickland* would not be challenged by

reasonable jurists. As such, the Court does not recommend a COA issue as to Jackson's claims in Grounds 11-16. For these reasons, the Court recommends that a COA be denied as to all claims that Jackson raised in his § 2254 petition.

RECOMMENDATION

For the foregoing reasons, the Court **RECOMMENDS** that Jackson's petition for writ of habeas corpus (DN 1) be **DENIED**. The Court further recommends that a Certificate of Appealability be **DENIED** as to all of Jackson's claims.

/s/
Dave Whalin, Magistrate Judge
United States District Court
May 24, 2017

NOTICE

Therefore, under the provisions of 28 U.S.C. Sections 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir.), *aff'd* U.S. 140 (1984).

Copies: Shawntele Cortez Jackson, *pro se*
Counsel of Record

/s/
Dave Whalin, Magistrate Judge
United States District Court
May 24, 2017

APPENDIX E

RENDERED: JANUARY 21, 2010
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

2007-SC-000392-MR

SHAWNTELE CORTEZ JACKSON	APPELLANT
v.	
COMMONWEALTH OF KENTUCKY	APPELLEE

ON APPEAL FROM JEFFERSON CIRCUIT COURT

HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE

NO. 06-CR-001673

MEMORANDUM OPINION OF THE COURT
AFFIRMING

Appellant, Shawntele Cortez Jackson, was found guilty by a Jefferson Circuit Court jury of murder and tampering with physical evidence. For these crimes, Appellant was sentenced to fifty years imprisonment. He now appeals his convictions as a matter of right. Ky. Const. § 110(2)(b).

I. Background

In May of 2006, Richard Lee Washington was fatally shot in the area of the Iroquois housing projects in Louisville. He was twenty-seven years-old. Appellant, twenty years old at the time, was living in one of the apartments with his girlfriend, Dominique Rudolph. At trial, it was the Commonwealth's theory that Appellant intentionally shot and killed Washington without excuse or justification. Appellant's defense was that Washington first assaulted him and that Washington was unintentionally shot in the course of defending and struggling over a handgun.

Between midnight and 12 :15 a.m. on May 16, 2006, Appellant received a phone call from an unidentified individual who owed him money. Accompanied by a recent acquaintance, D'Angelo Scott, Appellant sought a ride to a local convenience store in order to meet the caller. Appellant then approached Dora Ditto and her boyfriend, Washington, standing by a parked car. Though he knew Ditto, Appellant had only seen Washington around the neighborhood. According to Appellant, he approached Ditto and offered to pay her ten dollars to take him to the convenience store. She agreed and Washington drove the group.[1]

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[1] Prior to and during the trip, all four individuals consumed various drugs. Appellant allegedly received twenty to twenty-five Xanax pills from Washington in exchange for two rocks of crack cocaine. After giving ten of the pills to Scott, Appellant claimed he chewed up the rest. Ditto testified that she had drunk a one-half pint of gin and smoked a marijuana joint laced with cocaine, adding that Washington had smoked a similar "dirty blunt" while in the car.

When they arrived at the convenience store, Appellant met the caller and received his payment. Before leaving, however, Appellant and Washington began a verbal argument which continued until the group returned to Iroquois. According to Appellant, Washington started the argument because he wanted more "dope." According to Ditto, Appellant accused Washington of stealing his cell phone. Scott testified that he remembered the two arguing over a missing cell phone.

Back at Iroquois, Washington pulled the car into a parking spot. According to Appellant, who was still seated in the back seat, Washington and Ditto exited the car and walked toward the trunk. He slated that Ditto then removed a blank handgun from- the trunk and handed it to Washington. At this point, Appellant claimed that he awoke Scott and told him to get up. Appellant then exited the car and stepped up onto the sidewalk before resuming his argument with Washington. Washington allegedly approached Appellant and Appellant told Washington that he saw Ditto hand him the gun. Appellant stated that Washington threatened to kill him before the two began to yell and shove one another, with Washington pushing Appellant first and Appellant then pushing back. At some point thereafter, Appellant saw Washington draw a handgun and Appellant immediately grabbed Washington's wrists and the two men struggled for possession of the handgun. During this struggle, Appellant explained that the gun was in Washington's right hand when it fired, striking Washington in the back of the head.

The testimony of the other witnesses differed markedly from Appellant's version of events. Ditto stated that Appellant was the first to exit the car and that he went toward a group of apartments before returning, saying that he had found his cell phone. He then asked Washington for another ride, but Washington refused. Appellant insisted that Washington would do so, and Washington again refused. According to Ditto, Appellant then hit Washington with a handgun that she assumed came from his pocket. Washington ordered Ditto to get on the sidewalk, after which Appellant told Washington that he "ought to kill him." With the handgun in his right hand, Appellant then hit Washington again with the gun and it fired, killing Washington. Similarly, Scott stated that he remembered"-the two fighting, though he recalled Washington yelling more than Appellant. He testified that Appellant backed up and charged at Washington, swinging his right arm and hitting Washington in the face. Scott then heard a gun fire, though he did not recall seeing anyone in the group with a firearm that night.

Appellant stated that after the shooting he ran to Rudolph's apartment because he was scared and high. Once there, he claimed that he passed out on her bed, not waking or leaving for approximately thirty-six hours.[2] According to Ditto, Appellant immediately ran from the scene with a gun in his hand. Scott testified that he, too, went to Rudolph's apartment

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[2] Later, while interviewing Rudolph and searching her apartment, police stopped her son from removing two trash bags from the bedroom. Inside one of the bags was the clothing that Appellant wore the night of the shooting.

and slept, but remembered Appellant arriving sometime later. On this point, the Commonwealth presented the testimony of Amber Baker, a former girlfriend of Appellant. Baker stated that she was at her apartment when Appellant arrived within ten to fifteen minutes of the shooting looking scared. She claimed that he looked out of her screen door for approximately twenty minutes before leaving.

It was determined that the shooting occurred at around 12 :42 a.m. and the cause of Washington's death was a gunshot wound to the lower back right part of his skull, with the bullet traveling toward the left eye and slightly downward without exiting. He died instantaneously. Though police never recovered a weapon, the bullet was consistent with a.45 caliber automatic handgun. The medical examiner noted that Washington did not have any defensive wounds but did have a contusion over his left eyebrow and lacerations over his left cheekbone.

At the conclusion of trial, the jury found Appellant guilty of murder and tampering with physical evidence. The jury fixed his punishment at fifty years imprisonment for the count of murder and one year imprisonment for the count of tampering with physical evidence, recommending that the sentences run concurrent with one another. On appeal, Appellant raises ten allegations of error in his underlying trial. For the reasons that follow, we affirm Appellant's convictions.

II. Analysis

A. Failure to Strike Juror for Cause

Appellant's first argument on appeal is that the trial court abused its discretion in denying his motion to strike a prospective juror for cause and that such error is reversible because it forced Appellant to use all of his peremptory challenges. We find no error in this regard.

Appellant identifies three isolated responses by Juror #24 to defense counsel's hypothetical questions and contends that they demonstrate that the juror could not presume innocence. While defense counsel was explaining the presumption of innocence to the panel, she asked whether anyone would agree that -a defendant "was a little guilty of something" if his case progressed past an indictment and to trial. Juror #24 nodded in agreement and answered that "once a person has gotten this far along, there's bound to be some justification for it to start with." When defense counsel asked the juror whether he could still presume the defendant innocent or treat the parties "on am even playing field," he first indicated that it would be significant if the evidence showed the defendant carried a handgun, but his statement thereafter was largely inaudible. The juror then agreed with defense counsel's summary of the juror's statement that if the evidence showed that the defendant was carrying a handgun, he would be more likely to commit a crime. Defense counsel subsequently asked the juror whether he could put aside that feeling and still consider the evidence. His response, however, was again mostly inaudible, at one point stating that "it was hard to say." Counsel followed, "because you don't know what the evidence is," to which the juror agreed. Later in voir dire, Juror #24 nodded his head in agreement with defense

counsel's statement that someone carrying a concealed handgun without a permit would be more likely to commit a crime. And then, finally, Juror #24, when asked whether a defendant's illegal drug possession would indicate that he would be more likely to commit other crimes, the juror nodded in agreement (with many others on the panel) and stated that drug possession often leads to other crimes.

"RCr 9.36(1) provides that the trial judge shall excuse a juror [for cause] when there is reasonable ground to believe that the prospective juror cannot render a fair and impartial verdict." Smith v. Commonwealth, 734 S.W.2d 437, 444 (Ky. 1987) (quoting Peters v. Commonwealth, 505 S.W.2d 764, 765 (Ky. 1974)). "[T]he party alleging bias bears the burden of proving that bias and the resulting prejudice." Cook v. Commonwealth, 129 S.W.3d 351, 357 (Ky. 2004) (citing Caldwell v. Commonwealth, 634 S.W.2d 405, 407 (Ky. 1982)). Where there is such a showing, "[t]he court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." Shane v. Commonwealth, 243 S.W.3d 336, 338 (Ky. 2007).

The established "test for determining whether a juror should be stricken for cause is 'whether... the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.' Thompson v. Commonwealth, 147 S.W.3d 22, 51 (Ky. 2004) (quoting Mabe v. Commonwealth, 884 S.W.2d 668, 671 (Ky. 1994)). This Court has long recognized that 'a determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the

action of the trial court is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'

Fugett v. Commonwealth, 250 S.W.3d 604, 613 (quoting Pendleton v. Commonwealth, 83 S.W.3d 522, 527 (Ky. 2002)).

Having reviewed the entire voir dire, we do not believe the trial court abused its discretion in failing to strike Juror #24. None of his statements revealed an inability to conform his views to the requirements of the law - here, an alleged inability to indulge the presumption of innocence - and to render a fair and impartial verdict. Rather, the statements that Appellant complains of were specific responses to leading hypothetical questions posed by defense counsel, all of which asked the juror to assume certain facts consistent with criminal behavior. See Patton v. Young, 46'7 U.S. 1025, 1039 (1984) ("The trial judge properly may choose to believe those statements that were -the most fully articulated or that appeared to have been least influenced by leading."). When asked whether he could put aside the significance of a defendant possessing a firearm, the juror's audible response was equivocal at best, agreeing that his decision would depend upon the evidence presented. To the extent that Appellant argues that the juror's statement that a felony trial was "bound to" have "some justification for it," we think that is an accurate intuition (e.g., a finding of probable cause) and it does not follow that the juror could not presume the defendant's innocence for purposes of a trial. We, therefore, hold that the trial court did not abuse its

discretion in overruling Appellant's motion to strike Juror #24 for cause.

B. Inadmissible Opinion Testimony

Appellant next argues that the trial court erroneously permitted two of the Commonwealth's witnesses to offer opinion testimony. We review his claims here, but cannot agree.

Officer Robert King was the first to respond to the scene. At trial, the Commonwealth questioned King regarding several photographs displaying the positioning of Washington's body. During the questioning, the Commonwealth asked King whether, in his opinion and experience, the body appeared to have been in a struggle.

King replied, "No," and Appellant objected, claiming the question called for speculation. Though the trial court overruled Appellant's subsequent motion to strike King's response, his objection was sustained insomuch as the opinion lacked a proper foundation. The Commonwealth subsequently asked King the basis of his opinion, with King replying that he first observed the body at the scene with intact clothing, being free of rips, tears, or dirt. King concluded that he saw no evidence consistent with a struggle.

Appellant also argues that the trial court erroneously admitted the opinions of Detective Cohen. At trial, Cohen explained that he investigated the scene and that part of his routine crime investigation included visually inspecting a body for wounds,

paying close attention to detail and any relevant evidence. Cohen stated that he found small drops of blood on Washington's shirt, that his sweatshirt was slightly soiled, that his jacket was still on his shoulders, and that his hat was still on his head.

When the Commonwealth began to lay a foundation as to Cohen's experience, Appellant objected and asked the court to prohibit Cohen from expressing an opinion as to whether there was a struggle prior to Washington's death. Though the court believed that Cohen could not properly state such a conclusion, it ruled that he could conclude whether he believed the scene was consistent with a struggle, provided the Commonwealth established the necessary foundation. In addition, and over Appellant's objection, the trial court concluded that Cohen's extensive experience in similar investigations qualified him as an expert in his field. Cohen's testimony proceeded, wherein he explained that he had seen the aftermath of approximately one hundred fights during his ten years' experience as a police officer. He concluded that the positioning of Washington's body was inconsistent with. fight or struggle based upon the hat being close to his head, his clothing being intact, and a bag of chips and drink in his possession.[3]

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[3] Appellant now asserts that testimony at trial suggested that the scene may have been tampered with in this respect, thus undercutting the reliability of the officers' opinions. This argument, however, does not appear to have been raised below and thus we do not consider it here. See e.g. Commonwealth v. Pace, 82 S.W.3d 894, 895 (Ky. 2002) ("The general rule is that a party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived.").

Pursuant to KRE 701, a witness may testify "in the form of an opinion or inference" if. 1) it is "[r]ationally based on the perception of the witness;" 2) "[helpful to a clear understanding of the witness' testimony or the determination of a fact in issue;" and, 3) it is "[n]ot based on scientific, technical, or other specialized knowledge."[4] Testimony offered under KRE 701 is constrained by KRE 602, which "further refines the scope of permissible lay opinion testimony, limiting it to matters of which the witness has personal knowledge." Cuzick v. Commonwealth, 276 S.W.3d 260, 265 (Ky. 2009); see also Mills v. Commonwealth, 996 S.W.2d 473, 488 (Ky. 1999) ("KRE 701 must be read in conjunction with KRE 602, which limits a lay witness's testimony to matters to which he has personal knowledge."). A trial court's admission of lay opinion testimony is a decision committed to its sound discretion and is thus reviewed for an abuse of discretion. See e.g. United States v. Pierce, 136 F.3d.770, 773 (1=1 th Cir.1998); see also Robert G. Lawson, The Kentucky Evidence Law Handbook, § 6.05[6], p. 416 (4th ed. 2003) ("Judgments that have to be made in using KRE 701 are difficult (especially the helpfulness decision) and

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[4] In Hampton v. Commonwealth, we explained that Kentucky's adoption of KRE 701 "signaled this Court's intention to follow the modern trend clearly favoring the admission of such lay opinion evidence," which "reflects the philosophy of this Court, and most courts in this country, to view KRE 701 as more enclusionary than exclusionary." 133 S.W.3d 438, 440-41 (Ky. 2004) (quoting Clifford v. Commonwealth, 7 S.W.3d 371, 377 (Ky. 1999)).

more susceptible to sound decisions at trial than on appeal.").

Here, we conclude that both witnesses' opinions were clearly admissible as lay opinion and thus find no abuse of discretion in this regard. In forming their opinions that Washington's body did not reflect that he had been in a struggle, the witnesses rationally drew an inference from their first-hand perceptions at the scene. Though, as Appellant contends, it is true that the jury had photographs of the scene, King and Cohen, as eyewitnesses to their subject matter, could, nevertheless, help the jury in their interpretation, all going toward determining a fact in issue - namely, Appellant's claim of self-defense.

C. Inadmissible Reference to Possession of Handgun

Appellant contends that the trial court erred in allowing Amber Baker to testify that she had seen Appellant in possession of a small, "silver" handgun three to four days before the night of the shooting when the statements of Ditto and Scott indicated that a different, "black" handgun was actually used in causing Washington's death. Because of this discrepancy and because a handgun was never recovered, Appellant argues that the trial court erroneously concluded that Baker's statement was relevant and that its probative value substantially outweighed its prejudicial effect. We agree that the trial court abused its discretion in this regard, but believe that its effect was, ultimately; harmless.

That all evidence must be relevant in order to be admissible is perhaps the most fundamental rule of evidence. See KRE 402; see also Lawson, The Kentucky Evidence Law Handbook, at § 2.00, p. 27 ("The first critical determination to be made concerning the admissibility of any item of evidence is its relevance; no other principle or concept is of any significance in the absence of a positive determination on this issue."). KRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may, nevertheless, be inadmissible where "its probative value is substantially outweighed by the danger of undue prejudice." KRE 403. In both respects, we review a trial court's determination for an abuse of discretion. See Love v. Commonwealth, 55 S.W.3d 816, 822 (Ky. 2001) (citing Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999); Barnett v. Commonwealth, 979 S.W.2d 98 (Ky. 1998)).

Because the probativeness of Baker's statement - in the context of the evidence - was so minimal via KRE 403, we conclude that the trial court abused its discretion in admitting it. The Commonwealth makes no attempt to justify its admission, other than to claim (without reference to any authority) that it properly established Appellant's state of mind. We cannot agree. In stating that Appellant carried a gun on his person a few days prior to the shooting, Baker described a handgun that differed markedly in its characteristics than the handgun-described by eyewitnesses to the shooting. Indeed, by Appellant's own testimony, the handgun that killed Washington

was not his, but Washington's. In light of the fact that a handgun was never recovered, Baker's statement tended only to show Appellant's general propensity to carry a handgun - a use prohibited by KRE 404(b).

Nevertheless, in context, the error was harmless because we believe that it did not have "substantial influence" upon Appellant's trial such that it "substantially swayed" his conviction. Winstead, 283 S.W.3d at 688-89. Independent evidence strongly suggested Appellant's guilt. While in custody prior to trial, Appellant telephoned Baker and a recording of that call was played for the jury. Therein, Appellant warned Baker not to tell investigators that he was known for having a gun and told her to claim that she was forced or threatened to testify if she could not ignore the subpoena. This evidence taken with the fact that neither Appellant nor Washington had defensive wounds, that Appellant fled the scene of the crime, that no murder weapon was recovered, that Appellant attempted to dispose of the clothes he was wearing, and that Ditto saw Appellant threaten and intentionally strike an unarmed Washington with a loaded handgun all demonstrates that Baker's reference had little effect on Appellant's conviction.

D. Inadmissible Evidence in Jury Deliberations

Appellant's next claim of error is unpreserved. Prior to trial, Appellant moved that the audio from a crime scene DVD be excluded from play at trial. The Commonwealth agreed and the trial court sustained the motion. At trial, the Commonwealth played the

muted DVD for the jury without objection. The Commonwealth then moved to admit the DVD into evidence and Appellant did not object. Though Appellant now argues that the jury was able to make use of inadmissible evidence during its deliberations, he made no attempt to raise the issue at trial. See Pace, 82 S.W.3d at 895; Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994). Appellant does not request palpable error review and we do not address it further.

E. Limited Impeachment of Prosecution Witness

Appellant also argues that the trial court erroneously limited his ability to impeach Baker with a prior inconsistent statement. We agree, but hold the error to be harmless.

At trial, Baker testified that ten to fifteen minutes after hearing gunshots and sirens, Appellant came to her apartment for approximately ten to twenty minutes acting scared and looking out her screen door. Baker stated that the time was between 11:30 pm and 1:30 am, as that was the time when a popular television program aired that she remembered viewing that night. During Appellant's cross-examination of Baker, defense counsel established that Baker had given a similar statement to police. Defense counsel then proceeded to ask Baker whether she recalled giving a prior statement to investigator Joyce Aldrich, to which Baker stated that she did not. Defense counsel informed Baker as to the date and time of that interview, but she still claimed having no memory of way statement to Aldrich.

At the request of the Commonwealth, a bench conference ensued in which defense counsel explained that she was attempting to impeach Baker with a prior inconsistent statement - namely, that Baker had allegedly stated in her interview with Aldrich that Appellant arrived at her apartment at 11 :00 pm and omitted whether she heard gunshots or observed Appellant acting scared. The trial court noted that the prior statement had been incorporated into a written synopsis by Aldrich and that defense counsel simply could not read the writing aloud to Baker to accomplish impeachment. Rather, the trial court concluded that Aldrich would have to testify as to its contents, to which defense counsel agreed.

Defense counsel resumed her cross-examination of Baker and began asking whether she recalled giving certain statements to Aldrich and, apparently, began reading from Aldrich's summary to identify Baker's exact statement. As soon as it became clear that defense counsel was about to do so, the Commonwealth objected on hearsay grounds. The trial court agreed with the Commonwealth, stating that because Baker could not recall the statement, defense counsel could not ask her about it.

The next day, Aldrich testified and confirmed that she had spoken with Baker on the date and time previously indicated during Baker's cross-examination. Perhaps anticipating an objection from the Commonwealth, defense counsel then approached the bench and argued that Baker's previous denial and inability to recall speaking with Aldrich allowed her impeachment with the prior inconsistent

statement. In response, the Commonwealth argued that defense counsel could not pursue impeachment where the denial was not evasive but simply an inability to recall. The trial court agreed and ruled that Aldrich could not read Baker's statement aloud in order to impeach her. The trial court concluded that defense counsel could only ask Aldrich whether she had spoken to Baker.

Impeachment by prior inconsistent statement is a common technique used in discrediting witness credibility. In order to introduce a prior inconsistent statement, a proper foundation must first be established, whereby the witness is "inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them." KRE 613; see also Noel v. Commonwealth, 76 S.W.3d 923, 929-931 (Ky. 2002) (noting strict compliance with the foundation requirements). Where a proper foundation is laid, in Kentucky, the prior inconsistent statement represents a hearsay exception and may also be received as substantive evidence. KRE 801A(a)(1); Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

Though, generally, a trial court "has a broad discretion in deciding whether or not to permit the introduction of such contradictory evidence," Wise v. Commonwealth, 600 S.W. 2d 470, 472 (Ky. App. 1978), here we must conclude that the court clearly erred in prohibiting Baker's impeachment because her inability to recall speaking with Aldrich constituted inconsistency for purposes of the rule. In Brock v. Commonwealth, this Court held that "[a] statement is inconsistent . . . whether the witness presently

contradicts or denies the prior statement, or whether he claims to be unable to remember it." 947 S.W.2d 24, 27- 28 (Ky. 1994) (citing Wise, 600 S.W.2d at 472). Indeed, as Wise observed, "No person should have the power to obstruct the truth'-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" 600 S.W.2d at 472.

In any event, the error was harmless. Notably, the substantive value of Baker's prior statement was quite low. If taken as true, it only briefly placed Appellant in her home some two hours before Washington's death - a fact of little relevance to Appellant's claim of self-defense. As to its impeachment value, Baker's testimony was, nevertheless, later called into question: the defense later recalled Detective Cohen to testify to prior statements that Baker had made that were substantially similar to those Appellant sought to introduce through the testimony of Aldrich. Taken with the other evidence against Appellant, we cannot say that Baker's limited impeachment in this respect "substantially swayed" Appellant's conviction. Winstead, 283 S.W.3d at 688-89.

F. Exclusion of Photographic Evidence

Appellant argues that the trial court erroneously excluded certain photographic evidence which would have corroborated his defense. We find no error.

During the testimony of Officer Woolen, Appellant sought to introduce into evidence his "mug

shot," taken just after his arrest for the crimes. When the Commonwealth questioned its relevance, Appellant argued that the picture showed redness along his wrists and thus supported his claim that Washington held him by his wrists as the two struggled over the handgun. The Commonwealth objected and contended that the photo was of a low quality, as it was generated from a non-photographic printer. The trial court reviewed the print-out and noted that the printer production rendered Appellant's skin tone very yellow in appearance. Though the Commonwealth suggested that Appellant introduce from discovery a similar police photograph documenting Appellant's wrists just after his arrest at the scene (and prior to the prolonged wearing of handcuffs), he would not stipulate to their admission. Ultimately, the trial court concluded that the print-out was inadmissible due to its poor quality and Officer Woolen later testified by avowal as to the authenticity of the mug shot.

Having reviewed the photograph, we hold that the trial court's exclusion of the evidence was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." English, 993 S.W.2d at 945; see also Love, 55 S.W.3d at 822. It appears that the print-out did, indeed, produce a yellowing-effect, giving greater contrast to areas of darker pigmentation or low light. Thus, even if we assumed that the evidence were relevant in spite of these inaccuracies, see KRE 401, we believe that; pursuant KRE 403, the print-out left the evidence so inaccurate that its probative value was "substantially outweighed by the danger of . . . misleading the jury."

G. Jury Instructions

Appellant challenges several aspects of his jury instructions, arguing that such errors generally denied him a fair trial and his right to due process. We address each contention, but find no cause for reversal.

1. Failure to Instruct on Self-Protection

Appellant first argues that the trial court erroneously denied his request for a self-protection instruction as to the lesser offenses of second-degree manslaughter and reckless homicide. Though we agree that such an omission was an abuse of discretion, see Ratliff v. Commonwealth, 194 S.W. 3d 258, 274 (Ky. 2006) (abuse of discretion standard of review) (citing Johnson v. Commonwealth, 134 S.W.3d 563, 569-70 (Ky. 2004)), we believe that the error was harmless in this instance.

At the conclusion of trial, the court instructed the jury on the offenses of murder, second-degree manslaughter, and reckless homicide. Though the murder instruction included an additional element that required the Commonwealth to prove that Appellant did not act in self-protection, both the second-degree manslaughter and reckless homicide instructions lacked that additional element. Appellant tendered instructions that included the self-protection instruction as to, all three offenses and argued that it was legally required. The trial court disagreed and concluded that self-protection was not

an available defense to the "non-intentional" offenses of second-degree manslaughter and reckless homicide.

Generally speaking, "[once evidence is introduced which justifies an instruction on self-protection or any other justification defined in KRS chapter 503, the Commonwealth has the burden to disprove it beyond a reasonable doubt, and its absence becomes an element of the offense." Commonwealth v. Hager, 41 S.W.3d 828, 833 n.l (Ky. 2001) (citing KRS 500.070(1), (3), and 1974 Commentary thereto; Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977)). In practice, "[t]he burden of proof is assigned by including as an element of the instruction on the offense 'that he was not privileged to act in self-protection.'" Id. In Elliott v. Commonwealth, 976 S.W.2d 416, 422 (Ky. 1998), this Court, in a thorough analysis, departed from a line of authority that had once precluded the assertion of a self-protection defense to the charges of wanton murder, second-degree manslaughter, and reckless homicide (among other unintentional offenses). Since Elliott, this Court has found error where a trial court, nevertheless, denies an otherwise warranted self-protection instruction within a homicide instruction requiring a mens rea short of intent or specific intent. See Halter, 41 S.W.3d at 837- 38 (instruction given with respect to murder and first-degree manslaughter but not given with respect to second-degree manslaughter and reckless homicide). Here, too, we think it quite clear that the trial court abused its discretion in denying Appellant's requested self-protection instruction within -the instructed offenses-of second-degree manslaughter and reckless homicide.

Yet, we believe that this error was harmless, as we cannot say that "'the error itself had substantial influence' upon Appellant's trial. Winstead, 283 S.W.3d at 688-89 (Ky. 2009). Indeed, we believe it quite insignificant. Though it is generally true an erroneous instruction is presumed prejudicial, see Harp v. Commonwealth, 266 S.W.3d 813, 818 (Ky. 2008) and that "an erroneous instruction on a lesser included offense can be grounds for reversal even if the defendant was convicted of the higher offense," Love, 55 S.W.3d at 826 n.3, the practical effect here was to *lessen the Commonwealth's burden* with respect to the second degree manslaughter and reckless homicide instructions. In spite of that error, the jury, nevertheless, chose to convict Appellant under the correctly phrased instruction of murder, one which properly incorporated the Commonwealth's additional burden to disprove Appellant's self-protections claim beyond a reasonable doubt. As a result, the jury concluded, that Appellant was not entitled to the self-protection defense at all. While Appellant argues that we should still find reversible error here, he identifies no authority requiring such a result. The fact remains that Appellant was convicted under a correct instruction. If the jury had convicted him of either second-degree manslaughter or reckless homicide, we would not hesitate to reverse his conviction here. See e.g. Elliott, 976 S.W.2d at 422 (reversal where defendant was convicted under instruction lacking self-protection element); Mondie v. Commonwealth, 153 S.W.3d 203, 210 (Ky. 2,005) (same). That, however, is not-the case.

2. Erroneous Initial Aggressor Instruction

Appellant next contends that the evidence did not support an instruction setting forth the provocation exception to the defense of self-protection, pursuant to KRS 503.060(2), and thus the trial court abused its discretion in accepting the instruction over Appellant's objection. Having reviewed the record, we cannot agree.

It is well-established that "[a] trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence." Fredline v. Commonwealth, 241 S.W.3d 793, 797 (Ky. 2007) (citing Manning v. Commonwealth, 23 S.W.3d 610, 614 (Ky. 2000)); see also RCr 9.54(l). Indeed, "[i]n a criminal case, it is the duty of the court to prepare and give instructions on the whole law. This general rule requires instructions applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony." Lee v. Commonwealth, 329 S.W.2d 57, 60 (Ky. 1959). This Court reviews "a trial court's rulings regarding instructions for an abuse of discretion." Ratliff, 194 S.W.3d at 274.

KRS 503.060(2), in pertinent part, provides that a defendant's otherwise valid self-protection defense is "not justifiable when . . . [t]he defendant, with the intention of causing death or serious physical injury to the other person, provokes the use of physical force by such other person." In other words, "the privilege of self-defense is denied to an individual who provokes another into an assault for the purpose of using the assault as an excuse to kill or seriously injure that person" KRS § 503.050 Commentary

(1974). The exception "may apply to a defendant who is a mental or physical aggressor." Leslie W. Abramson, 10 Kentucky Practice, Substantive Criminal Law, § 5.24 (2009-2010).

Because the testimony at trial indicated that Appellant may have intentionally provoked Washington, we find no error in the trial court instructing the jury to that effect. Notably, Ditto testified that she saw Appellant first strike Washington with a handgun and heard him threaten Washington that he "ought to kill him." Moreover, Appellant admitted that the two engaged in an aggressive verbal exchange and shoved one another just prior to Washington's death. Taken together, an issue of fact was raised as to whether Appellant intentionally provoked Washington to assault him and precipitate his murder.

3. Failure to Instruct on Voluntary Intoxication

Appellant argues that it was reversible error for the trial court to deny his tendered voluntary intoxication instruction, as the evidence demonstrated that his intoxication prevented him from forming the requisite mental state for commission of the crimes. Again, we cannot agree.

Just as "[a] trial court is required to instruct the jury on every theory of the case that is reasonably deducible from the evidence," Fredline, 241 S.W.3d at 797, a criminal defendant has the right "to have the jury instructed on the merits of any lawful defense which he or she has," Grimes v. McAnulty, 957 S.W.2d

223, 226 (Ky. 1997) (citing Sanborn v. Commonwealth, 754. S.W.2d 534, (Ky. 1988), Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105 (1916)). It, too, though "is dependent upon the introduction of some evidence justifying a reasonable inference of the existence of a defense." Id. (citing Brown v. Commonwealth, 555 S.W.2d 252, 257 (Ky. 1977); Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1977)).

Pursuant to KRS 501.080(1), voluntary intoxication may be a defense where it negates "the existence of an element of an offense" - most often, the mens rea, but, even then, only that of specific intent. See McGuire v. Commonwealth, 885 S.W.2d 931, 934 (Ky. 1994) ("Voluntary intoxication does not negate culpability for a crime requiring a culpable mental state of wantonness or recklessness, but it does negate specific intent."). This Court has held that a voluntary intoxication instruction is warranted where, "from the evidence presented, a jury could reasonably conclude that the defendant was so intoxicated that he could not have formed the requisite mens rea for the offense." Fredline, 241 S.W.3d at 797 (citing Nichols v. Commonwealth, 142 S.W.3d 683, 689 (Ky. 2004)). Yet, "there must be evidence not only that the defendant was drunk, but that [he] was so drunk that [he] did not know what [he] was doing." Springer v. Commonwealth, 998 S.W.2d 439, 451-52 (Ky. 1999) (citing Stanford v. Commonwealth, 793 S.W.2d 112, 117-18 (Ky. 1990); Meadows v. Commonwealth, 550 S.W.2d 511 (Ky. 1977); Jewell, 549 S.W.2d at 807). Thus, it is often said that "mere drunkenness will not raise the defense of intoxication." Ropers v.

Commonwealth, 86 S.W.3d 29, 44 (Ky. 2.0.04) (citing Jewell, 549 S.W. 2d-at 812).

Though Appellant may have been under the influence of narcotics, the trial court properly denied his requested voluntary intoxication instruction because no evidence indicated that he was so impaired or intoxicated at the time the offenses were committed such that he was unable to form the requisite mens rea for murder (KRS 507.040) or tampering with physical evidence (KRS 524. 100). Appellant orally ingested approximately ten to fifteen Xanax pills prior to leaving for the convenience store, but that fact alone was insignificant. While Appellant's testimony, in conjunction with Ditto and Scott's, suggested that Appellant was "high" when the offenses were committed, it does not show that he was so impaired at the time of the altercation and subsequent flight to Rudolph's home that he did not know what he was doing - indeed, at trial, Appellant's defense rested upon his detailed account of what exactly happened.

4. Failure to Instruct on No Duty to Retreat

As to the jury instructions, we believe that Appellant's final contention is without merit. He argues that the trial court should have instructed the jury that he had no duty to retreat and that such an omission misled the jury in evaluating his claim of self-protection. Though it is generally true that Appellant had no duty to retreat, see Gibson v. Commonwealth, 237 Ky. 33, 34 S.W.2d 936 (1931) ("It is the tradition that a Kentuckian never runs. He does not have to."), he concedes that we have addressed and

rejected the very argument he now makes in Hilbert v. Commonwealth, 162 S.W.3d 921, 925-26 (Ky. 2005) - namely, that "[a]n instruction on retreat... was necessary to counter the inference that Appellant was under a duty to avoid, if at all possible, the altercation with the victims." In Hilbert, this Court "explained that the Penal Code had incorporated prior Kentucky law concerning retreat and under that law a specific retreat instruction was not required," Ropers v. Commonwealth, 285 S.W.3d 740, 756 (Ky. 2009) (reaffirming Hilbert),[5] as an adequate self-protection instruction makes unnecessary a "no duty of retreat" instruction.[6] See id. at 926 (citing cases); see also Bush v. Commonwealth, 335 S.W.2d 324, 326 (Ky. 1960) ("In fact, an instruction which does set out particular facts has been condemned, and it has been held that an instruction on self-defense should be in the usual form, leaving the question to be determined by the jury in the light of all the facts and

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[5] We note that the conduct for which Appellant was prosecuted occurred before July 12, 2006 - the effective date of Senate Bill 38 and the 2006 self-defense amendments - and, as in Rogers, we see no need to address their effect, if any, upon Hilbert at this time.

[6] Though we have acknowledged here that the trial court erroneously omitted a self-protection instruction as an element within the instructed offenses of second-degree manslaughter and reckless homicide, we do not believe this to be the type of "inadequacy" contemplated by Hilbert and its progeny which could necessitate a separate retreat instruction. See e.g. Crawford v. Commonwealth, 281 Ky'. 557, 136 S.W.2d 754, 758 (1940) ("The instruction in the instant case did not require the defendants to retreat and allowed them to defend themselves."). That is to say, the murder instruction under which Appellant was convicted incorporated a legally proper self-protection instruction.

circumstances of the case, rather than in the light of certain particular facts."); Rogers, 285 S.W.3d at 757 ("[R]etreat remains a factor amidst the totality of circumstances the jury is authorized to consider."). Accordingly, the trial court did not err by refusing Appellant's tendered instruction.

H. Cumulative Error

Finally, Appellant contends that even if we do not find any individual issue sufficient to require reversal, as is -the case, we should still reverse his convictions on the basis of the cumulative errors he has identified. Our review of the entire case, however, persuades us that Appellant received a fair trial and that the errors we have discussed were not so cumulative in their effect as to, nevertheless, mandate reversal. See Funk v. Commonwealth, 842 S.W.2d 476, 483 (Ky. 1992); Bryd v. Commonwealth, 825 S.W.2d 272, 278 (Ky. 1992) (overruled on other grounds by Shadowen v. Commonwealth, 82 S.W.3d 896 (Ky. 2002)).

III. Conclusion

Therefore, for the above stated reasons, we hereby affirm Appellant's convictions and sentence.

All sitting. All concur.

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