APPENDIX A

Decision of the United States Court of Appeals of Oct. 30, 2019

No. 19-1692

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRANDON J. LOFLAND,

Petitioner-Appellant,

v.

CONNIE HORTON, Warden,

Respondent-Appellee.

ORDER

Brandon J. Lofland, a pro se Michigan prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A).

A jury convicted Lofland of first-degree felony murder, two counts of carjacking, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. The trial court sentenced him to life imprisonment with no possibility of parole plus a consecutive two-year term for the felony-firearm conviction. His direct appeal was unsuccessful. *People v. Lofland*, No. 329186, 2017 WL 252242 (Mich. Ct. App. Jan. 19, 2017) (per curiam), *perm. app. denied*, 898 N.W.2d 591 (Mich. 2017) (mem.).

Lofland filed this § 2254 petition raising these three claims: (1) there was insufficient evidence that he was the perpetrator of the charged offenses; (2) the trial court violated his right to a jury trial by allowing a witness to identify him from still photographs taken from a surveillance video; and (3) trial counsel was ineffective for failing to present certain evidence at trial. The district court denied Lofland's petition, denying claims one and three on the merits and claim two as procedurally defaulted. *Lofland v. Horton*, No. 2:18-CV-13006, 2019 WL 2247791 (E.D. Mich.

May 24, 2019). The court also declined to issue a COA. Lofland seeks a COA on each of his three claims.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether . . . the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Lofland first claimed that the State presented insufficient evidence proving that he was the perpetrator of the charged offenses. That was also Lofland's defense at trial: misidentification. *See Lofland*, 2017 WL 252242, at *1. As recounted by the Michigan Court of Appeals, Lofland's charges stemmed from "a crime spree in Detroit on the night of September 13, 2014." *Id.* Sometime between 9:00 and 9:45 p.m., Lofland carjacked Kevin Foy, stealing a 2014 red Dodge Charger. The car had a pushbutton starter and was running when Lofland stole it, so Lofland was able to drive it without the key fob, which Foy still had, but once he stopped the engine, he was unable to restart it. At trial, the State showed a video from a gas station showing a man fill up the gas tank of a red Charger after 10:00 p.m. and then abandon the car when he could not restart it. Lofland's ex-girlfriend, Nivra Bracey, identified him as the driver from stills of the video. Lofland then tried to carjack Quinton Brown, who was in a Cadillac Escalade. Brown was armed, and he and Lofland shot each other. Brown later died from his injuries. At around 11:00 p.m., Lofland called Bracey, told her he had been shot, and asked her to call 911. He gave her one location, then another, and at 11:18 p.m., police located Lofland at a gas station about half a mile from where Brown had been shot. *Id.*

When reviewing insufficient-evidence claims, a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). And "[i]n assessing the adduced proof, the Court may sustain a

conviction based upon nothing more than circumstantial evidence." *Tucker v. Palmer*, 541 F.3d 652, 657 (6th Cir. 2008).

In denying Lofland's insufficient-evidence claim on direct appeal, the Michigan Court of Appeals held that there was enough evidence for a rational jury to have found that Lofland was the person who carjacked Foy. His ex-girlfriend identified him as the person who drove and then abandoned the red Charger. Evidence about the pushbutton starter and key fob explained why he had to abandon the car. And police also confiscated a black jacket and gray sweatshirt from Lofland, which matched the description of the clothes that the person who carjacked Foy was wearing. "This circumstantial evidence," the state court held, "was sufficient to permit a rational trier of fact to reasonably infer beyond a reasonable doubt that [Lofland] was the person who carjacked Foy, stealing the red Charger." *Lofland*, 2017 WL 252242, at *2.

The Michigan Court of Appeals also held that there was sufficient evidence showing that Lofland was the person who shot and carjacked Brown. Brown's car was about fifty feet from the abandoned Charger. Video evidence showed Lofland walk from the Charger in that direction. Brown told police that a man in a black jacket approached his car and shot him through the driver's window. Brown shot the man with his own .38 caliber Derringer. About twenty minutes after police were called for Brown's shooting, they found Lofland a half-mile away with a gunshot wound, yet he had not called the police himself, but instead asked his ex-girlfriend to do so. And the bullet fragment removed from Lofland was consistent with Brown's gun. The state court held that,

> [t]his evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that [Lofland] was the assailant who shot Brown while attempting to steal his Cadillac, and then, after having been shot by Brown during the offense, attempted to distance himself from Brown's location.

Id.

The state court noted that, as he does in his COA application, Lofland sought to identify discrepancies in the evidence and pointed out the lack of fingerprint or DNA evidence linking him to the crimes. But the Michigan Court of Appeals explained those alleged discrepancies, *see id.*

at *2 n.1, and held that, even so, there was sufficient evidence, when viewed in the light most favorable to the State, that Lofland was the person who committed the charged crimes, *id.* at *2.

The district court held that the Michigan Court of Appeals' decision was not an unreasonable application of *Jackson*. *Lofland*, 2019 WL 2247791, at *4-6. Given the state court's thorough analysis of Lofland's claim and the evidence presented, no reasonable jurist could debate that decision.

Lofland next claimed that the trial court violated his right to a trial by jury when it allowed his former girlfriend to identify him from still photographs taken from surveillance video at the gas station where the Charger was abandoned. The district court denied this claim as procedurally defaulted. *Id.* at *6-7.

To obtain federal habeas relief, a petitioner must have first exhausted his state-court remedies by "'fairly present[ing]' his claim in each appropriate state court." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *see also* 28 U.S.C. § 2254(b)(1)(A). When a petitioner has failed to present his claims fairly in state court and an adequate and independent state procedural rule now prohibits the state courts from considering the claims, federal habeas courts consider the claims to be procedurally defaulted. *See Clifton v. Carpenter*, 775 F.3d 760, 763-64 (6th Cir. 2014). A federal court will not review a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would create a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), such as when a petitioner presents new evidence of his actual innocence, *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013).

Lofland raised this improper-identification claim on direct appeal, but the Michigan Court of Appeals ruled that he had not preserved it because he failed to object to his ex-girlfriend's testimony at trial. *Lofland*, 2017 WL 252242, at *3. Because he did not comply with Michigan's contemporaneous-objection rule, the district court determined that Lofland had procedurally defaulted this claim. *See Taylor v. McKee*, 649 F.3d 446, 451 (6th Cir. 2011).

In the district court, Lofland argued that he did not procedurally default this claim; that, even if he did, the default should be ignored; and that, in any event, he satisfied the fundamental-miscarriage-of-justice exception. Lofland asserted that the Michigan Court of Appeals reviewed the claim for plain error and that there is at least some question whether that amounts to merits review, citing *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017). He largely reiterates that argument in his COA application, asserting that the state court's plain-error analysis focused on the merits of his claim and thus was not independent of the federal question, citing *Walker v. Martin*, 562 U.S. 307, 315 (2011).

But those arguments misunderstand the relevant issue. The issue in *Stewart* was when a state court's review warrants the deference required by § 2254(d). 867 F.3d at 638. The issue here is whether a state court's plain-error review of a claim means that the claim was not procedurally defaulted. And there is no uncertainty on that issue: It is a "well-established rule that a state court's application of plain-error review does not revive a habeas petitioner's otherwise procedurally defaulted claim on collateral review." *Fleming v. Metrish*, 556 F.3d 520, 530 (6th Cir. 2009). Indeed, *Stewart* recognizes both that the two issues are distinct and that the procedural-default issue is settled. *See Stewart*, 867 F.3d at 638 (noting that other precedents "stand only for the proposition that a state court's plain-error analysis cannot resurrect an otherwise defaulted claim").

Lofland also argued that the district court should review the merits of his claim even if he procedurally defaulted it. Although a habeas court may review the merits to *deny* a procedurally defaulted claim, *see* 28 U.S.C. § 2254(b)(2); *Bales v. Bell*, 788 F.3d 568, 573 (6th Cir. 2015), even then it need not and ordinarily will not, *see Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).

Finally, Lofland argued that he met the fundamental-miscarriage-of-justice exception to the procedural-default bar. The purported new evidence of his actual innocence that he presented was the statement, overheard by Brown's daughter, that her stepfather was going to kill Brown. But, as the district court pointed out, Brown knew his daughter's stepfather, and when an officer asked if the stepfather was his assailant, Brown answered no. *Lofland*, 2019 WL 2247791, at *8.

In sum, no reasonable jurist could debate the district court's determination that Lofland procedurally defaulted his second claim and that he met none of the exceptions to overcome that default.

In his third claim, Lofland asserted that his trial counsel was ineffective. To prove ineffective assistance of counsel, a habeas petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Lofland argued that his attorney was ineffective for failing to present evidence that Brown's daughter heard her stepfather say that he was going to kill Brown. The Michigan Court of Appeals denied this claim because, as noted above, Brown knew his daughter's stepfather and told police that he was not his attacker. The court also noted that Lofland presented no other evidence supporting his theory that the stepfather was the shooter. And the court pointed out that the statement would have been inadmissible hearsay. Thus, the state court held that counsel was not deficient for failing to present the statement at trial. *Lofland*, 2017 WL 252242, at *5. The district court held that, "[s]ince there was little or no evidence linking [the stepfather] to the murder, trial counsel was not ineffective in failing to pursue a third party culpability defense." *Lofland*, 2019 WL 2247791, at *10. No reasonable jurist could debate that decision.

Accordingly, Lofland's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Decision of the United States District Court of May 24, 2019

Lofland v. Horton

United States District Court for the Eastern District of Michigan, Southern Division
May 24, 2019, Decided; May 24, 2019, Filed
Civil No. 2:18-CV-13006

Reporter
2019 U.S. Dist. LEXIS 87734 *; 2019 WL 2247791

BRANDON JAMAR LOFLAND, Petitioner, v. CONNIE HORTON, Respondent,

Core Terms

shot, state court, procedural default, gas station, carjacked, merits, certificate, defaulted, prong, circumstantial evidence, deference, innocence, wearing, federal court, habeas corpus, perpetrator, argues, sufficiency of evidence, ineffective, convict, driver, beyond a reasonable doubt, deferential standard, writ petition, assailant, jurists, bullet, district court, habeas review, black jacket

Counsel: **[*1]** Brandon J. Lofland, Plaintiff, Pro se, KINCHELOE, MI.

For Connie Horton Warden, Respondent: Andrea M. Christensen-Brown Michigan Department of Attorney General, Lansing, MI.

Judges: HONORABLE VICTORIA A. ROBERTS, UNITED STATES DISTRICT JUDGE.

Opinion by: VICTORIA A. ROBERTS

Opinion

OPINION AND ORDER DENYING THE PETITION FOR WRIT OF HABEAS CORPUS, DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND GRANTING PETITIONER LEAVE TO APPEAL *IN FORMA PAUPERIS*

Brandon Jamar Lofland, ("Petitioner"), confined at the Chippewa Correctional Facility in Kincheloe, Michigan, filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his conviction for first-degree felony murder, M.C.L.A. 750.316(1)(b), two counts of carjacking, M.C.L.A. 750.529a, felon in possession of a firearm, M.C.L.A. 750.224f, and possession of a firearm in the commission of a felony. M.C.L.A. 750.227b.

For the reasons that follow, the petition for writ of habeas corpus is DENIED.

I. Background

A jury convicted Petitioner in Wayne County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See* Wagner v. Smith, 581 F. 3d 410, 413 (6th Cir. 2009):

> Defendant's convictions arise from a crime spree in Detroit on the night of September 13, 2014, during **[*2]** which he first carjacked Kevin Foy and took the vehicle Foy was sitting in, a 2014 red Dodge Charger, and then later attempted to carjack Quinton Brown, who was driving a Cadillac Escalade. Brown was shot during the offense and later died from his injury. The prosecutor's theory at trial was that between 9:00 and 9:45 p.m., Foy was sitting in the passenger seat of the running Charger when defendant ordered him out of the vehicle at gunpoint, and then drove away in the car. The Charger, which had a pushbutton starter, could be driven without the key fob if it was already running, but it could not be restarted once it was stopped. The prosecution presented video evidence from a gas station showing the stolen Charger pull up to a gas pump after 10:00 p.m., and the driver ultimately abandoning the vehicle when he could not restart it after purchasing gas. Defendant's former girlfriend,

> Nivra Bracey, identified defendant as the driver in still photographs obtained from the video. The video showed defendant walking away from the gas station in the direction of where Brown was later found. The prosecution theorized that defendant walked from the gas station in search of another vehicle, encountered **[*3]** Brown sitting in his Cadillac, and then shot Brown, planning to take his vehicle. Brown, who was armed, managed to shoot defendant. At approximately 11:00 p.m., defendant called Bracey, informed her that he had been shot in the neck, and asked her to call 911; defendant informed Bracey of his location, but then later gave her a different location. Ultimately, at 11:18 p.m., police officers responded to a gas station half a mile away from where Brown had been shot, and found defendant with gunshot wounds to his throat and cheek. The defense theory at trial was misidentification.

*People v. Lofland, No. 329186, 2017 Mich. App. LEXIS 89, 2017 WL 252242, at * 1 (Mich. Ct. App. Jan. 19, 2017)*.

Petitioner's conviction was affirmed. *Id., lv. den. 500 Mich. 1061, 898 N.W.2d 591 (2017)*.

Petitioner seeks a writ of habeas corpus on the following grounds: (1) The evidence was insufficient to establish Petitioner's identity, (2) the trial court erred in allowing a witness to identify Petitioner from photographs taken from a security videotape, and (3) trial counsel was ineffective for failing to present evidence pointing to an alternative suspect.

II. Standard of Review

28 U.S.C. § 2254(d), as amended by The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes the following standard of review for habeas cases:

> An application for a writ of habeas **[*4]** corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. An "unreasonable application" occurs when "a state court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id. at 409*. 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 **[*5]** established federal law erroneously or incorrectly." *Id. at 410-11*. "[A] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*(citing *Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)*). To obtain habeas relief in federal court, a state prisoner is required to show that the state court's rejection of his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id., at 103*. Habeas relief should be denied as long as it is within the "realm of possibility" that fairminded jurists could find the state court decision to be reasonable. *See Woods v. Etherton, 136 S. Ct. 1149, 1152, 194 L. Ed. 2d 333 (2016)*.

III. Discussion

A. Claim # 1. The sufficiency of evidence claim.

Petitioner argues that the prosecution presented insufficient evidence to establish his identity as the perpetrator.

It is beyond question that "the *Due Process Clause* protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship, 397 U.S. 358, 364, 90 S. Ct.*

1068, 25 L. Ed. 2d 368 (1970). But the crucial question on review of the sufficiency of the evidence to support a criminal conviction is, "whether **[*6]** the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A court need not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 318-19 (internal citation and footnote omitted)(emphasis in the original).

When considering a challenge to the sufficiency of the evidence to convict, the reviewing court must give circumstantial evidence the same weight as direct evidence. *See* United States v. Farley, 2 F.3d 645, 650 (6th Cir. 1993). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." United States v. Kelley, 461 F.3d 817, 825 (6th Cir. 2006)(internal quotation omitted); *See also* Saxton v. Sheets, 547 F.3d 597, 606 (6th Cir. 2008)("A conviction may be sustained based on nothing more than circumstantial evidence."). Moreover, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003)(quoting Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 n.17, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957)); *See also* Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150, 1954-2 C.B. 215 (1954)(circumstantial evidence is "intrinsically no different from testimonial evidence," **[*7]** and "[i]f the jury is convinced beyond a reasonable doubt, we can require no more"); Harrington, 562 U.S. at 113 ("sufficient conventional circumstantial evidence" supported the verdict).

A federal habeas court cannot overturn a state court decision that rejects a sufficiency of the evidence claim simply because the federal court disagrees with the state court's resolution of that claim. Instead, a federal court may grant habeas relief only if the state court decision was an objectively unreasonable application of the *Jackson* standard. *See* Cavazos v. Smith, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011). "Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Id.* Indeed, for a federal habeas court reviewing a state court conviction, "the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 566 U.S. 650, 656, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012). A state court's determination that the evidence does not fall below that threshold is entitled to "considerable deference under [the] AEDPA." *Id.*

Finally, on habeas review, a federal court does not reweigh the evidence or redetermine the credibility of **[*8]** the witnesses whose demeanor was observed at trial. Marshall v. Lonberger, 459 U.S. 422, 434, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983). It is the province of the factfinder to weigh the probative value of the evidence and resolve any conflicts in testimony. Neal v. Morris, 972 F. 2d 675, 679 (6th Cir. 1992). A habeas court therefore must defer to the fact finder for its assessment of the credibility of witnesses. Matthews v. Abramajtys, 319 F. 3d 780, 788 (6th Cir. 2003).

Under Michigan law, "[T]he identity of a defendant as the perpetrator of the crimes charged is an element of the offense and must be proved beyond a reasonable doubt." Byrd v. Tessmer, 82 Fed. Appx. 147, 150 (6th Cir. 2003)(citing People v. Turrell, 25 Mich. App. 646, 181 N.W.2d 655, 656 (1970)). Identity of a defendant can be inferred through circumstantial evidence. *See* Dell v. Straub, 194 F. Supp. 2d 629, 648 (E.D. Mich. 2002). Eyewitness identification is not necessary to sustain a conviction. *See* United States v. Brown, 408 F. 3d 1049, 1051 (8th Cir. 2005); Dell v. Straub, 194 F. Supp. 2d at 648.

The Michigan Court of Appeals rejected Petitioner's sufficiency of evidence claim:

> Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that the driver of the red Charger that was abandoned at the gas station was the same person who carjacked Foy of that same vehicle at a nearby location a short while earlier. In light of the description of the pushbutton starting mechanism for the Charger, the jury could find that the person who took the vehicle was able to drive away without the key fob and drove the vehicle to the nearby **[*9]** gas station, but was unable to restart the vehicle without the key fob after stopping to purchase gas. Therefore, the person decided to abandon the vehicle. The driver of the Charger was captured in a still photograph from the gas station's surveillance

video, and defendant's former girlfriend identified that person as defendant. In addition, the police later confiscated a black jacket and a gray hooded sweatshirt from defendant, which matched the description of the clothing worn by the person who carjacked Foy. This circumstantial evidence was sufficient to permit a rational trier of fact to reasonably infer beyond a reasonable doubt that defendant was the person who carjacked Foy, stealing the red Charger.

Sufficient evidence also supported defendant's identity as the person who shot and carjacked Brown. Brown's vehicle was approximately 50 feet from where defendant had abandoned the Charger. Given the evidence identifying defendant as the person who abandoned the Charger at the gas station, the jury could find that defendant walked down the street in the direction of Brown, in search of another vehicle. Brown told the police that a man wearing a black jacket approached him as he **[*10]** sat in the driver's seat of his Cadillac, and the man fired a gun through the driver's side window, shooting Brown. Brown was armed with a .38 caliber Derringer and managed to shoot his assailant. Approximately 20 minutes after receiving a dispatch about Brown's shooting, the police encountered defendant, who had a gunshot wound, at a location half a mile from where Brown had been shot. Despite having being shot, defendant did not call 911 for assistance, but instead called his former girlfriend and asked her to call 911. The bullet fragment removed from defendant was consistent with the caliber of bullet that would have been fired from Brown's .38 caliber Derringer. This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant was the assailant who shot Brown while attempting to steal his Cadillac, and then, after having been shot by Brown during the offense, attempted to distance himself from Brown's location.

Defendant argues that there were discrepancies in the evidence concerning the color of the perpetrator's pants and how many times he was shot, and that there was no eyewitness testimony, **[*11]** or DNA or fingerprint evidence linking him to the crimes. In making these arguments, however, defendant ignores that when evaluating the sufficiency of evidence, this Court is required to resolve all conflicts in the evidence in favor of the prosecution, and that this deferential standard of review is the same whether the evidence is direct or circumstantial. Defendant's challenges are related to the weight of the evidence rather than its sufficiency. Indeed, these same challenges were presented to the jury during trial. This Court will not interfere with the jury's role of determining issues of weight and credibility.

*People v. Lofland, 2017 Mich. App. LEXIS 89, 2017 WL 252242, at * 2* (internal footnote and citations omitted).

The Michigan Court of Appeals also rejected Petitioner's argument that the evidence was inconsistent to convict:

> Defendant highlights that he was wearing light blue jeans, contrary to Brown's statement that his perpetrator was wearing khaki pants and Foy's statement that his perpetrator was wearing dark pants. Defendant ignores that his former girlfriend identified him as the person at the gas station in possession of the Charger. He also ignores that both Brown and Foy described him as wearing a black jacket, that Foy described **[*12]** him as wearing a gray hoodie under the jacket, and that, when he was found, he was wearing a grey sweatshirt and a black jacket. That defendant was wearing light jeans, and not khaki pants, did not preclude the jury from identifying him as the perpetrator in light of the other circumstantial evidence linking him to the crimes. Foy, unlike Brown, was able to testify at trial, and explained that it was dark, that he really did not see the carjacker's pants because he could only see the carjacker's upper body at the window, and his main focus was on the gun. Defendant also emphasizes that he sustained two gunshot wounds (to his cheek and throat), but Brown fired only one shot. However, the jury could find from the evidence that defendant's wounds were caused by one gunshot. The evidence indicated that Brown was in an SUV that sits higher up off the ground, which explained why the bullet that killed Brown traveled from left to right and slightly upward. When Brown shot back from the driver's seat of his vehicle, his shot would have gone downward, making it possible that the bullet fired by Brown grazed defendant's left cheek before becoming embedded in defendant's throat. Indeed, only **[*13]** one bullet fragment was recovered from defendant's body at the hospital.

*People v. Lofland, 2017 Mich. App. LEXIS 89, 2017 WL 252242, at * 2, n. 1*.

The Michigan Court of Appeals reasonably concluded

that there was sufficient circumstantial evidence establishing Petitioner's identity as the person who stole Mr. Foy's car at gunpoint and who then carjacked and murdered Mr. Brown, so as to sustain his convictions. The police located Petitioner twenty minutes after Mr. Brown was shot; Petitioner was wearing a black jacket and gray hooded sweatshirt, which was later confiscated from Petitioner. Mr. Foy told the police that his assailant wore a gray and black hooded jacket; Mr. Brown told the police that his assailant was wearing a black jacket. The clothing that Petitioner wore shortly after the carjackings matched the description of the clothing of the suspect. The surveillance videotape from the gas station shows the driver of Mr. Foy's red Charger enter the gas station and then leave on foot heading towards the direction some fifty feet away where Mr. Brown was shot. Petitioner was positively identified as this man by Ms. Bracey. Mr. Brown told the police that he shot the suspect. A bullet fragment recovered from Petitioner's neck at the hospital was the same **[*14]** caliber bullet as would have been fired from Mr. Brown's weapon. Instead of calling 911 after being shot, Petitioner called Mr. Bracey, told her he had been shot, but did not say how he had been shot. Petitioner asked Ms. Bracey to call 911 but only gave her a general location as to his whereabouts, on Dexter Avenue. When Ms. Bracey called Petitioner back for a more precise location, Petitioner told her he was at Mack and Dickerson, but when the police responded to the location, they could not find Petitioner. Petitioner was found about a half mile from where Mr. Brown had been shot. Although Petitioner told the police he had been shot at a gas station, he could not give any more information.

A defendant's erratic and suspicious behavior in the aftermath of a crime is sufficient circumstantial evidence to support a jury's finding that the defendant was the perpetrator. *See* Johnson v. Coyle, 200 F. 3d 987, 992 (6th Cir. 2000). The fact that Petitioner was near the crime scene at the time of the carjackings and murder and the fact that Petitioner told inconsistent or incomplete stories about being shot to Ms. Bracey and to the police supports a finding that he was the perpetrator. *See e.g.* Jeffries v. Morgan, 446 Fed. Appx. 777, 784 (6th Cir. 2011).

Petitioner argues that there was insufficient **[*15]** evidence to convict him because the police did not recover DNA evidence, fingerprints, or other forensic evidence to convict. The Sixth Circuit notes that the "lack of physical evidence does not render the evidence presented insufficient; instead it goes to weight of the evidence, not its sufficiency." Gipson v. Sheldon, 659 Fed. Appx. 871, 882 (6th Cir. 2016).

Petitioner also points to discrepancies in the description of his pants and the fact that Mr. Brown told the police he shot his assailant two times but Petitioner had only one gunshot wound. A federal court reviewing a state court conviction on habeas review that is "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Cavazos, 565 U.S. at 7 (quoting Jackson v. Virginia, 443 U.S. at 326). This Court must presume that the trier of fact resolved these conflicts in favor of the prosecution and defer to that resolution.

There were multiple pieces of evidence to establish Petitioner's identity as the perpetrator; the Michigan Court of Appeals did not unreasonably apply *Jackson v. Virginia* in rejecting Petitioner's sufficiency of evidence claim. **[*16]** *See* Moreland v. Bradshaw, 699 F.3d 908, 919-21 (6th Cir. 2012).

B. Claim # 2. The identification claim.

Petitioner argues that Ms. Bracey improperly invaded the province of the jury when she was permitted to offer her lay opinion that Petitioner was the person shown in the still photograph from the gas station surveillance video.

Respondent argues that this claim is procedurally defaulted because Petitioner failed to object at trial. The Michigan Court of Appeals ruled that the claim was unpreserved, because Petitioner did not object; the unpreserved claim was reviewed for plain error. People v. Lofland, 2017 Mich. App. LEXIS 89, 2017 WL 252242, at * 3. Finding none, the Michigan Court of Appeals rejected the claim. 2017 Mich. App. LEXIS 89, [WL] at * 3-4.

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). If a petitioner fails to show cause for his procedural

default, it is unnecessary for the court to reach the prejudice issue. *Smith v. Murray, 477 U.S. 527, 533, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986)*. However, in an extraordinary case, where a constitutional error probably resulted in the conviction of one who **[*17]** is actually innocent, a federal court may consider the constitutional claims presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier, 477 U.S. 478, 479-80, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)*. However, to be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. *Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*. Actual innocence, which would permit collateral review of a procedurally defaulted claim, means factual innocence, not mere legal insufficiency. *Bousley v. United States, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)*.

The Michigan Court of Appeals clearly indicated that by failing to object at trial, Petitioner did not preserve his claim.

Petitioner argues in his reply brief that his claim is not procedurally defaulted because the plain error review conducted by the Michigan Court of Appeals amounts to an adjudication on the merits. (ECF 8, Pg ID 1223).

The fact that the Michigan Court of Appeals engaged in plain error review of Petitioner's claim does not constitute a waiver of the state procedural default. *Seymour v. Walker, 224 F. 3d 542, 557 (6th Cir. 2000)*. Instead, this Court must view the Michigan Court of Appeals' review of Petitioner's claim for plain error as enforcement of the procedural default. *Hinkle v. Randle, 271 F. 3d 239, 244 (6th Cir. 2001)*. In addition, the mere fact that the Michigan Court of Appeals also **[*18]** discussed the merits of Petitioner's claim in the alternative does not mean that the claim was not procedurally defaulted. A federal court need not reach the merits of a habeas petition where the last state court opinion clearly and expressly rested upon procedural default as an alternative ground, even though it also expressed views on the merits. *McBee v. Abramajtys, 929 F. 2d 264, 267 (6th Cir. 1991)*.

The case cited by Petitioner, *Stewart v. Trierweiler, 867 F.3d 633, 638 (6th Cir. 2017)*; *cert. den. 138 S. Ct. 1998, 201 L. Ed. 2d 251 (2018)*, does not support Petitioner's position. The Sixth Circuit in *Stewart* held that the AEDPA deference applies to any underlying plain-error analysis of a procedurally defaulted claim where the merits of the claim were addressed in the alternative, but did not suggest that a claim reviewed under the plain error standard is not defaulted.

Petitioner argues that even if the claim is procedurally defaulted, this Court for purposes of judicial economy can choose to ignore it. (ECF 8, Pg ID 1224). Procedural default is not a jurisdictional bar to review of a habeas petition the merits. See *Trest v. Cain, 522 U.S. 87, 89, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997)*. In addition, "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones, 351 F. 3d 212, 215 (6th Cir. 2003)*(citing *Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)*). "Judicial economy might counsel giving the [other] question priority, **[*19]** for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix, 520 U.S. at 525*. "However, where a straightforward analysis of settled state procedural default law is possible, federal courts cannot justify bypassing the procedural default issue." *Sheffield v. Burt, 731Fed. Appx. 438, 441 (6th Cir. 2018)*, *cert. denied*, *139 S. Ct. 155, 202 L. Ed. 2d 95 (2018)*. Petitioner's claim was clearly defaulted. There is no reason to bypass the default.

Petitioner offered no reasons for his failure to preserve this claim. Although ineffective assistance of counsel may constitute cause to excuse a procedural default, that claim itself must be exhausted in the state courts. See *Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)*. Petitioner raised an ineffective assistance of counsel claim involving his attorney's failure to present evidence of an alternative suspect, but did not raise a claim that trial counsel was ineffective for failing to object to Ms. Bracey's testimony. Petitioner never raised in the Michigan courts a specific claim about trial counsel's failure to object to Ms. Bracey's lay opinion testimony; any alleged ineffectiveness of counsel cannot constitute cause to excuse Petitioner's default. See *Wolfe v. Bock, 412 F. Supp. 2d 657, 684 (E.D. Mich. 2006)*.

Petitioner failed to allege any reasons to excuse his procedural **[*20]** default; it is unnecessary to reach the prejudice issue regarding this claim. *Smith, 477 U.S. at 533*.

Petitioner did not present any new reliable evidence to support a claim of innocence to allow this Court to consider his second claim in spite of the procedural default. Petitioner's sufficiency of evidence claim is

insufficient to invoke the actual innocence doctrine to the procedural default rule. See Malcum v. Burt, 276 F. Supp. 2d 664, 677 (E.D. Mich. 2003).

Petitioner points to evidence that Mr. Brown's daughter, Shakitta Callaway, overheard her stepfather, Carlton Shivers, threaten to kill Mr. Brown during a telephone conversation with Mr. Brown's ex-wife. Petitioner suggests that Mr. Shivers was the person who killed Mr. Brown. The same police report that Petitioner uses to support his claim indicates that a police sergeant directly asked Mr. Brown if Mr. Shivers shot him and Brown replied no. (ECF 7-11, Pg ID 888-91, 902, 905-08).

Ms. Callaway's statement to the police is hearsay and is thus presumptively unreliable for supporting an actual innocence claim. *Bell v. Howes*, 701 F. App'x, 408, 412 (6th Cir. 2017), *cert. denied sub nom. Bell v. Hoffner, 138 S. Ct. 519, 199 L. Ed. 2d 398 (2017), reh'g denied, 138 S. Ct. 2617, 201 L. Ed. 2d 1022 (2018)*(citing Herrera v. Collins, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). Ms. Callaway's statement to the police is also "entitled to little weight because [it is] unsworn." *Id.* Finally, Mr. Brown knew Mr. Shivers and told the **[*21]** police that he was not his assailant; any evidence suggesting that Mr. Shivers was the actual shooter is only minimally persuasive evidence of Petitioner's innocence; Petitioner is unable to demonstrate that failure to consider this claim will result in a fundamental miscarriage of justice. Id. at 413-14.

Petitioner did not present any new reliable evidence that he is innocent of these crimes; a miscarriage of justice will not occur if the Court declined to review Petitioner's second claim on the merits. See Campbell v. Grayson, 207 F. Supp. 2d 589, 597-98 (E.D. Mich. 2002).

C. Claim # 3. The ineffective assistance of counsel claim.

Petitioner alleges he was denied the effective assistance of counsel for failing to present evidence that Mr. Carlton Shivers threatened to kill Mr. Brown. Petitioner argues that this prior threat proves that Mr. Shivers was the actual killer.

A defendant must satisfy a two prong test to show that he or she was denied the effective assistance of counsel. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies **[*22]** within the wide range of reasonable professional assistance. *Id.* In other words, petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. Strickland, 466 U.S. at 689. Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must 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. "*Strickland*'s test for prejudice is a demanding one. 'The likelihood of a different result must be substantial, not just conceivable.'" Storey v. Vasbinder, 657 F.3d 372, 379 (6th Cir. 2011)(quoting Harrington, 562 U.S. at 112). The Supreme Court's holding in *Strickland* places the burden on the defendant who raises a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See* Wong v. Belmontes, 558 U.S. 15, 27, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009).

More importantly, on habeas review, "the question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect but whether that determination was unreasonable-a substantially higher threshold.'" Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)(quoting Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)) **[*23]**. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." Harrington v. Richter, 562 U.S. at 101. Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." Knowles, 556 U.S. at 123 (citing Yarborough v. Alvarado, 541 U.S. at 664). Pursuant to the § 2254(d)(1) standard, a "doubly deferential judicial review" applies to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[A] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." Harrington, 562 U.S. at 101.

"Surmounting *Strickland's* high bar is never an easy task." *Id. at 105* (quoting *Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)*).

Because of this doubly deferential standard, the Supreme Court indicated that:

> Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington v. Richter, 562 U.S. at 105.

In addition, a reviewing court must not merely give defense counsel the benefit of the doubt, but must also affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did. *Cullen v. Pinholster, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*.

The Michigan Court of Appeals rejected Petitioner's claim:

> Defendant relies on a police report in which Brown's daughter reported overhearing Shivers state his intention to kill Brown to establish the factual predicate for his claim that there was valuable evidence that Shivers shot Brown. The same police report, however, also discloses that a police sergeant directly asked Brown if Shivers shot him and "*he stated no*" (Emphasis added.) Moreover, **[*24]** Brown's daughter overheard Shivers's threatening statement while she was listening in on a conversation between Shivers and her mother. Because information in the record indicates that Brown knew Shivers and expressly stated that Shivers did not shoot Brown, that the testimony would have been hearsay because it involved Shivers's out-of-court statement, offered to prove the truth of the matter asserted, *MRE 801*, and defendant has not offered any other evidence to support a theory that Shivers was the shooter, defense counsel's decision to forego presenting this evidence was not objectively unreasonable. Accordingly, defendant has not overcome the strong presumption that defense counsel provided constitutionally effective assistance in this regard.

*People v. Lofland, 2017 Mich. App. LEXIS 89, 2017 WL 252242, at * 5* (internal citations omitted).

Petitioner argues that this Court should not employ the AEDPA's deferential standard with respect to the prejudice prong of his ineffective assistance of counsel claim because the Michigan Court of Appeals did not reach the prejudice prong of the *Strickland* standard in rejecting the claim.

This Court cannot accept Petitioner's argument. This Court recognizes that the Sixth Circuit several times ruled that when a state **[*25]** court only addresses one prong of the *Strickland* test in rejecting a habeas petitioner's ineffective assistance of counsel claim, the federal habeas court should review that prong under the AEDPA's deferential standard of review, but apply *de novo* review to the other prong. *See e.g. Rayner v. Mills, 685 F. 3d 631, 636-39 (6th Cir. 2012)*. The Sixth Circuit, however, in a subsequent case, while continuing to follow this holding, noted that this is a "peculiar rule" that is contrary to both the letter and the spirit of *§ 2254(d)*. *See Hodges v. Colson, 727 F. 3d 517, 537, n. 5 (6th Cir. 2013)*. The Sixth Circuit in *Hodges* believed that the panel in *Rayner* had ignored the Supreme Court's language in *Harrington* which indicated:

> Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for *§ 2254(d) applies when a "claim," not a component of one, has been adjudicated.*

Id. (quoting *Harrington*, 562 at 98)(emphasis original).

The Sixth Circuit also noted in *Hodges* that their prior holding in *Rayner* created:

> [t]he following peculiar rule: if the state court fails to given an explanation **[*26]** as to either prong, then full AEDPA deference is due to both prongs; but if the state court gives an explanation of one prong, then we do not give deference to the other. In other words, the more information the state court provides, the less deference we grant it. This is contrary not only to the language of the statute, which speaks of "claims" not components of claims, but also contrary to the spirit of *§ 2254(d)*, which is designed to give more deference to a state court judgment on the merits.
>
> Moreover, as a matter of logic, a finding that counsel's performance was not deficient implicitly,

> but unequivocally, encompasses a finding that the performance did not prejudice the defendant. Indeed, it would be nonsensical to argue that a performance deemed to be constitutionally sufficient nevertheless prejudiced the defendant. It must be assumed that a state court's decision that performance was not deficient includes a decision that the performance was not prejudicial.

Id.

In light of the clear language in *Harrington*, the AEDPA's deferential standard of review applies to the prejudice prong of the *Strickland* ineffective assistance of counsel standard, even if the Michigan Court of Appeals did not **[*27]** explicitly address the prejudice prong of the ineffective assistance of counsel claim. Moreover, the Michigan Court of Appeals clearly found that trial counsel was not deficient. Such a finding "implicitly, but unequivocally, encompasses a finding that the performance did not prejudice the defendant." *Hodges, 727 F. 3d at 537, n. 5*.[1]

To prevail on his claim, Petitioner must show that trial counsel's alleged failure to investigate other suspects for the murder constituted deficient performance that resulted in prejudice. *Zagorski v. Mays, 907 F.3d 901, 907 (6th Cir. 2018)*, *cert. denied*, *139 S. Ct. 450, 202 L. Ed. 2d 343* the commission of a crime by third parties does not constitute ineffective assistance of counsel, where the evidence does not 'point unerringly' to the guilt of the third party and the innocence of the accused." *Calicut v. Quigley, No. 05-CV-72334, 2007 U.S. Dist. LEXIS 166, 2007 WL 37751, at * 8 (E.D. Mich. Jan. 3, 2007)*(Roberts, J.)(quoting *Hoots v. Allsbrook, 785 F.2d 1214, 1222 (4th Cir. 1986)*). Mr. Brown knew Mr. Shivers and told the police he was not his assailant. Other than the threat, there is no other evidence linking Mr. Shivers to the murder. Since there was little or no evidence linking Mr. Shivers to the murder, trial counsel was not ineffective in failing to pursue a third party culpability defense. *See e.g. Robins v. Fortner, 698 F. 3d 317, 331 (6th Cir. 2012)*.

IV. Conclusion

The Court denies the petition for writ of habeas corpus. The Court also **[*28]** denies a certificate of appealability to Petitioner. To obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. *28 U.S.C. § 2253(c)(2)*. To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Id. at 484*. Likewise, when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its **[*29]** procedural ruling. *Id. at 484*. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing § 2254 Cases, Rule 11(a)*, 28 U.S.C. foll. *§ 2254*; *See also Strayhorn v. Booker, 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010)*.

For the reasons stated in this opinion, the Court denies Petitioner a certificate of appealability; he failed to make a substantial showing of the denial of a federal constitutional right. *See Siebert v. Jackson, 205 F. Supp. 2d 727, 735 (E.D. Mich. 2002)*.

Although this Court denies a certificate of appealability, the standard for granting an application for leave to proceed *in forma pauperis* (IFP) is lower than the standard for certificates of appealability. *See Foster v. Ludwick, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002)*.

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[1] Absent a clear directive from the Supreme Court or a decision of the Court of Appeals sitting en banc, a panel of the Court of Appeals, or for that matter, a district court, is not at liberty to reverse the circuit's precedent. *See Brown v. Cassens Transport Co., 492 F.3d 640, 646 (6th Cir. 2007)*. In the absence of Supreme Court precedent directly on point, a district court should decline to "underrule" established circuit court precedent. *See Johnson v. City of Detroit, 319 F. Supp. 2d 756, 771, n. 8 (E.D. Mich. 2004)*. It appears, however, that the clear language of the Supreme Court's decision in *Harrington* indicates that the AEDPA's deferential standard of review applies to both parts of a multipart claim, even if the state court only addresses one component of that claim. This Court's conclusion is supported by the logic behind the Sixth Circuit's criticism of *Rayner* in the *Hodges* decision.

While a certificate of appealability may only be granted if petitioner makes a substantial showing of the denial of a constitutional right, a court may grant IFP status if it finds that an appeal is being taken in good faith. *Id. at 764-65*; *28 U.S.C. § 1915(a)(3)*; *Fed. R.App.24 (a)*. "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. *Foster, 208 F. Supp. 2d at 765*. Although jurists of reason would not debate this Court's resolution of Petitioner's claims, the issues are not frivolous; therefore, an appeal could be taken in good faith and Petitioner may proceed *in forma pauperis* on appeal. *Id.*

V. ORDER

The Court [*30] DENIES the Petition for Writ of Habeas Corpus and a Certificate of Appealability.

Petitioner is **GRANTED** leave to appeal *in forma pauperis*.

Dated: 5/24/19

/s/ Victoria A. Roberts

HON. VICTORIA A. ROBERTS

UNITED STATES DISTRICT JUDGE

JUDGMENT

This matter came before the Court on a Petition for Writ of Habeas Corpus. In accordance with the Memorandum Opinion and Order entered on May 24, 2019:

(1) **The Petition for Writ of Habeas Corpus is DENIED WITH PREJUDICE**.

(2) **A Certificate of Appealability is DENIED**.

(3) **Petitioner is GRANTED leave to appeal *In Forma Pauperis***.

IT IS ORDERED.

Dated at Detroit, Michigan, this 24th day of May, 2019.

APPROVED:

/s/ Victoria A. Roberts

HON. VICTORIA A. ROBERTS

UNITED STATES DISTRICT JUDGE

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APPENDIX C

Decision of the Michigan Court of Appeals of Jan. 19, 2017

People v. Lofland

Court of Appeals of Michigan
January 19, 2017, Decided
No. 329186

Reporter
2017 Mich. App. LEXIS 89 *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BRANDON JAMAR LOFLAND, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *People v. Lofland, 500 Mich. 1061, 898 N.W.2d 591, 2017 Mich. LEXIS 1510 (July 25, 2017)*

Prior History: **[*1]** Wayne Circuit Court. LC No. 15-002799-01-FC.

Core Terms

shot, carjacked, photograph, gas station, wearing, video, bullet, driver, jury's, perpetrator, circumstantial evidence, province of the jury, reasonable inference, identification, credibility, abandoned, gunshot, jacket, wounds, pants, shoot

Judges: Before: RIORDAN, P.J., and FORT HOOD and SERVITTO, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, *MCL 750.316(1)(b)*; two counts of carjacking, *MCL 750.529a*; felon in possession of a firearm, *MCL 750.224f*; and possession of a firearm during the commission of a felony, *MCL 750.227b*. The trial court sentenced defendant as a fourth-offense habitual offender, *MCL 769.12*, to life imprisonment for the murder conviction, and concurrent prison terms of 25 to 30 years each for the carjacking convictions, and three to five years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from a crime spree in Detroit on the night of September 13, 2014, during which he first carjacked Kevin Foy and took the vehicle Foy was sitting in, a 2014 red Dodge Charger, and then later attempted to carjack Quinton Brown, who was driving a Cadillac Escalade. Brown was shot during the offense and later died from his injury. The prosecutor's theory at trial was that between 9:00 and 9:45 p.m., Foy was sitting in the passenger seat of the running Charger when defendant **[*2]** ordered him out of the vehicle at gunpoint, and then drove away in the car. The Charger, which had a pushbutton starter, could be driven without the key fob if it was already running, but it could not be restarted once it was stopped. The prosecution presented video evidence from a gas station showing the stolen Charger pull up to a gas pump after 10:00 p.m., and the driver ultimately abandoning the vehicle when he could not restart it after purchasing gas. Defendant's former girlfriend, Nivra Bracey, identified defendant as the driver in still photographs obtained from the video. The video showed defendant walking away from the gas station in the direction of where Brown was later found. The prosecution theorized that defendant walked from the gas station in search of another vehicle, encountered Brown sitting in his Cadillac, and then shot Brown, planning to take his vehicle. Brown, who was armed, managed to shoot defendant. At approximately 11:00 p.m., defendant called Bracey, informed her that he had been shot in the neck, and asked her to call 911; defendant informed Bracey of his location, but then later gave her a different location. Ultimately, at 11:18 p.m., police officers **[*3]**

responded to a gas station half a mile away from where Brown had been shot, and found defendant with gunshot wounds to his throat and cheek. The defense theory at trial was misidentification.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to identify him as the person who committed any of the charged crimes. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese, 491 Mich 127, 139; 815 NW2d 85 (2012)*. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Brantley, 296 Mich App 546, 550; 823 NW2d 290 (2012)*. "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack, 462 Mich 392, 400; 614 NW2d 78 (2000)*.

Identity is an essential element in a criminal prosecution, *People v Oliphant, 399 Mich 472, 489; 250 NW2d 443 (1976)*, and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern, 6 Mich App 406, 409-410; 149 NW2d 216 (1967)*. Positive identification by a witness or circumstantial evidence and **[*4]** reasonable inferences arising from it may be sufficient to support a conviction of a crime. *People v Davis, 241 Mich App 697, 700; 617 NW2d 381 (2000)*; *Nowack, 462 Mich at 400*. The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that the driver of the red Charger that was abandoned at the gas station was the same person who carjacked Foy of that same vehicle at a nearby location a short while earlier. In light of the description of the pushbutton starting mechanism for the Charger, the jury could find that the person who took the vehicle was able to drive away without the key fob and drove the vehicle to the nearby gas station, but was unable to restart the vehicle without the key fob after stopping to purchase gas. Therefore, the person decided to abandon the vehicle. The driver of the Charger was captured in a still photograph from the gas station's surveillance video, and defendant's former girlfriend identified that person as defendant. In addition, the police later confiscated a black jacket and a gray hooded sweatshirt from defendant, which matched the description of the clothing **[*5]** worn by the person who carjacked Foy. This circumstantial evidence was sufficient to permit a rational trier of fact to reasonably infer beyond a reasonable doubt that defendant was the person who carjacked Foy, stealing the red Charger.

Sufficient evidence also supported defendant's identity as the person who shot and carjacked Brown. Brown's vehicle was approximately 50 feet from where defendant had abandoned the Charger. Given the evidence identifying defendant as the person who abandoned the Charger at the gas station, the jury could find that defendant walked down the street in the direction of Brown, in search of another vehicle. Brown told the police that a man wearing a black jacket approached him as he sat in the driver's seat of his Cadillac, and the man fired a gun through the driver's side window, shooting Brown. Brown was armed with a .38 caliber Derringer and managed to shoot his assailant. Approximately 20 minutes after receiving a dispatch about Brown's shooting, the police encountered defendant, who had a gunshot wound, at a location half a mile from where Brown had been shot. Despite having being shot, defendant did not call 911 for assistance, but instead called his **[*6]** former girlfriend and asked her to call 911. The bullet fragment removed from defendant was consistent with the caliber of bullet that would have been fired from Brown's .38 caliber Derringer. This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant was the assailant who shot Brown while attempting to steal his Cadillac, and then, after having been shot by Brown during the offense, attempted to distance himself from Brown's location.

Defendant argues that there were discrepancies in the evidence concerning the color of the perpetrator's pants and how many times he was shot, and that there was no eyewitness testimony, or DNA or fingerprint evidence linking him to the crimes.[1] In making these arguments,

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[1] Defendant highlights that he was wearing light blue jeans, contrary to Brown's statement that his perpetrator was wearing khaki pants and Foy's statement that his perpetrator was wearing dark pants. Defendant ignores that his former girlfriend identified him as the person at the gas station in possession of the Charger. He also ignores that both Brown and Foy described him as wearing a black jacket, that Foy described him as wearing a gray hoodie under the jacket, and

however, defendant ignores that when evaluating the sufficiency of evidence, this Court is required to resolve all conflicts in the evidence in favor of the prosecution, *People v Lockett, 295 Mich App 165, 180; 814 NW2d 295 (2012)*, and that this deferential standard of review is the same whether the evidence is direct or circumstantial. *Nowack, 462 Mich at 400*. Defendant's challenges are related to the weight of the evidence rather than its sufficiency. *People v Scotts, 80 Mich App 1, 9; 263 NW2d 272 (1977)*. Indeed, these same **[*7]** challenges were presented to the jury during trial. This Court will not interfere with the jury's role of determining issues of weight and credibility. *People v Wolfe, 440 Mich 508, 514; 489 NW2d 748 (1992)*, amended *441 Mich 1201 (1992)*.

II. GREAT WEIGHT OF THE EVIDENCE

We also reject defendant's argument that his convictions must be reversed because the evidence preponderates so heavily against the jury's verdicts that it would be a miscarriage of justice to allow the verdicts to stand. A defendant is required to move for a new trial in the lower court to preserve a claim that his conviction is against the great weight of the evidence. *People v Cameron, 291 Mich App 599, 617-618; 806 NW2d 371 (2011)*. Because defendant did not move for a new trial below, our review of this issue is limited to plain error affecting defendant's substantial rights. *People v Musser, 259 Mich App 215, 218; 673 NW2d 800 (2003)*.

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon, 456 Mich 625, 642; 576 NW2d 129 (1998)*; *People v Unger, 278 Mich App 210, 232; 749 NW2d 272 (2008)*. Defendant does not challenge any of the elements of the various offenses, other than his identification. As discussed previously, sufficient circumstantial evidence supports defendant's identity as the perpetrator of the crimes. Considering Bracey's **[*8]** identification of defendant in the photographs from the gas station video as the person in possession of the stolen Charger shortly after Foy was carjacked, and that defendant was wearing clothing that matched Foy's description of the carjacker, the evidence does not preponderate so heavily against the jury's verdict for the Foy carjacking charge that it would be a miscarriage of justice to allow the verdict to stand.

Likewise, considering the evidence that defendant left the Charger at the gas station after it would not start, that he then began walking toward the location where Brown was shot, that Brown shot his assailant, that the police found defendant with a gunshot wound shortly after Brown was shot and within half a mile from where Brown had been shot, and that a bullet fragment removed from defendant was consistent with the caliber of bullet that Brown's weapon would have used, the evidence does not preponderate so heavily against the jury's verdicts for the Brown carjacking and murder charges that it would be a miscarriage of justice to allow the verdicts to stand.

Contrary to what defendant suggests, conflicting testimony and questions regarding the credibility of witnesses **[*9]** are not sufficient grounds for granting a new trial. *Lemmon, 456 Mich at 643*. This Court defers to the jury's determination of credibility "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities[.]" *Id. at 645-646* (citation omitted). That is not the case here. The jury was aware that neither victim identified defendant, that there were no other eyewitnesses, and that there was no fingerprint or DNA evidence linking defendant to the crimes. Again, it was up to the jury to assess the weight and reliability of the circumstantial identification evidence in light of the factors explored by the defense. *Id. at 643-644*. The jury's verdict is not against the great weight of the evidence.

III. LAY OPINION TESTIMONY

Defendant next argues that Bracey improperly invaded

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that, when he was found, he was wearing a grey sweatshirt and a black jacket. That defendant was wearing light jeans, and not khaki pants, did not preclude the jury from identifying him as the perpetrator in light of the other circumstantial evidence linking him to the crimes. Foy, unlike Brown, was able to testify at trial, and explained that it was dark, that he really did not see the carjacker's pants because he could only see the carjacker's upper body at the window, and his main focus was on the gun. Defendant also emphasizes that he sustained two gunshot wounds (to his cheek and throat), but Brown fired only one shot. However, the jury could find from the evidence that defendant's wounds were caused by one gunshot. The evidence indicated that Brown was in an SUV that sits higher up off the ground, which explained why the bullet that killed Brown traveled from left to right and slightly upward. When Brown shot back from the driver's seat of his vehicle, his shot would have gone downward, making it possible that the bullet fired by Brown grazed defendant's left cheek before becoming embedded in defendant's throat. Indeed, only one bullet fragment was recovered from defendant's body at the hospital.

the province of the jury when she offered her opinion that defendant was the person depicted in the still photograph from the gas station surveillance video. Because defendant did not object to this testimony below, this issue is unpreserved. We review this unpreserved claim of error for plain error **[*10]** affecting defendant's substantial rights. *People v Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999)*.

MRE 701 permits a lay witness to provide testimony in the form of an opinion if the opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." But "'a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense.'" *People v Fomby, 300 Mich App 46, 53; 831 NW2d 887 (2013)* (citation omitted). For this reason, if a witness is in no better position than the jury to identify a person in a video or still photograph, the witness's testimony identifying a defendant as the individual depicted is generally inadmissible as an invasion of the province of the jury. *Id. at 52-53*. Conversely, if a witness is in a better position than the jury to identify a person depicted in a video or photograph, the lay opinion testimony does not invade the province of the jury. *Id.*; see also *United States v LaPierre, 998 F2d 1460, 1465 (CA 9, 1993)*. As this Court observed in *Fomby*, the *LaPierre* Court offered two illustrations of when a lay witness may identify a defendant in a video or photograph at trial without invading the province of the jury. The *LaPierre* Court explained:

> Our cases upholding the use of testimony of this type have been limited to **[*11]** two types. The first type is those in which *the witness has had substantial and sustained contact with the person in the photograph*. The second type is those in which the defendant's appearance in the photograph is different from his appearance before the jury and the witness is familiar with the defendant as he appears in the photograph. [*LaPierre, 998 F2d at 1465* (citations omitted; emphasis added).]

The "common thread" binding these types of cases is that "there is reason to believe that the witness is more likely to identify correctly the person than is the jury." *LaPierre, 998 F2d at 1465*. See also *Fomby, 300 Mich App at 52*.

The evidence showed that Bracey was substantially familiar with defendant. Bracey testified that as of September 2014, she had known defendant for 2-1/2 years, had been in a relationship with him, and had seen him on a consistent basis. In fact, Bracey was the person who defendant chose to call for assistance after he was shot. Bracey acknowledged that the still photograph was not that clear and was taken from a distance, but she was still able to identify defendant with certainty based on her substantial contact with him. Given her familiarly with defendant, Bracey was in a better position than the jury to determine whether defendant **[*12]** was the person depicted in the still photograph. Therefore, Bracey's testimony did not invade the province of the jury, and her lay opinion testimony, which was rationally based on her perception of the photographs and was helpful to the jury's determination of a material fact at issue (identity), was admissible under *MRE 701*. Therefore, defendant cannot establish plain error.

IV. EVIDENCE THAT CARL SHIVERS THREATENED TO KILL BROWN

Defendant raises two claims involving the failure to present evidence that Brown's daughter overheard her stepfather, Carlton Shivers, threaten to kill Brown during a conversation between Shivers and Brown's former wife. He argues that defense counsel was ineffective for failing to present this evidence, and that it was misconduct for the prosecutor to not present this evidence. We disagree.

A. EFFECTIVE ASSISTANCE

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Heft, 299 Mich App 69, 80; 829 NW2d 266 (2012)*. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional **[*13]** norms and that this performance caused him or her prejudice." *People v Nix, 301 Mich App 195, 207; 836 NW2d 224 (2013)* (citation omitted). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009)*.

Decisions about what arguments to make and what evidence to present are matters of trial strategy, *People v Rockey, 237 Mich App 74, 76; 601 NW2d 887 (1999)*, and "this Court will not second-guess defense counsel's

judgment on matters of trial strategy." *People v Benton, 294 Mich App 191, 203; 817 NW2d 599 (2011)*. Defendant relies on a police report in which Brown's daughter reported overhearing Shivers state his intention to kill Brown to establish the factual predicate for his claim that there was valuable evidence that Shivers shot Brown. The same police report, however, also discloses that a police sergeant directly asked Brown if Shivers shot him and "*he stated no*" (Emphasis added.) Moreover, Brown's daughter overheard Shivers's threatening statement while she was listening in on a conversation between Shivers and her mother. Because information in the record indicates that Brown knew Shivers and expressly stated that Shivers did not shoot **[*14]** Brown, that the testimony would have been hearsay because it involved Shivers's out-of-court statement, offered to prove the truth of the matter asserted, *MRE 801*, and defendant has not offered any other evidence to support a theory that Shivers was the shooter, defense counsel's decision to forego presenting this evidence was not objectively unreasonable. Accordingly, defendant has not overcome the strong presumption that defense counsel provided constitutionally effective assistance in this regard.

B. THE PROSECUTOR'S CONDUCT

In a related argument, defendant complains that the prosecutor violated a duty by not introducing evidence of Shivers's death threat at defendant's trial. Because defendant did not argue below that the prosecutor engaged in misconduct by failing to present this evidence at trial, this issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *Carines, 460 Mich at 763*. Defendant does not cite any legal authority to support his position that the prosecution has an affirmative duty to present potentially exculpatory evidence at trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, **[*15]** nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly, 231 Mich App 627, 640-641; 588 NW2d 480 (1998)*. Regardless, defendant's argument confuses a prosecutor's duty to disclose evidence with a duty to present that evidence at trial. The prosecution does not have a duty to introduce allegedly exculpatory evidence at trial, only to make it available to the defendant. See *People v Lester, 232 Mich App 262, 278-279; 591 NW2d 267 (1998)*, overruled in part on other grounds in *People v Chenault, 495 Mich 142; 845 NW2d 731 (2014)*. Defendant does not contend that the prosecution failed to disclose the evidence of Shivers's threatening statement, or that he was unaware of that statement. Furthermore, there is no requirement that the prosecution negate every theory consistent with a defendant's innocence. *Nowack, 462 Mich at 400*. Thus, there is no basis for concluding that the prosecutor engaged in misconduct by failing to present the evidence of Shivers's threat.

Affirmed.

/s/ Michael J. Riordan

/s/ Karen M. Fort Hood

/s/ Deborah A. Servitto

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APPENDIX D

Decision of the Michigan Supreme Court of 2017

People v. Lofland

Supreme Court of Michigan

July 25, 2017, Decided

SC: 155439

Reporter
2017 Mich. LEXIS 1510 *; 500 Mich. 1061; 898 N.W.2d 591; 2017 WL 3175009

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BRANDON JAMAR LOFLAND, Defendant-Appellant.

Prior History: **[*1]** COA: 329186. Wayne CC: 15-002799-FC.

Mich. v. Brandon Jamar Lofland, 2017 Mich. App. LEXIS 89 (Mich. Ct. App., Jan. 19, 2017)

Judges: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Joan L. Larsen, Kurtis T. Wilder, Justices. WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.

Opinion

Order

On order of the Court, the application for leave to appeal the January 19, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

WILDER, J., did not participate because he was on the Court of Appeals panel at an earlier stage of the proceedings.