No._____

IN THE SUPREME COURT OF THE UNITED STATES

RUSSELL BROWN,

Petitioner,

v.

SHAWN P. PHILLIPS

Respondent.

On Petition for Writ of Certiorari to
the Sixth Circuit Court of Appeals

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

Respectfully submitted by,
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2019 WL 1795926
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United States District Court, E.D. Tennessee, Southern Division,
at Chattanooga.

Russell Patrick **BROWN**, Petitioner,

v.

Kevin **HAMPTON**, Warden, Respondent.

No. 1:17-CV-29-RLJ-CHS
Filed 04/24/2019

Attorneys and Law Firms

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Meredith Wood Bowen, State of Tennessee, Office of Attorney General, Nashville, TN, for Respondent.

MEMORANDUM OPINION

Leon Jordan, United States District Judge

***1** On May 21, 2013, a jury in the Bradley County, Tennessee Criminal Court, convicted Russell Patrick **Brown** ("Petitioner") of first-degree premeditated murder and aggravated arson [Doc. 1]. For these convictions, Petitioner received respective sentences of life and a concurrent twenty years [*Id.*]. Petitioner now brings this pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging the legality of those convictions [*Id.*].

Warden Kevin **Hampton** ("Warden" or "Respondent") has submitted an answer to the petition, which is supported by copies of the state court record [Docs. 10 and 10-1 through 10-21]. Petitioner has replied to the Warden's answer [Doc. 12], and thus the case is ripe for disposition. Because the Court can decide this case on the record, without receiving new evidence, an evidentiary hearing is not warranted. Rule 8, Rules Governing Section 2254 Cases In The United States District Courts.

For reasons which appear below, the Court will **DENY** and **DISMISS** this petition.

I. PROCEDURAL HISTORY

Petitioner filed a direct appeal from his convictions and sentences. On November 20, 2014, the Tennessee Court of Criminal Appeals ("TCCA") affirmed Petitioner's convictions. *State v. **Brown***, No. E201302663CCAR3CD, 2014 WL 12649802 (Tenn. Crim. App. Nov. 20, 2014), *perm. app. denied* (Tenn. 2015). On June 29, 2015, Petitioner filed a pro se petition for post-conviction relief in the trial court [Doc. 10-12 at 3-69, 72]. The trial court denied relief, the TCCA affirmed that denial, and the Tennessee Supreme Court ("TSC") denied Petitioner's application for permission to appeal. ***Brown** v. State*, No. E201600437CCAR3PC, 2016 WL 6087671, at *1 (Tenn. Crim. App. Oct. 18, 2016), *perm. app. denied* (Tenn. 2016).

Petitioner then brought this timely habeas corpus application in this Court.

II. FACTUAL BACKGROUND

The following factual recitation is taken from the TCCA's post-conviction opinion.

The petitioner's convictions were based on his stabbing a friend to death in a motel room and then setting fire to his bed before fleeing. The petitioner turned himself in to the police approximately eighteen hours later and testified in his own defense at trial, relating the following: He and the victim had been friends since childhood, with their friendship eventually turning into a sexual relationship, based on drugs. The petitioner explained that he did not consider himself a homosexual, but he engaged in sexual encounters with the victim because he was addicted to cocaine, which the victim provided for him.

On New Year's Eve, 2011, the petitioner and the victim purchased alcohol, cocaine, and prescription pills and socialized with the victim's roommates at his apartment. At about 11:00 p.m., he and the victim checked into a motel, where they continued to drink and use drugs. The petitioner then penetrated the victim anally, and the victim performed fellatio on the petitioner.

The petitioner testified that he never allowed the victim to penetrate him anally because he was not a homosexual. He said that the victim was aware that he was opposed to that type of relationship[.] That night, however, he awoke to find the victim penetrating him anally, which enraged him. He got the victim off of him, and the two men began a physical altercation. When he saw that a pocketknife that they had used earlier in the evening to cut their crack cocaine was open on the nightstand, he picked it up and stabbed the victim nineteen times. He then set fire to the bed, took the victim's car, and fled the scene.

***2** On cross-examination, the petitioner claimed that the victim had informed him that he had AIDS after letting the petitioner perform on him, and attempting to have anal intercourse with the petitioner. The petitioner conceded that he was larger than the victim, that the victim was unarmed, that the fight was over when he picked up the knife with the intent to harm the victim, and that he had intentionally set the fire.

The petitioner also presented in his defense a board-certified neurologist, Dr. Louise Ledbetter, who opined that the petitioner was "unable to make good decisions" and "lacked the ability to premeditate" due to his intoxication from the drugs and alcohol he had consumed that night. In rebuttal, the State presented board-certified forensic psychiatrist Dr. Jerry Glynn Newman, Jr., who opined that the petitioner had the capacity to premeditate at the time of the murder.

Brown, 2016 WL 6087671, at *1.

On this evidence, the jury convicted Petitioner of first-degree premediated murder and aggravated arson.

III. DISCUSSION

Petitioner's 35-page § 2254 petition lists four claims for relief: (1) insufficient evidence of premeditation to support his first-degree murder conviction; (2) insufficient evidence to sustain his aggravated assault conviction; (3) the trial court refused to give a self-defense instruction; and (4) counsel gave him ineffective assistance [Doc. 1, Pet. at 5-11, 14-34]. All claims, except for parts of Claim 4, were adjudicated in the state courts.

A. Standard for Adjudicated Claims

Adjudicated claims are evaluated under the review standards in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That statutory provision instructs a court considering a habeas claim to defer to any decision by a state court concerning the claim unless the state court's judgment (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.A. § 2254(d)(1)-(2).

A state court's decision is "contrary to" federal law when it arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or resolves a case differently than has the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 413 (2000). An "unreasonable application" occurs when a state court decision identifies the governing legal rule in Supreme Court cases but unreasonably applies the principle to the particular facts of the case. *Id.* at 407. A habeas court is to determine only whether the state court's decision is objectively reasonable, not whether, in the habeas court's view, it is incorrect or wrong. *Id.* at 411; *see also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (explaining that "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court"); *Harrington v. Richter*, 562 U.S. 86,102 (2011) ("[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.").

This is a high standard to satisfy. *Montgomery v. Bobby*, 654 F.3d 668, 676 (6th Cir. 2011) (noting that "§ 2254(d), as amended by AEDPA, is a purposefully demanding standard ... 'because it was meant to be' ") (quoting *Harrington*, 562 U.S. at 102). Further, findings of fact which are sustained by the record are entitled to a presumption of correctness—a presumption which may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007) ("[T]he habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct.") (citing 28 U.S.C. § 2254(e)(1)).

1. Insufficient Evidence (First-Degree Premeditated Murder)

***3** In this claim, Petitioner maintains that there was not sufficient evidence of premeditation, given the circumstances surrounding the killing. More specifically, Petitioner contends that he and the victim were childhood friends whose relationship had evolved into a sexual one, fueled by the victim providing drugs to Petitioner. Petitioner points to proof showing that, on the night of the crime, he and the victim used drugs and alcohol, that the victim's abrasions may have resulted from a struggle, that Petitioner anally penetrated the victim on the night of the crime, and that Petitioner, who did not consider himself to be homosexual, never allowed himself penetrated anally by the victim.

Petitioner also points to evidence demonstrating that he awakened to find the victim anally penetrating him, that he got the victim off him, and that an altercation ensued, during which the victim divulged to Petitioner that he (the victim) had contracted Acquired Immune Deficiency Syndrome ("AIDS"). Petitioner recounts that he then grabbed an open knife from the night stand and stabbed the victim. Petitioner continued stabbing the victim because Petitioner "was really mad that he would violate him like that" because anal penetration of Petitioner "was not part of ... and had never been part of the relationship" [Doc. 1 at 19]. Petitioner submits that a defense expert's testimony supported that, based on Petitioner's self-report that he had ingested various drugs and alcohol, Petitioner lacked the ability to premediate a homicide [*Id.* at 21]. Even the State's expert testified that a combination of alcohol and drugs could lower one's inhibition and cause difficulty in controlling one's emotion, so asserts Petitioner [*Id.*].

Respondent maintains that Petitioner argued to the TCCA in his direct appeal that he was too intoxicated to premediate the murder [Doc. 11 at 21]. Respondent points out that the TCCA found the jury was properly instructed on intoxication [*Id.*]. Respondent argues that the TCCA's determination that a rational trier of fact could have found the proof sufficient as to the element of premeditation (along with other elements of a premeditated first-degree murder offense) was not an "objectively unreasonable" application of the Supreme Court precedent [*Id.*]. Respondent thus concludes that Petitioner's claim of insufficient evidence of premeditation should be dismissed [*Id.*].

a) Law on Insufficient Evidence

The controlling rule in a Supreme Court case for resolving a claim of insufficient evidence is contained in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Gall v. Parker*, 231 F.3d 265, 287-88 (6th Cir. 2000) (observing that *Jackson* is the governing precedent for claims of insufficient evidence), *superseded by statute on other grounds as recognized by Parker v. Matthews*, 132 S. Ct. 2148 (2012). In *Jackson*, the Supreme Court held that evidence, when viewed in the light most favorable to the prosecution, is sufficient if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. Resolving conflicts in testimony, weighing the evidence, and drawing reasonable inferences from the facts are all matters which lie within the province of the trier of fact. *Id.* at 319.

A habeas court reviewing an insufficient-evidence claim must apply two levels of deference. *Parker v. Renico*, 506 F.3d 444, 448 (6th Cir. 2007). Under *Jackson*, deference is owed to the fact finder's verdict, "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008) (quoting *Jackson*, 443 U.S. at 324 n.16). Similarly, under AEDPA, deference is also owed to the state court's consideration of the trier-of-fact's verdict. *Cavazos*, 565 U.S. at 7 (noting the double deference owed "to state court decisions required by § 2254(d)" and "to the state court's already deferential review"). Hence, a petitioner "bears a heavy burden" when insufficiency of the evidence is claimed. *United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir. 1986).

b) Analysis

4 On direct review, Petitioner presented to the TCCA his claim that the evidence was not sufficient to sustain his first-degree murder conviction. ***Brown***, 2014 WL 12649802, at *4. The TCCA began its discussion of the claim by referring to *Jackson* as the rule controlling challenges to the sufficiency of evidence, then turned to the elements of the offense of conviction. *Id.*, 2014 WL 12649802, at *4-5. Citing to Tennessee Code Annotated § 39-13-202(a)(1) (2007), the TCCA stated: "First degree murder is the premeditated and intentional killing of another." *Id.*, 2014 WL 12649802, at *5. The TCCA defined "premeditation" as:

> an act done after the exercise of reflection and judgment. ... "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id., 2014 WL 12649802, at *5 (quoting Tenn. Code Ann. § 39-13-202(d)).

The TCCA observed that premeditation is a jury question and may be established by circumstances surrounding the killing, based upon such factors as "[t]he use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon, preparations before the killing for concealment of the crime; ... calmness immediately after the killing, ... the infliction of multiple wounds[;] the destruction or secretion of evidence at the murder[;] and the defendant's failure to render aid to a victim." *Id.*, 2014 WL 12649802, at *5 (all internal citations omitted). The TCCA explained that a jury was not limited to any specific evidence in determining whether a killing occurred after the exercise of reflection and judgment. *Id.*, 2014 WL 12649802, at *5.

Summarizing the proof which sustained the first-degree premeditated murder conviction, the TCAA pointed to evidence that established that the victim died as a result of multiple stab wounds; that Petitioner testified that, by the time he picked up the knife, the fight that had ensued between the victim and him had subsided; and that he picked up the knife with the intent to harm the victim. *Id.*, 2014 WL 12649802, at *5. The TCCA also pointed to evidence

showing that Petitioner stabbed the victim 19 times, including several times in the victim's neck and chest, and that the victim likely would have survived his wounds (including two neck and chest wounds that would have been fatal within minutes) if he had received medical treatment. *Id.*, 2014 WL 12649802, at *5.

Other circumstances indicative of a state of mind of premeditation, according to the TCCA, were that the victim, based upon his neck and chest wounds, would have been making "gurgling" noises; that, rather than render aid to the victim, Petitioner set the bed on fire and fled the scene in the victim's car; and that Petitioner disposed of the murder weapon and drove to various family members' homes before turning himself in to police. *Id.*, 2014 WL 12649802, at *5. Given proof of Petitioner's procurement of a deadly weapon; his use of the weapon to inflict 19 stab wounds (including several to the victim's neck and chest—both vital areas of the body) on an unarmed victim; his failure to render aid to the victim, despite seeing him bleeding profusely; his destruction of evidence by setting the bed on fire; his flight from the scene; and his disposal of the murder weapon, the TCCA found that such proof was sufficient to support a rational juror's inference that Petitioner acted with premeditation in committing the killing. *Id.*, 2014 WL 12649802, at *6.

***5** The TCCA, while acknowledging that Petitioner asserted that his voluntary intoxication rendered him incapable of premeditation, nonetheless reasoned that the jury heard evidence that Petitioner was under the influence of various drugs and alcohol at the time of the killing and evidence in the form of conflicting testimony from two experts about the effects of those drugs and whether Petitioner had the capability to premeditate at the time of the killing. *Id.*, 2014 WL 12649802, at *6. Observing that the jury was properly instructed on intoxication and specifically told of the relevance of intoxication on a defendant's culpable mental state, the TCCA held that the jury, by its verdict, had determined that Petitioner acted intentionally and with premeditation when he stabbed the victim and that his voluntary intoxication did not negate that intent. *Id.*, 2014 WL 12649802, at *6. The TCCA rejected Petitioner's claim, finding that he was not entitled to relief. *Id.*, 2014 WL 12649802, at *6.

Petitioner has presented nothing to show that the TCCA unreasonably determined that the evidence presented to the jury was sufficient to sustain his first-degree premeditated murder conviction. [1] When there is conflicting evidence regarding an issue, a jury's choice between such evidence furnishes no basis for habeas corpus relief. *Cavazos*, 565 U.S. at 6 ("[A] reviewing court '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.' ") (quoting *Jackson*, 443 U.S. at 326). Petitioner presented evidence to show intoxication; the State presented contrary evidence; and the jury chose to accept the State's version of events.

Given the above proof, the Court finds that TCCA's application of *Jackson* was not unreasonable and that its resulting decision was not based on an unreasonable factual determination. No writ will issue with respect to this claim.

2. Insufficient Evidence (Aggravated Arson)

Petitioner maintains, in his second claim, that there was inadequate evidence sustaining his aggravated arson conviction [Doc. 1 at 23]. Petitioner argues that he did not set the bed afire to destroy evidence of the killing, but instead to eliminate the existence of any trace of his rape [*Id.* at 23-24]. Petitioner asserts that he was acting in self-defense and with a mental state immediately after his rape that is insufficient to meet the mens rea requirement for aggravated arson [*Id.* at 24]. Respondent argues that the jury was properly instructed on voluntary intoxication, that its verdict reflects that it found Petitioner possessed the requisite mens rea beyond a reasonable doubt, and once again, that the state court's determination on this claim must remain undisturbed under the deferential standard of review [Doc. 11 at 23].

When this issue was raised on direct appeal, the TCCA first held that Petitioner had waived the issue by failing to support it in the argument section of his brief. ***Brown***, 2014 WL 12649802, at *6. The TCCA then noted that, notwithstanding the waiver, the evidence was sufficient under *Jackson* to sustain his conviction for aggravated arson.

The TCCA cited to Tennessee Code Annotated § 39-14-301(a)(1), which provides that a person commits aggravated arson when he "knowingly damages any structure by means of a fire ... [w]ithout the consent of all persons who have a possessory, proprietary or security interest therein," and "[w]hen one (1) or more persons are present therein[.]" *Id.*, 2014 WL 12649802, at *7. The TCCA explained that there is no requirement that the person or persons present be injured or that the property actually be destroyed to commit aggravated arson and that the knowing mens rea is satisfied where the person is aware of the nature of the conduct or the accompanying circumstances. *Id.*, 2014 WL 12649802, at *7.

***6** The state court recounted that Petitioner had testified that he intentionally set fire to the bed in his motel room after stabbing the victim multiple times; that a fire marshal had testified that there was no evidence that the fire had not been set intentionally; and that, had the fire department not responded, the fire likely would have spread from Petitioner's motel room to the entire building. The TCCA also pointed out that the motel owner testified that he had not given Petitioner permission to set the fire and that other guests were staying at the motel at that time. The TCCA noted that, while Petitioner claimed that he had seen no other guests at the motel that evening, he was aware that the victim was in the room when he set the fire and that an expert had testified that the victim would have survived the stabbing for several minutes and was likely still alive when Petitioner set the fire. Reasoning that, based on this evidence, a rational juror could conclude, beyond a reasonable doubt, that Petitioner was guilty of aggravated arson, the TCCA did not grant relief.

Petitioner has not provided the Court with anything to establish that the TCCA's disposition of his challenge to the sufficiency of evidence to support his aggravated arson conviction was an unreasonable application of *Jackson. Coleman v. Johnson*, 566 U.S. 650, 655 (2012) ("*Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.' " (quoting *Jackson*, 443 U.S. at 319)).

Thus, this Court concludes that the TCCA's decision that Petitioner's aggravated arson conviction was sustained by adequate evidence is not an unreasonable application of *Jackson.* Petitioner is due no relief on his second insufficient-evidence claim.

3. Self-Defense Jury Instruction

In this claim, Petitioner maintains that the trial court refused to give an instruction on self-defense, although the evidence shows that he was acting to defend himself against the rape and against "getting AIDS—a deadly disease" [Doc. 1 at 26-27]. Petitioner argues that, likewise, the trial court also refused to give a self-defense instruction for the aggravated arson charge, although he supplies no argument to support that claim [*Id.* at 27]. In Petitioner's reply, he argues additionally that he was justified in killing the victim because the victim had breached their understanding of no anal penetration of Petitioner; that Petitioner was fearful that the victim would forcibly complete the rape he had started; and that Petitioner's judgment was impaired by his emotional response to the rape [Doc. 12].

Citing to a Sixth Circuit case,[2] Petitioner maintains that failure to instruct that a defendant would have been justified in using deadly force to stop a rape is not harmless error and that the TCCA's rejection of his jury-instruction claim was an unreasonable application of the law [Doc. 12, Reply at 8-9]. For the first time in these habeas proceedings, Petitioner claims in his reply that the trial court's error deprived him of the right to present a full defense [*Id.* at 9].[3]

*7 Respondent counters that Petitioner, having failed to establish that he reasonably believed himself subject to imminent harm, was not entitled to the jury instruction and that, therefore, the claim should be denied [Doc. 11 at 27].

In addressing Petitioner's jury-instruction claim, the TCCA first iterated the allegations he offered in support. ***Brown***, 2014 WL 12649802, at *7. Petitioner pointed to his own testimony that he had been sexually assaulted by the victim and that the victim had told him that he suffered from AIDS after engaging in sexual conduct with Petitioner as evidence that "fairly raised the issue of self-defense." *Id.*, 2014 WL 12649802, at *7. Petitioner asserted that the trial court thus should have given that instruction. *Id.*, 2014 WL 12649802, at *7.

The TCCA then reviewed the law on self-defense. Under Tennessee law, "a person not engaged in unlawful activity and in a place he has a right to be is justified in using 'force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force.' " *Id.*, 2104 WL 12649802, at *8 (quoting Tenn. Code Ann. § 39-11-611(b)(1)). The person must have "a reasonable belief that there is imminent danger of death or serious bodily injury" and the danger creating this belief must be "real, or honestly believed to be real at the time" and "founded upon objectively reasonable grounds." *Id.*, 2104 WL 12649802, at *8 (all citations omitted). The TCCA pointed out that "a defendant is only entitled to a defense jury instruction where the issue is fairly raised by the evidence" and that a defendant bears the burden of introducing such evidence. *Id.*, 2104 WL 12649802, at *8.

The TCCA iterated testimony given at trial that was relevant to the issue. Petitioner testified that, when he awakened to find the victim sexually assaulting him, he easily pushed the victim off of him and ended the assault. *Id.*, 2104 WL 12649802, at *8. Petitioner further testified that the two engaged in a physical fight, but that the fight had ended when he picked up pocket knife with the intent to hurt the victim. *Id.*, 2104 WL 12649802, at *8. An expert testified that Petitioner had disclosed to the expert that he wanted to hurt the victim "because the victim hurt [him]." *Id.*, 2104 WL 12649802, at *8. The testimony, so determined the TCCA, did not suggest that the Defendant reasonably believed he was in danger of imminent death or serious bodily injury when he attacked the victim with the pocket knife. *Id.*, 2014 WL 12649802, at *8.

The TCCA next discussed Petitioner's self-defense theory predicated on the victim's disclosure that he had AIDS after he and Petitioner had engaged in sexual conduct. The TCCA determined that "the mere fact that the victim may have suffered from AIDS does not justify physical aggression out of fear of contracting the disease." *Id.*, 2014 WL 12649802, at *8 (citations omitted). The TCCA reasoned that, based on Petitioner's testimony, the fight between the victim and himself was over by the time he picked up the knife and attacked the victim. *Id.*, 2104 WL 12649802, at *8. The TCCA reasoned that the prevention of possible exposure to AIDS did not motivate Petitioner's knife attack on the victim because Petitioner already had been exposed to that disease. *Id.*, 2104 WL 12649802, at *8. Concluding that the above summarized proof did not raise an issue as to whether Petitioner acted in self-defense, the TCCA found no error in the trial court's refusal to instruct the jury on self-defense. *Id.*, 2104 WL 12649802, at *8. It denied Petitioner relief on his jury-instruction claim. *Id.*, 2104 WL 12649802, at *8.

***8** The resolution of this issue hinged on state law governing whether the evidence fairly raised the issue of self-defense so as to entitle a defendant to a self-defense instruction. The Supreme Court teaches that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Hence, whether the denial of a jury instruction on self-defense violated state law generally is not a cognizable claim in this habeas court. *See Phillips v. Million*, 374 F.3d 395, 397 (6th Cir. 2004) (explaining that "[s]tate-law trial errors will not warrant habeas relief unless the error rises to the level of depriving the defendant of fundamental fairness in the trial process."). The Court sees

no fundamental unfairness in the state court's refusal to instruct Petitioner's jury on the state law of self-defense.

Moreover, Petitioner does not cite to a Supreme Court case that holds that a criminal defendant is constitutionally entitled to a self-defense instruction, and this Court has found no such case. Indeed, there is authority to the contrary. *See Horton v. Warden, Trumbull Corr. Inst.*, 498 F. App'x 515, 523 (6th Cir. 2012) (explaining that there is "no Supreme Court decision unmistakably setting down" the rule "that a criminal defendant has a due process right to a jury instruction on self-defense"); *Phillips*, 374 F.3d at 397 (observing that a petitioner "offered no United States Supreme Court authority suggesting that the [state] courts unreasonably applied clearly established federal law in denying him a jury instruction on self-defense"). The Supreme Court "has held on numerous occasions that it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (citing *Wright v. Van Patten*, 552 U.S. 120, 123 (2008) (per curiam) (internal quotation marks omitted)).

Because the Supreme Court has not squarely-established the specific legal rule that the Constitution guarantees a criminal defendant a self-defense instruction, the state court's resolution of Petitioner's claim cannot be contrary to or an unreasonable application of controlling rule in a Supreme Court case. Accordingly, Petitioner can be granted no relief on his claim.

4. Ineffective Assistance

Petitioner claims that counsel gave him ineffective assistance by: 1) failing to spend adequate time meeting and speaking with him about his case; 2) failing to move to suppress Petitioner's confession; 3) coercing Petitioner to testify; 4) suffering from a conflict of interest; 5) failing to attend Petitioner's psychiatric evaluation by the State's expert witness; 6) failing adequately to investigate, prepare and present a self-defense claim at trial; 7) failing to secure exculpatory evidence; and 8) failing to interview defense witnesses to establish the victim's violent propensities [*Id.* at 29-31]. Petitioner maintains, in his last claim of ineffective assistance, that counsel's multiple errors, while perhaps harmless in isolation, "were cumulative in nature" and of such magnitude as to deny him a right to a fair trial [*Id.* at 31-32]. In support of his cumulative-error claim, Petitioner lists a collection of alleged attorney errors, including that counsel failed to (a) tell the jury that the murder weapon belonged to the victim; (b) present evidence to the jury that the knife was lying opened and ready to use near the bed; (c) adequately raise self-defense to support the trial court's issuance of a self-defense instruction; (d) call witnesses to testify regarding the victim's propensity for violence; (e) introduce the victim's past criminal history that would have shown a pattern of violent behavior; (f) call witnesses to testify that to tell the jury that Petitioner and victim spent $ 106 on liquor on the night of the crime; and (g) tell the jury that Petitioner has consumed over half a bottle of Paul Masson Brandy [*Id.* at 29-32].

***9** The Warden argues, in his answer, that Petitioner has raised eight claims of ineffective assistance (referring to claims 1-8); that Petitioner has procedurally defaulted three of those claims, specifically claims 2, 6 and 7; and that Petitioner is not is not entitled to relief with regard to the state court decisions rejecting claims 1, 3, 4, 5, and 8 on the merits, given the deferential standards of review set forth in 28 U.S.C. § 2254. The Warden also suggests that Petitioner has not established that counsel's performance was deficient for any error, singly or collectively. The Court first turns to the claims that, purportedly, were procedurally defaulted.

a) Procedural Defaulted Claims

The Warden asserts that Petitioner failed to offer to the TCCA his claims that counsel failed to seek to suppress Petitioner's confession (claim 2); to investigate, prepare, and present evidence at trial on a defense of self that would have justified a self-defense instruction (claim 6); and to discover exculpatory evidence, i.e., a second knife that would have revealed that Petitioner had

no plan to kill because he would have used his own knife (the second knife) if he had such a plan (claim 7). Petitioner's failure in this regard, so Respondent maintains, constitutes a procedural default.

(1) Governing Law

A state prisoner who petitions for habeas corpus relief must first exhaust his available state court remedies by presenting the claims sought to be redressed in a federal habeas court to the state courts. 28 U.S.C. § 2254(b)(1). The exhaustion rule requires total exhaustion of state remedies, *Rose v. Lundy*, 455 U.S. 509 (1982), meaning that a petitioner must have fairly presented each claim for disposition to all levels of appropriate state courts, through one full round of established review procedures. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Petitioner has the burden to establish that he has exhausted his available state remedies. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). A petitioner commits a procedural default by failing to raise a federal claim through all levels of available state court review, which bars habeas corpus relief unless that petitioner can show cause to excuse his default and prejudice as a result of the alleged constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991).

(2) Analysis

Respondent maintains that Petitioner's failure to present these specific claims to the TCCA amounts to a procedural default, which precludes federal review. The Court has examined Petitioner's post-conviction appellate brief and it does not contain those particular claims of ineffective assistance [Doc. 10-18 at 14-16]. Petitioner's failure to present his three claims to the TCCA for disposition constitutes a procedural default.

Petitioner does not assert cause and prejudice to excuse his procedural default; indeed, he concedes both that he committed the procedural default and that his procedural default forecloses federal habeas review of the cited claims [Doc. 12 at 1]. The Court agrees and will not review Claims 2, 6, or 7 alleging ineffective assistance of counsel.

b) Adjudicated Ineffective Assistance Claims 1, 3, 4, 5 and 8

(1) Applicable Law

The Sixth Amendment provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. IV. A defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Strickland*, the Supreme Court set forth a two-pronged test for evaluating claims of ineffective assistance of counsel:

> ***10** First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a break down in the adversary process that renders the result unreliable.

Id.

In considering the first prong of the Strickland test, the appropriate measure of attorney performance is "reasonableness under prevailing professional norms." *Id.* at 688. A petitioner asserting a claim of ineffective assistance of counsel must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at

690. The evaluation of the objective reasonableness of counsel's performance must be made "from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Thus, it is strongly presumed that counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

Second, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Moss v. United States*, 323 F.3d 445, 454 (6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 454-455 (quoting *Strickland*, 466 U.S. at 694). Counsel is constitutionally ineffective only if a performance below professional standards caused the defendant to lose what he "otherwise would probably have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

(2) Analysis

When Petitioner brought his post-conviction claims of ineffective assistance on appeal, the TCCA initially cited to *Strickland* and applied its two-pronged test for evaluating such claims. ***Brown***, 2016 WL 6087671, at 5 ("To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding") (citing *Strickland*, 466 U.S. at 687). Accordingly, the TCCA's decision on Petitioner's ineffective assistance claims was not contrary to the relevant Supreme Court precedent. The question then becomes whether the TCCA unreasonably applied *Strickland* to the facts of his case. With this inquiry in mind, the Court turns now to Petitioner's claims of ineffective assistance.

(A) Inadequate Amount of Time Meeting with Petitioner

Petitioner alleges, as his first claim of ineffective assistance, that counsel spent inadequate time meeting with him and discussing the case. Petitioner maintains that the five to seven hours counsel consulted with him were too few hours to engage him in a discussion of his prosecution, given the severity of the charges against him, the complexity of the case, and the punishment attached to convictions on those charges.

In reviewing this claimed attorney shortcoming, the TCCA iterated that counsel testified at the post-conviction hearing that he had spoken with Petitioner "at great length ... about the case." ***Brown***, 2016 WL 6087671, at *6. The TCCA pointed out that the post-conviction court accredited the testimony of counsel and co-counsel and resolved any disputes or conflicts in testimony or evidence against Petitioner. *Id.*, 2016 WL 6087671, at *5. The TCCA agreed with the post-conviction court's conclusion that counsel's testimony established that he conducted "a thorough investigation of the facts." *Id.*, 2016 WL 6087671, at *5. This conclusion implicitly amounts to a finding that there was no deficient performance.

***11** Although the TCCA did not make a finding as to prejudice on this particular claim, a "federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Here, the post-conviction court determined that evidence to support a need for further investigation had not been presented at the evidentiary hearing [Doc, 10-12 at 106 (pointing out the absence of "tangible evidence" to show "what further investigation or preparation would have achieved or uncovered")]. Thus, the post-conviction court implicitly determined that Petitioner had not satisfied *Strickland*'s prejudice prong by finding that no proof had been adduced to show what further investigation would have uncovered.

As one court has expressed it, "the brevity of time spent in consultation, without more, does not establish that counsel was ineffective." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980). Moreover, "regardless of the number of times [Petitioner] met with counsel, the fact that he was provided with a sufficient opportunity to discuss his case is all that is constitutionally required."

McGhee v. United States, No. 1:04-CR-45, 2009 WL 595994, at *9 (E.D. Tenn. Mar. 6, 2009). Nothing suggests that counsel failed properly to prepare the case for trial as a result of spending too little time consulting with Petitioner about the issues in his case. *See United States v. Mealy*, 851 F.2d 890, 908 (7th Cir. 1988) (observing that " '[w]e know of no case establishing a minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.' " (quoting *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir. 1988))). Indeed, the post-conviction court iterated that Petitioner admitted at the post-conviction hearing that they had met numerous times and substantively prepared for trial "over several hours" [Doc. 10-12 at 106].

Petitioner has offered no evidence in this Court to show a reasonable probability of a different outcome at trial, had counsel spent more than five to seven hours meeting with him and discussing his case. To be sure, Petitioner's "conclusory allegations regarding the time spent in consultation with his trial counsel do not show that he was prejudiced at trial[.]" *Mealy*, 851 F.2d at 908; *see also Akins v. United States*, No. 1:04-CR-190, 2011 WL 122037, at *6 (E.D. Tenn. Jan. 14, 2011) (finding that a petitioner failed to show prejudice by failing to allege "what more preparation time would have revealed and how it could have change (sic) the result of the criminal proceedings").

Given the post-conviction court's respective credibility findings as to the testimony by counsel and Petitioner, this Court finds that implicit determinations by both the TCCA and the post-conviction court that there was no prejudicial performance was not an unreasonable application of *Strickland*. Thus, the TCCA's decision on this claim must remain undisturbed.

(B) Coerced Petitioner to Testify

Petitioner's second claim of ineffective assistance is that counsel coerced him to testify, although Petitioner did not want to testify and although his testimony severely harmed his case.[4] Counsel testified at the post-conviction hearing that he had numerous discussions with his client about the advantages to be gained from testifying and the disadvantages that could ensue if Petitioner took the stand. ***Brown***, 2016 WL 6087671, at 3. Counsel stated that he encouraged Petitioner to testify to present his defenses of self-defense and voluntary intoxication because, in essence, his testimony would provide the only proof of those two defenses. *Id.*, 2016 WL 6087671, at 3. After considering the proof offered at the evidentiary hearing, the post-conviction court denied relief and, as noted, Petitioner appealed.

12** On appeal, the TCCA iterated that counsel testified at the post-conviction hearing that he had spoken with Petitioner "at great length" and had discussed "whether or not the petitioner should testify in his own defense." ***Brown, 2016 WL 6087671, at 6. The TCCA agreed with the post-conviction court's conclusion that counsel's testimony established that he prepared the Petitioner for his direct and cross-examination testimony. While the TCCA did not explicitly address Petitioner's coerced-testimony claim, the post-conviction court rejected the claim, reasoning as follows:

> Petitioner complains that more emphasis should have been placed on the defense of self at his trial. Yet, the only witness that could have asserted such defense was Petitioner himself under the particular facts of this case. Quizzically, Petitioner in the next breath challenges that his testimony was forced and not voluntary. This Court is left to wonder the true nature of Petitioner's complaint beyond his continued service of a life sentence. ... If Petitioner desired the defense of self, only his testimony would sufficiently raise such a claim to the jury to warrant consideration and argument. To the contrary, if he didn't want to testify, the defense of self would have never been raised, nor heard and considered by the petit jury.

[Doc. 10-12 at 104]. The post-conviction court then ruled against Petitioner based on his lack of credibility and the logical inferences to be drawn from circumstances surrounding the claim of coercion. More specifically, the post-conviction court stated that it "discredits Petitioner's testimony that he was forced to testify against his will given his obvious motivation and bias as exhibited at the post-conviction hearing. Petitioner voluntarily took the stand to propose that the murder was instigated by the deceased." [*Id.*].

"Credibility determinations are factual determinations" and "[a]s such, a decision based on a credibility determination 'will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding.' " *Merzbacher v. Shearin*, 706 F.3d 356, 367 (4th Cir. 2013) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); *see also Cooey v. Anderson*, 988 F. Supp. 1066, 1074–75 (N.D. Ohio 1997) (commenting that § 2254(d)'s deference requirement to a state court's findings applies to factual findings by a state trial court or an appellate court). Petitioner points to nothing to show that the post-conviction court's factual determination was objectively unreasonable, and this Court must defer to the factual finding.

Indeed, defense of self, according to the TCCA's opinion, was one of two theories formulated to combat the first-degree premeditated murder charge. ***Brown***, 2016 WL 6087671, at 2 (observing that counsel testified that the defense's strategy to defeat the premediated murder charge was "to show that the petitioner had acted in self-defense and that he lacked the capacity to premeditate due to his voluntary intoxication"). The sole method of presenting self-defense, as the post-conviction court thoughtfully determined, was through presentation of testimony by Petitioner.[5]

***13** This Court finds that the state court's decision on this ineffective-assistance claim did not ensue from an unreasonable application of *Strickland*. This claim warrants no habeas corpus relief.

(C) Conflict of Interest

Petitioner maintains, as his third claim of ineffective assistance, that counsel suffered from a conflict of interest because co-counsel previously had represented the victim. At the post-conviction hearing, counsel testified that Petitioner never mentioned his office's prior representation of the victim and that he was unaware that co-counsel had represented the victim, until Petitioner sought post-conviction relief. ***Brown***, 2016 WL 6087671, at *3. Similarly, co-counsel testified that Petitioner never told him that he had represented the victim; that he (co-counsel) was unaware of that representation until he learned of Petitioner's allegations in the post-conviction petition; and that, at that point, he looked into the matter, *id.*, 2016 WL 6087671, at *3, and determined that in the past he had represented the victim on a charge of the sale and/or delivery of narcotics [Doc. 10-13 at 52].

A criminal accused has a right to conflict-free representation under the Sixth Amendment. *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.") (citations omitted); *Gillard v. Mitchell*, 445 F.3d 883, 890 (6th Cir. 2006) (citing *Smith v. Anderson*, 689 F.2d 59, 62-63 (6th Cir. 1982)). An attorney who labors under an "actual conflict of interest" has rendered ineffective assistance of counsel. *Gillard*, 445 F.3d at 890 (citing *Strickland*, 466 U.S. at 692, for its holding that proof of an actual conflict satisfies the ineffectiveness prong, and creates a presumption of prejudice). "An actual conflict ... is a conflict of interest that adversely affects counsel's performance." *Id.* (quoting *Mickens v. Taylor*, 535 U.S. 162, 172 n. 5 (2002)).

Yet, "a possibility of conflict is insufficient to establish a violation of [the petitioner's] Sixth Amendment rights, and no violation occurs where the conflict is irrelevant or merely hypothetical." *Harbison v. Bell*, 408 F.3d 823, 836 (6th Cir. 2005) (citing *Moss v. United States*, 323 F.3d 445, 463–64 (6th Cir. 2003)) (alteration added). Where a § 2254 petitioner raises a

conflict of interest claim based on successive representation, not on joint or multiple representation, the two-pronged *Strickland* standard applies. *Stewart v. Wolfenbarger*, 468 F.3d 338, 350-51 (6th Cir. 2006); *Whiting v. Burt*, 395 F.3d 602, 619 (6th Cir. 2005); *Lordi v. Ishee*, 384 F.3d 189, 193 (6th Cir. 2004). [6]

Under *Strickland*, Petitioner "must establish both that his trial counsel suffered from an actual conflict of interest and that the conflict of interest adversely affected the quality of representation." *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 844 (6th Cir. 2017); *see also Mickens*, 435 U.S. at 174 (holding that where "there is a conflict rooted in counsel's obligations to *former* clients," the petitioner was required "to establish that the conflict of interest adversely affected his counsel's performance") (emphasis in original).

***14** The post-conviction court heard all the evidence, including testimony given by Petitioner, counsel, and co-counsel, and found that Petitioner had failed to establish that co-counsel's representation of the deceased victim in a narcotics case amounted to a conflict of interest [Doc. 10-12 at 103]. The post-conviction court further found that Petitioner had failed to show any prejudice because co-counsel served as second-chair assistant during Petitioner's premeditated murder prosecution (crediting co-counsel's testimony that he "was not substantially involved" in Petitioner's representation) and because the jurors heard substantial proof that the victim used illegal narcotics, including on the date of his death [Doc. 10-12 at 97, 103]. The clear implication from the post-conviction court's latter finding is that the quality of co-counsel's representation was unaffected by any alleged conflict. The post-conviction court concluded that Petitioner had not met his burden of showing an actual conflict of interest and was not entitled to relief.

When the issue was presented on appeal, the TCCA determined that the record supported the post-conviction court's findings and conclusions, pointing to counsel's testimony at the evidentiary hearing that he was unaware of the fact that his office had previously represented the victim in a drug case and to co-counsel's testimony that he similarly was unaware that he had represented the victim until he learned of the allegations in the post-conviction petition and reviewed the record. ***Brown***, 2016 WL 6087671, at *6. The TCCA declined to grant relief.

Petitioner has not explained here, nor did he explain in the state courts, how co-counsel's previous representation of the victim on unrelated narcotics charges caused him to abandon his duties to Petitioner. Nor did Petitioner identify, either in this Court or the state courts, co-counsel's specific acts or omissions that resulted from counsel's purported divided loyalties to the victim or Petitioner. *See Strickland*, 466 U.S. at 690 (requiring a claim of ineffective assistance to specify the acts or omissions of counsel that resulted unprofessional judgment). Indeed, the only fact Petitioner presented to the state court was that co-counsel represented the victim in a previous narcotics prosecution [Doc. 10-12 at 16]. But that fact, as the post-conviction court noted, in and of itself, does not demonstrate that a conflict of interest arose [*Id.*]. Without evidence "that a conflict existed or that any decision was influenced," the existence of an actual conflict is pure speculation. *Lordi*, 384 F.3d at 193; *see also Jalowiec*, 657 F.3d at 315 (observing that "typical successive representation [does] not pose an actual conflict of interest").

The state courts did not unreasonably apply *Strickland* in rejecting Petitioner's claim that co-counsel gave ineffective assistance by laboring under a conflict of interest. *See Lordi*, 384 F.3d at 193 (finding no unreasonable application of *Strickland* in "a case of a potential conflict of interest due to a successive representation that never ripened into an actual conflict"). Furthermore, because the Supreme Court has never addressed a conflict of interest that arises from the hybrid kind of successive representation here alleged, the TCCA decision on this claim cannot be seen as an unreasonable application of Supreme Court precedent. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (explaining that in the absence" of holdings from this Court

regarding the [issue] involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law" (quoting 28 U.S.C. § 2254(d)(1))).

Petitioner cannot be granted habeas corpus relief on this instant claim.

(D) Did Not Attend Petitioner's Mental Evaluation

Petitioner maintains that counsel failed to attend his psychiatric evaluation and familiarize himself with the affidavit submitted in connection with that evaluation that contained self-incriminating information used against him at trial. Petitioner asserts that, had counsel been present at the examination and studied the affidavit, he could have moved to suppress the affidavit that set forth the incriminating material. [7]

***15** At the post-conviction hearing, counsel explained that he objected initially to the admission of Petitioner's psychiatric evaluation but that he withdrew the objection because the prosecution expert's report contained essentially the same account of the crime Petitioner gave to him and to the defense's mental health expert, i.e., that "substances were used, it was a sexual assault, and he reacted to that sexual assault" [Doc. 10-13 at 27-28]. Counsel also pointed out that the report included Petitioner's claims of self-defense and voluntary intoxication [Doc. 10-13 at 28]. Recall that these were Petitioner's bedrock defenses against the first-degree murder charge. Too, counsel testified that the prosecutor had told him that the State would not use the evaluation at trial unless it became necessary to use it as rebuttal evidence and that this is what happened.

The post-conviction court, as explained before, accredited counsel's testimony over that of Petitioner's, including counsel's explanation of his rationale for withdrawing his objection. The post-conviction court determined that there was no deficient performance, noting that "[i]f Petitioner desired the defense of self, suppression of his self-serving statements would be the last tactic considered" [Doc. 10-12 at 104].

During Petitioner's post-conviction appeal, he raised this issue, claiming that counsel was ineffective "for not preparing him for the examination by the State's expert witness or attending his meeting with the expert." ***Brown***, 2016 WL 6087671, at *4. The TCCA noted that counsel testified at the evidentiary hearing in the post-conviction court that he "spoke with and prepared the petitioner for his examination by the expert witnesses" and that the post-conviction court had accredited that testimony. This factual finding necessarily resulted in an implicit determination that counsel did not render a deficient performance with respect to the "no preparation" aspect of Petitioner's ineffective assistance claim.

Neither the TCCA or the post-conviction court specifically ruled on Petitioner's allegation that counsel did not attend his evaluation. However, the post-conviction court determined that suppression of Petitioner's self-serving statements to the expert "is a non-issue as Petitioner himself told the jurors everything of substance subsequently related by State rebuttal experts" [Doc. 10-12 at 105]. This determination implicitly was a finding that counsel's alleged errors purportedly made in connection with Petitioner's psychological evaluation—alleged errors which included Petitioner's claim that counsel did not attend his evaluation—did not prejudice Petitioner. The TCCA did not grant relief on the claim.

Relief will be available only if the state court's application of *Strickland* was unreasonable. Counsel explained that he withdrew his objection because the psychiatric evaluation merely reiterated statements about the circumstances surrounding the killing to which Petitioner and his expert already had testified. Counsel further explained that the evaluation contained evidence relating to Petitioner's claims of self-defense and voluntary intoxication. Both defense attorneys characterized it as "trial strategy" to allow the evaluation to be submitted to the jury as a trial exhibit [Doc. 10-12 at 103-03].

The Supreme Court has held that a state court does not unreasonably apply *Strickland*'s deficient-performance component by accepting an attorney's explanation "that suppression would serve little purpose in light of [Petitioner]'s other full and admissible confession, to which [two witnesses] could testify." *See Premo v. Moore*, 562 U.S. 115, 123-124 (2011). Counsel made a reasonable tactical decision to withdraw his objection to the psychological evaluation because it contained Petitioner's statements about the killing which mirrored Petitioner's trial testimony and that of his expert and because the evaluation also contained support for Petitioner's claims of self-defense and voluntary intoxication. Strategic decisions such as these are particularly difficult to attack so as to demonstrate deficient performance. *Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable....").

***16** Similarly, as the post-conviction court held, there was no prejudice because "Petitioner himself told the jurors everything of substance subsequently related by State rebuttal experts" [Doc. 10-12 at 105]. "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001); *see also Harrington*, 526 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."). The unchallenged evaluation contained information about the circumstances of the killing that was cumulative, and there is no reasonable probability of changing an outcome by objecting to cumulative evidence. *Cf.*, *Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (finding that where "[s]ome of the evidence was merely cumulative of the humanizing evidence [counsel] actually presented; adding it to what was already there would have made little difference ... [thus a petitioner] cannot establish *Strickland* prejudice"); *Boutte v. Biter*, 556 F. App'x 623, 625 (9th Cir. 2014) (concluding that "[t]he absence of evidence that was cumulative of what had already been presented ... does not undermine our confidence in the outcome") (quotations and citation omitted); *Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009) (finding no prejudice because "[c]ounsel is not required to present cumulative evidence and "[b]ecause the evidence that [petitioner] faults counsel for failing to present is ... cumulative"); *Still v. Lockhart*, 915 F.2d 342, 344 (8th Cir. 1990) (counsel's failure to object to the admission of evidence is not prejudicial where the evidence is cumulative of "other evidence that would prove the same proposition").

The TCCA's resolution of the suppression issue, which necessarily resolved the claim that counsel did not attend Petitioner's psychological evaluation, was not an unreasonable application of *Strickland.*

(E) Failure to Call Defense Witnesses

Petitioner maintains that counsel failed to interview defense witnesses to establish that he and the victim always carried weapons and that the victim had violent propensities. In addressing Petitioner's ineffective assistance claims, the TCCA indicated that lead counsel's testimony at the post-conviction hearing established that "he conducted a thorough investigation of the facts, including whether the victim had any previous history of violent acts or violent crimes[.]" ***Brown***, 2016 WL 6087671, at *6.

The TCCA then focused its attention on Petitioner's claim that counsel should have called witnesses to establish the victim's violent propensities. The TCCA observed that Petitioner had not presented those alleged witnesses at the evidentiary hearing on his post-conviction petition. This omission was significant, according to the TCCA, because "to succeed on a claim that counsel did not properly investigate or call favorable witnesses at trial, a petitioner must generally elicit favorable testimony from those witnesses at the evidentiary hearing." *Id.*, 2016 WL 6087671, at *6. This was so, according to the TCCA, because "a post-conviction court may not speculate 'on the question of ... what a witness's testimony might have been if introduced' at trial." *Id.*, 2016 WL 6087671, at *6 (quoting *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)).

Again, the TCCA emphasized that the post-conviction court accredited the testimony of counsel and co-counsel and resolved any "disputes or conflicts in the proof and testimony" against Petitioner. *Id.*, 2016 WL 6087671, at *5. The post-conviction court, so iterated the TCCA, determined that counsel "formulated a cogent defense trial strategy" and engaged in "a valiant effort" to direct the jury's attention toward facts that were favorable to Petitioner's self-defense and voluntary intoxication defenses and away from "overwhelmingly negative facts" and robust proof of his guilt. *Id.*, 2016 WL 6087671, at *5. Despite the "very difficult circumstances" and the "sordid" facts of the case confronting the defense attorneys, the post-conviction court concluded, according to the TCCA, that their representation had been exceptional. *Id.*, 2016 WL 6087671, at *3, 5. Determining that the record supported the post-conviction court's findings and conclusions, the TCCA found no reason to disagree with the lower state court's decision and affirmed the lower state court's judgment on the ineffective assistance of counsel claims. *Id.*, 2016 WL 6087671 at *6.

***17** To prevail on this claim, Petitioner must show that the TCCA's application of *Strickland* was not reasonable. This showing can be accomplished if Petitioner directs the Court to a Supreme Court case that holds that *Strickland* requires a different resolution on a claim that counsel failed to interview witnesses, where a petitioner does not present the testimony of those witnesses at an evidentiary hearing to establish to what those witnesses would testified at trial. Petitioner has failed to cite to any Supreme Court precedent along these lines and he, thereby, has failed to demonstrate that the TCCA's adjudication of his claim "was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

The writ of habeas corpus will not issue with respect to this alleged attorney error.

(F) Cumulative Error

Petitioner maintains that counsel's errors, though each error, viewed in isolation, might be harmless, when considered collectively, amount to such prejudice as to have denied him a fair trial.

Petitioner presented the cumulative-error claim to the post-conviction court. That court discussed the issue, noting that, as a prerequisite to the application of the cumulative error doctrine, "actual errors must be found in the proof" [Doc. 10-12 at 107]. The post-conviction court, noting that it found no error of any kind, concluded that the cumulative error doctrine did not apply to Petitioner's case and that his claim failed.

On appeal, the TCCA merely noted that Petitioner was raising a cumulative error claim, but did not further address it. *See* ***Brown***, 2016 WL 6087671, at *4 ("The petitioner argues on appeal that trial counsel made a number of errors in representation, the cumulative effect of which was to deprive him of the effective assistance of counsel and a fair trial."). The TCCA, however, concluded that Petitioner had not met his burden of showing that he was denied the effective assistance of counsel and affirmed the post-conviction court's denial of his collateral review petition.

Petitioner will be entitled to the writ of habeas corpus if he demonstrates that the state court's adjudication of his cumulative-error claim was contrary to or an unreasonable application of a controlling rule in a Supreme Court case. Petitioner has not made that showing and this Court concludes that he cannot make it. This is so because the Supreme Court has not held that a district court may look to the cumulative effects of errors in deciding whether to grant habeas corpus relief. *See Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) (explaining that "the law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue.") (citing *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005)); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) (observing that "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief"); *cf., Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007) (assuming, without deciding, that

cumulative error could provide basis for § 2254 relief and holding that no relief is warranted if "there are simply no errors to cumulate.").

Because there is no Supreme Court precedent on this issue, the state court's adjudication of Petitioner's cumulative error claim could not have been unreasonable application of the relevant rule in a Supreme Court case. *See Carey*, 549 U.S. at 77. Habeas corpus relief is unavailable for this claim.

Furthermore, the instances of error raised in his § 2254 cumulative-error claim are not the same ones he offered in the state courts. A petitioner must raise a claim under the same legal theories in state courts as he does in federal courts; raising a claim in a different legal context in state courts does not exhaust it for federal habeas corpus purposes. *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998) ("This circuit has held that the doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court.").

***18** Because Petitioner did not exhaust those attorney-error claims in state courts and because state remedies are now foreclosed, he has committed a state procedural default and must show cause and prejudice to obtain habeas corpus review. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). No such showing has been made or even offered and Petitioner has committed an unexcused procedural default of his new legal theories in his cumulative-error claim. And if those specific attorney-error claims were exhausted in state courts, it remains that, for the above reasons, Petitioner is not entitled to relief. *See* 28 U.S.C. § 2254(b); *see also Granberry v. Greer*, 481 U.S. 129, 133–34 (1987) (permitting a court to deny a habeas petition (or claim) on the merits, despite a failure to exhaust state remedies).

IV. CONCLUSION

Based on the preceding law and analysis, this *pro se* state prisoner's application for a writ of habeas corpus will be **DENIED** and this case will be **DISMISSED**.

V. CERTIFICATE OF APPEALABILITY

Finally, the Court must consider whether to issue a certificate of appealability (COA) should Petitioner file a notice of appeal. A petitioner may appeal a final order in a § 2254 case only if he is issued a COA, and a COA will be issued only where the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). A petitioner whose claims have been rejected on a procedural basis must demonstrate that reasonable jurists would debate the correctness of a court's procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Porterfield v. Bell*, 258 F.3d 484, 485-86 (6th Cir. 2001). A petitioner whose claims have been dismissed on their merits must show that reasonable jurists would find the assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484.

After having reviewed each claim individually and in view of the procedural basis upon which is based the dismissal of several claims and the law upon which is based the dismissal on the merits of the rest of the claims, reasonable jurors would neither debate the correctness of the Court's procedural rulings nor its assessment of the claims. *Id.* Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, a COA will not issue.

IT IS SO ORDERED.

All Citations

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Footnotes

1 Indeed, during Petitioner's post-conviction appeal, the TCCA referred to the post-conviction court's characterization of the wealth of evidence against Petitioner as a

"mountain of proof pointing to the [p]etitioner's guilt." ***Brown***, 2017 WL 6087671 at *5 (alteration in original).

2 Petitioner cited to *United States v. Baker*, 199 F.3d 867 (1999), [Doc. 12 at 9], but he misstated the case name. The correct citation is *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999). Nevertheless, this case was not decided by the Supreme Court and has no bearing on whether the adjudication of Petitioner's jury-instruction claim was contrary to or an unreasonable application of Supreme Court precedent. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (holding that "§ 2254(d)(1) restricts the source of clearly established law to [Supreme Court's] jurisprudence").

3 A "reply to an answer to a petition for writ of habeas corpus is not the proper pleading for a habeas petitioner to raise additional grounds for relief." *McWilliams v. Klee*, No. 2:11-14896, 2012 WL 4801518, at *2 (E.D. Mich. Oct. 9, 2012) (citing cases); *see also Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005) ("Because the penalty-phase insufficiency argument was first presented in Tyler's traverse rather than in his habeas petition, it was not properly before the district court, and the district court did not err in declining to address it."). Because the "deprived of a full defense" claim is not properly before the Court, it will be disregarded. Even if the claim properly were before the Court, Petitioner did not raise it in his direct appeal brief [Doc. 10-8 at 32-37 (raising his jury-instruction claim on state law grounds generally and not on violation of his right to present a complete defense)]; thus, did not exhaust it; and now has procedurally defaulted it.

4 Petitioner claimed in his post-conviction appellate brief that, while "he was very adamant about not testifying," counsel "convinced him to do it" and that he "felt he was forced into testifying at the last minute" [Doc. 10-18 at 12, 14].

5 According to counsel's testimony at the evidentiary hearing, Petitioner had given a statement to law enforcement that he stabbed the victim when he awoke to find the victim sodomizing him [Doc. 10-13 at 33]. Counsel testified that he discussed with Petitioner that his testimony would not be required if that statement had been put into evidence, but that the prosecutor indicated that the statement would not be used unless it was needed in rebuttal [Doc. 10-13 at 33]. Counsel testified that he believed that "to put on proof of the defense of self-defense, [Petitioner] would have to testify" and that he encouraged his client to testify [Doc. 10-13 at 33-34].

6 Successive representation typically involves "previous unrelated representation of a co-defendant and/or trial witness," whereas joint representation is the simultaneous representation of co-defendants at trial and multiple representation is the representation of co-defendants at severed trials. *Lordi*, 384 F.3d a 193.

7 Petitioner's claim focuses on an affidavit made in connection with his psychological evaluation. The state court record contains a copy of Petitioner's evaluation that was admitted into evidence at trial as an exhibit to the prosecution expert's rebuttal testimony [Doc. 10-4 at 54-55; Doc. 10-12 at 27-33]. However, the record does not contain an affidavit supporting the evaluation. Petitioner's post-conviction challenge was to statements he made during the court-ordered psychiatric examination, which he characterized as a "confession," but he did not mention a supporting affidavit [Doc. 10-12 at 12-13]. Thus, the Court understands that Petitioner is grounding his ineffective assistance claim on counsel's failure to seek to suppress the evaluation itself based on Petitioner's self-incriminating statements included therein, rather than counsel's failure to seek to suppress an affidavit, the existence of which cannot be verified in the record.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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Filed: December 17, 2019

Mr. Russell Patrick Brown
Bledsoe County Correctional Complex
1045 Horsehead Road
Pikeville, TN 37367

Re: Case No. 19-5577, *Russell Brown v. Kenneth Hutchison*
Originating Case No. : 1:17-cv-00029

Dear Mr. Brown:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Karen S. Fultz
Case Manager
Direct Dial No. 513-564-7036

cc: Mr. John H. Bledsoe
Mr. John L. Medearis

Enclosure

No mandate to issue

No. 19-5577

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUSSELL PATRICK BROWN,

Petitioner-Appellant,

v.

KENNETH D. HUTCHISON, Warden,

Respondent-Appellee.

ORDER

Russell Patrick Brown, a Tennessee state prisoner, moves for a certificate of appealability (COA) and in forma pauperis status to appeal a district court judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

In 2013, a jury convicted Brown of first-degree murder and aggravated arson, and he was sentenced to life imprisonment. The state appellate court rejected his claims of insufficient evidence and denial of a jury instruction on self-defense. He filed a post-conviction action in state court, arguing ineffective assistance of counsel. The state court denied his claim after a hearing. His appeal of that decision was also unsuccessful. Brown repeated his claims in this petition for federal habeas corpus relief. After a thorough analysis of the claims, the district court denied the petition.

To receive a certificate of appealability, Brown must show that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because the state courts adjudicated the claims on the merits, the district court could grant relief only if the state courts' rejection of the claims was contrary to

or an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1).

Brown first seeks a COA to challenge the sufficiency of the evidence supporting his convictions. The state court relied on *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), in reviewing the evidence in the light most favorable to the prosecution to determine whether "*any* rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." Brown argues that there was insufficient evidence of premeditation to support his conviction of first-degree murder. The appellate court noted that Brown's use of a deadly weapon, a knife, on an unarmed victim, inflicting nineteen stab wounds to the neck and chest, his failure to render aid, and his disposal of the weapon, could support the jury's finding of premeditation. The jury has discretion to decide what inferences to draw from the evidence. *Coleman v. Johnson*, 566 U.S. 650, 655 (2012).

Brown counters that intoxication from drugs and alcohol prevented him from premeditating the killing, and evidence of that intoxication renders insufficient the evidence relied on by the state court. But the jury heard experts from both parties opine as to whether Brown's voluntary intoxication prevented him from forming the premeditation mens rea. Where there is conflicting evidence on an issue, we presume that the jury resolved that conflict in favor of the prosecution, and we must defer to that resolution. *Cavazos v. Smith*, 565 U.S. 1, 6-8 (2011). No reasonable jurist, therefore, could conclude that the district court's denial of habeas relief on this ground was debatable, let alone wrong.

Brown also contends that there was insufficient evidence to support his aggravated arson conviction. The state appellate court found that Brown had waived that issue but noted that any argument to the effect would be meritless. The evidence showed that Brown intentionally set fire to a bed in a motel room when the victim was present and still alive. Reasonable jurists would not find debatable or wrong the district court's assessment that the state court's decision on this claim was not contrary to or an unreasonable application of clearly established federal law.

Brown next seeks a COA on a jury instruction claim; he contends that the state trial court erred in denying his request for a jury instruction on self-defense. The state court found that no evidence supported such an instruction. Brown claimed that the victim had anally penetrated him and then told him that he had AIDS. The state appellate court noted that Brown's knife attack on the victim was not necessary to prevent the sexual assault, which had already occurred, and would not protect Brown from infection with AIDS, but instead created a greater risk of infection. No Supreme Court decision requires an instruction on self-defense. *See Phillips v. Million*, 374 F.3d 395, 397-98 (6th Cir. 2004). Without clearly established federal law from the Supreme Court, no reasonable jurist could not find debatable or wrong the district court's assessment that the state court's rejection of this claim was not contrary to or an unreasonable application of such law. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006).

Finally, Brown seeks a COA on four claims of ineffective assistance of trial counsel. Although he raised other claims below, he has narrowed the arguments in his motion , faulting counsel for his 1) failure to meet with him for sufficient time before trial; 2) coercing him to testify; 3) a conflict of interest; and 4) his failure to attend Brown's psychiatric examination or to move to exclude the psychiatric report. The state courts relied on *Strickland v. Washington*, 466 U.S. 668, 687 (1984), in reviewing these claims to determine whether Brown had established that his counsel's performance was deficient and that he was prejudiced as a result. Brown is not entitled to a COA on any of these claims.

Even if the "five to seven hours counsel consulted with" Brown prior to trial constituted deficient performance, Brown has failed to demonstrate that this deficiency resulted in any prejudice. He asserts only that more time with counsel "would have increase[d] the possibility of [his] success at trial." That is not enough; Brown must demonstrate that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowling v. Parker*, 344 F.3d 487, 504 (6th Cir. 2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). He has failed to meet that standard here. *See id.* at 506. Thus, no reasonable jurist would find

debatable the district court's determination that the state court did not unreasonably apply *Strickland.*

As to the coerced-testimony claim, the state trial court concluded that trial counsel's conduct was not constitutionally deficient on trial strategy grounds; the court found that having Brown testify was the only way to present the proposed defenses of self-defense and intoxication to the jury. The district court determined that the state court's conclusion was not an unreasonable application of *Strickland.* "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). No reasonable jurist could debate the district court's determination that no such obvious unfairness was present here.

The conflict-of-interest claim was rejected on prejudice grounds by the state trial court because counsel credibly testified at the evidentiary hearing that he was unaware that second chair counsel had previously represented the victim on a drug charge, and second chair counsel added that he did not remember the earlier case at the time of Brown's trial. The district court concluded that the state court did not unreasonably apply *Strickland* because Brown failed to establish that the alleged conflict adversely affected the quality of his representation. *See Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 844 (6th Cir. 2017). Here, Brown argues only that "the appearance of impropriety itself acted as both the ineffectiveness and prejudice." He cites no Supreme Court precedent for this proposition, however, and without one, no reasonable jurist could find the district court's conclusion debatable or wrong.

Finally, Brown seeks a COA on whether his counsel should have moved to suppress the psychiatric report. Counsel testified that he decided not to challenge the report because Brown had reported the same version of the events in this interview that he testified to on the stand. The state court accepted trial counsel's account and concluded that counsel's trial strategy was not objectively unreasonable. The district court once again determined that the state court did not unreasonably apply *Strickland* because "[c]ounsel made a reasonable tactical decision." As

previously noted, substantial deference is afforded to the strategic decisions of trial counsel. *Hughes*, 258 F.3d at 457. In light of that deference, no reasonable jurist would find the district court's assessment debatable or wrong.

Accordingly, the motion for a certificate of appealability is **DENIED**. The motion for in forma pauperis status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

2014 WL 12649802
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

State of Tennessee
v.
Russell Brown

No. E2013-02663-CCA-R3-CD
Assigned on Briefs August 19, 2014
Filed November 20, 2014

Appeal from the Criminal Court for Bradley County, No. 12-CR-059, Honorable Carroll L. Ross, Judge

Attorneys and Law Firms

Richard Hughes, Cleveland, Tennessee, for the Defendant-Appellant, **Russell Brown**.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Steven Bebb, District Attorney General; and Stephen Hatchett, Assistant District Attorney General, for the Appellee, State of Tennessee.

Camille R. McMullen, J., delivered the opinion of the court, in which John Everett Williams, J., and David A. Patterson, SP. J., joined.

OPINION

Camille R. McMullen, J.

The Defendant, **Russell Brown**, was convicted by a Bradley County jury of first degree premeditated murder and aggravated arson for which he received concurrent sentences of life with the possibility of parole and 20 years, respectively. On appeal, the Defendant argues that the evidence is insufficient to sustain his convictions and that the trial court erred in refusing to give a self-defense jury instruction. Upon our review, we affirm the judgment of the trial court.

This appeal stems from the stabbing death of the victim, Harold Montgomery, in the early morning hours of January 1, 2012. The Defendant was subsequently indicted on charges of aggravated arson and first degree premeditated murder. The following proof was adduced at trial.

State's Proof. On January 1, 2012, the Defendant turned himself into the Cleveland Police Department for the murder of the victim. The Defendant consented to a buccal swab, which was administered by Lieutenant Brian Pritchard of the Cleveland Police Department. Lieutenant Pritchard did not observe any signs of intoxication by the Defendant, such as slurred speech or an odor of alcohol. He also did not observe any injuries to the Defendant. Lieutenant Pritchard did not perform a blood test or rape kit on the Defendant.

Detective Andy Wattenbarger of the Cleveland Police Department gathered evidence and took photographs at the crime scene, a motel room at the Days Inn motel in Cleveland, Tennessee. A number of photographs depicting the motel room where the murder occurred were shown to the jury. Detective Wattenbarger confirmed that a fire had occurred inside of the motel room, but there was no evidence of an electrical fire as the cause. When he arrived on the scene, the victim had been removed from inside of the motel room and was lying on the sidewalk covered by a sheet. Inside of the room, Detective Wattenbarger found cocaine, drug paraphernalia, and alcohol. Detective Wattenbarger also found a glass pipe used to smoke crack cocaine in the victim's car, which was discovered by police in another location. On cross-examination, Detective Wattenbarger agreed that the victim was "soaked

with water" as a result of first responders extinguishing the fire inside the motel room. He also agreed that evidence could have been washed away by the water and destroyed by the fire.

Detective Shane Clark, a crime scene technician with the Cleveland Police Department, collected anal and penile swabs taken by the medical examiner at the autopsy of the victim. These samples were submitted to the Tennessee Bureau of Investigations ("TBI") for analysis and were admitted into evidence.

Ben Atchley, the Fire Marshall for the Cleveland Fire Department, conducted an arson investigation at the Days Inn motel. Mr. Atchley testified that the fire in this case started at the foot of the bed in the victim's motel room and resulted in a "pretty significant fire." He believed that had the fire department not been called in time to extinguish the fire, the fire had the potential to spread from that single room to the entire motel. In the course of his investigation, Mr. Atchley found nothing to indicate that this fire was not intentionally set. On cross-examination, Mr. Atchley agreed that the victim was not on the bed when the fire was set.

Detective Matt Jenkins of the Cleveland Police Department recovered the victim's car in Niota, Tennessee on the property of Raymond McDermott, the Defendant's uncle. The car was parked in a wooded area about 150 to 200 yards off Mr. McDermott's driveway. Detective Jenkins stated that based on his experience with stolen vehicles, the victim's car was "without a doubt" parked in that area in an attempt to hide it.

*2 Bill Patel, the owner of the Days Inn motel in Cleveland, Tennessee, testified that he did not give the Defendant permission to set a fire in the motel room and confirmed that there were other guests staying at the motel on January 1, 2012. He estimated that the damages to the Days Inn motel caused by the fire totaled approximately eight or nine thousand dollars.

Dr. Christopher Lochmuller, a forensic pathologist and Chief Deputy Medical Examiner at the Regional Forensic Center, performed the autopsy on the victim and was tendered as an expert in forensic pathology. Dr. Lochmuller opined that the victim's cause of death was multiple stab wounds and the manner of death was homicide. According to Dr. Lochmuller, the victim suffered 19 total stab wounds. Two wounds, a stab wound to the neck that struck the victim's carotid artery and a stab wound to the chest that punctured his lung, were fatal and would have resulted in the victim's death within "minutes" if left untreated. However, with medical attention, the victim likely would have survived all of his wounds. Dr. Lochmuller testified that as a result of the wounds to his neck and chest, the victim's lungs filled with blood and likely would have caused him to make "gurgling" noises. He noted that the victim did not have any burn injuries and confirmed that the victim died from his stab wounds and not from smoke inhalation. Dr. Lochmuller collected anal, penile, and oral swabs from the victim, which he gave to Detective Shane Clark to submit for analysis. On cross-examination, Dr. Lochmuller testified that the victim's blood test revealed that cocaine and painkillers had been recently ingested by the victim prior to his death. The effects of such drugs include euphoria, excitement, restlessness, risk taking, sleep disturbance, and aggression. Dr. Lochmuller noted that the drugs were not at toxic levels, and the victim would have maintained the ability to function.

Special Agent Jennifer Millsaps of the TBI was tendered as an expert in the field of serology and DNA analysis. She conducted the DNA analysis of the items submitted by the Cleveland Police Department, which included an anal and penile swab from the victim. The anal swab from the victim revealed the presence of spermatozoa, with the predominate DNA profile belonging to the Defendant and the minor DNA profile belonging to the victim. The penile swab from the victim revealed no DNA profile other than the victim.

Defense's Proof. The Defendant, 36 years old at the time of trial, testified that he and the victim had been friends since childhood. The Defendant began using drugs at the age of 16, and his friendship with the victim eventually evolved into "a sexual relationship, based on drugs." The Defendant testified that he does not consider himself a homosexual man but that his sexual relationship with the victim was fueled by his addiction to cocaine. The victim provided cocaine to the Defendant, and the two used cocaine "[e]very single time" they were together.

On December 31, 2011, the Defendant and the victim decided to spend the night together at the Days Inn motel to celebrate the Defendant's birthday and New Year's Eve. Earlier that day, the two men purchased cocaine, alcohol, and prescription pills and socialized with the

victim's roommates at his apartment. Around 11:00 p.m., the men went to the Days Inn motel where they continued to use drugs and drink alcohol. After smoking crack cocaine, the Defendant penetrated the victim anally, and the victim performed fellatio on the Defendant. The Defendant maintained that the victim never penetrated him anally because he does not "consider [himself] to be a homosexual male." He testified that the victim was aware that the Defendant was "opposed" to that "type of relationship[.]"

*3 The Defendant claimed that after their sexual encounter, he went to sleep and awoke to find the victim penetrating him anally. The Defendant testified that he "got [the victim] off of [him]" and a physical altercation ensued between the men. The Defendant then realized that the pocket knife that he and the victim had used to cut the crack cocaine earlier in the evening was "still open" on the night stand so he picked it up and began stabbing the victim. He continued to stab the victim 19 times. The Defendant stated, "I was really mad that he would violate me like that. I was completely irate. That's, that's not part of our relationship." The Defendant then set the bed on fire with a lighter, took the victim's car, and fled the scene.

The Defendant threw the pocket knife into the Hiwassee River while driving over a bridge and drove to the home of his uncle, Paul Brown. He called his mother and told her what happened, and she and Mr. Brown encouraged the Defendant to turn himself in to the police. He refused and instead drove to the home of another uncle, Raymond McDermott. The Defendant hid the victim's car in a wooded area near Mr. McDermott's home. Mr. McDermott drove the Defendant around for "several hours" and tried to calm him down. Mr. McDermott then took the Defendant to the home of Robert Johnson, another family member, who convinced the Defendant to turn himself in to the police.

On cross-examination, the Defendant acknowledged that he was bigger than the victim and that the victim was not armed when he and the Defendant began fighting. He agreed that the fight was over when he picked up the knife and that he picked up the knife with the intent to hurt the victim. He also agreed that he intentionally set the bed on fire before leaving the motel room. He added that he had not seen any other guests at the motel that night and did not know whether any one else was at the motel when he set the fire. According to the Defendant, the victim told the Defendant that he suffered from Acquired Immune Deficiency Syndrome (AIDS) "after knowingly, willingly ... letting [the Defendant] perform on him, and attempting to have anal intercourse with [the Defendant]."

Alma Brown, the Defendant's mother, testified that she had known the victim for 20 to 25 years and that he had been good friends with the Defendant "since they were kids." The Defendant and the victim spent a lot of time together, but Ms. Brown had never seen the two men argue or fight. On January 1, 2012, the Defendant called Ms. Brown and said, "Mama, I'm sorry. I didn't mean to do it." She did not know what the Defendant was talking about and told him she had to get ready for work. The Defendant hung up the phone and her brother-in-law, Paul Brown, immediately called her back. After talking with Mr. Brown, Ms. Brown drove to Mr. Brown's home to see the Defendant. When she arrived, the Defendant was crying and told her that the victim was dead. They both cried, and Ms. Brown told the Defendant that he should turn himself in to the police. The Defendant did not turn himself at that time, and Ms. Brown went to work. After work, she went to her the home of her uncle, Robert Johnson, to see the Defendant. Once Ms. Brown arrived, Mr. Johnson convinced the Defendant to turn himself in to the police.

Dr. Louise Ledbetter, a board-certified neurologist, was tendered as an expert in the field of neurology. She testified that she had 20 years of experience in treating patients with drug and alcohol addictions and had studied how the brain and body respond to these substances. She interviewed the Defendant on two different occasions and reviewed the evidence in this case. She noted that based on the victim's blood results, he had high levels of cocaine and two types of opiates, hydrocodone and oxycodone, in his system at the time of his death. She testified that these drugs are powerful, psychoactive substances that affect an individual's perception, ability to process information, emotional reactions, and overall behavior. She explained that it lowers one's inhibitions, "like the filter is gone." The Defendant told Dr. Ledbetter that he was under the influence of alcohol, Xanax, marijuana, hydrocodone, and crack cocaine on the night of the murder. Based on the information she gathered, she opined that the Defendant was intoxicated at the time of the murder and unable to make good decisions. She further opined that the Defendant lacked the ability to premeditate. She acknowledged that she was not provided a blood test for the Defendant to confirm his drug or alcohol levels and that she based her opinion on the Defendant's statements about his drug use that night.

***4 State's Rebuttal Proof.** In rebuttal, the State called Dr. Jerry Glynn Newman, Jr., a board-certified forensic psychiatrist, and he was tendered to testify as an expert in the field of forensic psychiatry. He interviewed the Defendant and reviewed the evidence in this case. The Defendant told Dr. Newman his version of the events and why he killed the victim. The Defendant told Dr. Newman that he had been sexually molested as a child and that when he awoke to find the victim anally penetrating him, "it upset [the Defendant] a great deal." The Defendant told Dr. Newman, "I wanted to hurt [the victim] because he hurt me .... I truly wanted to him to hurt." Dr. Newman opined that the Defendant had the capacity to premeditate at the time of the murder. He noted that the Defendant admitted that he wanted to hurt the victim, and stated, "[I]f he had that capacity, I think its not a giant leap to say he had the capacity to form the intent to kill as well."

The State also called Lieutenant Mark Gibson of the Cleveland Police Department, who interviewed the Defendant shortly after the Defendant turned himself in to police. Lieutenant Gibson specifically asked the Defendant if he had any injuries, and the only injury reported or observed was a small abrasion to one of the Defendant's hands. He did not report any other injuries to his face or rectum. He also did not show any signs of intoxication.

Following the proof, defense counsel requested a jury instruction on self-defense. After a discussion among the prosecutor, defense counsel, and the trial court, the trial court concluded that the facts did not warrant a self-defense instruction. Following deliberations, the jury convicted the Defendant as charged in the indictment of aggravated arson and first degree premeditated murder. The trial court imposed concurrent sentences of 20 years and life with the possibility of parole, respectively.

On September 11, 2013, the Defendant filed a timely motion for new trial, which was denied by the trial court after a hearing on October 28, 2013. The Defendant filed a timely notice of appeal to this court on November 25, 2013.

ANALYSIS

On appeal, the Defendant argues that the evidence is insufficient to sustain his convictions for first degree premeditated murder and aggravated arson and that the trial court erred in declining to give a self-defense jury instruction. The State responds that the evidence is sufficient to support both convictions and that the trial court properly denied the Defendant's request for a self-defense jury instruction. Upon review, we agree with the State.

I. Sufficiency of the Evidence. The Defendant first challenges the sufficiency of the evidence supporting his convictions for first degree premeditated murder and aggravated arson. When a defendant challenges the sufficiency of the evidence, the standard of review applied by this court is "whether, after reviewing 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); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt."). The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011) (citing State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010)). Further, the standard of review for sufficiency of the evidence " 'is the same whether the conviction is based upon direct or circumstantial evidence.' " State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)).

The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Moreover, the jury determines the weight to be given to circumstantial evidence and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury. Dorantes, 331 S.W.3d at 379 (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court shall not reweigh the evidence or substitute its inferences for those drawn by the trier of fact. Id.

***5 A. First Degree Premeditated Murder.** In challenging his conviction for first degree premeditated murder, the Defendant argues that the State failed to establish the element of premeditation. He avers that the evidence established that he acted in a moment of

excitement and passion and that he lacked the ability to premeditate due to his level of intoxication.

First degree murder is the premeditated and intentional killing of another person. T.C.A. § 39–13–202(a)(1) (2007). Premeditation is defined as "an act done after the exercise of reflection and judgment." Id. § 39–13–202(d). This section further defines premeditation:

> "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. " 'Premeditation' is the process of thinking about a proposed killing before engaging in the homicidal conduct." State v. Brown, 836 S.W.2d 530, 540–41 (Tenn. 1992) (quoting C. Torcia, Wharton's Criminal Law § 140 (14th ed. 1979)).

The existence of premeditation is a question of fact for the jury to determine and may be inferred from the circumstances surrounding the offense. State v. Rosa, 996 S.W.2d 833, 837 (Tenn. Crim. App. 1999) (citing Brown, 836 S.W.2d at 539). "[T]he use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing" may support the existence of premeditation. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997) (citing Brown, 836 S.W.2d at 541–42; State v. West, 844 S.W.2d 144, 148 (Tenn. 1992)). Additionally, the infliction of multiple wounds, the destruction or secretion of evidence of the murder, and the defendant's failure to render aid to a victim tend to support a finding of premeditation. State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000) (citing State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Lewis, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000). Of course, "[a] jury is not limited any specific evidence when determining whether a defendant intentionally killed the victim after the exercise of reflection and judgement." State v. Davidson, 121 S.W.3d 600, 615 (Tenn. 2003) (internal quotation marks and citations omitted). "The facts listed in Bland and other cases simply serve to demonstrate that premeditation may be established by any evidence from which a rational trier of fact may infer that the killing was done after the exercise of reflection and judgement[.]" Id. (internal quotation marks and citations omitted).

Viewed in the light most favorable to the State, the evidence in the present case established that the victim died as a result of multiple stab wounds inflicted by the Defendant on January 1, 2012. The Defendant testified that he and the victim were entangled in a physical fight immediately before the killing; however, he admitted that the fight had subsided by the time he picked up the pocket knife and that he picked up the knife with the intent to harm the victim. The Defendant then stabbed the unarmed victim 19 times, including several stab wounds to the victim's neck and chest. While at least two of the stab wounds would have been fatal within minutes, Dr. Lochmuller testified that the victim would likely have survived his wounds if he had received medical treatment. Dr. Lochmuller further testified that based upon the wounds inflicted to the victim's neck and chest, the victim would have been making "gurgling" noises. Rather than render aid, however, the Defendant set the bed on fire and fled the scene in the victim's car. He disposed of the murder weapon and drove to various family members' homes before turning himself in to police.

***6** Based upon these facts, a rational juror could infer that the Defendant acted with premeditation when he killed the victim. Specifically, the Defendant procured a deadly weapon and used it on an unarmed victim; inflicted 19 stab wounds, including several to the victim's neck and chest—vital areas of the body; and failed to render aid to the victim, despite seeing him bleeding profusely. Additionally, he destroyed evidence by setting the bed on fire and then fled the scene and disposed of the murder weapon. This evidence was sufficient to show premeditation and intent.

The Defendant also argues that he was unable to premeditate the murder of the victim because he was voluntarily intoxicated when he killed the victim. In that regard, we note that intoxication of a defendant does not justify the crime; however, its existence may negate a finding of specific intent. State v. Bullington, 532 S.W.2d 556, 560 (Tenn. 1976); T.C.A. § 39–11–503(a). "[I]f the voluntary [intoxication] of the accused exists to such an extent that he is

incapable of forming a premeditated and deliberate design to kill, he cannot be guilty of murder in the first degree." Bullington, 532 S.W.2d at 560 (citing Mellendore v. State, 191 S.W.2d 149, 151 (1945), overruled on other grounds by State v. Buggs, 995 S.W.2d 102 (Tenn. 1999)). Moreover, even if the defendant's intoxication is not such to render him totally incapable of premeditation, the jury may still "consider his state of intoxication along with all other facts of the case to determine whether the killing was the result of a premeditated purpose[.]" Bullington, 532 S.W.2d at 560 (citations omitted).

In the present case, the jury heard evidence that the Defendant was under the influence of various drugs and alcohol at the time of the killing. The jury also heard conflicting testimony from two experts regarding the effects of those drugs and whether the Defendant had the capability to premeditate at the time of the killing. The trial court instructed the jury on intoxication, in part, as follows:

> Intoxication, whether voluntary or involuntary, is relevant to the issue of the essential element of the defendant's culpable mental state.
>
> ... If you find that the defendant was intoxicated to the extent that he could not have possessed the required culpable mental state, then he cannot be guilty of the offense charged.

The trial court properly instructed the jury on the issue, and by their verdict, the jury clearly found that the Defendant acted intentionally and with premeditation when he stabbed the victim and that his voluntary intoxication did not negate his specific intent to commit this crime. "The weight to be given the evidence and the determination of whether the voluntary intoxication negated the culpable mental elements were matters for the jury." State v. Morris, 24 S.W.3d 788, 796 (Tenn. 2000). We will not reweigh the evidence or substitute our inferences for those drawn by the trier of fact. See Dorantes, 331 S.W.3d at 379. Accordingly, we conclude that the Defendant is not entitled to relief on this issue.

B. Aggravated Arson. The Defendant also challenges, in the "Issues Presented" section in his appellate brief, the sufficiency of the evidence supporting his conviction for aggravated arson. However, the Defendant failed to address this issue at all in the argument section of his brief. Consequently, this issue has been waived. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); see also Tenn. R. App. P. 27(a)(7). Waiver notwithstanding, the evidence was more than sufficient to sustain the Defendant's conviction for aggravated arson.

***7** For purposes of this case, a person commits aggravated arson when he "knowingly damages any structure by means of a fire ... [w]ithout the consent of all persons who have a possessory, proprietary or security interest therein," and "[w]hen one (1) or more persons are present therein[.]" T.C.A. §§ 39–14–301(a)(1), –302(a)(1). There is no requirement that the person or persons present be injured or that the property actually be destroyed. State v. Lewis, 44 S.W.3d 501, 508 (Tenn. 2001). Further, arson is not a "result-of-conduct" offense. In other words, it does not "require that a defendant act with an awareness that setting a fire or creating an explosion is reasonably certain to cause damage to a structure." State v. Gene Shelton Rucker, No. E2002–02101–CCA–R3–CD, 2004 WL 2827004, at *10 (Tenn. Crim. App. Dec. 9, 2004), perm. app. denied (Tenn. Mar. 21, 2005). Rather, "the nature of the conduct—creating a fire or explosion—that causes the damage to the structure is consequential and central to the offense." Id. Thus, the knowing mens rea is satisfied where "the person is aware of the nature of the conduct" or the accompanying circumstances. T.C.A. § 39–11–302(b); see Gene Shelton Rucker, 2004 WL 2827004, at *10.

In the present case, the Defendant's own testimony established that he intentionally set fire to the bed in his motel room after stabbing the victim multiple times. Fire Marshall Ben Atchey corroborated the Defendant's admission and testified that there was no evidence that the fire was not intentionally set. He further testified that had the fire department not responded, the fire likely would have spread from the Defendant's single motel room to the entire building. Bill Patel, the owner of the Days Inn motel, testified that he did not give permission to the Defendant to set the fire and that there were multiple other guests staying at the motel on January 1, 2012. Additionally, although the Defendant claimed that he did not see any other guests at the Days Inn motel that evening, he was certainly aware of the victim's presence in the motel room when he set the fire. Dr. Lochmuller testified that the victim would have survived several minutes after the stabbing and was likely still alive when the Defendant set the fire. See State v. Vaughan, 144 S.W.3d 391, 415 (Tenn. Crim. App. 2003) (noting that "the jury was entitled to conclude that the victim was still alive while the

[d]efendant went about the process of setting two fires, but died before being burned or inhaling any smoke"); State v. Richard Darrell Miller, No. 01C01–9703–CC–0087, 1998 WL 601241, at *6 (Tenn. Crim. App. Sept. 11, 1998), perm. app. denied (Tenn. Mar. 15, 1999) ("That [the victim] died while the defendants were in the act of starting the fire, rather than after the explosion, does not afford the defendant [ ] relief from this [aggravated arson] conviction."). Based on the evidence presented, a rationale juror could conclude, beyond a reasonable doubt, that the Defendant was guilty of aggravated arson.

II. Self–Defense Jury Instruction. The Defendant argues that the trial court erred in declining to instruct the jury on self defense. He maintains that his testimony regarding the sexual assault by the victim and the victim's assertion that he suffered from Acquired Immune Deficiency Syndrome (AIDS) after engaging in sexual conduct with the Defendant fairly raised the issue of self-defense, and therefore, the trial court should have so charged the jury. The State responds that the trial court properly declined to instruct the jury on self-defense because the facts do not provide a reasonable belief that the Defendant acted in self-defense. We agree with the State.

A defendant has a " 'constitutional right to a correct and complete charge of the law.' " State v. Litton, 161 S.W.3d 447, 458 (Tenn. Crim. App. 2004) (quoting State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), superseded by statute on other grounds as stated in State v. Reid, 91 S.W.3d 247, 291 (Tenn. 2002)). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (quoting State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). Because questions regarding the propriety of jury instructions are a mixed question of law and fact, the standard of review is de novo with no presumption of correctness. State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001).

***8** As correctly noted by the Defendant, "[i]t is well settled that whether an individual acted in self-defense is a factual determination to be made by the jury as the sole trier of fact." State v. Goode, 956 S.W.2d 521 (citing State v. Ivy, 868 S.W.2d 724, 727 (Tenn. Crim. App. 1993). However, a defendant is only entitled to a defense jury instruction where the issue is fairly raised by the evidence. T.C.A. § 39–11–203(c). The defendant has the burden of introducing this proof. Id., Sentencing Comm'n Cmts. To determine whether the defense has been fairly raised by the proof, the trial court must "consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence." State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998) (quoting State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993)).

Tennessee Code Annotated section 39–11–611(b)(1) provides, in pertinent part, that a person not engaged in unlawful activity and in a place he has a right to be is justified in using "force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force." "In addition, the use of deadly force in self-defense must be predicated on 'a reasonable belief that there is imminent danger of death or serious bodily injury.' " State v. Hawkins, 406 S.W.3d 121, 128 (Tenn. 2013) (quoting T.C.A. § 39–11–611(b)(2)(A)); see also State v. Calvin Grissette, No. M2003–02061–CCA–R3–CD, 2004 WL 1950728, at *5 (Tenn. Crim. App. Sept. 2, 2004) ("The [defendant] must reasonably believe that the other's force creates an 'imminent danger of death or serious bodily injury.' " (quoting T.C.A. § 39–11–611)). The danger must be "real, or honestly believed to be real," and the belief of danger must be "founded upon reasonable grounds." T.C.A. §§ 39–11–611(2)(B)–(C). In other words, the defendant must not only subjectively believe he is in imminent danger, but that belief must "meet an objective standard of reasonableness to be justified" under the defense. See Bult, 989 S.W.3d at 732. "[T]he mere fact that the defendant believes that his conduct is justified would not suffice to justify his conduct." Id.

In the present case, the trial court declined to instruct the jury on self-defense because it found that the evidence did not suggest that the Defendant reasonably believed he was in danger of imminent death or serious bodily injury. Upon our review of the record, we agree with the trial court's conclusion. The Defendant testified that he awoke to find the victim sexually assaulting him and that he easily pushed the victim off of him and ended the assault. A physical fight then broke out between the two men, but the Defendant confirmed that the victim was unarmed and smaller in size than the Defendant. Further, the Defendant testified that the fight had ended when he picked up the pocket knife and that he picked up the knife with the intent to hurt the victim. Dr. Newman testified that the Defendant told him that he wanted to hurt the victim "because the victim hurt [him]." This testimony does not

suggest that the Defendant reasonably believed he was in danger of imminent death or serious bodily injury when he attacked the victim with the pocket knife.

The Defendant's contention that the victim told the Defendant that he suffered from AIDS does not alter our conclusion. We acknowledge that the knowing exposure of another to human immunodeficiency virus (HIV) is a class C felony. See T.C.A. § 39–13–109(a) (2011). However, the mere fact that the victim may have suffered from AIDS does not justify physical aggression out of fear of contracting the disease. See, e.g., State v. Lathan, 953 So.2d 890, 897 (La. Ct. App. 2007) (rejecting defendant's self-defense claim based on fact that victim suffered from HIV without evidence of an overt or hostile act by the victim toward the defendant); People v. Bucker, 579 N.E.2d 1166, 1169 (Ill. App. Ct. 1991) ("[The] defendant's belief that the [victim] was infected with the HIV virus in itself creates no necessity or legal justification for the use of deadly force absent criminal conduct which might transmit the virus [.]"). Here, there is no evidence that the Defendant believed he needed to use deadly force to prevent an assault by the victim that might transmit the disease. According to the Defendant, the victim informed him that he suffered from AIDS "after knowingly, willingly ... letting [the Defendant] perform on him, and attempting to have anal intercourse with [the Defendant]." Thus, based on the Defendant's testimony, the knife attack was not to prevent possible exposure to AIDS as such exposure had already occurred. Further, the Defendant testified that the physical fight between him and the victim had ended when he picked up the knife and attacked the victim; accordingly, any threat of exposure to the disease through a physical fight with the victim had also ended. If anything, the Defendant's subsequent attack created a greater risk to be exposed to the disease. Like the trial court, we conclude that the evidence did not fairly raise an issue as to whether the Defendant acted in self-defense. Thus, we find no error in the trial court's refusal to so charge the jury. The Defendant is not entitled to relief.

CONCLUSION

*9 Based on the foregoing authority and analysis, we affirm the judgment of the trial court.

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Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

Russell Brown

v.

State of Tennessee

No. E2016-00437-CCA-R3-PC
Assigned on Briefs September 20, 2016
Filed October 18, 2016
Application for Permission to Appeal Denied by Supreme Court December 15, 2016

Appeal from the Criminal Court for Bradley County, No. 15-CR-265, Andrew Mark Freiberg, Judge

Attorneys and Law Firms

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Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Stephen Davis Crump, District Attorney General; and Brooklynn Townsend, Assistant District Attorney General, for the appellee, State of Tennessee.

Alan E. Glenn, J., delivered the opinion of the court, in which Thomas T. Woodall, P.J., and Robert H. Montgomery, Jr., J., joined.

OPINION

Alan E. Glenn, J.

***1** The petitioner, **Russell Brown**, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that he received the effective assistance of trial counsel. Following our review, we affirm the denial of the petition.

FACTS

On May 21, 2013, the petitioner was convicted by a Bradley County jury of first degree premeditated murder and aggravated arson, for which he received concurrent sentences of life and twenty years. His convictions were affirmed by this court on direct appeal, and our supreme court denied his application for permission to appeal. State v. **Russell Brown**, No. E2013-02663-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App. Nov. 20, 2014), perm. app. denied (Tenn. Mar. 21, 2015).

Our direct appeal opinion reveals that the petitioner's convictions were based on his stabbing a friend to death in a motel room and then setting fire to his bed before fleeing. Id. at 8-10. The petitioner turned himself in to the police approximately eighteen hours later and testified in his own defense at trial, relating the following: He and the victim had been friends since childhood, with their friendship eventually turning into "a sexual relationship, based on drugs." Id. at 3. The petitioner explained that he did not consider himself a homosexual, but he engaged in sexual encounters with the victim because he was addicted to cocaine, which the victim provided for him. Id.

On New Year's Eve, 2011, the petitioner and the victim purchased alcohol, cocaine, and prescription pills and "socialized with the victim's roommates at his apartment." Id. at 3-4. At about 11:00 p.m., he and the victim checked into a motel, where they continued to drink and use drugs. The petitioner then penetrated the victim anally, and the victim performed fellatio on the petitioner. Id. at 4.

The petitioner testified that he never allowed the victim to penetrate him anally because he was not a homosexual. He said that the victim was aware that he was " 'opposed' to that

'type of relationship[.]' " Id. That night, however, he awoke to find the victim penetrating him anally, which enraged him. He got the victim off of him, and the two men began a physical altercation. When he saw that a pocketknife that they had used earlier in the evening to cut their crack cocaine was open on the nightstand, he picked it up and stabbed the victim nineteen times. He then set fire to the bed, took the victim's car, and fled the scene. Id.

On cross-examination, the petitioner claimed that the victim had informed him that he had AIDS after letting the petitioner "perform on him, and attempting to have anal intercourse" with the petitioner. Id. The petitioner conceded that he was larger than the victim, that the victim was unarmed, that the fight was over when he picked up the knife with the intent to harm the victim, and that he had intentionally set the fire. Id.

The petitioner also presented in his defense a board-certified neurologist, Dr. Louise Ledbetter, who opined that the petitioner was "unable to make good decisions" and "lacked the ability to premeditate" due to his intoxication from the drugs and alcohol he had consumed that night. Id. at 5. In rebuttal, the State presented board-certified forensic psychiatrist Dr. Jerry Glynn Newman, Jr., who opined that the petitioner had the capacity to premeditate at the time of the murder. Id.

*2 On June 29, 2015, the petitioner filed *a pro se* petition for post-conviction relief in which he raised several claims, including ineffective assistance of trial counsel. Specifically, he alleged that his trial counsel were ineffective for, among other things, failing to properly investigate the case, failing to familiarize themselves with the petitioner's psychiatric evaluation, failing to adequately raise the defense of self-defense, failing to disclose a conflict of interest because of prior representation of the victim, and forcing the petitioner to testify in his own defense.

Following the appointment of post-conviction counsel, an evidentiary hearing was held on January 8, 2016. The petitioner's senior trial counsel, the public defender for the 10th Judicial District, testified that he was appointed to represent the petitioner while his case was still in general sessions court. He said he was already familiar with the petitioner because his office had represented him in other cases. Because of the severity of the charges in the case at bar, he was assisted in his representation by an assistant public defender, and it was the two of them who conducted the investigation of the facts of the case.

Senior trial counsel testified that his first conversation with the petitioner occurred at the justice center shortly after the petitioner had been arrested. The petitioner related what had happened and "was emphatic that he was under the influence of cocaine and other substances when the [victim] was killed." Senior trial counsel said the petitioner had given a statement to the Cleveland Police Department at the time of his arrest, and he was able to obtain a copy of that videotaped statement as part of discovery. After discussions with the petitioner and their investigation of the facts, he and junior trial counsel formulated a defense strategy of attempting to show that the petitioner had acted in self-defense and that he lacked the capacity to premeditate due to his voluntary intoxication.

Senior trial counsel testified that he retained the services of Dr. Ledbetter to review possible defenses of diminished capacity, legal insanity, and the inability to form premeditation. He never had any doubts about the petitioner's mental capacity, however, because he knew the petitioner and was unaware of his having any significant mental health history. In addition, the intelligent petitioner had no difficulty relating what occurred or discussing possible defenses. Before Dr. Ledbetter's meeting with the petitioner, he provided her with discovery, including the victim's toxicology results. He also informed the petitioner of the purpose of her visit and what questions she would be asking. Dr. Ledbetter did not provide a written report, at senior trial counsel's request, because counsel would have been required to turn over any written report to the State as part of reciprocal discovery. The petitioner "certainly knew" the rules regarding reciprocal discovery of reports, and there was "a meeting of the minds ... between [the petitioner], Dr. Ledbetter, and [himself] [ ] concerning [Dr. Ledbetter's] value as a trial witness and what [they] hoped to gain at trial from her ... expert testimony." Senior trial counsel went on to explain that he called Dr. Ledbetter as an expert witness "largely on the issue of premeditation and whether or not [the petitioner] could knowingly commit the homicide."

Senior trial counsel testified that, in response to his having engaged Dr. Ledbetter as an expert witness, the State obtained its own expert who examined the petitioner, prepared a report, and testified at trial to rebut Dr. Ledbetter's opinion regarding the petitioner's inability to form the requisite intent. He and junior trial counsel discussed the evaluation with the petitioner, and the petitioner "knew he was go[ing] to be examined by a state expert." Senior

trial counsel stated that he withdrew his initial objection to the introduction of the report of the State's expert witness because the report basically contained just the petitioner's account of what had happened, including the petitioner's claims of self-defense and voluntary intoxication.

*3 Senior trial counsel testified that he did not know until the petitioner's post-conviction petition that junior trial counsel had represented the victim in an earlier case. The petitioner never mentioned his office's prior representation of the victim. The petitioner also never mentioned the victim's having ever engaged in any violent behavior, and the individuals who had partied with the victim and the petitioner on the night of the homicide reported to counsel that the two men had been friendly toward each other that night. In addition, he could not recall from the victim's criminal history, which he and junior trial counsel reviewed before trial, that the victim had any convictions for crimes of violence.

Senior trial counsel testified that he had a number of discussions with the petitioner about testifying, including the advantages versus disadvantages of the petitioner's taking the stand. However, because the State had made it clear to him that it did not intend to introduce the petitioner's self-serving statement to police, and there had been no blood drawn on the petitioner to show his level of intoxication, he encouraged the petitioner to testify to present his defenses of self-defense and voluntary intoxication:

> But going into the trial, [the prosecutor] had made it clear to me he was not putting that statement in, so I do recall talking to [the petitioner] and encouraging him that he needed to testify if the defense is self-defense, for us to have a defense in this case. It was important. Certainly when we're using that expert, Dr. ... Ledbetter, to talk about intoxication, that he would have to testify because ... there was no blood drawn on [the petitioner] at the time he was arrested to show that there was anything in his system. All these results were from [the victim]. Dr. Ledbetter had certainly reviewed all that crime scene evidence, all of that, but obviously she spoke at length with [the petitioner] about what had occurred, how it occurred, substances that had been consumed, so I certainly thought it was important based on the fact that we're going forward with voluntary intoxication to negate premeditation, that we've got a defense of self-defense and he needed to testify.

Senior trial counsel testified that he and the petitioner talked at length about how "sordid" the facts were and how it was "a very difficult case." He said he prepared the petitioner for both his direct and cross-examination testimony, and the petitioner was always consistent in his account of what occurred and that he had been under the influence of intoxicants and had acted in self-defense. Senior trial counsel testified he believed they put on adequate proof at trial for a jury instruction on self-defense, but the trial court refused his request for that instruction.

Senior trial counsel acknowledged that the petitioner expressed some dissatisfaction with his representation, filing *pro se* motions to have him relieved as his counsel and a complaint against him with the Board of Professional Responsibility. He said that the petitioner raised his concerns before the trial court prior to trial and that they attempted to resolve the matters. Overall, he and the petitioner "got along fine." He felt no animosity toward the petitioner, and the petitioner never expressed any animosity toward him. He could not recall the petitioner's having made a complaint about not wanting to testify in the case.

Junior trial counsel testified that the petitioner never told him that he had represented the victim on a sale and delivery of cocaine charge and that he was not aware of that fact until he learned of the allegations in the post-conviction petition and looked into the matter. He said he had researched the victim's criminal history before trial, but only in terms of trying to find "some type of assaultive behavior" on the part of the victim. On cross-examination, junior trial counsel testified that he looked only at the list of the victim's convictions when checking his record; he did not pull the judgments in order to see who represented the victim in each case.

*4 The petitioner testified that he believed the trial judge "would have been obligated ... to charge the jury with a self-defense instruction" had counsel presented his case differently. He said that counsel, who met with him five to seven times for an hour each time, never discussed a defense of self-defense but instead only voluntary intoxication. Counsel did not inform him, however, that voluntary intoxication is not in and of itself a defense. The

petitioner stated that he was "very adamant" about not testifying because he believed it would be "detrimental to [his] well[-]being[.]" He said he felt no confidence in his ability to testify, but counsel told him that if he did not testify, Dr. Ledbetter would be unable to testify regarding the voluntary intoxication and premeditation issues. According to the petitioner, this information was "a convincing factor" in his decision to testify.

The petitioner testified that he was not properly prepared for his testimony "because it was a last minute decision" and that "most of the prepping" consisted of counsel "just asking [him] about the events that occurred that night." He said he was prepared for his examination with Dr. Ledbetter, but counsel never told him that he would be examined by the State's expert and did not prepare him for that examination.

The petitioner testified that during one of junior trial counsel's visits with him, junior trial counsel kept referring to the victim by his first name, which seemed to indicate counsel had some personal knowledge of the victim, so he asked junior trial counsel about it, and junior trial counsel "brought [his previous representation of the victim] to [the petitioner's] attention." The petitioner said that he had an issue with that fact, so he brought it to senior trial counsel's attention by notifying him of it in a letter. He also expressed his concerns to junior trial counsel. Both senior and junior trial counsel, however, "pretty much brushed it off."

The petitioner also complained that trial counsel did not subpoena as witnesses the individuals who had been at the party on the night of the victim's death, who, according to the petitioner, could have testified that the victim was "an aggressive individual" and "a known fighter." Finally, the petitioner testified that he felt as if trial counsel's representation was "kind of ... mechanical" and that he was not satisfied with the public defender's office from the beginning because he had "never had a positive experience with them."

Upon questioning by the post-conviction court, the petitioner acknowledged that evidence was brought before the jury about the statement of one of the New Year's Eve party attendees that the petitioner appeared impaired at the party. He further acknowledged that trial counsel vigorously questioned the State's witnesses about why the petitioner's blood was not tested and a rape kit was not performed on him.

On January 26, 2016, the post-conviction court entered a detailed and lengthy written order denying the petition on the basis that the petitioner had waived all his claims other than those relating to ineffective assistance of counsel and that the "proof necessary to support [his] post-conviction claims [of ineffective assistance] was wholly lacking." Thereafter, the petitioner filed a timely appeal to this court.

ANALYSIS

The petitioner argues on appeal that trial counsel made a number of errors in representation, the cumulative effect of which was to deprive him of the effective assistance of counsel and a fair trial. Specifically, he argues that counsel were deficient for not subpoenaing witnesses who could have given testimony about the victim's violent nature to support a jury instruction on self-defense; for not adequately meeting with him before trial; for not preparing him for the examination by the State's expert witness or attending his meeting with the expert; for not preparing him to testify in his own defense, which resulted in his being "forced into testifying at the last minute"; and for not addressing the concerns he raised prior to trial about junior trial counsel's having represented the victim in the past. The State responds by arguing that the post-conviction court properly found that trial counsel's performance was not deficient. We agree with the State.

***5** The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient

performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App.1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1 975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

In finding that the petitioner failed to meet his burden of demonstrating ineffective assistance of counsel, the post-conviction court, among other things, specifically accredited the testimony of both trial counsel, resolving "[a]ny and all disputes and conflicts in the proof and testimony" against the petitioner. After reviewing some of the overwhelmingly negative facts of the case, the court found that, "[d]espite th[e] mountain of proof pointing to the [p]etitioner's guilt, [senior trial counsel] formulated a cogent defense trial strategy" and engaged in "a valiant effort" to mitigate the petitioner's conduct by focusing the jury's attention on those facts that supported the petitioner's defenses of self-defense and voluntary intoxication. In sum, the court concluded that trial counsel "represented the [p]etitioner in an exceptional manner under very difficult circumstances."

***6** The record fully supports the findings and conclusions of the post-conviction court. The testimony of senior trial counsel, an experienced defense attorney, established, among other things: that he conducted a thorough investigation of the facts, including whether the victim had any previous history of violent acts or violent crimes; spoke at great length with the petitioner about the case, including whether or not the petitioner should testify in his own defense; spoke with and prepared the petitioner for his examination by the expert witnesses; prepared the petitioner for his direct and cross-examination testimony; and was completely unaware of the fact that his office had previously represented the victim in a drug case. Junior trial counsel's testimony also established that he had no memory or awareness of having represented the victim until he learned of the allegations in the post-conviction petition and reviewed the records.

As for the petitioner's claim that trial counsel should have called witnesses to testify about the victim's violent nature, we note that the petitioner did not present those alleged witnesses at the evidentiary hearing. In order to succeed on a claim that counsel did not properly investigate or call favorable witnesses at trial, a petitioner must generally elicit favorable testimony from those witnesses at the evidentiary hearing, as a post-conviction court may not speculate "on the question of ... what a witness's testimony might have been if introduced" at trial. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Accordingly, we affirm the judgment of the post-conviction court denying the petition.

CONCLUSION

Based on the foregoing authorities and reasoning, we conclude that the petitioner has not met his burden of showing that he was denied the effective assistance of counsel. Accordingly, we affirm the denial of the petition for post-conviction relief.

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