APPENDIX:A

Opinion/Order denying motion for certificate of appealability. Jomiah Washington v Willis Chapman, No#19-2454 (April 24, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: April 24, 2020

Mr. Linus Richard Banghart-Linn
Michigan Department of Attorney General
P.O. Box 30217
Lansing, MI 48909

Mr. Jomiah Washington
Thumb Correctional Facility
3225 John Conley Drive
Lapeer, MI 48446

Re: Case No. 19-2454, *Jomiah Washington v. Willis Chapman, et al*
Originating Case No. : 4:18-cv-12139

Dear Messrs. Banghart-Linn and Washington,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Ryan E. Orme
Case Manager
Direct Dial No. 513-564-7079

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

No. 19-2454

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 24, 2020
DEBORAH S. HUNT, Clerk

JOMIAH WASHINGTON,

Petitioner-Appellant,

v.

WILLIS CHAPMAN, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Jomiah Washington, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Washington has filed an application for a certificate of appealability.

Washington was sentenced to life imprisonment after being convicted of first-degree premeditated murder, assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death, mutilation of a dead body, and possession of a firearm during the commission of a felony. The Michigan Court of Appeals affirmed his convictions and sentence, and the Michigan Supreme Court denied leave to appeal. *People v. Washington*, No. 316428, 2014 WL 4628883 (Mich. Ct. App. Sept. 16, 2014) (per curiam), *perm. app. denied*, 863 N.W.2d 58 (Mich. 2015). The Michigan courts also denied Washington's motion for relief from judgment. *People v. Washington*, 908 N.W.2d 886 (Mich. 2018) (mem.).

Washington then filed a petition for a writ of habeas corpus, arguing that his right to a public trial was violated; he received ineffective assistance of trial counsel; a witness was coerced into testifying against him; the prosecutor committed misconduct; there was insufficient evidence in support of his murder conviction; his right to counsel was violated; and he received ineffective

assistance of appellate counsel. The district court denied the § 2254 petition and declined to issue a certificate of appealability.

Washington now seeks a certificate of appealability on his claims that his right to a public trial was violated, a witness was coerced into testifying against him, the prosecutor committed misconduct, there was insufficient evidence in support of his murder conviction, his right to counsel was violated, and he received ineffective assistance of appellate counsel when counsel failed to raise claims presented in his motion for post-conviction relief. Washington has forfeited review of the issues that he raised in the district court but did not raise in his application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(3); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the state courts have adjudicated the petitioner's claims on the merits, the relevant question is whether the district court's application of 28 U.S.C. § 2254(d) to those claims is debatable by jurists of reason. *See id.* at 336-37.

Washington argues that his right to a public trial was violated when the judge presiding over his preliminary examination asked some spectators to leave the courtroom after a witness complained that those spectators were intimidating her. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. However, "the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). In order to justify the partial closure of a courtroom, the only clearly established federal law is that "the trial court must balance the interests favoring closure against those opposing it." *Drummond*

v. Houk, 797 F.3d 400, 404 (6th Cir. 2015). Although Washington asserts that the trial court's decision was based on an unreasonable determination of the facts, the transcript of the pretrial hearing explicitly shows that spectators were told to leave the courtroom after a witness complained that spectators were making faces at her. In light of the deference due to state court factual determinations, reasonable jurists would not debate the district court's resolution of this claim.

Washington claims that his due process rights were violated when a witness was coerced into testifying against him. Specifically, Washington asserts that a witness who initially testified at an investigative subpoena hearing that Washington told her that he shot and killed the victim, that the shooting was an accident, and that he disposed of the victim's body, subsequently repudiated her prior testimony at Washington's preliminary hearing, where she testified that she had been coerced by a police detective into implicating Washington. The witness was called to testify at Washington's trial, but invoked the Fifth Amendment; however, the prosecutor was allowed to read her previous testimony into the record, and the detective took the stand and denied threatening the witness or telling her what to say. Because there is no dispute that the state courts failed to review the merits of this claim, it was subject to de novo review in the district court. *See Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003). However, since Washington never requested an evidentiary hearing in state court, he has failed to develop a factual basis in support of this claim. *See Carver v. Staub*, 349 F.3d 340, 351 (6th Cir. 2001). Moreover, Washington is unable to develop the factual basis before the district court because the claim does not rely upon a new rule of constitutional law and the factual predicate underlying the claim could have been previously discovered through the exercise of due diligence. *See* 28 U.S.C. § 2254(e)(2). Because Washington thus has not made and cannot make a substantial showing that the witness was coerced, reasonable jurists would not debate the district court's resolution of this claim.

Washington argues that the prosecutor committed misconduct by presenting false testimony. Specifically, Washington asserts that the prosecutor presented testimony implicating him after the witness recanted and stated that she was coerced by a police detective into making

the statements against him. In order to establish prosecutorial misconduct for presenting false testimony, the defendant must show that (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew that it was false. *Peoples v. Lafler*, 734 F.3d 503, 516 (6th Cir. 2013). Washington has failed to establish that the witness's initial testimony implicating him at the investigative subpoena hearing was false. Although the witness recanted her initial testimony, her testimony at the preliminary examination that she was coerced by a police detective into implicating Washington lacked credibility. During Washington's trial, the detective denied threatening the witness and explicitly stated that he did not tell her what to say. Moreover, the prosecutor presented evidence that the witness was the mother of two of Washington's children and that she visited Washington multiple times in prison after her testimony at the investigative subpoena hearing, showing that she had a motive to testify falsely at the preliminary examination. Under these circumstances, Washington cannot establish that the witness's initial testimony implicating him was actually false. In any event, because it is not clear whether the witness testified falsely at the investigative subpoena hearing or at the preliminary examination, Washington has failed to show that the prosecutor knew that the witness's testimony implicating him was false. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Washington argues that there was insufficient evidence in support of his murder conviction. When reviewing insufficient-evidence claims, a court must first determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Michigan law provides that a conviction for first-degree murder requires proof that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v. Jackson*, 808 N.W.2d 541, 547 (Mich. Ct. App. 2011) (quoting *People v. Kelly*, 588 N.W.2d 480, 488 (Mich. Ct. App. 1998)). "Premeditation and deliberation can be established through '(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the

homicide.'" *People v. Orr*, 739 N.W.2d 385, 389 (Mich. Ct. App. 2007) (per curiam) (quoting *People v. Schollaert*, 486 N.W.2d 312, 318 (Mich. Ct. App. 1992)). The evidence in this case included testimony that Washington was the father of the victim's unborn child; that Washington had threatened to kill the victim if she did not have an abortion; that Washington had previously choked the victim; that the victim had been shot in the head; and that Washington attempted to conceal the shooting by burning the victim's body. In light of this evidence, Washington has not made a substantial showing that he was convicted of first-degree murder on insufficient evidence. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Washington asserts that his Sixth Amendment right to counsel was violated when he was not represented by counsel at his arraignment. However, Washington has failed to make a substantial showing of the denial of a federal constitutional right because, under Michigan law, an arraignment is not a critical stage of the proceedings that requires the assistance of counsel. *See Lundberg v. Buchkoe*, 389 F.2d 154, 158 (6th Cir. 1968). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Washington argues that he received ineffective assistance of appellate counsel when counsel failed to raise his public-trial, coerced-testimony, prosecutorial-misconduct, insufficient-evidence, and right-to-counsel claims. To show ineffective assistance when appellate counsel presents one argument instead of another, "the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present.'" *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). Because Washington is unable to make a substantial showing that the underlying claims were meritorious, he is unable to show that these claims were stronger than the issues that counsel did present. *See Sylvester v. United States*, 868 F.3d 503, 510 (6th Cir. 2017). Accordingly, reasonable jurists could not disagree with the district court's rejection of this claim.

Based upon the foregoing, the court **DENIES** Washington's application for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX:B

Opinion denying petition for writ of habeas corpus. See Washington v Chapman, 2019 US Dist LEXIS 198972 (Nov 18, 2019)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOMIAH WASHINGTON,

Petitioner,

Case No. 18-cv-12139
Hon. Matthew F. Leitman

v.

WILLIS CHAPMAN,

Respondent.

/

JUDGMENT

The above entitled action came before the Court on a petition for a writ of habeas corpus. In accordance with the Order entered on November 18, 2019:

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that permission to appeal *in forma pauperis* is **GRANTED.**

DAVID J. WEAVER
CLERK OF THE COURT

By: s/Holly A. Monda
Deputy Clerk

Approved:

s/Matthew F. Leitman
Matthew F. Leitman
United States District Court

Dated: November 18, 2019
Flint, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOMIAH WASHINGTON,

Petitioner,

Case No. 18-cv-12139
Hon. Matthew F. Leitman

v.

WILLIS CHAPMAN,

Respondent.

/

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS (ECF NO. 1), (2) DENYING A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING LEAVE TO APPEAL *IN FORMA PAUPERIS*

Petitioner Jomiah Washington is a state prisoner currently confined at the Thumb Correctional Facility in Lapeer, Michigan. On July 9, 2018, Washington filed a *pro se* petition in this Court seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (the "Petition") (*See* ECF No. 1.) In the Petition, Washington challenges his state-court convictions for first-degree premeditated murder, Mich. Comp. Laws § 750.316; assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death, Mich. Comp. Laws § 750.90b(a); mutilation of a dead body, Mich. Comp. Laws § 750.160; and possession of a firearm in the commission of a felony, Mich. Comp. Laws § 750.227b.

The Court has carefully reviewed Washington's claims and concludes that he is not entitled to federal habeas relief. Accordingly, for the reasons stated below, the Court **DENIES** the Petition.

I

The facts underlying Washington's convictions are as follows.

In May 2011, the burned body of a woman named Daborah Young was found in a field. Young had been fatally shot in the head. At the time of Young's death, she was approximately 20 weeks pregnant.

Washington became a prime suspect in Young's murder. He was the father of Young's unborn child, and several witnesses said that Washington had threatened to kill Young if she did not have an abortion. Another witness said that Washington had also choked Young on a prior occasion.

The only witness to directly link Washington to Young's murder and the burning of her body was a woman named Amanda Baer. Baer is the mother of Washington's two children. On June 23, 2011, before the State filed charges against Washington, Baer appeared at an investigative subpoena hearing. During that hearing, Baer testified under oath that Washington had told her that he shot and killed Young, but the shooting was an accident. Baer further testified at the investigative subpoena hearing that Washington had admitted to disposing of Young's body.

Not long after Baer testified at the investigative subpoena hearing, Washington was arrested and charged with Young's death. His preliminary examination was held over four days in December 2011 and May and June 2012.

Baer testified at the preliminary examination. By that time, she had a change of heart and no longer wanted to implicate Washington in Young's death. During her testimony, she repudiated most, if not all, of her testimony from the investigative subpoena hearing that incriminated Washington. More specifically, Baer testified that prior to the investigate subpoena hearing, a detective investigating Young's murder, Brian Bowser, had her (Baer) arrested. Baer said that Bowser told her that if she did not implicate Washington in Young's death, Bowser would take Baer's children away from her and force Baer, who was pregnant at the time, to give birth in custody.

The prosecution then confronted Baer with her testimony from the investigative subpoena hearing that Washington had admitted to shooting Young and disposing of her body. Baer confirmed that she gave that testimony, but she said that it was not true and that she made it up in order to placate Bowser:

> Q: The next question I [the prosecutor] asked you [at the investigative subpoena hearing] was "What was the very first version of the story that [Washington] told you?" And your answer was "He was playing with his gun in the backyard. His gun went off, and he went in the front yard and there was a girl shot." Is that true that he –

> A: I said that but I only said that because they told me if I didn't come up with some type of story they were going to take my kids, put me in jail for accessory to murder that I didn't do. So I said what I had to say to get out of my situation.
>
> Q: Okay. You said that but it wasn't true?
>
> A: Right.
>
> [....]
>
> A: Because me and Detective Bowser – he already went over so many things with me for those two, three days I was in jail. I was sitting on hard cement all day. We went over all that already. That's how I came with my answers because to get out of my situation, this is what I had to do. I had to go on a report and I had to say [Washington] did this, that, and other to get out of it. That's basically what [Bowser] explained to me, that, "If you say that [Washington] did that, I don't care if you did it or not, if you say that [Washington] did it then you're free." So I was gone."

(Prelim. Exam. Tr., ECF No. 8-3, PageID.443, 454; *see also id.* at PageID.455.) At the conclusion of the preliminary examination, the state court was faced with both (1) Baer's confirmation that she incriminated Washington at the investigative subpoena hearing and (2) Bear's insistence that that incriminating testimony was not true. The state court then considered the entirety of Baer's testimony and all of the other evidence presented at the preliminary examination, and it concluded that there was enough evidence to bind Washington over for trial.

At trial, Baer was called as a witness. However, she invoked her Fifth Amendment right against self-incrimination and did not testify. Instead, the prosecution read Baer's testimony from the preliminary examination into the record. Importantly, as quoted above, that preliminary examination testimony included the prosecution reading back to Baer portions of her testimony from the investigative subpoena hearing in which she implicated Washington in Young's death. Therefore, the jury heard both (1) Baer's statements from the investigative subpoena hearing implicating Washington and (2) Baer's assertion at the preliminary examination that those incriminating statements were false and coerced by Bowser.

On April 18, 2013, a jury convicted Washington of all charges. The state trial court subsequently sentenced him to life in prison for the murder conviction, time served on the mutilation of a dead body conviction, eight-to-fifteen years for the assault conviction, and a consecutive two-year sentence for felony firearm.

Washington appealed his convictions to the Michigan Court of Appeals, and that court affirmed. *See People v. Washington*, 2014 WL 4628883 (Mich. Ct. App. Sept. 16, 2014. The Michigan Supreme Court thereafter denied leave to appeal. *See People v. Washington*, 863 N.W. 2d 58 (Mich. 2015).

Washington then filed a post-conviction motion for relief from judgment in the state trial court. That court denied the motion on May 25, 2016. *See People v. Washington*, Wayne Cir. Ct. Case No. 12-006201-FC (Wayne Cir. Ct. May 25,

2016). The Michigan appellate courts then denied Washington leave to appeal that decision. *See People v. Washington*, Mich. Ct. of Appeal Case No. 334514 (Mich.Ct.App. Nov. 23, 2016); *lv. den.* 908 N.W.2d 886 (Mich. 2018), *reconsideration denied*, 913 N.W.2d 313 (Mich. 2018).

II

Washington, appearing *pro se*, filed the Petition in this Court on July 9, 2018. (*See* Pet., ECF No. 1.) Washington described his claims, and the standards he believes that the Court should apply to those claims, as follows:

> I. Where [Washington] was denied his constitutional right to a public pre-trial hearing, habeas relief is appropriate because the state court's decision was both contrary to clearly established federal law and involved an unreasonable determination of the facts.
>
> II. Trial counsel was constitutionally ineffective for (a) failing to obtain copies of the interviews by police officers with Amanda Baer so that he could properly cross-examine her at the preliminary examination, and (b) failing to object to the pretrial courtroom closure.
>
> III. [Washington's] conviction was predicated on coerced testimony police-induced, by threats made upon the prosecutor's key witness in violation of the Fourteenth Amendment right to due process of law, which rendered the entire trial proceedings fundamentally unfair. Because the state courts did not reach the merits of this claim, review on habeas is de novo and the deference standard of 2254(d) does not apply.
>
> IV. [Washington] is entitled to habeas relief where the prosecutor knowingly presented false testimony in violation of due process of law. Because the state courts did not reach merits of this claim,

the deference standard of AEDPA does not apply, hence this Court should apply de novo review.

V. Where the prosecution presented testimony that the shooting was accidental, the state court's finding that there was sufficient evidence of premeditation involved [was] an objectively unreasonable application of clearly established Supreme Court precedent, thus habeas relief is warranted.

VI. [Washington] is entitled to habeas where he was denied counsel [at his district court arraignment] in violation of the Sixth and Fourteenth Amendment[s] of the United States Constitution.

VII. Where appellate counsel failed to raise constitutional claims requested by [Washington] in the alternative, to purchase copies of the transcripts so that he could file a Standard 4 brief pro per, [Washington was] deprived of his right to effective assistance of appellate counsel, and also demonstrates good cause and prejudice for not presenting the claims on appeal as of right.

(*Id.*)

III

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires federal courts to uphold state court adjudications on the merits unless the state court's decision (1) "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) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "The question under AEDPA is not whether a federal court believes the state court's

determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

In reviewing a claim under the AEDPA's deferential standard of review, this Court must review "the last state court to issue a reasoned opinion on the issue." *Hoffner v. Bradshaw*, 622 F. 3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005). In this case, Washington first raised most of the claims in the Petition in his post-conviction motion for relief from judgment in the state trial court. The Michigan Court of Appeals and the Michigan Supreme Court both denied Washington's applications for leave to appeal the state court's denial of that motion in unexplained one-sentence orders. Accordingly, this Court must "look through" these decisions to the Wayne County Circuit Court's opinion denying the motion for relief from judgment, which was the last state court to issue a reasoned opinion. *See Hamilton v. Jackson*, 416 F. App'x. 501, 505 (6th Cir. 2011).[1]

[1] The state judge court judge procedurally defaulted several of Washington's claims pursuant to Michigan Court Rule 6.508(D)(3) because Washington failed to show cause and prejudice for failing to raise these claims on his appeal of right. However, the state judge also denied Washington's post-conviction claims on the merits. Thus, AEDPA's deferential standard of review applies to her opinion. *See Moritz v. Lafler*, 525 F. App'x 277, 284 (6th Cir. 2013) ("We acknowledge that the state court's additional language discussing Moritz's failure to raise a choice-of-counsel claim in earlier appeals is a reference to procedural default. But this circuit's precedents leave no doubt that as long as the state court put forward a merits-based ground for denying post-conviction relief, its mentioning of procedural default as an alternative or even primary ground for denying relief does not preclude AEDPA deference.").

IV

A

Washington first argues that he was denied his Sixth Amendment right to a public pre-trial hearing because the judge presiding over his preliminary examination in Michigan's 36th District Court asked some people to leave the courtroom during Baer's testimony at the preliminary examination. The judge asked the spectators to leave after Baer complained that they were intimidating her. Washington raised this claim in his post-conviction motion for relief from judgment, and the state trial court rejected it:

> In defendant's case, the district court judge closed the court room, after the prosecutor's main witness, Amanda Baer, complained that she was being intimidated by person(s) in the audience. Defendant argues the court failed to consider alternatives to closing the court room pursuant to *Waller [v. Georgia*, 467 U.S. 39 (1984)], which violated his right to public hearing. This Court disagrees. In *Presley [Georgia*, 558 U.S. 209 (2010)], anyone associated with the case or the defendant, were expressly not allowed in the court room, and the trial judge closed the court room due to lack of space for the public at large. In defendant's case, protection of a witness from intimidation is clearly an overriding interest justifying the closure of the court room to the public. A witness has the right to testify without fear of reprisals from people who are attending the hearing in support of the defendant. *Waller, supra.* As such, this Court finds no violation of defendant's right to a public trial.

People v. Washington, Wayne Cir. Ct. Case No. 12-006201-FC, at ** 5–6 (ECF No. 8-24, PageID.2530-2531).

As the state court properly recognized, the clearly-established Supreme Court law with respect to the closure of a courtroom in a criminal case is found in *Waller v. Georgia*, 467 U.S. 39 (1984). In *Waller*, the Supreme Court held that the closure of a courtroom during a criminal proceeding does not violate a defendant's Sixth Amendment rights where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. *See id.* at 48. But, unlike here, *Waller* involved the complete closure of a courtroom. As the United States Court of Appeals for the Sixth Circuit has recognized, *Waller* did not clearly establish that its specific four part test applies "where some spectators but not all are removed from [a] courtroom." *Drummond v. Houk*, 797 F.3d 400, 403. "The only principle from *Waller* that [is] clearly established for purposes of [a] partial closure [is] the general one that the trial court must balance the interests favoring closure against those opposing it." *Id.* at 404.

The state court did not unreasonably apply this clearly established "general" rule from *Waller* when examining the partial closure of the courtroom at the preliminary examination. In this case, during Baer's preliminary examination testimony, several witnesses in the gallery began making faces and laughing at Baer

in an attempt to distract and intimidate her. (*See* 12/9/2011 Prelim. Exam. Tr., ECF No. 8-2, PageID.244.) Baer pointed the witnesses out to the presiding judge and told the judge that she did not want those witnesses in the courtroom. (*See id.*) In response, the judge did not close the courtroom completely; instead, the judge simply asked the few disruptive spectators to leave. (*See id.*) The state trial court reviewing that decision did not unreasonably apply *Waller* when it concluded that the presiding judge appropriately balanced the interests for and against closure and concluded that it was most appropriate to ask the disruptive spectators to leave the courtroom in order to prevent them from intimidating a testifying witness. *See Drummond*, 797 F.3d at 402-03 (6th Cir. 2015) (denying habeas relief on basis that partial courtroom closure violated petitioner's right to a public trial and concluding that state court's application of *Waller* was not unreasonable).

B

Washington next claims that he was denied the effective assistance of counsel. Ineffective-assistance claims are reviewed under the two-part test described in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must show that his counsel's performance was deficient. *See id.* at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment." *Id.* at 690. Second, a defendant must show that the deficient performance prejudiced the defense such that the defendant was denied a fair trial. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. On habeas review, the question is "not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.")

The Court will review each of Washington's ineffective assistance claims separately.

1

Washington first argues that his counsel was ineffective for failing to obtain copies of interviews police officers conducted with Baer. Washington insists that had counsel obtained copies of those interviews, counsel could have properly cross-examined Baer at the preliminary examination. The Michigan Court of Appeals considered this claim on direct review and rejected it:

> Washington claims that his trial lawyer was ineffective for failing to obtain copies of the interviews by police officers with Baer so that he could properly cross-examine her at the preliminary examination. However, Washington's

> citation to the record in his brief on appeal does not support his assertion that his lawyer failed to obtain copies of the interviews. Washington has the burden to establish the factual predicate for his ineffective assistance of counsel claim and may not leave it to this Court to search for the factual basis to sustain or reject his position. Washington has not shown that his trial lawyer engaged in an act or omission that fell below an objective standard of reasonableness under prevailing professional norms.

People v. Washington, 2014 WL 4628883, at * 3 (internal citations omitted).

The Michigan Court of Appeals' decision was not unreasonable. Washington did not present any evidence to the state court, nor any evidence to this Court, to support this claim of ineffective instance. For instance, he has not presented evidence that his counsel failed to obtain or review the police interviews with Baer. Conclusory allegations of ineffective assistance of counsel, without any evidentiary support, do not provide a basis for federal habeas relief. *See Workman v. Bell,* 178 F.3d 759, 771 (6th Cir. 1998). Washington is therefore not entitled to federal habeas relief, or an evidentiary hearing, on this claim. *See Cooey v. Coyle*, 289 F.3d 882, 893 (6th Cir. 2002) (citing 28 U.S.C. § 2254(e)(2)(A)(ii)) (denying habeas relief and evidentiary hearing on claim of ineffective assistance where petitioner "fail[ed] to submit evidence" supporting the claim).

2

Washington next claims that his trial counsel was ineffective for failing to object to the partial closure of the courtroom during the preliminary examination. This claim fails because Washington cannot show the failure to object caused him prejudice. Counsel is not ineffective for failing to make a futile or meritless objection. See *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2014) ("Omitting meritless arguments is neither professionally unreasonable nor prejudicial."); United *States v. Steverson*, 230 F.3d 221, 225 (6th Cir. 2000) (rejecting ineffective assistance claim and holding that because "any objection to the introduction of the records of prior felony convictions on the basis that they were obtained in violation of [defendant's] constitutional rights would have failed, [] trial counsel's failure to object to them on that basis was not deficient"). Here, Washington has not presented any evidence to undermine the basis of the magistrate's decision to ask the disruptive spectators to leave the courtroom. Nor has he provided any basis for the Court to conclude that the magistrate judge would have sustained any objection his counsel could have raised. Washington is therefore not entitled to federal habeas relief on this claim. *See Johnson v. Sherry*, 465 F. App'x. 477, 481 (6th Cir. 2012) (denying habeas relief and rejecting claim that counsel rendered ineffective assistance where counsel failed to object to closure of courtroom because "the judge would likely have overruled the objection, and the court of appeals would have likely affirmed").

C

Washington next claims that his Due Process rights were violated when Bowser coerced Baer into testifying against him (Washington) at Washington's preliminary examination.

Washington raised this claim in his post-conviction motion for relief from judgment in the state trial court. The state judge on post-conviction review never addressed the merits of the claim because the judge mistakenly believed that the issue had been raised on direct appeal. *See People v. Washington*, Wayne Cir. Ct. No. 12-006201-FC, at *6. (ECF No. 8-24, PageID.2531). This Court will therefore review the claim *de novo*.[2]

Washington asserts that he is entitled to federal habeas relief on this claim based upon the decision in *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973). In *Bradford*, the United States Court of Appeals for the Sixth Circuit affirmed "the granting of a writ of habeas corpus" where the petitioner's conviction resulted from the "state's knowing use of coerced testimony obtained by torture, threats and abuse of a witness is in custody." *Id.* at 66. Washington insists that, like the petitioner in

[2] After this Court determined that the state court had failed to address this claim on the merits, it asked the parties to submit supplemental briefs addressing, among other things, the standard of review that this Court should apply to this claim. (*See* Order, ECF No. 10.) Respondent thereafter acknowledged that this claim "was not adjudicated on the merits in state-court proceedings," and that this Court should therefore "review the claim *de novo*." (Respondent Supp. Br., ECF No. 11, PageID.2776.)

Bradford, he is entitled to habeas relief because his conviction resulted from the "use of coerced testimony." *Id.*

The Court disagrees that *Bradford* compels habeas relief. In *Bradford*, it was *undisputed* that the conviction resulted from coerced testimony. But here, there is a factual dispute on that key issue. As described in detail above, Baer testified at the preliminary examination that Bowser threatened and coerced her to testify against Washington. But Bowser denies that he ever threatened Baer or pressured her to incriminate Washington. (*See* 4/12/2013 Trial Tr., ECF No. 8-15, PageID.1880-1884.) And Washington never presented any evidence or otherwise sought to resolve this factual dispute. For example, because Washington never asked the state court for an evidentiary hearing to resolve this dispute, the state court never conclusively determined whether Baer's testimony was in fact coerced. He therefore has not established that he is entitled to federal habeas relief on this claim. *See, e.g.*, *Carver v. Staub*, 349 F.3d 340, 351 (6th Cir. 2001) (noting that a habeas petitioner "has the burden of establishing his right to federal habeas relief and of proving all facts necessary to show a constitutional violation").

This Court cannot resolve now resolve the factual dispute regarding whether Baer's testimony was coerced. In order to resolve that factual dispute, the Court would need to hold an evidentiary hearing. But AEDPA bars the Court from doing so. Under AEDPA where, as here, a petitioner has failed to develop a factual basis

for his claim in state court, a federal court may hold an evidentiary hearing only in certain limited circumstances:

> [where an] applicant has failed to develop the factual basis of a claim in State court proceedings, [a district] court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence;

28 U.S.C. § 2254(e)(2).[3]

Washington has not satisfied either of these exceptions. First, Washington has not even attempted to argue that the Court should hold an evidentiary hearing because of a "new rule of constitutional law." Second, Washington has failed to establish that "the factual predicate [of his coercion claim] could not have been previously discovered through the exercise of due diligence." *Id.* Under this provision, "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law."

[3] This provision of AEDPA applies where "a claim has not been adjudicated on the merits in a state court proceeding." *Keeling v. Warden, Lebanon Correctional Inst.*, 673 F.3d 452, 464 (6th Cir. 2012).

Keeling v. Warden, Lebanon Correctional Inst., 673 F.3d 452, 464 (6th Cir. 2012) (quoting *Williams v. Taylor*, 529 U.S. 420, 437 (2000)). Here, Washington raised his claim that Baer was coerced in his post-conviction motion for relief from judgment. But he never moved the state court for an evidentiary hearing on this claim. Nor has he ever argued that his counsel was ineffective for failing to seek such an evidentiary hearing.[4]

Simply put, this Court cannot hold an evidentiary hearing because Washington did not exercise the required diligence in state court. And without holding an evidentiary hearing, the Court cannot resolve the disputed question of fact regarding Baer's testimony in Washington's favor. Washington is therefore not entitled to federal habeas relief on this claim.

D

Washington next asserts that prosecution violated his Due Process rights when the it knowingly presented perjured testimony at Washington's trial. More specifically, Washington claims that Baer's testimony at the investigative subpoena

[4] Importantly, while Washington's trial counsel did not move to exclude Baer's testimony from the investigative subpoena hearing on the ground that it was coerced, he did argue to the jury during closing arguments that Baer had admitted that she "committed perjury" and "lied over and over again" at the investigative subpoena hearing. (4/17/2013 Trial Tr., ECF No. 8-17, PageID.2060-2061.) He also argued to the jury that they should disbelieve Baer's testimony incriminating Washington at the investigative subpoena hearing because that testimony was Baer's "only way out" of jail. (*Id.*, PageID.2162; *see also id.*, PageID.2060-2063.)

hearing that Washington had incriminated himself was false and that the prosecutor knew this testimony was false when the prosecutor had that testimony read into the record at Washington's trial.[5]

Washington is not entitled to federal habeas relief on this claim. To prevail on a claim that a conviction was obtained by evidence that the government knew or should have known to be false, a defendant must show that the statements were actually false, that the statements were material, and that the prosecutor knew they were false. *See Coe v. Bell*, 161 F. 3d 320, 343 (6th Cir. 1998). Mere inconsistencies in a witness' testimony do not establish the knowing use of false testimony by the prosecutor. *Id.* Moreover, the fact that a witness contradicts himself or herself or changes his or her story does not establish perjury. *Malcum v. Burt,* 276 F. Supp. 2d 664, 684 (E.D. Mich. 2003). Finally, allegations of perjury in a habeas corpus petition must be corroborated by some factual evidence in the record. See *Barnett v. United States*, 439 F.2d 801, 802 (6th Cir. 1971) ("allegations" that "do no more

[5] Washington raised this claim in his post-conviction motion for relief from judgment in state court. The state court declined to rule on it though because the state court held that the Michigan Court of Appeals had rejected this argument on direct appeal. *People v. Washington*, Wayne Cir. Ct. No. 12-006201-FC, at *6 (ECF No. 8-25, Page ID. 2702). However, while the Michigan Court of Appeals did address an argument that Washington raised on direct appeal with respect to Bear's testimony at the investigative subpoena hearing, it is not clear from the Michigan Court of Appeals' decision that it addressed this claim specifically. Out of an abundance of caution, this Court will review the claim *de novo*.

than establish the appearance of inconsistencies in testimony" are insufficient to establish the knowing use of perjured testimony by the prosecution).

Here, for all of the reasons explained above, there is an unresolved factual dispute with respect to whether Baer offered false testimony at the investigative subpoena hearing. Therefore, Washington has not made a clear showing of perjury. Moreover, Washington has not shown or identified any evidence that the prosecution knew that Baer had testified falsely at the investigative subpoena hearing when it had that testimony read into the record at Washington's trial. Washington is therefore not entitled to federal habeas relief on this claim.

E

Washington next claims that there was insufficient evidence to convict him of first-degree premeditated murder because there was insufficient evidence of premeditation. Washington also suggests that there was insufficient evidence to establish his identity as the shooter.

Washington raised an insufficiency-of-the-evidence claim in his post-conviction motion for relief from judgment in the state trial court. The state judge rejected the claim and held that there was sufficient evidence of premeditation to support Washington's first-degree murder conviction. *See People v. Washington*, Wayne Cir. Ct. No. 12-006201-FC, at *11 (ECF 8-25, PageID.2707).

The clearly established federal law governing Washington's sufficiency of the evidence claim is found in the line of Supreme Court decisions concerning the level of proof necessary to satisfy the Due Process Clause. In *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." And in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the Supreme Court determined that sufficient evidence supports a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

The review of insufficiency of the evidence claims under the *Jackson* standard is especially deferential in the habeas context. In habeas proceedings, the sufficiency of the evidence inquiry involves "two layers of deference": one to the jury verdict and a second to the decision by the state appellate court. *Tanner v. Yukins*, 867 F.3d 661, 672 (6th Cir. 2017). First, the Court "must determine whether, viewing the trial testimony and exhibits 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." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009) (citing *Jackson*, 443 U.S. at 319) (emphasis in Jackson). Second, if the Court were "to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable

doubt, on habeas review, [the Court] must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable." *Id.* When applying these two layers of deference, the Court's task is to "determine whether the [ ] [last court of review] itself was unreasonable in its conclusion that a rational trier of fact could find [the defendant] guilty beyond a reasonable doubt based upon the evidence introduced at trial." *Id.* (emphasis in original).

The state trial court did not unreasonably conclude that there was sufficient evidence of premeditation. Under Michigan law, premeditation may be established through evidence of "(1) the prior relationship of the parties, (2) defendant's actions before the killing, (3) the circumstances, including the wound's location, of the killing, and (4) defendant's conduct after the killing." *Cyars v. Hofbauer,* 383 F.3d 485, 491 (6th Cir. 2004). *See also People v. Anderson,* 531 N.W.2d 780, 786 (Mich. App. 1995). Premeditation under Michigan law may also be logically inferred from wounds inflicted on vital parts of the victim's body. *See Lundberg v. Buchkoe,* 338 F. 2d 62, 69 (6th Cir. 1964).

Here, the evidence established that Washington and the victim had a prior relationship, Washington had previously threatened the victim, the victim had been shot in the head, and that Washington had attempted to conceal his crime by burning the victim's body after the murder. Under these circumstances, it was not

unreasonable for the state court to conclude that there was sufficient evidence of premeditation.

Washington further argues that there was insufficient evidence to establish his identity as the shooter. But, as described above, Baer testified at the investigative subpoena hearing that Washington had told her that he had shot the victim. "[A]n admission by the accused identifying himself (or herself) as the person involved in the (crime) is sufficient to sustain a guilty verdict when the crime itself is shown by independent evidence." *United States v. Opdahl*, 610 F. 2d 490, 494 (8th Cir. 1979); *See Johnson v. Coyle,* 200 F.3d 987, 992 (6th Cir. 2000) (petitioner's identity as murderer supported in part by evidence that he confessed several times to murdering sister). Moreover, Washington's prior threats to kill the victim was additional evidence to permit a rational trier of fact to conclude that petitioner was the person who murdered the victim. *See Pinchon v. Myers*, 615 F. 3d 631, 643-44 (6th Cir. 2010).

Washington counters that there was insufficient evidence to convict him because the police did not recover DNA evidence, fingerprints, or other forensic evidence to convict him of premeditated murder. But "lack of physical evidence does not render the evidence presented insufficient; instead it goes to weight of the evidence, not its sufficiency." *Gipson v. Sheldon*, 659 F. App'x 871, 882 (6th Cir. 2016).

For all of these reasons, Washington is not entitled to federal habeas relief based on the insufficiency of the evidence.

F

Next, Washington that he was denied his Sixth Amendment right to counsel because he was not represented by an attorney at his initial arraignment on the warrant Michigan's 36th District Court. Washington raised this claim in his post-conviction motion for relief from judgment in the state trial court, and the state court rejected it. *See People v. Washington*, Wayne Cir. Ct. No. 12-006201-FC, at ** 11-12 (ECF 8-25, PageID.2707-2708).

Even assuming arguendo that Washington was denied the assistance of counsel at his arraignment on the warrant, he is not entitled to federal habeas relief because he has not shown how the absence of counsel at that proceeding caused him prejudice. The Supreme Court has held that the denial of counsel at an arraignment requires automatic reversal, without any harmless-error analysis, in only two situations: (1) when defenses not pled at arraignment were irretrievably lost, *see Hamilton v. Alabama,* 368 U.S. 52, 53–54 (1961); and (2) when a full admission of guilt entered at an arraignment without counsel was later used against the defendant at trial, despite subsequent withdrawal. *See White v. Maryland,* 373 U.S. 59, 60 (1963) (per curiam). Neither of those situations exists here. Washington is therefore not entitled to federal habeas relief on this claim. *See Whitsell v. Perini*, 419 F. 2d

95 (6th Cir. 1969) (petitioner not entitled to habeas relief based on fact that he was not represented by counsel at his arraignment where petitioner pleaded not guilty at arraignment and no incriminating statements were brought out and later used at trial); *Doyle v. Scutt*, 347 F. Supp. 2d 474, 481 (E.D. Mich. 2004) (same).

G

Finally, Washington claims that his appellate counsel was ineffective for failing to raise certain unidentified claims on direct appeal that Washington later raised in his post-conviction motion for relief from judgment. Washington raised this claim in his post-conviction motion for relief from judgment in the state trial court, and the state court rejected it:

> [F]or Defendant to obtain postconviction relief for ineffective assistance of appellate counsel based upon counsel's failure to present all possible claims on appeal; he must show appellate counsel's representation fell below an objective standard of reasonableness and that appellate counsel's representation was constitutionally deficient. In order to establish a claim of ineffective assistance of appellate counsel, Defendant must show that appellate counsel was ineffective for failing to raise an issue on appeal. Defendant must overcome the presumption that the failure to raise an issue was sound appellate strategy and must establish that the deficiency was prejudicial. *People v. Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993), and *aff'd* 449 Mich 375; 535 NW2d 496 (1995). Here, Defendant has not done so. As this Court did not find merit in any of these issues appellate counsel decided not to pursue, Defendant cannot show he was prejudiced by appellate counsel's failure to raise any of the issues contained in this motion. MCR 6.508(D)(3). Under the deferential standard of review, appellate counsel's

> decision to winnow out weaker arguments in pursuit of those that may be more likely to prevail is not evidence of ineffective assistance of counsel. *Reed*, *supra* at 391. Moreover, counsel's failure to assert all arguable claims is not sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney. Thus, Defendant's ineffective assistance of counsel argument must fail.

People v. Washington, Wayne Cir. Ct. No. 12-006201-FC, at ** 12-13 (ECF No. 8-25, PageID.2708-2709). That decision was not unreasonable.

"[A]ppellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)). And for all of the reasons stated above, Washington has not shown that any of the claims that he wanted his appellate counsel to raise on direct review were meritorious. He therefore has not shown that he is entitled to federal habeas relief on this claim.

Washington also claims that his appellate counsel was ineffective for failing to provide Washington with the trial transcripts so that Washington could file his own supplemental *pro per* appellate brief. But a criminal defendant has no federal constitutional right to self-representation on direct appeal from a criminal conviction. *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 163 (2000). And by accepting the assistance of counsel, a criminal appellant waives his right to present *pro se* briefs on direct appeal. *See Myers v. Johnson*, 76 F. 3d 1330, 1335 (5th Cir. 1996); *See also Henderson v. Collins,* 101 F. Supp. 2d 866, 881 (S.D. Ohio

1999); *aff'd in part, vacated in part on other grds* 262 F. 3d 615 (6th Cir. 2001) (defendant who was represented by counsel and also sought to submit *pro se* brief upon appeal did not have right to such hybrid representation). Thus, a defendant does not have a constitutional entitlement to submit a *pro per* appellate brief on direct appeal from a criminal conviction in addition to a brief submitted by the defendant's appellate counsel. *See McMeans v. Brigano,* 228 F. 3d 674, 684 (6th Cir. 2000). Because Washington was represented by appellate counsel, any failure by the trial court or appellate counsel to provide him with trial transcripts so that he could prepare his own *pro per* brief did not violate Washington's constitutional rights. See *U.S. v. Dierling*, 131 F.3d 722, 734, n. 7 (8th Cir. 1997); *Foss v. Racette*, 2012 WL 5949463, at *4 (W.D.N.Y. Nov. 28, 2012). Washington is therefore not entitled to federal habeas relief on his ineffective assistance of appellate counsel claim.

IV

In order to appeal the Court's decision, Washington must obtain a certificate of appealability. To obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the applicant is required to show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve

encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Here, jurists of reason would not debate the Court's conclusion that Washington has failed to demonstrate entitlement to habeas relief with respect to any of his claims because they are all devoid of merit. Therefore, the Court will **DENY** Washington a certificate of appealability.

Finally, although this Court declines to issue Washington a certificate of appealability, the standard for granting an application for leave to proceed *in forma pauperis* on appeal is not as strict as the standard for certificates of appealability. *See Foster v. Ludwick*, 208 F.Supp.2d 750, 764 (E.D. Mich. 2002). While a certificate of appealability may only be granted if a petitioner makes a substantial showing of the denial of a constitutional right, a court may grant *in forma pauperis* status if it finds that an appeal is being taken in good faith. *See id.* at 764-65; 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a). Although jurists of reason would not debate this Court's resolution of Washington's claims, an appeal could be taken in good faith. Accordingly, the Court **GRANTS** Washington permission to proceed *in forma pauperis* on appeal.

V

Accordingly, for the reasons stated above, the Court 1) **DENIES WITH PREJUDICE** Washington's petition for a writ of habeas corpus (ECF No. 1); 2) **DENIES** Washington a certificate of appealability, and (3) **GRANTS** Washington permission to proceed *in forma pauperis* on appeal.

IT IS SO ORDERED.

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: November 18, 2019

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on November 18, 2019, by electronic means and/or ordinary mail.

s/Holly A. Monda
Case Manager
(810) 341-9764

APPENDIX:C

People v Washington, 913 NW2d 313(2018), Order denying motion for reconsideration

Order

Michigan Supreme Court
Lansing, Michigan

July 3, 2018

Stephen J. Markman,
Chief Justice

155007(22)

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 155007
COA: 334514
Wayne CC: 12-006201-FC

JOMIAH WASHINGTON,
Defendant-Appellant.

/

On order of the Court, the motion for reconsideration of this Court's April 3, 2018 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

WILDER, J., did not participate because he was on the Court of Appeals panel.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 3, 2018

Clerk

a0625

APPENDIX:D

People v Washington, 908 NW2d 886(2018) Order denying application for leave to appeal

People v. Washington, 908 N.W.2d 886

Copy Citation

Supreme Court of Michigan

April 3, 2018, Decided

SC: 155007

Reporter

908 N.W.2d 886 * | 2018 Mich. LEXIS 560 ** | 501 Mich. 1034 | 2018 WL 1627713

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOMIAH WASHINGTON, Defendant-Appellant.

Subsequent History: Reconsideration denied by People v. Washington, 502 Mich. 905, 913 N.W.2d 313, 2018 Mich. LEXIS 1318 (July 3, 2018)

Prior History: [**1] COA: 334514. Wayne CC: 12-006201-FC.

People v. Washington, 2014 Mich. App. LEXIS 1726 (Mich. Ct. App., Sept. 16, 2014)

Judges: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement, Justices. WILDER, J., did not participate because he was on the Court of Appeals panel.

Opinion

Order

On order of the Court, the application for leave to appeal the November 23, 2016 order of the Court of Appeals is considered, **[*887]** and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

WILDER, J., did not participate because he was on the Court of Appeals panel.

Content Type: Cases

Terms:

APPENDIX:E

People v Washington, Mich App No#334514, Order denying application for leave to appeal

Court of Appeals, State of Michigan

ORDER

People of MI v Jomiah Washington

Docket No. 334514

LC No. 12-006201-01-FC

Kirsten Frank Kelly
Presiding Judge

Kurtis T. Wilder

Cynthia Diane Stephens
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is DENIED for failure to persuade the Court of the necessity of a remand at this time.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 23 2016

Date

Chief Clerk

APPENDIX:F

Opinion and Order denying state court motion for relief from judgment (May 25, 2016)

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Hon. Shannon N. Walker
Case# 12-06201-01

JOMIAH WASHINGTON,

Defendant.
_____/

OPINION

On April 18, 2013, following a jury trial, defendant, Jomiah Washington, was convicted of **first degree murder**, contrary to **MCL 750.316, dead bodies internment**, contrary to **MCL 750.160, assault on a pregnant individual intentionally causing miscarriage, still birth, or death**, contrary to **MCL 750.90b(a)**, and **felony firearm**, contrary to **MCL 750.227(b).** On May 13, 2013, defendant was sentenced to concurrent terms of "LIFE" for his murder conviction, time served on mutilation of a dead body, eight (8) to fifteen (15) years for his assault conviction, and a consecutive two (2) year sentence for felony firearm. On September 16, 2014, Michigan's Court of Appeals in an unpublished opinion affirmed defendant's convictions and sentence. *People v. Washington*, Docket# 316428. On May 28, 2015, Michigan's Supreme Court denied defendant's application for leave to appeal. "On order of the Court, the application for

leave to appeal the September 16, 2014 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand is DENIED." *People v Washington*, 497 Mich 1027; 863 NW2d 58 (2015). Defendant now brings a motion for relief from judgment pursuant to **MCR 6.500 et seq.** The Prosecution has not filed a response.

Defendant alleges eight errors. Issue [1] Defendant argues that he was deprived his sixth amendment right to a public pretrial hearing when the court removed spectators from the courtroom in contravene with *Waller v. Georgia.* [2] Defendant alleges trial counsel was ineffective for failing to object to the pretrial courtroom closure. 3] Defendant argues his conviction was predicated upon coerced testimony [sic] police–induced, by threats made upon the prosecutor's key witness in violation of the fourteenth amendment right to due process of law, which rendered the entire trial proceedings fundamentally unfair. 4] Defendant argues his right to due process was violated by the prosecution knowingly presenting perjured testimony. 5] Defendant argues the trial court failed to instruct the jury on involuntary manslaughter where the evidence supported such an instruction. 6] Defendant argues the prosecutor's star witness testified that the shooting was accidental; [sic] there was insufficient evidence to support the necessary elements of first degree murder. 7] Defendant argues his conviction should be set aside where counsel was absent during a critical stage in violation of his sixth and fourteenth amendment of the United States Constitution. 8]

Defendant complains he received ineffective assistance of appellate counsel on direct appeal when counsel failed to raise obvious and meritorious issues and in the alternative, counsel was ineffective for refusing to assist defendant with the trial transcripts, which prevented defendant from filing a pro per standard 4 brief.

MCR 6.508(D) provides in relevant part:

> The Defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the Defendant if the motion:
>
> ***
>
> (2) Alleges grounds for relief which were decided against the Defendant in a prior appeal or proceeding under this subchapter, unless the Defendant establishes
>
> (3) Alleges grounds for relief, except jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the Defendant demonstrates
>
> (a) Good cause for failure to raise such grounds on prior appeals or in the prior motion, and
>
> (b) Actual prejudice from the alleged irregularities that support the claim for relief. As used in this rule, "actual prejudice" means that
>
> (i) In a conviction following a trial, but for the alleged error the Defendant would have had a reasonably likely chance for an acquittal;
>
> ***
>
> (iii) Or that the irregularity was so offensive to the maintenance of a sound judicial process it should not be allowed to stand regardless of its effect on the outcome of the case.
>
> ***
>
> The court may waive the "good cause" requirement of sub-rule (D)(3)(a) if it concludes that there is a significant possibility that the Defendant is innocent of the crime.

Defendant argues he is entitled to a reversal of his conviction where he was deprived of his sixth amendment right to a public pre-trial hearing when the court

removed spectators from the court room in contravene [sic] with *Waller v. Georgia*, 467 US 39, 46 (1984) and *Pressley v. Georgia*, 130 S Ct 721 (2010). In *Waller*, the Supreme Court held that: (1) closure of entire suppression hearing was plainly unjustified and violated defendant's Sixth Amendment public-trial guarantee, and (2) new trial would be required only if new, public suppression hearing would result in suppression of material evidence not suppressed at first trial, or in some other material change in positions of the parties. *Waller v Georgia*, 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

The Court explained:

> 1. Under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the following tests: the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the trial court must consider reasonable alternatives to closing the hearing; and it must make findings adequate to support the closure. Cf. *Press–Enterprise Co. v. Superior Court of California*, 464 US 501, 104 S Ct 819, 78 LEd2d 629. Pp. 2214–2216.
>
> 2. Under the above tests, the closure of the entire suppression hearing here plainly was unjustified. The State's proffer was not specific as to whose privacy interests might be infringed if the hearing were open to the public, what portions of the wiretap tapes might infringe those interests, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general and did not purport to justify closure of the entire hearing. And the court did not consider alternatives to immediate closure of the hearing. *Id* at 2212.

In *Presley v. Georgia*, 130 S Ct 721, 724-725 (2010), the trial court before selecting a jury in Presley's trial, noticed a lone courtroom observer. *Id.*, at 270–271, 674 SE2d, at 910. The court explained that prospective jurors were about to enter and instructed the

man that he was not allowed in the courtroom and had to leave that floor of the courthouse entirely. *Id.*, at 271, 674 SE2d, at 910. The court then questioned the man and learned he was Presley's uncle. *Ibid.* The court reiterated its instruction: "'well, you still can't sit out in the audience with the jurors. You know, most of the afternoon actually we're going to be picking a jury. And we may have a couple of pre-trial matters, so you're welcome to come in after we ... complete selecting the jury this afternoon. But, otherwise, you would have to leave the sixth floor, because jurors will be all out in the hallway in a few moments. That applies to everybody who's got a case.' " *Ibid.*

Presley's counsel objected to "'the exclusion of the public from the courtroom,' " but the court explained, "'[t]here just isn't space for them to sit in the audience.' " *Ibid.* When Presley's counsel requested "'some accommodation,' " the court explained its ruling further: "'well, the uncle can certainly come back in once the trial starts. There's no, really no need for the uncle to be present during jury selection.... We have forty-two (42) jurors coming up. Each of those rows will be occupied by jurors; and, defendant's uncle cannot sit and intermingle with members of the jury panel. But, when the trial starts, the opening statements and other matters, he can certainly come back into the courtroom. *Presley v. Georgia*, 130 S Ct 721, 722, 558 U.S. 209, 210 (2010).

In defendant's case, the district court judge closed the court room, after the prosecutor's main witness, Amanda Baer, complained that she was being intimidated by person(s) in the audience. Defendant argues the court failed to consider alternatives

to closing the court room pursuant to *Waller*, which violated his right to public hearing. This Court disagrees. In *Presley*, anyone associated with the case or the defendant, were expressly not allowed in the court room, and the trial judge closed the court room due to lack of space for the public at large. In defendant's case, protection of a witness from intimidation is clearly an overriding interest justifying the closure of the court room to the public. A witness has the right to testify without fear of reprisals from people who are attending the hearing in support of the defendant. *Waller, supra.* As such, this Court finds no violation of defendant's right to a public trial.

Defendant's arguments two through four (Ineffective Assistance of Trial Counsel, admission of coerced testimony, and knowing placing on the record perjured testimony) have all been raised in his appeal of right before Michigan's Court of Appeals, which on September 16, 2014, affirmed defendant's convictions and sentence. *People v. Washington*, Docket No. 316428, 2014 WL 4628883 (2014), app den 497 Mich 1027; 863 NW2d 58 (2015). An appellate court's decision is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case. *People v. Peters*, 205 Mich App 312; 517 NW2d 773 (1994); *Supervisors v. Kennicott*, 94 US 498, 499 (1877). Further, **MCR 6.508 (D)(2),** states, "the court may not grant relief to the Defendant if the motion alleges grounds for relief, which were decided against the Defendant in a prior appeal." As Defendant has already argued these same issues in his appeal as of right, he is precluded from re-litigating those issues here.

Defendant's next argument is that his due process rights were violated when the trial court failed to instruct the jury on involuntary manslaughter, whereas in the defendant's opinion the evidence supported such an instruction. Defendant argues there was no direct evidence linking him to the death of the decedent, other than testimony from Amanda Baer, that defendant admitted to shooting a girl accidentally. Defendant posits that the circumstantial evidence presented along with the testimony of Baer points to an accidental shooting, rather than premeditated murder. In *People v. Cornell,* 466 Mich. 335, 646 N.W.2d 127 (2002), the Court considered whether necessarily included lesser offenses and cognate lesser included offenses were "inferior" offenses under **MCL § 768.32**. In consideration of this issue, Michigan appellate courts examined the meaning of the word "inferior":

"We believe that the word 'inferior' in [**MCL 768.32**] does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense." [*Cornell, supra* at 354, 646 NW2d 127, quoting *People v. Torres (On Remand),* 222 Mich App 411, 419-420, 564 NW2d 149 (1997)].

Moving on, manslaughter is defined as:

> [T]he act of killing, though intentional, [is] committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition....[*Maher v. People,* 10 Mich. 212, 219 (1862).]

A defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder."). Thus, to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions. *People v. Pouncey,* 437 Mich. 382, 389, 471 N.W.2d 346 (1991). Significantly, provocation is not an element of voluntary manslaughter. *People v. Moore,* 189 Mich App 315, 320, 472 N.W.2d 1 (1991). Rather, provocation is the circumstance that negates the presence of malice. An examination of the historical development of homicide law informs this Court that manslaughter is a necessarily included lesser offense of murder because the elements of manslaughter are included in the offense of murder. *People v Mendoza,* 468 Mich 527, 535-36; 664 NW2d 685, 690 (2003)

> Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty. *People v. Heflin,* 434 Mich. 482, 507-508, 456 NW2d 10 (1990).

Pertaining to the legal definition of murder, the phrase "malice aforethought" has evolved over the centuries. During the late fifteenth and early sixteenth centuries, "malice aforethought" meant that one possessed intent to kill well in advance of the act

itself. *Id.* at 10. Notably, the emphasis was on "aforethought," so that the critical difference between capital and noncapital murder was the passage of time between the initial formulation of the intent to kill and the act itself. Moylan, Criminal Homicide Law (Maryland Institute for Continuing Professional Education of Lawyers), ch. 2, § 2.7. The term "malice" alone had little significance beyond meaning intent, to commit an unjustified and inexcusable killing. *Id.* The purpose of the "malice aforethought" element was to distinguish between deliberate, calculated homicides and homicides committed in the heat of passion. Thus, this Court concludes, the elements of voluntary manslaughter are included in murder, with murder possessing the single additional element of malice. *Mendoza, supra.*

> [P]ains should be taken not to define [the mens rea required for involuntary manslaughter] in terms of a wanton *and* wilful disregard of a harmful consequence known to be likely to result, *because such a state of mind goes beyond negligence and comes under the head of malice. Id.*

Unlike murder, involuntary manslaughter contemplates an unintended result and thus requires something less than intent to do great bodily harm, intent to kill, or the wanton and wilful disregard of its natural consequences. [Citations omitted; emphasis added.] *United States v. Browner,* 889 F2d 549, 553 (1989), stating, "In contrast to the case of voluntary manslaughter ... the absence of malice in involuntary manslaughter arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to reach the traditional malice requirements." *Id.* Thus, this Court concludes that the elements of involuntary

manslaughter are included in the offense of murder because involuntary manslaughter's mens rea is included in murder's greater mens rea.

Having concluded that manslaughter is an inferior offense of murder because it is a necessarily included lesser offense, we now consider whether the trial court erred in refusing to give an involuntary-manslaughter instruction. An inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense. *Cornell, supra* at 357, 646 NW2d 127. In this case, the trial court concluded there was not sufficient evidence to support an involuntary-manslaughter instruction. Manslaughter, in both its forms, is an inferior offense of murder within the meaning of **MCL § 768.32.** Therefore, an instruction is warranted when a rational view of the evidence would support it. In defendant's scenario, there was testimony that defendant had on a number of occasions verbally threatened to stomp the baby out of the decedent, if she did not have an abortion; there was also testimony from a witness that defendant had previously aggressively choked the decedent, in a domestic violence incident, leaving heavy bruising on her neck. Thus, it is unlikely defendant unintentionally tried to harm the decedent. Therefore, this Court concludes a rational view of the evidence did not support an involuntary-manslaughter instruction. Therefore, the trial court did not err when it refused to give the instruction. *Mendoza, supra* at 548.

Next defendant argues that there was insufficient evidence to support the necessary elements of first degree murder. This Court disagrees for the reasons stated in the previous argument, that defendant's conduct and the death of the decedent did not meet the legal definition of involuntary manslaughter, as defendant had premeditated intentions of seriously harming the decedent prior to her shooting death in 2011.

Next defendant argues he was denied trial counsel at a critical stage in violation of his sixth and fourteenth amendment rights. Defendant complains that he was not furnished with an attorney during his initial arraignment, which is an arraignment on the warrant or complaint. Defendant avers that the denial of counsel at the initial arraignment is clearly at odds with transparent direction from the Supreme Court, and other adjoining counties whom regularly appoint counsel at the initial arraignment. However, defendant's suspicions are misplaced. **MCR 6.104** in pertinent part reads:

> The court at the [initial] arraignment must
> (1) inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law;
> (2) if the accused is not represented by a lawyer at the arraignment, advise the accused that
> (a) the accused has a right to remain silent,
> (b) anything the accused says orally or in writing can be used against the accused in court,
> (c) the accused has a right to have a lawyer present during any questioning consented to, and
> (d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer. **MCR 6.104(E)**.

Thus, the initial arraignment is not considered a critical stage where legal representation is required.[1] The court rules are clear that a defendant may or may not be represented by counsel, and have laid procedures to deal with either scenario. Therefore, defendant's argument must fail.

Defendant's final argument is that he received ineffective assistance of appellate counsel on direct appeal when counsel failed to raise obvious and meritorious issues and refused to provide defendant with transcripts, which defendant claims prevented him from filing a pro per standard-4 brief. However, for Defendant to obtain post-conviction relief for ineffective assistance of appellate counsel based upon counsel's failure to present all possible claims on appeal; he must show appellate counsel's representation fell below an objective standard of reasonableness and that appellate counsel's representation was constitutionally deficient.

In order to establish a claim of ineffective assistance of appellate counsel, Defendant must show that appellate counsel was ineffective for failing to raise an issue on appeal. Defendant must overcome the presumption that the failure to raise an issue was sound appellate strategy and must establish that the deficiency was prejudicial. *People v. Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993), and aff'd 449 Mich 375; 535 NW2d 496 (1995). Here, Defendant has not done so. As this Court did not find

[1] **MCL 764.13** and **764.26**.

merit in any of these issues appellate counsel decided not to pursue, Defendant cannot show he was prejudiced by appellate counsel's failure to raise any of the issues contained in this motion. **MCR 6.508(D)(3).** Under the deferential standard of review, appellate counsel's decision to winnow out weaker arguments in pursuit of those that may be more likely to prevail is not evidence of ineffective assistance of counsel. *Reed, supra* at 391. Moreover, counsel's failure to assert all arguable claims is not sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney. Thus, Defendant's ineffective assistance of counsel argument must fail.

Therefore, this Court finds defendant has not demonstrated both good cause and actual prejudice for the reasons stated above; and as such, defendant's arguments fail to meet the heavy burden under **MCR 6.508 (D)(3)(a)**. Thus, this Court holds defendant's request for a new trial, or evidentiary hearing, based upon his motion for relief from judgment are **DENIED**.

Dated: MAY 25 2016

Circuit Court Judge

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Hon. Shannon N. Walker
Case# 12-06201-01

JOMIAH WASHINGTON,

Defendant.
_____/

ORDER

At a session of this Court held in the Frank

Murphy Hall of Justice on MAY 25 2016

JUDGE SHANNON NICOL WALKER

PRESENT: HON. _____
Circuit Court Judge

In the above-entitled cause, for the reasons set forth in the foregoing Opinion;

IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is

DENIED.

_____
Circuit Court Judge

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record with prepaid postage on 5-25-16

Mary McGarry
Name

APPENDIX:G

People v Washington, 497 Mich 1027 (2015), Order denying the application for leave to appeal

Order

Michigan Supreme Court
Lansing, Michigan

May 28, 2015

Robert P. Young, Jr.,
Chief Justice

150321 & (61)

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 150321
COA: 316428
Wayne CC: 12-006201-FC

JOMIAH WASHINGTON,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the September 16, 2014 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to remand is DENIED.

t0518

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 28, 2015

Clerk

APPENDIX:H

People v Washington, 2014 Mich App LEXIS 1726, unpublished opinion from the Michigan Court of Appeals (September 16, 2014)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOMIAH WASHINGTON,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 316428
Wayne Circuit Court
LC No. 12-006201-FC

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Jomiah Washington, appeals by right his jury convictions of first-degree murder, MCL 750.316, assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death, MCL 750.90b(a), mutilation of a dead body, MCL 750.160, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Washington to serve life in prison without parole for the first-degree murder conviction, 8 to 15 years in prison for the assault of a pregnant individual intentionally causing miscarriage, stillbirth, or death conviction, time served for the mutilation of a dead body conviction, and 2 years in prison for the felony-firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

Washington argues that the trial court should have excluded references to Amanda Baer's investigative subpoena testimony when it read Baer's preliminary examination testimony into evidence at trial under MRE 804(b)(1). "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). At trial, Washington's lawyer objected to the admission of Baer's preliminary examination testimony. After the trial court ruled that the testimony was admissible under MRE 804(b)(1), and before Baer's preliminary examination testimony was read into evidence, the parties and the trial court discussed possible inadmissible portions of the preliminary examination transcript. Washington's lawyer did not object to the preliminary examination testimony in which the prosecutor impeached Baer with her investigative subpoena testimony. On appeal, Washington argues that the trial court should have excluded references to Baer's investigative subpoena testimony. Given that Washington has asserted a different ground for objection on appeal than he did at trial, the issue is unpreserved for appellate review. *Id.*

This Court reviews unpreserved evidentiary issues for plain error affecting the defendant's substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 66; 728 NW2d 902 (2006). To avoid forfeiture under the plain error rule, three requirements must be met: error must have occurred, the error was clear or obvious, and the error affected the defendant's substantial rights. *Id.* The third requirement generally requires a showing that the error affected the outcome of the lower court proceedings. *Id.*

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless it comes within an exception to the hearsay rule. *People v Dendel*, 289 Mich App 445, 452; 797 NW2d 645 (2010). MRE 804(b)(1) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The trial court found, and Washington does not dispute, that Baer was unavailable as a witness for purposes of the former testimony exception because she invoked her Fifth Amendment privilege against self-incrimination. See *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). By the time of the preliminary examination, Baer had become uncooperative and it was necessary for the prosecution to impeach Baer using her prior testimony at the investigative hearing. Baer's investigative subpoena testimony was given under oath and she was subject to cross-examination at the preliminary examination. Moreover, Washington's lawyer plainly understood the importance of Baer's testimony from the prior hearing and had the opportunity to clarify the nature of any discrepancies between Baer's testimony at the investigative hearing and her testimony at the preliminary examination. Indeed, Washington's lawyer got Baer to testify that she lied at the investigative hearing because officers threatened to take her children if she did not implicate Washington. He also got her to testify that she told the officers the truth prior to that hearing. Thus, it is evident from a fair reading of the preliminary examination that Washington's lawyer had an opportunity and similar motivation to develop Baer's testimony at the preliminary examination. *Id.* at 66-67. Therefore, the references to Baer's investigative subpoena testimony, which were used to impeach her at the preliminary examination, were admissible at the preliminary examination and later at trial. MRE 801(d)(1)(A); MRE 804(b)(1). Consequently, on this record, we cannot agree that the trial court plainly erred when it failed to sua sponte exclude the references within Baer's preliminary examination testimony to her testimony from the investigative hearing.

Washington's alternative argument that the trial court should have admitted the entire transcript of Baer's investigative subpoena testimony is misguided. The trial court properly concluded that Baer's investigative subpoena testimony transcript was inadmissible at trial because Washington's interests were not represented at the investigative subpoena hearing. Therefore, admitting the transcript of Baer's investigative subpoena testimony would have introduced inadmissible hearsay not within an exception. *Dendel*, 289 Mich App at 452.

Washington also argues his trial lawyer was ineffective. Where there has been no evidentiary hearing, as here, this Court reviews a claim of ineffective assistance of counsel for errors apparent on the record. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012) (quotation marks and citation omitted), lv den in relevant part by 493 Mich 864.

Washington claims that his trial lawyer was ineffective for failing to obtain copies of the interviews by police officers with Baer so that he could properly cross-examine her at the preliminary examination. However, Washington's citation to the record in his brief on appeal does not support his assertion that his lawyer failed to obtain copies of the interviews. Washington has the burden to establish the factual predicate for his ineffective assistance of counsel claim and may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Washington has not shown that his trial lawyer engaged in an act or omission that fell below an objective standard of reasonableness under prevailing professional norms.

There were no errors warranting relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly

APPENDIX:I

State Court Register Of Actions

THIRD JUDICIAL CIRCUIT OF MICHIGAN

REGISTER OF ACTIONS

CASE NO. 12-006201-01-FC

State of Michigan v Jomiah Washington

§ Location: **Criminal Division**
§ Judicial Officer: **Walker, Shannon**
§ Filed on: **06/25/2012**
§ Case Number History: **11060765-01**
§ **11713016-01**
§ Case Tracking Number: **11713016-01**
§ CRISNET/Incident No.: **1106020191**

CASE INFORMATION

Offense	Deg	Date
1. Homicide - Murder First Degree - Premeditated	.	06/02/2011
Arrest: 06/02/2011 DPHOM - Detroit Pd Homicide		
2. Homicide - Wilful Killing of Unborn Quick Child	.	06/02/2011
Arrest: 06/02/2011 DPHOM - Detroit Pd Homicide		
3. Dead Bodies - Disinterment & Mutilation	.	06/02/2011
Arrest: 06/02/2011 DPHOM - Detroit Pd Homicide		
4. Weapons Felony Firearm	.	06/02/2011
Arrest: 06/02/2011 DPHOM - Detroit Pd Homicide		
5. Assault - Pregnant Individual - Causingmiscarriage/stillbirth	.	09/21/2012

Case Type: **Capital Felonies**

Case Status: **05/25/2016 Final**

Case Flags: **Case has PDF Electronic Transcripts**

Statistical Closures
04/18/2013 Jury Verdict

Warrants
Failure To Appear - Washington, Jomiah (Judicial Officer: Lockhart, Steve)
06/30/2011 Warrant Cancelled/Recalled (LC)
Fine: $0
Bond: $0

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**State of Michigan**	**Weingarden, Lora** (313) 224-8081(W)
Defendant	**Washington, Jomiah** *Black Male* *Other Agency Number: 679385 Detroit Police Identification Number*	**Cripps, David R.** *Court Appointed* (313) 963-0210(W)
Appellate Attorney	**Rust, Daniel J.**	

DATE	EVENTS & ORDERS OF THE COURT	INDEX
06/24/2011	Recommendation for Warrant	
06/24/2011	Warrant Signed	
06/30/2011	**Arraignment on Warrant** (Judicial Officer: Lockhart, Steve) *Defendant Stands Mute; Plea Of Not Guilty Entered By Court*	
06/30/2011	**Plea** (Judicial Officer: Lockhart, Steve) 1. Homicide - Murder First Degree - Premeditated Defendant Stand Mute: Plea of Not Guilty Entered by Court	
06/30/2011	**Plea** (Judicial Officer: Lockhart, Steve) 2. Homicide - Wilful Killing of Unborn Quick Child Defendant Stand Mute: Plea of Not Guilty Entered by Court	

06/30/2011	**Plea** (Judicial Officer: Lockhart, Steve) 3. Dead Bodies - Disinterment & Mutilation Defendant Stand Mute: Plea of Not Guilty Entered by Court
06/30/2011	**Plea** (Judicial Officer: Lockhart, Steve) 4. Weapons Felony Firearm Defendant Stand Mute: Plea of Not Guilty Entered by Court
06/30/2011	**Interim Condition for Washington, Jomiah** (Judicial Officer: Lockhart, Steve) - Remand $0.00
07/12/2011	*CANCELED* **Preliminary Examination** *Adjourned:Referred to Clinic for Report*
07/12/2011	Motion to Assign Counsel Filed/Signed
07/12/2011	Order for a Competency Evaluation
07/12/2011	Filed
07/12/2011	Refer to Clinic for a Report
07/12/2011	Filed
09/08/2011	*CANCELED* **Competency Hearing** *Adjourned:At The Request Of The Court*
10/25/2011	**Competency Hearing** (Judicial Officer: Carter, Ruth) *Found Competent*
10/25/2011	Motion to Assign Counsel Filed/Signed
10/25/2011	Motion for a Continuance Filed/Signed
10/25/2011	Defendant Competent to Stand Trial
10/25/2011	Filed
12/09/2011	*CANCELED* **Preliminary Examination** *Adjourned:At The Request Of The Court*
01/12/2012	*CANCELED* **Preliminary Examination** *Adjourned at the Request of the Defense*
01/12/2012	Appearances by a Retained Attorney Filed
01/12/2012	Motion for a Continuance Filed/Signed
02/14/2012	*CANCELED* **Preliminary Examination** *Adjourned at the Request of the Defense*
04/24/2012	*CANCELED* **Preliminary Examination**

Adjourned at the Request of the Defense

05/01/2012 *CANCELED* **Preliminary Examination**
Adjourned at the Request of the Defense

05/30/2012 *CANCELED* **Preliminary Examination**
Adjourned at the Request of the Defense

06/25/2012 **Preliminary Examination** (Judicial Officer: Carter, Ruth)
Held: Bound Over

06/25/2012 Motion to Assign Counsel Filed/Signed

06/25/2012 Bound Over

06/25/2012 Order For Production Of Exam Transcript Signed and Filed — *26 pages*
Yolanda Carter;06-25-12;0+1;

07/05/2012 Stenographers Certificate Filed
Yolanda Carter;

06/26/2013 Notice of Transcript Filed — *Vol./Book 1 11 pages*
*Glenda Merritt; 5/13/13 SE***

07/02/2012 **Arraignment On Information** (Judicial Officer: McCree, Wade H.)
Resource: Court Rpt/Rec 6472 Smith, Jacquetta
Resource: Courtroom Clerk C5915 Covington, Darlynn
Held

07/02/2012 **Disposition Conference** (Judicial Officer: McCree, Wade H.)
Resource: Court Rpt/Rec 6472 Smith, Jacquetta
Resource: Courtroom Clerk C5915 Covington, Darlynn
Held

07/02/2012 Scheduled AOI

07/16/2012 **Calendar Conference** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
07/06/2012 Reset by Court to 07/16/2012
Held

07/16/2012 Order For Criminal Responsibility (Judicial Officer: Jones, Vera Massey)

09/14/2012 **Final Conference** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
Held

09/21/2012 **Motion Hearing** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C6005 Schultz, Roberta
Held

09/21/2012 Motion To Quash Information (Judicial Officer: Jones, Vera Massey)
H/D S/F

09/21/2012 Heard And Denied - Order Signed and Filed (Judicial Officer: Jones, Vera Massey)
Defendant's Motion To Quash Information

09/21/2012 Motion (Judicial Officer: Jones, Vera Massey)
People's Motion To Strike Count 2 and Add New Count: 750.90BA-Assault-Pregnant Individual-Ausing Miscarriage/Still Birth H/G

09/21/2012 Heard And Granted - Order Signed and Filed (Judicial Officer: Jones, Vera Massey)
People's Motion To Strike Count 2 and Add New Count: 750.90BA-Assault-Pregnant Individual-Ausing Miscarriage/Still Birth

09/21/2012 **Disposition** (Judicial Officer: Jones, Vera Massey)
2. Homicide - Wilful Killing of Unborn Quick Child
Dismissed

09/27/2012 Order (Judicial Officer: Jones, Vera Massey)
For Appointment of Independent Expert for Criminal Responsibility Evaluation Signed/Filed

10/15/2012 Report Received
As to Criminal Responsibility

10/19/2012 **Final Conference** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
Minutes Comment: S/I APA Rebecca Camargo (Clerk: Craig, M Date: 10-19-12)
09/14/2012 Reset by Court to 10/19/2012
Adjourned at the Request of the Prosecutor

10/26/2012 Motion
Defendant's Response to Prosecution's Motion in Limine

11/01/2012 **Final Conference** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
11/02/2012 Reset by Court to 11/01/2012
Held

11/01/2012 Motion (Judicial Officer: Jones, Vera Massey)
To admit photograph-Granted

11/01/2012 Motion (Judicial Officer: Jones, Vera Massey)
To admit statement of complainant to establish motive GRANTED

12/14/2012 **Motion Hearing** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
12/17/2012 Reset by Court to 12/14/2012
Adjourned at the Request of the Defense

12/17/2012 Order (Judicial Officer: Jones, Vera Massey)
For privated investigator at public expense; Signed/Filed

01/11/2013 **Motion Hearing** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C6011 Holder, Yolanda

Held

01/11/2013 Heard And Granted - Order Signed and Filed (Judicial Officer: Jones, Vera Massey)
Motion to admit other acts: Gun and prior domestic violence

01/11/2013 Heard And Denied - Order Signed and Filed (Judicial Officer: Jones, Vera Massey)
Mo. to Admit Voice Indentification Testimony -Can renew

04/01/2013 **Jury Trial** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/01/2013 Motion (Judicial Officer: Jones, Vera Massey)
To Allow use of the Examination Transcript of Amanda Baer if she refuses to testify.. Granted

04/02/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/03/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3326 Bauer, Becky
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/04/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/10/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/11/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5919 Banks, Barbara
Held

04/12/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5919 Banks, Barbara
Held

04/15/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/15/2013 Motion For A Directed Verdict Of Not Guilty (Judicial Officer: Jones, Vera Massey)
DENIED

04/16/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn

In Progress

04/17/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
In Progress

04/18/2013 **Jury Trial in Progress** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 3521 Payne, Janice
Resource: Courtroom Clerk C5929 Craig, Marilyn
Held

04/18/2013 Found Guilty By Jury (Judicial Officer: Jones, Vera Massey)

04/18/2013 Refer to Probation For Pre-Sentence Report (Judicial Officer: Jones, Vera Massey)

04/18/2013 **Disposition** (Judicial Officer: Jones, Vera Massey)
1. Homicide - Murder First Degree - Premeditated
Found Guilty by Jury
3. Dead Bodies - Disinterment & Mutilation
Found Guilty by Jury
4. Weapons Felony Firearm
Found Guilty by Jury
5. Assault - Pregnant Individual - Causingmiscarriage/stillbirth
Found Guilty by Jury

05/13/2013 **Sentencing** (Judicial Officer: Jones, Vera Massey)
Resource: Court Rpt/Rec 6566 Merritt, Glenda
Resource: Courtroom Clerk C5929 Craig, Marilyn
Sentenced

05/13/2013 Sentenced to Prison (Judicial Officer: Jones, Vera Massey)

05/13/2013 **Sentence** (Judicial Officer: Jones, Vera Massey)
1. Homicide - Murder First Degree - Premeditated
Prison Sentence
Fee Totals:

- Crime Victims Fee - (FEL)	130.00
- State Minimum Cost (FEL)	272.00
Court Costs	600.00
Fee Totals $	1,002.00

State Confinement:
Agency: Michigan Department of Corrections
Effective 05/13/2013
Term: Natural Life
Consecutive, Count 4
3. Dead Bodies - Disinterment & Mutilation
Prison Sentence
State Confinement:
Agency: Michigan Department of Corrections
Effective 05/13/2013
Comment: TIME SERVED
4. Weapons Felony Firearm
Prison Sentence
State Confinement:
Agency: Michigan Department of Corrections
Effective 05/13/2013
Term: 2 Yr to 2 Yr

Credit for Time Served: 684 Days
5. Assault - Pregnant Individual - Causingmiscarriage/stillbirth
Prison Sentence
SGL Range (Minimum 50 Months, Maximum 100 Months)
State Confinement:
Agency: Michigan Department of Corrections
Effective 05/13/2013
Term: 8 Yr to 15 Yr

05/23/2013	Order For Production Of Trial Transcript *Janice Payne JT 4/1-4,10-12,15-18/2013*	
05/23/2013	Stenographer Certificate Required	
05/31/2013	Stenographers Certificate Filed *Janice Payne JT 4/1-2,4,10-12,15-18/2013 not the reporter for 4/3/2013*	
07/09/2013	Stenographers Certificate Filed *Janice Payne JT 4/1-2,4,10-12,15-18/2013 not the reporter for 4/3/2013*	
08/20/2013	Notice of Transcript Filed *Janice Payne, Norman Barker; JT 4/11/13, 4/12/13, 4/15/13***	*Vol./Book 3 507 pages*
09/04/2013	Notice of Transcript Filed *Janice Payne; JT 4/17/13, 4/18/13***	*Vol./Book 2 28 pages*
09/05/2013	Notice of Transcript Filed *Janice Payne; 4/4/13 JT Transc***	*Vol./Book 1 88 pages*
09/20/2013	Notice of Transcript Filed *Janice Payne; 4/1/13 JT***	*Vol./Book 1 281 pages*
09/23/2013	Notice of Transcript Filed *Janice Payne; 4/2/13 JT***	*Vol./Book 1 259 pages*
10/04/2013	Notice of Transcript Filed *Jancice Payne; 4/10/13 JT***	*Vol./Book 1 219 pages*
10/08/2013	Notice of Transcript Filed *Janice Payne; 4/16/13 WT***	*Vol./Book 1 101 pages*
05/23/2013	Order For Production Of Sentencing Transcript *Glenda Merritt Se 5/13/2013*	
05/23/2013	Stenographer Certificate Required	
05/30/2013	Stenographers Certificate Filed *Glenda Merritt Se 5/13/2013*	
06/24/2013	Stenographers Certificate Filed *Glenda Merritt Se 5/13/2013*	
05/23/2013	Appointment for Claim of Appeal (Circuit)	

	Linda Ashford appointed	
06/03/2013	Order For Production Of Trial Transcript *Becky Bauer JT 4/3/2013*	*Vol./Book 1 194 pages*
06/03/2013	Stenographer Certificate Required	
06/14/2013	Stenographers Certificate Filed *Becky Bauer JT 4/3/2013*	
08/28/2013	Notice of Transcript Filed *Becky Bauer; 4/3/13 JT***	*Vol./Book 1 194 pages*
06/20/2013	Attorney Removed - New Attorney Assigned *Linda Ashford removed Daniel Rust appointed*	
07/09/2013	Order For Production Of Transcript *Janice Payne MO 9/21/2012, 11/1/2012, 1/11/2013*	
07/09/2013	Stenographer Certificate Required	
07/16/2013	Stenographers Certificate Filed *Janice Payne MO 9/21/2012, 11/1/2012, 1/11/2013*	
09/17/2013	Notice of Transcript Filed *Janice Payne MO 9/21/2012, 11/1/2012, 1/11/2013***	*Vol./Book 3 52 pages*
09/16/2014	Appellate Court Decision; Affirms Lower Court	
06/05/2015	Application For Leave To Appeal (Circuit) *Denied.*	
03/11/2016	Motion *MRJ Rec'd and Forwarded*	
03/11/2016	Motion For Relief From Judgment *in pro per.*	
05/25/2016	**Post Conviction** (Judicial Officer: Walker, Shannon) Resource: Court Rpt/Rec 01 Not On, Record Resource: Courtroom Clerk 6034C Reed, Alysia *Review status of MRJ filed in. Minutes Comment: No parties present - paper hearing only (Clerk: Reed, A Date: 06-01-16)* *06/10/2016 Reset by Court to 05/25/2016* *Held*	
05/25/2016	Order Denying Motion for Relief from Judgment Sgned & Filed (Judicial Officer: Walker, Shannon)	

DATE	FINANCIAL INFORMATION	
	Defendant Washington, Jomiah	
	Total Charges	1,122.00
	Total Payments and Credits	0.00
	Balance Due as of 6/9/2016	**1,122.00**

05/14/2013	Charge	Defendant Washington, Jomiah	1,002.00
07/10/2013	Charge	Defendant Washington, Jomiah	120.00

APPENDIX:J

Excerpted Trial Testimony Of Amanda Baer
April 10, 2013 pages 98-110

MR. CRIPPS: Thank you.

BY MR. CRIPPS:

Q. All right. Did you tell Amanda Baer that if she didn't come up with some type of story you were going to take her kids, put her in for accessory to murder?

A. No, sir.

Q. So, if she said that, that was a lie?

A. Absolutely.

Q. Did you tell Amanda Baer that there are certain things that she had to say to get out of her situation?

A. I did not.

Q. So, if she said that, that would be a lie?

A. Yes, sir.

Q. Did you tell Amanda Baer --

THE COURT: I might suggest that the defendant might want to sit back in his seat.

MR. CRIPPS: Thank you, your Honor.

THE COURT: Sometimes things have to go on the record.

Go ahead.

MR. CRIPPS: Yes, your Honor.

BY MR. CRIPPS:

Q. Did you tell Amanda Baer to say -- to tell you -- did you tell Amanda Baer to make up certain things regarding accusations against Mr. Washington?

A. One more time.
Q. Did you tell Amanda Baer that she had to make up certain accusations against Jomiah Washington?
A. No, sir.
Q. Did you tell Amanda Baer that she had to say he looked out the window to see if anybody was looking and you wrapped her up in a sheet and put her in his trunk? Did you tell her to say that?
A. No, sir.
Q. So, when Amanda Baer testified at the Exam under oath that she only said that because Sergeant Bowser told me to, would that be a lie then?
A. That would be a lie.
Q. In relation to the information that you got from Amanda Baer that we heard about today, did you tell her that when the prosecutor asked her certain things that she had to say certain things at that Investigative Subpoena Hearing?
A. I did not say that, no.
Q. So, if Amanda Baer said that at the Preliminary Examination that would be a lie?
A. Yes, sir.
Q. Did you at another time tell Amanda Baer that if she didn't testify at the Investigative Subpoena Hearing the way that you wanted her to that she would be an accessory

to murder, go to prison for 25 years, have her kids taken away, have her baby in jail, and never see her daughter again?

A. No, sir.

Q. So, when she testified that way in December 2012 at the Preliminary Examination that would have been a lie?

A. Yes, sir.

Q. Did you tell Amanda Baer that she had to say accusations against Mr. Jomiah Washington because if she didn't -- if she did say that these things occurred, but then said, later said they weren't true, that then she would just have to go to jail for 25 years?

A. I know you're reading the writing, but I can't understand that question.

Q. All right. Well, did you tell her -- did you say certain things at this Investigative Subpoena Hearing, and then later come to a later court hearing saying, oh, that's not true, I just made that up, that she would go to prison for 25 years?

A. No.

Q. Did you tell her that?

A. No, sir.

Q. So, if she testified that way at the Preliminary Examination under oath that would be a lie?

A. Yes, sir.

Q. Did you tell Amanda Baer that if she said that Jomiah Washington said he's going to set the car on -- the car on fire with the body in it -- did you tell her to say that?

A. No, sir.

Q. If Amanda Baer testified at the Preliminary Examination that, in fact, she said Detective Bowser told me to say that, would that be a lie?

A. Yes, sir.

Q. So, I've gone over probably conservatively about 10 or 12 different things that Amanda Baer has testified to at the Exam that she claims that you told her, that you say are absolute lies, is that correct?

A. They are lies, yes.

Q. And we also -- you were here earlier when you heard Brian Surma say that Amanda Baer claimed that certain things were said by him that he said were lies too, is that right?

A. Yes, sir.

Q. Is it fair to say that Amanda Baer is a complete liar in relation to important matters in this case?

MS. WEINGARDEN: Objection.

THE COURT: Yeah, because nobody knows what complete is.

MR. CRIPPS: Right.

THE COURT: So, you're going to have to rephrase.

BY MR. CRIPPS:

Q. Is it fair to say that Amanda Baer is a liar in relation to those accusations made?

A. To the accusations against me and --

Q. Mr. Surma.

A. Mr. Surma. Absolutely.

Q. The lies that Amanda Baer told were lies when she was under oath, is that correct, at the Preliminary Examination?

A. In regards to myself and Mr. Surma?

Q. Yeah.

A. Yes.

Q. So, those were lies that she told when she -- after she raised her hand to tell the truth, the whole truth, so help me God, is that correct?

A. Yes, sir.

MR. CRIPPS: No further questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. WEINGARDEN:

Q. What led you to look behind the garage of that Abington address?

A. Are you referring to the search warrant?

APPENDIX:K

Excerpted Trial Testimony Of Detective Brian Bowser
April 12, 2013, pages 150-154

your response being -- on the response crew, being sent to a scene. Your current cases, your partner's current cases, or your squad members current cases.

Q. Do you recall getting another case to investigate during the time you were investigating this case?

A. I did.

Q. And I don't know if it's legal for you to tell the jury what the case --

THE COURT: Excuse me.

What do you mean you don't know if it's legal?

Now, what are you getting ready to do?

Maybe you had better approach.

(Discussion off the record)

BY MS. WEINGARDEN:

Q. Did you receive any tips after your Investigative Subpoena Hearing?

A. Yes.

Q. And did you act on those tips?

A. I did.

Q. Did you direct a unit of the Police Department to go to an address in an attempt to arrest Jomiah Washington?

A. I did.

Q. What date was that?

A. June 29th, 2011.

Q. And were you told whether or not he was arrested?

A. He was.
Q. Where did you tell your crew to go and arrest him?
A. 17530 Rutherford Street in the city of Detroit.
Q. As part of your investigation in this case did you come up with the name of Jacob, a young man who lived in Bloomfield Hills?
A. I did.
Q. Did you send any officers to his house?
A. I did.
Q. And why did you do that?
A. During the interview certain information was obtained from Miss Baer. And I directed Sergeant McGinnis to go to the address, Jacob Uppergrow's (phonetic) residence in West Bloomfield and search for that evidence.
Q. Were you there at the time that was done?
A. I was not.
Q. Did you do any other search warrants in relation to this case?
A. I think a search warrant for the red Geo in question. I obtained a search warrant for the silver Alero. I obtained a search warrant for both cell phones that was recovered from Mr. Washington at the time of arrest. I obtained a search warrant for Mr. Washington's buccal swab.
Q. All right. Let me direct your attention to the two

phones that were taken from Mr. Washington's person.
A. Yes, ma'am.
Q. What did you do with the phones?
A. They were placed on evidence by the arresting crew. I obtained a search warrant, search warrant for each cell phone. And that was downloaded by Sergeant Kenneth Gardner of the Detroit Homicide Section.
Q. And what were you looking for on those phones?
A. Basically the phone numbers that were used to contact information, any text messages that could be used.
Q. And was that information forwarded to Sergeant McGinnis who you said is your forensic phone expert?
A. The contact information was, yes.
Q. Now, yesterday you saw some photographs that we put up on the machine of a white woman going through the drive through in McDonald's, is that fair?
A. Yes, ma'am.
Q. Did you recognize that woman?
A. Yes.
Q. Who is she?
A. Amanda Baer.
Q. Did you ever go to Mr. Bracey's address? He's the man who had the surveillance camera.
A. Yes.
Q. And did you do that fairly recently?

A. Yes.
Q. For what purpose?
A. Just to take some daylight photos of the current scene in order to show Mr. Bracey.
Q. Now, was there a vacant house next door to Mr. Bracey's home when you arrived there?
A. For the photos recently?
Q. Yes.
A. There was not. It had been torn down.
Q. Okay. So, let's go back. The day you were at the scene when the initial discovery happened. Did you notice whether there was a home next to Mr. Bracey's home?
A. On June 2nd, 2011 there was a vacant house that was one lot west of Mr. Bracey's house. And it had been burned out.
Q. Did you ever know that, that home was removed?
A. It was.
Q. How did you determine that?
A. I went out there and it was no longer there.
Q. When did you go out there in determining that it was no longer there?
A. I went out there for -- it might have been November of '12, maybe December of '12.
Q. Now, did you determine whether the video whether the video camera's view was -- could have been interrupted by

that now home that is now not there?

THE COURT: What does that mean?

MS. WEINGARDEN: I didn't say that very well, your Honor.

Let me try again.

BY MS. WEINGARDEN:

Q. Did you look at the video cameras on the man's house, the surveillance cameras?

A. Yes.

Q. And did you see in which direction they were pointing?

A. The two cameras that we were concerned with, that I was concerned with, is the camera at the rear of the location of Mr. Bracey's house, that faced westbound across his back yard and across the back yard of the house that was burned down and onto Iliad.

Q. Okay.

A. And the second camera is on the drive -- Mr. Bracey's driveway, which it is mounted to the rear of the house and it faces directly down his driveway onto -- and it shows Sunnyside. And that is facing south.

Q. Do you have any information about why or who removed that house?

A. I'm assuming it's the City of Detroit.

Q. Okay. Does it have anything to do with this case?

A. No, ma'am.

MS. WEINGARDEN: Judge, I would like to play Exhibit Number 75 for the jury, and then have the right to recall the officer.

THE COURT: We'll rise and have the jurors step into the jury room.

(Jury excused at 11:52 A.M.)

THE COURT: You may be seated.

Mr. Cripps.

MR. CRIPPS: Yes, your Honor.

I would object again to the admission of Proposed Exhibit 75.

This again is a interview, tape recorded interview with Miss Baer, that number one, was not under oath. Number two, was in relation to a witness who has taken the Fifth Amendment, as we all know, in this trial. And not subject to cross examination. It was prior to the time of the Investigative Subpoena and the Preliminary Examination.

It is a violation, we believe, of the right of confrontation under the decision of Crawford versus Washington, US Supreme Court case. It was not provided to the defense until yesterday, as the Court knows.

The most important concern I have is the fact that it, as I argued yesterday, it's an unsworn to, not under oath witness statement basically that I didn't have

a right to confront the witness about, Miss Baer, either at this trial or at the Preliminary Examination.

The reason I didn't have use of it at this trial is because she took the Fifth. The reason I didn't have use of it at the Exam because it wasn't provided to me.

And so for those reasons, your Honor, we believe it's a clear violation of the right of confrontation and ask that it not be allowed as an exhibit in this trial. It's being used as substantive evidence -- not by the prosecution, and prepared for litigation,

THE COURT: Are you finished?

MR. CRIPPS: Yes.

THE COURT: Now, I heard all that yesterday. Same arguments, nothing different, no case law that I was expected to get. It's being used for impeachment purposes. And anything you say to anybody else that's inconsistent with the testimony during trial can be used against you, can be put in as impeachment. She refused to testify, claiming to take the Fifth, after reading all that Preliminary Examination transcript stuff, I know she tried to do that in the last trial, so I didn't know why anybody was so surprised. But that made her unavailable. Therefore they had the right to put in her Examination

testimony. And during that she backs away from everything. And then -- and she also says that this officer did some really, really awful things. I made us sit here and watch that tape last night.

It impeaches her prior testimony. And therefore it will be admitted into evidence.

Now, I know it's a long tape. So, what we're going to do is start it and then we'll take our luncheon recess and then we'll continue.

We'll rise for our jurors.

MS. WEINGARDEN: Judge, could I say one thing?

The People are asking, your Honor, to admit it as substantive evidence under MRE 801 --

THE COURT: Please be seated.

80 what?

MS. WEINGARDEN: 801 (d).

MS. WEINGARDEN: Well, the reason that --

THE COURT: Excuse me.

801 (d) what?

801 (d), are you talking about (1)?

MS. WEINGARDEN: Not yet, your Honor.

May I have a moment?

THE COURT: Because I don't think that applies to this case.

MS. WEINGARDEN: I think it's 801 (d) (1) (B).

THE COURT: Can you read it?

MS. WEINGARDEN: Yes.

THE COURT: Listen, it says "Prior Statement of Witness".

And (d) says: "Statements Which Are Not Hearsay".

"A statement is not hearsay if: Prior Statement of Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person."

So, we know it's not (C).

MS. WEINGARDEN: Judge, I withdraw my --

THE COURT: I thought so.

Because it was once again what I said before, can't be used as substantive evidence because Mr. Cripps or any other attorney was there to cross examine her at this interview. So, it can't, cannot be used as

substantive evidence.

We'll rise for our jurors.

MR. CRIPPS: Your Honor, can I say one more thing?

THE COURT: No.

COURT OFFICER: Take your seats, please.

(Jury returned at 11:59 A.M.)

THE COURT: You may be seated.

The People ready to proceed?

MS. WEINGARDEN: Yes, your Honor.

THE COURT: You may.

MS. WEINGARDEN: We're having the video played.

THE COURT: I think you might have wanted to put the witness on the stand and ask him if he -- you know, once it starts, and then you can just have it played.

MS. WEINGARDEN: Okay.

THE COURT: That's Exhibit Number 75, we've admitted it into evidence.

(PX 75 received in evidence)

THE COURT: And not only that, if he's not seated in that chair the jurors might be able to see a bit more clearly.

(Witness Brian Bowser resumed stand)

MS. WEINGARDEN: Judge, as you can see we're

having technical difficulties.

THE COURT: Again?

MS. WEINGARDEN: Yes.

Could I call another assistant to help us?

THE COURT: Do whatever you can to help us along.

Can you do it?

All right.

No, that's the wrong view.

Stop.

Wrong view.

Stop it.

Could you go over it.

Did you call to get the other person down here so that we can move on?

MS. WEINGARDEN: Yes.

THE COURT: Okay.

(Whereupon Exhibit 75 Began Playing at 12:04 P.M.)

THE COURT: Counsel, this is a good time to stop running the tape.

(Whereupon Exhibit 75 Paused at 12:30 P.M.)

THE COURT: We're going to pause that tape and take our luncheon recess.

I'm going to caution the jurors you may not discuss this matter among yourselves nor with anyone

else.

We're going to ask you to go and have a nice lunch to be back here at 1:30 at which time we'll hear the continuation of this tape.

We'll rise for you to leave and go to lunch.

Everyone rise.

Jurors are free to go to lunch to be back at 1:30.

(Jury excused for lunch at 12:30 P.M.)

THE COURT: Please be seated.

I'm going to ask our spectators to remain in the courtroom for a few minutes to give the jurors time to get up the steps.

WITNESS BRIAN BOWSER: May I step down, ma'am?

THE COURT: Yes, you may.

(Witness Brian Bowser stepped down from witness stand)

THE COURT: Okay, spectators may now leave.

Okay, we're in recess until 1:30.

MR. CRIPPS: Yes, your Honor.

Thank you.

(Court in recess at 12:30 P.M.)

AFTERNOON SESSION

(Court in session at 1:31 P.M.)

(Jury returned at 1:31 P.M.)

(Witness Brian Bowser resumed witness stand)

THE COURT: You may be seated.

May I have a stipulation that all of our jurors are here and in their proper places?

MS. WEINGARDEN: Yes, your Honor.

MR. CRIPPS: Yes, your Honor.

THE COURT: All right.

You may proceed with the playing of the tape, video.

(Whereupon Exhibit 75 Resumed Playing at 1:31 P.M.)

(Whereupon Exhibit 75 Stopped at 2:22 P.M.)

THE COURT: Is that the end of the video?

MS. WEINGARDEN: I believe so.

Yes, it is.

THE COURT: All right.

Please turn it off.

This a very good time I think for the jury to take a 10 minute coffee break.

So, I'm going to caution the jurors not to discuss this matter among yourselves nor with anyone else.

If you would like to go out, well, you can do that or you can remain in the jury room. But if you go in the jury room you'll have to stay there until we tell you come back in. If you go out the door we want you to