UNITED STATES SUPREME COURT
ROGERS V. MICHIGAN,
CASE NO. NEW PETITION

APPENDIX "A"

Rogers v. Palmer,

DISTRICT COURT OPINION

2019 U.S. Dist. LEXIS 50284, March 26, 2019 (Last Decision on the Merits)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROWMOTO ANTWION ROGERS, Petitioner, v. CARMEN PALMER, Respondent.	Case No. 16-10424 Honorable Laurie J. Michelson

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Rowmoto Antwion Rogers filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his convictions for first-degree premeditated murder, assault with intent to commit murder, and two firearm-related felonies. Having reviewed the habeas petition, the Warden's response, Rogers's reply, and the state-court record, the Court will deny the habeas petition.

I.

The Court will rely on the following facts from the trial court record, as described by the Michigan Court of Appeals. *See* 28 U.S.C. § 2254(e)(1); *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009).

Rogers' convictions arise from a January 2008 shooting in the city of Detroit. *People v. Rogers*, No. 291180, 2010 WL 3062119, at *1 (Mich. Ct. App. Aug. 5, 2010). Shots were fired into a Jeep Commander occupied by five individuals, including Rayvon Perry and Martha Barnett, who died from her wounds. *Id.* None of the occupants of the vehicle were able to identify any of the shooters. *Id.*

The principal evidence against Rogers and his co-defendant Tony Hurd was Perry's testimony. *Id.* Perry testified that he knew both defendants and saw them shortly after the shooting. *Id.* According to Perry, Rogers admitted to him that he and another person, DeAndre Woolfolk, shot at the vehicle from a car driven by his co-defendant. *Id.* Rogers explained that they "messed up" by shooting at the wrong vehicle. *Id.* Perry did not initially disclose this information to the police, but eventually revealed it in response to the prosecutor's investigative subpoena. *Id.*

Rogers's conviction was affirmed on appeal. *Id.*, *lv. den.* 793 N.W.2d 236 (Mich. 2011).

Rogers filed a *pro se* post-conviction motion for relief from judgment, which was later supplemented with a brief filed by an attorney. The motion was denied. *People v. Rogers*, No. 08-009271-FC (Wayne Cty. Cir. Ct. May 1, 2012); *People v. Rogers*, No. 08-009271-FC (Wayne Cty. Cir. Ct. May 29, 2014). The Michigan Court of Appeals and Michigan Supreme Court denied Rogers leave to appeal. *People v. Rogers*, No. 324777 (Mich. Ct. App. Jan. 6, 2015); *lv. den.* 873 N.W.2d 560 (Mich. 2016).

Rogers seeks habeas relief on four different grounds: the prosecutor was improperly allowed to vouch for the credibility of his star witness during closing arguments, prejudicial photos were admitted during the trial, there was insufficient evidence to convict him, and the state court improperly denied him a new trial based on newly discovered evidence without holding a hearing.

II.

The Antiterrorism and Effective Death Penalty Act (AEDPA) (and 28 U.S.C. § 2254 in particular) "confirm[s] that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Thus, if a claim was "adjudicated on the merits in State court proceedings," this Court cannot grant habeas corpus relief on the basis of that claim "unless

the adjudication of the claim . . . resulted in a decision" (1) "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d). But if the state courts did not adjudicate a claim "on the merits," this "'AEDPA deference' does not apply and [this Court] will review the claim *de novo*." *Bies v. Sheldon*, 775 F.3d 386, 395 (6th Cir. 2014).

III.

A.

Rogers claims that he was denied a fair trial because of prosecutorial misconduct. Specifically, he argues that the prosecutor improperly vouched for the credibility of his main witness and made an improper "civic duty" argument to the jurors.

Although the Warden urges the Court to find Rogers procedurally defaulted this claim, the Court elects to skip to the merits because wading into procedural default unnecessarily complicates this claim. *See Thomas v. Meko*, 915 F.3d 1071, 1074 (6th Cir. 2019). The Michigan Court of Appeals did not unreasonably reject Rogers' claim of prosecutorial misconduct.

Rogers points to several of the prosecutor's comments in closing argument as improper. The prosecution stated,

> Hero[e]s come in all shapes and sizes. There are the hero[e]s that we're familiar with from movies and TV such as John Wayne. There are war hero[e]s. There are hero[e]s every day in terms of when you hear stories of people who pull people out of the path of cars or parents who are hero[e]s in helping their children or saving their children in fires.
>
> There's a hero that we've heard of most recently in that – the captain of that US AIR – the pilot of that airplane, who with years of training on how to fly airplanes still reacted with calm courage and set that airplane on the Hudson river – and there are reluctant hero[e]s. People who did not choose to be a hero. People who fought the pull to be a hero, who didn't want to be a hero, who didn't want to be in the spotlight.

> Rayvon Perry is the reluctant hero in this case. He's the reluctant hero because he came forward and told the truth about what he knew. It is on his shoulders that the case rests . . . . Why is Rayvon Perry a hero? Well, he is going against the grain.
>
> We live in a society where — from the time that we are young, we are taught that it is bad to be a tattle tail [*sic*]. We all know from our own experiences that it's not easy to tell on other people. It makes us uncomfortable particularly when it is with people we know. We also know — and you heard from the witnesses as well, that we live in a culture that has made it mad — it's become the word "snitch." Snitch is something negative. If you're a snitch, you're a bad person. 'Don't tell the police. Don't tell the government. Keep it to youself [*sic*].' Rayvon Perry went against that grain not easily, not willingly, reluctantly — but he did so nonetheless.
>
> Rayvon Perry told the truth against people that he knew . . . and he did it against tremendous pressure . . . He had every reason in the world not to tell the police and not to tell you that Rowmoto Rogers and Tony Hurd admitted being the shooter and the driver in this particular case, but he told the truth.

(ECF No. 1, PageID.21–22; ECF No. 5-8, PageID.1092–1094.)

The Michigan Court of Appeals conducted a plain-error review of this claim. They found that the comments did not amount to an improper vouching as to credibility or an appeal to the juror's civic duty. *Rogers*, 2010 WL 3062119, at *3. Instead, the comments were "properly presented reasons, grounded in the evidence for why the jury should find [Perry's] testimony credible." *Id.* And the prosecutor's characterization of Perry as a reluctant hero "was not an appeal to any sense of the jurors' civic duty, but rather was a comment on [Perry's] circumstances as reflecting reasons for finding his testimony credible." *Id.*

AEDPA deference applies when a state court, on plain-error review, "conducts any reasoned elaboration of an issue under federal law." *Stewart v. Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1998 (2018). Here, although the Court of Appeals only cited to state law, the cases it relied on discuss prosecutorial misconduct in the context of whether it denied the defendant a fair trial. *See People v. Dobek*, 732 N.W.2d 546 (Mich. Ct. App. 2007); *People v. McGhee*, 709 N.W.2d 595 (Mich. Ct. App. 2005); *People v. Unger*, 749 N.W.2d 272 (Mich Ct.

App. 2008). So the Court will presume that the Michigan Court of Appeals adjudicated the claim pursuant to federal law; i.e., it effectively undertook a due process analysis in determining whether the misconduct rendered the trial unfair. *See Johnson v. Williams*, 568 U.S. 289, 298–299 (2013). The Court will apply AEDPA deference to this claim.

The Court will first address the civic-duty claim. Prosecutors cannot make statements "calculated to incite the passions and prejudices of the jurors." *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir.1991). The Michigan Court of Appeals found that the prosecutor's characterization of Perry as a "reluctant hero" for coming forward and cooperating "was not an appeal to any sense of the jurors' civic duty, but rather was a comment on [Perry]'s circumstances as reflecting reasons for finding his testimony credible." *Rogers*, 2010 WL 3062119, at *3. The Court cannot say this was an unreasonable application of established Supreme Court law

Roger's improper-vouching claim is closer. But the Court is constrained by the considerable deference that must be given to the state court's decision. "When a petitioner makes a claim of prosecutorial misconduct, 'the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor.'" *Serra v. Michigan Dep't of Corr.*, 4 F.3d 1348, 1355 (6th Cir. 1993) (citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). "The key question on the merits 'is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Stewart*, 867 F.3d at 638 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). "Because that standard is 'a very general one,' courts have considerable leeway in resolving such claims on a case-by-case basis." *Id.* (quoting *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (internal quotation omitted)). "That leeway increases in assessing a state court's ruling under AEDPA" such that a federal court "'cannot set aside a state court's conclusion on a federal prosecutorial-misconduct claim unless a petitioner cites . . . other

Supreme Court precedent that shows the state court's determination in a particular factual context was unreasonable.'" *Id.* at 638–39 (quoting *Trimble v. Bobby*, 804 F.3d 767, 783 (6th Cir. 2015)).

"In evaluating alleged prosecutorial misconduct, [the court] first determine[s] whether the challenged statements made by the prosecutor were improper." *United States v. Bradley*, 917 F.3d 493 (6th Cir. 2019) (citation omitted). "If they appear improper, we then look to see if they were flagrant and warrant reversal." *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999) (citing *United States v. Carroll*, 26 F.3d 1380, 1388 (6th Cir. 1994)). "Improper vouching occurs when a prosecutor supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the office of the United States Attorney behind that witness" or makes comments that "imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony." *Id.* at 550 (citations omitted). To determine whether a prosecutor's remarks constituted flagrant misconduct, [the court] assess[es] (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Id.* (internal quotations and citations omitted).

Were the Court reviewing this issue *de novo*, it would be hard pressed to find that this was not improper vouching. And even applying AEDPA deference, the Michigan Court of Appeals' conclusion that these statements were not improper and therefore did not render Rogers' trial fundamentally unfair is at the outer bounds of reasonable. The prosecutor invited the jury to view Perry as a hero—and an honest one at that. And the prosecutor baldly stated that Perry was telling the truth. The theme of Perry's heroics pervaded the closing argument. And these statements are made all the more problematic because the evidence against Rogers was strongly dependent on

Perry's testimony. But the prosecutor's statements were contextualized by stating that Perry "had every reason in the world" to not go to the police because he and Rogers were from the same neighborhood and had a close relationship. (ECF No. 5-8, PageID.1094–1095.) So, given the leeway the federal court must give to state courts' application of the prosecutorial-misconduct standard, *see Stewart*, 867 F.3d at 638–39, the Court cannot find that the state court unreasonably concluded that the prosecutor was not implying special knowledge of the facts, but highlighting the reasons why the jury should find Perry's testimony credible. Further, Rogers' attorney, in closing, focused on sowing doubt and highlighting evidence that pointed the blame at another person. (ECF No. 5-8, PageID.1116–1122.) And the trial judge instructed the jury that "[t]he lawyer's statement and arguments are not evidence" and that it is the jury's job "and nobody else's" to decide the facts of the case, including "whether [the jury] believe[s] what each of the witnesses said." (ECF No. 5-8, PageID.1143, 1145.) So while the Court does not condone the prosecutor's conduct in this case, the Court cannot find that the state court unreasonably applied Supreme Court precedent in dismissing this claim.[1]

B.

Rogers next contends that his right to a fair trial was violated by the admission of three autopsy photographs, which he claims were "gruesome" and unduly prejudicial.

The Michigan Court of Appeals rejected Rogers' claim. *People v. Rogers*, 2010 WL 3062119, at *2. It found that the photos were relevant to prove cause of death and that the bullets

[1] Rogers' petition also appears to argue, in passing, that the prosecutor's comments violated his rights under the Confrontation Clause. (*See* ECF No. 1, PageID.24.) It is unclear whether this claim was raised with the state courts. And even assuming some variant was raised, the state court properly addressed it as a claim for prosecutorial misconduct as the prosecutor's statements during closing argument could not be deemed testimony and Rogers was able to cross-examine Perry. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004).

passed through an intermediary target before hitting the victim. *Id.* And it found that the "photographs were not so gruesome as to outweigh their probative value" because they were close up shots "not immediately recognizable as photographs of a human body" and were "clinical and bloodless." *Id.*

Rogers argues that he stipulated to the cause of death and that the bullets were shot from outside of the car, so the photos had no probative value. (ECF No. 1, PageID.32–37.) Instead they unfairly prejudiced him and "inflamed the jurors' passions and emotions." (*Id.*)

It is "not the province of a federal habeas court to reexamine state-court determinations on state-court questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). A federal court is limited in federal habeas review to deciding whether a state court conviction violates the Constitution, laws, or treaties of the United States. *Id.* Thus, errors in the application of state law, especially rulings regarding the admissibility of evidence, are usually not questioned by a federal habeas court. *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000).

To the extent Rogers asserts that his right to due process was violated, he must identify an evidentiary ruling that is "so egregious that it results in a denial of fundamental fairness" to obtain habeas relief. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Courts have defined the category of infractions that violate fundamental fairness very narrowly. *Id.* at 512 (citing *Wright v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993)). "Whether the admission of prejudicial evidence constitutes a denial of fundamental fairness turns upon whether the evidence is material in the sense of a crucial, critical highly significant factor." *Brown v. O'Dea*, 227 F.3d 642, 645 (6th Cir. 2000) (internal quotations omitted). Here, as recognized by the Michigan Court of Appeals, the photographs were bloodless and close-ups shots—not immediately recognizable as photographs of a human body. Further, the photos did not identify or implicate Rogers in the murder and there was other evidence

that described the way the victim was shot and killed. *Cf. Ege v. Yukins*, 485 F.3d 364, 375–378 (6th Cir. 2001) (finding due-process violation from admission of bitemark testimony identifying petitioner that was highly prejudicial given that no other evidence placed the petitioner at the scene of the murder). So while the photos may not have been terribly probative given the stipulations and other evidence at trial, their admission was not material of a "crucial highly significant factor" and does not rise to the level of egregiousness necessary to find a due-process violation.

Rogers is not entitled to relief on this claim.

C.

Rogers next contends that there was insufficient evidence to convict him.

Rogers raised a like claim with the Michigan Court of Appeals. (ECF No. 5-16.) In its opinion, however, that court adjudicated the claim as though Rogers was alleging that the conviction was against the great weight of the evidence. *Rogers*, 2010 WL 3062119, at *3–4. And "whether the evidence was sufficient to sustain a conviction and whether the verdict was against the great weight of the evidence are two separate questions." *People v. Brown*, 610 N.W.2d 234, 240 n. 6 (2000). So the Court will not, as the Warden suggests, presume that the Michigan Court of Appeals adjudicated Rogers' insufficient-evidence claim. (ECF No. 4, PageID.142 (citing *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013).) Instead, the Court will review this claim *de novo*.

"Evidence is sufficient to support a conviction so long as '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.'" *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)).

Rogers' primary argument is that there was insufficient evidence to establish his identity as the shooter. Under Michigan law, "the identity of a defendant as the perpetrator of the crimes charged is an element of the offense and must be proved beyond a reasonable doubt." *Byrd v. Tessmer*, 82 F. App'x 147, 150 (6th Cir. 2003) (citing *People v. Turrell*, 181 N.W.2d 655, 656 (Mich. Ct. App. 1970)).

He argues both that "there was ample reason not to believe" Perry's testimony (ECF No. 1, PageID.39–40) and that "even if believed" his testimony would be insufficient to establish identity because Perry testified that Rogers said that "it was a mistake" but he did not say that "it" was the shooting on January 28, 2008, nor did he say that he was involved in that "mistake."

To the extent that Rogers challenges the credibility of the prosecution witnesses, he would not be entitled to relief. Attacks on witness credibility are simply challenges to the quality of the prosecution's evidence, and not to the sufficiency of the evidence. *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002). An assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims. *Gall v. Parker*, 231 F.3d 265, 286 (6th Cir. 2000).

The primary evidence against Rogers was Perry's testimony that Rogers confessed to being the shooter. Perry was in the car when it was shot into and was shot in the hand. (ECF No. 5-5, PageID.650–665.) Perry testified that shortly after the shooting, he went to a house in his neighborhood and saw Rogers and his co-defendant, Tony Hurd. (ECF No. 5-5, PageID.667.) Rogers asked Perry about his hand and said, "I'm glad you're all right." (ECF No. 5-5, PageID.668.) Then he said something to the effect of "It was crazy how it happened." (*Id.*) Then Perry testified that Rogers "started to tell [him]" "who was responsible" and said that "it was a mistake" and "something had went wrong—what happened, it was the wrong car." (ECF No. 5-5,

PageID.669.) Perry testified that Rogers told him that he, Hurd and "Dollar" were in the car. (*Id.*) And that "after [Perry] stopped at the light they pulled up on the side of [them] —but not all the way, then shot the top of the car and the bottom of the car" "to kill everybody that was inside." (ECF No. 5-5, PageID.670–671.) Dollar also had a gun, but it jammed before he had a chance to shoot. (ECF No. 5-5, PageID.671.) Then an alarm went off that "scared [Hurd] and he [drove] off." (ECF No. 5-5, PageID.673.) Rogers asked whether Perry knew the girls in the car. (*Id.*) And when Perry said no, Rogers said "good—, like—I thought it was you all's girls." (ECF No. 5-5, PageID.674.)

There was also testimony from Jarmel Reives. But this testimony was mixed in implicating Rogers. He at first testified that he overheard Rogers say, "If they shot, I hope *they* didn't shoot my little dog." (ECF No. 5-7, PageID.986 (emphasis added).) "Little dog" was his name for Perry. (ECF No. 5-7, PageID.987.) After being further questioned, Reives appeared to change his testimony to Rogers saying, "*I* almost shot my little dog." (ECF No. 5-7, PageID.1005–1007(emphasis added).) Reives further testified that Rogers said that he knew he shot somebody, but he did not know who. (ECF No. 5-7, PageID.1006.) But later, he testified again that he overheard Rogers say, "I hope *they* didn't shoot my little dog." (ECF No. 5-7, PageID.1032 (emphasis added).) Given how often he switched between testifying that Rogers said "I" and "they," this testimony contributes little to the sufficiency of the evidence.

But Rogers' confession to Perry, if believed, is likely sufficient to establish his identity as the shooter. Despite what Rogers is arguing now, it was not ambiguous that Perry's testimony about Rogers' alleged confession concerned the January 28 shooting. The conversation took place a day or two after the shooting. Rogers asked about Perry's hand, and in response, started to tell him what happened, how Hurd had pulled the car next to theirs and how he had shot up the car to

kill everyone inside. Rogers also asked whether Perry knew the girls that were inside the car. So Perry's testimony was strong evidence that Rogers was the shooter. And although little corroborating evidence was presented, the Court cannot find that, if believed, Perry's testimony alone would be insufficient evidence to permit any reasonable jury to find, beyond a reasonable doubt, that Rogers was the shooter.

Rogers further appears to argue that there was insufficient evidence of premeditation and deliberation to sustain his conviction for first-degree murder.

To constitute first-degree murder in Michigan, the state must establish that a defendant's intentional killing of another was deliberate and premeditated. *See Scott v. Elo*, 302 F.3d 598, 602 (6th Cir. 2002) (citing *People v. Schollaert*, 486 N.W.2d 312, 318 (Mich. Ct. App. 1992)). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *See Johnson v. Hofbauer*, 159 F. Supp. 2d 582, 596 (E.D. Mich. 2001) (citing *People v. Anderson*, 531 N.W.2d 780 (Mich. Ct. App. 1995)). Although the minimum time required under Michigan law to premeditate "is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a 'second look.'" *See Williams v. Jones*, 231 F. Supp. 2d 586, 594-95 (E.D. Mich. 2002) (quoting *People v. Vail*, 227 N.W.2d 535 (Mich. 1975) *overruled on other grounds in People v. Graves*, 581 N.W.2d 229 (Mich. 1998)). Premeditation and deliberation may also be inferred from the type of weapon used and the location of the wounds inflicted. *See People v. Berry*, 497 N.W.2d 202 (Mich. Ct. App. 1993). Use of a lethal weapon will support an inference of an intent to kill. *Johnson,* 159 F. Supp. 2d at 596 (citing *People v. Turner*, 233 N.W.2d 617 (Mich. Ct. App. 1975)).

In the present case, there was sufficient evidence for a rational trier of fact to conclude that Rogers acted with premeditation and deliberation when he shot the victim. Rogers claims that there was insufficient evidence of premeditation because he told Perry that he had shot at the wrong car. But pursuant to the doctrine of transferred intent, Rogers could be liable for the victim's death, even though he intended to kill someone in another car but killed the victim instead. *See People v. Youngblood*, 418 N.W.2d 472 (Mich. Ct. App. 1988). Rogers told Perry that he intended to kill everyone in the vehicle. Rogers's involvement in what was essentially a drive-by shooting supported an inference of premeditation and deliberation. *See e.g., Puckett v. Costello*, 111 F. App'x 379, 383–84 (6th Cir. 2004). The evidence established that the victim was shot multiple times. The firing of multiple gunshots at the victim was also sufficient to establish premeditation and deliberation. *See Thomas v. McKee*, 571 F. App'x 403, 407 (6th Cir. 2014).

So even on *de novo* review, Rogers is not entitled to relief on his third claim.

D.

Rogers lastly contends that his due process rights were violated when the state trial court failed to grant him a new trial without holding a hearing. The basis for the new trial request was newly discovered evidence consisting of an affidavit from Anita Stafford, a woman who lived in the Perry brothers' neighborhood. (ECF No. 5-13, PageID.1224.) Her affidavit attacked the credibility of Perry. She said that the Perry brothers threatened her physically, verbally, and with their dogs. (*Id.*) She also claims she heard Rayvon Perry say on the day of Rogers' sentencing that "[w]e fooled them. We got our block back." (*Id.*)

The Warden argues that this claim is procedurally defaulted. (ECF No. 4, PageID.144–147.) He argues that Rogers did not present this claim on direct appeal, did not comply with Mich.

Ct. R. 6.508(D)(3) to show that he was nevertheless entitled to relief, and the state court enforced that rule. (ECF Nos. 5-15, 5-18.)

In most circumstances, a federal court may not consider the federal claims in a habeas corpus petition if a state court has denied relief because the petitioner "failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). To cement a procedural default, Rogers must have failed to comply with a procedural rule, the state courts must have enforced the rule against him, the rule must be an "adequate and independent" ground for barring habeas corpus review, and Rogers cannot excuse the default. *Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003); *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

All of these factors are met here. First, the state trial court clearly enforced Mich. Ct. R. 6.508(D)(3) to deny this claim. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); (ECF Nos. 1-9, PageID.82.) Second, "[i]t is well-established in this circuit that the procedural bar set forth in Rule 6.508(D) constitutes an adequate and independent ground on which the Michigan Supreme Court may rely in foreclosing review of federal claims." *Munson v. Kapture*, 384 F.3d 310, 315 (6th Cir. 2004). Third, Rogers does not present an excuse for the default.

Regardless, even assuming the claim was not defaulted, Rogers is not entitled to habeas relief. Whether to grant a defendant a new trial involves issues of state law and the Court cannot grant habeas relief based upon perceived errors of state law. *Estelle*, 502 U.S. at 67–68. So the Court will only grant habeas relief if this state-law error takes on a constitutional dimension. *Id.*

Here, Rogers couches his argument as a "due process" violation. But he does not explain (or support) a due-process argument arising out of a state court's denial of a new trial based solely upon newly discovered impeachment evidence. Instead, he simply states that Michigan courts must apply its four-factor test in determining whether he is entitled to a new trial "in compliance with

the due process clause." (ECF No. 1, PageID.44.) And that "due process of law requires a new trial where adequate newly discovered evidence is found." (ECF No. 1, PageID.52.) While Rogers cites to case after case, at bottom, he does not explain how his due process rights were violated by the denial of his request for a new trial based solely on allegedly new impeachment evidence.

Further, to the extent Rogers claims that the state court erred in not holding a hearing on his motion for new trial, he is not entitled to habeas relief. Even assuming a right to such a hearing, "errors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007).

So the Court will not grant Rogers relief on this claim.

IV.

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253. Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A COA 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). A petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citation omitted). In this case, the Court concludes that reasonable jurists could debate whether the prosecutor's improper vouching deprived petitioner of a fair trial. Therefore, the Court will grant a certificate of appealability on this issue.

For the reasons stated above, the petition for a writ of habeas corpus is DENIED, a certificate of appealability is GRANTED in part and the matter is DISMISSED.

IT IS SO ORDERED.

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

Date: March 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel of record on this date, March 26, 2019, using the Electronic Court Filing system.

s/William Barkholz
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROWMOTO ANTWION ROGERS,

Petitioner,

v.

Case No. 16-10424
Honorable Laurie J. Michelson

CARMEN PALMER,

Respondent.
_____/

JUDGMENT

In accordance with the Opinion and Order entered on March 26, 2019, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is DENIED, a certificate of appealability is GRANTED in part and the matter is DISMISSED.

Dated at Detroit, Michigan, this 26th Day of March 26, 2019.

DAVID J. WEAVER
CLERK OF THE COURT

APPROVED:

BY: s/William Barkholz
DEPUTY CLERK

s/LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

UNITED STATES SUPREME COURT

ROGERS V. MICHIGAN,

CASE NO. NEW PETITION

APPENDIX "B"

Rogers v. Skipper,

SIXTH CIRCUIT COURT OF APPEALS OPINION

2020 U.S. App LEXIS 23441, July 23, 2020 (Procedural Bar Discussion)

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0426n.06

Case No. 19-1426

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROWMOTO ANTWION ROGERS,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
GREGORY SKIPPER, Warden,	)	MICHIGAN
	)	
Respondent-Appellee.	)	
	)	

Before: MERRITT, CLAY, and BUSH, Circuit Judges.

MERRITT, Circuit Judge. Rowmoto Rogers, a Michigan inmate, appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Rogers was convicted, among other things, of first-degree murder for the death of teenager Martha Barnett after shots were fired into the vehicle in which Barnett was a passenger. Shortly after the shooting, Rogers confessed to his friend Rayvon Perry that he was the person who shot at the vehicle, thinking it belonged to someone else. Based largely on Perry's testimony at trial about Rogers' confession, Rogers was convicted and sentenced to life in prison without possibility of parole. The sole issue before us in this appeal is whether the closing argument of the prosecutor amounted to prosecutorial misconduct based on his "vouching" for the credibility of Perry. The district court held that the statements did not amount to prosecutorial misconduct. We do not reach the merits

of the claim, but instead affirm the district court on the alternate ground that Rogers' claim of prosecutorial misconduct is procedurally defaulted because his counsel did not comply with Michigan's contemporaneous-objection rule at trial.

Rogers was tried with codefendant Tony Hurd. The principal evidence against the defendants was Rayvon Perry's testimony. Perry, one of the five individuals in the car when it was fired upon, received a gunshot wound to his hand during the shooting. Perry testified that he knew both Rogers and Hurd, but he did not know at the time of the shooting that they were involved. Perry testified that, shortly after the shooting occurred, Rogers confessed to him to being the shooter. Rogers asked Perry about his hand and said, "I'm glad you're all right." Tr. Trans. Feb. 4, 2009, at 147. Perry testified that Rogers then said something to the effect of "[i]t was crazy how it happened." *Id.* Perry testified that Rogers "started to tell me . . . who was responsible" and said that "[i]t was a mistake" and "something had went [sic] wrong—what happened, it was the wrong car." *Id.* at 148. Perry testified that Rogers told him that Rogers, Hurd and DeAndre Woolfolk[1] were in the car that fired the shots. *Id.* Hurd was the driver. *Id.* When asked to describe how the shooting unfolded, Perry testified that "after we stopped at the light they [Rogers, Hurd and Woolfolk] pulled up on the side of us—but not all the way, then shot the top of the car and the bottom of the car." *Id.* at 149. Perry then testified that Rogers told him they shot at the car that way "to kill everybody that was inside." *Id.* at 150. Rogers told Perry that Woolfolk also had a gun, but it jammed before he had a chance to shoot. *Id.* at 151. Rogers said they left when an alarm went off on Perry's car that "scared [Hurd] and he [drove] off" because he thought it was a police siren. *Id.* at 152. Rogers asked Perry if he knew the girls in the car. When Perry said no, Rogers said "good—, like—I thought it was you all's girls." *Id.* at 152-53.

[1] Perry sometimes referred to Rogers as "Toe," Hurd as "Tone," and Woolfolk as "Dollar."

The jury convicted Rogers, the conviction was affirmed on direct appeal, and the Michigan Supreme Court denied leave to appeal. *People v. Rogers*, Nos. 291180, 291212, 2010 WL 3062119 (Mich. Ct. App. Aug. 5, 2010) (per curiam), leave to appeal denied, 793 N.W.2d 236 (Mich. 2011). Rogers filed a *pro se* post-conviction motion for relief from judgment in the state trial court, which was later supplemented with a brief filed by an attorney. The motion was denied. *People v. Rogers*, No. 08-009271-FC (Wayne Cty. Cir. Ct. May 1, 2012); *People v. Rogers*, No. 08-009271-FC (Wayne Cty. Cir. Ct. May 29, 2014). The Michigan Court of Appeals and Michigan Supreme Court denied Rogers leave to appeal. *People v. Rogers*, No. 324777 (Mich. Ct. App. Jan. 6, 2015), leave to appeal denied, 873 N.W.2d 560 (Mich. 2016). Rogers then sought habeas relief in federal court, raising four issues: the prosecutor improperly vouched for the credibility of Rayvon Perry during closing arguments; prejudicial photos were admitted during the trial; there was insufficient evidence to convict him; and the state court improperly denied him a new trial based on newly discovered evidence without holding a hearing. The district court denied the petition, and granted a certificate of appealability only on the prosecutorial misconduct issue. *Rogers v. Palmer*, No. 16-10424, 2019 WL 1354185, at *8 (E.D. Mich. Mar. 26, 2019). Rogers moved to expand the certificate of appealability to add additional issues, but the motion was denied by this court. *Rogers v. Skipper*, No. 19-1426 (6th Cir. June 19, 2019).

Now before us is Rogers' claim that he was denied a fair trial because of prosecutorial misconduct. Specifically, he argues that the prosecutor improperly vouched for the credibility of the main witness, Rayvon Perry, and made an improper "civic duty" argument to the jurors. Rogers points to several of the prosecutor's comments in closing argument as improper. The prosecution stated, in relevant part:

> Hero[e]s come in all shapes and sizes. There are the hero[e]s that we're familiar with from movies and TV such as John Wayne. There are war hero[e]s. There are

> hero[e]s every day in terms of when you hear stories of people who pull people out of the path of cars or parents who are hero[e]s in helping their children or saving their children in fires.
>
> There's a hero that we've heard of most recently in that – the captain of that US AIR – the pilot of that airplane, who with years of training on how to fly airplanes still reacted with calm courage and set that airplane on the Hudson river – and there are reluctant hero[e]s. People who did not choose to be a hero. People who fought the pull to be a hero, who didn't want to be a hero, who didn't want to be in the spotlight.
>
> Rayvon Perry is the reluctant hero in this case. He's the reluctant hero because he came forward and told the truth about what he knew. It is on his shoulders that the case rests. . . . Why is Rayvon Perry a hero? Well, he is going against the grain.
>
> We live in a society where — from the time that we are young, we are taught that it is bad to be a tattle tail [sic]. We all know from our own experiences that it's not easy to tell on other people. It makes us uncomfortable particularly when it is with people we know. We also know — and you heard from the witnesses as well, that we live in a culture that has made it bad — it's become the word "snitch." Snitch is something negative. If you're a snitch, you're a bad person. "Don't tell the police. Don't tell the government. Keep it to yourself." Rayvon Perry went against that grain not easily, not willingly, reluctantly — but he did so nonetheless.
>
> Rayvon Perry told the truth against people that he knew . . . and he did it against tremendous pressure . . . . He had every reason in the world not to tell the police and not to tell you that Rowmoto Rogers and Tony Hurd admitted being the shooter and the driver in this particular case, but he told the truth.

Tr. Trans. Feb. 9, 2009, at 14-15. Rogers' counsel did not object to this argument at trial. Rogers raised a claim of prosecutorial misconduct on direct appeal, and the Michigan Court of Appeals conducted a plain-error review, concluding that the comments did not amount to an improper vouching as to credibility or an appeal to the juror's civic duty. *Rogers*, 2010 WL 3062119, at *3. Rogers raised the claim again in his habeas petition, but the district court denied the claim on the merits.[2] The district court declined to rule on the procedural default issue, deciding instead to go directly to the merits of the prosecutorial misconduct claim. 2019 WL 1354185, at *2. As it did

[2] The district court stated that if it were "reviewing this issue de novo, it would be hard pressed to find that this was not improper vouching." 2019 WL 1354185, at *4.

before the district court, the government argues on appeal that the prosecutorial misconduct issue is procedurally defaulted. Appellee's Br. at 17-24. Because Rogers failed to comply with the state procedural rule requiring contemporaneous objection to the prosecutor's statements, we hold that the claim is procedurally defaulted and decline to reach the merits of the claim.

The procedural default bar, as applied in the habeas context, "precludes federal courts from reviewing claims that a state court has declined to address, because of a petitioner's noncompliance with a state procedural requirement." *Howard v. Bouchard*, 405 F.3d 459, 475 (6th Cir. 2005). Procedural default bars a claim from review on the merits if: (1) "there is a state procedural rule that is applicable to the petitioner's claim and . . . the petitioner failed to comply with the rule," (2) the state court "actually enforced the state procedural sanction," and (3) "the state procedural forfeiture is an 'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." *Scott v. Mitchell*, 209 F.3d 854, 863–64 (6th Cir. 2000) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)).

There is no dispute that Rogers failed to comply with the state procedural rule that requires defendants to specifically and contemporaneously object to alleged prosecutorial misconduct. *See People v. Brown*, 811 N.W.2d 531, 535-36 (Mich. Ct. App. 2011). The last state court to issue a reasoned decision on this claim was the Michigan Court of Appeals, which reviewed the prosecutorial misconduct claim for plain error because of trial counsel's failure to object. *Rogers*, 2010 WL 3062119, at * 3. Plain error review by the state courts does not constitute a waiver of state procedural default rules for purposes of our review of a habeas petition. *Girts v. Yanai*, 501 F.3d 743, 755 (6th Cir. 2007); *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) (holding that when a state appellate court reviews an issue for plain error, the federal courts view it as the state's enforcement of a procedural default.). Nor does a state court fail to sufficiently rely upon a

procedural default by ruling on the merits in the alternative. *McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991). Lastly, the failure to make a contemporaneous objection is a recognized and firmly-established independent and adequate state-law ground for refusing to review trial errors. *Hinkle*, 271 F.3d at 244; *see also Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). The Michigan Court of Appeals did not find that the prosecutor's comments amounted to plain error, and the claim was denied. By reviewing the claim only for plain error, the court enforced the contemporaneous-objection rule and we hold that the claim is procedurally defaulted.

A federal court will review a state prisoner's procedurally defaulted federal claim if the prisoner shows "cause" for the default and "prejudice" from the error, or if a manifest miscarriage of justice would otherwise result. *See Coleman v. Thompson*, 501 U.S. at 749–50. Rogers did not raise a claim of ineffective assistance of counsel, or any other reason, to excuse the default. Because he has not raised any claim or issue to excuse the default, he has forfeited the question of cause and prejudice.

The narrow exception for fundamental miscarriage of justice is reserved for the extraordinary case in which the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense. *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Schlup v. Delo*, 513 U.S. 298 (1995). Rogers has not presented any claim or evidence of actual innocence.

We affirm the judgment of the district court on the alternate ground of procedural default.

UNITED STATES SUPREME COURT

ROGERS V. MICHIGAN,

CASE NO. NEW PETITION

APPENDIX "C"

People v. Rogers,

MICHIGAN COURT OF APPEALS

No. 291180; (Mich. Ct. App. Aug. 5, 2010)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROWMOTO ANTWION ROGERS,

Defendant-Appellant.

UNPUBLISHED
August 5, 2010

No. 291180
Wayne Circuit Court
LC No. 08-009271-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY ANTHONY HURD,

Defendant-Appellant.

No. 291212
Wayne Circuit Court
LC No. 08-009271-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendants Rowmoto Antwion Rogers and Tony Anthony Hurd were tried jointly before a single jury, which convicted each of first-degree premeditated murder, MCL 750.316(1)(a), four counts of assault with intent to commit murder, MCL 750.83, and felon in possession of a firearm, MCL 750.224f. Defendant Rogers was also convicted of possession of a firearm during the commission of a felony, MCL 750.227b. Both defendants were sentenced to life imprisonment for the murder conviction, to be served concurrent to prison terms of 25 to 40 years for each assault conviction and two to five years for the felon-in-possession conviction; defendant Rogers was also sentenced to a consecutive two-year prison sentence for the felony-firearm conviction. Defendant Rogers appeals as of right in Docket No. 291180, and defendant Hurd appeals as of right in Docket No. 291212. The appeals have been consolidated for this Court's consideration. We affirm.

I. FACTS AND PROCEEDINGS

Defendants' convictions arise from a January 2008 shooting incident in the city of Detroit during which shots were fired into a Jeep Commander occupied by five individuals: Davon Perry, his younger brother Rayvon Perry, and three teenage female passengers, Dominique Spillman, Tiffany Whatley, and Martha Barnett. Martha Barnett died from gunshot wounds to her head and back. None of the occupants of the Commander were able to identify any of the shooters. The principal evidence against defendants was the testimony of Rayvon Perry. Rayvon testified that he knew both defendants and saw them at a "hang-out" house later on the day of the shooting. According to Rayvon, defendant Rogers admitted to him that he and another person, DeAndre Woolfolk, shot at the Commander from a car driven by defendant Hurd. Rogers explained that they "messed up" by shooting at the wrong vehicle. Rayvon stated that Hurd nodded in a manner expressing his agreement with Rogers's statements, and Hurd also stated that he drove away from the shooting when a burglar alarm in a nearby store was activated. Rayvon did not initially disclose this information to the police, but eventually revealed it in response to the prosecutor's investigative subpoena.

II. ADMISSION OF PHOTOGRAPHS

Both defendants argue that the trial court abused its discretion by admitting autopsy photographs depicting close-up views of the victim's gunshot wounds. We review the trial court's decision to admit photographic evidence for an abuse of discretion. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW2d 857 (2009). A court abuses its discretion when its decision is not within the range of principled outcomes. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

Defendants argue that the photographs should have been excluded under MRE 403 because they were not probative of their identity as the shooters, which was the principal issue at trial, and because their primary purpose was to inflame the jurors' emotions. We disagree.

MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" See *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Photographic evidence is also admissible for the purpose of corroborating a witness's testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). If photographs are admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *Id.*; *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Further, photographs are not deemed inadmissible simply because other testimony or evidence encompasses the same issue. *Mills*, 450 Mich at 76; *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008).

The three photographs in this case depict the entrance wound on the back of the victim's skull, an entrance wound on her back, and an exit wound through her right eyelid. The two entrance wound photographs were relevant to illustrate the medical examiner's testimony that the wounds were irregularly shaped, which led him to conclude that the bullets passed through intermediary targets before striking the victim. The third photograph, depicting the exit wound,

corroborated the medical examiner's testimony that the bullet passed into the victim's skull, traveled through her brain, and exited through the front of her head. The photographs were relevant to prove the cause of the victim's death. Although neither defendant disputed the cause of death, the prosecution is required to prove each element of a charged offense regardless whether the defendant specifically disputes or offers to stipulate to any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Further, the photographs were relevant to illustrate the basis for the medical examiner's testimony that the bullets that struck the victim likely first passed through an intermediary target, such as a vehicle, thereby indicating that the shots originated from outside the vehicle. Although neither defendant disputed that the shots originated from outside the vehicle, evidence at trial indicated that the two male occupants of the vehicle, Davon and Rayvon Perry, each tested positive for the presence of gunshot residue after the shooting, and that Davon Perry was admittedly armed with a gun. The prosecution was entitled to present evidence to erase any doubts the jury might have regarding whether the shots may have originated from within the vehicle.

Finally, the photographs are not so gruesome as to outweigh their probative value. The two photographs of the entrance wounds are close-up shots of the wounds and are not immediately recognizable as photographs of a human body. The photograph of the exit wound depicts only a small portion of the victim's face around her closed eye. No blood is depicted in any of the photographs. Rather than being particularly gruesome, the photographs are "rather clinical," *Hoffman*, 205 Mich App at 19, and they were used to illustrate clinical medical testimony. Because the photographs were relevant to a proper purpose, and are not so gruesome or shocking as to inflame the jurors' passions and emotions, the trial court did not abuse its discretion in admitting them.

III. PROSECUTOR'S CONDUCT

Defendant Rogers argues that the prosecutor improperly vouched for Rayvon's credibility during his closing argument, and also presented an impermissible civic duty argument when he argued that Rayvon was a "reluctant hero" and "went against the grain" when he decided to come forward and disclose the information he had learned, knowing that he would be labeled a "snitch." Defendant Hurd presents similar arguments in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. Because neither defendant objected to the prosecutor's comments at trial, this issue is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A prosecutor may, however, argue from the facts that a witness is credible. *Id.* It is also improper for a prosecutor to inject issues broader than a defendant's guilt or innocence into the proceedings by appealing to the jurors' fears and prejudices, *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005), or by urging a jury to convict a defendant out of a sense of civic duty or sympathy for the victim. *Unger*, 278 Mich App at 237.

In this case, the prosecutor discussed how the pejorative term "snitch" reflects a common attitude favoring loyalty to friends and neighbors and disfavoring cooperation with law

enforcement, thus providing substantial motive for Rayvon to remain silent and not disclose the information he had learned from defendants regarding the shooting, and yet Rayvon agreed to come forward and testify, against his own self-interests. The prosecutor did not improperly vouch for Rayvon's credibility, but rather properly presented reasons, grounded in the evidence, for why the jury should find his testimony credible. Further, the prosecutor's characterization of Rayvon as a "reluctant hero" for coming forward and cooperating was not an appeal to any sense of the jurors' civic duty, but rather was a comment on Rayvon's circumstances as reflecting reasons for finding his testimony credible. The prosecutor's comments were not improper and, therefore, did not amount to plain error.

Although defendant Hurd also argues in his pro se brief that his attorney was ineffective for failing to object to the prosecutor's arguments, because those arguments were not improper, any objection would have been futile. Defense counsel was not ineffective for failing to make a futile objection. *Unger*, 278 Mich App at 255-256.

IV. DEFENDANT ROGERS'S ADDITIONAL ISSUE IN DOCKET NO. 291180

Defendant Rogers argues that his convictions are against the great weight of the evidence, and therefore, that a new trial is warranted. Because defendant Rogers did not raise this issue in a motion for a new trial, it is not preserved. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, our review is limited to plain error affecting defendant Rogers's substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219; *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Defendant Rogers's argument is not directed at the elements of the crimes of which he was convicted, but rather solely at the credibility of Rayvon's testimony linking him to the crimes. A court may not act as a "thirteenth juror" when evaluating a challenge to the great weight of the evidence, and "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), our Supreme Court recognized that a court may grant a new trial based on questions of witness credibility only in limited circumstances, such as when the witnesses' testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable jury could not believe it.

Here, Rayvon's testimony was not patently incredible, it did not defy physical realities, and it was not so inherently implausible that it could not be believed. Thus, the determination of Rayvon's credibility was entirely within the province of the jury and this Court may not attempt to resolve that question differently. *Lemmon*, 456 Mich at 643-644; *Gadomski*, 232 Mich App at 28. Further, a defendant's uncorroborated confession is sufficient to establish his identity as the perpetrator of a homicide where, as here, other evidence has independently established a death by criminal agency. *People v Cotton*, 191 Mich App 377, 389-390; 394, 478 NW2d 681 (1991). Consequently, defendant Rogers's convictions are not against the great weight of the evidence.

V. DEFENDANT HURD'S ADDITIONAL ISSUES IN DOCKET NO. 291212

A. SUFFICIENCY OF THE EVIDENCE

Defendant Hurd argues that his convictions were not supported by sufficient evidence. We disagree. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a reasonable juror could find the defendant guilty beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002).

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). "The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A defendant is criminally liable for offenses that he specifically intends to aid or abet. *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006).

In this case, Rayvon Perry testified that defendant Hurd acknowledged being the driver of the vehicle from which defendant Rogers unleashed a barrage of gunshots at the victims' automobile, and that defendant Hurd expressed agreement with defendant Rogers's statements that they intended to kill the occupants of the other vehicle, but "messed up" by shooting at the wrong vehicle. If believed, this testimony was sufficient to establish defendant Hurd's guilt of each of the charged crimes under an aiding and abetting theory. Although defendant Hurd argues that Rayvon Perry was not credible, the credibility of his testimony was for the jury to resolve, and this Court may not resolve it anew. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Thus, the evidence was sufficient to support defendant Hurd's convictions.

B. DEFENDANT HURD'S SENTENCES

Defendant Hurd lastly argues that his 25-year minimum sentences for the assault convictions are unconstitutionally cruel or unusual, contrary to US Const, Am VIII (prohibiting "cruel *and* unusual" punishment), and Const 1963, art 1, § 16 (prohibiting "cruel *or* unusual" punishment). There is no merit to this argument.

Defendant Hurd does not dispute that his sentences are within the appropriate guidelines range.[1] A sentence within the appropriate guidelines range is presumptively proportionate, and a

[1] Defendant Hurd does not challenge the scoring of the guidelines or the trial court's determination of the appropriate guidelines range. "Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error." *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

proportionate sentence is neither cruel nor unusual. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Defendant Hurd has not overcome the presumptive proportionality of his sentences. His only argument is that the evidence of his guilt was weak, but as previously explained, the evidence was sufficient to establish each of his convictions beyond a reasonable doubt. Defendant Hurd intentionally assisted two co-felons in unleashing deadly force against an occupied vehicle, intending to kill the occupants. He has three prior drug-related convictions and committed the instant offenses while on parole. Under these circumstances, there is no merit to defendant Hurd's argument that his sentences are unconstitutionally cruel or unusual.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

Court of Appeals, State of Michigan

ORDER

Kirsten Frank Kelly
Presiding Judge

People of MI v Rowmoto Antwion Rogers

Michael J. Talbot

Docket No. 324777

LC No. 08-009271-FC

Cynthia Diane Stephens
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The defendant alleges grounds for relief that could have been raised previously and he has failed to establish both good cause for failing to previously raise the issues and actual prejudice from the irregularities alleged, and has not established that good cause should be waived. MCR 6.508(D)(3)(a) and (b).

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

JAN 06 2015
Date

Chief Clerk

UNITED STATES SUPREME COURT

ROGERS V. MICHIGAN,

CASE NO. NEW PETITION

APPENDIX "D"

People v. Rogers,

MICHIGAN SUPREME COURT ORDER

lv. Den. 488 Mich. 1035, 793 N.W.2d. 236 (Feb. 2, 2011)

Order

Michigan Supreme Court
Lansing, Michigan

February 2, 2011

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

141796

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 141796
COA: 291180
Wayne CC: 08-009271-FC

ROWMOTO ANTWION ROGERS,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the August 5, 2010 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.

I, Corbin R. Davis, 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.

February 2, 2011

Clerk

0126