

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS HANSERD,

Petitioner,

v

TONY TRIERWEILER,

Respondent.

APPENDIX A

 Neutral
As of: July 29, 2020 5:57 PM Z

Hanserd v. Trierweiler

United States Court of Appeals for the Sixth Circuit

February 25, 2020, Filed

No. 18-2404

Reporter
2020 U.S. App. LEXIS 5743 *

MARCUS HANSERD, Petitioner-Appellant, v. TONY TRIERWEILER, Warden, Respondent-Appellee.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Rehearing denied by, En banc *Hanserd v. Trierweiler, 2020 U.S. App. LEXIS 17406 (6th Cir., June 2, 2020)*

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Hanserd v. Trierweiler, 2018 U.S. Dist. LEXIS 185159 (E.D. Mich., Oct. 30, 2018)

Core Terms

ineffective-assistance, identification, ineffective, time-barred, in-court, eyewitness, appointment, certificate,

evidentiary, defaulted, innocence, deadline, earliest, one-year, suppress, corpus, weapon, opine

Counsel: Marcus Hanserd, Petitioner - Appellant, Pro se, Ionia, MI.

For TONY TRIERWEILER, Warden, Respondent - Appellee: Linus Richard Banghart-Linn, Assistant Attorney General, John S. Pallas, Office of the Attorney General, Lansing, MI; Rebecca Ashley Berels, Michigan Department of Attorney General, Lansing, MI.

Judges: Before: NORRIS, SUTTON, and BUSH, Circuit Judges.

Opinion

ORDER

Marcus Hanserd, a pro se Michigan prisoner, appeals a district court judgment denying his amended petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We granted a certificate of appealability as to one of the five claims raised in Hanserd's petition. The case is now before the court on the merits of this claim and has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See *Fed. R. App. P. 34(a)*.

In 2011, a jury found Hanserd guilty of first-degree murder, Mich. Comp. Laws § 750.316(1)(a); carjacking,

Mich. Comp. Laws § 750.529g; being a felon in possession of a weapon, Mich. Comp. Laws § 750.224f; carrying a dangerous weapon with unlawful intent, Mich. Comp. Laws § 750.226; and four counts of possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b. The trial court sentenced him as a habitual offender, second [*2] offense, to life in prison. The Michigan Court of Appeals affirmed, *People v. Hanserd, No. 305804, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227 (Mich. Ct. App., Sept. 11, 2012)* (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Hanserd, 493 Mich. 952, 828 N.W.2d 45 (Mich. 2013)* (mem.).

Hanserd then filed a motion for relief from judgment, which the trial court denied. *People v. Hanserd, No. 10-034377-FC-5 (Saginaw Cty. Cir. Ct. Dec. 4, 2013)*. The Michigan Court of Appeals affirmed, *People v. Hanserd, No. 322993, 2014 Mich. App. LEXIS 2900 (Mich. Ct. App. Dec. 11, 2014)*, and, on December 22, 2015, the Michigan Supreme Court denied leave to appeal, *People v. Hanserd, 498 Mich. 947, 872 N.W.2d 435 (Mich. 2015)* (mem.).

On March 18, 2016, at the earliest, Hanserd filed his original § 2254 petition by placing it in the prison mail. His original petition raised four grounds for relief—namely, that (1) there was insufficient evidence to support his convictions; (2) the trial court deprived him of a fair trial and his due process rights through improper evidentiary rulings, through instructional errors, and by denying funds for an expert witness to opine on eyewitness identification; (3) his trial counsel was ineffective for failing to call witnesses to establish his innocence; and (4) the evidence was insufficient to convict him because the medical examiner testified that the autopsy showed that the crime could not have been [*3] committed in the manner that an eyewitness claimed. On November 2, 2016, at the earliest, Hanserd filed an amended petition in which he claimed that his trial counsel was ineffective for failing to file a motion to suppress eyewitness Dawn Leuders's pretrial and in-court identification.

The district court denied the petition, as amended, and declined to issue a certificate of appealability. This court, however, granted Hanserd a certificate of appealability on the ineffective-assistance claim raised in his amended petition.

In this appeal, Hanserd reiterates his ineffective-assistance claim, and he also argues that the district court (1) incorrectly found that his ineffective-assistance claim alleged that his trial counsel neglected to

Hanserd v. Trierweiler

challenge Leuders's preliminary examination identification instead of her in-court identification, and (2) should have held an evidentiary hearing. He also moves for the appointment of counsel. The warden argues that Hanserd is not entitled to habeas relief because his ineffective-assistance claim is time-barred, is procedurally defaulted, and lacks merit. Hanserd responds that his ineffective-assistance claim is timely because his original petition—filed [*4] before the statute of limitations expired—claimed that "the state failed to give [him] funds to appoint an expert in the field of eyewitness identification."

We review de novo the district court's decision to deny a petition for a writ of habeas corpus under § 2254. *Burton v. Renico, 391 F.3d 764, 770 (6th Cir. 2004)*, and may affirm that decision "on any grounds supported by the record even if different from the reasons of the district court." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc., 280 F.3d 619, 629 (6th Cir. 2002)*.

We agree with the warden that Hanserd's ineffective-assistance claim is time-barred. This claim was first raised in Hanserd's amended petition, and he does not dispute that the amended petition was filed beyond the statute of limitations set forth in 28 U.S.C. § 2254(d). Instead, he appears to argue that his amended petition relates back to his original, timely petition, such that his ineffective-assistance claim is not time-barred.

Amendments to pleadings may be made after the statute of limitations has run if they "arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." *Fed. R. Civ. P. 15(c)(1)(B)*. In the federal habeas context, an amended claim relates back only when it arises "from the same core facts as the timely filed claims." *Mayle v. Felix, 545 U.S. 644, 657, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005)*; see also *Cowan v. Slovall, 645 F.3d 815, 818 (6th Cir. 2011)* ("[W]hen a prisoner files an original petition within the one-year [*5] deadline, and later presents new claims in an amended petition filed after the deadline passes, the new claims relate back to the date of the original petition if the new claims share a 'common core of operative facts' with the original petition." (quoting *Mayle, 545 U.S. at 664*)).

Here, Hanserd's claim that his trial counsel should have filed a motion to suppress Leuders's in-court identification is based on a separate set of core facts than those set forth in his original petition. Although Hanserd claimed in his original petition that the trial court failed to provide him funds for an expert witness to

opine on eyewitness identification and that his trial counsel was ineffective for failing to call witnesses to support his actual-innocence defense, he did not claim—nor assert any facts that would imply—that his trial counsel was ineffective for failing to challenge Leuders's in-court identification of him as the perpetrator. In other words, while Hanserd's original claims alleged trial court error and the ineffective assistance of counsel with respect to an issue unrelated to Leuders's in-court identification, his supplemental claim alleged the ineffective assistance of counsel specifically with respect [*6] to Leuders's in-court identification. Thus, because the ineffective-assistance claim raised in Hanserd's untimely amended petition lacks a "common core of operative facts" with the claims raised in his timely original petition, we find that the supplemental ineffective-assistance claim is time-barred. And although equitable tolling or a showing of actual innocence may permit review of an otherwise time-barred claim, see *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013); *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010); Hanserd has neither argued nor shown that either of these exceptions to § 2254(d)'s one-year limitations period applies. Consequently, we find that the ineffective-assistance claim raised in Hanserd's amended petition is barred by the statute of limitations. And because Hanserd's ineffective-assistance claim is time-barred, we need not address either the merits of the claim or the warden's argument that the claim is procedurally defaulted.

Accordingly, we **AFFIRM** the district court's judgment and **DENY** the motions for the appointment of counsel.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS HANSERD,

Petitioner,

v

TONY TRIERWEILER,

Respondent.

APPENDIX B

Hanserd v. Trierweiler

United States Court of Appeals for the Sixth Circuit

June 2, 2020, Filed

No. 18-2404

Reporter

2020 U.S. App. LEXIS 17406 *

MARCUS HANSERD, Petitioner-Appellant, v. TONY TRIERWEILER, WARDEN, Respondent-Appellee.

the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

End of Document

Prior History: Hanserd v. Trierweiler, 2020 U.S. App. LEXIS 5743 (6th Cir. Mich., Feb. 25, 2020)

Counsel: [*1] Marcus Hanserd, Petitioner - Appellant, Pro se, Ionia, MI.

For TONY TRIERWEILER, Warden, Respondent - Appellee: Linus Richard Banghart-Linn, Assistant Attorney General, Rebecca Ashley Berels, John S. Pallas, Office of the Attorney General of Michigan, Lansing, MI.

Judges: BEFORE: NORRIS, SUTTON, and BUSH, Circuit Judges.

Opinion

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to

* Judge Larsen recused herself from participation in this ruling.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS HANSERD,

Petitioner,

v

TONY TRIERWEILER,

Respondent.

APPENDIX C

◆ Positive
As of: July 29, 2020 6:08 PM Z

Hanserd v. Trierweiler

United States District Court for the Eastern District of Michigan, Southern Division

October 30, 2018, Decided; October 30, 2018, Filed

Case No. 16-cv-11099

Reporter
2018 U.S. Dist. LEXIS 185159 *; 2018 WL 5619698

MARCUS HANSERD, Petitioner, v. TONY TRIERWEILER,¹ Respondent.

STATES DISTRICT JUDGE.

Opinion by: MATTHEW F. LEITMAN

Subsequent History: Affirmed by, Motion denied by *Hanserd v. Trierweiler*, 2020 U.S. App. LEXIS 5743 (6th Cir. Mich., Feb. 25, 2020)

Prior History: *Hanserd v. Woods*, 2017 U.S. Dist. LEXIS 76995 (E.D. Mich., May 22, 2017)

Opinion

OPINION AND ORDER (1) DENYING PETITION FOR A WRIT OF HABEAS CORPUS (ECF #1) AND AMENDED PETITION (ECF #11), (2) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS

Core Terms

identification, eyewitness, lineup, certificate, shooting, shooter, ineffective, corpus, credibility, unreliable, pauperis, forma, appointment, photographic, reliability, pre-trial, remember, murder, trier, shot

Judges: [*1] Hon. MATTHEW F. LEITMAN, UNITED

¹The proper respondent in a habeas action is the habeas petitioner's custodian, which in the case of an incarcerated habeas petitioner is the warden of the facility where the petitioner is incarcerated. See *Edwards v. Johns*, 450 F.Supp.2d 755, 757 (E.D. Mich. 2006). See also Rule 2(a), 28 U.S.C. § 2254. Since the filing of the petition, Petitioner Marcus Hanserd has been transferred to the Bellamy Creek Correctional Facility, where Tony Trierweiler is the warden. Therefore, the Court amends the caption to reflect the fact that Trierweiler is the proper Respondent to this action.

Petitioner Marcus Hanserd is a state prisoner in the custody of the Michigan Department of Corrections. On March 25, 2016, Hanserd filed a *pro se* petition for a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254. (See ECF #1.) Hanserd filed an amended petition on November 7, 2016. (See ECF #11.) In the petitions, Hanserd challenges his state-court convictions for first-degree premeditated murder, *Mich. Comp. Laws* § 750.316(1)(a); carjacking, *Mich. Comp. Laws* § 750.529a; felon in possession of a weapon, *Mich. Comp. Laws* § 750.224f; carrying a dangerous weapon with unlawful intent, *Mich. Comp. Laws* § 750.226, and four counts of possession of a firearm in the commission of a felony, *Mich. Comp. Laws* § 750.227b.

The Court has reviewed Hanserd's claims and concludes that he is not entitled to federal habeas relief. Accordingly, for the reasons set forth below, the Court will DENY his petitions. The Court will also decline to

issue Hanserd a certificate of appealability. However, it will grant him permission to appeal *in forma pauperis*.

I

Hanserd was [*2] convicted following a jury trial in the Saginaw County Circuit Court. The Michigan Court of Appeals described the underlying facts as follows:

Defendant's convictions arise from the murder of Sheric Harris and related crimes that occurred after midnight on April 17, 2004. Two witnesses testified that defendant had committed a robbery at gun point at a Stop N Shop just before the shooting occurred at the Circle K party store. Defendant was identified by a witness at trial as the shooter from the Circle K. The same witness had also identified defendant in a corporeal lineup before trial. Evidence that the victim had been driving a Camaro, that defendant left the scene of the shooting in a Camaro, and that defendant's blood was found in the Camaro the victim had been driving once it was recovered, was also presented.

People v. Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *1 (Mich. Ct. App. Sept. 11, 2012).

Hanserd appealed his convictions to the Michigan Court of Appeals, and that court affirmed. See *id*. Hanserd then sought leave to appeal in the Michigan Supreme Court, and that court denied leave. See *People v. Hanserd*, 493 Mich. 952, 828 N.W.2d 45 (Mich. 2013).

Hanserd next filed a post-conviction motion for relief from judgment with the state trial court. That court denied the motion. See *People v. Hanserd*, No. 10-034377-FC-5 (Saginaw [*3] Cir. Ct., Dec. 4, 2013); *reconsideration den.* No. 10-034377-FC-5 (Saginaw Cir. Ct., Feb. 2, 2014). The Michigan appellate courts denied Hanserd leave to appeal that decision. See *People v. Hanserd*, No. 322993 (Mich. Ct. App. Dec. 11, 2014); *iv. den.* 498 Mich. 947, 872 N.W.2d 435 (Mich. 2015).

Hanserd thereafter filed the instant petitions for federal habeas relief in this Court. In those petitions, he seeks relief on the following grounds:

- I. Petitioner's conviction should be overturned because there was insufficient credible evidence, presented at trial to prove that the petitioner was guilty of the crimes.
- II. The trial court denied the petitioner a fair trial and his due process rights through improper evidentiary rulings that that [sic] included allowing 404b

testimony and denying funds for an expert on eyewitness identification problems; and improper instructional errors.

III. Petitioner was denied his right to a fair trial and effective assistance of trial counsel by his trial counsel's failure to call witnesses to establish petitioner's innocence. US Const, Am VI, XIV; *Mich. Const. of 1963*, art 1 sec 17, 20.

IV. Testimony of the medical examiner that performed the autopsy showed that the crime could not have been committed in the manner [*4] the eyewitnesses claimed, and thus there was insufficient evidence to convict the petitioner.

V. Ineffective assistance of trial counsel (for failing to challenge the eyewitness' pre-trial identification).

II

The majority of Hanserd's claims are reviewed under the standards established in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) ("AEDPA"). AEDPA provides that:

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

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

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, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

III

Respondent first [*5] argues that portions of Hanserd's first and second claims and his fourth claim are

procedurally defaulted for various reasons.

Procedural default is not a jurisdictional bar to review of a habeas petition on the merits. See *Trest v. Cain*, 522 U.S. 87, 89, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997). In addition, "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)). This Court believes that it would be more efficient to proceed to the merits of Hanserd's claims, particularly where several of the defaulted claims are interrelated with the properly preserved claims.

Respondent also argues that Hanserd's fifth claim, which Hanserd raised for the first time in his amended habeas petition, is barred by the statute of limitations because the amended petition was filed after the limitations period expired, and the fifth claim does not relate back to the claims filed in the initial petition.

The statute of limitations does not constitute a jurisdictional bar to habeas review. Therefore, a federal court can, in the interest of judicial economy, proceed directly to the merits of a habeas petition even if the claims therein are barred by a limitations period. See *Smith v. State of Ohio Dept. of Rehabilitation*, 463 F.3d 426, 429, n. 2 (6th Cir. 2006) (quoting *Trussell v. Bowersox*, 447 F.3d 588, 590 (8th Cir. 2006)). This Court need [*6] not resolve the dispute over the timeliness of Hanserd's amended habeas petition. Assuming without deciding that the amended petition was timely, Hanserd's fifth claim fails on the merits for the reasons stated below. See *Ahart v. Bradshaw*, 122 F. App'x 188, 192 (6th Cir. 2005).

IV

A

In Hanserd's first and fourth claims, he argues that there was insufficient evidence to convict him of the charged crimes. The question before the Michigan appellate courts on Hanserd's sufficiency-of-the-evidence claims was "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, 99 S. Ct. 2701, 61 L. Ed. 2d 560

(1979). But, on habeas review under AEPDA, this claim must survive "two layers" of deference:

We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. And second, on [*7] habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

Coleman v. Johnson, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012) (internal punctuation and citations omitted). See also *Brown v. Konleh*, 567 F.3d 191, 205 (6th Cir. 2009) (noting that when analyzing a *Jackson* claim on habeas review, reviewing court "cannot even inquire whether any rational trier of fact would conclude that petitioner [] is guilty of the offenses with which he was charged. Instead, [the reviewing court] must determine whether the [state] Court of Appeals itself was unreasonable in its conclusion that a rational trier of fact could find [the petitioner] guilty beyond a reasonable doubt based upon the evidence introduced at trial").

The Court now turns to each of Hanserd's insufficiency-of-the-evidence claims.

1

Hanserd first contends that there was insufficient evidence to establish his identity as the perpetrator of the crime. The Michigan Court of Appeals considered this claim on direct review and rejected it:

Defendant argues that there were a number of inconsistencies between the identifying witness's [*8] testimony and her previous statements to police that render her identification of defendant unreliable. Additionally, defendant argues that there were inconsistencies between various witnesses' testimony, further adding to the unreliability of the identification. However, all problems that defendant points out with the

identification are credibility and weight issues, which are determinations to be made by the jury. We will not interfere with the jury's role in determining credibility. When looking at the testimony in a light most favorable to the prosecution, a jury could have reasonably determined that defendant was the shooter. Defendant was identified as the shooter both in court and in a physical lineup before trial. An identification by a witness is sufficient evidence to support a conviction. Additionally, there was evidence that defendant's blood was found in the car the victim had been driving. There was sufficient evidence presented for the jury to reasonably determine that defendant was the shooter.
[...]

The prosecution [also] offered testimony to establish that the victim was driving the Camaro on the night of the shooting, that defendant was the shooter, that defendant [*9] drove from the scene in the Camaro, and that defendant's DNA profile matched the DNA profile of the blood samples taken from the Camaro. Given this evidence, the jury could have reasonably inferred that defendant shot the victim, stole the car, and left his DNA in the car. The prosecutor provided enough evidence to prove its theory beyond a reasonable doubt and the jury was responsible for determining what credibility and weight to give the evidence.

*Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *2* (internal footnote omitted).

Hanserd has not established that the Michigan Court of Appeals' ruling was contrary to, or an unreasonable application of, clearly established federal law. Here, an eyewitness to the crime — a woman named Dawn Lueders-identified Hanserd at trial as being the shooter based on her personal observation of the crime. That testimony alone was sufficient to support Hanserd's convictions, and it forecloses Hanserd from obtaining federal habeas relief based upon the insufficiency of the evidence. See *Thomas v. Perry*, 553 F. App'x 485, 487-88 (6th Cir. 2014) (rejecting habeas petitioner's sufficiency of evidence claim and affirming denial of habeas relief where eyewitness had identified petitioner as the shooter).

Hanserd counters that there were numerous inconsistencies in [*10] Lueders' testimony as well as inconsistencies between the various other witnesses

regarding their observations of the shooting. But when a federal court reviewing a state-court conviction on habeas review is "faced with a record of historical facts that supports conflicting inferences, the federal court" must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Cavazos v. Smith*, 565 U.S. 1, 7, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (quoting *Jackson*, 443 U.S. at 326). Moreover, the prosecution introduced other evidence that pointed to Hanserd as the perpetrator, such as evidence that Hanserd's blood was found in the stolen Camaro. The existence of this other evidence further confirms that the Michigan Court of Appeals did not unreasonably apply *Jackson* when it rejected Hanserd's sufficiency of evidence claim. See *Moreland v. Bradshaw*, 699 F.3d 908, 919-21 (6th Cir. 2012). Hanserd is therefore not entitled to federal habeas relief on this claim.

2

Hanserd next claims that there was insufficient evidence to support his convictions because the testimony of the medical examiner established that the murder could not have happened the way that Lueders and other witnesses described the shooting. More specifically, Hanserd [*11] argues that Lueders and others testified that he "opened the passenger door and shot into the vehicle three times at point blank range." (Pet., ECF #1 at Pg. ID 63-64.) But Hanserd says that based on the medical examiner's testimony regarding the trajectory of the bullets and where they entered the victim, "[t]he fact that no bullets were travelling in a downward angle, nor from the direction of the suspect, points to the impossibility that the crime occurred in the manner which Ms. Lueders and [another witness] testified to." (Id.)

The Michigan Court of Appeals considered this claim on direct review and rejected it:

Defendant asserts that [the] medical examiner's testimony about bullet paths indicated that the shooting could not have occurred in the manner claimed by the witnesses. However, because it cannot be determined which wounds the victim received first, and the victim was moving around during the incident, there is no definitive indication that the autopsy report was inconsistent with the testimony. Additionally, it was up to the jury to determine what weight to give the evidence.

Hanserd v. Trierweiler

Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *3.

Hanserd has not established that the Michigan Court of Appeals' ruling was contrary to, or an unreasonable [*12] application of, clearly established federal law. Most importantly, Hanserd is wrong when he argues that Lueders testified that he shot the victim at "point blank" range, and that Lueders' testimony is therefore inconsistent with the medical examiner's testimony. Lueders testified only that Hanserd "opened the passenger door[] and shot into the vehicle at the man sitting there." (ECF #10-9 at Pg. ID 491.) Lueders did not testify how far Hanserd was from the victim when Hanserd fired the shots, nor did she testify at what angle Hanserd pointed the gun. Hanserd has not sufficiently shown how that testimony offered by Lueders is inconsistent with the testimony of the medical examiner. Moreover, as noted above, to the extent that there were conflicts in the evidence, it was for the jury, not this Court on habeas review, to resolve those conflicts. See Jackson, 443 U.S. at 326. For all of these reasons, the Michigan Court of Appeals' decision affirming the jury's verdict was not contrary to, nor an unreasonable application of, clearly established federal law. Hanserd is therefore not entitled to federal habeas relief on this claim.

3

Finally, Hanserd argues that the jury's verdict went against the great weight of [*13] the evidence. A federal habeas court has no power to grant habeas relief on the ground that a state conviction is against the great weight of the evidence because that is a "state-law argument" and a "federal court is only allowed to review issues of federal law in a habeas proceeding." Nash v. Eberlin, 258 F. App'x 761, 764 n.4 (6th Cir. 2007). See also Artis v. Collins, 14 F. App'x 387 (6th Cir. 2001) (declining to grant certificate of appealability to habeas petitioner on claim that jury's verdict was against the manifest weight of the evidence). Hanserd is therefore not entitled to federal habeas relief on this claim.

B

Hanserd next alleges that the state trial court deprived him of a fair trial when it allowed the prosecutor to introduce evidence that Hanserd had been involved in a separate armed robbery about thirty minutes before the carjacking and murder. The Michigan Court of Appeals

considered this claim on direct review and rejected it: Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *5.

Defendant's primary argument is that there were not sufficient special circumstances between the shooting at the Circle K and the robbery at the Stop N Shop to be admissible to prove identity under *Golochowicz*. However, both crimes took place outside convenience stores and both crimes involved the use of a gun. That the caliber of the gun used [*14] could have been different is a minor detail that would go to the weight of the evidence rather than the admissibility. See People v. Barrera, 451 Mich. 261, 289, 547 N.W.2d 280; 451 Mich. 261, 547 NW2d 280 (1996). Both crimes also involved robberies and were committed within a close proximity and a short time of one another. Both crimes involved defendant, as identified by witnesses. The inconsistencies relied on by defendant to establish that the crimes were not similar was information for the jury to determine the weight of the evidence; the differences did not have a bearing on the admissibility of the evidence. Barrera, 451 Mich. at 289. The trial court did not abuse its discretion.

Hanserd has not established that the Michigan Court of Appeals' ruling was contrary to, or an unreasonable application of, clearly established federal law. To the extent that the state trial court violated the Michigan Rules of Evidence when it admitted this evidence, that was an error of state law. And, as noted above, "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States"). This claim is therefore not cognizable on federal habeas review. [*15] See Serra v. Michigan Dept. of Corrections, 4 F.3d 1348, 1354 (6th Cir. 1993). Moreover, Hanserd not shown that that the trial court's evidentiary rulings were "so egregious" that they violated his federal due process rights. McAdoo v. Eno, 365 F.3d 487, 494 (6th Cir. 2004) (explaining that only when an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness" may it violate federal due process rights and warrant federal habeas relief). Hanserd has therefore failed to establish a right to federal habeas relief on this claim.

C

Hanserd v. Trierweiler

Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *4-3.

Hanserd next argues that the state trial court denied him a fair trial when it refused to appoint him an expert to testify about the problems of eyewitness identification. The Michigan Court of Appeals considered this claim on direct review and rejected it:

Defendant goes through a lengthy analysis of People v. Anderson, 389 Mich. 155, 205 N.W.2d 461; 389 Mich. 155, 205 NW2d 461 (1973), overruled on other grounds in People v. Hickman, 470 Mich. 602, 684 N.W.2d 267; 470 Mich. 602, 684 NW2d 267 (2004), as well as psychological studies and cases discussing the problems with eyewitness identification. However, nowhere in *Anderson* or current case law is there a holding that eyewitness identifications are inherently unreliable. Defendant does not cite nor is there any current case law that forbids the use of eyewitness identification. Again, the jury is responsible for determining the credibility of eyewitness identification. [*16] Davis, 241 Mich.App. at 700.

Defendant argues that the unreliability of eyewitness identification made an expert necessary for proper investigation and trial testimony. He further asserts that the line-up procedures used in this case were impermissible and suggestive, and that an expert was necessary to explain the effects of a tainted lineup on identification. However, defendant did not object to the lineup procedure when it occurred, nor did defendant object to the in-court identification. Furthermore, the record does not reflect procedures that were impermissibly suggestive. We will not review identification issues on appeal if not raised before the trial court. People v. Whittfield, 214 Mich.App. 348, 351, 543 N.W.2d 347; 214 Mich. App. 348, 543 NW2d 347 (1995).

Moreover, defendant has not demonstrated that he could not safely proceed to trial absent an expert. Tanner, 469 Mich. at 443-444. In People v. Cooper, 236 Mich.App. 643, 658, 601 N.W.2d 409; 236 Mich. App. 643, 601 NW2d 409 (1999) this Court noted that it would be obvious to jurors that memories and perceptions of an eyewitness are sometimes inaccurate. Defense counsel extensively cross-examined each witness and raised the inconsistencies in testimony that defendant points to on appeal. The issues with identification raised by defendant were questions of credibility properly left to the determination of the jury. Davis, 241 Mich.App. at 700. The trial court did not abuse its discretion in denying [*17] defendant's request for an appointed expert. Tanner, 469 Mich. at 442. The United States Supreme Court precedent that would most closely [*18] address petitioner's claim is Ake v. Oklahoma, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In *Ake*, the Supreme Court held that when an indigent defendant demonstrates to a trial judge that his or her sanity at the time of the commission of the offense is to be a significant factor at trial, the state must provide a criminal defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense. But Hanserd has not identified any Supreme Court precedent that expands *Ake* to the appointment of non-psychiatric experts generally or identification experts specifically. And this Court is aware of none. See Ford v. Dreke, 135 F. App'x 769, 771-72 (5th Cir. 2005) (new rule proposed by habeas petitioner, requiring the appointment of an expert on eyewitness identification, did not fall within one of the exceptions to the rule against the application of a new rule on collateral review); Jackson v. Ylst, 921 F.2d 882, 886 (9th Cir. 1990) (habeas petitioner's claim that his due process rights were violated when he was denied the appointment of an expert on eyewitness identification proposed a new rule in violation of Teague v. Lane, 489 U.S. 208, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and therefore could not serve as a basis for federal habeas relief). Hanserd has therefore not

established that he is entitled to federal habeas relief [*19] on this claim.

D

Hanserd next contends that the state trial court erred when it refused to give the jurors an instruction concerning the inherent unreliability of eyewitness identification. At the beginning of trial, defense counsel indicated that he gave the court and the prosecution a copy of a proposed instruction on the eyewitness identification but he did not specify the contents of that instruction. At the conclusion of trial, defense counsel asked that this instruction be read to the jury. Defense counsel acknowledged that the court was going to read the jurors the standard jury instruction on identification, but counsel also proposed a "custom jury instruction that goes a little bit more in detail and specifically cites holdings and language from *People v. Anderson*,² that I am still asking the Court to give in addition to or instead of 7.8." (ECF #10-12 at Pg. ID 602.) The prosecutor objected to the proposed instruction on the ground that it took the holding in *Anderson* out of context and that the proposed instruction was more in the form of advocacy than an instruction. The trial court agreed that the proposed instruction appeared "to be somewhat advocacy as opposed to the standard [*20] [jury instruction], that's why we do that." (*Id.*) The court therefore defense counsel's request and indicated that it would give the standard jury instruction on identification: (*Id.*)

The Michigan Court of Appeals reviewed this claim on direct appeal and rejected it:

The trial court gave instructions on the presumption of innocence and the burden of proof. With regard to identification, the trial court denied defendant's request for a special instruction and instead gave the following:

One of the issues in this case is the identification of defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it. In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time,

how long the witness was watching, whether the witness has seen or known the offender before, how far away the witness was, whether the area was well lighted, and the witness's state of mind at that time.

Also, think about the circumstances at the time of the identification, such as how much time had passed as to the crime, how [*21] sure the witness was about the identification, and the witness's state of mind during the identification.

You may also consider any times that the witness has failed to identify the defendant or made an identification or gave a description that did not agree with his or her identification of the defendant during trial. You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because, then, it may be more reliable. However, you may use the identification testimony alone to convict the defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The trial court also gave an instruction on inconsistent statements and how the jury could use them to determine whether the trial testimony was truthful and to determine the facts of the case. Defendant's proposed instruction was not a proper recitation of the applicable law. (*People v. McGhee*, 288 Mich. App. 600, 606 (709 N.W.2d 595 (2005)). It recapped commentary in *[People v. Anderson* (389 Mich. 155, 205 N.W.2d 461 (1973)) about the problems inherent in eyewitness testimony. However, as discussed above, nowhere in *Anderson* or current case law was there a holding [*22] that eyewitness identifications are inherently unreliable. Defendant's proposed instruction skewed *Anderson* and would likely have confused the jury. Defendant's proposed instruction was better suited as a possible defense argument rather than as an instruction for the jury. The instructions given by the trial court adequately protected defendant's rights. The jury had adequate instruction to be able to determine what weight and credibility to give the identification evidence, and the trial court did not abuse its discretion in declining to give the proposed instruction.

² *People v. Anderson*, 389 Mich. 155, 205 N.W.2d 461 (Mich. 1973).

Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL

Hanserd has not established that the Michigan Court of Appeals' ruling was contrary to, or an unreasonable application of, clearly established federal law. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack upon the constitutional validity of a state court conviction is even greater than the showing required in a direct appeal. The question in such a collateral proceeding is whether the allegedly-improper instruction so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, [*23] or even "universally condemned," and an "omission or an incomplete instruction[] is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 154-155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). Furthermore, the challenged instruction must not be judged in isolation but must be considered in the context of the entire jury charge. See *Jones v. United States*, 527 U.S. 373, 391, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999).

Hanserd has not met this demanding standard. He has not identified any clearly established federal law that he was entitled to the instruction he sought. Nor has Hanserd established that the state trial court unreasonably applied Supreme Court precedent when it refused to give his proposed instruction. For these reasons, Hanserd has not established that he is entitled to federal habeas relief on this claim.

E

Hanserd next argues that he was denied the effective assistance of counsel. Federal claims of ineffective assistance of counsel are subject to the deferential two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* asks: (1) whether counsel was deficient in representing the defendant; and (2) whether counsel's alleged deficiency prejudiced the defense so as to deprive the defendant of a fair trial. See *id. at 687*. To meet the first prong, a petitioner must establish that his attorney's representation "fell below an objective [*24] standard of reasonableness," and must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that . . . the challenged action 'might be considered sound trial strategy.'" *Id. at 688, 689*. The "prejudice"

component of a *Strickland* claim "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). Prejudice, under *Strickland*, requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

The Court will now examine each of Hanserd's claims of ineffective assistance in turn.

1

Hanserd first argues that his trial counsel was ineffective when counsel failed to call Mitchell Braddock as a witness at trial. Braddock originally contacted the police while he was in prison and indicated that he would be willing to incriminate Hanserd as the shooter in exchange for a sentence reduction. (See Exhibits C, D, E, and F to the Petition.) However, at the preliminary examination, Braddock testified both that he [*25] did not remember what happened the night of the murder and that he did not see anything. (See ECF #10-2 at Pg. ID 301.) Braddock further testified that he saw a man identified as "Little Mark" at the convenience store and that "Little Mark" was not Hanserd. (See *id.* at Pg. ID 304.) Braddock then became evasive when the prosecutor tried to refresh his memory, claiming that he had no memory of the day of the shooting, that he was often "high," and that he did not want to talk about it. (*Id.* at Pg. ID 301-05.) Hanserd insists that Braddock could have provided testimony that the man identified as "Little Mark," and not Hanserd, was not the shooter.

The Michigan Court of Appeals reviewed this claim on direct review and rejected it:

Defendant argues that counsel should have called a witness who testified at the preliminary examination, maintaining the witness said that defendant was not the shooter. However, defendant mischaracterizes the witness's actual testimony. The witness testified that a man named "little Mark" was not defendant. However, the witness never said that "little Mark", and implicitly not defendant, was responsible for the shooting; instead the witness claimed he did [*26] not remember the events on April 17, 2004. Defendant's assertion that trial counsel erred in failing to call the witness is meritless. Based on the preliminary examination

Hanserd v. Trierweiler

testimony that the witness did not remember the incident, the witness would not have helped the defense. Additionally, the testimony from the preliminary examination did not assist the defense because the witness never said "little Mark" and not defendant was the shooter.

Defendant maintains that the prosecution's whole case was built around the eyewitness's testimony and that if called at trial his witness would have testified that defendant did not commit the crime. Defendant offers no proof to support his position. Defendant cites to a police report and letters from the witness; however, this was not evidence introduced at trial or included in the lower court record. Defendant merely claims that favorable testimony would have been offered. However, based on the witness' unpredictability, it cannot be said how he would have testified. The prosecutor indicated at the preliminary examination that the witness was expected to testify differently. And the witness consistently maintained throughout the preliminary examination [*27] that he did not remember the incident. In light of the evidence offered by the prosecution at trial and the witness's unpredictability, defense counsel's decision not to call the witness appears to have been a sound trial strategy.

*People v. Hanserd, 2012 Mich. App. LEXIS 1734, 2012 WL 3966227, at *7.*

Hanserd has not established that the Michigan Court of Appeals' ruling was contrary to, or an unreasonable application of, clearly established federal law. In the petition, Hanserd mischaracterizes Braddock's testimony. Braddock did not testify, as Hanserd claims, that Hanserd was not the shooter. Nor did Braddock testify that "Little Mark," and not Hanserd, was the shooter. Indeed, Braddock repeatedly said that he did not remember anything and was unwilling to definitively say anything about the shooting. It was not ineffective assistance for Hanserd's counsel to not call a witness who repeatedly testified at the preliminary examination that he had no information to provide about the shooting. See *Millender v. Adams, 376 F.3d 520, 527 (6th Cir. 2004)* (defense counsel has no obligation to present evidence or testimony that would not have exculpated the defendant). The Michigan Court of Appeals' rejection of this ineffective assistance of counsel claim was therefore not unreasonable. Thus, Hanserd is not entitled [*28] to federal habeas relief on this claim.

2

In Hanserd's amended habeas petition, he claims that his trial counsel was ineffective when counsel failed to move for the suppression of Lueders' pre-trial identification. Hanserd argues that the pre-trial identification should have been suppressed because (a) there was no counsel present at a photographic lineup and (b) Lueders was informed after she had identified Hanserd at the lineup that she had picked out the right person. Hanserd is not entitled to federal habeas relief with respect to either of these claims.³

a

Hanserd first argues that his trial counsel should have moved to exclude the photographic identification because Hanserd did not have counsel present at the lineup. However, Hanserd has not identified any authority to support the proposition that criminal defendants have a federal constitutional right to have counsel present at a photographic lineup. Indeed, a pre-trial photographic identification is not a critical stage under the *Sixth Amendment* at which counsel is required to be present. See *United States v. Ash, 413 U.S. 300, 321, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973)*; *Van v. Jones, 475 F.3d 292, 311 (6th Cir. 2007)*. The absence of counsel at the photographic lineup therefore provided no basis to suppress the identification. Thus, Hanserd's counsel was not ineffective [*29] for failing to move to exclude the identification on that basis. See *United States v. Sanders, 404 F.3d 980, 986 (6th Cir. 2005)* (counsel is not ineffective for failing to make a futile objection).

b

Hanserd next claims that his trial counsel should have moved to suppress the pre-trial identification because the lineup was unduly suggestive. More specifically, Hanserd argues that the officer who conducted the lineup told Lueders after she positively identified Hanserd that she had picked out the right person, and that post-identification statement rendered the lineup

³ As noted in Section III above, Respondent has raised serious arguments that these claims are procedurally defaulted and/or were filed after the expiration of the applicable statute of limitations. However, because the Court concludes that the claims fall on the merits, it will consider them.

Hanserd v. Trierweiler

v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. See *Castro v. United States, 310 F.3d 900, 901 (6th Cir. 2002)*.

Here, jurists of reason would not debate the Court's conclusion that Hanserd 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 Hanserd a certificate of appealability.

Finally, although this Court declines to issue Hanserd 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. [*32] 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 Hanserd's claims, an appeal could be taken in good faith. Accordingly, the Court GRANTS Hanserd permission to proceed *in forma pauperis* on appeal.

VI

Accordingly, for the reasons stated above, the Court 1) DENIES WITH PREJUDICE Hanserd's petition for a writ of habeas corpus and his amended petition for a writ of habeas corpus (ECF ## 1, 11), 2) DENIES Hanserd a certificate of appealability, and (3) GRANTS Hanserd permission to proceed *in forma pauperis* on appeal.

IT IS SO ORDERED.

/s/ Matthew F. Leitman

MATTHEW F. LEITMAN

UNITED STATES DISTRICT JUDGE

Dated: October 30, 2018

JUDGMENT

The above entitled matter having come before the Court on a petition for a writ of habeas corpus, Honorable

Matthew F. Leitman, a United States District Court Judge, presiding, and in accordance with the Opinion and Order entered on October 30, 2018.

(1) The petition for a writ of habeas corpus is DISMISSED WITH PREJUDICE.

(2) A certificate of appealability is DENIED.

(3) Petitioner is GRANTED leave to appeal *in forma pauperis*.

Dated at Flint, Michigan, this 30th day of October, 2018.

Approved:

/s/ Matthew F. Leitman

MATTHEW F. LEITMAN

United [**33] States District Judge

End of Document

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS HANSERD,

Petitioner,

v

TONY TRIERWEILER,

Respondent.

APPENDIX D

A Neutral
As of: July 29, 2020 6:01 PM Z

People v. Hanserd

Court of Appeals of Michigan
September 11, 2012, Decided
No. 305804

Reporter
2012 Mich. App. LEXIS 1734 *; 2012 WL 3966227

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARCUS DONTI HANSERD, Defendant-Appellant.

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

Subsequent History: Leave to appeal denied by *People v. Hanserd*, 493 Mich. 952, 828 N.W.2d 45, 2013 Mich. LEXIS 356 (Apr. 1, 2013)

Request denied by, Motion granted by, Motion denied by *People v. Hanserd*, 2014 Mich. App. LEXIS 2960 (Mich. Ct. App. Dec. 11, 2014)

Habeas corpus proceeding at, Motion denied by, Without prejudice *Hanserd v. Woods*, 2017 U.S. Dist. LEXIS 76995 (E.D. Mich., May 22, 2017)

Prior History: [*1] Saginaw Circuit Court, LC No. 10-034377-FC.

Core Terms

identification, credibility, eyewitness, shooting, shooter, unreliable, ineffective, lineup, scene

Judges: Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

Opinion

PER CURIAM.

A jury convicted defendant of first-degree murder, *MCL 750.316(1)(a)*, carjacking, *MCL 750.529a*, felon in possession of a weapon, *MCL 750.224f*, carrying a dangerous weapon with unlawful intent, *MCL 750.226*, and four counts of possession of a firearm during the commission of a felony, *MCL 750.227b*. Defendant was sentenced as a second-offense offender, *MCL 769.10*, to concurrent prison terms of life for first-degree murder, 356 to 480 months for carjacking, 47 to 90 months for felon in possession of a firearm, and 47 to 90 months for carrying a dangerous weapon with unlawful intent. Defendant also received a consecutive two-year prison term for each count of felony-firearm, to be served concurrently to each other. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the murder of Sheric Harris and related crimes that occurred after midnight on April 17, 2004. Two witnesses testified that defendant had committed a robbery at gun point at a Stop N Shop just before the shooting occurred at the Circle K party store. Defendant was identified by a witness at trial [*2] as the shooter from the Circle K.

The same witness had also identified defendant in a corporeal lineup before trial. Evidence that the victim had been driving a Camaro, that defendant left the scene of the shooting in a Camaro, and that defendant's blood was found in the Camaro the victim had been driving once it was recovered, was also presented.

First, defendant argues that there was insufficient evidence presented to establish his identity as the shooter. We disagree. We review sufficiency of the evidence issues de novo. *People v. Erickson*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id. at 196*. The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable doubt. *People v. Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Generally circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v. Carines*, 460 Mich 750, 757; 697 NW2d 130 (1999). What inferences can be drawn from the [*3] evidence and the weight given to those inferences is a question left to the jury. *People v. Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v. Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). We will not interfere with the jury's role in determining credibility and weight of the evidence. *People v. Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Instead, when reviewing whether there was sufficient evidence, we are "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v. Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The prosecutor must prove identity in all criminal prosecutions because identity is an element of every crime. *People v. Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The jury is responsible for determining the credibility of identification evidence. *People v. Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Generally, a positive identification by a witness is sufficient evidence to support a conviction. *Id.*

Defendant argues that there were a number of inconsistencies between the identifying witness's [*4] testimony and her previous statements to police

that render her identification of defendant unreliable.¹ Additionally, defendant argues that there were inconsistencies between various witnesses' testimony, further adding to the unreliability of the identification. However, all problems that defendant points out with the identification are credibility and weight issues, which are determinations to be made by the jury. *Davis*, 241 Mich App at 700; *Hardiman*, 466 Mich at 428. We will not interfere with the jury's role in determining credibility. *Wolfe*, 440 Mich at 514. When looking at the testimony in a light most favorable to the prosecution, a jury could have reasonably determined that defendant was the shooter. Defendant was identified as the shooter both in court and in a physical lineup before trial. An identification by a witness is sufficient evidence to support a conviction. *Davis*, 241 Mich App at 700. Additionally, there was evidence that defendant's blood was found in the car the victim had been driving. There was sufficient evidence presented for the jury to reasonably determine that defendant was the shooter.

Defendant also argues that there was insufficient evidence because the prosecution did not prove when defendant's DNA was deposited in the car. We disagree. Defendant offers no authority to support the proposition that the prosecutor had to prove that the DNA was deposited during the commission of the crime. A party cannot simply announce a position and then leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v. Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v. Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted). Additionally, the prosecution does not have to negate every possible theory of innocence and must instead prove its theory beyond a reasonable doubt. *Nowack*, 462 Mich at 400. The prosecution offered testimony to establish that the victim was driving the Camaro on the night of the shooting, that defendant was the shooter, that defendant drove from the scene in the Camaro, and that defendant's DNA profile matched the DNA profile of the blood samples taken from the Camaro. [*6] Given this evidence, the jury could have reasonably inferred that defendant shot the victim, stole the car, and left his DNA in the car. The prosecutor provided enough evidence to prove its theory beyond a reasonable doubt and the jury was responsible for determining what credibility and

¹We note that defense counsel brought out these inconsistencies during [*5] cross-examination.

weight to give the evidence.

Defendant points out that the prosecutor argued that the victim was the driver of the Camaro, but that the witnesses to the shooting testified that the victim was the passenger in a third car. Defendant asserts that the prosecutor's theory was therefore insufficient to support the jury's verdicts. Defendant also maintains that the witnesses' accounts were inconsistent with the Stop N Shop robbery because defendant left witnesses at the first scene but killed someone at the second scene. It is possible that the victim got out of the Camaro and was sitting in the third car talking to someone. Such an inference would be consistent with the prosecutor's theory. Regardless of where the victim was, the jury had sufficient evidence available to make reasonable inferences that defendant shot the victim and stole the Camaro. Moreover, it does not matter why defendant shot the victim [7] but did not shoot anyone at the first scene. All these problems and inconsistencies are credibility and weight issues that the jury was responsible for sorting out.

Defendant asserts that medical examiner's testimony about bullet paths indicated that the shooting could not have occurred in the manner claimed by the witnesses. However, because it cannot be determined which wounds the victim received first, and the victim was moving around during the incident, there is no definitive indication that the autopsy report was inconsistent with the testimony. Additionally, it was up to the jury to determine what weight to give the evidence. *Hardiman*, 466 Mich at 428.

Next, defendant argues that the trial court erred in denying his motion for an appointed expert to explain problems associated with eyewitness identification. We disagree. We review a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert for an abuse of discretion. *People v. Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion occurs when the decision falls outside the range of principled results. *People v. Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). The [8] trial court is not required to provide an indigent defendant with funds for an expert witness. *Tanner*, 469 Mich at 442. Instead, an expert will be provided for when the indigent defendant can demonstrate "a nexus between the facts of the case and the need for an expert." *Id. at 443* (internal quotation marks and citation omitted). The defendant must also demonstrate that he cannot safely proceed to trial absent the expert. *Id. at 443, 444*.

Defendant goes through a lengthy analysis of *People v. Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled on other grounds in *People v. Hickman*, 470 Mich 602; 684 NW2d 267 (2004), as well as psychological studies and cases discussing the problems with eyewitness identification. However, nowhere in *Anderson* or current case law is there a holding that eyewitness identifications are inherently unreliable. Defendant does not cite nor is there any current case law that forbids the use of eyewitness identification. Again, the jury is responsible for determining the credibility of eyewitness identification. *Devis*, 241 Mich App at 700.

Defendant argues that the unreliability of eyewitness identification made an expert necessary for proper investigation and [9] trial testimony. He further asserts that the line-up procedures used in this case were impermissible and suggestive, and that an expert was necessary to explain the effects of a tainted lineup on identification. However, defendant did not object to the lineup procedure when it occurred, nor did defendant object to the in-court identification. Furthermore, the record does not reflect procedures that were impermissibly suggestive. We will not review identification issues on appeal if not raised before the trial court. *People v. Whiffield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Moreover, defendant has not demonstrated that he could not safely proceed to trial absent an expert. *Tanner*, 469 Mich at 443-444. In *People v. Coopner*, 236 Mich App 643, 658; 601 NW2d 409 (1999) this Court noted that it would be obvious to jurors that memories and perceptions of an eyewitness are sometimes inaccurate. Defense counsel extensively cross-examined each witness and raised the inconsistencies in testimony that defendant points to on appeal. The issues with identification raised by defendant were questions of credibility properly left to the determination of the jury. *Davis*, 241 Mich App at 700. The [10] trial court did not abuse its discretion in denying defendant's request for an appointed expert. *Tanner*, 469 Mich at 442.

Defendant also argues that the trial court erred in admitting other acts evidence under *MRE 404(b)*. We disagree. We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v. Waclewski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). *MRE 404(b)* prohibits evidence of other acts if being offered to prove the character of the defendant. However, *MRE 404(b)* allows other acts evidence for a purpose other than character such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system

in doing an act, knowledge, identity, or absence of mistake or accident." *People v. VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994), established that *MRE 404(b)* evidence will be admissible when (1) the evidence is offered to prove something other than character, (2) the evidence is relevant under *MRE 402*, and (3) the evidence's probative value is not substantially outweighed by its prejudicial effect. *VanderVliet*, 444 Mich at 74-75. Moreover, when using other acts evidence under *MRE 404(b)* to establish identity, [11] the following must be established:

(1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *People v. Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), citing *People v. Galachowicz*, 413 Mich 298, 307-309, 319 NW2d 518 (1982).

Finally, only relevant evidence is admissible. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. *MRE 401*. However, relevant evidence will be excluded if the probative value is substantially outweighed by the prejudicial effect. *MRE 403*; *People v. Orlik*, 249 Mich App 297, 305-306; 642 NW2d 417 (2001). In order to admit evidence of a defendant's other acts, the trial court must still conduct an *MRE 403* balancing test. *VanderVliet*, 444 Mich at 75.

Defendant's primary argument is that there were not sufficient special circumstances between the shooting at the Circle K and the robbery at the Stop N Shop to be admissible to prove [12] identity under *Golachowicz*. However, both crimes took place outside convenience stores and both crimes involved the use of a gun. That the caliber of the gun used could have been different is a minor detail that would go to the weight of the evidence rather than the admissibility. See *People v. Barrera*, 451 Mich 261, 289; 547 NW2d 280 (1996). Both crimes also involved robberies and were committed within a close proximity and a short time of one another. Both crimes involved defendant, as identified by witnesses. The inconsistencies relied on by defendant to establish that the crimes were not similar was information for the jury to determine the weight of the evidence; the differences did not have a bearing on

the admissibility of the evidence. *Barrera*, 451 Mich at 289. The trial court did not abuse its discretion.

Defendant also argues that he was denied a fair trial when the trial court denied his request for a special jury instruction on eyewitness identification. We disagree. Claims of instructional error are reviewed *de novo*. *People v. Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). However, a trial court's decision on whether a particular instruction is applicable to the [13] facts of a case is reviewed for an abuse of discretion. *Id.* When reviewing jury instructions for error, this Court reviews the instructions as a whole. *People v. Richardson*, 490 Mich 115, 119; 803 NW2d 302 (2011). The trial court must instruct the jury on the applicable law and the instructions must include "all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v. McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). However, imperfect instructions are not grounds for reversal if the instructions given "fairly presented the issues to be tried and adequately protected the defendant's rights." *People v. Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011).

The trial court gave instructions on the presumption of innocence and the burden of proof. With regard to identification, the trial court denied defendant's request for a special instruction and instead gave the following:

One of the issues in this case is the identification of defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.

In deciding [14] how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness has seen or known the offender before, how far away the witness was, whether the area was well lighted, and the witness's state of mind at that time. Also, think about the circumstances at the time of the identification, such as how much time had passed as to the crime, how sure the witness was about the identification, and the witness's state of mind during the identification. You may also consider any times that the witness has failed to identify the defendant or made an identification or gave a description that did not agree with his or her identification of the defendant during trial. You should examine the witness's identification testimony carefully. You may consider

whether other evidence supports the identification, because, then, it may be more reliable. However, you may use the identification testimony alone to convict the defendant as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

The trial court [*15] also gave an instruction on inconsistent statements and how the jury could use them to determine whether the trial testimony was truthful and to determine the facts of the case.

Defendant's proposed instruction was not a proper recitation of the applicable law. *McGhee*, 268 Mich App at 606. It recapped commentary in *Anderson* about the problems inherent in eyewitness testimony. However, as discussed above, nowhere in *Anderson* or current case law was there a holding that eyewitness identifications are inherently unreliable. Defendant's proposed instruction skewed *Anderson* and would likely have confused the jury. Defendant's proposed instruction was better suited as a possible defense argument rather than as an instruction for the jury. The instructions given by the trial court adequately protected defendant's rights. The jury had adequate instruction to be able to determine what weight and credibility to give the identification evidence, and the trial court did not abuse its discretion in declining to give the proposed instruction.

Defendant also argues in his standard four brief that he was denied the effective assistance of counsel because defense counsel did not call a particular witness [*16] to testify at trial. We disagree. Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v. Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008). Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. U.S. Const, Am VI; Const 1963, art 1 § 20. Generally, effective assistance is presumed and the defendant carries the burden of proving otherwise. *People v. LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below professional norms, and (2) that but for counsel's ineffectiveness, the ultimate result would have been different. *People v. Frazier*, 478 Mich 231, 243; 733 NW2d 713, cert den 552 U.S. 1071; 128 S Ct 712; 169 L Ed 2d 571 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People*

v. Odom, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel has wide discretion in trial strategy, including whether to call or question witnesses, and what evidence to present. *People v. Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). [*17] Failure to call a particular witness will constitute ineffective assistance of counsel only when the failure would deprive the defendant of a substantial defense. *People v. Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that may have made a difference in the outcome of the trial. *People v. Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). But, this Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy. *Payne*, 285 Mich App at 190. This Court will also not judge counsel's competence with the advantage of hindsight. *Id.*

Defendant argues that counsel should have called a witness who testified at the preliminary examination, maintaining the witness said that defendant was not the shooter. However, defendant mischaracterizes the witness's actual testimony. The witness testified that a man named "little Mark" was not defendant. However, the witness never said that "little Mark", and implicitly not defendant, was responsible for the shooting; instead the witness claimed he did not remember the events on April 17, 2004. Defendant's assertion that [*18] trial counsel erred in failing to call the witness is meritless. Based on the preliminary examination testimony that the witness did not remember the incident, the witness would not have helped the defense. Additionally, the testimony from the preliminary examination did not assist the defense because the witness never said "little Mark" and not defendant was the shooter.

Defendant maintains that the prosecution's whole case was built around the eyewitness's testimony and that if called at trial his witness would have testified that defendant did not commit the crime. Defendant offers no proof to support his position. Defendant cites to a police report and letters from the witness; however, this was not evidence introduced at trial or included in the lower court record. Defendant merely claims that favorable testimony would have been offered. However, based on the witness' unpredictability, it cannot be said how he would have testified. The prosecutor indicated at the preliminary examination that the witness was expected to testify differently. And the witness consistently maintained throughout the preliminary examination that

he did not remember the incident. In light of the evidence [*19] offered by the prosecution at trial and the witness's unpredictability, defense counsel's decision not to call the witness appears to have been a sound trial strategy.

Affirmed.

/s/ Deborah A. Servitto

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

End of Document