No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DRASHAWN BARTLETT, Petitioner

v.

ANNA VALENTINE, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

APPENDIX

No. 20-5580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DRASHAWN BARTLETT,

Petitioner-Appellant,

v.

ANNA VALENTINE, Warden,

Respondent-Appellee.

ORDER

Before: BATCHELDER, Circuit Judge.

Drashawn Bartlett, a pro se Kentucky prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Bartlett moves the court for a certificate of appealability (COA) and to proceed in forma pauperis on appeal.

A jury convicted Bartlett and co-defendant James Girton of second-degree manslaughter and first-degree robbery. The trial court sentenced Bartlett to twenty-eight years in prison. The Kentucky Supreme Court affirmed. *See Girton v. Commonwealth*, Nos. 2007-SC-000289-MR, 2007-SC-000293-MR, 2009 WL 427229 (Ky. Feb. 19, 2009).

Bartlett then filed a motion to vacate his sentence in the state trial court, claiming that he received ineffective assistance of trial counsel and that his convictions violated the Double Jeopardy Clause. The trial court denied relief, and the Kentucky Court of Appeals affirmed. *See Bartlett v. Commonwealth*, No. 2013-CA-001218-MR, 2014 WL 7339200 (Ky. Ct. App. Dec. 24, 2014). Bartlett did not appeal to the Kentucky Supreme Court.

Bartlett next filed a § 2254 petition in the district court, raising the following claims: (1) the trial court erred by denying his request for a jury instruction on facilitation; (2) the evidence was insufficient for the jury to convict him of first-degree robbery; (3) the trial court erred by admitting irrelevant and prejudicial evidence; (4) the trial court erred by denying his motion to

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suppress; and (5) his trial attorney was ineffective for not presenting additional mitigating evidence during the penalty phase of his trial and for not objecting to a jury instruction that resulted in a double-jeopardy violation.

A magistrate judge filed a report that concluded that Bartlett was not entitled to relief on the merits of his first, second, and fifth claims; he procedurally defaulted his third claim; and his fourth claim was not cognizable in federal habeas proceedings. The magistrate judge therefore recommended denying Bartlett's petition. The district court adopted the report over Bartlett's objections, denied the petition, and declined to issue a COA.

Bartlett appealed and has filed a COA application. Bartlett seeks appellate review of only his claim that he received ineffective assistance of counsel with respect to the alleged double-jeopardy violation. By limiting his COA application to this issue, Bartlett has forfeited appellate review of the district court's resolution of his other claims. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Kelly v. McKee*, 847 F.3d 316, (6th Cir. 2017).

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). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The state grand jury charged Bartlett with capital murder for killing Adolfo Jiminez intentionally or wantonly under circumstances manifesting extreme indifference to human life. The grand jury also charged Bartlett with first-degree robbery for being armed with a deadly weapon or causing physical injury to Jiminez in the course of committing a theft. As to the murder charge, the trial court instructed the jury that it could find Bartlett guilty of the lesser-included offense of second-degree manslaughter, but only if it found that he was guilty of robbery. *See Bartlett*, 2014 WL 7339200, at *2. And the trial court instructed the jury, that to find Bartlett guilty of robbery, it had to find that he used a weapon or caused a physical injury to Jiminez. *See id.* As stated, the jury convicted Bartlett of second-degree manslaughter and robbery. The

Kentucky Court of Appeals rejected Bartlett's claim that these convictions violated the Double Jeopardy Clause because the death of the victim is an element of manslaughter, but not of robbery, and theft is an element of robbery, but not of manslaughter. *See id.*

As the district court noted, the Kentucky Court of Appeals essentially applied the double-jeopardy rule from *Blockburger v. United States*, 284 U.S. 299 (1932), which states that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. And because the two offenses do not require proof of the same facts, the district court concluded that Bartlett failed to satisfy the *Blockburger* test. The district court also rejected Bartlett's contention that by acquitting him of murder, the jury impliedly acquitted him of robbery because robbery was a necessary element of the manslaughter charge. And because Bartlett failed to establish an underlying double-jeopardy violation, the district court concluded that his attorney did not perform ineffectively by failing to raise a double-jeopardy objection to his robbery conviction.

In his COA application, Bartlett's double-jeopardy claim rests solely on whether the jury impliedly acquitted him of manslaughter and robbery when it acquitted him of murder. *See Saulsberry v. Lee*, 937 F.3d 644, 649 (6th Cir.) (discussing implied acquittals), *cert. denied*, 140 S. Ct. 445 (2019). He argues that because robbery was an essential element of both murder and manslaughter, his acquittal on the charge of murder implicitly acquitted him of robbery, which in turn implicitly acquitted him of manslaughter. Supreme Court precedent forecloses this argument, however. *See Ohio v. Johnson*, 467 U.S. 493, 501 (1984) ("Respondent's argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicount indictment immediately raises a double-jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now."). Consequently, the jury's not-guilty verdict on the murder charge did not implicitly acquit Bartlett of manslaughter and robbery, and therefore his convictions

did not result in a double-jeopardy violation. Thus, reasonable jurists could not disagree with the district court's conclusion that Bartlett's attorney did not perform ineffectively by not raising a double-jeopardy objection to his convictions.

Accordingly, the court **DENIES** Bartlett's COA application and **DENIES** as moot his motion to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

DRASHAWN BARTLETT — Plaintiff

v. — Civil Action No. 3:15-CV-00366-RGJ

AARON SMITH, *WARDEN* — Defendant

* * * * *

ORDER

This matter is before the Court on Drashawn Bartlett's ("Bartlett") Objections to Magistrate Judge H. Brent Brennenstuhl's ("Magistrate Judge") Report and Recommendation ("R&R") denying his petition for writ of habeas corpus made pursuant to 28 U.S.C § 2254 ("Petition"). Respondent, Aaron Smith has not filed a response, and the time for doing so has expired. This matter is now ripe, and for the reasons stated below the Court **DENIES** Bartlett's Objections and **ADOPTS** the R&R. Bartlett also seeks appointment of counsel to assist with additional briefing on the R&R. [DE 22]. The Court does not require more briefing, and therefore, Bartlett's Motion to Appoint Counsel, [DE 22] is **DENIED**.

I. Background

Bartlett and his co-defendant James Girton ("Girton") were convicted of first-degree robbery and second-degree manslaughter following a two-week trial in Jefferson County Kentucky Circuit Court. [DE 17 at 626–27]. Bartlett appealed, and the Supreme Court of Kentucky affirmed his conviction. [*Id.* at 631]. Bartlett then filed a petition for rehearing, which the Supreme Court of Kentucky denied, and which rendered the judgment final. [*Id.*]. Bartlett filed a motion to vacate, set aside, or correct his sentence pursuant to Ky. R. Crim. P.

Ex B

11.42 with the Jefferson County Circuit Court. [*Id.* at 631–32]. After an evidentiary hearing, Bartlett's motion was denied. [*Id.*]. Bartlett appealed to the Court of Appeals of Kentucky, who affirmed the order of the Jefferson Circuit Court and denied Bartlett's motion for reconsideration. [*Id.* at 632]. On May 14, 2015, Bartlett filed this action seeking habeas relief under § 2254. [*Id.*].

The Petition alleged five violations of Bartlett's due process rights as grounds for relief: 1) the trial court refused to instruct the jury on facilitation as a lesser included offense to robbery; 2) the trial court denied his motion for directed verdict on the robbery in the first-degree charge; 3) the trial court improperly admitted irrelevant and unduly prejudicial evidence against him; 4) the search warrant for his apartment was invalid and his statement to police was not voluntary; 5) his counsel was ineffective for failing to present mitigating evidence at sentencing and for failing to object to jury instructions that subjected him to double jeopardy. Only the second and fifth grounds are at issue here.

The Magistrate Judge found Bartlett was not entitled to habeas relief and recommended denying the Petition. [*Id.* at 650]. He also recommended that the Court deny a Certification of Appealability. [*Id.*]. Bartlett objects to two of the findings in the R&R: 1) that Bartlett's due process rights were not violated when the trial court denied his motion for directed verdict on the charge of robbery in the first degree; and 2) that Bartlett's counsel was not ineffective for failing to raise the double jeopardy argument. [DE 20]. The R&R includes the factual findings made by the Supreme Court of Kentucky. As a result, the Court will include only those facts relevant to the determination of Bartlett's stated objections to the R&R.

Adolfo Jimenez was shot and killed at his home in the Arcadia Apartments. [DE 17 at 627]. Bartlett and Girton were suspects in the murder and later charged with the murder and robbery. [*Id.*]. During the investigation and at trial both Bartlett and Girton gave several, differing statements.

Although their accounts diverged slightly, both Bartlett's and Girton's version of events generally were consistent that on the day of the shooting Bartlett's grandmother, with whom Bartlett had previously lived, offered to bring some of the clothes that he had left at her home to his new apartment. [*Id.*]. They arranged to meet at a convenience store, and Bartlett asked to borrow a friend's car in order to drive there. [*Id.*]. Girton accompanied Bartlett. They first drove to the agreed upon convenience store, but then decided to drive to Bartlett's grandmother's house to try to catch her before she left. [*Id.* at 628]. They drove to Bartlett's grandmother's home, which is located about a block from Jimenez's apartment, but she was not there. [*Id.*].

The following events remain in dispute. Bartlett's first statement to police suggested that once he and Girton determined Bartlett's grandmother was not home, they decided to drive through the neighborhood. [*Id.*]. They had planned to meet a couple of Bartlett's friends in front of Jimenez's apartment building. Once they parked, "Girton suddenly told Bartlett to 'hold on,' and without explaining what he was doing exited the vehicle, hurried across the street, and entered the building." [*Id.*]. Bartlett said that when he looked up a moment later, he could see Girton "tussling" with another man through a window in the apartment's door. He moved the car forward. Then Bartlett claims he heard a shot, after which, "Girton came running from the building and jumped into the car, exclaiming that the other man had tried to stab him. Bartlett claimed that he panicked at that point and drove off." [*Id.*].

Girton also gave an initial statement. Girton agreed that Bartlett was the one driving that night and that Bartlett could not have known why Girton suddenly got out of the car. [*Id.*]. Girton explained that "two or three weeks earlier Jimenez had robbed him at knife point behind the Arcadia apartments, and that when he caught sight of his assailant entering the apartment that night he had suddenly decided to retaliate." [*Id.*]. Girton's explanation for what happened inside the apartments was that "when he confronted Jimenez in the foyer of his building, Jimenez reached as though for a weapon, whereupon Girton shot him in the leg and ran away." [*Id.*].

The officers investigating the shooting found both Girton's and Bartlett's version of events to conflict with other evidence in the investigation. [*Id.*]. When confronted with the inconsistencies, Bartlett and Girton offered additional statements to the police. In the second statements, both Bartlett and Girton admitted the "the other, at least, had had robbery in mind." [*Id.* at 629]. Bartlett claimed that Girton had said that he "felt like robbing somebody." [*Id.*]. Bartlett claimed that did not take him seriously, and he did not know what was going on until Girton got back into the car. [*Id.*].

Girton, on the other hand, claimed that robbery was Bartlett's idea. Girton claimed that at first, "he had not felt 'up to' a robbery, but when he saw his former assailant he decided to go through with it. His intention, he said, was to rob Jimenez and to scare him, but when he thought that Jimenez was reaching for a weapon he shot him and fled." [*Id.*].

At trial, both Bartlett and Girton testified. Bartlett's testimony generally adhered to the second statement that he gave to police. [*Id.* at 630]. Girton's testimony, however, was substantially different. [*Id.*]. His trial testimony differed from his earlier statements in that at trial Girton claimed that he was the one driving the car and the reason they were at the

Arcadia apartments was because Bartlett had told him to drive to there to get a key to his grandmother's house from one of Bartlett's cousins. [*Id.*]. Girton claimed that he waited in the car while Bartlett went into the building. [*Id.*]. He heard a gunshot and "[l]ooking up, he saw Bartlett running from the building, so he pulled the car out of the parking space and in response to Bartlett's frantic, 'Go, man, go!' had panicked and sped off . . ." [*Id.*]. Girton testified that he agreed to "take the case," because they believed that since he was a juvenile his punishment would be less severe. [*Id.*].

At trial, the government argued that it did not really matter which of the two had pulled the trigger, because, evidence showed that both defendants planned and participated in an armed robbery that turned into a wanton murder. [*Id.*]. The court instructed the jury on that theory but also instructed on the lesser offenses of second-degree manslaughter and reckless homicide. The jury found both defendants guilty of robbery and second-degree manslaughter. [*Id.* at 630–31].

II. Standard of Review

A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). "A magistrate judge must promptly conduct the required proceedings . . . [and] enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1). This Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). The Court need not review under a *de novo* or any other standard those aspects of the report and recommendation to which no specific objection is made and may adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas v. Arn,* 474 U.S. 140, 149–50, 155 (1985).

A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (alterations in original) (citation omitted). A general objection that fails to identify specific factual or legal issues from the R&R is not permitted as it duplicates the magistrate judge's efforts and wastes judicial resources. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). After reviewing the evidence, the Court is free to accept, reject, or modify the magistrate judge's proposed findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

Bartlett's Objections to the R&R are essentially identical to the arguments made in his initial Habeas Petition. [*Compare* DE 1-1 *with* DE 20]. An "objection . . . that merely reiterates arguments previously presented, does not adequately identify alleged errors on the part of the magistrate judge." *Altyg v. Berryhill*, No. 16-11736, 2017 WL 4296604, at *1 (E.D. Mich. Sept. 28, 2017) (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) ("A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless."). As a result, Bartlett's general objections and repetition of the arguments made in his initial Petition cannot qualify as objections. Thus, the Court need not conduct a *de novo* review of the Magistrate Judge's report on Bartlett's Objections. *Ells v. Colvin*, No. 3:16-CV-00604-TBR, 2018 WL 1513674, at *2 (W.D. Ky. Mar. 27, 2018).

Even though the Court is not required to conduct a full *de novo* review, the Court has considered the merits of Bartlett's Objections and accepts the Magistrate Judge's proposed findings and recommendations as well reasoned.

III. Discussion

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Sta. 1214 (1996) ("AEDPA") governs Bartlett's claim. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA applies to all habeas corpus petitions filed after April 24, 1996 and requires "heightened respect" for legal and factual determinations made by state courts. *See Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). The pertinent section provides:

> 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 proceeding.

28 U.S.C. § 2254(d). This standard is "difficult to meet and [is a] highly deferential standard . . . ." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). Legal conclusions made by state courts are also given substantial deference under AEDPA. The Supreme Court has concluded that "a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded [*sic*] jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (per curiam) (internal quotation marks omitted) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). The Court will take Bartlett's objections in turn.

1. The trial court did not violate Bartlett's due process rights by denying his motion for directed verdict on the charge of robbery in the first degree.

Bartlett first objects to the Magistrate Judge's finding that Bartlett was not entitled to habeas relief based on the trial court's denial of his motion for directed verdict on the charge of robbery in the first degree. Bartlett does not contest that the Magistrate Judge properly found that the Supreme Court applied the proper federal law. [DE 20 at 663]. Rather, Bartlett asserts that while "both the state court and Magistrate readily acknowledge that Jackson is applicable, both fail to consider that as a matter of due process under the Fourteenth Amendment is the requirement that every element of a charged offense must be proven beyond a reasonable doubt as set forth in the jury instructions." [*Id.*]. He argues that "there was an absolute failure of proof of theft or attempted theft, an essential element of robbery," and the Court erred when it found that "it doesn't matter whether a theft was actually committed as long as there was an intent to commit a theft." [*Id.* at 664].

"Kentucky's appellate courts have held that a taking of property is not required for a crime to qualify as first-degree robbery." *Holbrook v. Com.*, No. 2013-CA-000094-MR, 2013 WL 5888270, at *2 (Ky. App. Nov. 1, 2013) (citing *Lamb v. Commonwealth*, 599 S.W.2d 462 (Ky. App. 1979)). That said, there must be some proof that there was some "intent to accomplish the theft." *Wade v. Com.*, 724 S.W.2d 207, 208 (Ky. 1986) ("The robbery statute requires only the use of force 'in the course of committing theft' and 'with intent to accomplish the theft'").

Smith cites no evidence in the record to contradict Bartlett's claim that nothing was taken from the victim. [DE 9 at 135–39]. For that reason, the Court will evaluate whether there is sufficient evidence to support a finding of "intent to accomplish the theft." "In

reviewing the sufficiency of the evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Turner v. Burt*, No. 19-1371, 2019 WL 4943759, at *3 (6th Cir. May 24, 2019) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "A federal habeas court 'does not reweigh the evidence or redetermine the credibility of the witnesses.'" *Simmons v. Schweitzer*, No. 16-4170, 2017 WL 4980159, at *2 (6th Cir. Apr. 5, 2017) (quoting *Matthews v. Abramajtys*, 319 F.3d 780, 788 (6th Cir. 2003)). "Additionally, circumstantial evidence standing alone if competent, may support a guilty verdict and is not required to eliminate any reasonable hypothesis except that of the defendant's guilt." *Bowen v. Haney*, 622 F. Supp. 2d 516, 546 (W.D. Ky. 2008). It is the province of the fact finder to weigh the probative value of the evidence and resolve any conflicts in testimony. *Neal v. Morris*, 972 F.2d 675, 679 (6th Cir. 1992).

The Magistrate Judge found that the Supreme Court did not err in concluding that there was sufficient evidence to support a first-degree robbery conviction because "a rational juror could have been convinced by Girton's second statement to police that the robbery was Bartlett's idea [and] the pair's coordinated getaway from the scene could indicate that Bartlett and Girton intended to rob someone - and Girton's assault of the victim furthered that objective." [DE 17 at 640]. The Magistrate Judge found that the "[i]n the light most favorable to the prosecution, it is clear a rational juror could convict Bartlett of robbery based on this evidence." [*Id.*].

The Court agrees. Girton's second statement to the police and his trial testimony, in which he alleges that it was Bartlett's idea to rob someone, is evidence of robbery. [*Id.*]. This evidence is supported by Bartlett's admission that Girton expressed a desire to rob someone

and the coordinated efforts to leave the scene of the shooting. [*Id.*]. Even though the evidence was circumstantial, there was sufficient evidence, taken in the light most favorable to the prosecution, that a rational juror could find Bartlett guilty of first-degree robbery. *See Gipson v. Sheldon,* 659 F. App'x 871, 879 (6th Cir. 2016) (upholding conviction of robbery where defendant did not actively participate in robbery and there was only circumstantial evidence connecting him to robbery where "specific intent to kill and rob Harper can be reasonably inferred from Gipson's presence at the crime scene, his companionship with Ricks, and his conduct after Harper had been killed"); *Pitts v. Wynder*, No. 05-CV-01038JF, 2006 WL 2092582, at *7 (E.D. Pa. July 24, 2006) (upholding first-degree robbery conviction where defendant contends that nothing was taken and there was disputed testimony about whether there was ever an intent to steal anything because "[t]he record includes trial testimony from one of the victims, Ms. Green, that petitioner's co-conspirators threatened her and Mr. Brown when they herded the victims into an upstairs bedroom and demanded drugs, money, and guns"). The Court is not permitted to reweigh the evidence, and thus, the Court adopts the R&R on this issue.

2. *Bartlett's counsel was not ineffective for failing to raise the double jeopardy argument.*

Bartlett also objects to the Magistrate Judge's finding that his counsel was not ineffective for failing to object to the jury instructions on double jeopardy grounds. [DE 20 at 675]. Bartlett argues that since the factual basis for the murder charge included the robbery, when the jury did not find him guilty of the murder charge, it implied they found him not guilty of the robbery. For that reason, the jury's guilty verdict on the robbery charge constituted double jeopardy. [DE 20 at 675–76]. He alleges that his counsel's failure to object to the double jeopardy violation constitutes ineffective assistance of counsel. [*Id.*].

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." To determine whether a conviction constitutes double jeopardy the Court must determine whether, "each offense 'requires proof of a fact which the other does not.'" *Reeves v. Campbell*, 708 F. App'x 230, 239 (6th Cir. 2017) (quoting *Blockburger v. United States*, 284 U.S. 299, 304, (1932)). That the same conduct or evidence supports two different charges, does not create a double jeopardy violation. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Rather, "[i]f each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id.*

As both the Supreme Court of Kentucky and the Magistrate Judge found:

> robbery . . . requires a defendant commit theft and use or threaten the immediate use of physical force with the intent of accomplishing the theft. . . . manslaughter . . . requires the defendant wantonly cause the death of another person. These charges clearly require proof of at least one fact which the other does not.

[DE 17 at 649]. Additionally, the Supreme Court of Kentucky has specifically found that a defendant's double jeopardy rights are not violated when he is charged with both the robbery and the murder that occurred during the robbery. *See Bennett v. Com.*, 978 S.W.2d 322, 327 (Ky. 1998) (holding double jeopardy did not bar conviction of wanton murder and first degree robbery because "[t]he death of the victim is an element necessary to convict of wanton murder, KRS 507.020(1)(b), but is not required to convict of first-degree robbery. Theft or attempted theft is an element necessary to convict of first-degree robbery, KRS 515.020(1), but is not required to convict of murder"); *Epperson v. Com.*, 197 S.W.3d 46, 60 (Ky. 2006) (finding defendant's double jeopardy rights were not violated on conviction of murder and

robbery charges because "[t]he jury instructions pertaining to the offense of murder did not require the jury to find that [defendant] participated in a robbery").

Bartlett does not argue that being prosecuted under both statutes constitutes double jeopardy. Instead, Bartlett erroneously asserts that the conclusions reached by the Supreme Court and the Magistrate Judge mean that "he was being tried on multiple robberies instead of the one set forth in the indictment," because he implicitly was found not guilty on the robbery associated with the murder charge when the jury did not finding him guilty of murder. [DE 20 at 675–76]. Yet, this logic does not follow. The same robbery was also part of the factual basis of the lesser included manslaughter charge. [DE 1-1 at 35]. Therefore, the jury did in fact find that there was evidence to support the robbery by finding Bartlett guilty on the manslaughter charge. Thus, the Court adopts the R&R on this issue.

3. *Bartlett is not entitled to a Certificate of Appealability.*

Finally, Bartlett objects to the Magistrate Judge's recommendation that a Certificate of Appealability ("COA") should be denied as to claims two and five. [DE 20 at 683].

A COA may issue only if the petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "Where a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. When "the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial

of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

Here, the Court decided Bartlett's claims on the merits. Therefore, to be entitled to a COA he must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* Bartlett has not made this showing. First, Bartlett has offered no argument specifically addressing his right to a COA. [DE 20 at 683]. Second, no "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

As to Bartlett's claim that his due process rights were violated when the court denied his motion for directed verdict, "[g]iven the doubly deferential standard of review that applies to this claim, no reasonable jurist could debate the district court's determination that [Bartlett] failed to establish that the [court's] resolution of this claim was contrary to, or involved an unreasonable application of, *Jackson* or was based on an unreasonable determination of the facts." *Stroud v. Brewer*, No. 18-2325, 2019 WL 6124886, at *3 (6th Cir. Apr. 2, 2019), cert. denied, 140 S. Ct. 266, 205 L. Ed. 2d 164 (2019) (upholding denial of COA of petitioner's claim that there was insufficient evidence to support her conviction for second-degree murder where she was not directly involved in the shooting and evidence of intent was circumstantial); *see also* § 1, *supra.* Thus, for the reasons stated above, as to the Bartlett's claim that denial of his motion for directed verdict violated due process, Bartlett has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Bartlett's objection that his prosecution violated the Double Jeopardy Clause is directly contradicted by Kentucky Supreme Court precedent. *See* § 2, *supra.* Further, when

Bartlett presented that same argument before the Kentucky Court of Appeals, he was forced to do so *pro se* "because the Department of Public Advocacy could not in good faith argue Bartlett's Double Jeopardy claim before the Court." [DE 17 at 649]. Therefore, Bartlett has failed to demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Gutierrez v. Gray*, No. 19-3514, 2019 WL 6445420, at *3 (6th Cir. Oct. 23, 2019) (finding no error where district court denied COA for double jeopardy claim directly contradicted by legal precedent).

Thus, the Court adopts the R&R on this issue.

IV. Conclusion

Bartlett has not objected to any other portions of the R&R. The Court need not review and may adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas,* 474 U.S. at 149–50. Therefore, the Court adopts the remainder of the R&R. For these and the reasons set forth above, **IT IS ORDERED** as follows:

1. Petitioner's Objections [DE 20] are **OVERRULED**.

2. The Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation [DE 17] is **ADOPTED**.

3. The issuance of a Certificate of Appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b) is **DENIED**.

4. Petitioner's Motion to Appoint Counsel [DE 22] is **DENIED**.

5. The Court will enter separate judgment under Federal Rule of Civil Procedure

Rebecca Grady Jennings, District Judge
United States District Court

May 4, 2020

Girton v. Commonwealth, 2009 **Ky. Unpub**. LEXIS 10 (**Ky.**, Feb. 19, 2009)

Core Terms

robbery, witnesses, convict, evidentiary hearing, murder

Counsel: BRIEF FOR APPELLANT: Drashawn Bartlett, LaGrange, **Kentucky**.

BRIEF FOR APPELLEE: Jack Conway, Frankfort, **Kentucky**, Bryan D. Morrow, Assistant Attorney General, Frankfort, **Kentucky**.

Judges: BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES. ALL CONCUR.

Opinion by: COMBS

Opinion

AFFIRMING

COMBS, JUDGE: Drashawn Bartlett appeals the order of the Jefferson Circuit Court that denied his motion for relief pursuant to **Kentucky** Rule[s] of Criminal Procedure (RCr) 11.42. After our review, we affirm.

On November 9, 2005, Adolfo Jiminez was shot and killed. Multiple witnesses saw a man get out of a car, shoot Jiminez, and run back to the car. The witnesses recorded the car's license plate number, which they provided to police. As a result, Bartlett and his co-defendant, James Girton, were arrested. Both admitted involvement, but each placed greater responsibility on the other. On January 9, 2006, Bartlett and Girton were indicted for murder, first-degree robbery, and other charges which are unrelated to this appeal.

On February 12, 2007, a jury found Bartlett guilty of the lesser charge of manslaughter in the second degree and first-degree robbery. He **[*2]** received a sentence of twenty-eight years' incarceration. The Supreme Court of **Kentucky** affirmed Bartlett's conviction on direct appeal on February 19, 2009.

On April 23, 2010, Bartlett filed a motion to have his conviction vacated and to hold an evidentiary hearing pursuant to RCr 11.42. His motion set forth a claim of ineffective assistance of counsel. On February 1, 2013, the trial court granted the motion for an evidentiary hearing for the limited purpose of determining whether Bartlett's trial counsel had completely and accurately conveyed plea offers between the Commonwealth and Bartlett. The hearing was held on May 31, 2013. On June 12, 2013, the trial court entered an order denying Bartlett's motion to set aside his conviction. This appeal follows.

In order to prove that he received ineffective assistance of counsel, a convicted defendant "must show that counsel's performance was deficient" and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The prejudice must be proven by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **[*3]** *Id.* at 694.

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Bartlett v. Commonwealth, 2014 Ky . App. Unpub. LEXIS 1004

Court of Appeals of **Kentucky**

December 24, **2014**, Rendered

NO. 2013-CA-001218-MR

Reporter

2014 Ky . App. Unpub. LEXIS 1004 *

DRASHAWN BARTLETT, APPELLANT v. COMMONWEALTH OF **KENTUCKY**, APPELLEE

Notice: THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED **KENTUCKY** APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Subsequent History: Rehearing denied by Bartlett v. Commonwealth, 2015 **Ky. App**. LEXIS 187 (**Ky.** Ct. **App**., Feb. 13, 2015)

Prior History: **[*1]** APPEAL FROM JEFFERSON CIRCUIT COURT. HONORABLE SUSAN SCHULTZ GIBSON, JUDGE. ACTION NO. 06-CR-000054.

Ex C

On appeal, our review of a trial court's denial of a motion for an evidentiary hearing is limited to determining whether the allegations are refuted by the record and, if they were true, whether they would nullify the conviction. *Lewis v. Commonwealth*, 411 S.W.2d 321, 322 (**Ky.** 1967). No evidentiary hearing is required if the record on its face contradicts the allegations. *Sparks v. Commonwealth*, 721 S.W.2d 726, 727 (**Ky. App**. 1986).

Bartlett first argues that his counsel failed to provide effective assistance by not presenting more mitigating evidence during the penalty phase of his trial. During the penalty phase, the only witness he presented was his mother. Bartlett claims that several other witnesses would have testified but that his attorney failed to confer with them prior to trial.

Bartlett correctly asserts that counsel has a duty to conduct a reasonable investigation of the case — including examining the defendant's past for mitigating factors. *Commonwealth v. Bussell*, 226 S.W.3d 96, 106 (**Ky.** 2007). The reasonableness of an investigation is determined by the surrounding circumstances. *Id.* at 107.

Bartlett alleges that several witnesses would have provided testimony which would have resulted in a reduced sentence. Those potential witnesses submitted affidavits ***after*** Bartlett's trial and conviction. Their substance was similar: Bartlett had been **[*4]** a well-behaved child and adolescent who had grown into a law-abiding adult; he loved music; he did not have violent tendencies; he was a responsible father to a young child; and he had been traumatized by the death of a close friend when both were teenagers. Bartlett also claims that they would have testified about being his being baptized and obtaining his GED while incarcerated. However, Bartlett does not provide any evidence that he had ever informed counsel of the potential witnesses. The trial court even asked if Bartlett had additional mitigating evidence, but he did not mention or refer to them.

The record shows that Bartlett's mother testified about his daughter, his love of music, and the progress that he had achieved in jail. Both Bartlett and his former roommate testified about his love for and involvement in producing rap music. Therefore, Bartlett's allegation of error relating to the inclusion of that information is moot.

The record also contradicts Bartlett's claim that he had never participated in criminal activity before the robbery and shooting death of Jiminez. It shows that Bartlett participated in drug rehabilitation and that he wrote to his attorney that he was **[*5]** under the influence of drugs at the time he was arrested for the robbery and murder. Drugs were found at the apartment where he lived, and several witnesses testified that they had used drugs with Bartlett. By his own admission, Bartlett knew that Girton was carrying a gun on the night of the robbery -- but he did not leave. Given the amount and strength of the contradictory evidence, we are unable to conclude that the testimony now proposed would "undermine the confidence in the outcome." *See Strickland, supra.*

Additionally, it is noteworthy that Bartlett's counsel conducted a reasonable investigation, including enlisting the services of a private investigator. Invoices show that the investigator spent more than twenty-three hours with potential witnesses and counsel. Counsel consulted with the Department of Psychological and Brain Sciences at the University of Louisville, and one of its doctors was present at trial in case the jury convicted Bartlett of the murder charge. Because of the surrounding circumstances and the lack of proof undermining the outcome, we are unable to conclude that counsel failed to conduct a reasonable investigation.

Bartlett's second claim of error is that **[*6]** his right to protection from double jeopardy was violated when he was convicted of both manslaughter and robbery. The Commonwealth accurately points out that this error is unpreserved. Nonetheless, we will address it because of the serious constitutional implications of double jeopardy violations. *Cardine v. Commonwealth*, 283 S.W.3d 641, 651 (**Ky.** 2009).

A single course of conduct can serve as the basis of conviction of two offenses if the act "constitutes a violation of two distinct statutes, and, if it does, if each statute requires proof of a fact the other does not." *Commonwealth v. Burge*, 947 S.W.2d 805, 811, 43 9 **Ky.** L. Summary 12 (**Ky.** 1996).

The jury in Bartlett's trial was correctly instructed that they could find him guilty of second-degree manslaughter only if they had found him guilty of the robbery. Conversely, the robbery instruction relied on the use of a weapon and the infliction of physical injury upon the victim. Bartlett claims that because robbery was a necessary element of second-degree manslaughter,

the instructions were redundant and violated his double jeopardy protection.

The Supreme Court has succinctly addressed the correlation of these two offenses:

> The death of the victim is an element necessary to convict of wanton murder, [1] KRS 507.020(1)(b), but is not required to convict of first-degree robbery. Theft or **[*7]** attempted theft is an element necessary to convict of first-degree robbery, KRS 515.020(1), but is not required to convict of murder. It is the element of assault (or wanton endangerment) which is common to both offenses.

Bennett v. Commonwealth, 978 S.W.2d 322, 327, 45 10 **Ky.** L. Summary 4 (**Ky.** 1998).

We cannot conclude that the trial court erred in denying Bartlett's motion to vacate judgment and to hold an evidentiary hearing.

Therefore, we affirm the Jefferson Circuit Court.

ALL CONCUR.

Footnotes

[1] Bartlett was not convicted of wanton murder; however, death of the victim is also a necessary element of manslaughter.

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Narrow By: Sources: All States Cases

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No. 20-5580

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DRASHAWN BARTLETT,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
ANNA VALENTINE, Warden,)
)
Respondent-Appellee.)

Before: GUY, KETHLEDGE, and NALBANDIAN, Circuit Judges.

Drashawn Bartlett, a pro se Kentucky prisoner, petitions the court to rehear its order of November 3, 2020, denying his application for a certificate of appealability.

Bartlett has not shown that we overlooked or misapprehended a point of law or fact in denying him a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** the petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk