APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT OPINION

Shalash v. Gray, 2020 U.S. App. LEXIS 38800

Copy Citation

United States Court of Appeals for the Sixth Circuit

December 10, 2020, Filed

No. 20-3772

Reporter
2020 U.S. App. LEXIS 38800 *

AHMAD SHALASH, Petitioner-Appellant, v. DAVID W. GRAY, Warden, Belmont Correctional Institution, Respondent-Appellee.

Core Terms

post-conviction, robberies, trial court, convictions, firearm, jurists, district court, specifications, beyond a reasonable doubt, appellate court, habeas relief, state court, fair trial, instructions, comments, vouching, default

Counsel: [*1] For **Ahmad Shalash**, Petitioner - Appellant: Stephenie Lape Wolfinbarger, Law Office, Cincinnati, OH.

For DAVID W. GRAY, Warden, Belmont Correctional Institution, Respondent - Appellee: William H. Lamb, Assistant Attorney General, Office of the Attorney General, Cincinnati, OH.

Judges: Before: KETHLEDGE, Circuit Judge.

Opinion

ORDER

Ahmad Shalash, an Ohio prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He now moves for a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(2).

A jury convicted Shalash of four counts of robbery, two counts of aggravated robbery, and two firearm specifications for each of the aggravated-robbery counts. *See State v. Shalash*, Nos. C-130748/749, 2014-Ohio-5006, 2014 WL 5840147, at *1 (Ohio Ct. App. Nov. 12, 2014). The trial court merged two of the robbery convictions with the aggravated-robbery convictions, merged the firearm specifications for each aggravated-robbery conviction, and sentenced Shalash to an

aggregate term of 44 years in prison. 2014-Ohio-5006, [WL] at *8. The Ohio Court of Appeals affirmed his convictions and sentence, 2014-Ohio-5006, [WL] at *12, and the Ohio Supreme Court denied review, *State v. Shalash*, 142 Ohio St. 3d 1517, 2015- Ohio 2341, 33 N.E.3d 65 (Ohio 2015) (table). Shalash then filed a petition to vacate his judgment and sentence pursuant to Ohio Revised Code § 2953.21. The trial court denied the petition, **[*2]** and the court of appeals affirmed. Shalash was represented by counsel throughout his state criminal and post-conviction proceedings.

In December 2017, Shalash, still represented, filed his § 2254 petition raising four grounds: (1) the evidence was insufficient to support his convictions, and the manifest weight of the evidence did not support them; (2) the prosecutor committed misconduct by making inflammatory statements during his closing argument and by vouching for a witness; (3) he was denied a fair trial because the trial court did not instruct the jury that the firearm specifications must be proven beyond a reasonable doubt; and (4) he was denied effective assistance of counsel and due process when the trial court denied his state post-conviction petition without a hearing.

The district court denied the petition and declined to grant a COA. The court first concluded that the "manifest weight of the evidence" portion of Shalash's first claim was not a federal constitutional claim over which the court had jurisdiction. It then concluded that Shalash had procedurally defaulted his first three claims and failed to show cause and prejudice or actual innocence to excuse the default and, alternatively, **[*3]** that the claims were without merit. Finally, the district court concluded that Shalash's fourth claim was not cognizable on habeas review.

Shalash now moves for a COA on each of his claims, arguing that the district court erred in concluding that the first three grounds were procedurally defaulted and meritless and that the fourth ground did not include a claim of ineffective assistance of counsel.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). Under the Antiterrorism and Effective Death Penalty Act, if a state court adjudicated a petitioner's claim on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim 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 "a decision that was based on **[*4]** an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In the COA context, this court must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

The district court devoted much of its analysis to the issues of procedural default, cause and prejudice, and actual innocence. But because the district court also determined that Shalash's claims failed on the merits or were not cognizable in habeas review, and because, for the reasons set forth below, reasonable jurists would not debate those determinations, the court need not address the procedural default issues. *See* Arias v. Hudson, 589 F.3d 315, 316 (6th Cir. 2009).

Shalash first challenges the sufficiency of the evidence to support his convictions. Sufficient evidence supports a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any*rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Moreover, in habeas proceedings, a 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"—**[*5]** *i.e.*, "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) (per curiam) (quoting *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011)).

On direct appeal, the state court found that the evidence was sufficient to support the convictions, pointing to the testimony of Shalash's wife Jennifer Neitz and his friend Jake Pfalz, who confessed to their participation in the robberies and described in detail Shalash's involvement in the crimes. *Shalash*, 2014-Ohio-5006, 2014 WL 5840147, at *5-8. In addition to these witnesses, several bank employees identified Neitz and Pfalz as participants in the robberies, surveillance videos supported that testimony, and other evidence placed Shalash in a white van that Neitz and Pfalz were seen to use in the robberies. *See* 2014-Ohio-5006, [WL] at *9. On the basis of this evidence, the state court of appeals determined that Shalash did not meet his burden of showing that "no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." 2014-Ohio-5006, [WL] at *8. Reasonable jurists could not debate the district court's conclusion that this determination was not an unreasonable application of *Jackson*.

Prosecutorial Misconduct

Shalash claims that he was denied a fair trial by the prosecution's allegedly inflammatory comments and vouching for a witness. **[*6]** To be entitled to habeas relief on a prosecutorial misconduct claim, the petitioner must show that the prosecutor's conduct so infected the trial so as to render the conviction fundamentally unfair. *See Parker v. Matthews*, 567 U.S. 37, 45, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)(per curiam). In his COA application, Shalash points to the prosecutor's references to his Muslim religion during his closing argument and argues that the prosecutor's purported appeal to racial or religious prejudice deprived him of a fair trial.

At one point, the prosecutor referred to the marriage of Shalash and Neitz in a mosque. He also referred to Shalash's "Muslim wife" in the getaway vehicle, and mentioned the Muslim culture relating to Shalash's wife participating in the robbery with her children and another male. The state appellate court determined that, while the comments were "arguably inappropriate," they were not so "prejudicial or outcome determinative as to . . . deny Shalash a fair trial" in light of

the overwhelming evidence of Shalash's guilt. *Shalash*, 2014-Ohio-5006, 2014 WL 5840147, at *11. Reasonable jurists could not debate the district court's conclusion that this determination was not an unreasonable application of *Matthews*. The comments presented an argument based on the evidence; they were not gratuitous [*7] references to Shalash's religion that were likely to inflame passion or prejudice. And, as the state court noted, the evidence against Shalash was strong.

In support of his witness-vouching claim, Shalash points to the prosecution's comment that a witness was "obviously . . . not going to lie" to the jurors. The state appellate court determined that this single statement was not vouching, but merely an argument that one witness—a school nurse who observed James in the vicinity of the bank on the day of the robbery—was probably reliable and had no motive to lie. *Id.* Impermissible vouching occurs when the prosecutor "supports the credibility of a witness by indicating a personal belief in the witness's credibility thereby placing the prestige of the [prosecutor's] office . . . behind that witness." *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999) .Improper vouching generally "involves either blunt comments, or comments that imply that the prosecutor has special knowledge of facts not in front of the jury[.]" *Id.* (citations omitted). The prosecutor's statement in this case did neither of these things. Thus, no reasonable jurist could debate the district court's conclusion that the state court's rejection of this claim was not contrary [*8] to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.

Jury Instructions for Firearms Specifications

Shalash claims that he was denied a fair trial by the trial court's failure to instruct the jury, in a separate instruction, that it must find the elements of the firearm specifications beyond a reasonable doubt. As the state appellate court explained, the trial court instructed the jury on the reasonable-doubt standard "at multiple times during the jury charge," and it reminded the jurors after reading each count of the indictment that the State's burden was to prove each element of each count beyond a reasonable doubt. *Shalash*, 2014-Ohio-5006, 2014 WL 5840147, at *12. The trial court also instructed the jury on the elements required for the firearm convictions. *Id.* The state court concluded that, "[w]hen taken together, these jury instructions satisfied the requirement that the firearm specifications had to be proven beyond a reasonable doubt." *Id.*

The Constitution requires that each element of a crime be proved to a jury beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Shalash argues in his COA application that there was a "complete omission of the reasonable doubt standard of [*9] proof in the instruction for a firearm specification" and that the state court's determination was thus an "unreasonable application of *Sullivan*." But Shalash failed to show that the jurors did not apply the reasonable-doubt standard when they convicted him of the firearm specifications. "[A reviewing court] must presume that juries follow their instructions." *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000).

A habeas petitioner bears a heavy burden when seeking habeas relief on the basis of allegedly improper jury instructions. *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). An allegedly improper jury instruction warrants habeas relief only if the instruction so infected the entire trial that the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (citing *Henderson*, 431 U.S. at 154). Given this precedent, and the trial court's repeated reasonable-doubt instructions, no reasonable jurist could debate the district court's determination that the state court's rejection of this claim was not unreasonable.

Denial of Hearing for State Post-Conviction Petition

In his fourth ground for habeas relief, Shalash alleged that he "was denied his right to effective assistance of counsel and due process when the trial court denied his Petition for Post-Conviction Relief without a hearing." In support of his state post-conviction **[*10]** petition, Shalash presented recanting affidavits of Neitz and Pfalz and argued that counsel failed to investigate possible alibi witnesses and information about the weapons used in the robberies. The trial court denied the post-conviction petition without a hearing, reasoning that: (1) Shalash's ineffective-assistance claim was barred by res judicata because he had the opportunity to raise the claim on appeal; and (2) the affidavits he presented were "viewed with grave suspicion" because of Neitz's relationship to Shalash and the significant amount of evidence that corroborated the witnesses' testimony about the participants' roles in the robberies. The state appellate court affirmed, noting that Shalash presented "a single assignment of error, challenging the postconviction petition without a hearing." Citing the Ohio Revised Code and state case law, the appellate court determined that a hearing was not required because Shalash failed to present evidence demonstrating "substantive grounds for relief."

No reasonable jurist could debate the district court's rejection of Shalash's claim because it alleges an error in state post-conviction proceedings that is not cognizable on federal **[*11]** habeas review. *See Kirby v. Dutton*, 794 F.2d 245, 247-48 (6th Cir. 1986) ("declin[ing] to allow the scope of the writ to reach . . . complaints about deficiencies in state post-conviction proceedings"). Shalash argues that this ground for relief included an independent substantive claim of ineffective assistance of trial counsel, but the district court concluded otherwise. As the court noted, Shalash's claim to have been denied effective assistance of counsel "when the trial court denied his post-conviction petition without a hearing" is naturally read as a challenge to the trial court's failure to hold an evidentiary hearing on his claim, not as an independent substantive claim. Thus, reasonable jurists could not debate the district court's rejection of Shalash's ineffective-assistance claim.

Accordingly, the court **DENIES** the application for a COA.

APPENDIX B.

UNITED STATES

DISTRICT COURT

JUDGE OPINION

Shalash v. Warden, Belmont Corr. Inst., 2020 U.S. Dist. LEXIS 104372

Copy Citation

United States District Court for the Southern District of Ohio, Western Division

June 15, 2020, Decided; June 15, 2020, Filed

Case No. 1:18-cv-333

Opinion

DECISION AND ENTRY ADOPTING THE REPORTS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE (Docs. 18, 23, 28) AS MODIFIED HERE

This case is before the Court pursuant to the Order of General Reference to United States Magistrate Judge Michael R. Merz. Pursuant to such reference, the Magistrate Judge, on April 24, 2019, submitted a Report and Recommendation recommending that Petitioner's habeas petition brought under 28 U.S.C. § 2254 be dismissed (Doc. 18). Petitioner filed objections on June 5, 2019 (Doc. 21), which the Magistrate Judge addressed in a supplemental Report and Recommendation (Doc. 23). Petitioner filed objections to the supplemental Report and Recommendation (Doc. 26), which were followed by a second supplemental Report and Recommendation (Doc. 28). Petitioner submitted a final set of objections on August 6, 2019 (Doc. 29).

I. BACKGROUND

Petitioner **Ahmad Shalash** was charged [*2] with four counts of robbery and two counts of aggravated robbery for participating in the robbery of four banks in the fall of 2012 with his wife, Jennifer Neitz, and their friend, Jake Pfalz. *State v. Shalash*, 2014-Ohio-5006, 2014 WL 5840147, at *1, *4 (Ohio Ct. App. Nov. 12, 2014). Neitz and Pfalz testified against Shalash at trial, and he was convicted of all charges by a jury in Hamilton County, Ohio and sentenced to an aggregate term of imprisonment of forty-four years. 2014-Ohio-5006, *Id.* at *5-8. Shalash appealed his convictions to the First District Court of Appeals, which affirmed. 2014-Ohio-5006, *Id.* at *12. Shalash also filed a petition for post-conviction relief pursuant to Ohio Revised Code ("R.C") § 2953.21. *State v. Shalash*, No. C-150614, 2016 Ohio App. LEXIS 4105, at *1 (Ohio Ct. App. Oct. 7, 2016). His petition was denied by the state trial court, and the First District affirmed the denial. 2014-Ohio-5006, *Id.* at *3.

On December 11, 2017, Shalash filed the instant habeas petition under 28 U.S.C. § 2254 asserting four separate grounds for relief. For the reasons stated below, the Court adopts the Magistrate Judge's recommendation and denies Shalash's petition for habeas relief.

II. ANALYSIS

A. Ground One

Petitioner's first ground for relief in his § 2254 habeas petition asserts that "[t]he evidence was insufficient to convict Mr. Shalash, and the manifest weight of the evidence did not support the trial court's conviction [*3] in violation of the due process clause of the Fourteenth Amendment." (Doc. 1 at 5). The Magistrate Judge found that Petitioner's manifest-weight-of-the-evidence claim is not a federal constitutional claim, and therefore is not a cognizable habeas claim. (Doc. 18 at 7); *see* *Schwarzman v. Gray*, No. 17-3859, 2018 U.S. App. LEXIS 27193, 2018 WL 994352, at *3 (6th Cir. Jan. 30, 2018). Petitioner does not object to this finding, and the Court agrees with and adopts the Magistrate Judge's recommendation that the manifest-weight-of-the-evidence claim be dismissed.

The Report and Recommendation further found Petitioner's sufficiency-of-the-evidence claim to be cognizable, but that Petitioner did not adequately raise the claim in state court, resulting in procedural default. (*Id.* at 8-9). The Magistrate Judge also found that Shalash did not adequately demonstrate actual innocence to excuse the default. (*Id.* at 10).

Petitioner objects to the Magistrate Judge's finding of procedural default, asserting that he adequately raised the sufficiency-of-the-evidence claim on direct appeal to the state supreme court based on factual arguments made in his brief, including that there was no physical evidence linking him to the charged robberies. (Doc. 21 at 5-6) (citing *Clinkscale v. Carter*, 375 F.3d 430, 437 (6th Cir. 2004) (noting that whether a petitioner "alleg[es] facts well within the mainstream of constitutional law" is "significant [*4] to the determination as to whether a claim has been fairly presented")). Petitioner also relies on *Peterson v. Miller*, in which the court found that a *pro se* petitioner had adequately raised a sufficiency-of-the-evidence claim based on the assertion of factual arguments including a lack of physical evidence linking him to the crimes. (*Id.* at 5) (citing *Peterson v. Miller*, No. 1:16-cv-509, 2017 U.S. Dist. LEXIS 215391, 2017 WL 6987994, at *15-16 (N.D. Ohio Dec. 7, 2017)).

Petitioner's memorandum to the Supreme Court of Ohio on direct appeal raised three "propositions of law," none of which involved a sufficiency-of-the-evidence claim. (*See* Doc. 10 at 109). Nevertheless, Shalash argues that like the petitioner in *Peterson*, he fairly presented the claim based on *factual arguments*, including that there was a lack of physical evidence linking him to the crimes. (Doc. 21 at 6). For example, the introductory paragraphs of his memorandum stated generally that the state had "decidedly little evidence" that Petitioner was involved in the bank robberies. (Doc. 10 at 110). Shortly after this statement, Shalash's memorandum goes on to state that because "the State knew it had 'slim pickings' to work with" the prosecutor made inflammatory statements concerning Petitioner's Muslim faith. [*5] (*Id.*). In the very next paragraph, Petitioner stated that "[f]or its part, the trial court was no help" in that it erroneously instructed the jury on the firearm specification. (*Id.*). Thus, in context, Petitioner's statements concerning the lack of evidence were made in support of his express propositions of law

regarding prosecutorial misconduct and erroneous jury instructions and were not made in support of a separate sufficiency-of-the-evidence claim.

The Court agrees with the Magistrate Judge that Petitioner's reliance on *Peterson* is not persuasive. In that case, the *pro se* petitioner raised two propositions of law on appeal to the state supreme court, yet neither proposition "clearly identif[ied] the nature of the claims asserted." 2017 U.S. Dist. LEXIS 215391, 2017 WL 6987994, at *15. Liberally construed, the court found that both propositions appeared to challenge the sufficiency of the evidence based upon factual assertions concerning a lack of evidence linking the petitioner to the crime. 2017 U.S. Dist. LEXIS 215391, [WL] at *44-45. By contrast, Petitioner's propositions of law presented to the Supreme Court of Ohio were not vague, and rather, clearly articulated arguments unrelated to a sufficiency-of-the-evidence claim. Accordingly, *Peterson* is distinguishable for two [*6] reasons. First, the court liberally construed the petition because the petitioner was *pro se*, and second, the petitioner in *Peterson* asked the court to consider factual arguments *which supported the propositions of law actually raised.*

Moreover, Petitioner expressly raised a sufficiency-of-the-evidence claim as an "assignment of error" on direct appeal to the First District Court of Appeals stating, "[t]he evidence was insufficient to convict Mr. Shalash . . . ." (Doc. 10 at 40). This shows that Shalash knew how to raise such a claim and suggests that he intentionally abandoned the claim on his appeal to the Supreme Court of Ohio.[1] *See, e.g.*, *Bailum v. Warden, Lebanon Corr. Inst.*, 832 F. Supp. 2d 893, 900 (S.D. Ohio 2011) (finding failure to exhaust § 2254 habeas claim when petitioner raised claim on appeal to the state court of appeals but abandoned the claim on appeal to the Supreme Court of Ohio), *report and recommendation adopted*, 832 F. Supp. 2d 893 (S.D. Ohio 2011).

Next, the Court will address Petitioner's objection to the Magistrate Judge's finding that Petitioner's failure to exhaust his default is not excused by the "actual innocence" exception. Petitioner supports his claim of innocence with affidavits of his co-defendants recanting their testimony. (Doc. 21 at 6).

HN1 The actual innocence exception [*7] to default is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018) (citing *Schlup v. Delo*, 513 U.S. 298, 315, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). Yet, "this innocence gateway is a narrow one" and "should open only when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Id.* (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 401, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013)). "The exception 'applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *Id.* (quoting *McQuiggin*, 569 U.S. at 395).

HN2 To make this assessment, courts "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." *Id.* (quoting *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)). Courts must also "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of the [new] evidence." *Id.* (quoting *House*, 547 U.S. at 537). A claim of actual innocence must be supported with "new, reliable evidence, **[*8]** such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial." *Id.* (citing *House*, 547 U.S. at 537).

For example, in *Davis*, the petitioner claimed actual innocence when an eyewitness recanted his trial testimony connecting the defendant to the murder. 900 F.3d at 317-18. Before the defendant's trial, the witness had previously recanted, testifying during the trial of a co-defendant that he had lied to the police about witnessing the murder in order to receive the offered reward money. *Id.* at 318-19. Yet, after being incarcerated for perjury, the witness backtracked and ultimately provided more details about what he had seen, going on to testify at the defendant's trial to having witnessed the assault and murder. *Id.* at 319-20. Years later, the witness again recanted, asserting that his father had pressured him to come forward and testify in order to get the reward money. *Id.* at 320.

The Sixth Circuit found that the witness's most recent recantation did not make it "more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *Id.* at 329 (citing *Schlup*, 513 U.S. at 327). While acknowledging that the witness's testimony was "the primary evidence linking [the defendant] **[*9]** to [the] murder," the court noted that the jury had found the witness's testimony credible despite having been aware of his earlier recantation, opportunistic behavior, and drug-related history. *Id.* The court further reasoned that a reasonable juror would likely find the new recantation unreliable because it "amount[ed] to another change in his story," and because his testimony implicating the defendant was corroborated by other evidence. *Id.* at 330-31. Finally, the court considered the circumstances surrounding the recantation, noting that the witness would not face adverse consequences for recanting. *Id.* at 333 (citing *Allen v. Yukins*, 366 F.3d 396, 405-06 (6th Cir. 2004)) (affirming district court's finding that an "affidavit was inherently suspect because [the affiant] could have signed the affidavit in order to help his codefendant . . . without endangering his own interests").

In the instant case, the Magistrate Judge concluded that the affidavits of Petitioner's co-defendants were unreliable (Doc. 18 at 10) and bolstered this finding in the supplemental Reports and Recommendations, noting that recanted testimony is inherently suspect (Doc. 23 at 4; Doc. 28 at 5). Petitioner persists in objecting to the Magistrate Judge's conclusion that the actual innocence **[*10]** exception does not apply. Petitioner specifically asserts that "the testimony of his coerced co-defendants was the only evidence placing him at the scene of any of the alleged crimes" and that "there was no physical evidence or any other testimonial evidence implicating him in the alleged crimes." (Doc. 21 at 7).

Upon review of the record, the Court reaches the same conclusion as the Magistrate Judge. Although Petitioner asserts that without his co-defendants' testimony, "Mr. Shalash could not have been convicted on sufficient evidence" (*id.* at 7), that is not the pertinent question. The question is whether, in light of the evidence presented at trial, including the co-defendants' testimony implicating Shalash in the robberies plus the new evidence—the co-defendants' affidavits recanting their trial testimony—it is more likely than not that "no reasonable juror would have convicted" the petitioner. *Davis*, 900 F.3d at 326. In order to assess this likelihood, the Court must consider whether a hypothetical jury would find the recantations reliable considering the circumstances under which they were made and the extent to which the testimony is corroborated by the other evidence presented at trial. *Id.* at 330.

Like in *Davis*, in **[*11]** the instant case, there was evidence presented at trial that the witness previously made contradictory statements concerning the defendant's involvement in the crimes. Here, one of Shalash's co-defendants—his wife, Jennifer Neitz—testified at trial that she wrote Shalash numerous letters while in prison stating that Shalash was not involved in the robberies and that "he was going to be going home." (Doc. 10-3 at 123-128). Thus, a jury may consider Neitz's latest recantation to be just another change in her story. Also like in *Davis*, the jury was made aware of the co-defendants' potential ulterior motives for testifying. In this case, both co-defendants testified that the prosecution offered them reduced sentences in exchange for their testimony implicating Shalash. (*Id.* at 130-131, 183-184). Nevertheless, the jury credited the co-defendants' testimony, convicting Shalash.

In addition, the co-defendants' testimony that Shalash was involved in the robberies as the getaway driver of a white van was corroborated by other eyewitness testimony and surveillance camera footage placing him driving a white van near the robbed banks around the time they were robbed. For example, co-defendant Jake Pfalz testified that **[*12]** Pfalz, Shalash, and Neitz, were together in the van when they drove to St. James Elementary school to scope out a nearby credit union. (*Id.* at 161-162). He testified that while they decided not to rob the credit union, approximately three to four hours later, they robbed a different bank—the Cheviot Savings Bank—with Shalash acting as the getaway driver. (*Id.* 163-169). Neitz similarly testified that the three defendants parked at the credit union by the school, that she entered the credit union to case it out, and that she later got in the van with Shalash and Pfalz after they decided not to rob the credit union; later robbing the Cheviot Savings Bank that afternoon with Shalash driving. (*Id.* at 86-91).

An eyewitness, Constance Lanter, the St. James school nurse, testified that she followed Pfalz, who had been acting suspiciously, from the school to the credit union where she saw "a woman . . . walking back and forth behind the credit union." (Doc. 10-2 at 144-145). She then saw Pfalz get into the passenger side of a white van. (*Id.* at 145-146). Lanter walked alongside the van and saw the driver who waved at her. (*Id.* at 146-147). Lanter then identified the driver as Shalash and testified that the woman also got into the van. (*Id.* at 147). Further, surveillance **[*13]** footage and additional eyewitness testimony placed Shalash and Pfalz with the white van at a Dairy Mart in front of the First Financial Bank approximately an hour and a half before the bank was robbed (Doc. 10-3 at 19-24, 27-28), with another camera showing Shalash at a gas station a mile away from the bank a half hour before the robbery. (*Id.* at 32-36).

Approximately six months after Shalash's conviction, Pfalz and Neitz submitted handwritten affidavits recanting their trial testimony and averring that Shalash was not aware of or involved in the robberies. (Doc. 10 at 20-22, 179-180). Pfalz's statement simply states that he and Neitz agreed to testify against Shalash in order to get reduced sentences and that Shalash had no knowledge of or involvement in the bank robberies. (*Id.* at 180). Neitz's affidavit also states that Shalash had no knowledge of the robberies, and further states that Pfalz and Neitz agreed to testify against Shalash because they believed he would be perceived as the leader because he is of Arab descent; whereas they would be perceived as manipulated by him, resulting in reduced sentences. (*Id.* at 179). Neitz later submitted a supplement explaining that she initially told the police that Shalash **[*14]** was involved in the robberies because she was upset with him for being separated from their children following the couple's arrest on unrelated charges. (*Id.* at 188). She further explains that she was heavily medicated during her testimony at trial, resulting in her testifying inaccurately. (*Id.* at 189). Neitz also submitted a transcript of her trial testimony indicating in the margins where her testimony was untrue—essentially stating that her husband was not there, that they dropped Shalash off before the robberies were planned and executed, and that she drove the van. (*Id.* at 191-291).

The jury that convicted Shalash was aware that Neitz previously wrote letters to her husband stating that he was not involved in the robberies and was also aware that the co-defendants agreed to testify against Shalash in exchange for reduced sentences. In addition, the co-defendants' testimony was corroborated by other eye-witness accounts and surveillance footage. Consequently, the Court agrees with the Magistrate Judge's conclusion that the statements recanting that testimony are inherently unreliable. Moreover, the circumstances of the recanted testimony are not compelling—they came several months after Shalash's conviction, and **[*15]** while Neitz's statements provide some level of detail (unlike Pfalz's affidavit), Neitz has an obvious interest in now speaking in support of Shalash—her husband. *Yancey v. Haas*, 742 Fed. Appx. 980, 984 (6th Cir. 2018) (explaining that "family members' credibility may be discounted because they 'have a personal stake in exonerating' the defendant") (quoting *McCray v. Vasbinder*, 499 F.3d 568, 573 (6th Cir. 2007)). Thus, the Court does not find that it is more likely than not that *no reasonable juror* would be convinced of Shalash's guilt beyond a reasonable doubt.

In the first supplemental Report and Recommendation, the Magistrate Judge alternatively found that Shalash's sufficiency-of-the-evidence claim fails on the merits. (Doc. 23 at 4-6). Shalash objects to this conclusion and asserts that he was convicted "based solely on the now recanted testimony of his co-defendants which was inconsistent and unreliable," noting a lack of direct evidence implicating him. (Doc. 26 at 6-7).

As the Magistrate Judge properly stated, ***HN3*** a habeas petitioner alleging a sufficiency-of-the-evidence claim must pass through two levels of deference. (Doc.23 at 5). First, the Court must review the trial court's conviction, asking whether "viewing the trial testimony and exhibits in the light most favorable to the prosecution, **[*16]** any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.*) (quoting *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009)). In doing so, courts may not "reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury." (*Id.*).

Thus, although Shalash asserts that the co-defendants' testimony was not credible, the Court's task is not to independently assess the co-defendants' credibility in place of the jury. And while

Shalash objects to a lack of direct evidence, ***HN4*** "a court may sustain a conviction based upon nothing more than circumstantial evidence." (*Id.*) (quoting *Stewart v. Wolfenbarger*, 595 F.3d 647, 656 (6th Cir. 2010)).

Second, ***HN5*** the Court must "defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." *Brown*, 567 F.3d at 205 (emphasis in original). Petitioner objects on the basis that "the jury could not have convicted without making inferences and such inferences are improper if they are 'so unsupportable as to fall below the threshold of bare rationality.'" (Doc. 26 at 7) (quoting *Coleman v. Johnson*, 566 U.S. 650, 656, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012)). The First District Court of Appeals denied Shalash's claim based on Neitz's and Pfalz's testimony, which the court found to be corroborated by eye-witness testimony and video surveillance footage. **[*17]** (Doc. 10 at 94-97). Accordingly, upon review of the state appellate court's reasoning, the Court agrees with the Magistrate Judge that the state court's opinion was not objectively unreasonable. (*See* Doc. 10 at 94-97).

For the reasons stated above, Petitioner's objections are overruled, and Petitioner's request for relief based on Ground One is denied.

B. Ground Two

Petitioner's second ground for habeas relief is based on "repeated instances of prosecutorial misconduct during his trial" in the form of statements the prosecutor made during closing arguments, including statements concerning Shalash's Muslim faith, a comment that the robberies were committed in a "heroin induced frenzy," and statement allegedly vouching for the credibility of one of the eyewitnesses. (Doc. 1 at 7, 18-19).

The Magistrate Judge found the prosecutorial misconduct claim procedurally defaulted, as Petitioner did not object to the statements during trial. (Doc. 18 at 13-15). Petitioner asserted the prosecutorial misconduct claim in his direct appeal to the First District. However, because he failed to object to the prosecutor's statements at trial, the state court of appeals reviewed the claim only for plain error. **[*18]** (Doc. 10 at 98). The Sixth Circuit has found that ***HN6***

when a state court enforces the "firmly-established Ohio contemporaneous objection rule" to find waiver, the claim is considered procedurally defaulted based on an independent and adequate state ground, even when the court goes on to consider the claim under plain error review. *Wogenstahl v. Mitchell*, 668 F.3d 307, 335-37 (6th Cir. 2012). As the Magistrate Judge properly found, that is precisely what occurred in this case. (Doc. 18 at 15).

The Petitioner does not object to this initial finding of default, but rather, objects to the Magistrate Judge's conclusion that his default cannot be excused by his trial attorney's ineffective

assistance. (Doc. 21 at 7-8). ***HN7*** A petitioner may show "cause and prejudice" excusing the default by showing that the default resulted from ineffective assistance of counsel. Yet the petitioner is required to have raised his ineffective assistance claim in state court. *See* Stokes v. Scutt, 527 F. App'x 358, 367 (6th Cir. 2013). In other words, "[a] claim of ineffective assistance . . . must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." Conley v. Warden Chillicothe Corr. Inst., 505 F. App'x 501, 507 (6th Cir. 2012) (citing Edwards v. Carpenter, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)); *see also* Burroughs v. Makowski, 411 F.3d 665, 668 (6th Cir. 2005) ("To constitute cause, that ineffectiveness must itself amount to a violation of the Sixth Amendment, and **[*19]** therefore must be both exhausted and not procedurally defaulted.").

The Magistrate Judge found Petitioner's ineffective assistance claim itself procedurally defaulted because Shalash did not fairly present the claim in state court. (Doc. 18 at 16). ***HN8*** In order for a claim to be "fairly presented" to the state court, "a petitioner must assert both the legal and factual basis for his or her claim." Williams v. Anderson, 460 F.3d 789, 806 (6th Cir. 2006) (emphasis omitted) (citing McMeans v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000)). Thus, the claim must be presented "as a federal constitutional issue—not merely as an issue arising under state law." *Id.* (quoting Koontz v. Glossa, 731 F.2d 365, 368 (6th Cir. 1984)). "A petitioner can take four actions in his brief which are *significant to* the determination as to whether a claim has been fairly presented as a federal constitutional claim: '(1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.'" *Id.* (emphasis added) (quoting Newton v. Million, 349 F.3d 873, 877 (6th Cir. 2003)).

In his brief on direct appeal to the First District Court of Appeals under **[*20]** an "assignment of error" alleging prosecutorial misconduct, Shalash stated that "he received ineffective assistance of counsel when his trial counsel failed to object to these clearly prejudicial instances of prosecutorial misconduct." (Doc. 10 at 53). Shalash further stated that the "obvious impropriety" of the prosecutor's remarks warranted a finding that his attorney's conduct fell below the deferential standard afforded trial counsel's decisions and that he was prejudiced by his counsel's failure to object because his prosecutorial misconduct claim was only entitled to plain error review. (*Id.* at 53-54). Shalash concluded the section by stating that his conviction should be reversed "whether based on the clear misconduct of the prosecutor during his closing remarks, or based on the ineffectiveness of his counsel in failing to object to them." (*Id.* at 54). On direct appeal to the Supreme Court of Ohio, Shalash repeated the argument, albeit largely in a footnote, that his trial counsel was ineffective for failing to object to the prosecutor's statement. (*Id.* at 120-121, 121 n.5).

Based on these statements, the Court respectfully disagrees with the Magistrate Judge and finds that the ineffective assistance of trial counsel claim **[*21]** was fairly presented. Petitioner did not invoke the Sixth Amendment or reference the *Strickland* test for constitutional ineffective assistance claims, but Shalash did cite to a state case employing federal constitutional analysis, State v. Carpenter, in which an Ohio court applied *Strickland* to assess whether an

attorney's failure to object to a prosecutor's comments amounted to ineffective assistance of counsel. (Doc. 10 at 53, 121 n.5) (citing State v. Carpenter, 116 Ohio App. 3d 615, 688 N.E.2d 1090, 1097 (Ohio Ct. App. 1996)). In addition, although Shalash raised this argument within his assignment of error concerning prosecutorial misconduct, he phrases the ineffective assistance claim as an alternative and independent ground for relief stating, "Mr. Shalash's conviction should be reversed and remanded for a new trial whether based on the clear misconduct of the prosecutor during his closing remarks, or based on the ineffectiveness of his counsel in failing to object to them." (Doc. 10 at 54, 121). Further, he addressed both prongs of the *Strickland* test: objectively unreasonable performance and prejudice. (Doc. 10 at 53-54, 121 n.5); *see* Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Yet, finding that Shalash's ineffective assistance claim was not defaulted does not automatically excuse his defaulted prosecutorial misconduct [*22] claim. Shalash still has to show that his trial counsel was in fact constitutionally ineffective for failing to object to the prosecutor's comments. *See* Buell v. Mitchell, 274 F.3d 337, 351-52 (6th Cir. 2001); *see also* Erkins v. Chuvalas, 684 F. App'x 493, 499-500 (6th Cir. 2017). As noted above, ***HN9*** ineffective assistance of counsel claims are governed by the two-pronged *Strickland* test, which requires defendants to show: (1) that counsel's representation fell below an objective level of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 466 U.S. at 688, 694; *see* Hale v. Burt, 645 F. App'x 409, 415 (6th Cir. 2016) ("A court need not assess counsel's deficient performance before considering prejudice, where the latter inquiry is an easier one.") (quoting *Altman v. Winn*, 644 Fed. Appx. 637, 2016 WL 1254049, at *4 (6th Cir. 2016)).[2]

Petitioner argued in state court and in his federal habeas brief that he was prejudiced by his trial counsel's failure to object because his procedural misconduct claim was afforded only plain error review. (Doc. 10 at 53, 121 n.5; Doc. 15 at 12-13). However, ***HN11*** the proper inquiry is whether there is a reasonable probability that, had counsel objected to the prosecutor's statements, *the outcome of his trial would have been different*. *See* Erkins, 684 F. App'x at 500; Hale, 645 F. App'x at 415-16. Petitioner has not met his burden of showing prejudice, and as [*23] a result, he has also failed to show "cause" to excuse default of his prosecutorial misconduct claim.

Moreover, the Court agrees with the Magistrate Judge's conclusion that regardless of the default, Petitioner's prosecutorial misconduct claim fails on the merits. (Doc. 23 at 9-13). The Magistrate Judge properly found that although the state court of appeals applied plain error review, the claim is subject to deferential review under AEDPA. (*Id.* at 9); Stewart v. Trierweiler, 867 F.3d 633, 638 (6th Cir. 2017) (citing Fleming v. Metrish, 556 F.3d 520, 531 (6th Cir. 2017)). Although the First District cited to only Ohio case law, there is, nevertheless, a rebuttable presumption the federal claim was adjudicated on the merits. *See* Lamar v. Houk, 798 F.3d 405, 427 (6th Cir. 2015) (finding rebuttable presumption that a claim was adjudicated on the merits when state court only addressed state-law aspect of claim) (citing Johnson v. Williams, 568 U.S.

289, 133 S. Ct. 1088, 1091, 1094, 1096, 185 L. Ed. 2d 105 (2013)). Shalash does not attempt to rebut this presumption.

HN12 In order to demonstrate prosecutorial misconduct, a petitioner "must show that the prosecutor's conduct so infected the trial so as to render the conviction fundamentally unfair." *Hardaway v. Burt*, 846 F.3d 191 (6th Cir. 2017) (citing *Parker v. Matthews*, 567 U.S. 37, 45, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)). Thus, the Court must consider the fairness of the trial—the "touchstone of due process analysis in cases of alleged prosecutorial misconduct." *Richardson v. Palmer*, 941 F.3d 838, 848 (6th Cir. 2019)(quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). The standard is of course higher under AEDPA [*24] review, under which the Court merely examines whether the state court's opinion was an unreasonable application of clearly established law as established by Supreme Court precedent. *Id.* at 847.

The state court of appeals considered the prosecutor's three statements concerning Shalash's religion made in his closing argument. (Doc. 10 at 98-99). The court found that the prosecutor's first statement that Shalash and Neitz had been married in a mosque did not "serve to inflame the jury's passions." (*Id.*). The second statement, made in the context of a discussion about Neitz's and Pfalz's credibility stated:

Is it common sense? Is it believable? Do you believe that a Muslim wife is going to somehow be driving around town with an outsider, Pfalz, a stranger to the family, robbing banks, and the husband has been with him just moments before and somehow he leaves the picture with the kids in the van?

(*Id.* at 99). In a third statement, the prosecutor said in rebuttal:

Are you kidding me? Give me a break. And a Muslim wife on top of that. In that culture the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. [*25] Give me a break.

(*Id.*). The court of appeals found these statement "arguably improper" but "not so inflammatory that we can conclude that Shalash's convictions resulted from passion and prejudice instead of the state's proof of his guilt." (*Id.* at 99). The court further noted that the state provided "overwhelming evidence of Shalash's guilt" and held that "none of the comments were so prejudicial or outcome determinative as to . . . deny Shalash a fair trial." (*Id.*). Upon review, the Magistrate Judge concluded that this analysis did not constitute an unreasonable application of standards adopted by the Supreme Court. (Doc. 23 at 13).

Petitioner objects to this conclusion, citing to several circuit court opinions in support of his assertion of prosecutorial misconduct.[3] (Doc. 26 at 8-9). However, Petitioner cites no Supreme Court cases in his objections, and "[t]he Supreme Court has reminded us countless times that 'circuit precedent does not constitute clearly established Federal law' and 'therefore cannot form the basis for habeas relief under AEDPA.'" *Stewart*, 867 F.3d at

641 (quoting *Parker*, 567 U.S. at 48-49 (2012)). Accordingly, Petitioner's objection is overruled, and the Court adopts the Report and Recommendation's finding that Petitioner's second [*26] ground for habeas relief is procedurally defaulted, and, alternatively, that it fails on the merits.

C. Ground Three

Petitioner's third ground for habeas relief asserts that he was denied a fair trial because the jury was not instructed that the firearm specifications must be proven beyond a reasonable doubt. (Doc. 1 at 8). The Report and Recommendation found this claim to be procedurally defaulted. (Doc. 18 at 18-19). Like with Ground Two, Shalash raised the jury instruction issue on direct appeal, but the state court of appeals reviewed the claim for plain error only because Shalash had not objected to the issue during his trial. (*Id.*). The state court of appeals relied on this independent and adequate state ground to reject the claim. (*Id.*; Doc. 10 at 100-102). Shalash concedes that the claim is procedurally defaulted, yet argues that his default should be excused because "he will suffer a miscarriage of justice if he is unable to bring this claim on the merits as the defective jury instruction created a *structural error* . . . of a constitutional nature [a]ffecting the fairness of the entire trial . . . ." (Doc. 15 at 16) (emphasis added).

The Court agrees with and adopts the Report [*27] and Recommendation's analysis finding that Ground Three is procedurally defaulted.[4] (Doc. 18 at 19-20; Doc. 23 at 13-14). As the Magistrate Judge explained, ***HN13*** procedural default may be excused in order to avoid a "miscarriage of justice," but that exception applies only upon the presentation of new, reliable evidence showing the petitioner is actually innocent. *Dufresne v. Palmer*, 876 F.3d 248, 256 (6th Cir. 2017) (citing *Schlup*, 513 U.S. at 321, 324). As discussed above, Petitioner has failed to make that showing. *See* Part II.A, *supra*.

In any case, Petitioner does not appear to be asserting actual innocence to excuse the default of his jury instruction error claim. Rather, Petitioner seems to be arguing that the default should be excused because the error alleged is a "structural error." However, the Sixth Circuit has rejected the argument that a claim involving structural error is not subject to procedural default. *Carruthers v. Mays*, 889 F.3d 273, 289 (6th Cir. 2018); *see also Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012) (holding that ***HN14*** a petitioner "must show actual prejudice to excuse their default, even if the error is structural"). Accordingly, even assuming the error was structural, such a finding would not, in and of itself, excuse the default.

In his first set of objections, Petitioner makes a slightly different argument, asserting that "Ohio's contemporaneous objection [*28] rule is excused where there is structural error . . . ." (Doc. 21 at 9). The Court understands this argument to be that the claim was not procedurally defaulted, because the state court of appeals improperly applied the Ohio contemporaneous objection rule

in the face of this allegedly structural error. ***HN15*** This relates to the first step of the *Maupin* test, which is used by courts to assess whether a claim has been procedurally defaulted. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). The first step of this four-part test asks whether "there is a state procedural rule that applies and petitioner failed to comply with that rule[.]" When a state court has misapplied its own procedural rule, the claim is not barred from habeas review. *Post v. Bradshaw*, 621 F.3d 406, 423 (6th Cir. 2010) (citing *Hill v. Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005)).

This argument fails for two reasons. First, Petitioner has conceded in his reply brief that Ground Three is procedurally defaulted, which could be considered a judicial admission. (Doc. 15 at 16); *See Beasley v. Wells Fargo Bank, N.A.*, 744 F. App'x 906, 914 (6th Cir. 2018) (finding that a statement made in a brief may be binding on the district court and court of appeals). Second, the Court finds that the Ohio court of appeals did not err in applying the Ohio contemporaneous objection rule. The First District Court of Appeals specifically analyzed whether Shalash's **[*29]** assertion that the failure to instruct the jury that the gun specifications had to be proven beyond a reasonable doubt amounted to a structural error requiring automatic reversal as opposed to plain error review. (Doc. 10 at 100-101). The court cited multiple state-court decisions applying plain error review under similar factual circumstances—where the defendant failed to object to the fact that the jury instructions did not specifically state that a gun specification had to be proven beyond a reasonable doubt. (*Id.* at 101) (citing *State v. Blankenship*, 102 Ohio App. 3d 534, 657 N.E.2d 559 (Ohio Ct. App. 1995); *State v. Norman*, No. C-920202, 1993 Ohio App. LEXIS 133, at *8-9 (Ohio Ct. App. Jan. 20, 1993)).

The state court of appeals also distinguished *Sullivan v. Louisiana*, in which the Supreme Court found that jury instructions *misstating* the reasonable doubt standard warranted reversal. 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). The court noted that in the instant case, the court instructed the jury multiple times of the correct reasonable doubt standard and further instructed the jury that the state had to prove the elements of each offense listed in that count beyond a reasonable doubt. (Doc. 10 at 100-101). In short, Petitioner acknowledges he failed to object to the jury instructions, implicating Ohio's contemporaneous objection rule. Finding no structural error, the court properly applied this independent **[*30]** and adequate ground to deny review of Petitioner's claim.

The Magistrate Judge reviewed the substance of Ground Three in the alternative, finding the claim to be without merit. (Doc. 18 at 20-23). The Magistrate Judge correctly afforded the First District Court of Appeals' decision deferential review under AEDPA. *See Stewart*, 867 F.3d at 638 (citing *Fleming*, 556 F.3d at 521). The Court agrees with and adopts the Magistrate Judge's finding that the state court of appeals reasonably applied Supreme Court precedent concerning erroneous jury instructions. As discussed above, the court of appeals distinguished *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), which found that jury instructions misstating the reasonable doubt standard (lowering the state's burden of proof) essentially resulted in "no jury verdict within the meaning of the Sixth Amendment" amounting to a "structural error." (Doc. 10 at 100-101); 508 U.S. at 280-82. The court noted that unlike in *Sullivan*, the jury in the instant case was given accurate beyond-a-reasonable-doubt instructions multiple times. (Doc. 10 at 100). In addition, the court considered the fact that the

instruction was repeated at the end of each count in the indictment, with the jury informed that the state must prove each element of the listed offenses beyond a reasonable doubt. [*31] (Doc. 10 at 100-101).

Petitioner objects to the Report and Recommendation's analysis of the merits, asserting that because the beyond-a-reasonable-doubt instruction was not given in conjunction with the firearm specification, this "omission of the standard is certainly at least as offensive as misstating the burden of proof." (Doc. 21 at 10). Yet, the Court agrees with the Magistrate Judge that the state court of appeals' application of *Sullivan* was objectively reasonable for the reasons stated *infra*. Therefore, Petitioner's third ground for habeas relief is denied as procedurally defaulted, and, alternatively, as meritless.

D. Ground Four

Shalash's fourth ground for relief states that he "was denied his right to effective assistance of counsel and due process when the trial court denied his Petition for Post-Conviction Relief without a hearing." (Doc. 1 at 10). Petitioner filed a petition for post-conviction relief pursuant to R.C. § 2953.21 asserting that Shalash's conviction should be vacated because his co-defendants recanted their trial testimony. (Doc. 10 at 176). Shalash also filed a supplement to his initial petition for post-conviction relief, adding a Sixth Amendment ineffective assistance of counsel claim [*32] on the basis that his trial counsel failed to investigate possible alibi witnesses. (*Id.* at 310). Shalash also asserted in the supplemental petition that his trial counsel did not follow up on information Shalash provided that would allegedly show that the gun used in the robberies had been confiscated prior to the charges against Shalash. (*Id.*). Shalash submitted affidavits of his co-defendants to support the first claim and submitted his own affidavit in support of his ineffective assistance claim. The trial court denied the petition, finding both claims to be barred by res judicata, reasoning that Petitioner could have raised both claims on direct appeal. (*Id.*). The court alternatively found that the claims failed on the merits, holding, with respect to the ineffective assistance claim, that even accepting Shalash's statements as true, he failed to demonstrate his counsel was ineffective under *Strickland*. (*Id.*).

Shalash then appealed this decision to the state court of appeals, asserting one assignment of error: "[t]he trial court abused its discretion to the prejudice of Mr. Shalash when it denied his post-conviction motion without holding a hearing." (*Id.* at 341). The court of appeals affirmed the [*33] trial court's denial without an evidentiary hearing, finding that Shalash had not demonstrated substantive grounds for postconviction relief—the standard for a post-conviction hearing pursuant to R.C. § 2953.21(D)(formerly codified at R.C. § 2953.21(C)). (*Id.* at 373-375).

Petitioner's federal habeas petition asserts that Shalash was "denied his right to effective assistance of counsel and due process *when the trial court denied his [petition] without a hearing*." (Doc. 1 at 10) (emphasis added). The Court agrees with the Magistrate Judge that, to the extent Petitioner seeks relief based on the trial court's denial of an evidentiary hearing, that claim is outside the scope of federal habeas review. *See Cornwell v. Bradshaw*, 559 F.3d 398, 412 (6th Cir. 2009) (finding petitioner's claim that state and district court improperly denied

evidentiary hearing "not cognizable in habeas corpus proceedings, which cannot be used to challenge errors or deficiencies in state court post-conviction proceedings") (citing Kirby v. Dutton, 794 F.2d 245, 247 (6th Cir. 1986)). Petitioner objects to the Report and Recommendation's alternate findings that the claim was procedurally defaulted and fails on the merits. (Doc. 21 at 10-11). These objections are overruled, as Petitioner's claim fails on the basis that it is not cognizable under habeas.

Petitioner [*34] also states in one set of objections that he has alleged a claim of ineffective assistance of counsel, asserting that the lower court unreasonably applied Strickland. (Doc. 21 at 12). However, the Court does not find that Petitioner has alleged ineffective assistance of counsel as a basis for habeas relief. While it is unclear what Shalash meant by his statement under Ground Four that he was denied effective assistance of counsel *because the trial court denied him a post-conviction hearing*; in context, the most natural reading is that Shalash believes he was denied his right to fully present his ineffective assistance claim because he did not receive a hearing in state court.

The facts supporting Shalash's fourth ground for relief indicate that Shalash had presented evidence outside of the record to the state court, in the form of affidavits. (Doc. 1 at 18-19). That Shalash had presented affidavits to the state court supports his assertion under Ground Four that an evidentiary hearing was appropriate. Shalash's federal habeas petition summarizes the contents of his affidavit in support of his ineffective assistance claim. (*Id.* at 19). Yet, the petition does not assert that his attorney's alleged [*35] conduct violated Shalash's Sixth Amendment right to effective assistance, nor does the petition allege prejudice in any way (*i.e.*, that but for his attorney's missteps the outcome of his trial would have likely been different).

Shalash does discuss the merits of his ineffective assistance claim in his reply brief or "traverse." (Doc. 15 at 19-21). However, even there, Shalash concludes the section by stating that Shalash "presented grounds to support his claim of ineffective assistance of counsel in violation of his Sixth Amendment right to counsel" but that he "was never given the opportunity to fully present his claims for post-conviction relief in the trial court despite the[ir] likely meritorious nature." (Doc. 15 at 21). Thus, it is apparent that to the extent Shalash addresses the merits of his ineffective assistance claim, he does so in order to bolster his assertion under Ground Four that a hearing on the issue was warranted.

Moreover, the fact that Shalash addresses the merits of his ineffective assistance claim in his reply brief does not excuse his failure to do so in his § 2254 petition. That is because ***HN16***

> an issue raised for the first time in a reply brief or traverse is not properly before the court. *See* Tyler v. Mitchell, 416 F.3d 500, 504 (6th Cir. 2005) (finding [*36] penalty-phase as opposed to guilt-phase insufficiency argument waived because it was raised for the first time in petitioner's traverse). Accordingly, the Court need not separately address an ineffective assistance claim, as Shalash has either not presented such a claim or has forfeited the claim by addressing it for the first time in his traverse. For the foregoing reasons, habeas relief based on Ground Four is denied.

III. CONCLUSION

As required by 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), the Court has reviewed the comprehensive findings of the Magistrate Judge and considered *de novo* all of the filings in this matter. Upon consideration of the foregoing, the Court does determine that the Reports and Recommendations (Docs. 18, 23, 28) should be and are hereby **ADOPTED** as modified herein.

Accordingly:

1) Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2 (Doc. 1) is **DISMISSED with prejudice**;

2) Petitioner's objections (Docs. 21, 26, 29) are **OVERRULED**;

3) A certificate of appealability shall not issue, because reasonable jurists would not disagree with this conclusion; and

4) The Clerk shall enter judgment accordingly, whereupon this case is **TERMINATED** on the docket of this Court.

IT IS SO ORDERED.

Date: June 15, 2020 **[*37]**

/s/ Timothy S. Black

Timothy S. Black

United States District Judge

APPENDIX C.

UNITED STATES DISTICT COURT MAGISTRATE OPINION 2ND SUPPLEMENTAL

Shalash v. Gray, 2019 U.S. Dist. LEXIS 122139

Copy Citation

United States District Court for the Southern District of Ohio, Western Division

July 22, 2019, Decided; July 23, 2019, Filed

Case No. 1:18-cv-333

Opinion

SECOND SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Petitioner's Objections (ECF No. 26) to the Magistrate Judge's Supplemental Report and Recommendations which recommended dismissal (the "Supplemental Report," ECF No. 23). The Supplemental Report reiterated the recommendations made in the original Report and Recommendations (the "Report," ECF No. 18). Judge Black has recommitted the case to the Magistrate Judge for reconsideration in light of the Objections (Recommittal Order, ECF No. 27).

The Petition pleads four grounds for relief:

Ground One: The evidence was insufficient to convict Mr. Shalash, and the manifest weight of the evidence did not support the trial court's conviction in violation of the due process clause of the Fourteenth Amendment.

Supporting Fact(s): 1. The State presented exhaustive evidence regarding a series of robberies that had [*2] occurred from early September to late October, 2012, yet provided no direct evidence that Mr. Shalash was involved other than the suspect testimony of his two co-defendants.

Ground Two: Mr. Shalash was denied a fair trial when he was subjected to repeated instances of prosecutorial misconduct during his trial.

Supporting Fact(s): 1. After giving an extensive presentation of undisputed evidence none of which pointed to Mr. Shalash's involvement in the robberies, outside of the testimony of his codefendants, the State, in closing argument, resorted to inflammatory tactics vilifying Mr. Shalash, inciting fear, referencing Mr. Shalash's religion, and vouching for the credibility of witnesses.

Ground Three: Mr. Shalash was denied a fair trial when the trial court failed to instruct the jury that the firearm specifications must have been proven "beyond a reasonable doubt."

Supporting Fact(s): Trial court failed to instruct jury on the standard of proof for the firearm specifications in Mr. Shalash's indictment. The trial court did not instruct the jury that Mr. Shalash must be found guilty of the specifications beyond a reasonable doubt.

Ground Four: Mr. Shalash was denied his right to effective [*3] assistance of counsel and due process when the trial court denied his Petition for Post-Conviction Relief without a hearing where he submitted evidence outside the trial record which supported his claims of ineffective assistance of counsel and affidavits of his codefendants recanting their trial testimony.

Supporting Fact(s): Mr. Shalash's conviction was based on little to no direct evidence of his involvement in a series of robberies except for the suspect testimony of his co-defendants who both submitted affidavits recanting their testimony.

Mr. Shalash's post-conviction petition was supported by two affidavits from Jennifer Nietz, his wife and co-defendant, and one affidavit from Jake Pfalz, his other co-defendant wherein they both recanted their trial testimony.

(Petition, ECF No. 1, PageID 5, 7-8, 10, 16-19.)

Analysis

Ground One: Sufficiency and Weight of the Evidence

In his First Ground for Relief, Shalash asserts his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. The Report recommended dismissing the manifest weight claim as not cognizable in habeas corpus (ECF No. 18, PageID 1200). Petitioner does not object to that conclusion. [*4]

The Report concluded the sufficiency of the evidence claim was procedurally defaulted because, although it was argued unsuccessfully in the Ohio First District Court of Appeals, it was not fairly presented thereafter to the Supreme Court of Ohio (ECF No. 18, PageID 1201). In his Reply, Petitioner conceded he did not present insufficiency of the evidence as a proposition of law on his Supreme Court appeal, but noted his comment on how little evidence there was in his general argument for discretionary review (ECF No. 15, PageID 1171). The question, then, is whether a general argument of the sort Shalash made in his Memorandum in Support of Jurisdiction is sufficient to fairly present an issue, particularly when an appellant is represented by counsel.[1]

The Report concludes the sufficiency issues was not fairly presented. In the Memorandum in Support of Jurisdiction, Shalash's counsel never made the explicit claim the evidence was insufficient, never asserted the First District was in error for rejecting this assignment, and never cited any of the relevant Supreme Court precedent, *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and its progeny.

To show the general argument was enough, Petitioner relied on *Peterson v. Miller*, No. 1:16-cv-509, 2017 U.S. Dist. LEXIS 215391 (N.D. Ohio Dec. 7, 2017). [*5] The Report distinguishes *Peterson* in that the Northern District was construing a *pro se* pleading which is entitled to liberal construction under Supreme Court precedent (Report, ECF No. 18, PageID 1202, citing *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Even in *Peterson* the court refused to find a liberally construed proposition of law raised a federal constitutional question.

The first set of Objections disagreed with the Report's reading of *Peterson* (ECF No. 21, PageID 1226). Having re-examined *Peterson*, the Magistrate Judge agreed in the Supplemental Report that it can be read as finding Peterson preserved a sufficiency of the evidence claim in the Ohio Supreme Court by the words he used, *pro se*, in the relevant propositions of law. Magistrate Judge Greenberg wrote:

Aside from a few references to "Fair Trial," "Due Process," and "Equal Protection," (Doc. No. 13-1, Exh. 17 at 242), Peterson did not couch the legal arguments he made in his jurisdictional memorandum to the Ohio Supreme Court in constitutional terms. Nor did he cite to any provision of the Constitution or any federal or state-court case applying federal constitutional law to support them. On the other hand, again liberally construing his state-court pleading, [*6] Peterson did present factual arguments that would advance a federal sufficiency-of-the-evidence claim, such as alleging a lack of physical evidence linking him to the crimes. The Court finds, therefore, that Peterson fairly presented this claim to Ohio courts, and it is preserved for federal habeas review.

2017 U.S. Dist. LEXIS 215391 at *46. Shalash's counsel says *Peterson* is not limited to *pro se* litigants. But it is only *pro se* litigants who are entitled to the liberal construction the *Peterson* court said it was giving to the *pro se* Memorandum in Support of Jurisdiction. Pleadings prepared by licensed attorneys are not entitled to that "liberal construction."

Putting these distinctions aside, the Magistrate Judge also noted in the Supplemental Report that the *Peterson* decision is not controlling authority, but rather the decision of a sister court, considered only for its persuasiveness.[2] While Shalash continues to object to the Magistrate Judge's reading of *Peterson*, he adds nothing in his Supplemental Objections which requires further analysis.

Shalash continues to argue in his current Objections that even if he has procedurally defaulted on his sufficiency of the evidence claim, his default is excused by his [*7] actual innocence. While recognizing that new evidence of actual innocence can excuse a procedural default under *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), the Report noted that the only new evidence of actual innocence was the affidavits of his two co-defendants, one of whom is the mother of his children, recanting their trial testimony. Recantation does not come within the types of new evidence accepted by the Sixth Circuit. See *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005), cited in the Report at PageID 1203.

The original Objections criticized the Report for "summarily dismiss[ing] the recanting affidavits without citing any law which supports the Magistrate's contention that the affidavits are unreliable." (ECF No. 21, PageID 1227). But as just noted, the Report cites *Souter* which quotes *Schlup* on the types of new evidence which are reliable. *Id.* The Supplemental Report also cites other case law suggesting "extreme suspicion" of affidavits recanting trial testimony, particularly Davis v. Bradshaw, 900 F.3d 315 (6th Cir. 2018). Shalash again objects, asserting that without the testimony of the co-defendants, Shalash "could not be placed at the scene of any of the alleged 3 robberies." (Current Objections, ECF No. 26, PageID 1258.) Of course with the confessing testimony of all the co-defendants, a prosecutor would [*8] have been gilding the lilly to introduce more evidence of Shalash's presence. The fact that he did not hardly proves he could not.

Both the Report and Supplemental Report concluded that even if the procedural default of the sufficiency claim were put to one side, Shalash would not be entitled to relief on the merits of that claim. The Supplemental Objections agree that the law applying Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), is accurately stated, but assert "[t]he Magistrate does very little analysis or discussion in the Supplemental R&R when determining ground one should be dismissed on the merits." (Current Objections, ECF No. 26, 1259.) The Objections then discuss the evidence against Shalash and discuss why it is not credible. *Id.* at PageID 1259-60. Petitioner concludes that "the jury could not have convicted without making inferences and such inferences are improper if they are 'so unsupportable as to fall below the threshold of bare rationality.'" *Id.*, quoting Coleman v. Johnson, 566 U.S. 650, 656, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012). In *Coleman*, however, the Supreme Court unanimously reversed a Third Circuit grant of the writ on an insufficiency of the evidence claim. The evidence here is much stronger than the evidence found sufficient in *Coleman*.

On habeas review, our task is not to analyze [*9] the evidence *de novo*, but rather to defer first to the trial jury and then to the state appellate court. Tucker v. Palmer, 541 F.3d 652 (6th Cir. 2008); *accord* Davis v. Lafler, 658 F.3d 525, 531 (6th Cir. 2011)(*en banc*); Parker v. Matthews, 567 U.S. 37, 43, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012). The Report quotes at length the First District's opinion finding sufficient evidence (ECF No. 18, PageID 1197-99). The appellate court relied on the testimony of co-conspirators Neitz and Pfalz, but also noted the conviction was supported by surveillance video, by testimony from employees of the four banks robbed, and by testimony of an eyewitness who saw the three in a white van near one of the robbed locations a couple of hours before the robbery. State v. Shalash, 2014-Ohio-5006 at ¶¶ 41-42. This analysis is a completely reasonable application of *Jackson*.

It is therefore again respectfully recommended that Petitioner's Objections in Ground One should be overruled.

Ground Two: Prosecutorial Misconduct

In his Second Ground for Relief, Shalash claims he was denied a fair trial by repeated acts of prosecutorial misconduct. Respondent asserted this claim was procedurally defaulted by trial

counsel's failure to make a contemporary objection to the allegedly improper comments and the Report agreed. The Report concluded this ground for relief was procedurally defaulted by failure to make a contemporaneous objection [*10] (ECF No. 18, PageID 1206-08).

In his First Objections, Shalash claimed he had raised ineffective assistance of trial counsel to excuse that default. The Supplemental Report found this ineffective assistance of trial counsel claim had not been properly presented to the state courts. The Current Objections add nothing on this point (Objections, ECF No. 26, PageID 1261).

Although the Report did not discuss the merits of the Second Ground, the Supplemental Report concluded that the First District's plain error review of this claim was entitled to deference. That decision is as follows:

[*P45] A prosecuting attorney has wide latitude to summarize the evidence and zealously advocate the state's position during closing argument. *See* State v. Richey, 64 Ohio St.3d 353, 362, 1992 Ohio 44, 595 N.E.2d 915 (1992). The propriety of a specific remark by a prosecutor must not be judged in isolation, but in light of the tenor and context of the entire closing argument. *See* State v. Slagle, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992). Improper remarks during closing argument are grounds for reversal when the remarks serve to deny the defendant a fair trial. *See* State v. Maurer, 15 Ohio St.3d 239, 266, 15 Ohio B. 379, 473 N.E.2d 768 (1984).

[*P46] As Shalash admits, he did not object to any of the prosecutor's comments during closing argument. He, therefore, has waived all but plain error. *See* State v. D'Ambrosio, 73 Ohio St.3d 141, 143-44, 1995 Ohio 129, 652 N.E.2d 710 (1995). Based upon our review [*11] of the record, we cannot conclude that the prosecutor's comments during closing argument rose to the level of plain error.

[*P47] The prosecutor's statements extensively summarizing the evidence against Shalash were not improper. The prosecutor's comments focusing on the "scary nature" of the robberies were based upon testimony from bank employees that they had been threatened with a gun, and their fear that Pfalz could have fatally shot them had he chosen to do so. Likewise, the prosecutor's statement that the robberies were the result of a "heroin-induced frenzy," was based upon testimony from Neitz and Pfalz that they had committed the robberies to feed their heroin habit, and that they had robbed the banks while "high" on heroin.

[*P48] Shalash next argues that the prosecutor committed misconduct when he repeatedly made inflammatory remarks about Shalash's religion. He points to three references to religion in the state's closing argument. The first reference occurred when the prosecuting attorney stated that Shalash and Neitz had been married at a mosque in Clifton. But nothing about this statement would serve to inflame the jury's passions. The second reference occurred during [*12] the prosecutor's discussion of Neitz's and Pfalz's credibility, when he said,

Is it common sense? Is it believable? Do you believe that a Muslim wife is going to somehow be driving around town with an outsider, Pfalz, a stranger to the family, robbing banks, and the husband has been with him just moments before and somehow he leaves the picture with the kids in the van?

The third reference occurred during the rebuttal portion of the state's closing argument when the prosecutor stated,

Are you kidding me? Give me a break. And a Muslim wife on top of that. In that culture the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. Give me a break.

[*P49] Although the comments were arguably inappropriate, they were not so inflammatory that we can conclude that Shalash's convictions resulted from passion and prejudice instead of the state's proof of his guilt. The state produced overwhelming evidence of Shalash's guilt, and none of the cited comments were so prejudicial or outcome determinative as to constitute plain error and to deny Shalash a fair trial.

[*P50] Finally, Shalash argues that **[*13]** the prosecuting attorney improperly vouched for the credibility of the school nurse when he said, "Obviously she's not going to lie to you." It is improper for an attorney to express a personal belief or opinion as to the credibility of a witness. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997 Ohio 407, 679 N.E.2d 646 (1997). Here, the prosecutor did not improperly vouch for the nurse's credibility as a witness. He merely argued that she was a reliable witness and that she lacked any motive to lie. Therefore, we overrule Shalash's second assignment of error.

State v. Shalash, 2014-Ohio-5006 (1st Dist. Nov. 12, 2014). The Magistrate Judge agrees with the First District that the prosecutor's arguments about inferring behavior from religious identification were improper, but unlikely to have outweighed "the overwhelming evidence of Shalash's guilt" in producing a verdict. The prosecutor's comment about the school nurse's testimony was not improper at all as it did not constitute vouching.

The assertedly improper comments on religious identification that are at issue were all made during closing argument and were unobjected to. This Ground for Relief is therefore procedurally defaulted and the First District's rejection of the claim on the merits is not objectively unreasonable.

Ground Three: Incomplete Jury Instructions

[*14] In this Third Ground for Relief, Shalash claims the trial judge did not instruct the jury that the required standard of proof on the firearm specification was proof beyond a reasonable doubt. The First District found this claim defaulted for lack of a contemporaneous objection. *Shalash*, 2014-Ohio-5006, ¶¶ 51-56. The Report recommended upholding the procedural default over Shalash's actual innocence claim for the reasons set forth as to Ground One. In the alternative, the Report recommended deference to the First District's plain error review on this question as well (ECF No. 18, PageID 1216).

With respect to the Third Ground, Shalash also argued that the jury instruction error was a "structural error" which is not lost by procedural default. The Report rejected this argument,

stating, "[n]or has he cited any authority for the proposition that a 'structural error' cannot be forfeited by failure to make a contemporaneous objection." (ECF No. 18, PageID 1213.) In his Objections, Shalash claims he did cite authority for that proposition and repeats citations from his Traverse including *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), and *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

The Supplemental Report concluded Shalash's counsel misread those cases which basically hold structural errors are not subject to [*15] harmlessness analysis and not that a structural error is immune to procedural default. The Current Objections rely on prior argument as to procedural default (Objections, ECF No. 26, PageID 1263).

As to the merits of Ground Three, the Report notes that the definition of reasonable doubt given by the trial court was completely consistent with *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Here again Shalash relies on hits prior argument on the merits.

Ground Four: Denial of Post-Conviction Petition without a Hearing

In his Fourth Ground for Relief, Shalash claims his rights to effective assistance of counsel, guaranteed by the Sixth Amendment, and due process of law, guaranteed by the Fourteenth Amendment, were violated when his petition for post-conviction relief was denied without an evidentiary hearing.

The Report recommended denying this ground for relief because Shalash had not raised it as a constitutional question on direct appeal and thereby failed to fairly present it to the state court; instead, he raised it as an abuse of discretion claim (ECF No. 18, PageID 1216-17). The Report also recommended denying the claim on the merits because no Supreme Court precedent clearly establishes a right to an evidentiary hearing in state post-conviction proceedings. *Id.* [*16] at PageID 1218.

Shalash objected that the Magistrate Judge raised procedural default *sua sponte*, that it had not been raised by Respondent (Objections, ECF No. 1231-32). The Supplemental Report noted the truth of this assertion, but cited Sixth Circuit law permitting a court's raising the defense *sua sponte*.

Shalash now objects that raising the defense *sua sponte* "is frowned upon by Sixth Circuit precedent." (Objections, ECF No. 26, PageID 1264, citing *Gatewood v. Sloan*, No. 1:16-cv-334, 2017 U.S. Dist. LEXIS 222579, *14, (N.D. Ohio Oct. 30, 2017); *Flood v. Phillips*, 90 F. App'x 108, 113-114, (6th Cir. 2004)). *Gatewood* is, of course, not Sixth Circuit precedent, but the opinion of a valued and known colleague, The Honorable William Baughman. Judge Baughman does not say that raising the defense *sua sponte* is "frowned upon." Rather he said "that a procedural default may be bypassed by the federal habeas court if the underlying claim may be resolved against the petitioner on the merits" and then chose to decide the merits question directly. *Gatewood* at *14.

Flood is a Sixth Circuit decision, but it is expressly non-precedential because it is unpublished. The *Flood*court agreed with the district court that Flood's claims (other than prosecutorial misconduct) were procedurally defaulted but nevertheless considered the claims [*17] *sua sponte* on the merits "because the state did not assert procedural default as an affirmative defense in its responsive pleadings . . . ." 90 F. App'x at 115.

Both *Gatewood* and *Flood* treat procedural default as a defense which district courts can raise *sua sponte*, but which they need not raise. Neither of them purports to overruled the published Sixth Circuit precedent permitting the raising of the defense *sua sponte, Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004); *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002)(§ 2254 capital case); *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005)(§ 2254 capital case); *Elzy v. United States*, 205 F.3d 882 (6th Cir. 2000)(§ 2255case). And as the Supreme Court noted in *Day v. McDonough*, 547 U.S. 198, 206-07, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), the Courts of Appeals have unanimously held, in appropriate circumstances, that courts on their own initiative may raise a petitioner's procedural default. It was not an abuse of discretion for the Magistrate Judge to raise the procedural default defense to Ground Four.

Shalash offers no additional argument as to why that defense was incorrectly decided as to Ground Four or on the merits of Ground Four.

Conclusion

Having reconsidered the case pursuant to the Recommittal Order, the Magistrate Judge again respectfully recommends that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court [*18] should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

July 22, 2019.

/s/ *Michael R. Merz*

United States Magistrate Judge

APPENDIX D.

UNITED STATES DISTICT COURT MAGISTRATE OPINION

1ST SUPPLEMENTAL

Shalash v. Gray, 2019 U.S. Dist. LEXIS 100848

Copy Citation

United States District Court for the Southern District of Ohio, Western Division

June 17, 2019, Decided; June 17, 2019, Filed

Case No. 1:18-cv-333

Opinion

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case, brought by Petitioner **Ahmad Shalash** with the assistance of counsel, is before the Court on Petitioner's Objections (ECF No. 21) to the Magistrate Judge's Report and Recommendations which recommended dismissal (the "Report," ECF No. 18). Judge Black has recommitted the case to the Magistrate Judge for reconsideration in light of the Objections (Recommittal Order, ECF No. 22).

The Petition pleads four grounds for relief and Petitioner objects to the Report's conclusions as to each one. They are considered here seriatim.

Ground One: Sufficiency and Weight of the Evidence

In his First Ground for Relief, Shalash asserts his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. The Report recommended dismissing the manifest weight claim as [*2] not cognizable in habeas corpus (ECF No. 18, PageID 1200). Petitioner does not object to that conclusion.

The Report concluded the sufficiency of the evidence claim was procedurally defaulted because, although it was argued unsuccessfully in the Ohio First District Court of Appeals, it was not fairly presented thereafter to the Supreme Court of Ohio (ECF No. 18, PageID 1201). In his Reply, Petitioner conceded he did not present insufficiency of the evidence as a proposition of law on his Supreme Court appeal, but noted his comment on how little evidence there was in his general argument for discretionary review (ECF No. 15, PageID 1171). The question, then, is whether a general argument of the sort Shalash made in his Memorandum in Support of Jurisdiction is sufficient to fairly present an issue, particularly when an appellant is represented by counsel.[1]

The Report concludes the sufficiency issues was not fairly presented. In the Memorandum in Support of Jurisdiction, Shalash's counsel never made the explicit claim the evidence was insufficient, never asserted the First District was in error for rejecting this assignment, and never cited any of the relevant Supreme Court precedent, *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), **[*3]** and its progeny.

To show the general argument was enough, Petitioner relied on *Peterson v. Miller*, No. 1:16-cv-509, 2017 U.S. Dist. LEXIS 215391 (N.D. Ohio Dec. 7, 2017). The Report distinguishes *Peterson* in that the Northern District was construing a *pro se* pleading which is entitled to liberal construction under Supreme Court precedent (Report, ECF No. 18, PageID 1202, citing *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). Even in *Peterson* the court refused to find a liberally construed proposition of law raised a federal constitutional question.

The Objections disagree with the Report's reading of *Peterson* (ECF No. 21, PageID 1226). Having re-examined *Peterson*, the Magistrate Judge agrees it can be read as finding Peterson preserved a sufficiency of the evidence claim in the Ohio Supreme Court by the words he used, *pro se*, in the relevant propositions of law. Magistrate Judge Greenberg wrote:

Aside from a few references to "Fair Trial," "Due Process," and "Equal Protection," (Doc. No. 13-1, Exh. 17 at 242), Peterson did not couch the legal arguments he made in his jurisdictional memorandum to the Ohio Supreme Court in constitutional terms. Nor did he cite to any provision of the Constitution or any federal or state-court case applying federal constitutional law to support them. **[*4]** On the other hand, again liberally construing his state-court pleading, Peterson did present factual arguments that would advance a federal sufficiency-of -the-evidence claim, such as alleging a lack of physical evidence linking him to the crimes. The Court finds, therefore, that Peterson fairly presented this claim to Ohio courts, and it is preserved for federal habeas review.

2017 U.S. Dist. LEXIS 215391 at *46. Shalash's counsel says *Peterson* is not limited to *pro se* litigants. But it is only *pro se* litigants who are entitled to the liberal construction the *Peterson* court said it was giving to the *pro se* Memorandum in Support of Jurisdiction. Pleadings prepared by licensed attorneys are not entitled to that "liberal construction."

In addition, the words the *Peterson* court was construing are different from the words involved here. In *Peterson* the word "insufficient" was used in the second proposition of law and the words "without [any] facts of [sic] law" were used in the first proposition in the Ohio Supreme Court. Here there are no words adverting to the sufficiency of the evidence in any of the propositions of law, prepared by counsel, that were filed in the Supreme Court of Ohio.

Putting these distinctions aside, **[*5]** the Magistrate Judge also notes that the *Peterson* decision is not controlling authority, but rather the decision of a sister court, considered only for its persuasiveness.[2]

Shalash argues that even if he has procedurally defaulted on his sufficiency of the evidence claim, his default is excused by his actual innocence. While recognizing that new evidence of actual innocence can excuse a procedural default under *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), the Report noted that the only new evidence of actual innocence was the affidavits of his two codefendants, one of whom is the mother of his children, recanting their trial testimony. Recantation does not come within the types of new evidence accepted by the Sixth Circuit. See *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005), cited in the Report at PageID 1203.

The Objections criticize the Report for "summarily dismiss[ing] the recanting affidavits without citing any law which supports the Magistrate's contention that the affidavits are unreliable." (ECF No. 21, PageID 1227). But as just noted, the Report cites *Souter* which quotes *Schlup* on the types of new evidence which are reliable. *Id.*

Courts in general are strongly skeptical of affidavits recanting sworn trial testimony. "Recanting affidavits and witnesses are [*6] viewed with extreme suspicion." *United States v. Willis*,257 F.3d 636, 645 (6th Cir. 2001); *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991); *see also United States v. Lewis*, 338 F.2d 137, 139 (6th Cir. 1964). Even if accepted, recantation of trial testimony is generally not sufficient to grant habeas relief absent constitutional error. *Welsh v. Lafler*, 444 Fed. App'x 844, 850 (6th Cir. 2011). See general discussion to the same effect in *Davis v. Bradshaw*, 900 F.3d 315 (6th Cir. 2018).

Even if the procedural default of the sufficiency claim were put to one side, Shalash would not be entitled to relief on the merits of that claim. In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

[T]he 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 . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319; *United States v. Paige*, 470 F.3d 603, 608 (6th Cir. 2006); *United States v. Somerset*, 2007 U.S. Dist. LEXIS 76699 * 4-5 (S.D. Ohio Oct. 12, 2007). This rule was recognized in Ohio law at *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *In re Winship*, 397 U.S. at 361.

In cases such as Petitioner's challenging [*7] the sufficiency of the evidence and filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), two levels of deference to state decisions are required:

In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to

groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. See *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could **[*8]** not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable. See 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009). In a sufficiency of the evidence habeas corpus case, deference should be given to the trier-of-fact's verdict under *Jackson* and then to the appellate court's consideration of that verdict, as commanded by the AEDPA. *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008); *accord Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011)(*en banc*); *Parker v. Matthews*, 567 U.S. 37, 43, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012). Notably, "a court may sustain a conviction based upon nothing more than circumstantial evidence." *Stewart v. Wolfenbarger*, 595 F.3d 647, 656 (6th Cir. 2010).

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." *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311, 313 (2011) (*per curiam*). And second, on 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 **[*9]** the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, [773], 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)).

Coleman v. Johnson, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978, (2012)(*per curiam*); *Parker v. Matthews*, 567 U.S. 37, 43, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (*per curiam*).

The Report quotes at length the First District's opinion finding sufficient evidence (ECF No. 18, PageID 1197-99). The appellate court relied on the testimony of co-conspirators Neitz and Pfalz, but also noted it was supported by surveillance video, by testimony from employees of the four banks robbed, and by testimony of an eyewitness who saw the three in a white van near one of the robbed locations a couple of hours before the robbery. *State v. Shalash*, 2014-Ohio-5006 at ¶¶ 41-42. This analysis is a completely reasonable application of *Jackson*.

In sum, Petitioner's Objections on the sufficiency of the evidence claim should be overruled.

Ground Two: Prosecutorial Misconduct

In his Second Ground for Relief, Shalash claims he was denied a fair trial by repeated acts of prosecutorial misconduct. Respondent asserted this claim was procedurally defaulted by trial counsel's failure to object to the allegedly improper comments. The Report concluded this ground for relief was procedurally defaulted by failure to make a contemporaneous objection (ECF No. 18, PageID 1206-08).

[*10] In his Objections, Shalash recounts that he admitted at every stage in the state courts that his trial attorney had not made a contemporaneous objection, but asserted this was ineffective assistance of trial counsel. The Report noted Shalash did not raise as an assignment of error that he received ineffective assistance of trial counsel in this failure to object and that his entire argument on this point was, "Furthermore, Mr. Shalash submits that he received the ineffective assistance of counsel when his trial counsel failed to object to these clearly prejudicial instances of prosecutorial misconduct." (Report, ECF No. 18, PageID 1209, quoting Appellant's Brief, State Court Record ECF No. 10, Ex. 10, PageID 101.) Noting that any claim of ineffective assistance of trial counsel as an excuse for procedural default must be fairly presented to the state courts, the Report concluded this one sentence did not amount to fair presentation and the failure to make a contemporaneous objection had not been excused.

Shalash objects by reciting the four ways accepted for fair presentation by the Sixth Circuit (Objections, ECF No. 21, PageID 1229, quoting *Clinkscale v. Carter*, 375 F.3d 430 (6th Cir. 2004):

Additionally, a petitioner must have "'fairly [*11] presented' the substance of each of his federal constitutional claims to the state courts . . . ." *Hannah v. Conley*, 49 F.3d 1193, 1196 (6th Cir. 1995) (citations omitted). *See also O'Sullivan*, 526 U.S. at 844 (section 2254(c)"requires only that state prisoners give state courts a *fair* opportunity to act on their claims") (emphasis in original); *Manning*, 912 F.2d at 881 ("The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims."). As we have explained:

A petitioner can take four actions in its brief which are significant to the determination as to whether a claim has been fairly presented: (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law."

Newton, 349 F.3d at 877. *See also Levine v. Torvik*, 986 F.2d 1506, 1516 (6th Cir.), *cert. denied*, 509 U.S. 907, 125 L. Ed. 2d 694, 113 S. Ct. 3001 (1993) ("A petitioner 'fairly presents' his claim to the state courts by citing a provision of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis [*12] in similar fact patterns.").

Clinkscale, 375 F.3d at 437-38. Clinkscale had made a **claim** of ineffective assistance of trial counsel in the Ohio Court of Appeals. *Id.* at 438. Shalash does not assert he made a **claim** that his attorney was ineffective for not objecting to the prosecutorial comments. Instead, he says he used the "clearly constitutional terms 'ineffective assistance of counsel,' a commonly known and specific constitutional right in both his direct appeal brief to the First District Court of Appeals and his Memorandum in Support of Jurisdiction to the Ohio Supreme Court." (Objections, ECF No. 21, PageID 1229.)

The Report rejected this argument, noting

A constitutional claim cannot be preserved for habeas review by reciting talismanic words — an actual argument must be made. Merely using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987). "A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument." *Riggins v. McGinnis*, 50 F.3d 492, 494 (7th Cir. 1995). The same must be said of "ineffective assistance."

(ECF No. 18, PageID 1209-10.)

Examining again the Appellant's Brief on direct appeal, the Magistrate Judge **[*13]** finds he did not raise ineffective assistance of trial counsel as an assignment of error (State Court Record, ECF No. 10, PageID 87, *et seq.*). His only mention of the Sixth Amendment, the constitutional provision that guarantees effective assistance, is in his argument about jury instructions, a different provision of the Sixth Amendment. *Id.* at PageID 104. On further appeal, Shalash raised three propositions of law, but none of them asserts ineffective assistance of trial counsel. As on direct appeal, he mentions in the body of his argument that it was ineffective assistance to fail to object, but in neither instance did he cite any law in support of that assertion. The First District certainly did not consider itself faced with a claim of ineffective assistance of trial counsel. Indeed, it enforced the procedural default of failing to make a contemporaneous objection by reviewing the prosecutorial misconduct claim only for plain error.

The Magistrate Judge remains persuaded Shalash made no claim of ineffective assistance of trial counsel that gave the First District a fair opportunity to decide that question. But, as with the First Objection, if we put the procedural default to one side, Shalash is not entitled **[*14]** to relief on the merits of his prosecutorial misconduct claim because the First District's plain error review is entitled to deference under 28 U.S.C. § 2254(d)(1). The opinion of a state court on plain error review is still entitled to AEDPA deference if the federal court reaches the merits despite the procedural default. *Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009); *Kittka v. Franks*, 539 Fed. App'x 668, 672 (6th Cir. 2013); *Bond v. McQuiggan*, 506 Fed. App'x 493, 498 n. 2 (6th Cir. 2013); *Stojetz v. Ishee*, 2014 U.S. Dist. LEXIS 137501 *231 (S.D. Ohio Sept. 24, 2014).

The First District decided the prosecutorial misconduct claim on plain error review as follows:

[*P45] A prosecuting attorney has wide latitude to summarize the evidence and zealously advocate the state's position during closing argument. *See* State v. Richey, 64 Ohio St.3d 353, 362, 1992 Ohio 44, 595 N.E.2d 915 (1992). The propriety of a specific remark by a prosecutor must not be judged in isolation, but in light of the tenor and context of the entire closing argument. *See* State v. Slagle, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992). Improper remarks during closing argument are grounds for reversal when the remarks serve to deny the defendant a fair trial. *See* State v. Maurer, 15 Ohio St.3d 239, 266, 15 Ohio B. 379, 473 N.E.2d 768 (1984).

[*P46] As Shalash admits, he did not object to any of the prosecutor's comments during closing argument. He, therefore, has waived all but plain error. *See* State v. D'Ambrosio, 73 Ohio St.3d 141, 143-44, 1995 Ohio 129, 652 N.E.2d 710 (1995). Based upon our review of the record, we cannot conclude that the prosecutor's comments during closing argument rose to the level of plain error.

[*P47] The prosecutor's statements extensively summarizing [*15] the evidence against Shalash were not improper. The prosecutor's comments focusing on the "scary nature" of the robberies were based upon testimony from bank employees that they had been threatened with a gun, and their fear that Pfalz could have fatally shot them had he chosen to do so. Likewise, the prosecutor's statement that the robberies were the result of a "heroin-induced frenzy," was based upon testimony from Neitz and Pfalz that they had committed the robberies to feed their heroin habit, and that they had robbed the banks while "high" on heroin.

[*P48] Shalash next argues that the prosecutor committed misconduct when he repeatedly made inflammatory remarks about Shalash's religion. He points to three references to religion in the state's closing argument. The first reference occurred when the prosecuting attorney stated that Shalash and Neitz had been married at a mosque in Clifton. But nothing about this statement would serve to inflame the jury's passions. The second reference occurred during the prosecutor's discussion of Neitz's and Pfalz's credibility, when he said,

Is it common sense? Is it believable? Do you believe that a Muslim wife is going to somehow be driving around [*16] town with an outsider, Pfalz, a stranger to the family, robbing banks, and the husband has been with him just moments before and somehow he leaves the picture with the kids in the van?

The third reference occurred during the rebuttal portion of the state's closing argument when the prosecutor stated,

Are you kidding me? Give me a break. And a Muslim wife on top of that. In that culture the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. Give me a break.

[*P49] Although the comments were arguably inappropriate, they were not so inflammatory that we can conclude that Shalash's convictions resulted from passion and prejudice instead of the state's proof of his guilt. The state produced overwhelming evidence of Shalash's guilt, and none of the cited comments were so prejudicial or outcome determinative as to constitute plain error and to deny Shalash a fair trial.

[*P50] Finally, Shalash argues that the prosecuting attorney improperly vouched for the credibility of the school nurse when he said, "Obviously she's not going to lie to you." It is improper for an attorney to express **[*17]** a personal belief or opinion as to the credibility of a witness. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997 Ohio 407, 679 N.E.2d 646 (1997). Here, the prosecutor did not improperly vouch for the nurse's credibility as a witness. He merely argued that she was a reliable witness and that she lacked any motive to lie. Therefore, we overrule Shalash's second assignment of error.

State v. Shalash, 2014-Ohio-5006 (1st Dist. Nov. 12, 2014).

The Sixth Circuit has articulated the relevant standard for habeas claims of prosecutorial misconduct:

On habeas review, claims of prosecutorial misconduct are reviewed deferentially. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (citation omitted). Even if the prosecutor's conduct was improper or even "universally condemned," *id.*, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and **[*18]** (4) whether other evidence against the defendant was substantial. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). Under [the] AEDPA, this bar is heightened by the deference we give to the . . . [Ohio] Supreme Court's determination of . . . [Petitioner's] prosecutorial-misconduct claims. *See Macias v. Makowski*, 291 F.3d 447, 453-54 (6th Cir. 2002)("If this court were hearing the case on direct appeal, we might have concluded that the prosecutor's comments violated Macias's due process rights. But this case is before us on a petition for a writ of habeas corpus. So the relevant question is not whether the state court's decision was wrong, but whether it was an unreasonable application of clearly established federal law.").

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003).

On habeas review, "the relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). "Even if the prosecutor's conduct was improper or even universally condemned, we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair." *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003). Yet reversal is required if the prosecutor's misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant." **[*19]** *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997); see also *Gall v. Parker*, 231 F.3d 265, 311 (6th Cir. 2000), overruled on other grounds by, *Bowling v. Parker*, 344 F.3d 487, 501 n.3 (6th Cir. 2003).

Bates v. Bell, 402 F.3d 635, 640-41 (6th Cir. 2005).

Although then-Judge Fischer[3] did not cite any federal case law in his decision, the precedent cited in ¶ 45 generally adopts the federal standards. In his Reply, Shalash argued the merits of this claim as if habeas review were *de novo* and omitted any citation to relevant United States Supreme Court authority (ECF No. 15, PageID 1180-82). But, as noted above, our review is deferential under 28 U.S.C. § 2254(d)(1) and only clearly established Supreme Court precedent can be a predicate for habeas relief.

The Magistrate Judge concludes that the First District's decision is not an objectively unreasonable application of the standards adopted by the Supreme Court. Ground Two should therefore be dismissed on the merits as well as for procedural default.

Ground Three: Incomplete Jury Instructions

In this Third Ground for Relief, Shalash claims the trial judge did not instruct the jury that the required standard of proof on the firearm specification was proof beyond a reasonable doubt. The First District found this claim defaulted for lack of a contemporaneous objection. *Shalash*, 2014-Ohio-5006, ¶¶ 51-56. The Report recommends upholding the procedural default over Shalash's actual innocence claim for the [*20] reasons set forth as to Ground One. In the alternative, the Report recommends deference to the First District's plain error review on this question as well (ECF No. 18, PageID 1216).

With respect to the Third Ground, Shalash also argued that the jury instruction error was a "structural error" which is not lost by procedural default. The Report rejected this argument, stating, "[n]or has he cited any authority for the proposition that a 'structural error' cannot be forfeited by failure to make a contemporaneous objection." (ECF No. 18, PageID 1213.) In his Objections, Shalash claims he did cite authority for that proposition and repeats citations from his Traverse including *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), and *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

Shalash's position is simply a misreading of these cases. The distinction made in *Fulminante* is between structural errors, which are not subject to harmless error analysis, and other constitutional errors at trial, which are assessed as to whether they were harmful or not. *Fulminante* does not discuss procedural default in any way. The same is true of *Rose*.

As to the merits of Ground Three, the Report notes that the definition of reasonable doubt given by the trial court was completely consistent with *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Indeed, [*21] it is not the content of the definition about which Shalash complains, but that it was not repeated in conjunction with the firearm specification. The First District's decision on the merits, which expressly recognized *Sullivan* as the controlling precedent, was not an objectively unreasonable application of *Sullivan*.

Ground Four: Denial of Post-Conviction Petition without a Hearing

In his Fourth Ground for Relief, Shalash claims his rights to effective assistance of counsel, guaranteed by the Sixth Amendment, and due process of law, guaranteed by the Fourteenth Amendment, were violated when his petition for post-conviction relief was denied without an evidentiary hearing.

The Report recommended denying this ground for relief because Shalash had not raised it as a constitutional question on direct appeal and thereby failed to fairly present it; instead, he raised it as an abuse of discretion claim (ECF No. 18, PageID 1216-17). The Report also recommended denying the claim on the merits because no Supreme Court precedent clearly establishes a right to an evidentiary hearing in state post-conviction proceedings. *Id.* at PageID 1218.

Shalash objects that the Magistrate Judge raised procedural default *sua sponte*, that it had **[*22]** not been raised by Respondent (Objections, ECF No. 1231-32). Shalash is correct that Respondent defended Ground Four on the merits and the procedural default matter was raised *sua sponte* by the Magistrate Judge. The Sixth Circuit, however, has held it is not inappropriate for the Court to raise a procedural default defense *sua sponte*. *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004); *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002)(§ 2254 capital case); *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005)(capital case); *Elzy v. United States*, 205 F.3d 882 (6th Cir. 2000)(§ 2255 case). See also, *Day v. McDonough*, 547 U.S. 198, 206-07, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (stating that "[w]hile the issue remains open in this Court, see *Trest v. Cain*, 522 U.S. 87, 90, 118 S. Ct. 478, 139 L. Ed. 2d 444 (1997), the Courts of Appeals have unanimously held that, in appropriate circumstances, courts, on their own initiative, may raise a petitioner's procedural default," citing cases in all but the D.C. Circuit Court).

The only excusing cause suggested for this procedural default is Shalash's asserted actual innocence. The insufficiency of the actual innocence argument is discussed under Ground One above.

As part of his Fourth Ground for Relief, Shalash claims he received ineffective assistance of trial counsel when his trial attorney failed to subpoena two witnesses, one of whom would allegedly have provided an alibi, and failed to investigate Shalash's claim that the gun alleged to have been used in the robberies in 2012 had been confiscated **[*23]** in 2011. The trial judge found the supporting affidavits marginal at best. Shalash had made a "shotgun" allegation of ineffective assistance of trial counsel and had not provided affidavits from the supposed alibi witnesses.

Conclusion

Having reconsidered the case pursuant to the Recommittal Order, the Magistrate Judge again respectfully recommends that the Petition be dismissed with prejudice. Because reasonable

jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

June 17, 2019.

s/ *Michael R. Merz*

United States Magistrate Judge

APPENDIX E.

UNITED STATES DISTICT COURT MAGISTRATE OPINION

Ahmad Shalash v. Gray, 2019 U.S. Dist. LEXIS 69180

Copy Citation

United States District Court for the Southern District of Ohio, Western Division

April 23, 2019, Decided; April 24, 2019, Filed

Case No. 1:18-cv-333

Opinion

REPORT AND RECOMMENDATIONS

Petitioner **Ahmad Shalash** brought this habeas corpus action with the assistance of counsel to obtain relief from his convictions for robbery and aggravated robbery in the Hamilton County Court of Common Pleas. The case is before the Court for decision on the Petition (ECF No. 1), the State Court Record (ECF No. 10), the Return of Writ (ECF No. 11), and Petitioner's Reply.

Although originally filed at the Columbus seat of court, the case was transferred to the Western Division at Cincinnati in accordance with the habeas venue rule, S. D. Ohio Civ. R. 82.1(f). The Magistrate Judge reference in the case has recently been transferred to the undersigned to help balance the Magistrate Judge workload in the District.

Litigation History

Shalash was indicted by a Hamilton County, Ohio, grand jury under two separate case numbers for his involvement in four [*2] separate bank robberies. A trial jury, which heard both cases together, convicted him of three counts of robbery and two counts of aggravated robbery in one case and one count of robbery in the second case. He was sentenced to an aggregate term of imprisonment of forty-four years and appealed to the First District Court of Appeals which affirmed. *State v. Shalash*, 1st Dist. Hamilton Nos. C-130748, 130749, 2014-Ohio-5006 (Nov. 12, 2014), appellate jurisdiction declined, 142 Ohio St. 3d 1517, 2015-Ohio-2341, 33 N.E.3d 65 (2015) ("*Shalash I*").

While the appeal was pending, Shalash filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 which the trial court denied. Shalash again appealed to the First District, asserting as his single assignment of error that the trial court had erred in denying his post-conviction petition without a hearing. The First District affirmed. *State v. Shalash*, 1st Dist. Hamilton No. C-150614, 2016 Ohio App. LEXIS 4105 (Oct. 7, 2016), appellate jurisdiction declined, 149 Ohio St. 3d 1420, 2017-Ohio-4038, 75 N.E.3d 237 (2017) ("*Shalash II*").

Shalash then filed his Petition in this Court[1], pleading the following grounds for relief:

Ground One: "The evidence was insufficient to convict Mr. Shalash, and the manifest weight of the evidence did not support the trial court's conviction in violation of the due process clause of the Fourteenth Amendment."

Supporting Fact(s): 1. "The State presented exhaustive evidence regarding a series of robberies that [*3] had occurred from early September to late October, 2012, yet provided no direct evidence that Mr. Shalash was involved other than the suspect testimony of his two co-defendants."

Ground Two: "Mr. Shalash was denied a fair trial when he was subjected to repeated instances of prosecutorial misconduct during his trial."

Supporting Fact(s): 1. "After giving an extensive presentation of undisputed evidence none of which pointed to Mr. Shalash's involvement in the robberies, outside of the testimony of his co-defendants, the State, in closing argument, resorted to inflammatory tactics vilifying Mr. Shalash, inciting fear, referencing Mr. Shalash's religion, and vouching for the credibility of witnesses.

Ground Three: "Mr. Shalash was denied a fair trial when the trial court failed to instruct the jury that the firearm specifications must have been proven 'beyond a reasonable doubt.'"

Supporting Fact(s): "Trial court failed to instruct jury on the standard of proof for the firearm specifications in Mr. Shalash's indictment. The trial court did not instruct the jury that Mr. Shalash must be found guilty of the specifications beyond a reasonable doubt."

Ground Four: "Mr. Shalash was denied his right [*4] to effective assistance of counsel and due process when the trial court denied his Petition for Post-Conviction Relief without a hearing" where he submitted evidence outside the trial record which supported his claims of ineffective assistance of counsel and affidavits of his co-defendants recanting their trial testimony.

Supporting Fact(s): "Mr. Shalash's conviction was based on little to no direct evidence of his involvement in a series of robberies except for the suspect testimony of his co-defendants who both submitted affidavits recanting their testimony."

"Mr. Shalash's post-conviction petition was supported by two affidavits from Jennifer Nietz, his wife and co-defendant, and one affidavit from Jake Pfalz, his other co-defendant wherein they both recanted their trial testimony."

(Petition, ECF No. 1, PageID 5, 7-8, 10, 16-19.)

Analysis

Ground One: Conviction on Insufficient Evidence and Against the Manifest Weight of the Evidence

In his First Ground for Relief, Shalash asserts his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. Shalash combined these two claims in his First Assignment on Direct Appeal and the First District [*5] decided them as follows:

Sufficiency and Weight of the Evidence

{¶ 36} In his first assignment of error, Shalash argues that his convictions for robbery, aggravated robbery, and the accompanying firearm specifications were supported by insufficient evidence and were contrary to the manifest weight of the evidence.

{¶ 37} To reverse a conviction for insufficient evidence, the reviewing court must be persuaded, after viewing the evidence in a light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541 (1997). To reverse a conviction as against the manifest weight of the evidence, the reviewing court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.* at 387.

{¶ 38} The state argued that Shalash was guilty as either a principal or as a complicitor to the four bank robberies. Complicity is defined as when a person "acting with the kind of culpability required for the commission of an offense * * * aid[s] or abets another [*6] in committing the offense." R.C. 2923.03(A)(2). To support a conviction for complicity by aiding and abetting, the state must show that the defendant assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime and that the defendant shared the criminal intent of the principal. *State v. Johnson*, 93 Ohio St. 3d 240, 754 N.E.2d 796, 2001-Ohio-1336 (2001), syllabus. Aiding and abetting can be inferred by presence, companionship, and conduct before and after the offense is committed. *Id.* at 243-245.

{¶ 39} Shalash was charged with robbery under R.C. 2911.02(A)(2). In order to prove the robbery counts, the state was required to prove that Shalash or his accomplice, in committing a theft offense, inflicted, attempted to inflict, or threatened to inflict physical harm on another. He was also charged with aggravated robbery under R.C. 2911.01(A)(1). To convict Shalash of the aggravated-robbery counts, the state was required to prove that Shalash or his accomplice, in committing a theft offense, had a deadly weapon on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it. To establish the three-year firearm specification, the state was required to prove that Shalash or his accomplice had a firearm on or about his [*7] person or under his control while committing the offenses and displayed it, brandished it, indicated that he possessed it, or used it to facilitate the offenses. See R.C. 2941.145.

{¶ 40} Shalash primarily argues the state failed to prove his involvement in the offenses. He contends that Neitz's and Pfalz's credibility was undermined by the state's promises of leniency,

and by conflicts in their testimony. He further argues that the state failed to present any physical evidence directly linking him to the offenses.

{¶ 41} But based upon our review of the evidence, we conclude the jury could have found that Shalash had participated in the robberies as either a principal or as an accomplice. Neitz and Pfalz testified that Shalash had conspired with them to rob the four banks to feed their heroin habits. Neitz's role was to "case" the banks, Pfalz's role was to rob the banks, and Shalash's role was to supply the disguises and the gun and to drive the getaway van. Neitz and Pfalz described the four bank robberies in detail. Pfalz testified that he had threatened to use a gun and that he had displayed a gun at the Cheviot Savings and First Financial Banks.

{¶ 42} Neitz's and Pfalz's testimony was supported [*8] by surveillance video from the four banks, surveillance video from St. James Elementary School near the Cheviot Savings Bank, and by surveillance video from a UDF and Dairy Mart near the First Financial Bank. Their testimony was also consistent with the testimony of the four banks' employees, and with Lanter's testimony that she had seen Pfalz, Neitz, and Shalash in a white van outside the St. James School, a couple of hours before the Cheviot Savings Bank had been robbed. Neitz and Pfalz testified that the money from each robbery had been divided among Pfalz, Neitz, and Shalash. Thus, a rational jury could find that Shalash had actively participated in the offenses.

{¶ 43} Shalash also argues that the jury's verdict was against the manifest weight of the evidence. He argues that neither Neitz nor Pfalz were credible given that they had admitted to either being less than truthful on prior occasions or had demonstrated an inability to testify consistently under oath at trial, and they had agreed to testify against him for leniency in their own cases. But the jury was in the best position to evaluate their credibility and to determine the weight to be afforded their testimony. Given that [*9] the totality of the evidence established that Shalash had aided and abetted Neitz and Pfalz in the four offenses, and that Shalash has not demonstrated any basis for disturbing the jury's determination, we cannot conclude that Shalash's convictions were contrary to the manifest weight of the evidence. See *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We, therefore, overrule his first assignment of error.

Shalash I, 2014-Ohio-5006.

In *State v. Thompkins*, 78 Ohio St. 3d 380, 1997- Ohio 52, 678 N.E.2d 541 (1997), the Ohio Supreme Court reaffirmed the important distinction between appellate review for insufficiency of the evidence and review on the claim that the conviction is against the manifest weight of the evidence. It held:

In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, *citing Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Robinson, supra*, 162 Ohio St. at 487, 55 O.O. at 388-389, 124 N.E.2d at 149. Weight

of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than [*10] the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis added.)

When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony. *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* ([1st Dist.]1983), 20 Ohio App. 3d 172, 175, 20 Ohio B. 215, 219, 485 N.E.2d 717, 720-721 ("The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.").

78 Ohio St. 3d at 387. In *Martin*, 1st Dist, Judge [*11] Robert Black contrasted the manifest weight of the evidence claim:

In considering the claim that the conviction was against the manifest weight of the evidence, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. . . .

20 Ohio App. 3d at 172, ¶3 of the syllabus. The consequences of the distinction are important for a criminal defendant. The State may retry a case reversed on the manifest weight of the evidence; retrial of a conviction reversed for insufficiency of the evidence is barred by the Double Jeopardy Clause. *Tibbs v. Florida*, 457 U.S. 31, 40-41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982).

A manifest weight of the evidence claim is not a federal constitutional claim and is therefore not cognizable in habeas corpus. *Johnson v. Havener*, 534 F.2d 1232, 1234 (6th Cir. 1986). An allegation that a verdict was entered upon insufficient evidence, on the other hand, states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990) (en banc). In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

[T]he relevant question [*12] is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the e of fact fairly to resolve conflicts in the testimony, to weigh the evidence an essential elements of the crime beyond a

reasonable doubt . . . . This familiar standard gives full play to the responsibility of the trier to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319; *United States v. Paige*, 470 F.3d 603, 608 (6th Cir. 2006); *United States v. Somerset*, No. 3:03-po-2, 2007 U.S. Dist. LEXIS 76699 (S.D. Ohio Oct. 12, 2007) (Rice, J.). This rule was recognized in Ohio law at *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *In re Winship, supra.*

Because of this distinction, a habeas corpus court cannot decide on the merits a manifest weight claim. To put it another way, whether a verdict is against the manifest weight is a question of state law and habeas relief is available only for federal constitutional violations. 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 131 S. Ct. 13, 178 L. Ed. 2d 276 (2010); *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990); *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982), *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983).

Respondent asserts that merits review of the sufficiency of the evidence claim is also barred by Petitioner's failure to fairly present that claim to the Supreme Court of Ohio (Return, ECF No. 11, PageID 1125). While **[*13]** conceding that he did not "present sufficiency of the evidence as a 'proposition of law' in his Memorandum in Support of Jurisdiction," he asserts he did argue the evidence was insufficient in his general argument for discretionary review (Reply, ECF No. 15, PageID 1171).

Upon examination of the Memorandum in Support of Jurisdiction (State Court Record, ECF No. 10, Ex. 15, PageID 155 *et seq.*), the Magistrate Judge notes that none of the three propositions of law deals with the sufficiency or weight of the evidence. The phrase "decidedly little evidence[,]" *id.* at PageID 158, is used to describe the evidence at trial, but there is no legal argument at all about the applicability of *Jackson*, the relevant United States Supreme Court precedent, or indeed any case law related to this issue.

The Magistrate Judge concludes that Shalash did not fairly present his sufficiency of the evidence claim to the Supreme Court of Ohio. His complaint that there was "decidedly little evidence" does not assert that the First District erred in overruling his First Assignment of Error. As an appellate court, inundated with thousands of possible appeals a year, the Supreme Court of Ohio cannot be expected to **[*14]** comb the record on appeal looking for issues that are not clearly presented. To hold that this issue was fairly presented would essentially wipe out the requirement that a habeas petitioner must complete a full round of state court review. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).

To combat this conclusion, Petitioner relies on the analysis in *Peterson v. Miller*, No. 1:16-cv-509, 2017 U.S. Dist. LEXIS 215391 (N.D. Ohio Dec. 7, 2017), to argue for "liberal construction" of his Supreme Court Memorandum (Traverse, ECF No. 15, PageID 1172). In *Peterson*, Magistrate Judge Greenberg liberally construed Peterson's *pro se* propositions of law in the Ohio Supreme Court as raising sufficiency of the evidence claims. *Id.* at * 44. In general, the filings

of *pro se* litigants are to be liberally construed. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). But Shalash, unlike Peterson, did not appear *pro se* in the Supreme Court of Ohio, but was represented by counsel. And even in *Peterson* the Magistrate Judge was unwilling to find the liberally-construed propositions of law raised a federal constitutional question. *Peterson* supports the proposition that a federal constitutional claim must at least be stated in a proposition of law in the Memorandum in Support of Jurisdiction; an oblique reference to the weakness of the evidence is insufficient.

Alternatively, **[*15]** Shalash seeks to excuse any procedural default of this claim by asserting he is actually innocent of these crimes. Adequate proof of actual innocence will excuse a procedural default and allow a habeas court to consider a claim on the merits. *Schlup v. Delo*, 513 U.S. 298, 319, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). The Sixth Circuit has set the following standard for proving actual innocence:

[I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo*, 513 U.S. 298, 316, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error **[*16]** with new reliable evidence --whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence --that was not presented at trial" *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005). As new evidence Shalash relies on the affidavits of his co-defendants Jennifer Neitz (Shalash's wife and mother of three of his children) and Jake Pfalz recanting their trial testimony. This is simply not "new reliable evidence" within the meaning of *Schlup*. Shalash himself implicitly characterizes these witnesses as unreliable by accusing them of perjuring themselves at trial (Traverse, ECF No .15, PageID 1169).

The insufficient evidence portion of Ground One is procedurally defaulted, and that default is not excused by Shalash's actual innocence. That portion of Ground One should therefore be dismissed as defaulted. The manifest weight portion of Ground One is not cognizable in habeas corpus and should be dismissed on that basis.

Ground Two: Prosecutorial Misconduct

In his Second Ground for Relief, Shalash claims he was denied a fair trial by repeated acts of prosecutorial [*17] misconduct. Shalash raised prosecutorial misconduct as his Second Assignment of Error on direct appeal and the First District decided it as follows:

Prosecutorial Misconduct

{¶ 44} In his second assignment of error, Shalash argues that multiple instances of prosecutorial misconduct denied him a fair trial. Shalash argues the prosecuting attorney committed misconduct during closing argument when he presented extensive evidence of the robberies, focused on the scary nature of the crimes, argued that the crimes had been committed during a "heroin-induced frenzy," made inflammatory remarks about Shalash's religion, and improperly vouched for the credibility of a witness.

{¶ 45} A prosecuting attorney has wide latitude to summarize the evidence and zealously advocate the state's position during closing argument. *See* State v. Richey, 64 Ohio St.3d 353, 362, 1992 Ohio 44, 595 N.E.2d 915 (1992). The propriety of a specific remark by a prosecutor must not be judged in isolation, but in light of the tenor and context of the entire closing argument. *See* State v. Slagle, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992). Improper remarks during closing argument are grounds for reversal when the remarks serve to deny the defendant a fair trial. *See* State v. Maurer, 15 Ohio St.3d 239, 266, 15 Ohio B. 379, 473 N.E.2d 768 (1984).

{¶ 46} As Shalash admits, he did not object to any of the prosecutor's comments during closing [*18] argument. He, therefore, has waived all but plain error. *See* State v. D'Ambrosio, 73 Ohio St.3d 141, 143-44, 1995 Ohio 129, 652 N.E.2d 710 (1995). Based upon our review of the record, we cannot conclude that the prosecutor's comments during closing argument rose to the level of plain error.

{¶ 47} The prosecutor's statements extensively summarizing the evidence against Shalash were not improper. The prosecutor's comments focusing on the "scary nature" of the robberies were based upon testimony from bank employees that they had been threatened with a gun, and their fear that Pfalz could have fatally shot them had he chosen to do so. Likewise, the prosecutor's statement that the robberies were the result of a "heroin-induced frenzy," was based upon testimony from Neitz and Pfalz that they had committed the robberies to feed their heroin habit, and that they had robbed the banks while "high" on heroin.

{¶ 48} Shalash next argues that the prosecutor committed misconduct when he repeatedly made inflammatory remarks about Shalash's religion. He points to three references to religion in the state's closing argument. The first reference occurred when the prosecuting attorney stated that Shalash and Neitz had been married at a mosque in Clifton. But nothing about this statement [*19] would serve to inflame the jury's passions. The second reference occurred during the prosecutor's discussion of Neitz's and Pfalz's credibility, when he said,

Is it common sense? Is it believable? Do you believe that a Muslim wife is going to somehow be driving around town with an outsider, Pfalz, a stranger to the family, robbing banks, and the husband has been with him just moments before and somehow he leaves the picture with the kids in the van?

The third reference occurred during the rebuttal portion of the state's closing argument when the prosecutor stated,

Are you kidding me? Give me a break. And a Muslim wife on top of that. In that culture the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. Give me a break.

{¶ 49} Although the comments were arguably inappropriate, they were not so inflammatory that we can conclude that Shalash's convictions resulted from passion and prejudice instead of the state's proof of his guilt. The state produced overwhelming evidence of Shalash's guilt, and none of the cited comments were so prejudicial or outcome determinative as to constitute [*20] plain error and to deny Shalash a fair trial.

{¶ 50} Finally, Shalash argues that the prosecuting attorney improperly vouched for the credibility of the school nurse when he said, "Obviously she's not going to lie to you." It is improper for an attorney to express a personal belief or opinion as to the credibility of a witness. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997 Ohio 407, 679 N.E.2d 646 (1997). Here, the prosecutor did not improperly vouch for the nurse's credibility as a witness. He merely argued that she was a reliable witness and that she lacked any motive to lie. Therefore, we overrule Shalash's second assignment of error.

State v. Shalash, 2014-Ohio-5006.

Respondent asserts that merits review of this claim is barred by Shalash's procedural default in that he made no objections to the prosecutor's comments in closing. (Return, ECF No. 11, PageID 1125-26).

The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

We now make it explicit: in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation [*21] of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Engle v. Isaac*, 456 U.S. 107, 110, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). "Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review." *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000) (internal quotation marks and citation omitted); *Murray v. Carrier*, 477 U.S. 478, 485, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87.

[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., *Beard v. Kindler*, 558 U.S. 53, 55, 130 S. Ct. 612, 175 L. Ed. 2d 417 (2009). This is an important "corollary" to the exhaustion requirement. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." *Coleman*, 501 U.S., at 731-732, 111 S. Ct. 2546, 115 L. Ed. 2d 640. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced **[*22]** by the exhaustion doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Davila v. Davis, 137 S. Ct. 2058, 2064, 198 L. Ed. 2d 603 (2017).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); accord *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001); *Lott v. Coyle*, 261 F.3d 594, 601-02 (6th Cir. 2001).

First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.

. . . .

Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.

Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin, 785 F.2d at 138; accord *Hartman v. Bagley*, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002). A habeas petitioner can overcome a procedural default by showing cause for the default and prejudice from the asserted error. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015).

Ohio has a relevant procedural rule, **[*23]** to wit, that a litigant must make a contemporaneous objection to error occurring in the trial court so that the error can be corrected, if possible, in the

trial court. State v. Glaros, 170 Ohio St. 471, 166 N.E.2d 379 (1960), paragraph one of the syllabus; *see also* State v. Mason, 82 Ohio St. 3d 144, 162, 1998- Ohio 370, 694 N.E.2d 932 (1998). The First District enforced that rule by reviewing only for plain error. An Ohio state appellate court's review for plain error is enforcement, not waiver, of a procedural default. Wogenstahl v. Mitchell, 668 F.3d 307, 337 (6th Cir. 2012), *citing* Keith v. Mitchell, 455 F.3d 662, 673 (6th Cir. 2006); Jells v. Mitchell, 538 F.3d 478, 511 (6th Cir. 2008); Lundgren v. Mitchell, 440 F.3d 754, 765 (6th Cir. 2006); White v. Mitchell, 431 F.3d 517, 525 (6th Cir. 2005); Biros v. Bagley, 422 F.3d 379, 387 (6th Cir. 2005); Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001), *citing* Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000) (plain error review does not constitute a waiver of procedural default).

The contemporaneous objection rule is an adequate and independent state ground of decision. Wogenstahl, 668 F.3d at 334; Goodwin v. Johnson, 632 F.3d 301, 315 (6th Cir. 2011); Smith v. Bradshaw, 591 F.3d 517, 522 (6th Cir. 2010); Nields v. Bradshaw, 482 F.3d 442, 451 (6th Cir. 2007); Biros, 422 F.3d at 387; Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003), citing Hinkle, 271 F.3d at 244; Scott v. Mitchell, 209 F.3d 854, 867-68 (6th Cir. 2000), *citing* Engle, 456 U.S. at 124-29. *S*

To overcome this procedural default, Shalash asserts it was ineffective assistance of trial counsel to fail to object. In order to rely on ineffective assistance of trial counsel to excuse a procedural default, a petitioner must present the ineffective assistance claim to the state courts for adjudication in the ordinary fashion those courts have prescribed for such claims. Edwards v. Carpenter, 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). In other words, ineffective assistance of trial counsel will not serve as cause if that claim is itself procedurally defaulted.

Because failure to make objections to portions of a closing argument is an **[*24]** omission that appears on the face of the appellate record, Ohio law requires that it be presented on direct appeal or be later barred by *res judicata.* State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967).

Shalash objects that he did not procedurally default his claim of ineffective assistance of trial counsel in this regard because he raised it both in the First District and on further appeal to the Supreme Court of Ohio ((Reply, ECF No. 15, PageID 1179, citing Appellant's Brief (State Court Record, ECF No. 10, Ex. 10, and Memorandum in Support of Jurisdiction, *Id.* at Ex. 15)).

Petitioner did not raise ineffective assistance of trial counsel as an assignment of error on direct appeal, although he did accuse his attorney of ineffective assistance for not objecting (Appellant's Brief, State Court Record, ECF No. 10, Ex. 10, PageID 101). However, his entire argument consists of: "Furthermore, Mr. Shalash submits that he received the ineffective assistance of counsel when his trial counsel failed to object to these clearly prejudicial instances of prosecutorial misconduct." *Id.* That is a purely conclusory claim. No authority is cited for the proposition that failure to object to any of the alleged instances of prosecutorial misconduct is **[*25]** deficient performance. Like Shalash's reliance on the First Ground for Relief on the notion that stating there was "decidedly little evidence" suffices to preserve a sufficiency of the evidence claim, his argument here is unpersuasive. A constitutional claim cannot be preserved for habeas review by reciting talismanic words — an actual argument must be made. Merely

using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987). "A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument." *Riggins v. McGinnis*, 50 F.3d 492, 494 (7th Cir. 1995). The same must be said of "ineffective assistance."

As with Ground One, merits review of Shalash's Second Ground for Relief is barred by his failure to make a contemporaneous objection.

Ground Three: Incomplete Jury Instructions on the Firearm Specification

In this Third Ground for Relief, Shalash claims the trial judge did not instruct the jury that the required standard of proof on the firearm specification was proof beyond a reasonable doubt. Petitioner raised this issue as his Third Assignment of Error on direct appeal and the First District decided [*26] it as follows:

Jury Instruction on the Firearm Specifications

{¶ 51} In his third assignment of error, Shalash maintains the trial court erred by failing to separately instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt.

{¶ 52} Shalash did not object to any of the jury instructions at trial. He argues, nonetheless, that under the United States Supreme Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the trial court's failure to give this instruction is a "structural error" requiring automatic reversal. The state argues, on the other hand, that the trial court's failure to instruct the jury is a trial error amenable to a "plain error" analysis. *See State v. Blankenship*, 102 Ohio App.3d 534, 546, 657 N.E.2d 559 (12th Dist.1995); *State v. Norman*, 1st Dist. Hamilton No. C-920202, 1993 Ohio App. LEXIS 133, *8-9 (Jan. 20, 1993).

{¶ 53} After reviewing the case law and the record, we agree with the state that a plain-error analysis applies. The structural error at issue in *Sullivan* was the denial of the right to trial by jury by giving a defective reasonable doubt instruction. *Sullivan* at 279. The instruction the trial court gave to the jury suggested that the jury had to have a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. *Id.* at 276-277. The *Sullivan* court held that a "beyond-a-reasonable-doubt instruction" that misdescribes the [*27] burden of proof requires per se reversal. *Id.* at 281.

{¶ 54} Here, however, the trial court properly instructed the jury on the reasonable-doubt standard at multiple times during the jury charge. At the beginning of the jury charge, the trial court stated:

[t]here is no requirement that the defendant present any evidence. The duty of proof rests entirely with the state of Ohio. The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment. Reasonable doubt. Reasonable doubt is present when the jurors after they have carefully considered and compared all the evidence cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible human doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

At the end of each count of the indictment, the trial court instructed **[*28]** the jury that the state was required to prove the elements of the offense listed in that count of the indictment beyond a reasonable doubt.

{¶ 55} The trial court specifically instructed the jury that he aggravated-robbery charges in counts 3 and 5 of the indictment included the necessity of finding that Shalash, while committing the robbery, or immediately fleeing thereafter, "had a deadly weapon on or about his person, or under his control, and displayed, brandished, indicated possession or used the deadly weapon, to wit: a firearm." The court also instructed the jury that it specify on counts 3 and 5 whether it found that Shalash "did have on or about his person, or under his control, a firearm, while committing the offense of aggravated robbery."

{¶ 56} When taken together, these jury instructions satisfied the requirement of instructing the jury that the firearm specifications had to be proven beyond a reasonable doubt. Therefore, the trial court did not commit plain error by failing to separately instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt. *See Blankenship*, 102 Ohio App.3d at 546, 657 N.E.2d 559; *State v. Norman*, 1st Dist. Hamilton No. C-920202, 1993 Ohio App. LEXIS 133, at *8-9; *State v. Dubose*, 7th Dist. Mahoning No. 00-CA-60, 2002-Ohio-3020, ¶ 20-35; *State v. Penson*, 2d Dist. Montgomery No. 9193, 1990 Ohio App. LEXIS 732, *32 (Feb. 26, 1990); *State v. Small*, 8th Dist. Cuyahoga No. 68167, 1995 Ohio App. LEXIS 4844, *19-20 (Nov. 2, 1995). We, therefore, overrule Shalash's third assignment of error and affirm **[*29]** the judgment of the trial court.

Shalash I.

Respondent asserts this Third Ground for Relief is procedurally defaulted for the same reason as Ground Two: failure to make a contemporaneous objection (Return of Writ, ECF No. 11, PageID 1126). As noted above with respect to Ground Two, state court review for plain error is an enforcement of the contemporaneous objection rule which is itself an adequate and independent state procedural ground of decision.

Shalash admits the procedural default but says it is excused because "he will suffer a miscarriage of justice if he is unable to bring this claim on the merits as the defective jury instruction created a structural error . . ." (Reply, ECF No. 15, PageID 1183). This argument confuses two different strains of habeas corpus doctrine. When an error is properly characterized as "structural," that

means it is per se harmful, that the courts do not evaluate it for harmlessness as is true of other constitutional errors. So, for example, an error under *Faretta v. California*, 422 U.S. 806, 812-13, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), denying a criminal defendant the rights of self-representation, is structural *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984), in that it affects the entire trial proceeding. The same thing is true of *Batson* violations, *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008), judicial bias or complete **[*30]** denial of counsel, *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (citations omitted) or racial discrimination in the selection of a grand jury. *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986).

On the other hand, the "miscarriage of justice" exception to procedural default is available only on adequate proof of actual innocence. *Calderon v. Thompson*, 523 U.S. 538, 557-58, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (holding that "avoiding a miscarriage of justice as defined by our habeas corpus jurisprudence" requires "a strong showing of actual innocence").

As noted above, Shalash has not produced proof of actual innocence which satisfies the *Schlup* gateway requirement. Nor has he cited any authority for the proposition that a "structural error" cannot be forfeited by failure to make a contemporaneous objection.

Even though the First District decided the Third Assignment of Error on plain error review, its decision is still entitled to AEDPA deference. *Fleming v. Metrish*, 556 F.3d 520, 532 (6th Cir. 2009); *Kittka v. Franks*, 539 F. App'x 668, 672 (6th Cir. 2013); *Bond v. McQuiggan*, 506 Fed. Appx. 493, 498 n. 2 (6th Cir. 2013); *Stojetz v. Ishee*, No. 2:04-cv-263, 2014 U.S. Dist. LEXIS 137501 *231 (S.D. Ohio Sept. 24, 2014) (Frost, J.). That is, the decision must be deferred to unless it is contrary to or an objectively unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); *Brown v. Payton*, 544 U.S. 133, 140, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Williams (Terry) v. Taylor*, 529 U.S. 362, 379, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The First District recognized that the controlling Supreme Court precedent is *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). *Shalash I*, 2014-Ohio-5006, at ¶¶ 52-53. In *Sullivan*, the Court found that the complained-of instruction was "essentially identical to the one held unconstitutional **[*31]** in *Cage v. Louisiana* . . . ." 508 U.S. at 277, citing 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990) (per curiam), overruled on other grounds in *Estelle*, 502 U.S. at 72 n.4. Justice Scalia noted that the requirement of proof beyond a reasonable doubt, "which was adhered to by virtually all common-law jurisdictions," was required in both federal and state courts. *Id.* at 278, citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The instruction given in both *Sullivan* and *Cage*read:

"If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a

reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical [*32] certainty, but a *moral certainty.*" 554 So. 2d 39, 41 (La. 1989) (emphasis added).

Cage, 498 U.S. at 40. The Court rejected this instruction because it overstated the amount of doubt the jury must have by equating "reasonable doubt" with "grave uncertainty" and "actual substantial doubt." *Id.* at 41.

The First District reasonably interpreted *Sullivan* as proscribing a "defective reasonable doubt instruction." *Shalash I*, 2014-Ohio-5006 at ¶ 53, citing 508 U.S. at 279. In contrast to *Sullivan*, the First District found that the trial court here "instructed the jury on the reasonable doubt standard multiple times during the jury charge." *Id.* at ¶ 54. The definition of reasonable doubt used by the trial court was

Reasonable doubt is present when the jurors after they have carefully considered and compared all the evidence cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible human doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Id.

This definition of reasonable [*33] doubt closely follows the model in Ohio Jury Instructions:

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. "Reasonable doubt" is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

2 OJI-CR 405.07. This definition is prescribed by statute in Ohio. Ohio Revised Code § 2901.05(E).

The Sixth Circuit held recently that "[a] reasonable-doubt instruction will be problematic only if there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard[,]" but "stress[ed] that departures from pattern instructions regarding the reasonable-doubt standard tend only to muddy the waters further. "At worst such variations may be prejudicial to a defendant; at best they add needlessly

to the work of appellate [*34] courts while being of no real benefit to the jury." *United States v. Rios*, 830 F.3d 403, 433, 434 (6th Cir. 2016) (internal quotation marks and citations omitted).

Petitioner's complaint is not about the **content** of the trial court's reasonable doubt instruction, but about the trial judge's failure to repeat it again in connection with the firearm specification.

During the course of the jury charge, Hon. Charles J. Kubicki, Jr., the trial judge, told the jurors that, when considering direct and circumstantial evidence together, they had to satisfy jurors of the "defendant's guilt beyond a reasonable doubt." (Transcript, State Court Record, ECF No. 10-4, PageID 1046.) He repeated that language in detailing that the State had to prove whatever was in the indictment beyond a reasonable doubt. *Id.* at 1049. He repeated it again in describing the presumption of innocence. *Id.* He expressly told the jury that "[t]he defendant must be acquitted unless the States produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment." *Id.* This appears just before the definition of reasonable doubt quoted above. Then, the requirement of a finding of guilt beyond a reasonable doubt was repeated each time the [*35] judge read the elements of the individual crimes.

In applying *Sullivan*, the First District expressly considered the instructions as a whole and found them adequate. *Shalash I*, 2014-Ohio-5006, at ¶ 56. That was not contrary to nor an objectively unreasonable application of *Sullivan*. Therefore, if the Court should reject the procedural default defense on Ground Three, it should conclude Shalash is not entitled to relief on the merits.

Ground Four: Denial of the Post-Conviction Petition Without a Hearing Violates Shalash's Rights to Effective Assistance of Counsel and Due Process of Law

In his Fourth Ground for Relief, Shalash claims his rights to effective assistance of counsel, guaranteed by the Sixth Amendment, and due process of law, guaranteed by the Fourteenth Amendment.

On appeal from denial of his petition for post-conviction, Shalash's sole assignment of error read "The trial court abused its discretion when it denied Mr. Shalash's post-conviction motion to vacate 2 without holding a hearing." (Appellant's Brief, State Court Record, ECF No. 10, PageID 383). No claim is made in the body of the Brief that failure to hold a hearing was a violation of either the Sixth Amendment or the Fourteenth. Indeed, the only federal decision cited is *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for the underlying standard [*36] of ineffective assistance of trial counsel. Thus, the First District did not review the constitutional claims made in the Fourth Ground for Relief — violations of the Sixth and Fourteenth Amendments by denying a hearing — because those claims were not fairly presented to it.

The claim that was presented on appeal — that the trial judge abused his discretion in denying the petition without a hearing — does not state a claim cognizable in habeas. Abuse of discretion

is not a denial of due process. *Sinistaj v. Burt*, 66 F.3d 804, 807-08 (6th Cir. 1995). Put another way, this Court cannot review whether the First District correctly applied Ohio law on when a post-conviction petition may be dismissed without a hearing. *State v. Calhoun*, 86 Ohio St. 3d 279, 1999- Ohio 102, 714 N.E.2d 905 (1999).

In addition to applying Calhoun, the First District also decided that Shalash had presented insufficient evidence to warrant relief. It noted that actual innocence, attempted to be shown by the recanting affidavits, is not a basis for a constitutional claim. *Shalash II*, 2016 Ohio App. LEXIS 4105, at * 2. . The deficiencies in the recantation affidavits provided an adequate basis for rejecting them. *Id.* Finally, the evidence offered in support of the ineffective assistance of trial counsel claim, even if accepted, did not show the result of the trial was likely to have been different. *Id.* at *3.

In arguing [*37] Ground Four in the Reply/Traverse, Shalash makes the plain claim that denying his post-conviction petition without a hearing denied him due process of law (ECF No. 15, PageID 1185). No constitutional claim to this effect was fairly presented to the First District. But even if we were to liberally construe the post-conviction appeal as if it had presented such a claim, it would be without merit: no decision of the United States Supreme Court recognizes a due process right to an evidentiary hearing on a post-conviction petition. Shalash cites no case law purportedly making such a holding and none is known to the Court.

In sum, Shalash's Fourth Ground is procedurally defaulted for lack of fair presentation to the state courts. In the alternative, it is without merit because (1) there is no constitutional guarantee of an evidentiary hearing in post-conviction and (2) the First District's decisions on the underlying constitutional claims are neither contrary to nor an objectively un reasonable application of clearly established Supreme Court precedent.

Conclusion

In accordance with the foregoing analysis, it is respectfully recommended that the Petition herein be dismissed with prejudice. [*38] Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

April 23, 2019.

/s/ Michael R. Merz

United States Magistrate Judge

APPENDIX F.

OHIO COURT OF APPEALS OPINION DIRECT APPEAL

State v. Shalash, 2014-Ohio-5006

Copy Citation

Court of Appeals of Ohio, First Appellate District, Hamilton County

November 12, 2014, Date of Judgment Entry on Appeal

APPEAL NOS. C-130748, C-130749

Syllabus

Defendant's convictions for two counts of robbery and two counts of aggravated robbery in conjunction with thefts at four banking institutions were neither based on legally insufficient evidence nor contrary to the manifest weight of the evidence, where the state presented testimony from two codefendants that the defendant had aided and abetted them in the commission of the offenses by providing a gun and disguises and acting as the getaway driver, and their testimony was corroborated by testimony of the bank employees and surveillance video from the banks and surrounding businesses.

The prosecuting attorney did not commit misconduct during closing argument when he commented on the extensive evidence of the robberies, focused on the scary nature of the crimes, argued that the crimes had been committed during a "heroin-induced frenzy," and commented on the credibility of a state's witness, because the comments were based upon the evidence presented at trial, and while the prosecuting attorney's comments about [**2] the defendant's religion were arguably inappropriate, they were not so prejudicial or outcome determinative as to constitute plain error and deny the defendant a fair trial.

The trial court's failure to specifically instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt was not a structural error requiring immediate reversal, but a trial error subject to a plain-error standard of review where the defendant had failed to object to the lack of such an instruction and where the trial court had properly instructed the jury on the reasonable-doubt standard and specifically instructed the jury with respect to the aggravated-robbery offenses that the defendant must have had a deadly weapon on or about his person or under his control while committing the offenses.

Counsel: Joseph T. Deters, Hamilton County Prosecuting Attorney, and Judith Anton Lapp, Assistant Prosecuting Attorney, for Plaintiff-Appellee.

Blake P. Somers LLC, Blake P. Somers and Sarah Mosher, for Defendant-Appellant.

Judges: FISCHER, Judge. CUNNINGHAM, P.J, and DEWINE, J., concur.

Opinion by: FISCHER

Opinion

FISCHER, Judge.

[*P1] Defendant-appellant **Ahmad Shalash** was charged with four counts of robbery and two counts of aggravated [**3] robbery stemming from his involvement in four separate bank robberies. The aggravated-robbery counts included both one-year and three-year firearm specifications. A jury found Shalash guilty of all six counts and the accompanying specifications. The trial court sentenced Shalash to 44 years in prison.

[*P2] In this appeal, Shalash argues that (1) his convictions are not supported by the sufficiency and the weight of the evidence; (2) multiple instances of prosecutorial misconduct during closing arguments denied him a fair trial; and (3) the trial court erred in failing to specifically instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt. Finding none of Shalash's arguments meritorious, we affirm the trial court's judgment.

The Charges against Shalash and the State's Evidence at Trial

[*P3] Shalash was charged in two separate indictments with robbery and aggravated robbery in connection with four bank robberies that had occurred over a six-week period from September 7, 2012, to October 22, 2012. In the case numbered B-1207436-B, the Hamilton County grand jury indicted Shalash on three counts of robbery and two counts of aggravated robbery. The robbery [**4] charge in count 1 concerned a theft at the Fifth Third Bank on Harrison Avenue. The aggravated-robbery charge in count 3 and the robbery charge in count 4 concerned a theft at the Cheviot Savings Bank. The aggravated-robbery and robbery charges in counts 5 and 6 concerned a theft at the First Financial Bank in Deer Park. The aggravated-robbery charges in counts 3 and 5 were accompanied by one-year and three-year firearm specifications. Shalash was also indicted in the case numbered B-1208349, for one count of robbery in connection with a theft at the Emery Federal Credit Union. The following is a summary of the evidence presented at Shalash's trial with respect to each of the charges.

Fifth Third Bank

[*P4] On September 7, 2012, around 5:00 p.m., Teresa Hellman, Valerie Turchinn, and Debbie Merkel were working at the Fifth Third Bank on Harrison Avenue in Cheviot when a man wearing a baseball hat, sunglasses, and gloves entered the bank. The man was carrying a long white bag and yelled, "Give me all your money. This isn't a joke. I've got a gun." The man used his hand to block his face. He then threw the bag at Hellman, who grabbed money from a cash

drawer and put it in the bag. She also [**5] placed some $100 bills on top of the bag. The man snatched the bag and ran out of the bank. Hellman hit the alarm button and locked the doors. Some of the $100 bills fell on the bank floor. Hellman testified that $860 was missing from her cash drawer. The three women's descriptions of the robbery was consistent with video of the robbery taken from the bank's surveillance system that was played during the trial.

[*P5] Minutes after the robbery, Cheviot police officer James Dietrich arrived at the scene. He saw several $100 bills on the ground. He took written statements from the three bank employees and photographed the scene. Officer Jeff Patton arrived shortly thereafter with a K-9, Charlie. Charlie tracked the scent of the robber to the street. Officer Patton testified that the robber had likely entered a vehicle and fled from the scene.

Emery Federal Credit Union

[*P6] On October 11, 2012, around 10:22 a.m., Sharon Haney, Ken Jones, and Stephanie Ash were working at the Emery Federal Credit Union when a man entered the front door of the bank, yelling. The man was wearing a hoodie, a bandana over his nose, and gloves. He walked to Haney's window, told her he had a gun, and demanded that she give [**6] him the money in her cash drawer. The man told Ash and Jones to get down on the floor or he would shoot them.

[*P7] The man passed a bag to Haney and told her to give him all of the $100 and $50 bills. She opened her drawer, gave him the bills, and handed the bag back to him. The man then handed the bag back to Haney and demanded that she give him all the money in the drawer. Haney took the bag and gave him the remaining cash in the drawer. Haney gave the robber approximately $13,000. The man then fled from the bank. Haney testified that the man had placed a gloved hand over his mouth during the robbery.

[*P8] Ash testified that a day or two prior to the robbery a woman had entered the bank and had asked for information on opening an account. The day of the robbery, this same woman had entered the bank prior to the robbery and had spoken with another bank employee. Ash's, Jones's, and Haney's testimony was consistent with surveillance video of the robbery and surveillance video taken the day prior to the robbery.

[*P9] Officer Mark Peters testified that he had responded to a robbery at the Emery Federal Credit Union. When he arrived at the bank, uniformed officers were already there. He interviewed [**7] the bank employees and reviewed video from the bank's surveillance system. During his investigation, he had contacted the Green Township and Cheviot police. They had provided with him the names of two possible suspects, one of whom was Jennifer Neitz. When he returned to the Emery Federal Credit Union with a photograph of Neitz, the bank employees recognized her as having entered the bank both the day prior to and the day of the robbery. By working with the two police agencies, Officer Peters testified he had developed a pattern for the bank robberies.

Cheviot Savings Bank

[*P10] On October 19, 2012, around 4:30 p.m., Sheila Linemann and Maureen Monahan were working at the Cheviot Savings Bank when a man walked through the front door and yelled, "This is a robbery." The man was wearing blue jeans, a dark hooded sweatshirt, a "beanie-type" hat, a medical mask, sunglasses, and gloves. The man pointed a gun at Monahan, the bank's manager, who was in her office, and yelled, "Don't move." He then pointed the gun at the drive-through teller's head, and ordered her not to move. The man then ran up to Linemann's teller window, handed her a dingy pillowcase, and told her he wanted "large bills." Linemann [**8] gave the man $400 from her cash drawer.

[*P11] When Monahan moved, he pointed the gun at her again and said, "Don't move." Then he pointed the gun at the drive-through teller and Linemann and yelled, "More, I want more." When Linneman told the man that she didn't have any more money, he bolted through the door. Linemann activated the bank's alarm system. The police arrived five minutes later.

[*P12] Monahan testified that although the robbery lasted 45 seconds, it seemed like forever. She was very scared and thought that the robber "was going to blow her brains out." Monahan testified that the bank's surveillance system had captured a white van leaving the parking lot of the bank 20 seconds after the robbery had occurred. She further testified that prior to the robbery, a woman had come to the bank inquiring about opening a business checking account. The woman had come into her office, but she had appeared nervous and would not sit down. She spoke with the woman for a minute or two before she left the bank.

[*P13] Monahan identified a still photograph from the bank's surveillance system, which showed her speaking with the woman. Monahan's and Linemann's testimony was consistent with bank surveillance video [**9] of the robbery. The surveillance video depicted a white van in the back parking lot of the bank during the robbery.

[*P14] Nancy Wabnitz, a secretary at St. James Elementary School, and Constance Lanter, a nurse at the school, testified that around 1:15 p.m. on October 19, 2012, a suspicious man had entered the school and said he was looking for his brother. When the name the man gave Wabnitz and Lanter did not match the name of any current student at the school, Wabnitz asked him to leave the building. The man was captured on the school's surveillance video. He was wearing a gray hooded sweatshirt.

[*P15] Lanter testified that she followed the man outside the building and watched as he walked towards a credit union in front of the school. As the man approached the credit union, Lanter saw a woman walking back and forth behind the credit union. The man and woman both entered the front passenger side of a white van. Lanter testified that another man was sitting in the front seat of the van, and a young child was standing between the front seats of the van. The driver of the van, whom Lanter identified as Shalash, waved at her. Lanter waved back. The van then pulled out of the parking lot. The van [**10] had a Florida license plate. Lanter wrote down the van's license plate number and gave it to the police. She identified both the van and the

woman at the credit union from still photographs taken from the surveillance video at the Cheviot Savings Bank.

First Financial Bank

[*P16] Andy Kunkel testified that on October 22, 2012, he was working as a teller at the First Financial Bank in Deer Park, Ohio. He heard a clanking noise on the glass of the bank's front door around 4:00 p.m., and saw a man enter the bank with a gun. The man pointed the gun at him and yelled, "Give me the money" before handing him a bag. Kunkel grabbed the money from his cash drawer and placed it on top of the bag. The man grabbed the cash and started towards the door. He then came back and grabbed the bag before fleeing from the bank. Kunkel testified that the robbery lasted roughly 15 seconds, and that video from the bank's surveillance system accurately depicted the robbery.

[*P17] Kunkel was shown a still photograph from the bank's surveillance system, which showed Kunkel speaking with a woman prior to the robbery, but Kunkel could not recall talking to her. Richard Ambrose, a loan originator at the bank, testified that he [**11] had walked to the front door of the bank after the robbery had occurred. As he looked out the door, he saw a white van on the left side of the street pulling out and driving away from the bank.

Police Investigation Leads to Shalash, Neitz, and Pfalz

[*P18] During their investigation of the First Financial Bank robbery, the police obtained surveillance video from a United Dairy Farmers ("UDF") and a Dairy Mart located near the First Financial Bank the day the robbery had occurred. Vijay Harsh, the owner of the Dairy Mart, testified that sometime around 3:00 p.m., two men had exited from a white van, entered the store, inquired about the price of a package of cigarettes and left. He identified Shalash from still photographs taken from the store's surveillance system as the man who had exited from the driver's side of the van and had entered the store. Alicia Banks, the store manager at the UDF, testified that the store's surveillance video had captured a white van entering the UDF parking lot at 3:56 p.m. A man in a white t-shirt got out of the van, entered the store, and purchased a package of cigarettes.

[*P19] Detective Mike Lampe testified that he investigated the robbery at the Cheviot Savings [**12] Bank. He responded to the bank the day of the robbery. He was able to develop a lead in the investigation when surveillance video showed a white van leaving the scene of the robbery, and a patrol officer had recalled being dispatched to the St. James Elementary School earlier in the day for a report by a school nurse of a suspicious white van. Detective Lampe testified that the patrol officer had obtained the van's license plate number from the school nurse. The van was registered to Neitz. Detective Lampe testified that the van had discoloration and peeling paint that was visible in the surveillance video taken at the Dairy Mart the day of the

First Financial Bank robbery, and in surveillance video taken from a Kroger store the day of the Cheviot Savings Bank robbery.

[*P20] Detective Lampe testified that through his investigation of Neitz, he became familiar with Pflaz and Shalash. Pfalz had remained in Ohio following the robberies. He had been arrested and interviewed by police. Pfalz gave a statement implicating himself, Neitz, and Shalash in the robberies. Detective Lampe then traveled to North Carolina to interview Neitz and Shalash, both of whom had been arrested there on unrelated [**13] charges. Shalash invoked his *Miranda* rights and chose not to speak with Detective Lampe. Neitz, however, provided him with a detailed statement admitting her, Shalash's, and Pflaz's involvement in the four robberies. Detective Lampe denied coercing Neitz, or threatening her in any manner to obtain her statement. He testified that Neitz's statement was consistent with the surveillance video relating to each of the four robberies and with Pfalz's statement.

Testimony of Shalash's Codefendants

[*P21] At trial, Neitz testified that she, Shalash, and Pfalz were addicted to heroin. One day as they were driving around in a white van with Pflaz's mother, Pfalz suggested that they rob a bank to obtain money to support their heroin habit. They traveled to the Fifth Third Bank on Harrison Avenue. Neitz walked inside the bank to report how many people were inside. When Neitz returned, Pfalz jumped out of the van, went inside the bank, and then returned to the van yelling, "Go, go, go." Once Shalash had driven the van from the area, Neitz became aware that Pfalz had robbed the bank. According to Neitz, Pfalz had divided the money among him, his mother, Shalash, and her. Neitz identified herself and Pfalz [**14] from still photographs taken from Fifth Third Bank's surveillance system just prior to and during the robbery.

[*P22] Neitz testified that on October 10, 2012, Pfalz had contacted Shalash and asked him to bring a gun with him so they could rob another bank. Neitz testified that she had previously purchased a gun. It was registered in her name, but the gun belonged to Shalash. Shalash, Neitz, and their four-year-old son, picked up Pfalz and his mother. As they drove around in the van, the four adults planned to rob the Emery Federal Credit Union. They agreed that Neitz would enter the credit union to ensure no customers were inside. While Neitz was inside the bank, Shalash drove the van around the bank's parking lot to see who was in the area. Just as Pfalz was about to enter the credit union, a man exited from his car and entered the credit union. When he did not come out of the credit union, the four decided to abandon their plan to rob the credit union. Neitz testified that still photographs from the surveillance system at the credit union showed her walking out of the credit union on October 10, 2012, at 10:59 a.m. According to Neitz, the four adults agreed that they would return to the [**15] credit union the next day.

[*P23] The following day, Shalash drove back to the credit union. Neitz went inside the credit union again to "check things out." She identified herself from still photographs taken from surveillance video at the bank the day of the robbery. Neitz testified that Shalash had driven around the parking lot to see if a police car had left the area. As Pfalz robbed the credit union, Shalash circled the parking lot in the van. When Pfalz came out, he jumped in the van with the

money. They drove to Pfalz's apartment, which was near the credit union, and divided the money from the robbery.

[*P24] Neitz testified that although the van was titled in her name, it belonged to Shalash. After each robbery, Shalash would drive Pfalz to a dumpster, so he could dispose of the clothing used in the robbery. The third robbery took place on October 19, 2012. That day, Neitz and Shalash picked up Pfalz and drove around in the van. Neitz testified that they had a gun with them, but it was not a real gun. Neitz was shown her prior statement to police in which she had said that they had a real gun with them, which was registered in her name, but that the gun really belonged to Shalash.

[*P25] They ended [**16] up at a credit union in front of St. James Elementary School. Neitz went into the credit union and Pfalz went into the school. When Pfalz came out of the school, she and Pfalz got into the van and left. They decided not to rob the credit union because Shalash was concerned that people inside the school could identify them. Neitz further testified that they were also concerned about the feasibility of robbing the credit union, because the door to the credit union was secured and had to be opened from the inside. So they drove around in the van for a couple of hours, got high from heroin, and discussed robbing another bank. They ended up at the Cheviot Savings Bank. Neitz went inside the bank to check things out, Pfalz robbed the bank with the gun and a white bag from the van, and Shalash drove the van away from the bank. Pfalz came back with $400 that they used to buy "dope."

[*P26] On October 22, 2012, they robbed the First Financial Bank in Deer Park. Neitz testified that it was Shalash's idea to rob that particular bank, because he owned a building in the area and had been to the bank once before. They had picked up Pfalz, and were driving around in the van. Pfalz was nervous and wanted [**17] to get high before the robbery. They did not have any heroin, so Shalash told her to give Pfalz some of her pills. Neitz gave Pfalz the pills.

[*P27] Prior to robbing the bank, they stopped at two convenience stores to buy cigarettes. Neitz identified photographs of Shalash and Pfalz leaving the van, entering the convenience stores, and returning to the van. Following those stops, they traveled to the First Financial Bank. She entered the bank to see if there were any customers inside. Pfalz went into the bank with a gun and robbed it. Pfalz came out with money in his pockets, which they divided. They put Pfalz's clothing and gun in a Kroger bag and threw it in a dumpster in Kentucky.

[*P28] A few days later, Neitz and Shalash drove to North Carolina where they were arrested on unrelated charges. Neitz spoke with Detective Lampe while she was in custody in North Carolina. She gave him a statement implicating herself, Pfalz, and Shalash in the four robberies. She and Shalash were extradited to Ohio two months later. While in jail, she gave another statement to police. She also wrote Shalash letters trying to reassure him that she was going to help him. She was scared to tell him that she had spoken [**18] with police. Neitz admitted that she had testified against Shalash to get a plea deal from the state, but she told the jury that she had not lied in order to receive better treatment.

[*P29] On cross-examination, Neitz testified that she had been under the influence of drugs when she had given her first statement, so her statement was inaccurate. Detective Lampe was

insinuating that he could get her out of jail, if she would talk to him. Neitz was shown two letters that she had written to Shalash while in jail. Neitz admitted that in those two letters she had stated that Shalash had nothing to do with the robberies. On redirect examination, Neitz admitted that she had not been under the influence of drugs during either statement she had given police, she had not been coerced to give her statements, and she had lied in her letters when she had stated that Shalash had not been involved in the robberies.

[*P30] Pfalz testified that he was friends with Neitz and Shalash. During the course of their friendship, they had become addicted to pills and heroin. They started stealing things so they could continue to buy drugs. In September 2012, they were driving around high when they decided to rob a bank [**19] to feed their drug habit. They drove to a Fifth Third Bank. They decided that Neitz would go into the bank to check things out, Pfalz would rob the bank, and Shalash would drive the getaway van. Neitz went into the bank. When she came out, she told him that there were two people in the bank, it was closing time, and they were counting money. He went into the bank and robbed it. He did not have a gun. He ran to the van, and Shalash drove off. They split the approximately $900 he stole from the bank, using the money to buy heroin, gasoline, and cigarettes. He identified still photographs of himself and Neitz in the bank the day of the robbery.

[*P31] Pfalz testified that by October 10, 2012, they had run out of money and were driving around broke. They decided to rob the Emery Federal Credit Union because it was close to Pfalz's grandma's house. They went to the credit union two or three times before they robbed it. They had planned to rob the credit union on October 10, but an older man had walked into the credit union and they had decided to abandon their plan. They returned the next day, October 11, 2012, and decided to proceed with the robbery. They agreed that Shalash would drive the van, [**20] Neitz would go in the bank and look around, and Pfalz would rob it. Pfalz identified himself and Neitz in still photographs taken from the bank's surveillance system before and during the robbery. He testified that he split the money from the robbery with Neitz and Shalash. Pfalz testified that he wore clothing that belonged to Shalash, and he used pillowcases and a bag from the van during the robberies. He further testified that he, Neitz, and Shalash wanted to get high before the robbery.

[*P32] Eight days later, on October 19, 2012, Neitz, Shalash, and Pfalz discussed robbing another bank. Pfalz testified that they drove to a credit union near a school. Pfalz went into the school, but he left when he was confronted by school employees. He got back in the van, and they drove to another bank, Cheviot Savings Bank. Pfalz testified that Neitz had entered the bank at 3:46 p.m. to "case it." He entered the bank shortly thereafter and robbed it. He admitted that he had pointed a gun and threatened to shoot the bank employees. He testified the gun was only a toy, but that he had acted like it was a real gun. He stole $500, and they split the money among them. Pfalz testified that Shalash drove [**21] the white van through a Kroger parking lot after the robbery.

[*P33] Three days later, Pfalz, Neitz, and Shalash robbed the First Financial Bank in Deer Park. Prior to the robbery, they had stopped at a couple of convenience stores. Pflaz identified himself and Shalash from still photographs taken from one of the store's surveillance videos. Pfalz testified that Neitz had "checked out" the bank prior to the robbery, and that he had robbed the

bank wearing clothing that Shalash kept in the van. Shalash had spray painted the toy gun he had brandished during the robbery. Pfalz admitted that during the robbery he had left the bag inside the bank and had to return to get it. Pfalz testified that he stole $1500, which he split with Shalash and Neitz.

[*P34] After the robbery, Pfalz threw the clothing and gun into a dumpster in Kentucky. He decided to stay in Ohio following the robberies so as to not draw suspicion to himself. Pfalz admitted that he had prior felony convictions for theft and that he had been promised leniency if he testified against Shalash.

Jury Verdict and Shalash's Sentence

[*P35] The jury found Shalash guilty of all the aggravated-robbery and robbery charges, as well as the accompanying firearm [**22] specifications. The trial court merged the aggravated-robbery and robbery charges that related to the Cheviot Savings Bank and First Financial Bank. The court sentenced Shalash to eight years for each of the robbery charges and 11 years for each of the aggravated-robbery charges, and it ordered that the terms be served consecutively. The trial court also merged the one-year firearm specifications with the three-year firearm specifications for each of the aggravated robberies, and ordered that these terms be served consecutively to each other and to the prison terms for the aggravated-robbery and robbery offenses, for a total prison term of 44 years.

Sufficiency and Weight of the Evidence

[*P36] In his first assignment of error, Shalash argues that his convictions for robbery, aggravated robbery, and the accompanying firearm specifications were supported by insufficient evidence and were contrary to the manifest weight of the evidence.

[*P37] *HN1* To reverse a conviction for insufficient evidence, the reviewing court must be persuaded, after viewing the evidence in a light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime proven beyond [**23] a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541 (1997). To reverse a conviction as against the manifest weight of the evidence, the reviewing court must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.* at 387.

[*P38] The state argued that Shalash was guilty as either a principal or as a complicitor to the four bank robberies. *HN2* Complicity is defined as when a person "acting with the kind of culpability required for the commission of an offense * * * aid[s] or abets another in committing the offense." R.C. 2923.03(A)(2). To support a conviction for complicity by aiding and abetting,

the state must show that the defendant assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime and that the defendant shared the criminal intent of the principal. *State v. Johnson*, 93 Ohio St. 3d 240, 754 N.E.2d 796, 2001-Ohio-1336 (2001), syllabus. Aiding and abetting can be inferred by presence, companionship, and conduct before and after the offense is committed. *Id.* at 243-245.

[*P39] Shalash was charged with robbery under R.C. 2911.02(A)(2). ***HN3*** In order to prove the robbery counts, the state was required to prove that Shalash or his accomplice, in committing [**24] a theft offense, inflicted, attempted to inflict, or threatened to inflict physical harm on another. He was also charged with aggravated robbery under R.C. 2911.01(A)(1). ***HN4***

To convict Shalash of the aggravated-robbery counts, the state was required to prove that Shalash or his accomplice, in committing a theft offense, had a deadly weapon on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it. To establish the three-year firearm specification, the state was required to prove that Shalash or his accomplice had a firearm on or about his person or under his control while committing the offenses and displayed it, brandished it, indicated that he possessed it, or used it to facilitate the offenses. *See* R.C. 2941.145.

[*P40] Shalash primarily argues the state failed to prove his involvement in the offenses. He contends that Neitz's and Pfalz's credibility was undermined by the state's promises of leniency, and by conflicts in their testimony. He further argues that the state failed to present any physical evidence directly linking him to the offenses.

[*P41] But based upon our review of the evidence, we conclude the jury could have found that Shalash had [**25] participated in the robberies as either a principal or as an accomplice. Neitz and Pfalz testified that Shalash had conspired with them to rob the four banks to feed their heroin habits. Neitz's role was to "case" the banks, Pfalz's role was to rob the banks, and Shalash's role was to supply the disguises and the gun and to drive the getaway van. Neitz and Pfalz described the four bank robberies in detail. Pfalz testified that he had threatened to use a gun and that he had displayed a gun at the Cheviot Savings and First Financial Banks.

[*P42] Neitz's and Pfalz's testimony was supported by surveillance video from the four banks, surveillance video from St. James Elementary School near the Cheviot Savings Bank, and by surveillance video from a UDF and Dairy Mart near the First Financial Bank. Their testimony was also consistent with the testimony of the four banks' employees, and with Lanter's testimony that she had seen Pfalz, Neitz, and Shalash in a white van outside the St. James School, a couple of hours before the Cheviot Savings Bank had been robbed. Neitz and Pfalz testified that the money from each robbery had been divided among Pfalz, Neitz, and Shalash. Thus, a rational jury could [**26] find that Shalash had actively participated in the offenses.

[*P43] Shalash also argues that the jury's verdict was against the manifest weight of the evidence. He argues that neither Neitz nor Pfalz were credible given that they had admitted to either being less than truthful on prior occasions or had demonstrated an inability to testify consistently under oath at trial, and they had agreed to testify against him for leniency in their own cases. But the jury was in the best position to evaluate their credibility and to determine the

weight to be afforded their testimony. Given that the totality of the evidence established that Shalash had aided and abetted Neitz and Pfalz in the four offenses, and that Shalash has not demonstrated any basis for disturbing the jury's determination, we cannot conclude that Shalash's convictions were contrary to the manifest weight of the evidence. *See* Thompkins, 78 Ohio St.3d at 387, 678 N.E.2d 541. We, therefore, overrule his first assignment of error.

Prosecutorial Misconduct

[*P44] In his second assignment of error, Shalash argues that multiple instances of prosecutorial misconduct denied him a fair trial. Shalash argues the prosecuting attorney committed misconduct during closing argument when he presented [**27] extensive evidence of the robberies, focused on the scary nature of the crimes, argued that the crimes had been committed during a "heroin-induced frenzy," made inflammatory remarks about Shalash's religion, and improperly vouched for the credibility of a witness.

[*P45] *HN5* A prosecuting attorney has wide latitude to summarize the evidence and zealously advocate the state's position during closing argument. *See* State v. Richey, 64 Ohio St.3d 353, 362, 1992 Ohio 44, 595 N.E.2d 915 (1992). The propriety of a specific remark by a prosecutor must not be judged in isolation, but in light of the tenor and context of the entire closing argument. *See* State v. Slagle, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992). Improper remarks during closing argument are grounds for reversal when the remarks serve to deny the defendant a fair trial. *See* State v. Maurer, 15 Ohio St.3d 239, 266, 15 Ohio B. 379, 473 N.E.2d 768 (1984).

[*P46] As Shalash admits, he did not object to any of the prosecutor's comments during closing argument. He, therefore, has waived all but plain error. *See* State v. D'Ambrosio, 73 Ohio St.3d 141, 143-44, 1995 Ohio 129, 652 N.E.2d 710 (1995). Based upon our review of the record, we cannot conclude that the prosecutor's comments during closing argument rose to the level of plain error.

[*P47] The prosecutor's statements extensively summarizing the evidence against Shalash were not improper. The prosecutor's comments focusing on the "scary nature" of the robberies were based upon testimony from bank [**28] employees that they had been threatened with a gun, and their fear that Pfalz could have fatally shot them had he chosen to do so. Likewise, the prosecutor's statement that the robberies were the result of a "heroin-induced frenzy," was based upon testimony from Neitz and Pfalz that they had committed the robberies to feed their heroin habit, and that they had robbed the banks while "high" on heroin.

[*P48] Shalash next argues that the prosecutor committed misconduct when he repeatedly made inflammatory remarks about Shalash's religion. He points to three references to religion in the state's closing argument. The first reference occurred when the prosecuting attorney stated that Shalash and Neitz had been married at a mosque in Clifton. But nothing about this statement

would serve to inflame the jury's passions. The second reference occurred during the prosecutor's discussion of Neitz's and Pfalz's credibility, when he said,

Is it common sense? Is it believable? Do you believe that a Muslim wife is going to somehow be driving around town with an outsider, Pfalz, a stranger to the family, robbing banks, and the husband has been with him just moments before and somehow he leaves the picture [**29] with the kids in the van?

The third reference occurred during the rebuttal portion of the state's closing argument when the prosecutor stated,

Are you kidding me? Give me a break. And a Muslim wife on top of that. In that culture the women aren't even supposed to be out without a male relative and we got her robbing banks with a non-male relative with the kids in the truck. Give me a break. Give me a break.

[*P49] Although the comments were arguably inappropriate, they were not so inflammatory that we can conclude that Shalash's convictions resulted from passion and prejudice instead of the state's proof of his guilt. The state produced overwhelming evidence of Shalash's guilt, and none of the cited comments were so prejudicial or outcome determinative as to constitute plain error and to deny Shalash a fair trial.

[*P50] Finally, Shalash argues that the prosecuting attorney improperly vouched for the credibility of the school nurse when he said, "Obviously she's not going to lie to you." ***HN6***

It is improper for an attorney to express a personal belief or opinion as to the credibility of a witness. *State v. Williams*, 79 Ohio St.3d 1, 12, 1997 Ohio 407, 679 N.E.2d 646 (1997). Here, the prosecutor did not improperly vouch for the nurse's credibility as a witness. He merely argued [**30] that she was a reliable witness and that she lacked any motive to lie. Therefore, we overrule Shalash's second assignment of error.

Jury Instruction on the Firearm Specifications

[*P51] In his third assignment of error, Shalash maintains the trial court erred by failing to separately instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt.

[*P52] Shalash did not object to any of the jury instructions at trial. He argues, nonetheless, that under the United States Supreme Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the trial court's failure to give this instruction is a "structural error" requiring automatic reversal. The state argues, on the other hand, that the trial court's failure to instruct the jury is a trial error amenable to a "plain error" analysis. *See State v. Blankenship*, 102 Ohio App.3d 534, 546, 657 N.E.2d 559 (12th Dist.1995); *State v. Norman*, 1st Dist. Hamilton No. C-920202, 1993 Ohio App. LEXIS 133, *8-9 (Jan. 20, 1993).

[*P53] After reviewing the case law and the record, we agree with the state that a plain-error analysis applies. The structural error at issue in *Sullivan* was the denial of the right to trial by jury by giving a defective reasonable doubt instruction. *Sullivan* at 279. The instruction the trial court gave to the jury suggested that the jury had to have a higher degree of doubt than is required for acquittal under the reasonable-doubt [**31] standard. *Id.* at 276-277. The *Sullivan* court held that a "beyond-a-reasonable-doubt instruction" that misdescribes the burden of proof requires per se reversal. *Id.* at 281.

[*P54] Here, however, the trial court properly instructed the jury on the reasonable-doubt standard at multiple times during the jury charge. At the beginning of the jury charge, the trial court stated:

[t]here is no requirement that the defendant present any evidence. The duty of proof rests entirely with the state of Ohio. The defendant must be acquitted unless the state produces evidence which convinces you beyond a reasonable doubt of every essential element of the crime charged in the indictment.

Reasonable doubt. Reasonable doubt is present when the jurors after they have carefully considered and compared all the evidence cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible human doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important [**32] of his or her own affairs.

At the end of each count of the indictment, the trial court instructed the jury that the state was required to prove the elements of the offense listed in that count of the indictment beyond a reasonable doubt.

[*P55] The trial court specifically instructed the jury that the aggravated-robbery charges in counts 3 and 5 of the indictment included the necessity of finding that Shalash, while committing the robbery, or immediately fleeing thereafter, "had a deadly weapon on or about his person, or under his control, and displayed, brandished, indicated possession or used the deadly weapon, to wit: a firearm." The court also instructed the jury that it specify on counts 3 and 5 whether it found that Shalash "did have on or about his person, or under his control, a firearm, while committing the offense of aggravated robbery."

[*P56] When taken together, these jury instructions satisfied the requirement of instructing the jury that the firearm specifications had to be proven beyond a reasonable doubt. Therefore, the trial court did not commit plain error by failing to separately instruct the jury that the state had to prove the firearm specifications beyond a reasonable doubt. [**33] *See Blankenship*, 102 Ohio App.3d at 546, 657 N.E.2d 559; *State v. Norman*, 1st Dist. Hamilton No. C-920202, 1993 Ohio App. LEXIS 133, at *8-9; *State v. Dubose*, 7th Dist. Mahoning No. 00-CA-60, 2002-Ohio-3020, ¶ 20-35; *State v. Penson*, 2d Dist. Montgomery No. 9193, 1990 Ohio App. LEXIS 732, *32 (Feb. 26, 1990); *State v. Small*, 8th Dist. Cuyahoga No. 68167, 1995 Ohio App. LEXIS 4844, *19-20

(Nov. 2, 1995). We, therefore, overrule Shalash's third assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, P.J., and **DEWINE, J.**, concur.

APPENDIX G.

OHIO COURT OF

APPEALS

OPINION

POST CONVICTION

APPEAL

State v. Shalash, 2016 Ohio App. LEXIS 4105

Copy Citation

Court of Appeals of Ohio, First Appellate District, Hamilton County

October 7, 2016, Decided

APPEAL NO. C-150614

Opinion

JUDGMENT ENTRY.

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Petitioner-appellant **Ahmad Shalash** appeals from the Hamilton County Common Pleas Court's judgment denying his postconviction petition. We affirm the court's judgment.

Shalash was convicted in 2013 upon jury verdicts finding him guilty on multiple counts of aggravated robbery and robbery for his part in a series of bank robberies. He unsuccessfully challenged his convictions in his direct appeal to this court and in a petition under R.C. 2953.21 for postconviction relief, filed with the common pleas court in 2014. *See State v. Shalash*, 1st Dist. Hamilton Nos. C-130748 and C-130749, 2014-Ohio-5006, *appeal not accepted*, 142 Ohio St. 3d 1517, 2015--Ohio-2341, 33 N.E.3d 65. In this appeal, he presents a single assignment of error, challenging the denial of his postconviction petition without a hearing. We find no merit to this challenge.

In his petition, Shalash sought relief from his convictions on the grounds that he was actually innocent, that his trial counsel had been ineffective in investigating his case, and that the prosecution [*2] had engaged in misconduct in convincing his two co-indictees to testify against him. He supported his actual-innocence and prosecutorial-misconduct claims with affidavits of his co-indictees, recanting their trial testimony implicating him in the robberies. And he supported his ineffective-counsel claim with a copy of his letter to his postconviction counsel detailing his trial counsel's alleged deficiencies.

The petition and its supporting evidence, along with the record of the proceedings leading to Shalash's convictions, did not demonstrate substantive grounds for postconviction relief. *See* R.C. 2953.21(C). A claim of actual innocence based on evidence outside the trial record does not provide a ground for relief, because such a claim does not demonstrate a constitutional violation in the proceedings leading to the petitioner's conviction. *See* R.C. 2953.21(A)(1)(a); *State v. Powell*, 90 Ohio App.3d 260, 264, 629 N.E.2d 13 (1st

Dist.1993). Shalash's claim that the prosecution had suborned and elicited perjured testimony from his co-indictees failed in its central premise, because the common pleas court could not be said to have abused its discretion in discounting the credibility of their affidavits, *see* *State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 1999 Ohio 102, 714 N.E.2d 905 (1999), and, thus, their trial testimony was not demonstrated to have been false. *See* *State v. Iacona*, 93 Ohio St.3d 83, 97, 2001 Ohio 1292, 752 N.E.2d 937 (2001). Finally, **[*3]** the evidence offered by Shalash in support of his ineffective-counsel claim did not demonstrate a reasonable probability that, but for his trial counsel's alleged deficiencies, the results of Shalash's trial would have been different. *See* *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Because Shalash failed to sustain his burden of submitting evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied his postconviction petition without an evidentiary hearing. *See* R.C. 2953.21(C); *State v. Pankey*, 68 Ohio St.2d 58, 428 N.E.2d 413 (1981); *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980). We, therefore, overrule the assignment of error and affirm the court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

FISCHER, P.J., HENDON and **MOCK, JJ.**

APPENDIX H.

AFFIDAVIT OF

JENNIFER NEITZ

EXHIBIT A

COPY

January 10, 2014

I AM WRITING THIS STATEMENT TO BE SUBMITTED TO THE COURT IN THE CASE AGAINST AHMAD SHALASH. MR. SHALASH HAS BEEN CHARGED WITH AND CONVICTED OF MULTIPLE COUNTS OF AGGRAVATED ROBBERY. THIS CONVICTION WAS POSSIBLE DUE TO TESTIMONY BY MYSELF AND JACOB PEALZ AGAINST MR SHALASH. MR PEALZ AND I TESTIFIED UNDER OATH THAT AHMAD SHALASH WAS A PARTICIPANT IN FOUR BANK ROBBERIES. HOWEVER, THIS IS NOT ACCURATE. JAKE PEALZ AND I WERE THE ONES TO PLAN AND CARRY OUT THESE ROBBERIES AND MR SHALASH HAD NO KNOWLEDGE OF THEM. MR. PEALZ AND I HAD PREVIOUSLY DISCUSSED IMPLICATING MR. SHALASH IN THE EVENT THAT WE SHOULD BE CAUGHT (WE THOUGHT THAT BY DOING THIS IT WOULD BE TO OUR BENEFIT AS MR SHALASH IS BLACK AND THEREFORE WOULD BE PERCEIVED AS BEING A LIKELY SUSPECT (WE WERE OF THE BELIEF THAT DUE TO PRECONCEIVED PREJUDICES AGAINST BOTH HIS RACE AND RELIGION HE WOULD BE FOUND AT FAULT (WHEREAS IT WOULD APPEAR THAT WE HAD BEEN MANIPULATED, THUS BEING HELD LESS ACCOUNTABLE FOR THESE CRIMES. THIS WAS, IN FACT, THE CASE AND BOTH MYSELF AND MR. PEALZ WERE GIVEN PLEA DEALS THAT GAVE US REDUCED SENTENCES IN EXCHANGE FOR TESTIMONY AGAINST AHMAD SHALASH.

Jennifer M. Otto 2/19/14 — 2-19-14

JENNIFER M. OTTO
Notary Public
In and for the State of Ohio
My Commission Expires May 21, 2018

NOTARY PUBLIC
STATE OF O

DEFENDANT'S EXHIBIT B

Affidavit of Jennifer Neitz

EXHIBIT 1

STATE OF OHIO :
: SS
COUNTY OF MONTGOMERY :

Now comes Jennifer Neitz, after first having been duly cautioned and sworn, who hereby states and testifies upon personal knowledge, as follows:

(1) JENNIFER NEITZ *87934 D.O.B. 9-19-76
4104 GERMANTOWN PIKE
DAYTON, OH 45418

(2) JANE PFALTZ AND I WERE INVOLVED IN ROBBING FOUR BANKS IN 2012. DURING THIS TIME I HAD BEEN AFRAID OF BEING CAUGHT, AS I HAD GONE INTO ALL FOUR BANKS BEFORE THE ROBBERIES, AND THE VEHICLE THAT WAS USED WAS REGISTERED IN MY NAME. JANE AND I HAD DISCUSSED HOW IF WE WERE TO BE IDENTIFIED, THE POLICE WOULD AUTOMATICALLY THINK THAT AHMAD SHALASH WAS INVOLVED, AS THE VEHICLE USED WAS HIS. WE ALSO DISCUSSED IMPLICATING MR. SHALASH AS BEING THE DRIVER.

(3) ON OCTOBER 31, 2012 AHMAD SHALASH AND I WERE ARRESTED IN NORTH CAROLINA ON UNRELATED CHARGES. WE WERE BOTH IN HIS VAN WITH OUR

CHILDREN, WHEN MR. SHALASH'S ACTIONS CAUSED US BOTH TO BE ARRESTED AND TAKEN AWAY FROM OUR CHILDREN. I WAS EXTREMELY ANGRY AT MR. SHALASH.

(4) A FEW DAYS AFTER BEING ARRESTED AND SITTING IN JAIL, DETECTIVES FROM CINCINNATI CAME TO N.C. TO TALK TO ME. I WAS STILL VERY UPSET ANGRY AT MR SHALASH, SO WHEN I WAS QUESTIONED ABOUT THE ROBBERIES, I TOLD THE DETECTIVES THAT MR. SHALASH WAS INVOLVED WITH ALL OF THEM AND WAS IN FACT THE DRIVER. I WAS NOT EXACTLY THINKING CLEARLY AS I WAS UPSET ABOUT BEING IN JAIL, AND COMING OFF OF DRUGS.

(5) ONCE MR SHALASH DISCOVERED I HAD IMPLICATED HIM IN THIS, I THOUGHT IT WAS TOO LATE FOR ME TO TELL WHAT HAD REALLY HAPPENED. IT SEEMED AS IF EVERYONE WANTED MR. SHALASH TO BE INVOLVED.

(6) I WAS REPEATEDLY TOLD BY MY ATTORNEY THAT THE PROSECUTOR WANTED ME TO TESTIFY AGAINST MR. SHALASH, AND IF I DIDN'T COOPERATE I WOULD GO TO PRISON FOR 40 YEARS.

(7) I FELT AS IF I REALLY DIDN'T HAVE A CHOICE AND FINALLY AGREED TO TESTIFY TO WHAT WERE PREVIOUSLY MADE, UNTRUE STATEMENTS THAT I HAD MADE.

(8) BEFORE TESTIFYING I WAS ABLE TO SPEAK TO JAKE PFALZ, AS WE WERE LEFT BY OURSELVES IN A ROOM AT THE COURTHOUSE. HE STATED THAT HE WAS GOING TO TESTIFY AGAINST MR. SHALASH TO GET A DEAL, AND SINCE AHMAD WOULD BE FOUND GUILTY

BECAUSE OF THAT, I SHOULD DO THE SAME

(9) WHEN FACED WITH THE PROBABILITY THAT AHMAD WAS GOING TO BE FOUND GUILTY, AND I WOULD GET 40 YEARS IF I DIDN'T COOPERATE, I AGREED TO TESTIFY.

(10) DURING MR. SHALHSH'S TRIAL I DID IN FACT TESTIFY THAT MR. SHALHSH WAS INVOLVED AND WAS THE DRIVER. THIS WAS UNTRUE. HE WAS NOT PRESENT OR INVOLVED IN ANY OF THE ROBBERIES AND HAD NO KNOWLEDGE OF THEM. I REPEATEDLY LIED DURING MY TESTIMONY, AND EVEN HAD TO BE REMINDED BY THE PROSECUTOR OF WHAT I HAD PREVIOUSLY TOLD THE DETECTIVES. BEFORE I TESTIFIED I HAD TAKEN QUITE A FEW KLONOPIN JUST TO BE CALM ENOUGH TO BE ABLE TO TESTIFY.

(11) AFTER THE COMPLETION OF THE TRIAL AND AFTER I REVIEWED MY TESTIMONY, I REALIZED HOW MANY INACCURACIES THERE WERE IN MY STATEMENTS. I DID NOT RECALL A LOT OF WHAT I HAD SAID BECAUSE I HAD BEEN SO HEAVILY MEDICATED.

(12) MR. SHALHSH WAS CONVICTED OF A CRIME THAT HE DID NOT COMMIT BASED UPON MY TESTIMONY, AND THIS IS WHY I HAVE MADE THE DECISION TO TESTIFY AS TO WHAT REALLY DID HAPPEN.

(13) I HAD A CHANCE TO REVIEW MY TESTIMONY AT TRIAL AND MADE CORRECTIONS AS TO WHERE IT WAS UNTRUE. I MADE THESE CORRECTIONS IN THE MARGINS OF MY TESTIMONY.

FURTHER AFFIANT SAYETH NAUGHT.

Jennifer Neitz

Sworn to and subscribed in my presence, a Notary Public in and for the State of Ohio, County of Montgomery, on this 3rd day of September, 2014

Notary Public

BLAKE PAUL SOMERS
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration
Section 147.03 R.C.

NOTARIAL SEAL
STATE OF OHIO

APPENDIX I.

AFFIDAVIT OF

JAKE PFALZ

Dear: Honorable Judge Kubicki COPY 3-4-14

I Jake pfeil Submit this statement to the Hamilton county courts on the behalf of Ahmad Shalash. Ahmad Shalash being found guilty and convicted for four Banks robberies. Is false.

I Jake pfeil and Jennifer Neitz plaedall four Bank Robbesies. And me and Jennifer Neitz agreed to testify against Mr. Ahmad Shalash. To Have our time reduced. How what so ever Mr. Ahmad Shalash Have Know. Knowledge ore any involvement for any of those Bank robberies.

I Jake pfeil unfortunely could not get this NOTORIZED So I am going to sign and date this Thanks Jake pfeil

3-4-14

EXHIBIT B