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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DARIUS THERIOT,

Petitioner-Appellant,

v.

BOB VASHAW, Warden,

Respondent-Appellee.

No. 20-1029

Appeal from the United States District Court
for the Eastern District of Michigan at Flint.
No. 4:15-cv-13679—Linda V. Parker, District Judge.

Argued: October 21, 2020

Decided and Filed: December 16, 2020

Before: BATCHELDER, GRIFFIN, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Christopher J. McGrath, FEDERAL COMMUNITY DEFENDER'S OFFICE, Flint, Michigan, for Appellant. Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Christopher J. McGrath, FEDERAL COMMUNITY DEFENDER'S OFFICE, Flint, Michigan, for Appellant. Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

OPINION

GRIFFIN, Circuit Judge.

Petitioner Darius Theriot appeals the district court's judgment that denied his petition for a writ of habeas corpus, which he filed pursuant to 28 U.S.C. § 2254. He brings two right-to-present-a-defense claims and one right-to-confrontation claim. Unlike the district court, we do not reach the merits of his claims. Instead, we hold that Theriot procedurally defaulted his claims and that he has not persuaded us that we should excuse his default. Accordingly, we affirm the district court's judgment.

I.

"The facts as recited by the Michigan Court of Appeals are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1)." *Shimel v. Warren*, 838 F.3d 685, 688 (6th Cir. 2016). The pertinent facts are the following:

> This case arises from a drive by shooting. Defendant Theriot drove the vehicle from which defendant Matthews shot an AK-47, killing a pregnant woman and injuring three others.
>
> * * *
>
> . . . Defendant Theriot admitted to getting the gun, which he illegally owned, of his own free will. One witness testified that defendant Theriot made the decisions on where to go that night, and he intentionally drove his truck to the house and slowed down when he drove by it. Defendant Theriot was quoted as saying, "don't worry about it, we'll get them later, we'll take care of it in our own time," after four men associated with the victims had confronted defendant Theriot and his friends. After the shooting, defendant Theriot wiped the gun clean of prints, and he was the last person seen with the gun. He also urged witnesses not to snitch and to lie for him.

People v. Matthews, No. 308369, 2013 WL 6703494, at *1, *4 (Mich. Ct. App. Dec. 19, 2013) (per curium) (unpublished).

In a Michigan state court trial, a jury convicted petitioner Theriot "of one count of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, one count of assault of a pregnant individual causing death to fetus, MCL 750.90b(a), and one count of felony-firearm, MCL 750.227b." *Matthews*, 2013 WL 6703494, at *1. Theriot appealed to the Michigan Court of Appeals. *Id.* That court affirmed his convictions. *Id.* at *7. The Michigan Supreme Court denied Theriot's application for leave to appeal the state intermediate court's judgment. *People v. Theriot*, 849 N.W.2d 373, 373 (Mich. 2014) (mem.).

Thereafter, Theriot filed a habeas corpus petition pursuant to 28 U.S.C. § 2254, which he later amended. He argued that the state trial court violated his constitutional rights when it (1) prohibited him from questioning witnesses about his demeanor after the shooting (allegedly violating his right to present a defense and his right to confrontation), and (2) prohibited him from admitting jailhouse telephone call recording excerpts into evidence (allegedly violating his right to present a defense). The state opposed the habeas petition.

The district court denied Theriot's amended habeas petition[1] but granted a certificate of appealability regarding his claims that the state trial court violated his federal constitutional rights when it (1) prohibited him from questioning witnesses about his demeanor after the shooting and (2) excluded jailhouse telephone call recording excerpts. *Theriot v. MacLaren*, No. CV 15-13679, 2019 WL 7020689, at *13–14 (E.D. Mich. Dec. 20, 2019). Petitioner timely appealed the district court's judgment.

II.

When "considering a district court's denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2254," such as the case at bar, "we review all legal conclusions de novo." *Crump v. Lafler*, 657 F.3d 393, 396 (6th Cir. 2011).

[1]There are actually two amended habeas petitions. Petitioner's appointed attorney filed the first one, and petitioner himself filed the second one about a month later. The district court acknowledged the existence of the two amended petitions, but it did not determine which one was the operative petition. *MacLaren*, 2019 WL 7020689, at *3 n.2. Instead, the district court denied both petitions. *Id.* at *14. The parties did not brief the question of which amended petition controls. The differences between the two amended petitions, however, do not affect our resolution of this appeal.

III.

A.

"[A] federal court may not review federal claims that were procedurally defaulted in state courts." *Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018) (alteration in original) (quoting *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017)), *cert. denied sub nom. Maslonka v. Nagy*, 139 S. Ct. 2664 (2019). When we conduct the procedural default analysis, we examine the last reasoned state-court decision. *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013). A habeas petitioner procedurally defaults a claim when "(1) [he] fails to comply with a state procedural rule; (2) the state courts enforce the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Wheeler v. Simpson*, 852 F.3d 509, 514 (6th Cir. 2017) (quoting *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc)). We have the option, however, to excuse a procedural default and review a defaulted claim on the merits if a petitioner demonstrates "(1) cause for the default and actual prejudice, or (2) that the failure to consider the claim will result in a fundamental miscarriage of justice." *Williams v. Bagley*, 380 F.3d 932, 966 (6th Cir. 2004).

B.

Petitioner procedurally defaulted his right-to-present-a-defense claims. First, he did not comply with Michigan's procedural rules concerning issue preservation.[2] In Michigan, "[t]o preserve an issue for appellate review, a party must object below and specify the *same* ground for objection that it argues on appeal." *People v. Bosca*, 871 N.W.2d 307, 338 (Mich. Ct. App. 2015) (emphasis added); *cf. People v. Cain*, 869 N.W.2d 829, 832 (Mich. 2015) ("[I]ssues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." (citation omitted)). In other words, "an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v. Bulmer*, 662 N.W.2d 117, 118 (Mich. Ct. App. 2003) (per curiam). At trial, petitioner objected based on Michigan's evidentiary rules. *Matthews*, 2013 WL 6703494, at *2, *4. But

[2]Petitioner even concedes that the non-compliance "prong of the [procedural default] test is easily satisfied."

because Theriot did not also make a contemporaneous objection predicated on violations of his constitutional right to present a defense, he failed to comply with Michigan's procedural rules regarding issue preservation. Second, the state intermediate court enforced its procedural rule. We know that because a state appellate court's review for plain error is enforcement of a procedural rule, *Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) ("[W]e view a state appellate court's review for plain error as the enforcement of a procedural default."), and here, the Michigan Court of Appeals reviewed petitioner's right-to-present-a-defense claims for plain error because he did not preserve them, *Matthews*, 2013 WL 6703494, at *2, *4. Third, Michigan's contemporaneous-objection rule "constitutes an adequate and independent state ground for foreclosing federal review." *Taylor v. McKee*, 649 F.3d 446, 451 (6th Cir. 2011). Because all the requirements are met regarding petitioner's right-to-present-a-defense claims, we conclude that he procedurally defaulted them.

When a petitioner procedurally defaults a claim, he may nevertheless obtain review of the claim if he demonstrates "cause for the default and actual prejudice."[3] *Williams*, 380 F.3d at 966. "A showing of cause requires more than the mere proffer of an excuse." *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006). Instead, "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 763–64 (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Regarding his right-to-present-a-defense claim that concerns the jail house telephone call recording excerpts, petitioner offers no argument about cause or actual prejudice; therefore, he forfeits this issue. *See Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 621 (6th Cir. 2013) ("Issues adverted to in a perfunctory manner, without some effort to develop an argument, are deemed forfeited."). Accordingly, we will not excuse Theriot's procedural default of this claim.

Regarding his other right-to-present-a-defense claim (the one that concerns the demeanor evidence), petitioner argues that the "external objective factor in this case was the [state] trial

[3]A petitioner can also have us excuse a procedural default if he demonstrates "that the failure to consider the claim will result in a fundamental miscarriage of justice." *Williams*, 380 F.3d at 966. Theriot, however, does not advance this theory for excusing a procedural default.

court's refusal to permit counsel to finish making a complete record with regard to his objection to the exclusion of testimony about Mr. Theriot's demeanor following the shooting." Petitioner's theory seems to be that if the state trial court had not "short-circuited" the discussion about the demeanor evidence, his attorney would have made an objection based on petitioner's federal constitutional right to present a defense. But petitioner's trial attorney went back and forth with the trial court for nearly ten transcript pages without making an objection in constitutional terms. Towards the end of this discussion, Theriot's trial attorney had opportunities to object based on the constitutional right to present a complete defense but did not do so. Moreover, the argument that trial counsel would have eventually made the constitutional objection is speculative, and Theriot offers nothing to bring it out of the realm of sheer possibility. Accordingly, we conclude that Theriot has fallen short of demonstrating cause to excuse his procedural default.

As for actual prejudice, petitioner merely states that "[p]rejudice can take many forms, some more obvious than others," and "[t]he prejudicial effect of the trial court's decision to abruptly put an end to counsel's objection regarding the exclusion of evidence of [petitioner's] demeanor is plain and palpable." That argument is perfunctory, and as such, it fails. *See Johns v. Holder*, 678 F.3d 404, 408–09 (6th Cir. 2012).

To have us excuse the procedural default of his right-to-present-a-defense claims, petitioner had to show cause and actual prejudice. *Williams*, 380 F.3d at 966. He did not establish either element. Accordingly, we will not excuse these procedural defaults.

C.

Petitioner also procedurally defaulted his Confrontation Clause claim. First, he did not comply with Michigan's procedural rule that requires litigants to support their claims with sufficient argumentation. As the state intermediate court noted, Theriot "ma[de] no argument on how he was denied [his] right" to confront witnesses against him. *Matthews*, 2013 WL 6703494, at *4 n.3. And on appeal, he does not dispute his non-compliance.[4] Petitioner, therefore, did not

[4]Petitioner instead contends that the warden forfeited his opportunity to benefit from petitioner's purported non-compliance because the warden—in his answer to the habeas petition—did not argue that petitioner's supposed

follow this state procedural rule. Second, the state intermediate court actually enforced its procedural rule. Once the Michigan Court of Appeals concluded that Theriot had not offered an argument regarding his Confrontation Clause claim, it determined that his failure rendered the claim abandoned. *Id.* at *2 n.1 ("Theriot fails to specifically address how the trial court erred [regarding his right-to-confrontation claim]. Thus, to the extent that defendant Theriot argues that the trial court erred by prohibiting him from cross-examining the witness about defendant Theriot's anger, this issue is abandoned."). Third, Michigan's abandonment rule is an adequate and independent state-law basis for prohibiting federal review of a claim. *See Harris*, 680 N.W.2d at 21 ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue."); *see also Marchbanks v. Jones*, No. 1:06-CV-269, 2009 WL 1874191, at *2 (W.D. Mich. June 26, 2009) ("[A] review of Michigan cases shows that the principal of abandonment is regularly applied and is a ground independent of the merits."); *Smith v. Wolfenbarger*, No. 2:11-CV-10031, 2012 WL 1957286, at *9 (E.D. Mich. May 31, 2012) (collecting cases). Since all the elements are met regarding petitioner's right-to-confrontation claim, we conclude that he procedurally defaulted it.

Because Theriot has procedurally defaulted his right-to-confrontation claim, he must demonstrate that we should excuse the default if he wants us to review the claim. *Williams*, 380 F.3d at 966. Despite having that burden, petitioner is inexplicably silent on why we should excuse his default. Silence is not enough. *Burley*, 834 F.3d at 618. Accordingly, we will not excuse Theriot's procedural default of his right-to-confrontation claim.

IV.

For these reasons, we affirm the district court's judgment.

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non-compliance rendered the Confrontation Clause claim procedurally defaulted. Theriot's argument, however, is unpersuasive because in his answer, the warden argued that Theriot had procedurally defaulted all his habeas claims.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARIUS R. THERIOT,

Petitioner,

v.

Civil Case No. 15-13679
Honorable Linda V. Parker

DUNCAN MACLAREN,

Respondent.
_____/

OPINION AND ORDER DENYING THE AMENDED PETITIONS FOR WRIT OF HABEAS CORPUS, GRANTING IN PART A CERTIFICATE OF APPEALABILITY, AND GRANTING LEAVE TO APPEAL *IN FORMA PAUPERIS*

Petitioner Darius R. Theriot ("Theriot") has filed an amended habeas corpus petition that challenges his convictions in a Michigan state court for second-degree murder, several assaults, and one firearm offense. He asserts that he was denied his right to present a defense and that his trial attorney's failure to object to the scoring of the Michigan sentencing guidelines constituted ineffective assistance of counsel. The State argues that Theriot procedurally defaulted two of his claims and that the state appellate court's adjudication of his claims was objectively reasonable.

The standard for evaluating state-court rulings is highly deferential, and the state appellate court's adjudication of Theriot's claims was not so lacking in justification that there was an error beyond any possibility for fairminded

disagreement. Accordingly, the Court is denying Theriot's request for habeas relief.

I. Background

Theriot was charged with one count of first-degree murder in violation of Michigan Compiled Laws § 750.316, three counts of assault with intent to commit murder in violation of Michigan Compiled Laws § 750.83, one count of assaulting a pregnant woman causing miscarriage or death to a fetus in violation of Michigan Compiled Laws § 750.90b(a), and one count of possessing a firearm during the commission of a felony in violation of Michigan Compiled Laws § 750.227b. The charges arose from a drive-by shooting during the late evening or early mornings hours between July 9-10, 2011.

The evidence at trial established that, on the night in question, Theriot and some of his male friends and relatives attended a party at JeNae Hudson's home on Wabash Street in Detroit, Michigan. The young men were drinking and socializing with some girls when two cars arrived at the house. Four young men jumped out of one car in an aggressive manner; one of them had a gun. Theriot and his friends approached the intruders to determine what the problem was. One of the intruders responded that Theriot's friend Devon Matthews had pointed a gun at the intruders on a previous occasion. Theriot and his friends did not have any guns with them at

the time. Theriot's cousins Dominque Stewart and Roumelle Merchant diffused the tension between the two groups of young men, and after Stewart shook hands with someone, the intruders left. As they left, however, one of them said, "Y'all be careful. You guys playing with fire."

Theriot then told his friends, "Don't worry about it, we'll get them later," and because he did not feel safe, he stated that he was going to get his gun. Theriot and his friends left the party, got in Theriot's pick-up truck, and drove to his house, where he retrieved an AK47 assault rifle. Theriot put the gun in the bed of his truck and then drove the group back to the party.

After spending another twenty or thirty minutes at the party, the group left in Theriot's truck. Theriot drove the group down the street where the people that had interrupted the party lived. At the time, Matthews was seated in the bed of the truck, and the rest of the group, including Roumelle Merchant, Manjaro Benning, Dominque Stewart, and someone named Nicholas, were seated in the truck. Deveius Weathers and Theriot's brother James followed in a white car.

Theriot slowed down near a house where some people were gathered outside. Shortly afterward, Matthews fired the AK47 multiple times at the people from the bed of Theriot's truck. Two women and one man were injured in the

shooting, and a pregnant woman was killed. The four victims were not the people who had argued with Theriot and his friends earlier that night.

Theriot and his friends subsequently went to Theriot's home where one or more of the young men removed casings from the bed of the truck. From there, the group went to a drug house where Theriot and Matthews wiped the gun to remove fingerprints. The next day, Theriot and the young men who had been with him on the previous night got together and talked about the shooting. Theriot was nonchalant and said that there would be no snitching.

JeNae Hudson informed the police what she knew about the incident, and Theriot reported to the police a few days after the shooting. In subsequent jailhouse phone conversations with Stewart, Theriot encouraged Stewart to lie and to say that Theriot did not have anything to do with the crime. Theriot also informed Stewart that he (Theriot) was an enforcer.

Theriot and Matthews were tried jointly in Wayne County Circuit Court.[1] The prosecutor's theory was that Theriot aided and abetted Matthews in committing the crime and that he was guilty even though he intended to harm a different group of people than the ones who were shot.

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[1] A jury deliberated Theriot's case, but Matthews waived his right to a jury trial and asked the trial court to decide his case.

Theriot was the only defense witness. His defense was that he did not intend to kill anyone or have Matthews kill anyone and that there was reasonable doubt as to whether he was guilty. He testified that he did not instruct or ask Matthews to kill anyone, he did not know Matthews was going to kill anyone, and he did not tell anyone to lie under oath in court. Theriot also testified that he put the AK47 rifle in his truck for protection because someone in the group that confronted him and his friends earlier that night had a gun. He denied threatening anyone about going to court; he also denied telling his friends to lie and not snitch, explaining that, when he told his friends on the day after the shooting to say that he was not driving during the shooting, he meant that he did not know who was shooting.

On December 7, 2011, the jury found Theriot guilty of second-degree murder, as a lesser-included offense of first-degree murder, and guilty as charged on the three counts of assault with intent to commit murder, one count of assault of a pregnant woman causing death to a fetus, and one count of felony firearm. The trial court initially sentenced Theriot to four concurrent terms of forty-five to eighty years in prison for the murder and the assaults with intent to commit murder, a concurrent term of ten to fifteen years in prison for the assault on a pregnant woman, and a consecutive term of two years in prison for the firearm conviction.

In an appeal of right, Theriot argued that: (1) the trial court deprived him of his right to present a defense and his right of confrontation by excluding evidence that he reacted with surprise to the shooting; (2) the trial court deprived him of his right to present a defense by denying his request to admit excerpts of his jailhouse telephone calls; and, (3) the trial court erred by sentencing him as a second habitual offender because (a) the prosecutor never filed a notice of intent to pursue an enhanced sentence and (b) he did not have a prior felony conviction. Theriot also requested the assignment of a different trial court judge if the case was remanded for a new trial or re-sentencing. The Michigan Court of Appeals affirmed Theriot's convictions, but vacated his sentence and remanded his case to the trial court for re-sentencing because Theriot should not have been sentenced as a habitual offender. *See People v. Theriot*, No. 308640, 2013 WL 6703494, at *1 and *6-*7 (Mich. Ct. App. Dec. 19, 2013) (unpublished). On July 29, 2014, the state supreme court denied leave to appeal. *See People v. Theriot*, 849 N.W.2d 373 (Mich. 2014).

On October 31, 2014, the state trial court re-sentenced Theriot to four concurrent terms of thirty-five to forty-five years in prison for the second-degree murder and assault-with-intent-to-murder convictions and a concurrent sentence of ten to fifteen years in prison for the assault-of-a-pregnant-woman conviction. The

court also sentenced Theriot to two years in prison for the felony-firearm conviction, but it noted that Theriot had already served that sentence.

Theriot appealed his new sentence, claiming that he was entitled to re-sentencing because his trial attorney failed to object to the scoring of offense variable five of the sentencing guidelines. The Michigan Court of Appeals affirmed the sentence, concluding that offense variable five was correctly scored and counsel was not ineffective for failing to object to the scoring of the variable. *See People v. Theriot*, No. 325973 (Mich. Ct. App. June 21, 2016).

Meanwhile, on October 16, 2015, Theriot commenced this action by filing a pro se habeas corpus petition under 28 U.S.C. § 2254 and a motion for appointment of counsel. In his habeas petition, Theriot argued as grounds for relief that the trial court violated his constitutional rights by (1) excluding evidence of his surprised reaction immediately after the shooting and (2) refusing to allow his attorney to admit in evidence excerpts of recorded phone conversations. After Respondent filed an answer to the petition, the Court granted Theriot's motion for appointment of counsel and, on October 31, 2016, newly-appointed counsel for Theriot moved to hold the habeas petition in abeyance because Theriot's appeal from his new sentence was pending in the Michigan Supreme Court.

On December 15, 2016, the Court granted the motion for a stay and closed this case for administrative purposes. On January 5, 2017, the Michigan Supreme Court denied leave to appeal Theriot's sentencing claims because it was not persuaded to review the questions presented to it. *See People v. Theriot*, 888 N.W.2d 103 (Mich. 2017).

Theriot then filed an amended habeas petition and a motion to re-open this case.[2] The Court granted the motion to re-open this case, and Respondent subsequently filed a supplemental answer which addresses Theriot's sentencing claim.

II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires habeas petitioners who challenge "a matter 'adjudicated on the merits in State court' to show that the relevant state court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.' " *Wilson v. Sellers*, 138 S. Ct. 1188,

[2] Theriot actually filed two amended petitions. The first one (ECF No. 21) was filed by his appointed attorney, and the second one (ECF No. 23) was filed by Theriot himself.

1192 (2018) (quoting 28 U.S.C. § 2254(d)). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and 'demands that state-court decisions be given the benefit of the doubt,' *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)." *Renico v. Lett*, 559 U.S. 766, 773 (2010).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). To obtain a writ of habeas corpus from a federal court, a state prisoner must show that the state court's ruling on his or her claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. A state-court's factual determinations are presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and review is

"limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III. Analysis

A. The Exclusion of Evidence About Theriot's Reaction to the Shooting

Theriot alleges first that the trial court deprived him of his right of confrontation and his right to present a defense by excluding his verbal and nonverbal expressions of surprise immediately after the shooting. The trial court ruled that Theriot's surprised demeanor and his remark, "What the hell was that?" were assertions and inadmissible as hearsay.

Theriot, on the other hand, maintains that his surprised demeanor was non-assertive conduct, which is admissible in evidence, and that his question, "What the hell was that?" was not offered for the truth or was admissible under the "excited utterance" exception to the hearsay rule. He contends that the trial court should have admitted evidence of his reaction to the shooting during his cross-examination of prosecution witnesses because the evidence would have bolstered his defense that he lacked the necessary intent to be convicted of aiding and abetting Devon Matthews.

The Michigan Court of Appeals agreed with Theriot on the state evidentiary issue and concluded that the trial court abused its discretion by prohibiting Theriot

from asking witnesses about his demeanor and question immediately after the shooting. *Theriot*, 2013 WL 6703494, at *2. The Court of Appeals, nevertheless, concluded that the error was harmless and that Theriot was not entitled to relief. *Id.* at *2, 4. As for Theriot's claim that his right of confrontation was violated, the Court of Appeals stated that Theriot abandoned the claim by not making an argument on how he was denied the right.

The Court of Appeals reviewed Theriot's claim regarding the right to present a defense for "plain error" because Theriot did not preserve the issue by objecting on constitutional grounds at trial. *Id.* at *2. The Court of Appeals cited Supreme Court precedent on the constitutional issue, but then concluded that the evidentiary error did not rise to the level of a constitutional deprivation. *Id.* at 4. The court found that Theriot was not denied a meaningful opportunity to present a defense "because there was testimony showing that he was scared after the shooting based on how he sped off and jerked the truck[]" and because he was able to ask the witnesses questions about the incident to show that he did not know there would be a shooting. *Id.*

1. Procedural Default

Respondent argues that Theriot procedurally defaulted his claim regarding the right to present a defense because the Michigan Court of Appeals reviewed that

claim for "plain error."[3] Theriot maintains that there was no procedural default because his trial attorney did object at trial and because the Court of Appeals reviewed his claim on the merits.

In the habeas context, a procedural default is "a critical failure to comply with state procedural law." *Trest v. Cain*, 522 U.S. 87, 89 (1997). Under the doctrine of procedural default, "a federal court will not review the merits of [a state prisoner's] claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012).

A procedural default is not a jurisdictional bar to reviewing the merits of a claim, *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005), and "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). Because Theriot's claim does not warrant habeas relief, the Court bypasses the procedural-default analysis and proceeds directly to the merits of his claim.

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[3] Respondent has not argued that Theriot's claim under the Confrontation Clause is procedurally defaulted.

2. The Merits

Theriot asserts that the trial court erred when it ruled that he could not elicit testimony regarding his verbal and nonverbal reactions to the shooting. He maintains that the proffered testimony was admissible under the Michigan Rules of Evidence and state-court decisions.

The contention that the trial court violated Michigan's evidentiary rules is not a cognizable claim on federal habeas review, *Hall v. Vasbinder*, 563 F.3d 222, 239 (6th Cir. 2009), because "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). The only question is whether excluding testimony about Theriot's reaction to the shooting violated his constitutional rights to present a defense and to confront the witnesses against him.

a. Right to Confrontation

Theriot contends that not being able to ask witnesses about his reaction to the shooting violated his right to confront the witnesses.

i. Clearly Established Federal Law

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal prosecution "the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This right is "applicable to the States through the Fourteenth Amendment," *Idaho v. Wright*, 497 U.S. 805, 813 (1990), and it "includes the right to cross-examine witnesses." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

A defendant's right to confront the witnesses against him, however, is not absolute. *United States v. Davis*, 430 F.3d 345, 360 (6th Cir. 2005). "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). When it is merely the *extent* of cross-examination that is limited, a trial court retains considerable discretion to bar exploration of a relevant subject on cross-examination. *Dorsey v. Parke*, 872 F.2d 163, 166-67 (6th Cir. 1989). "Where the trial court limits the extent of cross-examination, the inquiry for the reviewing court is 'whether the jury had enough information, despite the limits placed on otherwise permitted cross-examination, to assess the defense theory." *Stewart v. Wolfenbarger*, 468 F.3d 338, 347 (6th Cir. 2006), as

amended on denial of reh'g and reh'g en banc (Feb. 15, 2007) (quoting *Dorsey*, 872 F.2d at 167).

ii. Application

Theriot's trial attorney was not prevented from cross-examining prosecution witnesses. He was merely barred from asking them what Theriot's demeanor was, and what he had said, immediately after the shooting. Although Theriot contends that testimony about his surprised reaction to the shooting would have supported his defense that he did not know what Matthews intended to do, his trial attorney was able to elicit testimony from more than one prosecution witness that Theriot did not instruct any of his friends to shoot anyone. Furthermore, because Theriot was able to describe his reaction to the shooting when he testified, the jury had enough information, despite the limits placed on the cross-examination of witnesses, to assess the defense theory.

The Court also is mindful that errors under the Confrontation Clause are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Vasquez v. Jones*, 496 F.3d 564, 574 (6th Cir. 2007). For reasons explained more fully below in the discussion on Theriot's right to present a defense, the evidence against Theriot was strong. The alleged confrontational error, therefore, was harmless, and Theriot is not entitled to relief on his claim.

b. The Right to Present a Defense

Theriot claims that the exclusion of evidence regarding his reaction to the shooting violated his right to present a defense.

i. Clearly Established Federal Law

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations and internal quotation marks omitted). The exclusion of evidence is unconstitutional if it "significantly undermined fundamental elements of the defendant's defense." *United States v. Scheffer*, 523 U.S. 303, 315 (1998). "Restrictions on the defendant's right to present relevant evidence … may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 330 (Stevens, J., dissenting) (citing *Rock v. Arkansas*, 523 U.S. 303, 330 1988)).

"The right to present a defense, however, is not absolute." *Ferensic v. Birkett*, 501 F.3d 469, 475 (6th Cir. 2007) (citing *Taylor v. Illinois*, 484 U.S. 400, 409 (1988), and *Michigan v. Lucas*, 500 U.S. 145, 152 (1991)). Trial judges may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury."

Holmes v. South Carolina, 547 U.S. 319, 326 (2006). The Constitution also permits judges to exclude evidence that is repetitive. *Id.*

Further, "erroneous evidentiary rulings rarely constitute a violation of a defendant's right to present a defense." *United States v. Hardy*, 586 F.3d 1040, 1044 (6th Cir. 2009) (citing *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001)). A habeas "court's duty 'is not to determine whether the exclusion of the evidence by the trial judge was correct or incorrect under state law, but rather whether such exclusion rendered [the] petitioner's trial so fundamentally unfair as to constitute a denial of federal constitutional rights.' " *Lewis v. Wilkinson*, 307 F.3d 413, 420 (6th Cir. 2002) (quoting *Logan v. Marshall*, 680 F.2d 1121, 1123 (6th Cir. 1982)). Thus, "even if exclusion of evidence was erroneous under state law, the constitutional right to present a defense is not abridged unless the evidence was so material that it deprived the defendant of a fair trial." *Allen v. Howes,* 599 F. Supp. 2d 857, 872 (E.D. Mich. 2009).

ii. Application

Theriot points to two places in the record where he was deprived of his right to show that he was surprised by the shooting. The first instance occurred when defense counsel attempted to ask prosecution witness Manjaro Benning whether Theriot was angry at anybody after the shooting. The prosecutor objected to the

question, and the trial court sustained the objection on grounds that an answer to the question would be speculative and possibly hearsay if the answer included Theriot's words or nonverbal assertions. (*See* 11/29/11 Trial Tr. at 84-85, ECF No. 10-9 at Pg ID 664-65.)

The second instance occurred when defense counsel asked Roumelle Merchant how Theriot reacted after the shooting. The prosecution objected to the question, and the trial court sustained the objection on the basis that Theriot's reaction would be an assertion and, therefore, inadmissible hearsay. (*See* 11/30/11 Trial Tr. at 172-75, ECF No. 10-10 at Pg Id 959-60.)

Defense counsel subsequently raised the issue in the jury's absence and explained that, when he asked Merchant how Theriot reacted immediately after the shooting, he anticipated that Merchant would say that Theriot acted surprised and said, "What the hell was that?" The trial court upheld its previous ruling that Theriot's reactions to the shooting were assertions of innocence and inadmissible as hearsay. (*See* 12/1/11 Trial Tr. at 7-15, ECF No. 10-11 at Pg ID 1026-1034.)

The probative value of the testimony that Theriot wanted to elicit from those witnesses was not outweighed by factors such as unfair prejudice, confusion of the issues, or the potential to mislead the jury. Nevertheless, as the Michigan Court of Appeals pointed out,

> Theriot was not precluded from presenting a complete defense because there was testimony showing that he was scared after the shooting based on how he sped off and jerked the truck. Defendant Theriot was also able to ask the witnesses whether anyone encouraged defendant Theriot to get the gun and drive by the house, and whether defendant Theriot ordered or encouraged defendant Matthews to shoot.

Theriot, 2013 WL 6703494, at *4.

The state appellate court's summary of the facts is supported by the record. (*See* 11/29/11 Trial Tr. at 85-86, ECF No. 10-9 at Pg ID 665-66 (defense counsel's cross-examination of Benning on whether Benning heard anyone encourage or instruct someone to shoot a gun and whether Theriot had motioned to anyone); *id.* at 82, Pg ID 662 (Benning's testimony that the shooting was somewhat of a surprise to him); *id.* at 95-96, Pg ID 675-76 (Benning's testimony that he did not hear Theriot speak with Matthews before the shooting); *id.* at 163-65, Pg ID 743-45 (defense counsel's cross-examination of Dominque Stewart regarding whether Theriot told Matthews to kill somebody and whether there was any conversation about killing anybody); *id.* at 169, Pg ID 749 (Stewart's testimony that Theriot and everyone else in their group acted scared after the shooting); 11/30/11 Trial Tr. at 169, 172, ECF No. 10-10 at Pg ID 956, 959 (defense counsel's cross-examination of Roumelle Merchant regarding whether Theriot instructed Matthews to shoot anyone); *id.* at 172, Pg ID 959 (Merchant's testimony that Theriot acted scared

after the shooting); 12/1/11 Trial Tr. at 162, ECF No. 10-11 at Pg ID 1181 (defense counsel's cross-examination of James Theriot and James' testimony that he did not hear anyone planning the shooting, and he did not hear anyone say, "Let's go kill somebody").

Theriot, moreover, testified that the gunshots surprised him and that after the shooting, he asked the men in his truck what happened. (*See* 12/5/11 Trial Tr. at 171, ECF No. 10-12 at Pg ID 1380.) According to Theriot, he asked Matthews what he was shooting. (*See id.* at 172, Pg ID 1381.) He also testified that immediately after the shooting, his reaction was, "What the heck just happened?" (12/6/11 Trial Tr. at 32, ECF No. 10-13 at Pg ID 1427.) He stated that he had been mad and confused by the shooting and that he had not known exactly what was happening. (*Id.* at 32-33, Pg ID 1427-28.)

The Court cannot conclude that fairminded jurists could disagree on the state court's determination that permitting Theriot to introduce evidence from prosecution witnesses that he was surprised by the shooting would have been cumulative to his live testimony.[4] The exclusion of additional testimony about

[4] In this Court's view, evidence that Petitioner was "scared" after the shooting is not the same as evidence showing that he was "surprised" shots were fired. The fact that Petitioner sped off after the shooting does not necessarily demonstrate that he was surprised that it happened. Additional evidence from other witnesses as to

Theriot's verbal and nonverbal reactions to the shooting did not violate his constitutional right to present a defense. *See United States v. Reichert*, 747 F.3d 445, 454 (6th Cir. 2014) (concluding that the defendant's constitutional right to present a defense was not violated by the exclusion of testimony because the defendant "had at least one other avenue of putting his own statements and beliefs into evidence: by taking the stand himself").

c. Harmless Error

Even if the Court concluded that the exclusion of this evidence violated Theriot's right to present a defense, the violation is subject to harmless error analysis. *See Fleming v. Metrish*, 556 F.3d 520, 536 (6th Cir. 2009) (analyzing a claim regarding the exclusion of testimony and the right to present a defense for harmless error). On habeas review, an error is harmless unless it had a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). As recently explained by the Sixth Circuit Court of Appeals:

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the latter would therefore not have been cumulative. Further, a jury could find Petitioner's testimony on the issue self-serving and therefore testimony from other witnesses could have been helpful. For these reasons, the Court is granting a certificate of appealability on this claim. *See infra*.

> In federal habeas proceedings, the *Brecht* standard governs and the federal court will not grant habeas relief unless the state error "resulted in 'actual prejudice.' " [*Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015)] (quoting *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710). This means that in order to grant habeas relief, the court must have at least "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.' " *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) (quoting *Brecht*, 507 U.S. at 627, 113 S.Ct. 1710). "[G]rave doubt" about whether the error was harmless means that "the matter is so evenly balanced that [the court] feels [it]self in virtual equipoise as to the harmlessness of the error." *Id.* at 435, 115 S.Ct. 992.

O'Neal v. Balcarcel, 933 F.3d 618, 624 (6th Cir. 2019).

Here, the evidence against Theriot was substantial, if not overwhelming. At his sentencing, the trial court summarized the evidence against Theriot as follows:

> THE COURT: Well, here's . . . essentially what the evidence was.
>
> [I]t was his [Theriot's] gun, his car, his idea, his idea to put the gun in the hands of the killer. And even though he was convicted as an aider and abettor, the record is just replete with evidence that he's the ringmaster or the puppeteer in this entire affair.
>
> . . . .
>
> He was behind the wheel of the truck when it slowed down to facilitate the shooting. And, . . . all of his post shooting activities . . . really show[] how he was engaged in . . . extraordinary efforts to manipulate the outcome of the event and the case.
>
> He is the overt leader in this situation. And his own words . . . [that he is] the shot caller and the one who causes everybody's demeanor to change when he comes on the scene is just . . . abundant evidence of his leadership in this entire tragic deathly bloody affair.

(1/4/12 Sentence Tr. at 7-8, ECF No. 10-15 at Pg ID 1632-33.) The Michigan Court of Appeals summarized the facts similarly, noting that

> Theriot admitted to getting the gun, which he illegally owned, of his own free will. One witness testified that defendant Theriot made the decisions on where to go that night, and he intentionally drove his truck to the house and slowed down when he drove by it. Defendant Theriot was quoted as saying, "don't worry about it, we'll get them later, we'll take care of it in our own time," after four men associated with the victims had confronted defendant Theriot and his friends. After the shooting, defendant Theriot wiped the gun clean of prints, and he was the last person seen with the gun. He also urged witnesses not to snitch and to lie for him.

Theriot, 2013 WL 6703494, at *4.

The state courts' summaries of the facts are supported by the record. There was additional evidence that Theriot knew his gun was loaded when he put it in his truck (*see* 12/6/11 Trial Tr. at 60, ECF No. 10-13 at Pg ID 1455), and that he was nonchalant immediately after the shooting and on the following day. (*See* 11/29/11 Trial Tr. at 70, 87, ECF No. 10-9 at Pg ID 650, 667.)

The evidence against Theriot was not so evenly balanced that the jurors would have reached a different verdict if witnesses had testified about Theriot being surprised after the shooting. This Court, therefore, does not have a grave doubt as to whether the alleged errors had a substantial and injurious effect or influence on the jury's verdict, that is, whether the error was harmless.

Accordingly, the state appellate court's conclusions that Theriot was not deprived of a meaningful opportunity to present a defense and that the evidentiary error was harmless were objectively reasonable.

Theriot was not deprived of a fair trial by the exclusion of evidence, and even if he was, the error was harmless. He is not entitled to relief on his claim.

B. The Exclusion of Excerpts from Recordings of Phone Calls

Theriot alleges next that the trial court's denial of his request to admit small portions of recordings of his jailhouse telephone calls to friends and relatives violated his right to present a defense. The prosecution initially introduced excerpts of the recordings, but when defense counsel tried to introduce additional excerpts of the recordings to show that the calls were taken out of context, the trial court denied his request. Theriot argues that the trial court's ruling violated Michigan's "rule of completeness," *see* Mich. R. Evid. 106,[5] and also deprived him

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[5] This rule reads as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Mich. R. Evid. 106.

of his constitutional right to present a defense because the proffered evidence revealed the real meaning of his comments.

The Michigan Court of Appeals reviewed Theriot's evidentiary claim on the merits and concluded that the trial court did not err by refusing to play the additional excerpts. *Theriot*, 2013 WL 6703494 at *5. The Court of Appeals reviewed Theriot's constitutional claim for "plain error" because Theriot did not preserve the claim for appellate review. *Id.* at *4. The Court of Appeals then concluded that no constitutional error occurred. *Id.* at *5.

Respondent argues that Theriot's claim is procedurally defaulted because he did not object on constitutional grounds at trial. Theriot maintains that his claim is not procedurally defaulted because the state court denied his claim on the merits, rather than on the basis of a procedural default.

As noted above, a procedural default is not a jurisdictional bar to review of the merits, *Howard*, 405 F.3d at 476, and "federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson*, 351 F.3d at 215. In the interest of efficiency, the Court bypasses the procedural-default analysis and proceeds directly to the merits of Theriot's claim.

1. Clearly Established Federal Law

Petitioner had a constitutional right to present a complete defense, *Crane,* 476 U.S. at 690, but the right to present a defense is not absolute. *Ferensic*, 501 F.3d at 475. Although the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes,* 547 U.S. at 326. The Supreme Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted." *Crane*, 476 U.S. at 690 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). As the Court explained in *Scheffer*:

> A defendant's right to present relevant evidence is … subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus bow to accommodate other legitimate interests in the criminal trial process. As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve."

523 U.S. at 308 (footnote, additional quotation marks and citations omitted). A reviewing court's duty is to determine whether the exclusion of evidence rendered the petitioner's trial so fundamentally unfair as to violate his constitutional rights, *Lewis*, 307 F.3d at 420, or deprive the defendant of a fair trial. *Allen,* 599 F. Supp. 2d at 872.

2. Application

During the first day of testimony, the prosecution introduced evidence of a phone conversation between Theriot and Dominque Stewart a few weeks after the shooting. During that conversation, Stewart stated that he wished he could go back to that night, and Theriot responded that "we" made some bad decisions that night. (*See* 11/29/11 Trial Tr. at 152-53, ECF No. 10-9 at Pg ID 732-33.)

Later in the trial, defense counsel argued in the jury's absence that the recording was unclear as to whether Theriot had said "he" or "we" made some bad decisions on the night of the crime. He requested permission to introduce another part of the recording to show that the conversation was really about "manning up" to the crime and telling the police what he did. (*See* 12/6/11 Trial Tr. at 12-13, ECF No. 10-13 at Pg ID 1407-08.) The trial court denied defense counsel's request because the proposed evidence was self-serving hearsay and because

Theriot had taken the stand and could testify as to what he meant. (*Id.* at 13-14, Pg ID 1408-09.)

The prosecution introduced another recording of a jailhouse phone call in which Stewart was discussing JeNae Hudson with Theriot. Hudson had spoken to the police and implicated Theriot in the crime shortly after the shooting, and during Stewart's phone conversation with Theriot, Theriot stated he did not know what Hudson had told the police. He also said that Hudson "was on some bullshit." (*See* 11/29/11 Trial Tr. at 26, ECF No. 10-9 at Pg ID 606; 12/6/11 Trial Tr. at 16, ECF No. 10-13 at Pg ID 1411.) Defense counsel stipulated to the admission of the recording (*see* 11/29/11 Trial Tr. at 112, ECF No. 10-9 at Pg ID 692), but he subsequently asked for permission to introduce twenty-four more seconds of that recording to show that Theriot was referring to some photos and warrants. (*See* 12/6/11 Trial Tr. at 15-16, ECF No. 10-13 at Pg ID 1410-11.) The trial court denied the request to play the additional twenty-four seconds of the recording because, in the court's opinion, the comment would confuse the jury, rather than illuminate Theriot's remarks, and because Theriot was planning to testify anyway. (*Id.* at 17, Pg ID 1412.)

The prosecution introduced a third jailhouse phone recording in which Theriot advised his brother James Theriot "to take the Fifth all the way." (*See*

12/1/11 Trial Tr. at 137, ECF No. 10-11 at Pg ID 1156; 12/6/11 Trial Tr. at 5, ECF No. 10-13 at Pg ID 1400.) Defense counsel wanted to introduce an earlier conversation where Theriot's and James' mother said that she planned to encourage James to plead the Fifth Amendment because the police were trying to use James against Theriot. Defense counsel wanted to introduce an additional recording to show that Theriot was trying to protect James from a threat or a scare tactic by the police, not because Theriot was trying to protect himself. (12/6/11 Trial Tr. at 5-10, ECF No. 10-13 at Pg ID 1400-1405.) The trial court denied defense counsel's request on grounds that (i) it did not give any context to the evidence already in evidence, (ii) Theriot could have cross-examined James about the matter, (iii) Theriot could explain his phone conversation in his future testimony, and (iv) the proffered evidence would create more confusion than illumination. (*Id.*)

The trial court opined that defense counsel's arguments were undermined by the fact that Theriot was in the process of testifying and he could explain what he meant by his prior statements when he testified without introducing self-serving hearsay. (*Id.* at 13-14, Pg ID 1408-09.) The court ruled that defense counsel could only ask Theriot to explain his prior conversations, which were already in evidence. (*Id.* at 14, Pg ID 1409.)

The Michigan Court of Appeals upheld the trial court's rulings. *Theriot*, 2013 WL 6703494, at *5-6. The court reasoned that playing additional excerpts of the recordings, apart from the original statements, would cause confusion and that Theriot was trying to rebut the implication of guilt by providing alternative explanations for his previous comments, rather than context for the statements. *Id.* The court rejected Theriot's constitutional argument on the basis that he had a meaningful opportunity to present a complete defense by testifying. *Id.*

In his habeas petition, Theriot claims that the excerpts he attempted to introduce should have been admitted in evidence under Michigan's rule of completeness and to provide context to the excerpts the prosecutor introduced. Theriot maintains that his proffered excerpts: undercut the prosecution's theory by providing alternative explanations for his statements; supported his theory that Matthews, and not Theriot, made bad decisions on the night of the crimes; show he was upset with Hudson because she was not truthful, not because she went to the police; and demonstrate that he was not encouraging his brother James to be evasive, but was trying instead to prevent James from exposing himself to criminal liability for perjury or something else. According to Theriot, without the additional excerpts he wanted to introduce, he was forced to ask the jury to take his word for what the phone conversations meant.

To the extent the trial court may have violated a Michigan rule of evidence, Theriot's claim is not cognizable on federal habeas review. *Hall*, 563 F.3d at 239. Even if cognizable, the state court determined that Theriot's proffered evidence was not admissible under the "rule of completeness," and the state court's interpretation of state law binds this Court on habeas review. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Furthermore, rules of completeness are "not designed to make something admissible that should be excluded." *United States v. Costner*, 684 F.3d 370, 373 (6th Cir. 1982) (interpreting Fed. R. Evid. 106, which is similar to Michigan Rule of Evidence 106). Finally, the late introduction of the additional evidence could have confused the jury.

Additionally, the Court cannot find that the state court unreasonably applied clearly established federal law when ruling that Petitioner had alternative avenues to put the jailhouse calls in context, including his own testimony. *United States v. Kerley*, 784 F.3d 327, 343 (6th Cir. 2015) (citing *Reichert*, 747 F.3d at 454). In fact, during his trial testimony, Theriot was able to provide an explanation for the comments that the prosecutor introduced through the jailhouse phone recordings. (*See* 12/6/11 Trial Tr. at 27, ECF No. 10-13 at Pg ID 1422 (explaining what he had meant when he talked with Stewart about Hudson going to the police and being "on some bullshit"); *id.* at 27-29, Pg ID 1422-24 (explaining that he told his

brother James to "take the Fifth all the way" because he did not want James to continue lying on the stand and perjure himself); *id.* at 29-30, Pg ID 1424-25 (explaining that when he told people that he did not have anything to do with the shooting, he meant that he wanted everyone to tell the truth to his lawyer and the police).) Therefore, he was not deprived of his right to present a complete defense by the trial court's evidentiary ruling. *Reichert*, 747 F.3d at 454.

The Court concludes that the state trial court's evidentiary ruling and exclusion of evidence did not deprive Theriot of his right to present a defense or his right to a fair trial. Further, the state appellate court's conclusion that Theriot's right to present a defense was not violated was neither contrary to, nor an unreasonable application of, Supreme Court precedent. Theriot is not entitled to relief on his claim.

C. The Sentence and Trial Counsel's Failure to Object

In his third and final claim, Theriot challenges the scoring of offense variable five of the Michigan sentencing guidelines. He contends that the fifteen points he received for offense variable five placed him in a higher guidelines range despite the lack of evidentiary support for the score and that his trial attorney was ineffective for failing to object to the score.

The Michigan Court of Appeals reviewed Theriot's claim following his re-sentencing. It reviewed the claim for plain error because Theriot did not preserve the claim for appellate review by raising it at sentencing, in a motion for re-sentencing, or in a motion to remand. Analyzing the claim, the Court of Appeals concluded that the trial court did not plainly err when it scored fifteen points for offense variable five and that trial counsel was not ineffective for failing to object to the score.

Respondent has not asserted that Theriot's sentencing claim is procedurally defaulted. (*See* Supplemental Answer in Opp'n to Pet. for Writ of Habeas Corpus, at 3, ECF No. 26 at Pg ID 2347.) Instead, Respondent argues that the claim lacks merit.

The Court understands Theriot to be raising two interrelated claims: (1) the sentencing guidelines were mis-scored; and, (2) trial counsel was ineffective for failing to object to the scoring of the guidelines. The contention that the sentencing guidelines were mis-scored is not a cognizable claim on habeas review because a challenge to the state court's application and interpretation of state sentencing guidelines is "a matter of state concern only," *Howard v. White,* 76 F. App'x 52, 53 (6th Cir. 2003), and "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984).

Theriot nevertheless contends that he was sentenced on inaccurate information and that his trial attorney violated his Sixth Amendment right to the effective assistance of counsel. A sentence based on extensively and materially false information, which the defendant had no opportunity to challenge, violates due process. *Townsend v. Burke*, 334 U.S. 736, 741 (1948). Further, an attorney violates the constitutional guarantee of effective assistance if the attorney's performance was deficient and the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The Court, however, finds that the trial court did not rely on extensively and materially false information, and that trial counsel was not ineffective for failing to object to the scoring of offense variable five.

Offense variable five "is psychological injury to a member of a victim's family." Mich. Comp. Laws § 777.35(1). Fifteen points is an appropriate score if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." Mich. Comp. Laws § 777.35(1)(a). A score of zero is proper if "[n]o serious psychological injury requiring professional treatment occurred to a victim's family." Mich. Comp. Laws § 777.35(1)(b).

According to Theriot, the assessment of fifteen points for offense variable fifteen was without support in the state presentencing report and in the lower court

record. However, at Theriot's initial sentencing, the prosecutor stated that the murder victim's mother, Ronnette Dukes, had contacted a victim's advocate because she lived in Alabama and could not attend Theriot's sentencing. (*See* 1/4/12 Sentencing Tr. at 14, ECF No. 10-15 at Pg ID 1639.) Ms. Dukes reported to the victim's advocate that "the whole situation was very stressful for her" and that the loss of her unborn grandchild and not being able to get to know the grandchild was "extremely hard for her." (*Id.*) She also reported that she had been in counseling. *Id.*

Ms. Dukes' comments demonstrate that serious psychological injury requiring professional treatment occurred to a member of the victim's family. Therefore, the trial court did not sentence Theriot on the basis of extensively and materially false information, and trial counsel was not ineffective for failing to object to the scoring of offense variable five. An objection would have lacked merit, and "[o]mitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

The state appellate court's decision affirming Theriot's sentence and rejecting his ineffectiveness claim was not contrary to Supreme Court precedent. Therefore, habeas relief is not warranted on Theriot's sentencing claim.

IV. Certificate of Appealability

"[A] prisoner seeking postconviction relief under 28 U.S.C. § 2254 has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, [the] petitioner must first seek and obtain a [certificate of appealability.]" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

> A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). That standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Welch v. United States, 136 S. Ct. 1257, 1263-64 (2016).

Reasonable jurists could debate the Court's resolution of Theriot's first claim regarding his right of confrontation and his right to present a defense. Reasonable jurists also could debate Theriot's claim regarding the exclusion of the recordings from his jailhouse phone calls. Reasonable jurists, however, could not debate the Court's assessment of Theriot's claim regarding his sentence. Therefore, the Court will grant in part and deny in part a certificate of appealability.

V. Conclusion and Order

The state appellate court's adjudication of Theriot's claims was neither contrary to clearly established federal law, an unreasonable application of clearly established federal law, nor an unreasonable determination of the facts.

Accordingly,

IT IS ORDERED that Theriot's amended petitions for the writ of habeas corpus (ECF Nos. 21 and 23) are denied.

IT IS FURTHER ORDERED that a certificate of appealability may issue on claims one and two only.

IT IS FURTHER ORDERED that Theriot may proceed in forma pauperis if he appeals this decision.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: December 20, 2019

Case No. 20-1029

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

DARIUS THERIOT

Petitioner - Appellant

v.

BOB VASHAW, Warden

Respondent - Appellee

BEFORE: BATCHELDER, Circuit Judge; GRIFFIN, Circuit Judge; MURPHY, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: January 07, 2021

Order

Michigan Supreme Court
Lansing, Michigan

July 29, 2014

148725

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 148725
COA: 308640
Wayne CC: 11-008423-FC

DARIUS REECE THERIOT,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the December 19, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

t0721

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

July 29, 2014

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON RAYMON MATTHEWS,

Defendant-Appellant.

UNPUBLISHED
December 19, 2013

No. 308369
Wayne Circuit Court
LC No. 11-008423-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS REECE THERIOT,

Defendant-Appellant.

No. 308640
Wayne Circuit Court
LC No. 11-008423-FC

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

This matter involves a consolidated criminal appeal from the circuit court. In Docket No. 308369, defendant Devon Matthews appeals as of right from his bench trial convictions of one count of second-degree murder, MCL 750.317, three counts of assault with intent to do great bodily harm less than murder, MCL 750.84(1)(a), one count of felon in possession of a firearm (felon in possession), MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 30 to 35 years for the second-degree-murder conviction, 5 to 10 years for each of the assault-with-intent-to-do-great-bodily-harm convictions, and 2 to 5 years for the felon-in-possession conviction, and to a consecutive prison term of 2 years for the felony-firearm conviction. We affirm defendant Matthews's sentence.

In Docket No. 308640, defendant Darius Theriot appeals as of right from his jury trial convictions of one count of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, one count of assault of a pregnant individual causing

death to fetus, MCL 750.90b(a), and one count of felony-firearm, MCL 750.227b. He was sentenced as a second-offense habitual offender to concurrent prison terms of 45 to 80 years for the second-degree-murder conviction and each of the assault-with-intent-to-murder-convictions, and 10 to 15 years for the assault-causing-death-to-fetus conviction, and to a consecutive prison term of 2 years for the felony-firearm conviction. We affirm defendant Theriot's convictions, but we vacate his sentence and remand for resentencing.

This case arises from a drive by shooting. Defendant Theriot drove the vehicle from which defendant Matthews shot an AK-47, killing a pregnant woman and injuring three others.

I. DOCKET NO. 308369

Defendant Matthews argues that the information in the presentence investigation report (PSIR) did not support a score of 15 points for OV 5, and thus, he is entitled to resentencing for his second-degree-murder conviction. We disagree.

We review for clear error the trial court's factual findings that serious psychological injury requiring professional treatment occurred to the victim's mother. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo whether these findings were sufficient to assess 15 points for OV 5. *Id.* The trial court's factual findings must be supported be a preponderance of the evidence. *Id.*

The trial court must assess 15 points for OV 5 if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). The fact that professional treatment has not been sought is not conclusive. MCL 777.35(2). A trial court must assess 15 points "if the serious psychological injury to the victim's family *may* require professional treatment." *Id.* (emphasis added).

The trial court did not clearly err when it determined that the victim's mother suffered psychological injury that may require professional treatment. Citing *People v Portellos*, 298 Mich App 431, 441-442, 449; 827 NW2d 725 (2012), defendant argues that the victim's impact statement only describes the mother's disbelief and grief at the loss of her daughter, which is not evidence that she suffered a psychological injury requiring counseling. However, the impact statement also stated that the victim's mother had not tried counseling yet, which as the trial court noted, could be an indication that she was contemplating treatment. Additionally, as the trial court also noted, the impact statement described more than just natural and ordinary grief arising from the death of a loved one, particularly because of the nature of the crime. Accordingly, we conclude that these findings were sufficient to assess 15 points for OV 5.

However, even if we determined that the trial court erred by assessing 15 points for OV 5, defendant is not entitled to resentencing because the scoring error would not alter his appropriate guidelines range. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

II. DOCKET NO. 308640

A. NONASSERTIVE CONDUCT

First, defendant Theriot argues that the trial court abused its discretion by prohibiting defendant Theriot from asking any of the witnesses about his demeanor immediately after the shooting. We agree, but because the error was harmless, we find that defendant is not entitled to relief.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). However, to the extent defendant Theriot argues that the trial court's ruling violated his constitutional right to present a defense, that argument is unpreserved, as an objection based on the rules of evidence does not preserve the issue of whether the exclusion violated a constitutional right, and thus, we review it for plain error affecting substantial rights. See *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003)

Defendant Theriot argues that any testimony regarding his nonverbal behavior and demeanor was admissible as nonassertive conduct. Defendant Theriot argues that his reaction to the shooting, whether by his sudden silence, erratic driving, or body language, was not a statement for hearsay purposes.[1] Defendant Theriot also argues that his statement "what the hell was that?" made immediately after the shooting was not hearsay because it was not assertive or offered for the truth of the matter asserted, and thus was admissible. At trial, the trial court prohibited defendant Theriot from admitting into evidence any witnesses' observations of his reaction to the shooting. The trial court determined that evidence of defendant Theriot's reaction to the shooting contained an implied assertion, making it hearsay.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Quoting 2 McCormick on Evidence (4th ed), § 250, pp 110-111, this Court explained the rationale for excluding nonassertive conduct from the definition of hearsay:

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[1] Defendant Theriot asserts that he was prohibited from cross-examining a witness about whether defendant Theriot exhibited anger with defendant Matthews after the shooting, as opposed to nonchalance. However, in his argument section, defendant Theriot fails to specifically address how the trial court erred in this regard. Thus, to the extent that defendant Theriot argues that the trial court erred by prohibiting him from cross-examining the witness about defendant Theriot's anger, this issue is abandoned. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

> People do not, prior to raising their umbrellas, say to themselves in soliloquy form, "It is raining," nor does the motorist go forward on the green light only after making an inward assertion, "The light is green." The conduct offered in the one instance to prove it was raining and in the other that the light was green, involves no intent to communicate the act sought to be proved, and it was recognized long ago that purposeful deception is less likely in the absence of intent to communicate. [*People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 214; 579 NW2d 82, mod in part on other grounds 458 Mich 862 (1998).]

The key determination is whether an assertion was intended. *People v Watts*, 145 Mich App 760, 762; 378 NW2d 787 (1985). Behavior that is "so patently involuntary" such as the "spontaneous act of crying" cannot be treated as an assertion. *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984).

Reactions to a shooting are likely spontaneous outbursts, and thus, "so patently involuntary" that they could not be intended assertions. Defendant Theriot's display of surprise, anger, silence, and erratic driving were likely involuntary reactions to the shooting, and they do not indicate that he had an "intent to communicate the act sought to be proved." Thus, defendant Theriot should have been permitted to ask questions regarding his demeanor following the shooting, so long as the conduct involved was involuntary and spontaneous, and not intended as an assertion. Accordingly, the trial court erred in this regard.

Likewise, defendant Theriot's question "what the hell was that?" made after the shooting was not hearsay. As stated, to qualify as hearsay, the "statement" must be an "assertion". Defendant Theriot's question is incapable of being true or false, and thus, is not an assertion. *Jones (On Rehearing After Remand)*, 228 Mich App at 204-205; see also *United States v Thomas*, 451 F3d 543, 548 (CA 8, 2006) (stating that "[q]uestions and commands generally are not intended assertions, and therefore cannot constitute hearsay"). Even if the question could qualify as an assertion, the question was not offered to prove the matter asserted, i.e., what something was. Rather, the question was offered to show that defendant Theriot was surprised the shooting occurred. Although, as the trial court suggested, there may be an implied assertion that defendant Theriot is innocent of being an aider and abettor because he did not know there was going to be a shooting, this Court has stated that implied assertions are not hearsay. *Jones (On Rehearing After Remand)*, 228 Mich App at 225-226. Thus, the trial court erred in excluding this evidence.[2]

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[2] Plaintiff argues that defendant Theriot may not offer his own exculpatory statement because it is self-serving. See e.g., *People v Taylor*, 98 Mich App 685, 690; 296 NW2d 631 (1980) ("An exculpatory statement by a defendant made after his arrest is properly excluded at trial as self-serving."). The self-serving line of cases is distinguishable because they concern a defendant offering his or her own statements, and not another witness testifying about defendant's conduct. They are also distinguishable because in the present case the conduct occurred before the arrest, as opposed to after the defendant was arrested and Mirandized.

However, although the trial court erred, in light of the overwhelming evidence against defendant Theriot, the error was harmless, and thus, he is not entitled to relief. MCR 2.613(A). Defendant Theriot admitted to getting the gun, which he illegally owned, of his own free will. One witness testified that defendant Theriot made the decisions on where to go that night, and he intentionally drove his truck to the house and slowed down when he drove by it. Defendant Theriot was quoted as saying, "don't worry about it, we'll get them later, we'll take care of it in our own time," after four men associated with the victims had confronted defendant Theriot and his friends. After the shooting, defendant Theriot wiped the gun clean of prints, and he was the last person seen with the gun. He also urged witnesses not to snitch and to lie for him. Further, given that the jury heard testimony that defendant Theriot was scared after the shooting, particularly because he stepped on the gas and jerked the truck, it is unlikely that hearing he was surprised would have changed the verdict.

Additionally, defendant Theriot argues the trial court's rulings denied him his right to present a defense. "[A] criminal defendant has a state and federal constitutional right to present a defense," but this right is not absolute. *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). The Sixth Amendment only grants criminal defendants "'a *meaningful* opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (quotation marks and citation omitted) (emphasis added). As noted, the trial court's evidentiary error was harmless, and as such, it did not rise to the level of a constitutional deprivation. Defendant Theriot was not precluded from presenting a complete defense because there was testimony showing that he was scared after the shooting based on how he sped off and jerked the truck. Defendant Theriot was also able to ask the witnesses whether anyone encouraged defendant Theriot to get the gun and drive by the house, and whether defendant Theriot ordered or encouraged defendant Matthews to shoot. Accordingly, defendant Theriot had a meaningful opportunity to present a defense.[3]

B. RULE OF COMPLETENESS

Next, defendant Theriot argues that the trial court erred by denying his request to admit additional excerpts of recorded jail phone conversations between him and his friend and mother. We disagree. As stated, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Herndon*, 246 Mich App at 406. However, to the extent that defendant Theriot argues that the exclusion of the additional excerpts violated his constitutional right to present a defense, that issue is unpreserved, and thus, we review for plain error. *Coy*, 258 Mich App at 12.

The common law "rule of completeness" was codified in MRE 106, which provides, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." "The premise of

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[3] Defendant Theriot states that he also enjoys a right to confront the witnesses against him, but makes no argument on how he was denied this right. Thus, it is considered abandoned. See *Harris*, 261 Mich App at 50.

the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). Our Supreme Court has stated that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996),).

The trial court did not err by refusing to play the additional excerpts. Defendant Theriot stipulated to the admission of the recorded jail calls, and he did not move to have the additional excerpts played at the time the prosecution played the other portions of the tapes. Instead, defendant Theriot waited until the last day of trial to request the admission of the additional excerpts. MRE 106 clearly states that "the adverse party may require the introduction *at that time* of any other part . . . which ought in fairness to be considered *contemporaneously* with it." Contrary to what the rules requires, defendant Theriot failed to move for the introduction of the other parts of the recorded statements at the time the prosecution introduced them, so they could be played at the same time. Playing the additional excerpts, some of which were only seconds long, apart from the original statements, would likely cause confusion, as the trial court correctly determined.

Further, the trial court allowed defense counsel to inquire about the context of the statements on direct examination, where defendant Theriot was able to explain why he said what he said. This Court has noted that allowing a defendant to explain his statements rather than playing a recording that was not relevant except for the portion that the jury heard, has "the potential to be more compelling evidence in favor of the defense than the tape itself." *Herndon*, 246 Mich App at 409. Defendant Theriot has failed to explain how the additional excerpts were relevant, i.e., how they would offer context for the other statements. Defendant Theriot sought to admit his own statements, not to offer context or to make the statements complete, but to rebut any implication of guilt by providing alternative explanations for the statements. And, as discussed, defendant Theriot was able to do this during his direct examination, which still provided the jury with an "intelligible presentation of the full context in which disputed events took place." *Sholl*, 453 Mich at 741. Accordingly, given that MRE 106 is a discretionary rule, *People v Fackelman*, 489 Mich 515, 545 n 22; 802 NW2d 552 (2011), we find no evidentiary error.

Additionally, defendant Theriot asserts that the trial court's ruling violated his right to present a defense. As discussed in Issue II, the Sixth Amendment only grants criminal defendants "a *meaningful* opportunity to present a complete defense." *Holmes*, 547 US at 324 (quotation marks and citation omitted) (emphasis added). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038, 35 L Ed 2d 297 (1973). "The Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *People v King*, 297 Mich App 465, 474; 824 NW2d 258 (2012), quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (opinion by Thomas, J.).

As discussed, pursuant to MRE 106, the trial court properly excluded the additional excerpts, and thus defendant Theriot was not denied his constitutional right to present a defense. See *Hayes*, 421 Mich at 278. Moreover, defendant Theriot had a meaningful opportunity to present a complete defense, as he was able to provide an explanation about his statements during his direct examination, which had the potential to be more compelling than listening to a few seconds of a recording. Finally, defendant Theriot fails to argue that MRE 106 is arbitrary or disproportionate to the purpose it was designed to serve; thus, in this respect, this issue is abandoned. See *King*, 297 Mich App at 474. Accordingly, we find no constitutional error.

C. HABITUAL OFFENDER SENTENCE

Next, defendant Theriot argues, and the prosecutor agrees, that the trial court erred in sentencing him as a second-offense habitual offender. We agree. A trial court's decision to enhance a defendant's sentence under the habitual offender statutes is reviewed for an abuse of discretion. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Defendant Theriot argues that he cannot be sentenced as a second-offense habitual offender because the prosecutor failed to provide him with a notice of intent to seek an enhanced sentence. If a prosecutor wishes to seek an enhanced sentence, the prosecutor must file a written notice of intent within 21 days of the defendant's arraignment, or if the arraignment is waived, within 21 days of the filing of the information. MCL 769.13(1); MCR 6.112(F). Here, the prosecutor concedes that defendant Theriot was not provided with a notice of intent to seek an enhanced sentence. Thus, defendant Theriot should not have been sentenced as a second-offense habitual offender.

Additionally, defendant Theriot argues that he cannot be sentenced as a second-offense habitual offender because he did not have a prior felony conviction for purposes of habitual offender sentencing. The second-offense-habitual-offender statute, MCL 769.10(1), provides:

> If a person has been convicted of a felony or an attempt to commit a felony . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony . . . .

Thus, the statute requires the defendant to have been convicted of an offense before the commission of the sentencing offense. "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v Dipiazza*, 286 Mich App 137, 141-142; 778 NW2d 264 (2009), citing MCL 762.12. Here, the parties concede that defendant Theriot's HYTA status was revoked after the jury convicted him in this case, so at the time defendant Theriot committed the sentencing offense, he did not have a prior felony conviction for purposes of habitual offender sentencing. Thus, defendant Theriot should not have been sentenced as a second-offense habitual offender. Accordingly, we remand for resentencing.

D. JUDICIAL BIAS

Finally, defendant Theriot argues that he should be resentenced before a new trial judge. We disagree. To determine whether a different trial judge should resentence a defendant, this Court applies the following test:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).

Here, the trial judge did not make any comments on the record indicating that he was biased. The trial judge may have vigorously expressed his views, but only out of frustration with defendant Theriot's actions in that he attempted to coach witnesses, frequently interrupted the proceedings, and tried to run the trial over his attorney. Additionally, even though some of the trial court's rulings were erroneous, this is not enough to demonstrate bias. See *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004) ("Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying."). Given the length of the trial and the amount of testimony heard, reassigning this matter to a different judge, who knows nothing about the case, would entail waste, particularly when there is no indication that the trial judge would not be able to resentence defendant Theriot fairly.

III. CONCLUSION

In Docket No. 308369, we affirm defendant Matthews's sentence. In Docket No. 308640, we affirm defendant Theriot's convictions, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

v File No. 11-8423

DEVON MATTHEWS and DARIUS THERIOT,

Defendant.

_____/

WAIVER TRIAL/JURY TRIAL

BEFORE THE HONORABLE MICHAEL M. HATHAWAY

Detroit, Michigan - November 29, 2011

APPEARANCES:

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Q Sooner or later it's gon' catch up with us and when it does, don't say anything, correct?
A No. Basically just tell the truth.
Q Oh, basically just tell the truth?
A Yes. Tell the truth.
Q Who said basically just tell the truth?
Did Darius say if it -- when it finally catches up with us, please tell the truth? Did Darius say that?
A No.
Q Okay. Thank you.
So who said when it finally catches up with us, please tell the truth?
A Everybody in the, in the immediate circle.
Q Everybody said, yeah, when it finally catches up with us, we're going to be totally honest?
A Yes. We have no choice but to.
Q Okay. What as Darius' demeanor during that next day?
A Um, nah, it was nonchalant.
Q You said he was nonchalant about the --
A Yes.
Q -- whole thing?
Correct?
A Yes.
Q And you specifically told him if anyone came to you, you said you would tell the truth; is that correct?

vehicle, where?
A Unknown.
Q Pardon?
A Unknown.
Q You know?
A Unknown.
THE COURT: Unknown, is that what you said?
THE WITNESS: Yes.
MR. SCHULMAN: Okay.
THE COURT: Okay.
BY MR. SCHULMAN:
Q And what, did you have a reaction from the other people in your vehicle when you heard the shots?
A Not that I know of.
Q Now, after you drove away did you see Darius Theriot react to the what happened in that shooting?
A I was -- at the moment I wasn't focused on around me because I, like I said, I had an intoxicated person on my shoulder. So wouldn't -- after, after that I didn't see nothing. I was tending to him because I didn't want him it throw up on me.
Q Okay. Do you remember any -- do you remember Darius being angry at anybody about the occurrence?
MS. LINDSEY: Objection. That would call for speculation on his part.

MR. SCHULMAN: Well.

MS. LINDSEY: Angry at anybody.

THE COURT: Yes. I agree. I mean and, and if you're ask -- actually asking for words that Mr. Theriot might have spoken or nonverbal assertions, that could get into a hearsay?

MR. SCHULMAN: Well, the preposition the People opened the door.

THE COURT: I don't think so. And, of course, they have options about the defendant's assertions that you don't have. So I'll sustain the objection.

BY MR. SCHULMAN:

Q Did anytime did you ever hear anybody instruct another individual about a firearm, to use it, shoot, anything like that?

A No.

Q Did you ever hear anyone give any direction on encouragement to anybody?

A No.

Q Did you ever hear anybody say now or like that to give --

A No.

Q Did you ever hear anyone say all right this is the spot, anything like that?

A No.

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

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DEVON MATTHEWS and DARIUS THERIOT,

Defendant.

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WAIVER TRIAL/JURY TRIAL

BEFORE THE HONORABLE MICHAEL M. HATHAWAY

Detroit, Michigan - November 30, 2011

APPEARANCES:

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Q But you know for a fact that Devon did the shooting; is that correct?
A Yes, sir.
Q And you know for a fact that Darius did not instruct him to shoot anybody; is that correct?
A Yes, sir.
Q Now, do you know how Darius reacted right after the bullets were shot, right after the AK47 was shot?
A I remember the car was jerking, sir, so he had to be scared, too.
Q I'm not asking you if he was scared. I'm asking if you saw how he reacted. You said he slammed -- stopped the car, right?
A Yeah.
Q So obviously he stopped the car --
A Yes.
Q -- for whatever reason.

Did you see his body language? Did you see how he reacted? Did you have hear anything he said as far as how he reacted?

A Yes, sir.
Q What did you see or hear?
A I heard, I heard him.

MS. LINDSEY: Objection, your Honor.

Objection, your Honor. He can't say what he

heard.

THE COURT: Well --

MS. LINDSEY: It's hearsay.

MR. RADNER: Goes to reaction. Not trying to say for the matter asserted. I'm trying to get how he reacted to this.

THE COURT: How Darius reacted?

MR. RADNER: Yeah.

THE COURT: Well, that could be --

MR. RADNER: It just, it --

THE COURT: -- an assertion.

MS. LINDSEY: Yeah.

THE COURT: Verbal or otherwise.

I think I know what you're you driving at, and under those circumstances actually it would be hearsay because it would be offered for either the truth of the matter asserted verbally or otherwise as an assertion of the defendant's state of mind which is, of course, exculpatory assertion, so I will sustain the objection.

MR. RADNER: I'm asking specifically. I'm asking specifically.

BY MR. RADNER:

Q Okay. Did you see --

MS. LINDSEY: No, no, no.

THE COURT: No, you cannot --

MR. RADNER: Can we approach, please.

THE COURT: No, you may not approach. Don't waste my time. No hearsay.

None of your client's alleged statements are coming into evidence through this witness while you are questioning this witness.

MR. RADNER: It's excited utterance right after gunshots.

MS. LINDSEY: No, no.

MR. RADNER: It's not being offered for the truth of the matter asserted.

THE COURT: You just said excited utterance. That's what hearsay exception means.

MR. RADNER: Also he can -- if we can please approach, I can --

THE COURT: No.

MR. RADNER: -- tell you.

THE COURT: The People's objection is sustained.

BY MR. RADNER:

Q Okay. Do you know how Darius reacted to the shooting?

THE COURT: Mr. Radner, I'm not going to argue with you about this anymore. This witness' observation about how your client supposedly reacted to the shooting either verbally or otherwise is not coming into

evidence, so stop it and move on.

BY MR. RADNER:

Q How many people in the truck in total when the shooting took place?

A Six, sir.

Q One last question. I almost for got to do.

You've been sitting in the witness room pretty much all day, right?

A Yes, sir.

Q Please tell the jury what you told me right before we broke for lunch.

MS. LINDSEY: Objection. That is hearsay. Out of court statement offered for the truth of the matter asserted.

MR. RADNER: Your Honor.

THE COURT: His testimony, Mr. Radner, his testimony here in court is his testimony in court, not statements that he gave you. He can't testify about those statements. And he can't testify at least in that fashion.

MR. RADNER: Well, the --

THE COURT: Well, but you can't -- you're going to have to ask the question in some other way then.

MR. RADNER: Okay.

MS. LINDSEY: Judge.

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

v File No. 11-8423

DEVON MATTHEWS and DARIUS THERIOT,

Defendant.

_____/

WAIVER TRIAL/JURY TRIAL

BEFORE THE HONORABLE MICHAEL M. HATHAWAY

Detroit, Michigan - December 1, 2011

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Detroit, Michigan

Thursday, December 1, 2011

At 10:04 a.m.

- - -

THE CLERK: Calling Case 11-8423, Defendant 01, the People versus Devon Matthews and Defendant 02, the People versus Darius Theriot. These matters are before the court for a bench trial and a jury trial.

MS. LINDSEY: Good morning, your Honor.

Lisa Lindsey on behalf of the People of the State of Michigan.

MS. BROWN: Good morning, your Honor.

Nicole Brown appearing on behalf of the People.

MR. RADNER: Solomon Radner on behalf of Mr. Theriot.

MR. PLUMPE: Good morning, your Honor.

Robert Plumpe, P22965, on behalf of Mr. Matthews.

We're ready to proceed.

THE COURT: Okay. And I guess our jury is all here. I want to just grab a real quick cup of coffee. It will take me two minutes and we'll get started.

Thank you.

MS. LINDSEY: Yes, sir.

MR. RADNER: And, your Honor, just to let the

Court know, there's one matter I'd like to address at some point before the jury comes out.

THE COURT: Oh, all right.

(At 10:05 a.m., proceedings recessed)

(At 10:09 a.m., proceedings resumed)

THE COURT: All right. Court's back in session.

Mr. Radner, what's your issue?

MR. RADNER: Judge, I just like to make a record and at the same time an offer of proof.

Yesterday I tried to ask an eyewitness how Darius reacted and what he said immediately after the AK47 was shot. At the time the prosecutor objected to his words coming in as being hearsay. I mentioned that I didn't think that it was gonna be offered for the truth of the matter asserted. I believe the Court then sustained the objection. I then said that it would be an excited utterance because it was right after gunshots were fired.

THE COURT: It would have been an exited exculpatory utterance.

MR. RADNER: Well, it would have been an excited utterance. It would have been potentially exculpatory, but --

THE COURT: Okay. Go ahead.

MR. RADNER: -- the court rules -- okay.

So I think and, of course, I, I can't be certain with these witnesses because things are, they're kind of -- some of the witnesses are back and forth on what they're saying. I think the answer to the question was going to be something to the effect of what the hell was that and acting surprised.

THE COURT: Right.

MR. RADNER: There's no truth asserted in the statement what the hell was that.

THE COURT: Oh, there is.

MR. RADNER: It's --

THE COURT: There the, the assertion with an utterance like that is the assertion is I'm innocent. I'm innocent of being an aider and abettor to a shooting because I didn't know there was going to be a shooting. It's an implied assertion.

MR. RADNER: It is. It is an implied assertion just as it's possible for body language to be an implied assertion. Yet --

THE COURT: Yeah.

MR. RADNER: -- to ask and, and this brings up the next point. I then asked him how my client reacted to the shooting and the Court didn't allow that either.

THE COURT: Right.

MR. RADNER: I thought that it was at the time I stated that I -- that it was an excited utterance and also not being offered for the truth of the matter asserted. And whatever statement the body language may have been by how he reacted is just asking the witness what he saw, what he perceived and, and how can he --

THE COURT: And the answer you think would have been what?

MR. RADNER: I think the answer was gonna be surprised which goes to an essential element of aiding and abetting which is knowledge of the shooting. If he acted surprised, then --

THE COURT: Yeah, but it is just another way to get your client's testimony in through hearsay. And it is testimony because it's a -- well, first of all, there's a foundation issue about a witness saying another person, the declarant acted surprised.

I mean how does -- what exactly does he mean or how does he know that. And without getting into more detail I'm not sure the witness is even competent to -- would be allowed to testify to that unless he, he, he talked about it in, in greater context. And the more context he provides, the more it does indeed become hearsay.

It may be nonverbal, but it is an assertion.

It is again evidence of your client's having asserted a lack of knowledge about what the actor was doing, and it is in that respect an assertion of innocence. It's like a denial of committing a crime.

Hearsay doesn't always have to be verbal as I'm sure you know. And oftentimes impermissible hearsay is offered in an -- in the form of a nonverbal assertion, and that's what that he would be. So I think I made the right ruling here.

Now, you know, if, if the People were asking a witness to testify about an incriminating reaction or words that the defendant made, that would be an entirely different circumstance. That would be probably admissible. But when the defense is trying to put that kind of evidence in, it's impermissible hearsay in my view.

But, anyway, I think we've said everything we can about it.

Ms. Lindsey, do you have anything you wanna say?

MS. LINDSEY: No. I, I think I made a sufficient record of what's my objection yesterday.

MR. RADNER: Your Honor, just one last thing just to complete the record. There was another witness that was asked by the defense how did Darius react and

the answer was nonchalant. And that answer was allowed even though the question was how did Darius react, and it was posed by the defense.

THE COURT: Well --

MR. RADNER: That --

THE COURT: -- nonchalant is sort of incriminating.

MR. RADNER: Yes. Yes, it is. But prior to him answering that it was he was allowed to answer the question. And --

THE COURT: You mean there was no objection or there was an objection rather --

MR. RADNER: There's no objection then.

THE COURT: -- and I ruled?

MR. RADNER: There was no objection by, by the prosecutor.

THE COURT: Well, maybe she knew nonchalant was going to be the answer and so she had no objection to that.

MR. RADNER: Okay.

THE COURT: Nonchalant I would have let in. If knowing that, knowing that that was the answer, I would let it in because that's incriminating.

MR. RADNER: So.

THE COURT: I mean it may strike you as unfair,

but, you know, in the body of evidence there's always the admissibility or non-admissibility of evidence often depends on who's offering it and, and why it's being offered. And a, a facial expression or, or words or expressions, body language or whatever that tends to be incriminating can be admitted.

And but it wasn't Ms. Lindsey that was asking the questions at that time I don't think. But the fact that nonchalant came in over without an objection does not in any way open the door if that's the point you're trying to make about being exculpatory body language or expressions.

MR. RADNER: So then just to complete my record, and then we can bring the jury back in if there's nothing else, Rule 083, the following are not excluded by the hearsay rule even though the declarant is available as a witness.

Number two, excited utterance. A statement relating to startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

I don't see anything in here about whether or not it's exculpatory or incriminating. There were gunshots that were fired just a few feet behind where my client was. And how he reacted to that if the Court has

already ruled that it is an assertion, I would just make a record that probably is not being offered for the truth of the matter asserted in that body language, but also that it would be considered an excited utterance per 803 paren two.

THE COURT: Okay. So exculpatory excited utterances.

Ms. Lindsey, what do you think about those?

MS. LINDSEY: Well, as it relates to what he just said, he's trying to have it both ways. He's saying it's not being offered for the truth of the matter asserted; that he's using it under 803. It is being offered for the truth of the matter asserted. And if it is, that is essentially he's trying to put in his client's own statement which he cannot do --

THE COURT: Yeah.

MS. LINDSEY: -- because it's not an admission of a proper --

THE COURT: Yeah. See, I think the reason why exculpatory excited utterances, I don't mind having these kind of dialogues because these help me, too. And I -- this is fine, but there has to be fundamentally with any hearsay that's admitted through an exception a circumstantial trustworthiness. And I think that so-called exculpatory exited utterances are almost like

a contradiction of terms.

I mean there is a strong possibility that a defendant can contrive an excited utterance to appear to express innocence. And I would be disinclined to allow excited utterances from a defendant on that basis because there is no circumstantial element of trustworthiness. And the, the exited utterance, if it is exculpatory, could be purely a contrivance. But anyway --

MS. LINDSEY: And, Judge, just --

THE COURT: You have --

MS. LINDSEY: -- just so we can --

THE COURT: -- appellate issue now.

MS. LINDSEY: Just so we can make a complete record, that the witness statement given by Roumelle Merchant 7-18-11 at 2:10 p.m. at Homicide, he was asked the question in his witness statement did anybody say anything after the shooting?

His answer on page two of that witness statement was it was quiet. Nobody believed what happened.

So there's not even, according to his witness statement, an assertion that was made.

MR. RADNER: Then that even strengthens the fact that he should be allowed; that the body language

should have been allowed to come in because there was no assertion that was made according to the prosecutor.

MS. LINDSEY: No, but he said nobody.

THE COURT: All right. Okay. Stop.

MR. RADNER: I'm just making the record.

THE COURT: We, we've spent, we've spent enough time on this.

Okay. You're made your record. Everybody's made a record.

MR. RADNER: Just --

THE COURT: We'll get the jury.

MR. RADNER: Can I just ask one last thing. Just so that I, I don't wanna upset the Court, am I not gonna be allowed to ask eyewitnesses how my client reacted to today the shooting?

THE COURT: Right. Unless he, unless his reaction was yes.

Are any of them gonna say that?

MR. RADNER: I wouldn't ask them if that was gonna be the answer.

THE COURT: Well then you can't do it.

MR. RADNER: Okay. Thank you.

THE COURT: All right.

And just for the record, the Court made a thumbs up gesture.

MS. LINDSEY: Yes.

(At 10:19 a.m., jury returned)

THE COURT: All right. You may be seated.

Sorry for the delay. I tend to be the eternal optimistic about how quickly we can plow thorough other things. And we did have a busy morning. But we are prepared now to give you our undivided attention for the rest of the day I think.

Now, one of you had asked when I said yesterday that we're on track, what does that mean. Originally I think we told you that this was going to be a six or seven day trial, and that continues to be our collective evaluation.

We are moving along pretty good here. This is the fourth day. And, okay.

Oh, you're reminding me about your jury duty. When is that, is it Monday?

JUROR NUMBER 1: Monday.

THE COURT: Okay. I'll take care of it.

So this is the fourth day. You won't be here tomorrow. I, I think we're, we're all confident that we're gonna wrap this up by the end of the day Tuesday at the latest. So that, that's where we stand right now.

All right. Ms. Brown apparently has a --