APPENDIX A1 – A3

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Order Affirming the District Court's Judgment

HAYNES V CHAPMAN

No. 20-1221

Dated: April 20, 2021

(3-pages)

NOT RECOMMENDED FOR PUBLICATION

No. 20-1221

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERMAINE LATWONE HAYNES,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
WILLIS CHAPMAN, Warden,	)	MICHIGAN
	)	
Respondent-Appellee.	)	

ORDER

Before: GUY, SILER, and GIBBONS, Circuit Judges.

Jermaine Latwone Haynes, a pro se Michigan prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2014, a Michigan jury convicted Haynes of two counts of assault with intent to commit murder, one count of felon in possession of a firearm, and one count of possession of a firearm during the commission of a felony. The trial court sentenced Haynes to thirty to fifty years of imprisonment for the assault-with-intent-to-commit-murder convictions, a concurrent ten to fifty years for the felon-in-possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed his convictions, *People v. Haynes*, No. 320409, 2015 WL 2412359 (Mich. Ct. App. May 19, 2015), and the Michigan Supreme Court denied permission to appeal further, *People v. Haynes*, 871 N.W.2d 191, 191-92 (Mich. 2015) (mem.).

In 2016, Haynes filed his § 2254 petition in the district court, alleging: (1) insufficient evidence to support his assault-with-intent-to-commit-murder convictions; (2) prosecutorial misconduct; (3) ineffective assistance of counsel; and (4) denial of transcripts on appeal. The district court dismissed Haynes's petition as meritless. *Haynes v. Campbell*, No. 16-cv-14371, 2020 WL 532397 (E.D. Mich. Feb. 3, 2020). On appeal, this court granted Haynes a certificate of appealability for his claims that his trial counsel provided ineffective assistance by failing to investigate and present self-defense and mitigating evidence.

This court reviews de novo a district court's dismissal of a § 2254(d) petition but reviews the court's factual findings for clear error. *See England v. Hart*, 970 F.3d 698, 706 (6th Cir. 2020), *cert. denied*, 2021 WL 1072313 (U.S. Mar. 22, 2021) (No. 20-991). Federal habeas corpus guards against extreme malfunctions in state criminal justice systems rather than acting as a substitute for ordinary error correction through appeal. *Greene v. Fisher*, 565 U.S. 34, 38 (2011); *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011). Under § 2254(d), the district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (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 to the state courts.

Haynes argues that his counsel was ineffective in representing him. In order to demonstrate ineffective assistance of counsel, the defendant must show that: (1) counsel's performance was deficient; and (2) this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Tackett v. Trierweiler*, 956 F.3d 358, 373 (6th Cir. 2020). To establish this prejudice, counsel's errors must have been so serious as to deprive the defendant of a trial that was fair and reliable. *Strickland*, 466 U.S. at 687; *Tackett*, 956 F.3d at 373.

Haynes first contends that his counsel was ineffective because he failed to pursue a strategy of self-defense and present evidence in support of that strategy. This evidence included: (1) text messages sent by Melrose Williams to Haynes; (2) text messages that Haynes sent to his brother; (3) two witnesses, Anthony Gaskins and Estelle Burnett, who allegedly would have testified to

violence they experienced that was related to the events underlying Haynes's convictions; and (4) police and hospital records that would have supported Gaskins's and Burnett's potential testimony. Haynes maintains that this evidence would have shown that he feared for his life leading up to his confrontation with the victims and that he acted in self-defense. The Michigan Court of Appeals rejected this argument. *Haynes*, 2015 WL 2412359, at *3-6.

The Michigan Court of Appeals' opinion was a reasonable application of *Strickland*. The alleged evidence relied on by Haynes was never presented to the state courts, and the only indication of its existence is a self-serving affidavit from Haynes. In it, Haynes averred that he told his counsel about text messages from Melrose Williams, sister of one of the victims, in which she allegedly warned Haynes that her brother was seeking to do him harm. Haynes also alleges that his counsel did not seek text messages that Haynes sent to his brother, in which Haynes expressed fear of the police. Haynes maintains that these messages would have countered the prosecutor's insinuation that Haynes was not the victim in the attack because he failed to call the police. Haynes also contends that counsel should have called Gaskins, who recently had been shot in the leg, and Burnett, whose home was the target of gunfire. Haynes believes that their testimony would have explained his "state of mind" at the time of the incident and supported a self-defense strategy.

Even if Haynes's allegations are accepted as true, this evidence was inconsistent with his trial testimony. He testified that he did not know the victims before the day of the shootings. While he had a disagreement with their friend the previous day, he believed that everything had been resolved at that time. Even when one of the victims allegedly approached him the following day, Haynes did not indicate that he was concerned for his safety. Consequently, any evidence that Haynes feared for his life or acted in self-defense contradicted his trial testimony.

Despite Haynes's testimony, counsel arguably could have pursued an alternative strategy of self-defense and relied on the evidence cited by Haynes. However, this strategy still was contrary to the testimony of the victims and other witnesses, who identified Haynes as the aggressor. In order to establish prejudice from counsel's allegedly deficient performance, Haynes

must demonstrate a reasonable probability exists that his jury would have had a reasonable doubt about his guilt. *See Strickland*, 466 U.S. at 695; *Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable."). The evidence cited by Haynes, even if it exists, does not rise to this level. Even if this evidence provided a basis for a self-defense strategy, it does not show a "substantial" likelihood that the jury would have acquitted Haynes in light of the other testimony presented at trial. *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). Therefore, the state court could reasonably conclude that Haynes was not prejudiced by his counsel's failure to pursue a self-defense strategy.

Haynes next argues that counsel was ineffective for not presenting evidence of mitigating circumstances during his sentencing, but the Michigan Court of Appeals' rejection of this argument, *Haynes*, 2015 WL 2412359, at *7, was a reasonable application of *Strickland*. Although a defendant has the right to the effective assistance of counsel during noncapital sentencing proceedings, *Lafler v. Cooper*, 566 U.S. 156, 165 (2012), Haynes has not shown that he was prejudiced by any allegedly deficient performance of his counsel. Haynes maintains that counsel should have submitted evidence of his abusive and violent childhood, his intense grief over the loss of a family member, and the possibility that he suffered from a mental defect. But Haynes gave a lengthy statement at sentencing and could have presented his evidence at that time, but he failed to do so. Further, Haynes has not submitted any evidence supporting this claim, and his description of the evidence is conclusory and unsupported by facts. Consequently, it is insufficient to establish that he suffered the required prejudice. *See* Rule 2(c)(2) of the Rules Governing § 2254 Cases; *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005).

For his last ineffective-assistance-of-counsel claim, Haynes argues that his counsel should have investigated his mental health history and sought psychological testing. The Michigan Court of Appeals reasonably rejected this claim. *Haynes*, 2015 WL 2412359, at *7. Haynes submits evidence that he previously had been prescribed psychotropic medication and that psychological evaluations diagnosed him as suffering from psychotic and anxiety disorders and substance dependence. Despite this mental health background, Haynes has not demonstrated any manner in

which he was prejudiced by counsel's alleged failure to investigate it further. Haynes does not maintain that any mental health issues would have provided a defense to his crimes, and he presents no evidence that he was incompetent at the time of his trial. Haynes argues that this evidence would have allowed the jury to know that he "was hypersensitive to the surrounding circumstances," but he does not demonstrate that it was reasonably probable his jury would have reached a different result due to this evidence. *See Strickland*, 466 U.S. at 694. Therefore, the Michigan Court of Appeals' rejection of this claim was a reasonable application of *Strickland*.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B1 – B9

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Opinion and Order (1) Denying Petition for Writ of Habeas Corpus, (2) Denying A Certificate of Appealability, and (3) Granting Permission to Appeal *In Forma Pauperis*

HAYNES v CAMPBELL

Case No. 16-cv-14371

Dated: February 3, 2020

(9-pages)

Date and Time: Saturday, June 12, 2021 1:19:00 PM CDT

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1. *Haynes v. Campbell, 2020 U.S. Dist. LEXIS 16904*

Client/Matter: -None-

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Cases	Sources: Sources

Haynes v. Campbell

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

February 3, 2020, Decided; February 3, 2020, Filed

Case No. 16-cv-14371

Reporter
2020 U.S. Dist. LEXIS 16904 *; 2020 WL 532397

JERMAINE LATWONE HAYNES, Petitioner, v. SHERMAN CAMPBELL,[1] WARDEN, Respondent.

Subsequent History: Affirmed by *Haynes v. Chapman, 2021 U.S. App. LEXIS 11675 (6th Cir. Mich., Apr. 20, 2021)*

Prior History: *Haynes v. Haas, 2019 U.S. Dist. LEXIS 112433 (E.D. Mich., July 8, 2019)*

Core Terms

ineffective, shooting, self-defense, Appeals, trial counsel, credibility, habeas relief, certificate, sentencing, witnesses, fired, argues, impeach, shot, gun, clearly established federal law, in forma pauperis, defense counsel, habeas corpus, circumstances, felony assault, writ petition, gunshots, messages, lesser, gon, instruction of a jury, intent to kill, direct appeal, direct review

Counsel: **[*1]** Jermaine Latwone Haynes, Petitioner, Pro se, MACOMB CORRECTIONAL FACILITY, NEW HAVEN, MI.

For Randall Haas, Respondent: Andrea M. Christensen-Brown, John S. Pallas, Michigan Department of Attorney General, Lansing, MI; Christopher M. Allen, Michigan Attorney General, Lansing, MI.

Judges: MATTHEW F. LEITMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: MATTHEW F. LEITMAN

Opinion

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS (ECF No. 1), (2) DENYING A CERTIFICATE OF APPEALABILITY, AND (3) GRANTING PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Petitioner Jermaine Latwone Haynes is a state prisoner in the custody of the Michigan Department of Corrections. Haynes filed a *pro se* petition for a writ of habeas corpus under *28 U.S.C. § 2254* on December 14, 2016. (*See* Pet., ECF No. 1.) In the petition, Haynes challenges his state-court convictions for two counts of assault with intent to commit murder, *Mich. Comp. Law § 750.83*; felon in possession of a firearm, *Mich. Comp. Law § 750.224f*, and possession of a firearm during the commission of a felony ("felony-firearm"), *Mich. Comp. Law § 750.227b*. (*See id.*) The convictions arose out of Haynes' shooting of two men — David Owusu and Malik Atkins.

Haynes raises four claims in his petition: (1) insufficient evidence, (2) prosecutorial misconduct, (3) ineffective **[*2]** assistance of trial counsel, and (4) denial of transcripts on appeal. (*See id.*)

The Court has reviewed Haynes' claims and the record and concludes that he is not entitled to federal habeas relief. Accordingly, the Court will **DENY** his petition. The Court will also **DENY** Haynes a certificate of appealability but will **GRANT** him permission to appeal *in forma pauperis*.

I

The Michigan Court of Appeals summarized the evidence against Haynes as follows:

> The testimony presented at trial included that defendant approached David Owusu before the shooting and made a statement along the lines of:

[1] The Court amends the caption to reflect the name of Petitioner Haynes' current warden. See *Rule 2(a) of the Rules Governing § 2254 Cases*, 28 U.S.C. foll. *§ 2254*.

> "I want you and your friend to leave off the block or I'm gon' shoot the both of ya'll," "Get off the street or I'm gon' pop you and your friend," or "If you and him don't get off our block, I'm gon' pop both of ya'll." The testimony also indicated that, shortly after defendant verbalized the threat, defendant fired multiple gunshots at Owusu and Malik Atkins using a black semi-automatic handgun while they were riding their bikes down the street.
>
> * * *
>
> At trial, defendant testified to the events that occurred on the day of the incident and the day before the incident . . .
>
> Further, defendant testified about his **[*3]** state of mind during the incident, indicating that he feared for his life when he heard the gunshots and that he was paranoid at the time of the incident.
>
> * * *
>
> Owusu and Atkins both testified that Atkins was unarmed when the incident occurred and that defendant fired gunshots at them as they were riding away from the scene after defendant threatened Owusu. Even though defendant testified that Atkins was armed and approached defendant while reaching for a gun in his waistband, defendant never testified at trial that he was armed, that he needed to defend himself, or that he fired the weapon at Owusu and Atkins. Instead, defendant testified that he ran away when Atkins pulled the gun out of his waistband and hid in an abandoned house.

*People v. Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *1, *5, *6 (Mich. Ct. App. May 19, 2015)*.

After Haynes was convicted at trial, he raised four issues on direct appeal. Through his appointed appellate counsel, Haynes claimed that the evidence of intent necessary to support a conviction of assault with intent to murder was insufficient and that he was denied a fair trial due to the prosecutor's improper vouching for witnesses' credibility.

Haynes also raised two issues *pro se* through what is known as a "Standard 4" brief.[2] First, he asserted that **[*4]** his trial counsel was constitutionally ineffective. He cited eight specific theories of ineffective assistance, in which trial counsel failed to

> a. investigate text messages which would have revealed Haynes' state of mind,
>
> b. call two witnesses identified by Haynes,
>
> c. obtain hospital and police records which would have supported Haynes' claim that he feared for his life,
>
> d. impeach the prosecution witness effectively with the witness's inconsistent testimony,
>
> e. present a self-defense theory or question defendant about prior circumstances which contributed to his behavior during the incident,
>
> f. request a jury instruction on felonious assault,
>
> g. introduce mitigating evidence at sentencing, or
>
> h. pursue psychological testing or expert witnesses regarding Haynes' state of mind and culpability.

The second issue that Haynes raised in his Standard 4 brief was that his appellate counsel failed to provide him his trial and sentencing transcripts. Haynes argued that this failure prevented Haynes, in his Standard 4 brief, from citing facts in the record as required by the court rules. (*See* ECF No 8-11, PageID.672.)

The Michigan Court of Appeals affirmed Haynes' convictions. **[*5]** *See Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *7*. The Michigan Supreme Court thereafter denied leave to appeal. *See People v. Haynes, 498 Mich. 921, 871 N.W.2d 191 (Mich. 2015)*.[3]

In Haynes' timely-filed petition for writ of habeas corpus, he raises the same issues that he argued on his direct appeal.

II

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at *28 U.S.C. § 2241 et seq.*, sets forth the standard of review that federal courts must use when considering habeas petitions brought by prisoners challenging their state-court convictions.

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[2] Under Michigan law, criminal defendants may file a brief *in propria persona* for claims that they seek to raise on appeal where their appointed appellate counsel does not include those grounds in their pleadings. *See* Standard 4, Michigan Supreme Court Administrative Order No. 2004-6, 471 Mich c, cii (2004) (establishing minimum standards for criminal defense appellate services); *see also* ***Ware v. Harry, 636 F. Supp. 2d 574, 594 (E.D. Mich. 2008)***.

[3] In the Michigan Supreme Court's order denying leave to appeal, that court granted Haynes' motion to "add matters," permitting the inclusion of a competency evaluation report in his application for leave to appeal. (*See* ECF No. 8-12, PageID.928.)

AEDPA provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether **[*6]** that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)*.

III

A

Haynes first argues that there was insufficient evidence of his intent to kill Owusu and Atkins. The Michigan Court of Appeals considered this claim on direct review and rejected it:

> The testimony presented at trial included that defendant approached David Owusu before the shooting and made a statement along the lines of: "I want you and your friend to leave off the block or I'm gon' shoot the both of ya'll," "Get off the street or I'm gon' pop you and your friend," or "If you and him don't get off our block, I'm gon' pop both of ya'll." The testimony also indicated that, shortly after defendant verbalized the threat, defendant fired multiple gunshots at Owusu and Malik Atkins using a black semi-automatic handgun while they were riding their bikes down the street. Given that minimal circumstantial evidence was sufficient to establish defendant's state of mind, defendant's statement of intent prior to the shooting and defendant's act of firing multiple gunshots at Owusu and Atkins as they rode away from defendant, provided sufficient circumstantial evidence from which the jury could infer an actual intent to **[*7]** kill. Although defendant's recollection of the incident differed from Owusu's and Atkins's accounts, and aspects of 6 Owusu's testimony conflicted with his previous statements, this Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. Thus, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence presented at trial for a reasonable jury to conclude beyond a reasonable doubt that defendant fired the gun at Owusu and Atkins with an intent to kill.

*Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *1* (internal citations and punctuation omitted).

Haynes has not shown that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. Haynes argues that witness testimony that he shot at Owusu and Atkins from several houses away indicated that he only wanted to frighten them, and therefore his intent to kill was not proven beyond a reasonable doubt. (*See* Pet., ECF No. 1, Page.ID 46-47.) But under *Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*, the inquiry is not

> whether *it* [the reviewing court] believes that the evidence at the trial **[*8]** established guilt beyond a reasonable doubt . . . [but] whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-19 (citing *Woodby v. INS, 385 U.S. 276, 282, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)*; *Johnson v. Louisiana, 406 U.S. 356, 362, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)*) (emphasis in original).

Here, Owusu and Atkins testified that Haynes shot at them multiple times as they rode their bikes away from him. And evidence was presented at trial that Haynes had previously threatened to shoot Owusu and Atkins. Under these circumstances, Haynes has not shown that the Michigan Court of Appeals unreasonably concluded that a rational trier of fact could find that Haynes possessed an intent to kill. Haynes is therefore not entitled to federal habeas relief on this claim.

B

Haynes next argues that the prosecutor improperly vouched for the credibility of the two complaining witnesses.[4] More specifically, Haynes argues that "[t]he prosecutor, in a move to sway the jury, improperly bolstered the testimony of the two complaining witnesses by stating that he was, personally, very proud of Owusu and Atkins and their truthful testimony (TT, 01/08/2014, 28)." (Pet., ECF No. 1, PageID.48.[5])

The Michigan Court of **[*9]** Appeals considered this claim on direct review and rejected it:

> Allegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context. A prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. However, prosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." Additionally, prosecutorial arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief or disbelief. A prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes.
>
> In light of defendant's conflicting account of the incident, it is evident that the outcome of this case depended on whether the jury believed Owusu's and Atkins's testimony or defendant's testimony. Accordingly, the prosecutor was permitted to comment on Owusu's and Atkins's **[*10]** credibility during her closing argument. Additionally, the prosecutor's statement did not imply that she had any special knowledge, outside of the evidence presented at trial, regarding Owusu's and Atkins's truthfulness. Likewise, there is no indication that the prosecutor put the prestige of the office behind a personal belief of a witness' truthfulness. Thus, the prosecutor's comments were not improper and defendant's claim is without merit.

*Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *2* (internal citations and punctuation omitted).

Haynes has not shown that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. "A prosecutor's improper comments will be held to violate the Constitution only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews, 567 U.S. 37, 45, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)* (quoting *Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)*). The single comment that Haynes identified comprised a sentence and a half in the prosecutor's entire closing and rebuttal arguments. During those arguments, the prosecutor made other proper comments about how the jury should assess the credibility of the witnesses. On this record, the limited example of arguable vouching by the prosecutor did not "so infect[] **[*11]** the trial" as to deny Haynes his right to due process. Haynes is therefore not entitled to federal habeas relief on this claim.

C

Haynes next raises eight theories of ineffectiveness of his trial counsel, all of which were adjudicated on the merits and rejected by the state courts during his direct appeal. None entitle him to habeas relief.

1

Claims of ineffective assistance of counsel are subject to the two-prong standard described in *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. First, a defendant must show that his counsel's performance was deficient. *See id. at 687*. "This requires showing that counsel made errors so

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[4] Respondent argues that Haynes procedurally defaulted this issue. Where analyzing the merits of a habeas claim "present[s] a more straightforward route for resolving [the] petition," a court need not address the question of procedural default. *Bell v. Jackson, 379 F. App'x 440, 443 (6th Cir. 2010)* (citing *28 U.S.C. § 2254(b)(2)*; *Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)*). The Court chooses that route here.

[5] Haynes presented this argument in a brief before the Michigan Supreme Court, which Haynes attached to his petition. (*See* Pet., ECF No. 1, PageID.48.) In the petition, Haynes adopted the arguments that he presented to that court on this issue. (*See id.*, PageID.9, directing the Court to his Michigan Supreme Court brief).

serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id.* Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id. at 690*. Second, a defendant must show that the deficient performance prejudiced the defense such that the defendant was denied a fair trial. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*. On habeas review, the question is "not whether counsel's actions were **[*12]** reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* ("The standards created by *Strickland* and *§ 2254(d)* are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so.")

2

In order to understand Haynes' ineffective assistance claims in context, it is helpful to review Haynes' testimony at trial. He testified as follows:

- The day before the shooting, he got into a fight with a young man named Adrian. The fight related to Adrian's use of Haynes' lawnmower.
- After the confrontation with Adrian, Adrian's father came over to speak with Haynes. They had a productive conversation, and when they were done speaking, Haynes believed that "everything was resolved, everything was fine between [him] and Adrian after that point." (ECF No. 8-8, PageID.554.)
- The next day, as Haynes was returning to his house, he saw Owusu (whose name Haynes did not know at the time), Adrian, and Atkins. Owusu was playing basketball nearby, and Adrian and Atkins were sitting on the porch of Adrian's house.
- Owusu asked Haynes for a cigarette lighter, and Haynes thought that that request was unusual because Atkins had a lit cigarette (and **[*13]** thus must have had a means to light it that he presumably could have shared with Owusu).
- Even though Haynes believed that the request for the lighter was "suspect," he did not think that anything bad was about to happen. (*Id.*, PageID.556.) Instead, he "didn't really pay [any] attention" to Owusu and "just turned around" and began heading into his house. (*Id.*, PageID.555.)
- At that point, Atkins started walking towards Haynes, and Haynes saw Atkins reach into his (Atkins') waistband. Haynes believed that Atkins was "about to shoot me or something because I [saw] him reaching for a gun." (*Id.*, PageID.557.) Then Atkins did pull a gun "all the way out," and when Atkins did so, Haynes began "running." (*Id.*) Haynes "started hearing shots" and he "kept running." (*Id.*) Haynes ran to an abandoned house and, while hiding out at that house, he was "scared" and "paranoid." (*Id.*, PageID.558.)
- Haynes then received phone calls from people who told Haynes that Adrian, Owusu, and Atkins were trying to set Haynes up to be shot.
- Haynes' denied that he had shot Atkins and Owusu with the intent to kill them. (*Id.*, PageID.561.)

3

The majority of Haynes' theories of ineffective assistance assert that his **[*14]** trial counsel failed to present Haynes' theory that (1) he acted in self-defense and (2) was "paranoid" and in fear for his life at the time of the incident.

More specifically, Haynes says that his trial counsel failed to:

- Present the defense of self-defense at trial;
- Obtain text messages between Haynes and a woman named Melrose Williams. Haynes says that these messages would have shown that shown that Owusu and his friends "were seeking out [Haynes] with the intent to do him harm." (ECF No. 1, PageID.55);
- Obtain text messages between Haynes and his brother Frederick. Haynes says that these messages would have shown that he "felt his life was in danger from the police." (*Id.*, PageID.57.)
- Call two neighbors of Haynes' as witnesses at trial. Haynes says the witnesses could have "justified [] Haynes' reason for fearing for his life" at the time of the incident. (*Id.*, PageID.58.);
- Obtain hospital and police records related to incidents of violence at the homes of Haynes' neighbors. Haynes says that this evidence would have helped explain why Haynes was in fear for his life at the time of the shooting. (*See id.*, PageID.59-60.); and

> • Request psychological testing of Haynes. Haynes says **[*15]** that the testing could have explained "why [Haynes] was hypersensitive" to the circumstances surrounding the incident in question. (*Id.*, PageID.67.)

The Michigan Court of Appeals considered each of these claims on direct review and rejected them. That court did so, in part, because it concluded that a self-defense theory, or a theory that Haynes acted out because he was afraid for his life, would have been inconsistent with Haynes' own version of events that he offered in his trial testimony:

> Even though defendant asserts that he informed defense counsel that he acted in self-defense, it is not evident from the lower court record that defendant actually notified defense counsel of this defense or that defense counsel failed to investigate a self-defense theory. More significantly, the presentation of a theory of self-defense would have been completely inconsistent with the testimony of Owusu, Atkins, *and defendant*. Owusu and Atkins both testified that Atkins was unarmed when the incident occurred and that defendant fired gunshots at them as they were riding away from the scene after defendant threatened Owusu. *Even though defendant testified that Atkins was armed and approached defendant **[*16]** while reaching for a gun in his waistband, defendant never testified at trial that he was armed, that he needed to defend himself, or that he fired the weapon at Owusu and*
>
> *Atkins. Instead, defendant testified that he ran away when Atkins pulled the gun out of his waistband and hid in an abandoned house.* Although defendant could have raised inconsistent defenses at trial, in order to demonstrate that defense counsel was ineffective, he must rebut the strong presumption that defense counsel's decision to defend defendant by repeatedly attacking the credibility of Owusu and Atkins and offering defendant's testimony as the accurate portrayal of the incident was "sound trial strategy under the circumstances. *Defendant has failed to demonstrate that a decision to forgo a theory of self-defense that was wholly inconsistent with defendant's testimony—and, in fact, would have effectively impeached defendant's testimony—was not sound trial strategy.*

*Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *6* (internal citations and punctuation omitted; first emphasis in original; second and third emphasis added). *See also 2015 Mich. App. LEXIS 1029, [WL] at *4* ("[T]here is no indication that the content of the text messages [between Haynes and his brother] provided a substantial defense to **[*17]** defendant's charges or were relevant to the theory of the case presented by the defense at trial"); *2015 Mich. App. LEXIS 1029, [WL] at *5* ("[T]he details of the alleged shooting at the home of [Haynes'] neighbor did not have any tendency to make more or less probable a fact of consequence to this action ... The documents ... could not provide any additional information regarding whether [Haynes] fired a weapon ... or whether [Haynes] had an actual intent to kill"); *2015 Mich. App. LEXIS 1029, [WL] at *7* ("[T]here is no indication in the record that [Haynes'] purported mental illnesses prevented from him either appreciating the wrongful nature of his actions or conforming his conduct to the law under either version of the incident offered at trial").[6]

Haynes has not shown that the Michigan Court of Appeals' rejection of his ineffective assistance claims related to his desire to present a defense of self-defense and to present evidence that he was afraid for his life at the time of the incident was contrary to, or an unreasonable application of, clearly established federal law. As that court correctly concluded, Haynes' own trial testimony was inconsistent with the defense of self-defense and the evidence of paranoia that Haynes says his attorney should have **[*18]** presented.

First, Haynes did not testify at trial that he was in any fear or that he was paranoid in the moments leading up to the incident. Instead, he testified that he was *not* concerned by his initial interaction with Owusu (concerning the cigarette lighter request), that he turned to walk away after that initial interaction, and that the first time he felt paranoia was *after* he had been shot at. Thus, evidence that Haynes supposedly felt paranoia before the shooting would not have fit well with his own testimony.

Second (and more importantly), Haynes' testimony was not consistent with a defense of self-defense or with any evidence attempting to justify a shooting by Haynes.

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[6] The Michigan Court of Appeals rejected each of the individual ineffective assistance claims referenced above related to Haynes' desire to present a defense of self-defense and his claim that he feared for his life at the time of the shooting. *See Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at ** 3-7*. For the reasons stated above, Haynes has not shown that any of these rulings were unreasonable.

That is because Haynes denied firing any shots and because (as described immediately above) he denied being in fear before the shooting. Indeed, Haynes said that *he* was the target of shots, not the shooter. Thus, evidence of self-defense would have undermined his own testimony.

For all of these reasons, Haynes cannot show that his attorney acted unreasonably in failing to present a defense of self-defense and/or the other evidence identified above concerning Haynes' state of mind at the time of the shooting. Haynes **[*19]** is therefore not entitled to federal habeas relief related to these claims.

4

Next, Haynes asserts that his trial counsel failed to impeach Owusu, a prosecution witness, with inconsistent prior testimony. The Michigan Court of Appeals considered this claim on direct review and rejected it:

> [D]efendant argues that his counsel failed to effectively impeach Owusu. In his brief, defendant identifies four statements that defense counsel failed to utilize at trial in order to undermine Owusu's credibility. However, contrary to defendant's arguments, the lower court record indicates that defense counsel impeached Owusu's testimony with his prior inconsistent statements and emphasized the inconsistencies in Owusu's testimony during his closing argument. Therefore, defendant has failed to establish the factual predicate of his claim. Further, the record shows that defense counsel effectively impeached Owusu's testimony, but, despite defense counsel's efforts, the jury found Owusu's and Atkins's testimony to be more credible than defendant's testimony. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel.

*Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *5* (internal citations and punctuation **[*20]** omitted).

Haynes has not shown that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. Haynes' assertion in the petition that his trial counsel failed to impeach Owusu is Counsel impeached Owusu with respect to (1) Owusu's prior belied by the record. statement to police that he did not see the gun that he later described at trial and (2) discrepancies in Owusu's description of the shooter. (*See* 1/7/2014 Trial Tr. ECF No. 8-7, Page.ID 454-55, 459.) Counsel also raised Owusu's inconsistent testimony during closing arguments. (*See* 1/8/2014 Trial Tr. at 35, ECF No. 8-8, Page.ID 579.) Haynes is therefore not entitled to federal habeas relief on this claim.

5

Haynes next argues that his trial counsel was ineffective for failing to introduce mitigating circumstances at sentencing. The Michigan Court of Appeals reviewed this claim on direct appeal and rejected it:

> Defendant also argues that his counsel was ineffective because he failed to introduce mitigating circumstances at his sentencing which may have resulted in a lesser sentence. This claim is without merit. Defendant provided a lengthy statement at sentencing, during **[*21]** which he explained his perspective on the incident, his belief that the young men were waiting to rob him, his concerns that his charges were intensified because of his "bad history with the police in [his] neighborhood," and his belief that the jury should have received a self-defense instruction. Thus, he had ample opportunity to raise the "mitigating circumstances" that he references in his Standard 4 brief without the intercession of his attorney and has failed to establish that his attorney's decision fell below an objective standard of reasonableness.

*Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *6* (internal citations and punctuation omitted).

Haynes has not shown that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. Although trial counsel's remarks at sentencing related to mitigation were brief, counsel did tell the sentencing court that Haynes was "not beyond rehabilitation" and "has the love and support of his mother." (Sent. Tr., ECF No. 21-2, Page.ID 993.) And as the state court observed, Haynes also allocuted at length and thus had the opportunity to raise any issues he felt lacking in counsel's presentation. (*See id.*, Page.ID 994-996.) Haynes **[*22]** is therefore not entitled to federal habeas relief on this claim.

6

Haynes finally argues that his trial counsel was ineffective when counsel failed to seek a jury instruction for felonious assault as a lesser-included offense to assault with intent to commit murder. The Michigan Court of Appeals considered this argument on direct review and rejected it:

> Next, defendant argues that his counsel was ineffective for failing to request a jury instruction on felonious assault. However, MCL 768.32(1) precludes a jury instruction on an uncharged lesser cognate offense. People v. Jones, 497 Mich. 155, 164, 860 N.W.2d 112; 497 Mich. 155, 860 NW2d 112 (2014). And felonious assault is a cognate lesser offense of assault with intent to commit murder. People v. Otterbridge, 477 Mich. 875, 721 N.W.2d 595 (2006). Accordingly, this claim is without merit.

Haynes, 2015 Mich. App. LEXIS 1029, 2015 WL 2412359, at *6.

Haynes has not shown that the Michigan Court of Appeals' decision was contrary to, or an unreasonable application of, clearly established federal law. Attorneys are not ineffective under *Strickland* when they fail to raise a frivolous argument or one that is futile. *See, e.g.*, Holmes v. United States, 281 F. App'x 475, 479 (6th Cir. 2008) (citing Mapes v. Coyle, 171 F.3d 408, 427 (6th Cir. 1999)). Here, under Michigan law, felonious assault is a cognate lesser offense of assault with intent to commit murder. *See* People v. Otterbridge, 477 Mich. 875, 721 N.W.2d 595 (Mich. 2006). And the governing jury instruction on lesser offenses prohibits "consideration of cognate lesser offenses." **[*23]** People v. Jones, 497 Mich. 155, 164, 860 N.W.2d 112 (2014). As a result, any request for the felonious assault instruction would have failed. Haynes' trial counsel was therefore not ineffective in not seeking the instruction, and Haynes is not entitled to federal habeas relief on this claim.

D

The final issue that Haynes raises in the Petition is that he should have been permitted to file an amended Standard 4 *pro se* brief with the Michigan Court of Appeals because he was denied trial and sentencing transcripts by his appointed appellate attorney. The Michigan Court of Appeals did not address this issue directly but it did deny Haynes' related motions to remand and for an evidentiary hearing in which he sought to establish an alternative testimonial record.

Haynes is not entitled to federal habeas relief on this claim. Neither the Sixth Amendment nor the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to self-representation on direct appeal from a criminal conviction. *See* Martinez v. Court of Appeal of California, 528 U.S. 152, 161, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). Accordingly, a defendant appealing a conviction is not constitutionally entitled to submit a *pro se* appellate brief in addition to a brief filed by appellate counsel. *See* McMeans v. Brigano, 228 F.3d 674, 684 (6th Cir. 2000).

The State of Michigan may choose to permit defendants to submit *pro se* briefs, *see* Martinez, 528 U.S. at 163, as Standard 4 provides, but no part of the federal **[*24]** constitution protects a defendant's right to do so. Because Haynes had no constitutional right to file his Standard 4 brief, the constitution mandates neither the provision of transcripts for the purpose of drafting that brief, nor the opportunity to file an amended brief.

E

In order to appeal the Court's decision, Haynes must obtain a certificate of appealability, which requires a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). To demonstrate this denial, an applicant must show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented are adequate to deserve encouragement to proceed further. *See* Slack v. McDaniel, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). A federal district court may grant or deny a certificate of appealability when the court issues a ruling on the habeas petition. *See* Castro v. United States, 310 F.3d 900, 901 (6th Cir. 2002).

Here, jurists of reason would not debate the Court's conclusion that Haynes has failed to demonstrate entitlement to federal habeas relief with respect to any of his claims because they are all devoid of merit. Therefore, the Court **DENIES** Haynes a certificate of appealability.

Although this Court declines to issue Haynes a certificate of appealability, the standard **[*25]** for granting an application for leave to proceed *in forma pauperis* on appeal is not as strict as the standard for certificates of appealability. *See* Foster v. Ludwick, 208

F.Supp.2d 750, 764 (E.D. Mich. 2002). While a certificate of appealability requires a substantial showing of the denial of a constitutional right, a court may grant *in forma pauperis* status on appeal if it finds that an appeal is being taken in good faith. *See id. at 764-65*; *28 U.S.C. § 1915(a)(3)*; *Fed. R. App. 24 (a)*. Although jurists of reason would not debate this Court's resolution of Haynes' claims, an appeal could be taken in good faith. Therefore, Haynes may proceed *in forma pauperis* on appeal.

V

Accordingly, for the reasons stated above, the Court (1) **DENIES WITH PREJUDICE** the petition for a writ of habeas corpus (ECF No. 1), (2) **DENIES** Haynes a certificate of appealability, and (3) **GRANTS** Haynes permission to appeal *in forma pauperis*.

IT IS SO ORDERED.

/s/ Matthew F. Leitman

MATTHEW F. LEITMAN

UNITED STATES DISTRICT JUDGE

Dated: February 3, 2020

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 3, 2020, by electronic means and/or ordinary mail.

/s/ Holly A. Monda

Case Manager

(810) 341-9764

JUDGMENT

The above entitled action came before the Court on a petition **[*26]** for a writ of habeas corpus. In accordance with the Opinion and Order entered on February 3, 2020:

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED that permission to appeal *in forma pauperis* is **GRANTED.**

Approved:

/s/ Matthew F. Leitman

Matthew F. Leitman

United States District Judge

Dated: February 3, 2020

Flint, Michigan

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APPENDIX C1

MICHIGAN SUPREME COURT

Opinion and Order Denying Leave to Appeal the May 19, 2015 Judgment of the

Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN v JERMAINE LATWONE HAYNES

S.C. No. 151877

Dated: November 24, 2015

(1-page)

LexisNexis

Date and Time: Saturday, June 12, 2021 1:20:00 PM CDT

Job Number: 146006001

Document (1)

1. *People v. Haynes, 871 N.W.2d 191*

Client/Matter: -None-

498 Mich. 921:

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	custom: Custom

Neutral
As of: June 12, 2021 6:20 PM Z

People v. Haynes

Supreme Court of Michigan

November 24, 2015, Decided

SC: 151877

Reporter
871 N.W.2d 191 *; 2015 Mich. LEXIS 2711 **; 498 Mich. 921

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JERMAINE LATWONE HAYNES a/k/a TONY KENDRICK, Defendant-Appellant.

Prior History: **[**1]** COA: 320409. Wayne CC: 13-008812-FC.

People v. Haynes, 2015 Mich. App. LEXIS 1029 (Mich. Ct. App., May 19, 2015)

Judges: Robert P. Young, Jr., Chief Justice. Stephen J. Markman, Mary Beth Kelly, Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Justices.

Opinion

[*191] Order

On order of the Court, the motion for miscellaneous relief is GRANTED. The application for leave to appeal the May 19, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we **[*192]** are not persuaded that the questions presented should be reviewed by this Court.

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APPENDIX D1 – D6

MICHIGAN COURT OF APPEALS

Per Curiam Opinion and Order Affirming Petitioner's Convictions

PEOPLE OF THE STATE OF MICHIGAN v JERMAINE LATWONE HAYNES

No. 320409

Dated: May 19, 2015

(6-pages)

LexisNexis

Date and Time: Saturday, June 12, 2021 1:21:00 PM CDT

Job Number: 146006017

Document (1)

1. *People v. Haynes, 2015 Mich. App. LEXIS 1029*

Client/Matter: -None-

Search Terms: 2015 Mich. app. lexis 1029

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Sources: Sources

Neutral
As of: June 12, 2021 6:21 PM Z

People v. Haynes

Court of Appeals of Michigan

May 19, 2015, Decided

No. 320409

Reporter
2015 Mich. App. LEXIS 1029 *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JERMAINE LATWONE HAYNES, also known as TONY KENDRICK, Defendant-Appellant.

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

Subsequent History: Leave to appeal denied by, Motion granted by *People v. Haynes, 498 Mich. 921, 871 N.W.2d 191, 2015 Mich. LEXIS 2711 (Nov. 24, 2015)*

Habeas corpus proceeding at *Haynes v. Haas, 2019 U.S. Dist. LEXIS 112433 (E.D. Mich., July 8, 2019)*

Prior History: **[*1]** Wayne Circuit Court. LC No. 13-008812-FC.

Core Terms

defense counsel, text message, ineffective, assault, witnesses, defendant argues, credibility, fired, kill, ineffective assistance of counsel, self-defense, investigate, substantial defense, lower court, prosecutorial, documents, closing argument, trial strategy, no indication, state of mind, circumstances, impeached, gunshots, insanity, probable, shooting, asserts, murder, gun

Judges: Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

Opinion

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of assault with intent to commit murder, *MCL 750.83*, felon in possession of a firearm, *MCL 750.224f*, and possession of a firearm during the commission of a felony ("felony-firearm"), *MCL 750.227b*. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence presented at trial for a rational jury to find him guilty of assault with intent to commit murder beyond a reasonable doubt. We disagree.

This Court reviews de novo a defendant's challenge to the sufficiency of the evidence. *People v Harverson, 291 Mich App 171, 177; 804 NW2d 757 (2010)*. We review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements proved beyond a reasonable doubt. *Id. at 175*.

Under *MCL 750.83*, there are three elements of assault with intent to commit murder: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Ericksen, 288 Mich App 192, 195-196; 793 NW2d 120 (2010)* (internal quotation marks and citation omitted). On appeal, defendant only claims that the evidence did not establish he had an actual intent to kill.

Circumstantial evidence **[*2]** and reasonable inferences arising from the evidence can provide sufficient evidence to establish the elements of a crime. *People v Dunigan, 299 Mich App 579, 582; 831 NW2d 243 (2013)*. "This Court has consistently observed that [b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Ericksen, 288 Mich App at 196-197* (internal quotation marks and citation omitted; alteration in original). An intent to kill can be inferred from the use of a dangerous weapon. *People v Dumas, 454 Mich 390, 403; 563 NW2d 31 (1997)* (opinion by RILEY, J.). Additionally, in determining whether a defendant had an intent to kill,

the jury may consider:

> the nature of the defendant's acts constituting the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. [*People v Taylor, 422 Mich 554, 568; 375 NW2d 1 (1985)* (internal quotation marks and citation omitted).]

The testimony presented at trial included that defendant approached David Owusu before the shooting and made a statement along the lines of: "I want you and your friend to leave off the block or I'm gon' shoot the both **[*3]** of ya'll," "Get off the street or I'm gon' pop you and your friend," or "If you and him don't get off our block, I'm gon' pop both of ya'll." The testimony also indicated that, shortly after defendant verbalized the threat, defendant fired multiple gunshots at Owusu and Malik Atkins using a black semi-automatic handgun while they were riding their bikes down the street. Given that "minimal circumstantial evidence [was] sufficient" to establish defendant's state of mind, *Ericksen, 288 Mich App at 196-197*, defendant's statement of intent prior to the shooting and defendant's act of firing multiple gunshots at Owusu and Atkins as they rode away from defendant, provided sufficient circumstantial evidence from which the jury could infer an actual intent to kill. Although defendant's recollection of the incident differed from Owusu's and Atkins's accounts, and aspects of Owusu's testimony conflicted with his previous statements, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses," *People v Kanaan, 278 Mich App 594, 619; 751 NW2d 57 (2008)*, and "all conflicts in the evidence must be resolved in favor of the prosecution," *People v Fletcher, 260 Mich App 531, 562; 679 NW2d 127 (2004)*. Thus, viewing the evidence in the light most favorable to the prosecution, there **[*4]** was sufficient evidence presented at trial for a reasonable jury to conclude beyond a reasonable doubt that defendant fired the gun at Owusu and Atkins with an intent to kill.

II. PROSECUTORIAL ERROR

Next, defendant argues that his rights to a fair trial and due process were violated by the prosecutor's comments indicating that she was proud of Owusu and Atkins and the testimony they provided at trial. We disagree.

A defendant must contemporaneously object and request a curative instruction to preserve a claim of prosecutorial misconduct. *People v Bennett, 290 Mich App 465, 475; 802 NW2d 627 (2010)*. Accordingly, "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger, 278 Mich App 210, 234-235; 749 NW2d 272 (2008)*. Defendant did not object when the prosecutor commented on Owusu's and Atkins's testimony during her closing argument, so this issue is not preserved for appeal. We review unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights. *People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999)*.

The prosecutor stated the following during her closing argument:

> If you listened to the testimony of David Owusu and Malik Atkins, it was just **[*5]** as consistent as two people would be. Okay. They would be similar enough but different enough because each of us have a different perspective. They were located in different places. They didn't add. They didn't embellish. They just testified simply to what they saw.
>
> Frankly, I'm very proud of David Owusu and Malik Atkins. I'm very proud of their conduct on August 22nd. I was very proud of their testimony, but that they came here without fear. People have fear and won't come forth. They told you we were a bit nervous. They were honest, a bit nervous[,] but they told truthfully what they saw and what they heard on that day.

"[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *Bennett, 290 Mich App at 475*. A "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id. at 476*. However, "[p]rosecutors have discretion on how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Id.* Additionally, "prosecutorial arguments regarding credibility are not improper when based **[*6]** on the evidence, even if couched in terms of belief or disbelief." *Unger, 278 Mich App at 240*. "[A]

prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas, 260 Mich App 450, 455; 678 NW2d 631 (2004)*.

In light of defendant's conflicting account of the incident, it is evident that the outcome of this case depended on whether the jury believed Owusu's and Atkins's testimony or defendant's testimony. Accordingly, the prosecutor was permitted to comment on Owusu's and Atkins's credibility during her closing argument. See *id.* Additionally, the prosecutor's statement did not imply that she had any special knowledge, outside of the evidence presented at trial, regarding Owusu's and Atkins's truthfulness. See *Bennett, 290 Mich App at 476*. Likewise, there is no indication that "the prosecutor put the prestige of the office behind a personal belief of a witness' truthfulness." *People v Bahoda, 448 Mich 261, 277 n 26; 531 NW2d 659 (1995)*. Thus, the prosecutor's comments were not improper and defendant's claim is without merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel based on eight instances of defense **[*7]** counsel's allegedly deficient performance. We disagree. Because this issue is raised for the first time on appeal, it is unpreserved and our review is for errors apparent on the record. See *People v Sabin (On Second Remand), 242 Mich App 656, 658-659; 620 NW2d 19 (2000)*.

To establish ineffectiveness of counsel, a defendant generally must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would be different. *People v Lockett, 295 Mich App 165, 187; 814 NW2d 295 (2012)*. Defendant bears a heavy burden of proving ineffective assistance of counsel because there is a strong presumption that defense counsel provided adequate representation. *People v Vaughn, 491 Mich 642, 670; 821 NW2d 288 (2012)*. Defendant also carries the burden of establishing the factual basis of his claim. *People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999)*. This Court may not substitute its own judgment for that of defense counsel or second-guess defense counsel on matters of trial strategy, as defense counsel has great discretion with respect to the trial tactics employed while trying a case. *People v Pickens, 446 Mich 298, 330; 521 NW2d 797 (1994)*.

A. FAILURE TO PRESENT EVIDENCE RELATED TO TEXT MESSAGES EXCHANGED WITH MELROSE WILLIAMS AND FREDERICK HAYNES

Defendant first argues that his counsel failed to investigate and present evidence related to text messages exchanged by Melrose **[*8]** Williams and defendant and Frederick Haynes and defendant, which would have indicated "that the victim and his friends were seeking out the [d]efendant with the intent to do him harm" and that defendant believed "that his life was in danger from the police."

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo, 283 Mich App 360, 371; 770 NW2d 68 (2009)*. Choices "regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second-guess with the benefit of hindsight." *People v Dixon, 263 Mich App 393, 398; 688 NW2d 308 (2004)*. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense," *id.*, which is a defense that may have affected the outcome of the trial, *Chapo, 283 Mich App at 371*.

Defendant has failed to demonstrate that defense counsel was ineffective for failing to investigate or present text messages and related testimony from Williams regarding the young men's intent to harm defendant. There is no mention of Williams in the lower court record or any indication that defendant received text messages from Williams. Instead, defendant's own testimony at trial indicated: he did not know Owusu or Atkins before **[*9]** the day of the incident; he had an altercation with Adrian regarding a lawn mower and related name-calling the day before the incident; and he received phone calls from "a lot of people" after Atkins fired gunshots at him, which indicated that Adrian, Owusu, and Atkins "tried to set [him] up." When the prosecutor asked defendant on cross-examination who called him after the incident, defendant only stated that "[d]ifferent people that's [sic] on the block" called him and he could only identify "Tone" and "Shugey" by name, expressly stating that no one else came to mind.

Defendant filed an affidavit with his Standard 4 brief on appeal which indicates that he "informed [defense counsel] of the existence of several text-messages from one of the complainant's sister [sic], Mrs. Melrose Williams, in which [he] was warned that her brother was

out with his friends seeking to do [him] and Anthony Gaskins harm[.]" Clearly then defendant's attorney was aware of that evidence and it must be presumed that it was not offered at trial for strategic reasons which this Court will not second-guess. See *People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009)*; *Dixon, 263 Mich App 393; 688 N.W.2d 308*. Thus, defendant has failed to establish the factual predicate of his claim. See *Hoag, 460 Mich at 6*.

And defense counsel was **[*10]** not ineffective for failing to obtain and present the text messages that defendant sent to Haynes regarding his fear of the police. It is not apparent from the lower court record that the text messages existed or that defendant made defense counsel aware of the text messages. As such, defendant has failed to establish the factual predicate of his claim. See *Hoag, 460 Mich at 6*. Moreover, even assuming that the text messages existed, there is no indication that failing to investigate or subpoena the text messages fell below an objective standard of reasonableness. See *Vaughn, 491 Mich at 669*. There is no indication that the content of the text messages provided a substantial defense to defendant's charges or were relevant to the theory of the case presented by the defense at trial. Additionally, as the prosecution argues on appeal, it appears unlikely that the text messages would have been admissible at trial given their irrelevance to the events that gave rise to defendant's charges, see *MRE 401* ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), and "[f]ailing to advance **[*11]** a meritless argument . . . does not constitute ineffective assistance of counsel," *Ericksen, 288 Mich App at 201*.

B. FAILURE TO CALL ANTHONY GASKINS AND ESTELLE BURNETT AS WITNESSES

Next, defendant argues that his counsel was ineffective for failing to present Anthony Gaskins and Estelle Burnett as witnesses, both of whom would have helped the jury understand defendant's "state of mind" at the time of the incident. In his brief, defendant asserts that Gaskins would have testified regarding "the occurrences of the days leading up to the day of the confrontation," including that he was a recent victim of gun violence and had received the same text messages that defendant received from Williams. According to defendant, Burnett's testimony could have helped the jury to understand defendant's state of mind because her home was recently "the target of gunfire."

Similar to defendant's first claim, there is no mention of Gaskins or Burnett in the lower court record. But as defendant notes in his affidavit filed with his Standard 4 brief, he told his attorney about these two potential witnesses and their anticipated testimony. Thus, again, it must be presumed that this evidence was not offered at trial for strategic reasons **[*12]** which this Court will not second-guess. See *Payne, 285 Mich App at 190*; *Dixon, 263 Mich App 393; 688 N.W.2d 308*. Therefore, defendant has failed to establish the factual predicate of his claim. See *Hoag, 460 Mich at 6*.

However, even assuming, arguendo, that Gaskins and Burnett would have testified as defendant asserts, and that their testimony would have been relevant and admissible at trial, defense counsel's failure to call them as witnesses did not deprive defendant of a substantial defense. *Dixon, 263 Mich App at 398*. At trial, defendant testified to the events that occurred on the day of the incident and the day before the incident, and neither Gaskins nor Burnett were present when the shooting occurred. Further, defendant testified about his state of mind during the incident, indicating that he feared for his life when he heard the gunshots and that he was paranoid at the time of the incident. Accordingly, defense counsel's purported failure to call Gaskins and Burnett as witnesses did not deprive defendant of a substantial defense and defense counsel's performance did not constitute ineffective assistance of counsel. See *id.*

C. FAILURE TO OBTAIN HOSPITAL RECORDS AND POLICE REPORTS

Next, defendant argues that his counsel was ineffective because he failed to obtain hospital records and police **[*13]** reports or other documents related to Gaskins's and Burnett's potential testimony. Defendant appears to argue that the hospital records related to Gaskins's leg injuries, which were "severe enough to warrant amputation of his leg," would have corroborated the reasons why defendant feared for his life. Defendant asserts that the police-related documents "could [have] introduced to the jury the fact that [defendant's] next door neighbor's house had been shot up because the perpetrators were under the impression that it was [defendant's] residence."

First, apart from defendant's assertions in his Standard 4 brief, defendant has failed to establish the existence of any hospital records and police reports containing the information that he describes on appeal, and there is no

indication in the lower court record of such documentation. However, even if the documents exist, it is unlikely that they would have been admissible. Only relevant evidence is admissible. See MRE 402. The details of Gaskins's leg amputation and the details of the alleged shooting at the home of defendant's neighbor did not have any tendency to make more or less probable a fact of consequence to the action. See MRE 401. These documents **[*14]** were only, if at all, peripherally related to any of the events that gave rise to defendant's charges and could not provide any additional information regarding whether defendant fired a weapon at Owusu and Atkins or whether defendant had an actual intent to kill Owusu and Atkins during the incident. See *People v Murphy (On Remand), 282 Mich App 571, 580; 766 NW2d 303 (2009)*. Thus, defense counsel was not ineffective by failing to obtain and present the documents at trial.

D. FAILURE TO EFFECTIVELY IMPEACH OWUSU

Next, defendant argues that his counsel failed to effectively impeach Owusu. In his brief, defendant identifies four statements that defense counsel failed to utilize at trial in order to undermine Owusu's credibility. However, contrary to defendant's arguments, the lower court record indicates that defense counsel impeached Owusu's testimony with his prior inconsistent statements and emphasized the inconsistencies in Owusu's testimony during his closing argument. Therefore, defendant has failed to establish the factual predicate of his claim. See *Hoag, 460 Mich at 6*. Further, the record shows that defense counsel effectively impeached Owusu's testimony, but, despite defense counsel's efforts, the jury found Owusu's and Atkins's testimony to be more credible than **[*15]** defendant's testimony. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand), 219 Mich App 38, 42; 555 NW2d 715 (1996)*.

E. FAILURE TO PRESENT SELF-DEFENSE THEORY

Next, defendant argues that his counsel was ineffective because he failed to ask defendant questions that would have revealed to the jury that he fired the gun in self-defense after Atkins approached him with a handgun. Defendant attributes defense counsel's performance to a lack of preparation.

As stated above, defense counsel was "responsible for preparing, investigating, and presenting all substantial defenses." *Chapo, 283 Mich App at 371*. However, "[w]here there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *In re Ayres, 239 Mich App 8, 22; 608 NW2d 132 (1999)*. Additionally, the decision to argue one defense over another is considered a matter of trial strategy. *People v Hedelsky, 162 Mich App 382, 387; 412 NW2d 746 (1987)*.

Even though defendant asserts that he informed defense counsel that he acted in self-defense, it is not evident from the lower court record that defendant actually notified defense counsel of this defense or that defense **[*16]** counsel failed to investigate a self-defense theory. More significantly, the presentation of a theory of self-defense would have been completely inconsistent with the testimony of Owusu, Atkins, *and defendant*. Owusu and Atkins both testified that Atkins was unarmed when the incident occurred and that defendant fired gunshots at them as they were riding away from the scene after defendant threatened Owusu. Even though defendant testified that Atkins was armed and approached defendant while reaching for a gun in his waistband, defendant never testified at trial that he was armed, that he needed to defend himself, or that he fired the weapon at Owusu and Atkins. Instead, defendant testified that he ran away when Atkins pulled the gun out of his waistband and hid in an abandoned house. Although defendant could have raised inconsistent defenses at trial, *People v Lemons, 454 Mich 234, 245; 562 NW2d 447 (1997)*, in order to demonstrate that defense counsel was ineffective, he must rebut the strong presumption that defense counsel's decision to defend defendant by repeatedly attacking the credibility of Owusu and Atkins and offering defendant's testimony as the accurate portrayal of the incident was "sound trial strategy under the circumstances." **[*17]** *People v Toma, 462 Mich 281, 302; 613 NW2d 694 (2000)*. Defendant has failed to demonstrate that a decision to forgo a theory of self-defense that was wholly inconsistent with defendant's testimony—and, in fact, would have effectively impeached defendant's testimony—was not sound trial strategy.

F. FAILURE TO REQUEST FELONIOUS ASSAULT INSTRUCTION

Next, defendant argues that his counsel was ineffective for failing to request a jury instruction on felonious assault. However, *MCL 768.32(1)* precludes a jury instruction on an uncharged lesser cognate offense. *People v Jones, 497 Mich 155, 164; 860 NW2d 112*

(2014). And felonious assault is a cognate lesser offense of assault with intent to commit murder. People v Otterbridge, 477 Mich 875; 721 NW2d 595 (2006). Accordingly, this claim is without merit.

G. FAILURE TO INTRODUCE MITIGATING CIRCUMSTANCES AT SENTENCING

Defendant also argues that his counsel was ineffective because he failed to introduce mitigating circumstances at his sentencing which may have resulted in a lesser sentence. This claim is without merit. Defendant provided a lengthy statement at sentencing, during which he explained his perspective on the incident, his belief that the young men were waiting to rob him, his concerns that his charges were intensified because of his "bad history with the police in [his] neighborhood," and his belief that the **[*18]** jury should have received a self-defense instruction. Thus, he had ample opportunity to raise the "mitigating circumstances" that he references in his Standard 4 brief without the intercession of his attorney and has failed to establish that his attorney's decision fell below an objective standard of reasonableness. See Vaughn, 491 Mich at 669-671.

H. FAILURE TO SEEK PSYCHOLOGICAL TESTING OR CHALLENGE DEFENDANT'S SANITY

Finally, defendant argues that his attorney was ineffective for failing to request that psychological testing be performed on him. Failing to investigate and present a meritorious insanity defense can constitute ineffective assistance of counsel. People v Newton, 179 Mich App 484, 491; 446 NW2d 487 (1989). However, even if this Court assumes that defendant was, in fact, diagnosed with the mental conditions mentioned in his Standard 4 brief, the record contains no evidence that defendant was affected by symptoms of those conditions at the time of the incident. Additionally, to the extent that defendant is arguing that he was entitled to an insanity defense, a defendant must show that he "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the **[*19]** law" in order to establish an affirmative defense of legal insanity. MCL 768.21a(1). "Mental illness or having an intellectual disability does not otherwise constitute a defense of legal insanity." MCL 768.21a(1); see also People v Carpenter, 464 Mich 223, 237; 627 NW2d 276 (2001). Consequently, defendant's diagnoses of paranoid schizophrenia and PTSD would not have been sufficient to support a legal insanity defense. And there is no indication in the record that defendant's purported mental illnesses prevented him from either appreciating the wrongful nature of his actions or conforming his conduct to the law under either version of the incident offered at trial. Accordingly, defendant has failed to establish that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would be different. See Lockett, 295 Mich App at 187.

Affirmed.

/s/ Michael J. Talbot

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

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