Grayson v. Horton

United States Court of Appeals for the Sixth Circuit

May 3, 2021, Filed

No. 20-1287

Reporter
2021 U.S. App. LEXIS 13172 *

CLINTON RAYSHAWN GRAYSON, Petitioner-Appellant, v. CONNIE HORTON, Warden, Respondent-Appellee.

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

Grayson v. Horton, 2020 U.S. Dist. LEXIS 62927, 2020 WL 1821021 (E.D. Mich., Apr. 10, 2020)

Core Terms

confession, footage, harmless, co-defendants, mask, robbery, apartment complex, video, masked man, apartment, state court, murder, phone, dark, hair, clothing, picture, tan, tinted windows, circumstantial, corroborated, exhaust, loud

Counsel: CLINTON RAYSHAWN GRAYSON, Petitioner - Appellant, Pro se, Kincheloe, MI.

For CONNIE HORTON, Warden, Respondent - Appellee: Jared D. Schultz, Office of the Attorney General, Lansing, MI.

Judges: Before: MOORE, GIBBONS, and MURPHY, Circuit Judges. KAREN NELSON MOORE, Circuit Judge, dissenting.

Opinion

ORDER

Clinton Rayshawn Grayson, a pro se Michigan prisoner, appeals a district court's judgment denying his habeas corpus petition filed pursuant to *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)*.

After a group of masked men robbed the Moon Lite Party Store and fatally shot its owner, Grayson and three others (Kenneth Hill, Darius Diaz-Gaskin, and Jomar Robinson) were charged with first-degree felony murder, armed robbery, conspiracy to commit armed robbery, and possession of a firearm during the commission of a felony. The trial court denied Grayson's motion to suppress his confession to police and admitted his statements at trial. The jury subsequently convicted Grayson as charged. He was sentenced to an aggregate term of life in prison. **[*2]** His co-defendants were convicted of the same charges at a separate trial.

On appeal, the Michigan Court of Appeals concluded that the trial court erred by denying the motion to suppress because the police had continued to interrogate Grayson after he had unequivocally asserted his right to remain silent. *People v. Grayson, No. 328173, 2017 Mich. App. LEXIS 483, 2017 WL 1103464, at *5-7 (Mich. Ct. App. Mar. 23, 2017)* (per curiam), *perm. app. denied, 501 Mich. 864, 901 N.W.2d 381 (Mich. 2017)*. Nonetheless, the court concluded that the admission of Grayson's confession had been harmless beyond a reasonable doubt in light of the following evidence presented at trial. *2017 Mich. App. LEXIS 483, [WL] at *7-9*.

A witness who lived near the party store testified that, at around 11:05 p.m. on the day of the robbery, "he saw a boxy, tan-colored vehicle with tinted windows and a loud exhaust or engine stop on his street, Elmira. The vehicle pulled over in front of a nursing building and three people, all dressed in dark clothing got out of the vehicle and began walking." *2017 Mich. App. LEXIS 483, [WL] at *8*. "Another witness . . . saw three individuals dressed in dark clothing and wearing dark ski masks, one of whom was carrying a red duffle bag, running out of the party store." *Id.* When "[a] police canine unit tracked a scent from the party store to Elmira Street," "officers . . . found money on the ground in front of the **[*3]** nursing building . . . ." *Id.*

The robbery and shooting were recorded by the party store video surveillance, which showed that the incident occurred between approximately 11:04 p.m. and 11:06 p.m. *Id.* After the police released information to the public and received tips, Grayson and his co-defendants were identified as possible suspects. *Id.* Police found photos of Grayson on his Facebook page "and were also able to see him and his association with his co-defendants. Police also obtained defendant's driver's license photograph." *Id.*

Hill, one of Grayson's co-defendants, lived at an apartment complex with security cameras. A security supervisor at this complex testified that "Hill drove a tan or gold Buick LeSabre with tinted windows that had a loud exhaust." *Id.* The supervisor described the security footage from the night of the murder as showing that four individuals left the area of Hill's apartment at 10:36 p.m. and that the car was no longer in the parking lot at 10:39 p.m. *Id.* The video depicted Hill's car returning to the apartment complex at 11:16 p.m., and "the same four individuals . . . walking up the stairway toward Hill's apartment" shortly thereafter. *Id.* "The security supervisor **[*4]** recognized Hill from the video footage as well as one of the other men 'with the hair' as having been around before, although he could see neither's face clearly." *Id.* Police officers also testified that one of the masked men seen in the party store footage and still shots from the store surveillance had physical characteristics that matched Grayson's. *Id.*

In addition, an officer who investigated Grayson's cell phone records discovered "an increased pattern of interaction between [Grayson] and his co-defendants both before and after the party store incident" and that Grayson's "phone was in the area of the party store at the time of the incident." *Id.* When Grayson was arrested at a female friend's home, she identified his belongings in her home, which "included an open duffle bag containing black clothing and a black knit ski mask." *2017 Mich. App. LEXIS 483, [WL] at *9*. Accordingly, the Michigan Court of Appeals affirmed Grayson's convictions and sentence, and the Michigan Supreme Court denied leave to appeal.

In his *§ 2254* petition, Grayson asserted, among other things, that the trial court's failure to suppress his confession to police violated his *Sixth Amendment* right to counsel and his *Fifth Amendment* right to be free from compelled self-incrimination. **[*5]** The State filed a response in opposition. Grayson filed a reply, withdrawing his *Sixth Amendment* claim.

The district court denied Grayson's *§ 2254* petition. As to the *Fifth Amendment* claim, the court determined that the Michigan Court of Appeals had reasonably concluded that police questioning of Grayson after he invoked his right to remain silent constituted impermissible interrogation in light of *Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*, and *Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)*. The district court nevertheless concluded that the error in admitting the confession was harmless under the harmless-error test from *Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*. The district court granted a certificate of appealability ("COA") with respect to Grayson's *Fifth Amendment* claim. This court denied his motion to expand the COA.

On appeal, Grayson reasserts his *Fifth Amendment* claim. Although the State concedes that the trial court erroneously admitted Grayson's confession, the State contends that the error was harmless. In habeas actions, this court reviews the district court's legal conclusions de novo and its factual findings for clear error. *Davis v. Lafler, 658 F.3d 525, 530 (6th Cir. 2011)*.

"[B]efore a federal constitutional error can be held harmless" on a direct appeal from a state criminal judgment, a state appellate "court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*. And a state appellate **[*6]** court's application of *Chapman*'s harmless-error test qualifies as a "merits" decision under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Davis v. Ayala, 576 U.S. 257, 269, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015)*. Under AEDPA, a federal court may not grant a writ of habeas corpus after a state court issues this type of merits

decision unless the state court proceedings:

> (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)(1)-(2); see also Davis, 658 F.3d at 530.

The Supreme Court explained the proper standard of review under paragraph (1) of this statutory text as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing **[*7]** legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (opinion of O'Connor, J.); see also Davis, 658 F.3d at 530.

Even apart from AEDPA, the Supreme Court in *Brecht* held that a constitutional error in a state criminal case requires reversal on federal habeas review only if it caused "actual prejudice." 507 U.S. at 637. For claims adjudicated on the merits by the state court, this "*Brecht* test subsumes the limitations imposed by AEDPA." Davis, 576 U.S. at 270. We have thus held that the *Brecht* test encompasses the question of whether a state court reasonably applied *Chapman*'s "harmless beyond a reasonable doubt" standard. Davenport v. MacLaren, 964 F.3d 448, 454-55 (6th Cir. 2020), cert. granted sub nom. Brown v. Davenport, 2021 U.S. LEXIS 1825, 2021 WL 1240919 (U.S. Apr. 5, 2021). Unlike *Chapman*, the *Brecht* test requires more than a "'reasonable possibility' that the error was harmful." Davis, 576 U.S. at 268 (quoting Brecht, 507 U.S. at 637). Under *Brecht*, "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" Id. at 267-68 (quoting O'Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)).

Applying this *Brecht* test here, we conclude that the district court properly determined that the introduction of Grayson's confession did not cause him actual prejudice. To begin with, the government **[*8]** presented a compelling case even without Grayson's confession. And the strength of the government's case is perhaps the "most significant" factor in the harmless-error analysis. Samuels v. Mann, 13 F.3d 522, 528 (2d Cir. 1993); see Cooper v. Chapman, 970 F.3d 720, 732 (6th Cir. 2020); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Grayson's confession confirmed that he was, in fact, a masked man seen in the video at the party store. Yet, aside from the confession, ample evidence proved that Grayson was one of the perpetrators of the murder. The government presented picture and video evidence from the crime scene and from Hill's apartment complex. Still images of the scene showed that the mask did not entirely cover Grayson's face. And the still images were consistent with photos of Grayson from his Facebook page. The images were also consistent with an image of an unmasked man with distinct hair like Grayson's returning to Hill's apartment complex shortly after the murder. See Grayson, 2017 Mich. App. LEXIS 483, 2017 WL 1103464, at *8. Experienced officers described the consistencies within this photo comparison. One officer testified that the masked man in the store video "had a substantial amount of hair underneath his hat, a medium complexion, a wide, distinct bridge of his nose, and a build that was not heavy. The officer testified that the same characteristics were notable **[*9]** in the apartment complex security video and in [Grayson's] Facebook photos, and that they were able to identify [Grayson] as one of the suspects based on these characteristics." *Id.*; see Tr., R.6-7, PageID#1512-14. "Another officer testified that [Grayson] had specific characteristics that made him recognizable as well, including his hair, his nose, and a dark discoloration under his eyes." Grayson, 2017 Mich. App. LEXIS 483, 2017 WL 1103464, at *8; see Tr., R.6-7, PageID#1589-90.

Because Grayson wore a mask, we may well be left with "grave doubt" about the harmlessness of Grayson's confession if we relied solely on this picture evidence. O'Neal, 513 U.S. at 445. But these picture comparisons must be considered with the substantial corroborating evidence showing that Grayson was, in fact, the masked

robber in the images. Right before the store robbery, a witness who lived nearby saw a tan car with tinted windows drive by making a distinctively loud exhaust noise. *Grayson, 2017 Mich. App. LEXIS 483, 2017 WL 1103464, at *8*. This tan car parked close to the store, and three individuals dressed in dark clothes got out. *Id.*; *see* Tr., R.6-6, PageID#1227-36. Another witness called 911 after seeing three men wearing dark ski masks run out of the party store toward where the tan car had been parked. *See* Tr., R.6-6, PageID#1255-57. **[*10]**

A security supervisor who worked at Hill's apartment complex next connected Hill to this incriminating car. The supervisor explained that Hill drove a tan or gold Buick LeSabre that had tinted windows and made a loud exhaust noise. *Id.*, PageID#1360. The supervisor also testified about footage from the apartment complex's security cameras. The footage showed Hill and three others exit the apartment complex at 10:36 p.m. on the night of the murder, get into Hill's car, and leave. *Id.*, PageID#1366-71. The murder happened a few minutes past 11:00 p.m. The footage next showed Hill and the three others returning at 11:16 p.m. *Id.*, PageID#1375-79, 1404. The security supervisor identified Hill based on his distinctive gait (along with the fact that the person had been in Hill's car). *Id.*, PageID#1381-82, 1409-10. And although the security supervisor could not identify Grayson by his name from the footage, he did recognize one of Hill's companions with the "[v]ery distinctive" hair because the supervisor had "seen [this individual] around" Hill's apartment complex previously. *Id.*, PageID#1377-78, 1381, 1398-99.

Evidence from Grayson's cellphone further connected him to his co-defendants and to **[*11]** the crime. An expert obtained six months of records from the co-defendants' cellphones. Those records showed "an increased pattern of interaction" between their phones before and after the robbery. Tr., R.6-7, PageID#1445. During a phone call about ten minutes before the robbery, moreover, Grayson's phone "interacted" with a cell tower located about two miles away from the store. *Id.*, PageID#1446. Evidence from Grayson's Facebook page likewise showed his connections to some co-defendants. *Id.*, PageID#1478. The anonymous tip that led the police to the co-defendants further corroborated these facts (and was consistent with nonpublic information that the police had at the time). *Id.*, PageID#1580. Lastly, officers arrested Grayson at his friend's apartment. The friend allowed the officers to examine Grayson's property at this apartment, which included black clothing and a black knit mask (even though it was May). Tr., R.6-6, PageID#1301.

As in *Brecht*, the evidence in this case was at least "weighty," "if not overwhelming." *507 U.S. at 639*. The prosecutors presented a compelling circumstantial case even ignoring Grayson's confession. And such circumstantial "evidence is entitled to equal weight as direct **[*12]** evidence; therefore, the prosecution may meet its burden entirely through circumstantial evidence." *Cooper, 970 F.3d at 732*; *see Hopkins v. Cockrell, 325 F.3d 579, 583-85 (5th Cir. 2003)*. This evidence is, by contrast, far removed from "a case in which, absent [the defendant's] confession, the State would have had insufficient evidence to support a conviction." *Golphin v. Branker, 519 F.3d 168, 191 (4th Cir. 2008)* (distinguishing *Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*). The evidence also created much more than "a relatively weak but plausible case" against Grayson. *Cf. Reiner v. Woods, 955 F.3d 549, 557-62 (6th Cir. 2020)*. And Grayson presented no evidence identifying another person as the individual who committed the crime or suggesting that he could not have been one of the perpetrators. *Cf. O'Neal v. Balcarcel, 933 F.3d 618, 624-28 (6th Cir. 2019)*.

In addition, the prosecution did not use Grayson's confession in a particularly harmful way. *Cf. Hopkins, 325 F.3d at 583-85*. Although the prosecution mentioned the confession in opening and closing arguments, it was largely as corroboration of the other evidence establishing Grayson's guilt. Indeed, the prosecution at one point minimized the importance of the confession: "You don't need the Defendant's confession to look at these pictures, but you do also have the Defendant's confession." Tr., R.6-8, PageID#1751. The prosecution later noted: "This Defendant basically *corroborated* everything that was done during the course of the investigation." **[*13]** *Id.*, PageID#1788 (emphasis added). These statements were generally consistent with the prosecution's emphasis on the photos and video evidence. It repeatedly suggested that the jury could ask for this evidence and "look at the footage from both security cameras" at the store and apartment complex. *Id.*, PageID#1766. This case thus is not like those where, say, "the prosecutor repeatedly referred to [the defendant's] incriminating statements, telling the jury that they could convict beyond a reasonable doubt based only on his own statements." *Jones v. Harrington, 829 F.3d 1128, 1142 (9th Cir. 2016)*.

Admittedly, the Supreme Court has instructed courts, at

least on direct appeal, "to exercise extreme caution before determining that the admission of [a coerced] confession at trial was harmless." *Fulminante, 499 U.S. at 296*. And the confession in this case was obviously powerful corroborating evidence of Grayson's guilt. Yet the Court has also made clear "that confessions are susceptible to harmless-error review on direct appeal, a context in which the State bears a higher burden of proving the harmlessness of an error." *Golphin, 519 F.3d at 190* (discussing *Fulminante, 499 U.S. at 295-97*). So we and other circuit courts have found the admission of a defendant's confession harmless under *Brecht*. *See id. at 190-91*; *see also, e.g., Cooper, 970 F.3d at 731-32*; *Hopkins, 325 F.3d at 583-85*. It **[*14]** is harmless in this case too.

In response, Grayson reiterates that the party store surveillance video could not identify the perpetrators because they wore masks, and he claims that the remaining evidence was weak and circumstantial. As he notes, another individual with similarly distinctive hair could be friends with Hill. Likewise, individuals other than Hill might drive tan cars with tinted windows that make distinctively loud exhaust noises. It is also at least possible that Grayson was coincidentally near the party store at the time of the robbery. And perhaps it was merely by happenstance that Hill and three others left his apartment in his car just before the robbery and returned to the apartment in that car just after it. But the claim that these facts were all just unfortunate coincidences becomes less and less likely when they are aggregated and placed in the context of the *entire* record. Even if we thought such a "coincidence" defense could create a "'reasonable possibility' that the error was harmful," *Davis, 576 U.S. at 268* (citation omitted), that *Chapman* test does not apply in these federal habeas proceedings. To apply *Chapman* now would "undermine[] the States' interest in finality and infringe[] **[*15]** upon their sovereignty over criminal matters . . . ." *Brecht, 507 U.S. at 637*. Instead, we must ask whether the matter is "so evenly balanced" that we find ourselves "in virtual equipoise as to the harmlessness of the error." *O'Neal, 513 U.S. at 435*. And although none of the facts, standing alone, necessarily satisfies *Brecht* without Grayson's confession, the "record as a whole" leaves us with no doubt that the error was harmless. *Brecht, 507 U.S. at 638*. Simply put, it is "highly unlikely" that the jury would have acquitted Grayson absent his confession. *Golphin, 519 F.3d at 191* (citation omitted).

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

Dissent by: KAREN NELSON MOORE

Dissent

KAREN NELSON MOORE, Circuit Judge, dissenting. I do not share the majority's conviction as to the strength of the state's case against Clinton Rayshawn Grayson. Without Grayson's confession—in which he identifies himself as one of the three masked men in security footage from the Moon Lite party store when Basim Sulaka was murdered—this is little more than a case of guilty by association, and a weak one at that. Because I have "grave doubt" as to whether the admission of Grayson's confession had a "substantial and injurious" influence on the jury's verdict, I would reverse the district court's judgment. *Reiner v. Woods, 955 F.3d 549, 555 (6th Cir. 2020)* (quoting **[*16]** *O'Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)*); *see Brecht v. Abrahamson, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*.

Beginning with the Moon Lite security footage, I have serious difficulty matching Grayson to the three masked men, and I am confident that the jury would as well. As the prosecutor argued at closing, the three men in the security footage are wearing "very good disguises," R. 6-8 (4/1/2015 Trial Tr. at 117) (Page ID #1749), and the testimony of the officers who claim to have matched pictures of Grayson to that footage is highly suspect insofar as they did so only after receiving anonymous tips that Grayson was involved. The footage from Kenneth Hill's apartment is of poor quality; the security guard who reviewed it failed to identify Grayson in it, instead remarking on the noticeable hair of one of the individuals in the footage. Then there is Grayson's cell phone data, which shows, at best, that he may have been in the general vicinity of the Moon Lite store on the night in question. That could be said of any number of people. And it makes sense that Grayson's phone was interacting with those of his co-defendants—his friends—but ceased around the time of the robbery if those co-defendants were involved. But that does little to implicate Grayson. Finally, there is the evidence **[*17]** that when Grayson was arrested at a friend's home—months after the crime—police identified a bag belonging to Grayson with a black mask inside. But the officer who testified as to Grayson's arrest described the mask as "knit"; that does not match the mask worn by the individual purported to be Grayson in the security footage, which appears to be made of a

synthetic material.

In short, when Grayson's confession is removed from the picture, the prosecution was left with circumstantial evidence of limited probative value tying Grayson to the crime largely through his association with Hill, Darius Diaz-Gaskin, and Jomar Robinson. Indeed, there is no DNA, fingerprint, or other physical evidence connecting Grayson to the crime scene, and neither of the witnesses who saw three masked men in dark clothes enter the Moon Lite party store identified Grayson. But with Grayson's confession in hand, identification ceased to be a key issue in the case. Without it, I have grave doubts that the jury would have identified Grayson as one of those three masked men in the security footage. *See Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*. Thus, I must respectfully dissent.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLINTON RAYSHAWN GRAYSON,

Petitioner,

v.

CONNIE HORTON,

Respondent.
_____/

Case No. 2:17-cv-14170

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER DENYING THE HABEAS CORPUS PETITION [1], GRANTING A CERTIFICATE OF APPEALABILITY, AND GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS

Petitioner Clinton Rayshawn Grayson, a state inmate at the Chippewa Correctional Facility in Kincheloe, Michigan, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF 1. Grayson was convicted of first-degree murder, Mich. Comp. Laws § 750.316(1)(b), armed robbery, Mich. Comp. Laws § 750.529, possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b, and conspiracy to commit armed robbery, Mich. Comp. Laws § 750.157a; Mich. Comp. Laws § 750.529. ECF 6-9, PgID 1830–31. He now challenges his convictions on grounds that the trial court, two police officers, and his trial attorney violated his constitutional rights. ECF 1. For the following reasons, the Court will deny his petition.

BACKGROUND

The charges against Grayson arose from a shooting and robbery at a party store in Clinton Township, Michigan on March 28, 2014. *People v. Grayson*, No.

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328173, 2017 WL 1103464, at *1 (Mich. Ct. App. Mar. 23, 2017). The owner of the store, fifty-one-year-old Basim Sulaka, was shot and killed during the incident. *Id.* Grayson and three other men (Darius Diaż-Gaskin, Jomar Robinson, and Kenneth Hill) were charged with the crimes. *Id.* Grayson was tried before a jury in Macomb County Circuit Court. ECF 6-1.

At trial, the State presented two witnesses that saw three individuals wearing dark clothing on the night that a robbery occurred at a party store. *Grayson*, 2017 WL 1103464, at *8. One witness watched three people wearing dark clothing exit a boxy, tan vehicle near a nursing building a short distance from the party store. As the witness left for work shortly after seeing the three people, he passed the party store that had significant police presence outside it and informed the police of the three people he had seen. *Id.* The second witness saw three people dressed in dark colors, wearing ski masks, and carrying a red duffle bag run out of the party store. *Id.* During the police investigation, a canine unit tracked a scent from the party store to the nursing building where the first witness saw the three people, and the police found money on the ground outside the same nursing building. *Id.*

The State also presented video footage from a surveillance camera inside the party store that depicted the robbery with time stamps that lined up with the timing provided by the two witnesses. *Id.* When the police could not identify anyone in the surveillance video, they released it to the public and received several prudent tips related to Grayson and the other co-defendants. *Id.* From the tips, police were able to uncover that Grayson and the co-defendants were associated with each other, that

one of the co-defendants drove a tan Buick LeSabre that matched the witness's description, that video footage from a co-defendant's apartment shows four people in dark clothing leave the apartment and get into the tan Buick, that the Buick is seen leaving and returning from the apartment complex in a timeframe that matches when the robbery occurred, and that the hair, facial features, and body frames of the persons in the party store surveillance video matched the apartment complex footage and Grayson and the co-defendants' ID photos. *Id.* Grayson's cell phone records revealed that he had increased contact with each of the other co-defendants both right before and after the robbery and that his phone was in the area of the party store at the time of the robbery. *Id.*

After Grayson was arrested at the home of a friend, that friend identified Grayson's belongings at her home, which included a duffle bag, black clothing, and a black ski mask. *Id.* at *9. During the police's interrogation of Grayson, he stated that he no longer wanted to talk. *Id.* at *5. But after he chatted with the police further, Grayson admitted his involvement in the robbery. *Id.* at *6. Video of his confession was presented at trial. *Id.*

On April 2, 2015, a jury found him guilty of first-degree murder, armed robbery, felony-firearm, and conspiracy to commit armed robbery.[1] ECF 6-9, PgID 1830–31. On May 29, 2015, the trial court sentenced Grayson to life imprisonment without the possibility of parole for the murder conviction, twenty-three years and

[1] Grayson's three co-defendants were tried jointly after Grayson's trial, and all three of them were also convicted of felony murder, armed robbery, conspiracy to commit armed robbery, and felony-firearm. *Grayson*, 2017 WL 1103464, at *1 n.1.

nine months to fifty years in prison for the robbery and conspiracy convictions, and two years in prison for the felony-firearm conviction. ECF 13. Grayson, through counsel, appealed his convictions and sentence, and on March 23, 2017, the Michigan Court of Appeals affirmed Grayson's convictions and sentence. *See Grayson*, 2017 WL 1103464. Grayson then filed an application for leave to appeal in the Michigan Supreme Court, which was denied. *People v. Grayson*, 501 Mich. 864 (2017).

On December 21, 2017, Grayson filed the present petition for a writ of habeas corpus. ECF 1. He raised four claims:

> I. The trial court's failure to suppress [his] statement to police violated his . . . Fifth Amendment right to freedom from compelled self-incrimination.[2]
>
> II. The State trial court denied [his] request for a jury instruction on accident, in violation of [his] constitutional right to a fair trial.
>
> III. Two police officers invaded the province of the jury by identifying [him] as one of the masked robbers and as one of the men in the codefendant's apartment complex, in violation of [his] constitutional right to a fair trial and a trial by jury.
>
> IV. Trial counsel was constitutionally ineffective for failing to object to the police officers' identification testimony.

ECF 1, PgID 8.

[2] Grayson initially argued that the denial of his motion to suppress also violated his Sixth Amendment right to counsel. ECF 1, PgID 8. In his reply brief, however, he concedes that the Sixth Amendment right to counsel does not attach until the accused has been formally charged and that he was not formally charged before the police interrogated him. ECF 11, PgID 2229. The Sixth Amendment argument has been abandoned.

LEGAL STANDARD

The Court may not grant habeas relief to a state prisoner unless her claims were adjudicated on the merits and the state court adjudication was "contrary to" or resulted in an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

"A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the] precedent." *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)).

The state court unreasonably applies Supreme Court precedent only when its application of precedent is "objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 520–21 (2003) (internal citations omitted). A merely "incorrect or erroneous" application is insufficient. *Id.* "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, 654 (2004)).

A federal court reviews only whether a state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *Greene v. Fisher*, 565 U.S. 34, 38 (2011). A state court need not cite to or be aware of Supreme Court cases, "so long as neither the reasoning

nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002). Decisions by lower federal courts "may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) (citing *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003)).

DISCUSSION

I. Fifth Amendment Claim

Grayson alleged that the trial court violated his Fifth Amendment right not to incriminate himself when the court denied his motion to suppress his statement to the police. ECF 1, PgID 3. A videotape of Grayson's statement to detectives was played at trial, and a transcript of the interview was given to the jury. *See* ECF 6-8, PgID 1639–45. Grayson argued that the police used coercive techniques to obtain his confession and continued to question him after he invoked his constitutional right to remain silent by stating, "I don't want to talk no more." The Michigan Court of Appeals agreed with Grayson that the trial court erred by denying Grayson's motion to suppress, but the Court of Appeals concluded that the error was harmless. *Grayson*, 2017 WL 1103464, at *7–9. Grayson maintained that the error was not harmless because his confession likely had a powerful effect on the jurors and because there was little evidence of guilt.

A. Clearly Established Federal Law

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

U.S. Const. amend. V. "To give force to the Constitution's protection against compelled self-incrimination, the [Supreme] Court established in *Miranda* [*v. Arizona*, 384 U.S. 436 (1966),] 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" *Florida v. Powell*, 559 U.S. 50, 59 (2010) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989)). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473–474; *see also Pennsylvania v.* Muniz, 496 U.S. 582, 602 n.14 (1990) ("Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions . . . that are designed to elicit incriminatory admissions."). The focus of the inquiry on the *Miranda* safeguards should be on the suspect's perceptions, not the intent of the police. *Rhode Island v. Innis*, 446 U.S. 291, 3001 (1980). Thus, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 302 (emphasis in original). "The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police

are seeking to expand the interview." *Tolliver v. Sheets*, 594 F.3d 900, 920–21 (6th Cir. 2010) (citations omitted).

Here, Detectives Dan Quinn and Brian Gilbert interviewed Grayson following his arrest. *See* ECF 16-14, PgID 1971. Detective Quinn advised Grayson of his constitutional rights, including the right to remain silent. *Id.* at 1974–75. Grayson stated that he understood his rights, and he signed a written waiver of his rights. *Id.* at 1975.

After a preliminary discussion about Grayson's education, neighborhood, family life, and job, the detectives began to ask him about the incident at the party store. Detective Gilbert informed Grayson that the police had a lot of evidence against him, but that he wanted Grayson to be honest with him so that he could tell the prosecutor that Grayson was honest and forthcoming about what had happened. Grayson then stated twice that he "don't want to talk no more." *Id.* at 1985. But the officers continued to talk with him and ask him questions related to the robbery. *See id.* at 1986–2038. During the continued interrogation, Grayson admitted to being armed and entering the party store with two of his co-defendants, including Diaz-Gaskin who also was armed. *Id.* at 1990–2000. He stated that the purpose of going to the store was to get money. *Id.* at 1990. He admitted that, after entering the store, he told the victim to get down, tussled with the victim, and hit the victim after the victim was shot and fell to the floor. *Id.* at 1993. Grayson denied knowing why the gun fired. *Id.* at 1992–93. He explained that he thought at the time it was his gun that had fired, but that he later learned it was Diaz-Gaskin's gun that had fired. *Id.* at 1994.

He also admitted that he and his co-defendants had taken what they could from the store before leaving, and he even identified himself in photos derived from the videotape of the incident. *Id.* at 1997–98, 2004–07.

Detective Quinn testified at the pretrial hearing on Grayson's motion to suppress that, after Grayson said he did not want to talk anymore, he continued talking to Grayson, but only to clarify what Grayson had said and to determine what Grayson's intentions were. ECF 6-2, PgID 173–74, 189, 194. Detective Quinn maintained that he did not ask Grayson anymore questions after Grayson said that he did not want to talk; instead, according to Detective Quinn, he merely conveyed what was going to happen next, and that Grayson reinitiated the interview by asking questions. *Id.* at 174–75, 185–89.

But Grayson's comment that he did not want to talk anymore was unequivocal. Detective Quinn, in fact, admitted at the pretrial hearing that he had understood Grayson when Grayson said for a second time that he did not want to talk. *Id.* at 189. Despite the unequivocal nature of Grayson's comment, the detectives subsequently informed Grayson four more times that the interview was his opportunity to explain what had occurred. ECF 6-14, PgID 1986–87. Although Grayson subsequently indicated that he *did* want to talk to the detectives, the detectives had already told him about the surveillance tapes. They had also informed him that they needed his side of the story and an explanation of how the incident happened. They even suggested that, for sentencing purposes, it would be advantageous for Grayson to tell his side of the story.

The detectives should have known that their comments were likely to elicit an incriminating response from Grayson when they (i) presented him with inculpatory evidence, (ii) implied that the sentencing judge would be lenient with Grayson if he admitted his involvement in the crimes, and (iii) repeatedly encouraged Grayson to explain his version of what had happened. *See People v. White*, 493 Mich. 187, 198–202 (2013). It is apparent from the record that the detectives were seeking to expand the interview. The Michigan Court of Appeals reasonably concluded that the detectives' statements following Grayson's invocation of the right to remain silent constituted interrogation and that the trial court erred by denying Grayson's motion to suppress his custodial statement. The question then remains of whether the trial court's error was harmless.

B. Harmless Error

The Michigan Court of Appeals concluded that the presentation of the interrogation was harmless because there was sufficient evidence for the jury to find Grayson guilty beyond a reasonable doubt without his statements to the police. *Grayson*, 2017 WL 1103464, at *8. On habeas review, an error is harmless unless it had a "substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Furthermore, "[s]tate courts' harmless-error determinations are adjudications on the merits, and therefore federal courts may grant habeas relief only where those determinations are objectively unreasonable." *O'Neal v. Balcarcel*, 933 F.3d 618, 624 (6th Cir. 2019) (citing *Ayala*, 135 S. Ct. at 2198-99).

The evidence at Grayson's trial included:

- testimony that, shortly before the crimes, three people in dark clothing got out of a tan car with a loud muffler on a side street by the party store (ECF 6-6, PgID 1228–36);

- testimony from another witness who saw three people wearing dark clothing and dark ski masks run out of the party store about 11:04 p.m. on the night of the crimes (*Id.* at 1254–63);

- testimony from a canine handler that his dog tracked a human scent from the party store to the side street where the tan car had been observed (*Id.* at 1270–74);

- video surveillance showing the incident at the party store at approximately 11:04 p.m. (ECF 6-7, PgID 1484–1502);

- testimony that tipsters provided the police with Grayson's name, the names of his co-defendants, and information about Grayson's Facebook page, which confirmed his association with the co-defendants (*Id.* at 1475–80, 1576–80);

- security footage at Hill's apartment complex showing Hill and three other individuals leaving the complex at 10:37 p.m. on the night of the crimes and returning to the complex at 11:16 p.m. and then walking in the stairwell near Hill's apartment (ECF 6-6, PgID 1363–82);

- testimony that Grayson's Facebook photos resembled the first suspect to enter the store and one of the four individuals to return to Hill's apartment-complex after the crimes (ECF 6-7, PgID 1509–14);

- testimony that there was increase in interaction between Grayson's cell phone and that of his co-defendants before and after the crimes and that Grayson's cell phone interacted with a cell phone tower about two miles from the party store nine or ten minutes before the crimes (*Id.* at 1445–46); and

- testimony that Grayson had dark clothing and a dark ski mask in his duffle bag at the time of his arrest on May 9, 2014 (ECF 6-6, PgID 1298–1301).

Grayson did not testify, and his only witness was Detective Bryan Gilbert, who described the investigation and his and Detective Quinn's interview with Grayson. Detective Gilbert admitted that the police had no DNA evidence, no fingerprint evidence, and no tire tracks or footprints linking Grayson to the crimes, but he opined that he did not think the shooting was a mistake or an accident. ECF 6-8, PgID 1711–45.

The evidence was not so evenly balanced that the Court has a grave doubt about whether the admission of Grayson's custodial statement had a substantial and injurious effect or influence on the jury's verdict. The trial court's error in allowing the interrogation to be presented at trial was harmless. The Court will therefore deny habeas relief on Grayson's Fifth Amendment claim.

II. The Jury Instructions

Grayson's second claim was that the trial court violated his rights to a fair trial and to present a defense by denying his request for a jury instruction on accident as a defense. ECF 1, PgID 4. Grayson argued that a jury instruction on accident was warranted because there was sufficient evidence that he thought Diaz-Gaskin accidentally shot the victim when the victim stumbled and fell to the floor. *Id.* at 38. Although Respondent contended that Grayson's claim is not cognizable on habeas review, the Court finds it unnecessary to resolve that issue, because there is no merit to Grayson's claim.

The Supreme Court has said that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation