No. 21-3024

FILED
July 6, 2021
DEBORAH S. HUNT, Clerk

United States Court of Appeals
for the Sixth Circuit

GABRIEL SCHAAF,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
TIM SHOOP,)
)
Warden, Respondent-Appellee.)

Before: NORRIS, Circuit Judge.

Gabriel Schaaf, a pro se Ohio prisoner, appeals the judgment of the district court dismissing his 28 U.S.C. § 2254 habeas corpus petition. The court construes Schaaf's notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). He has filed a motion to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In December 2016, Schaaf called 911 to report that he had come home from work to find his twenty-nine-year-old son, Jonathan, dead from multiple sharp injuries to his head, neck, and back. *See State v. Schaaf*, No. CA2018-03-004, 2019-Ohio-196, at *1 (Ohio Ct. App. Jan. 22, 2019). After six months of investigation yielded no new clues, police called Schaaf and asked him if they could speak to him about the case. Schaaf informed them that an attorney had told him not to talk to detectives and that they could call his attorney with any questions. A few months later, police again contacted Schaaf, who indicated he would speak to them if they came to him. On June 8, 2017, police went to Schaaf's home. He was mowing his grass when they arrived, and they recorded an audio interview with him outside while he remained seated on his riding lawnmower. The detectives pointed out inconsistencies in Schaaf's earlier statement to the police and indicated that Jonathan's death could be justified if it was the result of self-defense. Schaaf then admitted that he and Jonathan had been in a physical altercation and that he had struck Jonathan with a hatchet

several times. Detectives arrested Schaaf and he was taken to the police station, where he executed a written waiver of his *Miranda v. Arizona*, 384 U.S. 436, (1966), rights. Schaaf agreed to a second interview, which was recorded on video, and he confessed to killing Jonathan.

Schaaf was later charged with murder, aggravated murder, and tampering with evidence. He filed a motion to suppress the statements made to police, which was denied. The jury found Schaaf guilty on all three counts. The trial court imposed a term of imprisonment of twenty-five years to life.

Schaaf appealed, claiming first that the prosecutor improperly commented on his rights to remain silent and to counsel. Second, Schaaf asserted that the trial court erred by denying his motion to suppress the audio interview at his home—because he had earlier invoked his right to remain silent—and the video interview at the police station as fruit of the poisonous tree. Third, Schaaf claimed that his conviction for aggravated murder was not supported by sufficient evidence and was against the manifest weight of the evidence because there was no proof of "prior calculation and design." The Ohio Court of Appeals affirmed. 2019-Ohio-196, at *7. The Ohio Supreme Court denied leave to appeal. *State v. Schaaf*, 155 Ohio St. 3d 1439, 2019- Ohio 1536 (Ohio 2019) (table).

Schaaf then filed this habeas petition, raising the three claims raised in state court: (1) prosecutorial misconduct deprived him of a fair trial where the prosecutor commented on his invocation of his rights to counsel and to remain silent; (2) the trial court denied his right to due process by admitting pretrial statements made in violation of *Miranda*; and (3) the evidence was insufficient to support the charge of aggravated murder.

A magistrate judge concluded that Schaaf's claim of prosecutorial misconduct was procedurally defaulted and lacked merit. The magistrate judge further concluded that Schaaf's *Miranda* claim lacked merit because he was not in custody during the audio interview at his home and he waived his *Miranda* rights prior to the video interview at the police station. Finally, the magistrate judge concluded that sufficient evidence supported

Schaaf's conviction for aggravated murder. The magistrate judge therefore recommended dismissing the petition and denying a COA.

Schaaf filed objections to the recommendation as to the second claim only, and the matter was again referred to the magistrate judge. In a supplemental report, the magistrate judge noted that Schaaf had made no objections to the conclusions relating to his first and third grounds for habeas relief and recommended adopting the report and recommendation as to those grounds. The magistrate judge further recommended overruling the objections Schaaf raised as to his *Miranda* claim and dismissing the petition.

Schaaf filed objections to the supplemental report, continuing to challenge the findings in relation to the audio interview that occurred at his home. The district court determined that the magistrate judge did not err in relying on the fact that Schaaf was not in custody at the time of the interview and that it was irrelevant under the law whether he had previously invoked his rights to counsel and to remain silent. The district court overruled Schaaf's objections, adopted the magistrate judge's original and supplemental reports, dismissed the petition, and denied a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). A COA analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claims," and whether "the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348). "[A] COA does not require a showing that the appeal will succeed," *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

At the outset, it is noted that Schaaf filed objections to the magistrate judge's report only as to his *Miranda* claim. By failing to file specific objections to a magistrate judge's report and recommendation, a party forfeits further review of his claims by the district court and this court. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see Thomas v. Arn*, 474 U.S. 140, 142 (1985). To the extent that Schaaf now seeks a COA on his first and third claims, he has forfeited further review of those claims. While exceptional circumstances may warrant departure from the forfeiture rule in the interests of justice, *see Thomas*, 474 U.S. at 155; *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), none is present in this case.

In his remaining claim, Schaaf asserted that his right to due process was violated when the trial court admitted statements he made to police. Schaaf asserted that the interview at his home was improper because he had already informed the detectives that he had an attorney and that, if they wanted to talk to him, they should make an appointment through counsel. He also argued that he was in custody—or the legal equivalent—while the police were at his home, yet he was not given *Miranda* warnings before the audio interview that occurred while he was outside on his lawnmower. Schaaf asserted that, because the audio interview was improper, the video interview at the police station after he was arrested should also have been suppressed as fruit of the poisonous tree.

Reasonable jurists would not debate the district court's conclusion that the state court's adjudication of this claim was not contrary to or an unreasonable application of clearly established federal law. "*Miranda* warnings are necessary only if the defendant is subjected to a 'custodial interrogation.'" *United States v. Galloway*, 316 F.3d 624, 628-29 (6th Cir. 2003). In determining whether an interrogation was custodial, courts consider "(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual's freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions." *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010).

The record supports the state trial court's findings that Schaaf's pre-*Miranda* interview was voluntary and informal, and without any restraint on his freedom of movement. As the state appellate court recounted, two detectives went to Schaaf's home in an unmarked police vehicle; they were dressed in plain clothes but wore tactical vests. *Schaaf*, 2019-Ohio-196, at *4; *see also Beckwith v. United States*, 425 U.S. 341, 346 n.7 (1976) (explaining that an interrogation in one's home usually does not indicate a custodial situation). When the detectives arrived, Schaaf was mowing his yard on a riding mower. The detectives motioned for Schaaf to come over, he drove over to them, turned off the mower, and stayed seated on it while the detectives asked him questions. *Id.* Testimony at the suppression hearing indicated that the detectives spoke to Schaaf from a distance of approximately fifteen feet and that the interview lasted less than an hour. The state appellate court explained that that audio tape of the interview did not contain any threats by the detectives and that Schaaf sounded coherent and not confused. *Id.*

In his objections to the magistrate judge's report, Schaaf asserted that, even if he was not "in custody" during this interview, the circumstances were sufficiently similar to custody that *Miranda* warnings were required because the police were wearing tactical vests and carrying firearms, they showed up unannounced, and the interview took place at his home where he had the protection of the Fourth Amendment. Schaaf's arguments are unavailing. As the magistrate judge explained, the tactical vests are a commonplace part of the police uniform, the officers never unholstered their weapons, and Schaaf neither attempted to move away from the officers nor asserted that he was prevented from doing so. *See Hoffner v. Bradshaw*, 622 F.3d 487, 512 (6th Cir. 2010) (finding defendant was not in custody even after an officer pointed a gun at him because he made statements voluntarily and not in response to police questioning). Even if Schaaf had a subjective belief that he was not free to leave, the Supreme Court has repeatedly instructed courts to dismiss a suspect's subjective thoughts. *See, e.g., Stansbury v. California*, 511 U.S. 318, 323 (1994). Given the circumstances here, a reasonable person in Schaaf's position—seated on

his lawnmower in his own backyard—would not have felt that he was unable to stop the interview and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *cf. Orozco v. Texas*, 394 U.S. 324, 327 (1969) (deeming a suspect "in custody" when police confined him to his bedroom during questioning). Because Schaaf was not in custody while police spoke to him at his home, *Miranda* warnings were not required.

Nor did police violate Schaaf's rights by going to his home to speak to him after he had told them that he had been advised by an attorney not to talk to them. Even if this is considered an invocation of Schaaf's right to counsel, there was no violation of that right because Schaaf was not in custody. In *Edwards*, the Supreme Court established that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused *in custody* if he has clearly asserted his right to counsel." 451 U.S. at 485 (emphasis added). But "[a]n individual who is not in *Miranda* custody has no constitutional right to counsel." *Schreane v. Ebbert*, 864 F.3d 446, 453 (6th Cir. 2017) (citing *United States v. Malcolm*, 435 F. App'x 417, 420 (6th Cir. 2011)). For the reasons previously indicated, the record supports a finding that Schaaf was not in custody for *Miranda* purposes while police were interviewing him at his home and therefore had no right to counsel.

Finally, reasonable jurists would not debate the district court's rejection of Schaaf's argument that his statements at his home tainted his later videotaped confession made after a waiver of his *Miranda* rights. Because none of the statements made at his home violated *Miranda*, none of them can taint his later statements. *See Hoffner*, 622 F.3d at 512 (citing *Missouri v. Seibert*, 542 U.S. 600, 606 (2004)). Schaaf's claim does not deserve encouragement to proceed further.

For the foregoing reasons, Schaaf's application for a COA is **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

GABRIEL SCHAAF,

Petitioner, : Case No. 3:20-cv-090

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

TIM SHOOP, Warden,
Chillicothe Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case, brought *pro se* by Petitioner Gabriel Schaaf, is before the Court on Petitioner's Objections (ECF No. 23) to the Magistrate Judge's Supplemental Report and Recommendations ("Supplemental Report," ECF No. 20). The Court has vacated the judgment previously entered in the case in order to rule on those Objections (ECF Nos. 21, 22, 24).

The only Objections made to the original Report and Recommendations ("Report," ECF No. 15) were directed to the Magistrate Judge's conclusions on Ground for Relief Two and the Supplemental Report only addressed those conclusions. The Magistrate Judge's conclusions as to Grounds One and Three are therefore ADOPTED.

In the Supplemental Report, the Magistrate Judge analyzed each alleged factual error to which Schaaf pointed in his Objections and analyzed each case on which Schaaf relied to claim legal error by the Twelfth District Court of Appeals. Schaaf again objects and is entitled to *de*

novo review by the Court of each portion of the Objections to the Supplemental Report to which he objects.

Schaaf emphasizes that he had left a voicemail message for the detectives on February 15, before the so-called lawn mower interview on June 8, that if they wanted to talk to him, they should make an appointment through his attorney (Objections, ECF No. 23, PageID 838). It is undisputed that the detectives showed up at his house to interview him without setting up an appointment with his attorney. They also did not Mirandize him before beginning the lawnmower interview, but only after taking him into custody at the end of that interview after he admitted that he had struck his son with a hatchet.

Schaaf argues his voicemail message can "be likened to invoking right to not speak. And, this can also be likened to requesting to have counsel present for questioning . . ." (Objections, ECF No. 23, PageID 838-39). Thus he argues the detectives had no right to question him during the lawnmower interview without his attorney present and the results of that interview should have been suppressed. *Id.*, citing *Connecticut v. Barrett*, 479 U.S. 523 (1987).

Barrett does not support Schaaf's claim. In that case the defendant was in custody and at the police station. Given *Miranda* warnings, he refused to make a written statement without his attorney present, but agreed to continue to answer questions orally. The Supreme Court held that the Supreme Court of Connecticut had erred in suppressing the oral statements under *Miranda*.

In the Supplemental Report, the Magistrate Judge held that the requirement for *Miranda* warnings only applies when a suspect is in custody. The Magistrate Judge relied on controlling Sixth Circuit precedent, *Mason v. Mitchell,* 320 F.3d 604 (6th Cir. 2003), for this proposition (Supplemental Report, ECF No. 20 PageID 830).

In his Objections, Petitioner asserts that the state court was required to consider the totality of the circumstances of the lawnmower interview to determine if he was in custody or the legal equivalent

when he made the incriminating statements (Objections, ECF No. 23, PageID 840). He again quotes *United States v. Mendenhall*, 446 U.S. 544 (1980):

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the usage of language or tone of voice indicating that compliance with the officer might be compelled.

446 U.S. at 554. He also cites facts reported in the *Mendenhall* opinion which led the Supreme Court to conclude no seizure had taken place in that case (Objections, ECF No. 23, PageID 840-41).

A habeas corpus court does not review *de novo* the application of law to fact by the courts of the convicting State. Rather, it must determine whether that application was objectively unreasonable. 28 U.S.C. § 2254(d)(1). To overturn the state court decision, a habeas petitioner must show "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Wheeler*, 577 U.S. 73 (2015)(*per curiam*), quoting *White v. Woodall*, 572 U.S. 415 (2014), quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Looking only at the factors quoted from *Mendenhall*, it is clear that the state court's decision in this case was not objectively unreasonable. While the detectives were armed, they did not unholster or otherwise display those weapons nor did they touch Schaaf until they finally arrested him. The use of a totality of the circumstances test implies that there is no one factor which will turn a questioning from non-custodial to custodial.

Petitioner relies heavily on *United States v. Ray*, 803 F.3d 244 (6th Cir. 2015). In that case the Sixth Circuit interpreted *Missouri v. Seibert*, 542 U.S. 600 (2004), a case which did not produce

a majority opinion in the Supreme Court. *Ray* was before the circuit court on direct appeal and was remanded for application of the standard, newly-announced in *Ray*, in the first instance by the District Court. In this habeas corpus case we are not concerned with applying a standard in the first instance. Nor can we reverse if we find the Ohio courts did not follow *Ray*. Instead, we may grant the writ only if the state court decision was an objectively unreasonable application of the holding of the United States Supreme Court in a relevant case. The Court is convinced the Magistrate Judge correctly analyzed the relevant Supreme Court precedent and the Supplemental Report is therefore correct in concluding the state court decision on the Fifth Amendment issue is objectively reasonable.

Conclusion

Having considered *de novo* those portions of the Supplemental Report to which petitioner has objected, the Court OVERRULES those Objections and adopts the Supplemental Report as well as adopting the original Report to the extent Petitioner did not object to it. It is therefore ordered that the Petition herein be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

December 22, 2020

*s/Thomas M. Rose

Thomas M. Rose
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

GABRIEL SCHAAF,

Petitioner, : Case No. 3:20-cv-090

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

TIM SHOOP, Warden,
Chillicothe Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case, brought *pro se* by Petitioner Gabriel Schaaf, is before the Court for decision on the Petition (ECF No. 1), the State Court Record (ECF No. 8), the Return of Writ (ECF No. 9), and Petitioner's Reply (ECF No. 14).

Litigation History

On July 10, 2017, a Preble County Grand Jury indicted Petitioner on one count of tampering with evidence, one count of murder, and one count of aggravated murder in connection with the December 26, 2016, death of his adult son. (Indictment, State Court Record ECF No. 8, Ex. 1). A jury convicted Schaaf on all three counts and he was sentenced to twenty-five years to life imprisonment. The Ohio Twelfth District Court of Appeals affirmed the conviction. *State v. Schaaf,* 2019 Ohio 196 (Ohio App. 12th Dist. Jan. 22, 2019), appellate jurisdiction declined, 155 Ohio St. 3d 1439 (2019).

APPENDIX C

Schaaf then filed his Petition for Writ in this Court, pleading the following grounds for relief:

> **Ground One:** Schaaf was deprived of a fair trial and due process by the prosecutor's misconduct.
>
> **Supporting Facts:** The prosecutor committed misconduct and violated petitioner's right to a fair trial and due process of law by commenting of petitioner's pretrial silence and his invoking his right to remain silent.
>
> **Ground Two:** The trial court violated petitioner's constitutional rights by allowing pretrial statements made in violation of *Miranda* rights.
>
> **Supporting Facts:** The petitioner's rights against self incrimination and right to remain silent were violated by the state allowing the use of pretrial custodial interview statements made without *Miranda* warning.
>
> **Ground Three**: The evidence is constitutionally insufficient to support petitioner's conviction for aggravated murder.
>
> **Supporting Facts:** There is insufficient evidence to support petitioner's conviction for the offense of aggravated murder in this case, where several of the facts alleged in this case are wrong and not supported by the evidence.

(Petition, ECF No. 1, PageID 5, 7, 8)

Analysis

Ground One: Prosecutorial Misconduct

In his First Ground for Relief, Schaaf claims he was deprived of a fair trial by the prosecutor's comment on his pre-trial silence and his invoking his right to remain silent.

Respondent asserts Ground One is procedurally defaulted because Schaaf's attorney made no contemporaneous objection to either instance of asserted misconduct (Return of Writ, ECF No. 9,

PageID 711.) Schaaf replies that although the court of appeals discussed procedural default, it proceeded to decide the relevant claims on the merits and thus the claimed procedural default was overlooked by the Twelfth District (Reply, ECF No. 14, PageID 764).

Schaaf raised his claims of prosecutorial misconduct as his First Assignment of Error on direct appeal and the Twelfth District decided it as follows:

> [*13] SCHAAF WAS DEPRIVED OF A FAIR TRIAL DUE TO THE PROSECUTION COMMENTING ON SCHAAF INVOKING HIS RIGHT TO REMAIN SILENT AND RIGHT TO COUNSEL.
>
> [*14] Schaaf argues that the state deprived him of a fair trial when the prosecutor, during voir dire, stated that there would be no trial if there was no dispute as to what occurred between Schaaf and Jonathon. Schaaf also argues that the state deprived him of a fair trial when a detective testified that Schaaf told the police he would not speak to them on the advice of counsel. Schaaf concedes that he did not object to either claimed instance of error and is limited to a review for plain error.
>
> [*15] Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002- Ohio 68, 759 N.E.2d 1240 (2002). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros,* 78 Ohio St.3d 426, 436, 1997-Ohio-204, 678 N.E.2d 891 (1997). This court should notice plain error with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice. *State v. Widmer,* 12th Dist. Warren No. CA2011-03-027, 2012-Ohio-4342, ¶ 84.
>
> [*16] To demonstrate that the state deprived him of a fair trial, Schaaf must demonstrate that the prosecutor's comments or actions were improper and prejudicially affected his substantial rights. See *State v. Elmore*, 111 Ohio St. 3d 515, 2006-Ohio-6207, ¶ 62, 857 N.E.2d 547. In making such a determination, the focus is upon the fairness of the trial, not upon the culpability of the prosecutor. *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 57. A finding of prosecutorial misconduct will not be grounds for reversal unless the defendant can establish that he has been denied a

fair trial because of the prosecutor's actions. See State v. Smith, 12th Dist. Warren No. CA2017-02-013, 2017-Ohio-7540, ¶ 29. During voir dire, the prosecutor stated:

> Does everyone understand that if everyone in this room agreed about what happened on December 26th, 2016, there wouldn't be a need for a trial? In other words, there likely will be a conflict of evidence in this case. Is there anyone who doesn't understand that?
>
> And is there anyone who for any reason does not feel that they could be part of that function of a trier of fact and separate what they think the truth is and what they think the lies are and reach a fair and impartial verdict?

[*17] These statements were appropriate and accurately relayed to jurors that facts are contested in every trial. The remarks appeared designed to prepare jurors for the unique task of resolving conflicts in evidence in rendering a verdict. The questions posed by the prosecutor were neutrally phrased and did not insinuate that only a guilty or dishonest individual would seek a trial.

[*18] Next, Schaaf argues that the prosecutor committed misconduct by eliciting testimony from a detective concerning Schaaf's right to remain silent. During direct examination, the prosecutor asked the detective what the status of the police investigation was prior to Schaaf's admission to involvement in the homicide. The detective's response explained the various reasons why law enforcement focused its effort on Schaaf as the primary suspect. Those reasons included that the killer had draped a towel over the body, indicating a personal relationship with Jonathon, that the blood on scene appeared coagulated and inconsistent with Schaaf's timeline, Schaaf's demeanor, his failure to contact law enforcement for updates on the investigation for over two weeks following the death, and Schaaf's cancellation of a police interview. With respect to this cancellation, the detective stated that Schaaf called and left a voice message stating that he had talked to his attorney, who advised him not to speak to the police.

[*19] The use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335, syllabus. In *Leach*, the Ohio Supreme Court held, in limited circumstances, testimony concerning pre-arrest silence is appropriate if it is introduced as evidence of the "course of the investigation." *Id.* at ¶ 32. The court concluded that while it

> was improper to admit the investigator's direct testimony regarding the defendant's decision to exercise his right to silence through the invocation of counsel over the telephone, the investigator's testimony regarding the defendant's failure to keep his scheduled appointment with the police was "legitimate." *Id.*
>
> [*20] In this case, detective's testimony on direct examination concerning Schaaf cancelling an appointment based on his attorney's advice not to speak with police was the state's use of pre-arrest silence as substantive evidence of appellant's guilt and was error. [footnote: To be clear, there is no indication that the prosecutor intended to elicit this testimony. The detective provided a lengthy response to a general question.] However, assuming a Fifth Amendment violation occurred, this court would not find that Schaaf was deprived of a fair trial. As will be addressed below, the murder verdicts were supported by substantial evidence of Schaaf's guilt. Compare *Leach* at ¶ 29 (noting that the defendant was convicted on no physical evidence and only on the credibility of the state's complaining witnesses). Moreover, any error would be harmless because jurors were aware that Schaaf later voluntarily agreed to speak with police and provided them with his version of events wherein he set forth his claim of self-defense.) This court overrules Schaaf's first assignment of error.

Schaaf, 2019-Ohio-196.

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

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

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). "Absent cause and prejudice, 'a federal

habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review.'" *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000), quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87.

> [A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., *Beard v. Kindler*, 558 U.S. 53, 55, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009). This is an important "corollary" to the exhaustion requirement. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed. d 659 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." *Coleman* [*v. Thompson*], 501 U.S. [722,] 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 [(1991)]. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Barton v. Warden, S. Ohio Corr. Facility,* 786 F.3d 450, 464 (6th Cir. 2015), *Guilmette v. Howes,* 624 F.3d 286, 290 (6th Cir. 2010)(*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594, 601-02 (6th Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster*

> *County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); accord, *Hartman v. Bagley,* 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002). A habeas petitioner can overcome a procedural default by showing cause for the default and prejudice from the asserted error. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015).

Applying the *Maupin* analysis, the Court finds first that Ohio has a relevant procedural rule, requiring a contemporaneous objection to trial court error: parties must preserve errors for appeal by calling them to the attention of the trial court at a time when the error could have been avoided or corrected. *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus; *see also State v. Mason*, 82 Ohio St. 3d 144, 162 (1998).

In this case the Twelfth District enforced that rule by reviewing Schaaf's First Assignment of Error under the plain error standard. An Ohio state appellate court's review for plain error is enforcement, not waiver, of a procedural default such as a failure to make a contemporaneous objection. *Wogenstahl v. Mitchell*, 668 F.3d 307, 337 (6th Cir. 2012); *Jells v. Mitchell,* 538 F.3d 478, 511 (6th Cir. 2008); *Lundgren v. Mitchell,* 440 F.3d 754, 765 (6th Cir. 2006); *White v. Mitchell,* 431 F.3d 517, 525 (6th Cir. 2005); *Biros v. Bagley*, 422 F.3d 379, 387 (6th Cir. 2005); *Hinkle v. Randle*, 271 F.3d 239 (6th Cir. 2001).

Furthermore, the Sixth Circuit has repeatedly held that Ohio's contemporaneous objection

rule is an adequate and independent basis of state court decision. *Wogenstahl v. Mitchell*, 668 F.3d 307, 334 (6th Cir. 2012),*citing Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006); *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir. 2010); *Nields v. Bradshaw*, 482 F.3d 442 (6th Cir. 2007); *Biros v. Bagley,* 422 F.3d 379, 387 (6th Cir. 2005); *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003), *citing Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), *citing Engle v. Isaac,* 456 U.S. 107, 124-29 (1982). *See also Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000); *Goodwin v. Johnson*, 632 F.3d 301, 315 (6th Cir. 2011); *Smith v. Bradshaw*, 591 F.3d 517, 522 (6th Cir.), *cert. denied*, 562 U.S. 876 (2010).

Although a procedural default can be excused by an adequate showing of cause and prejudice or actual innocence, Schaaf proffers no excusing cause, presumably because he believes the Twelfth District excused his procedural default by engaging in plain error review. But that is not the law, as shown above. Schaaf's First Ground for Relief should be dismissed as procedurally defaulted.

In the alternative, the First Ground for Relief is without merit. Regarding the first component of the claim – the prosecutor's comment to the venire about why there was to be a trial – is an accurate statement of the law and completely appropriate under the circumstances.

As to the second component – the detective's testimony that Schaaf had declined to be interviewed on advice of counsel – the Twelfth District found that it amounted to use of Schaaf's pre-arrest silence as substantive proof of his guilt and its admission was therefore error, although it was harmless error. *Schaaf*, 2019-Ohio-196, ¶ 20.

When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is

contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011); *Brown v. Payton,* 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor,* 529 U.S. 362, 379 (2000).

Respondent asserts that the correct Supreme Court law to apply to this finding of harmless error is that adopted in *Brecht v. Abrahamson*, 507 U.S. 619 (1993): constitutional error is harmless if the habeas court is satisfied it did not have a substantial and injurious effect or influence in determining the verdict. *Brecht,* adopting standard from *Kotteakos v. United States*, 328 U.S. 750 (1946); *Williams v. Bauman*, 759 F.3d 630, 637 (6th Cir. 2014). This standard calls for reversal when the reviewing court lacks a "fair assurance" that the outcome of a trial was not affected by evidentiary error. *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004). *Brecht* applies post-AEDPA "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the "harmless beyond a reasonable doubt" standard set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705." *Fry v. Pliler*, 551 U.S. 112 (2007).

Petitioner agrees that *Brecht* is the correct standard to apply (Reply, ECF No. 14, PageID 765). However, he argues that it was applied unreasonably. *Id.* The Magistrate Judge disagrees. As the Twelfth District points out, this fact of declining an interview on advice of an attorney was not elicited by the prosecutor, but given by the detective as part of a long response to a very general question[1]. The jury learned as part of the same answer that Schaaf had later agreed to an interview. And there was very substantial additional evidence of Schaaf's guilt. It is very unlikely that the jury's verdict was affected by this statement.

In sum, Petitioner's First Ground for Relief is procedurally defaulted and also without

[1] The question was: "And what are your thoughts as the lead investigator on this case at that time?" The question calls for a narrative response and could possibly have been subject to an objection on that basis.

merit. It should be dismissed on both grounds.

Ground Two: Admission of Statements Taken in Violation of *Miranda v. Arizona*

In his Second Ground for Relief, Schaaf asserts the trial court committed constitutional error by admitting statements he made without compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). Respondent asserts the Second Ground for Relief is without merit (Return, ECF No. 9, PageID 727). Schaaf responds that the failure of the trial court to suppress statements he made, both before and after he was given *Miranda* warnings, was contrary to or an unreasonable application of Supreme Court precedent, permitting relief under 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts, permitting relief under 28 U.S.C. § 2254(d)(2)(Reply, ECF No. 14, PageID 768).

Schaaf presented this claim as his second Assignment of Error on direct appeal and the Twelfth District decided it as follows:

> [*22] THE TRIAL COURT ERRED IN OVERRULING SCHAAF'S MOTION TO SUPPRESS AND ALLOWING INCULPATORY STATEMENTS TO BE ADMITTED DESPITE SCHAAF INVOKING HIS RIGHT TO COUNSEL AND NOT BEING ADMINISTERED MIRANDA WARNINGS.
>
> [*23] Schaaf argues that the trial court should have suppressed both the "lawn mower" interview and his subsequent interview at the police station. Schaaf contends that police should not have questioned him during the lawn mower interview without first advising him of his Miranda rights because he was in "custody" during the interview as police were "badgering" him during questioning. Schaaf also contends that police should not have questioned him at all because he had earlier invoked his right to remain silent. Schaaf argues that his statements during the interview at the police station are fruit of the poisonous tree.
> [*24] This court's review of a trial court's denial of a motion to suppress evidence presents a mixed question of law and fact. *State*

v. Cochran, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Id.* at ¶ 12.

[*25] The state may not use a defendant's statements, whether exculpatory or inculpatory, stemming from custodial interrogation, unless the state demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Durham*, 12th Dist. Warren No. CA2013-03-023, 2013-Ohio-4764, ¶ 15, 999 N.E.2d 1233. However, the police are not required to administer the warnings set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966), to every individual they question. *State v. Byrne*, 12th Dist. Butler Nos. CA2007-11-268 and CA2007-11-269, 2008-Ohio-4311, ¶ 10, citing *Biros*, 78 Ohio St.3d at 440; *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L. Ed. 2d 714 (1977). Rather, the "duty to advise a suspect of constitutional rights pursuant to Miranda is only required when the police subject a person to a custodial interrogation." *State v. Fridley,* 12th Dist. Clermont No. CA2016-05-030, 2017-Ohio-4368, ¶ 35, 93 N.E.3d 10.

[*26] "*Miranda* defines custodial interrogation as any 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of any action in any significant way.'" (Emphasis deleted.) *State v. Matthews*, 12th Dist. Butler No. CA2012-09-175, 2013-Ohio-3482, ¶ 10, quoting *Miranda*, 384 U.S. at 444. "In determining whether an individual was in custody during an interrogation by the police, the court must examine the totality of the circumstances surrounding the interrogation." *State v. Gomez*, 12th Dist. Butler No. CA2017-03-035, 2017-Ohio-8681, ¶ 20, citing *State v. Robinson*, 12th Dist. Butler No. CA2015-01-013, 2015-Ohio-4533, ¶ 12, 48 N.E.3d 109. The determination of whether a custodial interrogation has occurred "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002-Ohio-2068, 2002 Ohio App. LEXIS 1985, *11-12 (Apr. 29. 2002), citing *Stansbury v. California*, 511 U.S. 318, 323-324, 114 S.Ct. 1526, 128 L. Ed. 2d 293 (1994).

Therefore, "[i]n judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.'" *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995- Ohio 24, 653 N.E.2d 253 (1995), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L. Ed. 2d 497 (1980).

[*27] At the suppression hearing, a detective testified that he and his partner drove to Schaaf's home in an unmarked police vehicle. Both detectives wore plain clothes with tactical vests. They observed Schaaf in his yard cutting the grass on a riding lawn mower.

[*28] The detectives motioned for Schaaf to come over to them. Schaaf did not immediately drive over but made a few more passes with the mower. Eventually, he drove over to the detectives, turned the mower engine off, and sat on it while they asked him questions.

[*29] The detectives stood about 15 feet from Schaaf while questioning him. The interview lasted around 50 minutes. Audio of the interview demonstrates that the detectives did not threaten Schaaf nor did Schaaf sound confused or disoriented. Schaaf was not placed into handcuffs until the interview was complete and after he had made inculpatory statements.

[*30] This court finds that the trial court's determination that Schaaf was not in police custody during the lawn mower interview was supported by competent and credible evidence. Consequently, this court finds that police were not required to provide Schaaf with Miranda warnings before the lawn mower interview commenced. Schaaf's statements were voluntary and admissible.

[*31] Next, Schaaf argues that the detectives should not have conducted the lawn mower interview because he had earlier invoked his right to counsel. The United States Supreme Court has held that "[a]n accused * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. at 484-485. However, the *Edwards* rule applies only if the accused invokes his right to an attorney while in custody. *Coleman*, 2002- Ohio 2068, 2002 Ohio App. LEXIS 1985 at *10, citing *United States v. Harris*, 961 F. Supp. 1127, 1135 (S.D. Ohio 1997).

> [*32] Schaaf was not in police custody in February 2017 when he informed detectives by phone that he had been advised against speaking to them by an attorney. For the reasons just discussed, Schaaf was also not in police custody during the lawn mower interview. Accordingly, Schaaf had no Fifth Amendment right to counsel during the lawn mower interview that the detectives could have violated by questioning him. Schaaf was free to ignore the advice of his attorney and speak to police. Based on the foregoing, the trial court also did not err in overruling Schaaf's motion to suppress his statements at the police station. Consequently, this court overrules Schaaf's second assignment of error.

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According to the Sixth Circuit,

> The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. A suspect is "in custody" for purposes of receiving *Miranda* protection if there has been a "formal arrest or restraint on freedom of movement." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California,* 511 U.S. 318, 323 (1994) (per curiam). *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason,* 429 U.S. at 495). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984).

Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003). Even the fact that a person is already in prison, is questioned in private, and is questioned about events in the outside world does not *per se* amount to custodial questioning. *Howes v. Fields*, 565 U.S. 499 (2012).

Schaaf does not dispute the historical factual findings that the so-called lawn mower interview took place at his home in his own yard after he had made several passes over the lawn

with the mower after the detectives appeared. Although they had on tactical vests and were armed, Schaaf does not claim that they drew their weapons. He does not assert that he attempted to leave and was prevented from doing so. Under these circumstances, a reasonable person would not have believed that he was in custody or at least the determination of the Ohio courts to that effect is not an unreasonable determination of the facts in light of the evidence that was before them.

Schaaf's second claim under this Ground for Relief is that his statement at the police station after he had been given *Miranda* warnings should have been suppressed because he had previously invoked his right to counsel, relying on *Edwards v. Arizona*, 451 U.S. at 484-485. However, at the Twelfth District pointed out, "the *Edwards* rule applies only if the accused invokes his right to an attorney while in custody." *Schaaf*, 2019-Ohio-196, ¶ 31 citing *State v. Coleman*, 2002-Ohio-2068, (12th Dist. Apr. 29, 2002), citing this Court's decision in *United States v. Harris*, 961 F. Supp. 1127, 1135 (S.D. Ohio 1997). It is very clear that Schaaf was not in custody when he said he would not talk on advice of counsel in February, 2017.

The Twelfth District's decision on the Second Assignment of Error is neither contrary to nor an objectively unreasonable application of *Miranda* and its Supreme County progeny. Nor is it an unreasonable determination of the facts on the basis of the evidence before the state courts. Schaaf's Second Ground for Relief should therefore be dismissed on the merits.

Ground Three: Insufficient Evidence for Aggravated Murder Conviction

In his Third Ground for Relief, Schaaf claims his conviction for aggravated murder is not supported by constitutionally sufficient evidence. Respondent defends this Ground for Reloief on the merits, contending the Twelfth District's decision is entitled to deference under relevant

Supreme Court precedent (Return, ECF No. 9, PageID 742, et seq.). In his Reply, Schaaf raises both claims made on direct appeal, to wit, that there was insufficient evidence of prior calculation and design and also insufficient evidence to rebut his self-defense claim (ECF No. 14, PageID 777, et seq.).

In his direct appeal, Schaaf argued this claim as his Third Assignment of Error which the Twelfth District decided as follows:

> [*34] THE EVIDENCE DID NOT SUPPORT A CONVICTION FOR AGGRAVATED MURDER.
>
> [*35] Schaaf argues that his convictions for murder and aggravated murder were supported by insufficient evidence and were against the manifest weight of the evidence. The concept of legal sufficiency of the evidence refers to whether the conviction can be supported as a matter of law. *State v. Everitt,* 12th Dist. Warren No. CA2002-07-070, 2003-Ohio-2554, ¶ 10. In reviewing the sufficiency of the evidence, an appellate court must examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found all the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.
>
> [*36] To determine whether a conviction is against the manifest weight of the evidence, a reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Bradbury*, 12th Dist. Butler No. CA2015-06-111, 2016-Ohio-5091, ¶ 17. An appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *Id.* at ¶ 18.
>
> [*37] The aggravated murder count required the state to prove that Schaaf purposely caused Jonathon's death "with prior calculation

and design." R.C. 2903.01(A). Schaaf argues that there was insufficient evidence to support this element because there was no evidence that he planned Jonathon's homicide. Instead, the evidence reflected a mutual combat between father and son which culminated in Schaaf delivering fatal blows in self-defense.

[*38] There is no bright-line test to determine whether prior calculation and design are present; each case must be decided on a case-by-case basis. *State v. Adams,* 12th Dist. Butler No. CA2009-11-293, 2011-Ohio-536, ¶ 23.

> Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

State v. Braden, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶ 61, 785 N.E.2d 439.

[*39] The Ohio Supreme Court has held that the state provided sufficient evidence of prior calculation and design where, during a robbery, the defendant placed a gun to the forehead of a cooperative and unresisting store clerk, who was standing with his hands above his head, and pulled the trigger, instantly killing the clerk. *State v. Goodwin*, 84 Ohio St.3d 331, 344, 1999- Ohio 356, 703 N.E.2d 1251 (1999). Following the murder, the defendant did not flee the store. Instead, the defendant then placed the gun to the forehead of another store clerk and ordered him to go to the store safe. *Id.*

[*40] The court explained that the defendant's decision to place a gun against the victim's forehead required thought. That the defendant took some additional time to decide to pull the trigger showed calculation. The court held that these facts, coupled with the defendant's actions following the killing, demonstrated that the murder was in furtherance of the defendant's robbery scheme and was not a spur-of-the-moment accidental shooting. *Id.*

[*41] The Ohio Supreme Court also found prior calculation and design where the defendant was a participant in a planned robbery at an apartment. *State v. Jackson*, 92 Ohio St.3d 436, 2001- Ohio 1266, 751 N.E.2d 946 (2001). During the robbery, the defendant struck a victim with a handgun, placed a pillow behind her head and threatened to kill her. *Id.* at 436. The victim begged to be spared,

and the defendant did not kill her. Next, the defendant ordered two other victims to lie on the floor next to one another. The defendant then told his accomplice that these prone victims knew who he was, and he would have to kill them. *Id.* One at a time, the defendant placed a pillow against the head of the victims, hesitated, then pulled the trigger, killing both. *Id.* at 436-437.

[*42] The court noted that the defendant's actions again did not demonstrate a spur-of-the-moment decision to kill. Instead, the evidence indicated that the defendant decided to kill the defendants [sic] execution-style after he realized they recognized him, and the defendant took time to retrieve a pillow from the couch to effectuate his calculated plan. *Id.* at 442.

[*43] Schaaf's recorded statements to police establish that he struck Jonathon several times on the head with a door dowel. This action rendered Jonathon unconscious, breathing, and face down on the ground. Schaaf was aware that Jonathon was still alive but also knew that he was "not okay." Schaaf then retrieved a hatchet. He next swung the hatchet multiple times at the back of Jonathon's neck and shoulders. The coroner's testimony and photographs introduced into evidence graphically demonstrated that the blows were delivered with such force that Jonathon was essentially decapitated. Schaaf admitted in his interview at the police station that his purpose in using the hatchet was to make sure that Jonathon was "finished off," ostensibly so that "he wouldn't suffer."

[*44] This court concludes that the evidence in this case, when viewed in a light most favorable to the prosecution, was sufficient to allow the jury to find prior calculation and design. Reasonable jurors could find that Schaaf had time and opportunity to plan Jonathon's homicide between rendering him unconscious with the dowel and the ultimate act of killing. This is demonstrated by Schaaf observing Jonathon's failing medical state following the dowel attack, his subsequent retrieval of a specific weapon, and the decision to employ massive force and repeated blows to ensure that Jonathon was, in Schaaf's words, "finished off." Schaaf's description of using the hatchet for the alleged reason of ending Jonathon's suffering does not indicate a spur-of-the-moment killing during a mutual combat scenario but rather a calculated choice.

[*45] Next, Schaaf argues that the jurors lost their way in finding that he did not act in self-defense. Self-defense, in a deadly force scenario, is an affirmative defense that requires a defendant to prove three elements by a preponderance of the evidence: "(1) the defendant was not at fault in creating the violent situation, (2) the

> defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Goff*, 128 Ohio St.3d 169, 176, 2010-Ohio-6317, ¶ 36, 942 N.E.2d 1075, citing *State v. Thomas,* 77 Ohio St.3d 323, 326, 1997- Ohio 269, 673 N.E.2d 1339 (1997).
>
> [*46] Upon review, this court does not find that the jury lost its way in finding that Schaaf did not meet his burden on self-defense. Schaaf did not testify or otherwise present any evidence. But a self-defense case was nonetheless presented to jurors through the lawn mower interview and his subsequent statements at the police station. Jurors were free to find Schaaf not credible for a variety of reasons, including the absence of any self-defense type injuries on his body, his failure to contact police immediately after the homicide, his casual demeanor contacting 9-1-1 and speaking to a first-responding officer after reporting his son's death, and his deliberate deception during the ensuing police investigation. Consequently, Schaaf's murder convictions were supported by sufficient evidence and were not against the manifest weight of the evidence and this court overrules the third assignment of error.

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Applicable Law

An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia,* 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990)(en banc). In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

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

Jackson v. Virginia, 443 U.S. at 319; *United States v. Paige,* 470 F.3d 603, 608 (6th Cir. 2006); *United States v. Somerset*, 2007 U.S. Dist. LEXIS 76699 (S.D. Ohio 2007). This rule was recognized in Ohio law at *State v. Jenks*, 61 Ohio St. 3d 259 (1991). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *In re Winship, supra.* A sufficiency challenge should be assessed against the elements of the crime, not against the elements set forth in an erroneous jury instruction. *Musacchio v. United States*, 577 U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).

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

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. See *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate

> court's sufficiency determination as long as it is not unreasonable. See 28 U.S.C. § 2254(d)(2).

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

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U. S. 1, ___, 132 S. Ct. 2, 181 L. Ed. 2d 311, 313 (2011) (per curiam). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U. S. ___, ___, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010)).

Coleman v. Johnson, 566 U.S. 650, 651, (2012)(per curiam); *Parker v. Matthews*, 567 U.S. 37, 43 (2012) (per curiam). The federal courts do not make credibility determinations in reviewing sufficiency of the evidence claims. *Brooks v. Tennessee,* 626 F.3d 878, 887 (6th Cir. 2010).

In contrast to a sufficiency of the evidence claim, an assertion that a verdict is against the manifest weight of the evidence does not state a claim arising under the United States Constitution. *Johnson v. Havener*, 534 F.2d 1232 (6th Cir. 1986). Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. § 2254(a); *Wilson v. Corcoran,* 562 U.S. 1

(2010); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida,* 463 U.S. 939 (1983). A habeas court cannot, therefore, consider a manifest weight claim.

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

> In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, (1982), *citing Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Robinson, supra*, 162 Ohio St. at 487, 55 O.O. at 388-389, 124 N.E.2d at 149. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis added.)
>
> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a " 'thirteenth juror' " and disagrees with the factfinder's resolution of the conflicting testimony. *Tibbs*, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720-721 ("The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be

> exercised only in the exceptional case in which the evidence weighs heavily against the conviction.").

78 Ohio St. 3d at 387. In *State v. Martin*, 20 Ohio App. 3d 172 (Hamilton Cty. 1983)(cited approvingly by the Supreme Court in *Thompkins*), Judge Robert Black contrasted the manifest weight of the evidence claim:

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

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

In presenting his Third Assignment of Error to the Twelfth District, Schaaf made both insufficiency and manifest weight arguments. (Appellant's Brief, State Court Record , ECF No. 8, PageID 63-66). In deciding the Third Assignment of Error, the Twelfth District appears to have applied the insufficiency of the evidence standard to the prior calculation and design element and the manifest weight standard to the self-defense argument. Compare *Schaaf*, 2019-Ohio-196, ¶ 37 & 44 (using sufficiency language) with ¶ 45 (using manifest weight – the jury lost its way – language).

Because the manifest weight claim is not cognizable in habeas corpus, this Report will analyze the Third Ground for Relief only as it presents an insufficient evidence claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

GABRIEL SCHAAF,

Petitioner, : Case No. 3:20-cv-090

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

TIM SHOOP, Warden,
Chillicothe Correctional Institution,

:

Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case, brought *pro se* by Petitioner Gabriel Schaaf, is before the Magistrate Judge on recommittal by District Judge Rose (ECF No. 19) to consider Petitioner's Objections (ECF No. 18) to the original Report and Recommendations in this case (the "Report," ECF No. 15).

Schaaf pleaded the following grounds for relief:

> **Ground One:** Schaaf was deprived of a fair trial and due process by the prosecutor's misconduct.
>
> **Supporting Facts:** The prosecutor committed misconduct and violated petitioner's right to a fair trial and due process of law by commenting of petitioner's pretrial silence and his invoking his right to remain silent.
>
> **Ground Two:** The trial court violated petitioner's constitutional rights by allowing pretrial statements made in violation of *Miranda* rights.
>
> **Supporting Facts:** The petitioner's rights against self incrimination and right to remain silent were violated by the state allowing the use

APPENDIX D

> of pretrial custodial interview statements made without *Miranda* warning.
>
> **Ground Three**: The evidence is constitutionally insufficient to support petitioner's conviction for aggravated murder.
>
> **Supporting Facts:** There is insufficient evidence to support petitioner's conviction for the offense of aggravated murder in this case, where several of the facts alleged in this case are wrong and not supported by the evidence.

(Petition, ECF No. 1, PageID 5, 7, 8.)

The Report recommended that Ground One, prosecutorial misconduct, be dismissed as procedurally defaulted or, alternatively, on the merits (ECF No. 15, PageID 790-92). Schaaf makes no objection to either of these two conclusions. The Report likewise recommended that Ground Three, insufficient evidence, be dismissed on the merits. *Id.* at PageID 796-807. Schaaf raises no objections related to Ground Three. The Court may accordingly adopt the Report as to Grounds One and Three without further analysis.

Petitioner reserves his Objections for Ground Two, failure to suppress his statements to the police which were used to incriminate him. The balance of this Supplemental Report analyzes those Objections.

Analysis

Ground Two: Admission of Statements Taken in Violation of *Miranda v. Arizona*

In his Second Ground for Relief, Schaaf asserts the trial court committed constitutional error by admitting statements he made without compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). Respondent defended Ground Two on the merits (Return, ECF No. 9, PageID 727). The

Report recommends dismissing Ground Two on the merits, concluding that the Ohio Twelfth District Court of Appeals decision on this claim, presented as the Second Assignment of Error on direct appeal, was neither an unreasonable application of relevant Supreme Court precedent (28 U.S.C. § 2254(d)(1)) nor based on an unreasonable determination facts in light of the evidence in the state court record (28 U.S.C. § 2254(d)(2))(ECF No. 15, PageID 796).

Petitioner divides his Objections into asserted factual errors (ECF No. 18, PageID 811-12) and legal errors. *Id.* at PageID 812-18. This Supplemental Report response to the Objections in the order they are made, but some of the asserted legal errors are dependent on findings of fact. The appropriate standard to apply to evaluating the Objections may be different depending on whether they challenge a state court finding of fact or a state court legal conclusion. A habeas petitioner must overcome state court findings of fact by clear and convincing evidence in the state court record. 28 U.S.C. § 2254(e); *Cullen v. Pinholster*, 563 U.S. 170 (2011). State court legal conclusions are entitled to deference under Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") unless they are contrary to or an objectively unreasonable application of clearly established federal law as announced in holdings of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Virginia v. LeBlanc,* 582 U.S. ___, 198 L. Ed. 2d 186 (2017); *Woods v. Donald*, 575 U.S. 312 (2015); *Brown v. Payton,* 544 U.S. 133, 134 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). Only holdings of the Supreme Court, not dicta in its opinions, can warrant habeas corpus relief. *Bryan v. Bobby*, 843 F.3d 1099 (6th Cir. 2016), citing *White v. Woodall*, 572 U.S. 415 (2014).

Petitioner's Factual Objections

Schaaf's first objection is to a finding of fact made by the court of appeals (Objections, ECF No. 18, PageID 811). In deciding the case, the Twelfth District Court of Appeals wrote:

> [*28] The detectives motioned for Schaaf to come over to them. Schaaf did not immediately drive over but made a few more passes with the mower. Eventually, he drove over to the detectives, turned the mower engine off, and sat on it while they asked him questions.

State v. Schaaf, 2019-Ohio-196 (Ohio App. 12th Dist. Jan. 22, 2019). The Report accepted the findings of fact made in this paragraph because Schaaf had not contested them:

> Schaaf does not dispute the historical factual findings that the so-called lawn mower interview took place at his home in his own yard after he had made several passes over the lawn with the mower after the detectives appeared. Although they had on tactical vests and were armed, Schaaf does not claim that they drew their weapons. He does not assert that he attempted to leave and was prevented from doing so. Under these circumstances, a reasonable person would not have believed that he was in custody or at least the determination of the Ohio courts to that effect is not an unreasonable determination of the facts in light of the evidence that was before them.

(Report, ECF No. 15, PageID 795-96).

Schaaf now argues:

> However, the appellate court, and subsequently Magistrate Judge Merz, got the sequence of this event out of order. Schaaf only drove over to the detectives after they motioned to him, and then he came straight to them. (P. ID 483) This fact was not fully presented to the trial judge, during the motion to suppress, but during the trial.

(Objections, ECF No. 18, PageID 811). Schaaf does not point to any place in his Reply (ECF No. 14) where he contested these factual findings. He instead cites to a page of the trial transcript where the prosecutor is examining Detective Dean Miller about his efforts to interview Schaaf. Miller testified:

> The following day, on June the 8th, we decided rather than to call him to ask him again to come in, we went to his house. Sole intent of going to his house that day was to confront him with the inconsistencies, confront him with our beliefs of what we thought happened. We did that and arrived that afternoon.
>
> Q. All right. So you showed up at 3994 Sonora?
>
> A. We did.
>
> Q. About what time of day?
>
> A. I'm guessing sometime early afternoon. 2:00, maybe, 3. I'm not real sure to be honest with you.
>
> Q. Was the Defendant home?
>
> A. He was. He was mowing grass in the back yard on a riding lawn mower.
>
> Q. What happened after he realized that you were standing in his back yard?
>
> A. Detective Blevins and I walked to the end of the concrete driveway to where it joined the yard. Mr. Schaaf was, like I said, on his riding lawn mower. He was probably, I don't know, 25 yards across the yard from us. As I recall, he kind of turned, looked at us, made eye contact, went back, kept on mowing. He made eye contact with us again. Detective Blevins kind of motioned for him to come over to us and he did. He drove across the yard and came to where we were at.

(Trial Transcript, State Court Record ECF No. 8-1, PageID 482-83.)

The testimony of Detective Miller supports the factual finding for which Petitioner contends: Schaaf did not stop mowing the grass and approach the officers, even though he had made eye contact with them, until one of them motioned him to come to them. This behavior on Schaaf's part is consistent with other avoidance behavior to which Detective Miller testified. Schaff had told them to come interview him on his job, but they found out that he had been terminated from the job. *Id.* at PageID 482. When they called him about that, he begged off

talking to them by claiming he was sick. *Id.* He tried to avoid a face-to-face interview by asking them to interview him over the phone. *Id.* at PageID 481. Their desire to interview Schaaf was based on their firm conviction that Schaaf was responsible for the killing of his son, based on his behavior of never calling them to ask about the investigation. *Id.* at PageID 480.

Petitioner's second factual objection is:

> When Schaaf invoked his right to not speak, it was in connection to his right to have his attorney present during questioning. And this was in responce [sic] to formal questioning requested by the police. (P. ID 481) This was presented slightly differently during motion to suppress [sic]. (P. ID 217-18).

(Objections, ECF No. 18, PageID 811). Once again, the first transcript reference here is to Detective Miller's testimony at trial. At no point in the testimony transcribed at PageID 481 does Miller say anything about Schaaf invoking his right not to speak. Schaaf here is trying to replace the testimony at the suppression hearing with later testimony at trial, but his Second Assignment of Error, on which the Twelfth District was ruling at the contested portion of their decision, was directed to suppression hearing testimony. *Schaaf,* 2019-Ohio-196, ¶ 27.

Schaaf's third factual objection is that when he canceled an appointment with the detectives, he told them to call his attorney and this is not reflected in the Report (ECF No. 18, PageID 811). But neither the Twelfth District nor the Report made a factual finding to the contrary. The testimony of Detective Miller supports a finding that Schaaf left a voicemail message for the detectives saying that, on advice of an attorney, he was not going to come into the station to talk to them and that they should arrange a meeting with him and his attorney, leaving a couple of phone numbers (Trial Transcript, State Court Record 8-1, PageID 481).

Schaaf's fourth factual error objection is that there is no record of any assertion by police that they ever tried to call Schaaf's attorney (ECF No. 18, PageID 811). So far as the Magistrate

Judge is aware, that is a correct assertion of fact.

Schaaf's fifth factual error omission is that "All of these facts take place after an initial questioning, where Schaaf was Mirandized." (Objections, ECF No. 18, PageID 811, citing Motion Hearing Transcript, State Court Record ECF No. 8-1, PageID 211). Nothing at the cited transcript page says anything about *Miranda*.

Nothing in Schaaf's asserted factual errors shows that any factual conclusion by the Twelfth District, or in the Report which accepted those findings, is clearly erroneous; they merely point to additional facts which could properly have been found. As to the materiality of those facts, Schaaf argues that the detectives should have understood his voicemail as "an invitation to set up an appointment with Schaaf and his attorney together for formal questioning." (Objections, ECF No. 18, PageID 812).

The Magistrate Judge agrees with Petitioner that this would have been a reasonable interpretation of the voicemail and there is no evidence of record that the detectives accepted that invitation. Instead, they went to Schaaf's home and conducted the "lawn mower" interview.

Petitioner's Legal Objections

Petitioner's first legal objection is to the Twelfth District's conclusion that Schaaf was not in custody during the lawn mower interview (Objections, ECF No. 18, PageID 812). The Report deferred to this conclusion (ECF No. 15, PageID 795-96). Schaaf asserts this was an unreasonable application of a myriad of Supreme Court precedents (Objections, ECF No. 18, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)[1]; and

[1] Cited by Schaaf as appearing at 466 U.S. 544.

Collins v. Virginia, 138 S.Ct. 1663 (2018).

The requirement to provide *Miranda* warnings depends on whether the person being questioned is in custody.

> The *Miranda* Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. A suspect is "in custody" for purposes of receiving *Miranda* protection if there has been a "formal arrest or restraint on freedom of movement." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California,* 511 U.S. 318, 323 (1994) (per curiam). *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason,* 429 U.S. at 495). "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984).

Mason v. Mitchell, 320 F.3d 604 (6th Cir. 2003). Petitioner does not contend that he was in custody during the lawn mower interview, but rather that the circumstances of the interview were sufficiently similar to custody that they are equivalent for *Miranda* purposes. He emphasizes that the detectives were armed and wore tactical vests, that the interview took place on his private property in which he had protectible Fourth Amendment interests, and that the detectives showed up unannounced.

Mendenhall does not support Petitioner's position. There the Supreme Court overturned a Sixth Circuit decision that the defendant's consent to search her person was not voluntary and upheld her conviction for possession of heroin with intent to distribute it even though she had not been told that she was free to leave. *Mendenhall* is a Fourth Amendment case and has no holding

pertaining to when a person is in custody for Fifth Amendment purposes.

Collins v. Virginia is also a Fourth Amendment case holding police officers could not search a motorcycle parked within the curtilage of of a defendant's home. Like *Mendenhall*, it has no holdings under the Fifth Amendment.

The circumstances of the lawn mower interview did not require *Miranda* warnings. The wearing of firearms, which were here not unholstered, is commonplace among American law enforcement officer and has been for many years. While tactical vests are a more recent standard issue item, they are purely defensive and would not cause a reasonable person to believe he was in custody. Schaaf was not being held at all, much less being held incommunicado, as he suggests. Accordingly, the Magistrate Judge repeats his conclusion in the Report that "a reasonable person [in Schaaf's situation during the lawn mower interview] would not have believed that he was in custody or at least the determination of the Ohio courts to that effect is not an unreasonable determination of the facts in light of the evidence that was before them." (Report, ECF No. 15, PageID 796).

Petitioner second legal objection is to the conclusion of the Twelfth District, found to be reasonable in the Report, that the trial court was not required to suppress Schaaf's lawn mower statement because he had invoked his right to counsel in his earlier voicemail message. The Twelfth District had concluded that "the *Edwards [v. Arizona*, 451 U.S. 477, 482 (1981)] rule applies only if the accused invokes his right to an attorney while in custody." *Schaaf*, 2019-Ohio-196, ¶ 31.

Schaaf asserts this holding is an unreasonable application of Supreme Court precedent in *Massiah v. United States*, 377 U.S. 201 (1964)[2]; *Smith v. Illinois*, 469 U.S. 91 (1984); *Minnick*

[2] Schaaf gives the citation as 377 U.S. 218 (1967).

v. Mississippi, 498 U.S. 146 (1990); *Rhode Island v. Innis*, 446 U.S. 291 (1981); and *Missouri v. Seibert*, 542 U.S. 600 (2004).

In *Massiah* the Court held that a person formally indicted who had retained counsel, pleaded not guilty, and been released on bail could not have statements later secretly elicited from him by narcotics agents used against him at trial; to do so violated his Sixth Amendment right to counsel. The Twelfth District's decision is not contrary to *Massiah* because, at the time of the questioning, Schaaf had not been indicted or otherwise formally charged. The constitutional right to counsel attaches only upon the initiation of adversary judicial proceedings, such as formal charge, preliminary hearing, indictment, information, or arraignment. *United States v. Gouveia*, 467 U.S. 180 (1984); *Kirby v. Illinois*, 406 U.S. 682 (1972)(no right to counsel in a pre-indictment line-up). The right becomes applicable only when the government's role shifts from investigation to accusation. *Moran v. Burbine*, 475 U.S. 412 (1986).

In *Smith v. Illinois*, the defendant was in custody. During the reading of the *Miranda* warnings, he requested an attorney, but then continued to answer questions. The Supreme Court suppressed the answers to questions asked after the in-custody request for counsel was made. *Smith* is completely consistent that the Twelfth District's determination that Schaaf's voicemail assertion that he wanted an attorney present was not present because it was not made while he was in custody.

Minnick involves a variation on *Smith*: after arrest the defendant requested an attorney and was provided access to one. Thereafter, without the attorney present, questioning resumed. The Supreme Court held the results should have been suppressed because the attorney was not present.

In *Innis*, the Supreme Court held that police officers' expressions of concern to an in-custody defendant about who might be injured if the murder weapon were found did not amount

to interrogation.

Seibert did not produce a majority opinion. In that case, the defendant was taken into custody and transported to the police station for questioning. The police began the questioning without *Miranda* warnings, gave the warnings part-way through, then sought to introduce both the before and after statements. The facts here are different. Officers began the lawn mower interview without taking Schaaf into custody. They arrested him only after he admitted that he had had a physical altercation with his deceased son and had struck him several times with a hatchet. *Schaaf*, 2019-Ohio-196, ¶ 7. At that point he was in custody and was given *Miranda* warnings, whereupon he signed a *Miranda* waiver. *Id.* at 8. Thus Schaaf's post-waiver statements were not the product of continuous in-custody interrogation.

Petitioner's third legal error objection is that the Report "does not comment on the voluntariness or admissibility of Schaaf's statements that he motioned [sic] to suppress." (Objections, ECF No. 18, PageID 817). Schaaf makes no argument that his statements were involuntary and therefore inadmissible other than those already discussed. For example, he does not assert that he was physically threatened. Thus there is no need for a separate "voluntariness" analysis.

Petitioner's fourth legal error objection is "[n] either Magistrate Judge, nor Ohio appellate court addresses Schaaf's 'fruit of the poisonous tree argument.'" Because admission of Schaaf's lawn mower interview was lawful, admission of his post-waiver statements was not the "fruit of a poisonous tree."

Conclusion

Having reconsidered the case in light of the Objections, the Magistrate Judge again recommends that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

November 19, 2020.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,

Appellee,

- vs -

GABRIEL R. SCHAAF,

Appellant.

CASE NO. CA2018-03-004

OPINION
1/22/2019

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 17-CR-12359

Martin P. Votel, Preble County Prosecuting Attorney, Preble County Courthouse, 101 East Main Street, Eaton, Ohio 45320, for appellee

Nicole L. Rutter-Hirth, 2541 Shiloh Springs Road, Dayton, Ohio 45426, for appellant

RINGLAND, J.

{¶ 1} Gabriel Schaaf appeals from his convictions in the Preble County Court of Common Pleas for aggravated murder, murder, and tampering with evidence. For the reasons discussed below, this court affirms Schaaf's convictions.

{¶ 2} At approximately 5:45 p.m. on December 27, 2016, Schaaf called 9-1-1 and reported that he had arrived home from work to find his son – 29 year-old Jonathan Schaaf – dead in their home. Police arrived on scene and found Jonathan deceased and covered with

a towel. He was face down with his head in a pool of blood. He had suffered multiple sharp and blunt force injuries to the head, back of his neck, and upper back.

{¶ 3} Schaaf denied involvement in Jonathon's death. He told police that Jonathon was asleep on the couch when he left for work that morning. When he returned he found a door ajar and noticed some items out of place. Schaaf provided the investigating detectives with potential leads on various individuals who may have wanted to harm his son.

{¶ 4} Police considered Schaaf the primary suspect in Jonathon's death. Nonetheless, they investigated Schaaf's leads over the next six months, none of which resulted in any furtherance of the investigation. In February 2017, detectives called Schaaf and left him a message asking if he would speak with them about the case. Schaaf returned the call, leaving a voicemail stating that he spoke to an attorney who told him not to talk to the detectives. Oddly, Schaaf ended the message by telling police they could call him, or his attorney, if they had any questions.

{¶ 5} Several months later, detectives again called Schaaf and asked if he would speak with them concerning the death investigation. Schaaf told detectives if they wanted to talk they would need to come to him.

{¶ 6} On June 8, 2017, detectives travelled to Schaaf's home. There they observed Schaaf cutting his grass on a riding lawn mower. The detectives then interviewed Schaaf for approximately one hour while he sat on the lawn mower. Detectives recorded the interview in an audio format.

{¶ 7} The detectives confronted Schaaf with inconsistencies in his earlier statements and the evidence revealed in the investigation. They urged Schaaf to admit his involvement in Jonathon's homicide and suggested that the homicide could be justified if done in self-defense. About 25 minutes into the interview, Schaaf revealed that he had been in a physical altercation with Jonathon on December 26, 2016. In addition, Schaaf admitted that

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he struck Jonathon several times with a hatchet.

{¶ 8} The detectives placed Schaaf under arrest and transported him to the police station. Schaaf executed a written waiver of his *Miranda* rights at the station before submitting to a second interview, which was recorded in video format.

{¶ 9} A grand jury subsequently indicted Schaaf for tampering with evidence, a violation of R.C. 2921.12(A)(1), murder, a violation of R.C. 2903.02(A), and aggravated murder, a violation of R.C. 2903.01(A).

{¶ 10} The matter proceeded to a jury trial. The state introduced the testimony of the detectives and a coroner. The state also introduced audio and video recordings of Schaaf's statements including his initial 9-1-1 call, an interview with a responding police officer at the crime scene, the "lawn mower" interview, and the post-arrest interview at the police station. Schaaf rested without introducing evidence but argued self-defense in closing. The court instructed the jury on self-defense.

{¶ 11} The jury returned guilty verdicts on all three counts. The court sentenced Schaaf to 25 years to life in prison. Schaaf raises three assignments of error in this appeal.

{¶ 12} Assignment of Error No. 1:

{¶ 13} SCHAAF WAS DEPRIVED OF A FAIR TRIAL DUE TO THE PROSECUTION COMMENTING ON SCHAAF INVOKING HIS RIGHT TO REMAIN SILENT AND RIGHT TO COUNSEL.

{¶ 14} Schaaf argues that the state deprived him of a fair trial when the prosecutor, during voir dire, stated that there would be no trial if there was no dispute as to what occurred between Schaaf and Jonathon. Schaaf also argues that the state deprived him of a fair trial when a detective testified that Schaaf told the police he would not speak to them on the advice of counsel. Schaaf concedes that he did not object to either claimed instance of error and is limited to a review for plain error.

{¶ 15} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights by influencing the outcome of the proceedings. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Biros*, 78 Ohio St.3d 426, 436 (1997). This court should notice plain error with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice. *State v. Widmer*, 12th Dist. Warren No. CA2011-03-027, 2012-Ohio-4342, ¶ 84.

{¶ 16} To demonstrate that the state deprived him of a fair trial, Schaaf must demonstrate that the prosecutor's comments or actions were improper and prejudicially affected his substantial rights. *See State v. Elmore*, 111 Ohio St. 3d 515, 2006-Ohio-6207, ¶ 62. In making such a determination, the focus is upon the fairness of the trial, not upon the culpability of the prosecutor. *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 57. A finding of prosecutorial misconduct will not be grounds for reversal unless the defendant can establish that he has been denied a fair trial because of the prosecutor's actions. *See State v. Smith*, 12th Dist. Warren No. CA2017-02-013, 2017-Ohio-7540, ¶ 29. During voir dire, the prosecutor stated:

> Does everyone understand that if everyone in this room agreed about what happened on December 26th, 2016, there wouldn't be a need for a trial? In other words, there likely will be a conflict of evidence in this case. Is there anyone who doesn't understand that?
>
> And is there anyone who for any reason does not feel that they could be part of that function of a trier of fact and separate what they think the truth is and what they think the lies are and reach a fair and impartial verdict?

{¶ 17} These statements were appropriate and accurately relayed to jurors that facts

are contested in every trial. The remarks appeared designed to prepare jurors for the unique task of resolving conflicts in evidence in rendering a verdict. The questions posed by the prosecutor were neutrally phrased and did not insinuate that only a guilty or dishonest individual would seek a trial.

{¶ 18} Next, Schaaf argues that the prosecutor committed misconduct by eliciting testimony from a detective concerning Schaaf's right to remain silent. During direct examination, the prosecutor asked the detective what the status of the police investigation was prior to Schaaf's admission to involvement in the homicide. The detective's response explained the various reasons why law enforcement focused its effort on Schaaf as the primary suspect. Those reasons included that the killer had draped a towel over the body, indicating a personal relationship with Jonathon, that the blood on scene appeared coagulated and inconsistent with Schaaf's timeline, Schaaf's demeanor, his failure to contact law enforcement for updates on the investigation for over two weeks following the death, and Schaaf's cancellation of a police interview. With respect to this cancellation, the detective stated that Schaaf called and left a voice message stating that he had talked to his attorney, who advised him not to speak to the police.

{¶ 19} The use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, syllabus. In *Leach*, the Ohio Supreme Court held, in limited circumstances, testimony concerning pre-arrest silence is appropriate if it is introduced as evidence of the "course of the investigation." *Id.* at ¶ 32. The court concluded that while it was improper to admit the investigator's direct testimony regarding the defendant's decision to exercise his right to silence through the invocation of counsel over the telephone, the investigator's testimony regarding the defendant's failure to keep his scheduled appointment with the police was "legitimate." *Id.*

{¶ 20} In this case, detective's testimony on direct examination concerning Schaaf cancelling an appointment based on his attorney's advice not to speak with police was the state's use of pre-arrest silence as substantive evidence of appellant's guilt and was error.[1] However, assuming a Fifth Amendment violation occurred, this court would not find that Schaaf was deprived of a fair trial. As will be addressed below, the murder verdicts were supported by substantial evidence of Schaaf's guilt. *Compare Leach* at ¶ 29 (noting that the defendant was convicted on no physical evidence and only on the credibility of the state's complaining witnesses). Moreover, any error would be harmless because jurors were aware that Schaaf later voluntarily agreed to speak with police and provided them with his version of events wherein he set forth his claim of self-defense. This court overrules Schaaf's first assignment of error.

{¶ 21} Assignment of Error No. 2:

{¶ 22} THE TRIAL COURT ERRED IN OVERRULING SCHAAF'S MOTION TO SUPPRESS AND ALLOWING INCULPATORY STATEMENTS TO BE ADMITTED DESPITE SCHAAF INVOKING HIS RIGHT TO COUNSEL AND NOT BEING ADMINISTERED MIRANDA WARNINGS.

{¶ 23} Schaaf argues that the trial court should have suppressed both the "lawn mower" interview and his subsequent interview at the police station. Schaaf contends that police should not have questioned him during the lawn mower interview without first advising him of his *Miranda* rights because he was in "custody" during the interview as police were "badgering" him during questioning. Schaaf also contends that police should not have questioned him at all because he had earlier invoked his right to remain silent. Schaaf argues that his statements during the interview at the police station are fruit of the poisonous

1. To be clear, there is no indication that the prosecutor intended to elicit this testimony. The detective provided a lengthy response to a general question.

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tree.

{¶ 24} This court's review of a trial court's denial of a motion to suppress evidence presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 12. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Id.* at ¶ 12.

{¶ 25} The state may not use a defendant's statements, whether exculpatory or inculpatory, stemming from custodial interrogation, unless the state demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *State v. Durham*, 12th Dist. Warren No. CA2013-03-023, 2013-Ohio-4764, ¶ 15. However, the police are not required to administer the warnings set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), to every individual they question. *State v. Byrne*, 12th Dist. Butler Nos. CA2007-11-268 and CA2007-11-269, 2008-Ohio-4311, ¶ 10, citing *Biros*, 78 Ohio St.3d at 440; *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711 (1977). Rather, the "duty to advise a suspect of constitutional rights pursuant to *Miranda* is only required when the police subject a person to a custodial interrogation." *State v. Fridley*, 12th Dist. Clermont No. CA2016-05-030, 2017-Ohio-4368, ¶ 35.

{¶ 26} "*Miranda* defines custodial interrogation as any 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of any action in any significant way.'" (Emphasis deleted.) *State v. Matthews*, 12th Dist. Butler No. CA2012-09-175, 2013-Ohio-3482, ¶ 10, quoting *Miranda*, 384 U.S. at 444.

"In determining whether an individual was in custody during an interrogation by the police, the court must examine the totality of the circumstances surrounding the interrogation." *State v. Gomez*, 12th Dist. Butler No. CA2017-03-035, 2017-Ohio-8681, ¶ 20, citing *State v. Robinson*, 12th Dist. Butler No. CA2015-01-013, 2015-Ohio-4533, ¶ 12. The determination of whether a custodial interrogation has occurred "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002 Ohio App. LEXIS 1985, *11-12 (Apr. 29. 2002), citing *Stansbury v. California*, 511 U.S. 318, 323-324, 114 S.Ct. 1526 (1994). Therefore, "[i]n judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.'" *State v. Gumm*, 73 Ohio St.3d 413, 429 (1995), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980).

{¶ 27} At the suppression hearing, a detective testified that he and his partner drove to Schaaf's home in an unmarked police vehicle. Both detectives wore plain clothes with tactical vests. They observed Schaaf in his yard cutting the grass on a riding lawn mower.

{¶ 28} The detectives motioned for Schaaf to come over to them. Schaaf did not immediately drive over but made a few more passes with the mower. Eventually, he drove over to the detectives, turned the mower engine off, and sat on it while they asked him questions.

{¶ 29} The detectives stood about 15 feet from Schaaf while questioning him. The interview lasted around 50 minutes. Audio of the interview demonstrates that the detectives did not threaten Schaaf nor did Schaaf sound confused or disoriented. Schaaf was not placed into handcuffs until the interview was complete and after he had made inculpatory statements.

{¶ 30} This court finds that the trial court's determination that Schaaf was not in police custody during the lawn mower interview was supported by competent and credible evidence. Consequently, this court finds that police were not required to provide Schaaf with *Miranda* warnings before the lawn mower interview commenced. Schaaf's statements were voluntary and admissible.

{¶ 31} Next, Schaaf argues that the detectives should not have conducted the lawn mower interview because he had earlier invoked his right to counsel. The United States Supreme Court has held that "[a]n accused * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. at 484-485. However, the *Edwards* rule applies only if the accused invokes his right to an attorney *while in custody*. *Coleman*, 2002 Ohio App. LEXIS 1985 at *10, citing *United States v. Harris*, 961 F. Supp. 1127, 1135 (S.D. Ohio 1997).

{¶ 32} Schaaf was not in police custody in February 2017 when he informed detectives by phone that he had been advised against speaking to them by an attorney. For the reasons just discussed, Schaaf was also not in police custody during the lawn mower interview. Accordingly, Schaaf had no Fifth Amendment right to counsel during the lawn mower interview that the detectives could have violated by questioning him. Schaaf was free to ignore the advice of his attorney and speak to police. Based on the foregoing, the trial court also did not err in overruling Schaaf's motion to suppress his statements at the police station. Consequently, this court overrules Schaaf's second assignment of error.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE EVIDENCE DID NOT SUPPORT A CONVICTION FOR AGGRAVATED MURDER.

{¶ 35} Schaaf argues that his convictions for murder and aggravated murder were supported by insufficient evidence and were against the manifest weight of the evidence. The concept of legal sufficiency of the evidence refers to whether the conviction can be supported as a matter of law. *State v. Everitt*, 12th Dist. Warren No. CA2002-07-070, 2003-Ohio-2554, ¶ 10. In reviewing the sufficiency of the evidence, an appellate court must examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found all the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 36} To determine whether a conviction is against the manifest weight of the evidence, a reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Bradbury*, 12th Dist. Butler No. CA2015-06-111, 2016-Ohio-5091, ¶ 17. An appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *Id.* at ¶ 18.

{¶ 37} The aggravated murder count required the state to prove that Schaaf purposely caused Jonathon's death "with prior calculation and design." R.C. 2903.01(A). Schaaf argues that there was insufficient evidence to support this element because there was no evidence that he planned Jonathon's homicide. Instead, the evidence reflected a mutual combat between father and son which culminated in Schaaf delivering fatal blows in self-

defense.

{¶ 38} There is no bright-line test to determine whether prior calculation and design are present; each case must be decided on a case-by-case basis. *State v. Adams*, 12th Dist. Butler No. CA2009-11-293, 2011-Ohio-536, ¶ 23.

> Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.

State v. Braden, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶ 61.

{¶ 39} The Ohio Supreme Court has held that the state provided sufficient evidence of prior calculation and design where, during a robbery, the defendant placed a gun to the forehead of a cooperative and unresisting store clerk, who was standing with his hands above his head, and pulled the trigger, instantly killing the clerk. *State v. Goodwin*, 84 Ohio St.3d 331, 344 (1999). Following the murder, the defendant did not flee the store. Instead, the defendant then placed the gun to the forehead of another store clerk and ordered him to go to the store safe. *Id.*

{¶ 40} The court explained that the defendant's decision to place a gun against the victim's forehead required thought. That the defendant took some additional time to decide to pull the trigger showed calculation. The court held that these facts, coupled with the defendant's actions following the killing, demonstrated that the murder was in furtherance of the defendant's robbery scheme and was not a spur-of-the-moment accidental shooting. *Id.*

{¶ 41} The Ohio Supreme Court also found prior calculation and design where the defendant was a participant in a planned robbery at an apartment. *State v. Jackson*, 92 Ohio St.3d 436 (2001). During the robbery, the defendant struck a victim with a handgun, placed a pillow behind her head and threatened to kill her. *Id.* at 436. The victim begged to be

spared, and the defendant did not kill her. Next, the defendant ordered two other victims to lie on the floor next to one another. The defendant then told his accomplice that these prone victims knew who he was, and he would have to kill them. *Id.* One at a time, the defendant placed a pillow against the head of the victims, hesitated, then pulled the trigger, killing both. *Id.* at 436-437.

{¶ 42} The court noted that the defendant's actions again did not demonstrate a spur-of-the-moment decision to kill. Instead, the evidence indicated that the defendant decided to kill the defendants execution-style after he realized they recognized him, and the defendant took time to retrieve a pillow from the couch to effectuate his calculated plan. *Id.* at 442.

{¶ 43} Schaaf's recorded statements to police establish that he struck Jonathon several times on the head with a door dowel. This action rendered Jonathon unconscious, breathing, and face down on the ground. Schaaf was aware that Jonathon was still alive but also knew that he was "not okay." Schaaf then retrieved a hatchet. He next swung the hatchet multiple times at the back of Jonathon's neck and shoulders. The coroner's testimony and photographs introduced into evidence graphically demonstrated that the blows were delivered with such force that Jonathon was essentially decapitated. Schaaf admitted in his interview at the police station that his purpose in using the hatchet was to make sure that Jonathon was "finished off," ostensibly so that "he wouldn't suffer."

{¶ 44} This court concludes that the evidence in this case, when viewed in a light most favorable to the prosecution, was sufficient to allow the jury to find prior calculation and design. Reasonable jurors could find that Schaaf had time and opportunity to plan Jonathon's homicide between rendering him unconscious with the dowel and the ultimate act of killing. This is demonstrated by Schaaf observing Jonathon's failing medical state following the dowel attack, his subsequent retrieval of a specific weapon, and the decision to employ massive force and repeated blows to ensure that Jonathon was, in Schaaf's words,

"finished off." Schaaf's description of using the hatchet for the alleged reason of ending Jonathon's suffering does not indicate a spur-of-the-moment killing during a mutual combat scenario but rather a calculated choice.

{¶ 45} Next, Schaaf argues that the jurors lost their way in finding that he did not act in self-defense. Self-defense, in a deadly force scenario, is an affirmative defense that requires a defendant to prove three elements by a preponderance of the evidence: "(1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Goff*, 128 Ohio St.3d 169, 176, 2010-Ohio-6317, ¶ 36, citing *State v. Thomas*, 77 Ohio St.3d 323, 326 (1997).

{¶ 46} Upon review, this court does not find that the jury lost its way in finding that Schaaf did not meet his burden on self-defense. Schaaf did not testify or otherwise present any evidence. But a self-defense case was nonetheless presented to jurors through the lawn mower interview and his subsequent statements at the police station. Jurors were free to find Schaaf not credible for a variety of reasons, including the absence of any self-defense type injuries on his body, his failure to contact police immediately after the homicide, his casual demeanor contacting 9-1-1 and speaking to a first-responding officer after reporting his son's death, and his deliberate deception during the ensuing police investigation. Consequently, Schaaf's murder convictions were supported by sufficient evidence and were not against the manifest weight of the evidence and this court overrules the third assignment of error.

{¶ 47} Judgment affirmed.

HENDRICKSON, P.J., and M. POWELL, J., concur.

In the Supreme Court of Ohio

STATE OF OHIO, Plaintiff, vs GABRIEL SCHAAF, Defendant.	:	Case No. 19-0355 On appeal from the Twelfth District Court of Appeals, Preble County Case No. 18CA030004 Trial No. 17CR12359

Notice of Appeal

Now comes defendant-Appellant, Gabriel Schaaf, in propria persona, and hereby gives notice of appeal to the Supreme Court of Ohio, the decision of the Court of Appeals, Twelfth District, Preble County, rendered on the 22nd, day of January, 2019, in Appeal No. 18CA030004.

This case involves a felony, raises a substantial constitutional question, and is one of great general interest.

Respectfully submitted,

Gabriel Schaaf
Appellant, Pro se

#742-705
Chillicothe Correctional
P.O. Box 5500
Chillicothe, Ohio 45601

Exhibit 12

IN THE COURT OF COMMON PLEAS, PREBLE COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

V.

CASE NO. 17-CR-12359

GABRIEL R. SCHAAF,

DEFENDANT.

JUDGMENT ENTRY
OF SENTENCE
(Prison Term)

On March 13, 2018, Defendant's sentencing hearing was held pursuant to Ohio Revised Code §2929.19. Defense counsel and the prosecuting attorney or his assistant were present as was the Defendant who was afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of sentencing under §2929.12.

The Court finds that the Defendant has been convicted of:

Offense:	**A violation of ORC Section:**	**Degree:**
Tampering with evidence	2921.12(A)(1)	Third
Murder	2903.02(A)	Unclassified
Aggravated murder	2903.01(A)	Unclassified

as a result of the finding of guilty on each offense by a petit jury.

It is therefore ordered that the Defendant serve a stated prison term as follows:

Offense	**Term**	**Mandatory §2929.13(F)**
Aggravated murder, an unclassified felony	Life with parole eligibility after 25 years	
Tampering with evidence third degree felony	Three years	no

The murder charge and the aggravated murder charge are merged for purposes of sentencing. The third degree felony sentence shall run concurrently to the life sentence.

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APPENDIX F

Exhibit 7

The Court has further notified the Defendant that post release control is mandatory in this case up to a maximum of five years for the second degree mandatory sentence. The Court further advised the Defendant that the Parole Board under Ohio Revised Code §2967. 28 may impose for any violation of conditions of post release control additional prison time above and beyond any prison time ordered by the Court, subject to a maximum of one-half of the time ordered by the Court herein. As part of this sentence, Defendant shall serve a mandatory period of post release control of five years, and any additional term of imprisonment imposed for a violation of post release control.

The Defendant is therefore ordered conveyed to the custody of the Ohio Department of Rehabilitation and Correction. Credit for 278 days is granted as of this date along with future custody days while Defendant awaits transportation to the appropriate state institution.

The Court finds that the Defendant is able-bodied and has the ability to work upon his/her release from prison. Accordingly, Defendant is ordered to pay all costs of prosecution, court appointed counsel costs, and any supervision fees permitted pursuant to Ohio Revised Code §2929.18(A)(4), all for which execution is granted. Upon his/her release from prison, the Defendant shall pay the unpaid financial sanctions mentioned above pursuant to a schedule to be established by the Defendant and the Clerk of Courts.

Bond is ordered released to the person posting same, except that if the Defendant posted his/her own bond, said bond shall be first used toward the payment of court costs, attorney fees, with any balance remaining refunded to Defendant.

The Court advised the Defendant of his right to appeal, his right to counsel and his right to a transcript provided at county expense provided he is indigent.

JUDGE

CC: PROSECUTOR
SHERIFF
JAIL – PETITT
KIRSTEN KNIGHT

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The Supreme Court of Ohio

State of Ohio

v.

Gabriel R. Schaaf

Case No. 2019-0355

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Preble County Court of Appeals; No. CA2018-03-004)

Maureen O'Connor
Chief Justice