UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 21, 2022

Clerk - Middle District of Florida
U.S. District Court
U.S. Courthouse and Federal Building
2110 1ST ST
FORT MYERS, FL 33901

Appeal Number: 21-12978-E
Case Style: Joseph Shook v. State of Florida, et al
District Court Docket No: 2:19-cv-00526-SPC-MRM

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell/aw, E
Phone #: (404) 335-6184

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12978-E

JOSEPH SHOOK,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
SECRETARY, DOC,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Joseph Shook, a Florida prisoner serving a term of life imprisonment for second-degree murder, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition, which raised 13 grounds for relief. He argued that the trial court erred in admitting (1) pictures of the victim's body; and (2) evidence of the victim's petition for a domestic violence injunction and documents pertaining to her divorce proceedings. He also claimed that his counsel performed ineffectively by (3) failing to challenge a prospective juror who was hard of hearing; (4) opening the door to testimony regarding the victim's state of mind; (5) failing to effectively cross-examine Detective Margaret Nosbusch; (6) failing to request a curative instruction after Ruth

Castagner, a state's witness, testified about a handwritten note by the victim; (7) failing to properly question Sherri Dunaske, a state's witness and crime-scene investigator; (8) misadvising him not to testify; (9) failing to object when the prosecutor improperly commented on his decision not to testify during closing arguments; (10) failing to object when the prosecutor improperly argued facts not in evidence during closing arguments; (11) failing to object to an erroneous jury instruction for voluntary manslaughter; (12) failing to call two witnesses to testify; and (13) failing to present evidence that the victim was not afraid of him.

Here, reasonable jurists would not debate the district court's denial of Shook's § 2254 petition. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) (holding that to obtain a COA the movant must demonstrate that "reasonable jurists" would find the district court's determinations debatable). Ground 1 was procedurally defaulted because Shook did not exhaust his federal claim, Shook could not return to state court to exhaust the claim, and no exception to his default applied. *See Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 458 (11th Cir. 2015) (holding that a claim is not exhausted unless it was clearly indicated to the state courts that it was a federal claim); *Bailey v. Nagle*, 172 F.3d 1299, 1302-03 (11th Cir. 1999) (holding that an unexhausted claim is procedurally defaulted if it would now be procedurally barred under state law); *Franqui v. State*, 965 So. 2d 22, 35 (Fla. 2007) (holding that a claim was procedurally barred because it could have been raised on direct appeal); *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (holding that procedural default can be excused by a showing of cause and prejudice or of actual innocence). Ground 2 failed because Shook did not establish the violation of a constitutional right. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (explaining that, when a § 2254 petitioner asserts a claim that has been adjudicated on the merits in state court proceedings, the petitioner bears the burden of proving he is entitled to relief).

Additionally, Ground 3 did not entitle Shook to relief because he offered nothing to establish that the state court's factual finding that the juror did not have problems hearing was incorrect. *See Nejad v. Att'y Gen., State of Ga.*, 830 F.3d 1280, 1289 (11th Cir. 2016) (providing that federal habeas courts must presume that factual findings made by state courts are correct unless the habeas petitioner rebuts that presumption with clear and convincing evidence). Consequently, Shook could not establish that his counsel performed ineffectively by failing to challenge the prospective juror based on the juror's hearing difficulties because the juror did not have problems hearing. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[T]he failure to raise non-meritorious issues does not constitute ineffective assistance."). Grounds 4, 5, 6, 7, 11, and 12 each failed because Shook did not establish that his counsel's purported deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687-97 (1984) (holding that an ineffective-assistance claim requires a showing of deficient performance and resulting prejudice). Ground 8 did not entitle Shook to relief because the record refuted his claim. Grounds 9 and 10 failed because the state post-conviction court reasonably determined that the statements at issue were not improper.

Lastly, Ground 13 did not entitle Shook to relief because the evidence that Shook took issue with his counsel for failing to present would have been cumulative. Thus, Shook could not show that his counsel performed ineffectively by failing to present the evidence. *See Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1157 (11th Cir. 2017) (stating that this Court has "held that counsel's failure to present cumulative evidence is not ineffective assistance."). Accordingly, Shook's motion for a COA is DENIED, and his motion for IFP status is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOSEPH SHOOK,

Petitioner,

v. Case No: 2:19-cv-526-SPC-MRM

STATE OF FLORIDA and
SECRETARY, DOC,

Respondents.
_____/

OPINION AND ORDER[1]

Before the Court is Joseph Shook's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. (Doc. 1).

Background

Joseph Shook is a state prisoner housed at South Bay Correctional Facility in South Bay, Florida. In 2007, the State of Florida charged Shook with the murder of his then-wife, Melissa Shook. (Doc. 11-1 at 16). After a trial, the jury found Shook guilty of second-degree murder. (Doc. 11-1 at 69). The trial court sentenced Shook to life in prison. (Doc. 11-1 at 71-77). Kathleen

[1] Disclaimer: Documents hyperlinked to CM/ECF are subject to PACER fees. By using hyperlinks, the Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide, nor does it have any agreements with them. The Court is also not responsible for a hyperlink's availability and functionality, and a failed hyperlink does not affect this Order.

Fitzgeorge and Katherine Smith represented Shook at trial and sentencing. (Doc. 11-1 at 221).

Shook appealed his conviction and sentence. He raised two issues: (1) the trial court erred in admitting pictures of the victim's body; and (2) the trial court erred by admitting evidence of the petition for a domestic violence injunction and divorce. (Doc. 11-1 at 86-135). The Second District Court of Appeal of Florida (2nd DCA) affirmed without a written opinion. (Doc. 11-1 at 164).

Shook moved for post-conviction relief under Florida Rule of Criminal Procedure 3.850.[2] (Doc. 11-1 at 168-216). He raised eleven grounds of ineffective assistance of counsel:

- Trial counsel failed to challenge a prospective juror with hearing problems
- Trial counsel opened the door to otherwise inadmissible hearsay about the victim's demeanor and state of mind
- Trial counsel failed to cross-examine a state witness who said the victim had gotten a domestic violence injunction because she feared Shook
- Trial counsel failed to ask for a curative instruction after the trial court admitted evidence about a handwritten note by the victim without an adequate predicate
- Trial counsel failed to examine a crime scene investigator about why she failed to collect two other shovels at Shook's home
- Trial counsel advised Shook to not testify
- Trial counsel failed to object to the trial prosecutor's comments in closing about Shook's decision to not testify
- Trial counsel failed to object to prosecutor comments about facts not in evidence
- Trial counsel failed to object to the jury instruction on voluntary manslaughter

[2] His original motion was dismissed without prejudice for violating filing requirements and because some of the claims were facially insufficient. (Doc. 11-1 at 218-219).

- Trial counsel failed to call certain witnesses
- Trial counsel failed to introduce telephone records and pictures as evidence the victim was not afraid of Shook

The state postconviction court denied four of the claims as facially insufficient and ordered the State to respond to the other seven. (Doc. 11-1 at 273-276). After the State responded, the postconviction court denied all grounds. (Doc. 11-11 at 2-152). Shook appealed the order to the 2nd DCA. (Doc. 11-11 at 176-177). He raised the same grounds as he did in the postconviction court. The 2nd DCA affirmed without a written opinion. (Doc. 11-11 at 237).

Shook constructively filed his federal habeas petition on July 25, 2019. (Doc. 1). Respondent responded on December 2, 2019. (Doc. 10). Shook replied on March 10, 2020. (Doc. 14).

Applicable Habeas Law

A. AEDPA

The Antiterrorism Effective Death Penalty Act (AEDPA) governs a state prisoner's petition for habeas corpus relief. 28 U.S.C. § 2254. Relief may be granted only on a claim adjudicated on the merits in state court if the adjudication:

> (1) led to a decision that contradicted, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014). A state court's violation of state law is not enough to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles set forth in the decisions of the United States Supreme Court when the state court issued its decision. *White*, 134 S. Ct. at 1702; *Casey v. Musladin*, 549 U.S. 70, 74 (2006) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Habeas relief is appropriate only if the state court decision was "contrary to, or an unreasonable application of," that federal law. 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of Supreme Court precedent if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, *Brown v. Payton*, 544 U.S. 133, 134 (2005); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either

unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson*, 234 F.3d at 531 (quoting *Williams*, 529 U.S. at 406). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "[T]his standard is difficult to meet because it was meant to be." *Sexton v. Beaudreaux*, 138 S. Ct. 255, 2558 (2018).

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 694 (2002). When the last state court to decide a federal claim explains its decision in a reasoned opinion, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

Finally, when reviewing a claim under 28 U.S.C. § 2254(d), a federal court must remember that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A]

state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").

B. Exhaustion

AEDPA precludes federal courts, absent exceptional circumstances, from granting habeas relief unless a petitioner has exhausted all means of relief available under state law. Failure to exhaust occurs "when a petitioner has not 'fairly presented' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1284 (11th Cir. 2012) (quoting *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010)). The petitioner must apprise the state court of the federal constitutional issue, not just the underlying facts of the claim or a similar state law claim. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). And he must invoke "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Procedural defaults generally arise in two ways:

> (1) where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred; or (2) where the petitioner never raised the claim in state court, and it is obvious that the state court would hold it to be procedurally barred if it were raised now.

Cortes v. Gladish, 216 F. App'x 897, 899 (11th Cir. 2007). A federal habeas court may consider a procedurally barred claim if (1) petitioner shows "adequate cause and actual prejudice," or (2) if "the failure to consider the claim would result in a fundamental miscarriage of justice." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)).

C. Ineffective Assistance of Counsel

Shook raises eleven grounds of ineffective assistance of counsel, a difficult claim to sustain. "[T]he cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (quotation omitted).

In *Strickland v. Washington*, the Supreme Court established a two-part test for determining whether a convicted person may have relief for ineffective assistance of counsel. 466 U.S. 668, 687-88 (1984). A petitioner must establish: (1) counsel's performance was deficient and fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* This is a "doubly deferential" standard of review that gives both the state court and the petitioner's attorney the benefit of the doubt. *Burt*, 134 S. Ct. at 13 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011)).

When considering the first prong, "courts must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance.'" *Sealey v. Warden*, 954 F.3d 1338, 1354 (11th Cir. 2020) (quoting *Strickland*, 466 U.S. at 689).

The second prong requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1355 (quoting *Strickand*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "An ineffective-assistance claim can be decided on either the deficiency or prejudice prong." *Id.* And "[w]hile the *Strickland* standard is itself hard to meet, 'establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)).

In denying Shook's motion for post-conviction relief, the state court recognized that *Strickland* governs a claim of ineffective assistance of counsel. (Doc. 11-11 at 4). This means Shook must show that the state court unreasonably applied *Strickland* or unreasonably determined the facts. In determining "reasonableness," a federal petition for the writ of habeas corpus authorizes determining only "whether the state habeas court was objectively reasonable in its *Strickland* inquiry," not an independent assessment of whether counsel's actions were reasonable. *Putnam v. Head*, 268 F.3d 1223, 1244, n.17 (11th Cir. 2001), *cert denied*, 537 U.S. 870 (2002).

Discussion

The State concedes Shook timely filed the petition, which raises thirteen grounds. It also concedes Shook exhausted all his ineffective assistance of counsel claims.

A. Ground 1: The trial court erred by admitting photographs of the victim's body

Shook argues the trial court should not have admitted pictures of the victim's body because they were irrelevant and highly prejudicial. He apparently argues doing so violated his due process rights under the Fourteenth Amendment.

Though Shook did argue on direct appeal it was erroneous to admit these pictures, he only did so under state rules of evidence and state cases that discuss those rules of evidence. He never presented the due process claim to the state courts. Ground One is thus unexhausted. *See Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 457 (11th Cir. 2015) ("The crux of the exhaustion requirement is simply that the petitioner must have put the state court on notice that he intended to raise a federal claim.").

And even had Shook exhausted this claim, it would fail on the merits. A Florida state court determined admission of the photographs did not violate Florida's rules of evidence. Federal courts will not generally review state trial courts' evidentiary determinations. *Hall v. Wainwright*, 733 F.2d 766, 770

(11th Cir. 1984); *see Lisenba v. California*, 314 U.S. 219, 228 (1941) ("We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence.").

As to Shook's argument that admitting the pictures made the trial unfair, habeas relief is warranted only when an error so infused the trial with unfairness as to deny due process of law. *See Taylor v. Sec'y, Fla. Dep't. of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014). Typically, introducing photographic evidence of a crime victim does not violate a defendant's right to a fair trial. *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989). It does so only where the evidence is "so inflammatory or gruesome, and so critical that its introduction denied petitioner a fundamentally fair trial." *Id.*

At Shook's trial, the photographs were not a crucial component of the prosecution's case. Other pieces of evidence, most notably Shook's fingerprints on the duct tape found on the victim's mouth, were more significant. This ground is denied.

B. Ground 2: The trial court erred in admitting evidence of the victim's petition for domestic violence injunction and documents pertaining to her divorce proceeding

The trial court admitted the final judgment of domestic violence injunction and three documents from Shook's divorce proceeding: a notice of mediation, a notice of trial, and a case management notice. Shook insists this was a mistake. While he makes a conclusory claim that admitting these

documents violated federal law, he only argues the documents were inadmissible hearsay because they were offered to prove his state of mind.

The trial court found the domestic violence action and the dissolution of marriage action relevant to establish motive and intent. (Doc. 11-12 at 262). It permitted them as public records. (Doc. 11-12 at 258-59). But it did not admit documents with hearsay statements. In fact, when making its ruling, the trial court cited *Stoll v. State*, 762 So. 2d 870, 876-77 (Fla. 2000), which stands for the proposition that although a court can take judicial notice of court records, hearsay statements in the documents are not admissible.

Because Shook fails to set forth a violation of his federal constitutional rights, the Court is constrained in its review of this state-law claim. A federal habeas court does not "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The state court determined this evidence was admissible based on its understanding of Florida's evidentiary rules. What is more, the record contradicts Shook's assertion that the state court admitted hearsay evidence because hearsay statements were explicitly excluded. This ground is denied.

C. Ground 3: Trial counsel failed to challenge a prospective juror with hearing problems

Shook claims he was deprived of a fair trial because the jury included a juror with hearing issues.

The state postconviction court found the record contradicted Shook's argument because the juror's hearing was fine. (Doc. 11-11 at 5). A juror told an attorney she was "hard of hearing," and the attorney responded that he was not speaking loudly. The juror did not suggest she needed any accommodation, even after the trial court inquired. Because the record showed the juror was not impaired and merely mentioned having trouble hearing because an attorney was speaking softly, it found Shook had no right to relief.

A federal habeas court presumes the state postconviction court's findings of fact are correct; it is the petitioner's burden to rebut that presumption with clear and convincing evidence. 28 § U.S.C. 2254(e)(1). Shook does not meet that burden. He does not cite any portion of the record that shows the juror could not hear the proceedings, nor does he show why his trial counsel should have struck this juror. Instead, he continues to make a conclusory claim that the juror could not adequately hear even though the record contradicts his assertion.

What is more, because the juror was apparently not hearing impaired, any objection on that basis would have been overruled. It is not ineffective assistance of counsel to fail to make a meritless objection. *See Green v. Georgia*, 882 F.3d 978, 987 (11th Cir. 2018) (holding that the petitioner could not have possibly suffered *Strickland* prejudice where the objection not made would have been futile); *Pinkney v. Sec'y, Dep't of Corr.*, 876 F.3d 1290, 1297 (11th

Cir. 2017) (stating that "an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"). This ground is denied.

D. Ground 4: Trial counsel opened the door to otherwise inadmissible hearsay about the victim's state of mind

Shook alleges his trial counsel allowed the state to introduce otherwise inadmissible evidence about the victim's state of mind. This ground arises from the trial court's decision to overrule an objection made by defense counsel during testimony from the victim's pediatrician.

During cross-examination of the victim's boyfriend, Justin Castagner. Shook's trial counsel asked Castagner whether the victim became unglued because of the stress of taking care of three children. (Doc. 11-12 at 17). Then, during direct examination of Dr. Georgia Roca-Rodriguez, the children's doctor, the following exchange occurred:

> Q: Did you have conversation [sic] with Melissa Shook?
>
> A: Yes, I did.
>
> Q: Did she appear to be worried or upset in any way when you were speaking with her during that visit?
>
> MS. FITZGEORGE: Objection, Your Honor.
>
> THE COURT: Sidebar
>
> THE COURT: The Defendant is present at sidebar. What's your objection, legal basis?

> MS. FITZGEORGE: Several objections. One, it goes to her state of mind. Two, if this is for some person of medical diagnosis there's been no foundation laid. And three, it's irrelevant.

After the prosecutor responded, the trial court issued its ruling:

> THE COURT: Okay. The objection is overruled. The Court finds that the inquiry as it relates to the child's demeanor is relevant to connect why the child went to the Defendant's home. As it relates to the victim's state of mind, the Court finds that there have been three separate occasions during cross-examination that the issue has been raised by the Defense as to the victim's demeanor or state of mind. The most recent being on cross-examination of Mr. Castagner, regarding whether or not the victim would become unglued as it relates to the stress of childrearing or taking care of three children, so for those reasons the Court is overruling the objection as to relevancy and also as to the demeanor or character of the victim. Thank you.

(Doc. 11-12 at 35-37).

Shook exhausted this ground in state court. The state postconviction court denied the claim as facially and legally insufficient. But it also considered the merits, writing:

> [E]ven if it had been facially sufficient, the record reflects that counsel's first objection took place before the comment Defendant complains of in this claim. Additionally, counsel strenuously objected all throughout trial to such evidence. Moreover, to counter the State's argument that the victim had been a happy, cheerful person, defense counsel argued at trial that the victim was stressed and not as happy as everyone seemed to think. Defendant has failed to demonstrate any entitlement to relief.

(Doc. 11-11 at 5) (internal citations omitted).

Shook fails to show the state court unreasonably applied *Strickland*. To make out a successful claim under *Strickland*, Shook must show his counsel's performance was deficient and that he was prejudiced by it. But he fails to do

so. Part of his defense strategy was to call into question the State's presentation of the victim as happy and cheerful. To do that, defense counsel elicited testimony from witnesses that the victim was stressed. That strategy necessarily allowed the prosecution to focus on the victim's state of mind. Shook does not show a reasonable probability of a different outcome had his lawyer abandoned the strategy.

Additionally, Shook's argument focuses on his disagreement with the postconviction court's interpretation of state law. But this Court defers to a Florida state court's interpretation of its own laws. *See Agan v. Vaughn*, 119 F.3d 1538, 1549 (11th Cir. 1997) (It is a "fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters."). This ground is denied.

E. Ground 5: Trial counsel failed to cross-examine a state witness who said the victim got a domestic violence injunction because she feared Shook

Shook claims his defense suffered because his counsel did not cross-examine witness Margaret Nosbush, who testified the victim sought a domestic violence injunction because she feared Shook. Shook also insists a "proper cross-examination would have brought forth crucial evidence that would have helped [his] defense and possibly brought forth an acquittal." (Doc. 1 at 11). He presented this claim to the state postconviction court. That court denied the claim as facially insufficient, but also wrote:

> [E]ven if the claim had been facially sufficient [Shook] would still not be entitled to any relief as the record reflects that defense counsel argued and established at trial through the cross-examination of other witnesses that the victim had not been afraid of Defendant.

(Doc. 11-11 at 6).

The record supports the postconviction court's findings. Indeed, Shook's counsel presented evidence throughout the trial that the victim did not fear Shook. For example, she elicited from multiple witnesses that the victim remained in contact with Shook despite the restraining order. (*See, e.g.*, Doc. 11-12 at 457-58, 310-11). Trial counsel did not fail to address the issue and thus was not deficient. Shook also fails to show prejudice. Though he insists a proper cross-examination would have brought to light exculpatory evidence, he fails to specify what this evidence was. This ground is denied.

F. Ground 6: Trial counsel failed to ask for a curative instruction after the trial court heard testimony about a handwritten note by the victim

This ground arises from a discussion about the admissibility of a refrigerator note. Shook claims an instruction was necessary "to dissipate the prejudice resulting from [the] testimony" about a note written by the victim.

During direct examination of witness Ruth Castagner, the prosecutor asked about a note the victim wrote to her boyfriend, Justin Castagner, and left on the witness's refrigerator door the morning she disappeared. The prosecution sought to introduce the note because it contradicted the contents

of text messages sent by the victim the day she went missing. The prosecution believed the text messages were sent by Shook, not the victim.

Defense counsel objected to the admissibility of the note. After a sidebar, the trial court sustained the objection and said Justin Castagner would have to authenticate the note. The prosecutor withdrew his request to introduce the note because Justin Castagner had already testified and the prosecutor did not want to recall him. The defense also objected to testimony from Ruth Castagner about the contents of the note, and the trial court agreed. Shook believes his counsel should have sought a curative instruction for Justin Castagner's earlier testimony about the note.

The postconviction court found the claim legally and facially insufficient. It also wrote: "the record reflects that [trial] counsel was diligent to protect [Shook's] rights as concerns the note, and that this issue was heavily litigated, both in a motion in limine and at several side-bar conferences, where counsel was often overruled." (Doc. 11-11 at 6).

The postconviction court's ruling was reasonable. A curative instruction attempts to mitigate prejudice after the jury hears inadmissible evidence. Shook fails to identify any prejudice a curative instruction could have mitigated. In fact, it does not appear any of Justin Castagner's testimony was inadmissible. The objection during Ruth Castagner's testimony concerned whether she could authenticate the note. The trial court determined Ruth

Castagner could not authenticate the note and barred her from testifying about its contents. There was no reason for a curative instruction because neither Castagner gave inadmissible testimony about the note, so the decision not to request one was reasonable and did not prejudice Shook. This ground is denied.

G. Ground 7: Trial counsel failed to ask a crime scene investigator why she only collected one of three shovels at Shook's home

Sherri Dunaske testified she collected one shovel from Shook's home so she could compare dirt on the shovel with dirt from the burial site. Shook's lawyer asked her why she did not collect two other shovels. Dunaske said she could not answer because she did not want to get in trouble.

Shook exhausted this claim. The state postconviction court denied the claim as facially and legally insufficient. (Doc. 11-11 at 6). That court also found the merits lacking:

> [E]ven if the claim had been facially sufficient [Shook] would still not be entitled to any relief as the record reflects that trial testimony revealed that testing of the soil samples would not have determined where the victim had been killed. There was also testimony that established that the medical examiner was unable to determine where and when the victim died. As to [Shook's] claim that counsel should have questioned the witness as to why she would have gotten into trouble for answering a question, the claim is conclusory and speculative.

(Doc. 11-11 at 7) (internal citations and quotations omitted).

The state postconviction court properly found trial counsel was not ineffective for failing to ask the witness why she would have gotten into

trouble. In his Petition, Shook contends Dunaske's testimony insinuated there was foul play in how she chose which shovel to examine. But he presents no evidence to support this. Nor does he provide any reason to think the trial's outcome would have been different had trial counsel pressed the issue. Shook fails to show that the state court unreasonably applied *Strickland* or unreasonably determined the facts in denying this ground.

H. Ground 8: Trial counsel advised Shook to not testify

Shook insists his trial counsel should have called him to the stand because he was the only person who could testify in support of his alibi defense. The state postconviction court denied the claim as facially insufficient, writing:

> In the instant case, the record reflects that counsel was very careful to convey to the trial court her need to have sufficient time to speak with Defendant about his decision to testify and the court provided such time. Moreover, the record reflects that Defendant did, in fact, voluntarily agree with counsel not to testify. However, Defendant does not specify what advice counsel gave him and how that advice was ineffective. As this claim was also raised in the original motion that was dismissed as facially insufficient, and as Defendant has already been given an opportunity to amend pursuant to Spera, there is no need to grant him another. Thus, this Court may deny the claim on that basis.

(Doc. 11-11 at 7-8) (internal citations omitted).

Shook now contends his counsel told him it would be unwise and unnecessary for him to testify. Even so, the record shows that Shook understood it was his decision—and his decision alone—not to testify:

> THE COURT: Please be seated, sir. Mr. Shook were you given an opportunity last evening in private to consult with your counsel, Ms. Smith and Ms. Fitzgeorge, who are present with you and have been with

> you throughout the trial, regarding your decision to testify or not to testify.
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Mr. Shook, do you understand that it is ultimately your decision and yours alone; do you understand that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Have you had ample opportunity to speak with your counsel about it?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And have you made a decision as it relates to that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Is that a decision that has been forced or pressured upon you?
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: Is it a decision that you came about on your own free will, sir?
>
> THE DEFENDANT: Yes, ma'am.

(Doc. 11-13 at 93-94). The trial court then read aloud the instructions it would read to the jury depending on whether Shook testified. (Doc. 11-13 at 94-95). The discussion concluded with the following:

> THE COURT: Having read those two instructions to you, Mr. Shook, I will now ask after consultation with your counsel what your decision is in this regard.
>
> THE DEFENDANT: On advice of my counsel, I will not testify.
>
> THE COURT: Is that also your decision and yours alone?
>
> THE DEFENDANT: Yes, ma'am.

(Doc. 11-13 at 95).

A criminal defendant has a fundamental constitutional right to testify on his own behalf at trial that cannot be waived by defense counsel. *United States v. Teague*, 953 F.2d 1525, 1534-35 (11th Cir. 1992). For counsel to be effective in the context presented here, counsel must advise the defendant (1) of his right to testify or not testify; (2) of the strategic implications of each choice; and (3) that it is ultimately for the defendant himself to decide whether to testify. *McGriff v. Dep't of Corr.*, 338 F.3d 1231, 1237 (11th Cir. 2003).

The record shows Shook knew it was his decision whether to testify. After speaking with his counsel, he decided to not testify. But he does not provide details of his conversations with his counsel about whether to testify. As such, he does not show that his attorney's advice was unreasonable or based on an incorrect understanding of the law. Nor does he demonstrate that his proposed alibi testimony would likely have changed the trial's outcome. *See Johnson v. United States*, 294 F. App'x 709, 711 (3d Cir. 2008) (affirming district court's denial of habeas relief when petitioner only provided a vague and conclusory claim that his testimony would have changed the trial's result). *Strickland* requires that Shook show a reasonable probability the trial result would have been different had he testified. He fails to do so. This ground is denied.

I. Ground 9: Trial counsel failed to object to the prosecutor's comments about Shook's decision to not testify

In closing arguments, the prosecutor told the jury, "Well, if you remember from the testimony of...the victim's mother, the Defendant called her the day after the disappearance and claimed that [the victim] wanted [to] get back with him, drop the divorce, and by doing so he is telling you the jury precisely what he wants." (Doc. 11-11 at 8). Shook asserts this comment was an inappropriate comment on his decision not to testify. The postconviction court reviewed the trial transcript and determined "the State was commenting on the verbal content of the phone call between the witness and Defendant and commenting on his state of mind." (Doc. 11-11 at 9).

The Court agrees with the state court's determination. The prosecutor's comment was not a remark on Shook's decision to not testify. Thus, there would be no reason for trial counsel to object. And there is no reasonable likelihood that the outcome of the trial would have been different had Shook's counsel objected. This claim is denied.

J. Ground 10: Trial counsel failed to object to prosecutor comments about facts not in evidence

In his closing statement, the prosecutor told the jury that Shook said he had visions of the victim being buried in the woods. Shook insists his attorney should have objected because this was not in evidence. The state postconviction court disagreed:

> However [sic] the record reflects that when Detective Kalstrom asked Defendant "if he had any idea where his wife Melissa Shook might be," Defendant "didn't have any specific knowledge of that. He had a vision, if you will, of seeing her dead in the woods..." Because there was testimony at trial to this effect, the State's closing statement was not improper.

(Doc. 11-11 at 10 (citations omitted)).

The record supports the state court's conclusion and refutes Shook's claim. During trial, Detective Kalstrom testified that before the victim's body was found he asked Shook where the victim was. Shook replied that he did not know but described seeing a vision of her dead in the woods. (Doc. 11-12 at 476-77). The prosecutor was free to refer to this evidence during closing argument. Any objection would have been futile.

The postconviction court reasonably applied *Strickland*.[3] Counsel cannot be deemed deficient for failing to make a meritless objection. This ground is denied.

K. Ground 11: Trial counsel failed to object to the jury instruction on voluntary manslaughter

Shook believes the following jury instruction on voluntary manslaughter was inaccurate and warranted an objection:

---

[3] In both his Petition and his Reply, Shook conflates a claim of prosecutorial misconduct with a claim of ineffective assistance of counsel. Because the only claim raised in state postconviction proceedings was an ineffective assistance of counsel claim, any allegations of prosecutorial misconduct are unexhausted and barred from federal habeas review.

> To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. Melissa Jill Shook is dead
> 2. (a) Joseph Ray Shook committed an intentional act that caused the death of Melissa Jill Shook; or
> (b) The death of Melissa Jill Shook was caused by the culpable negligence of Joseph Ray Shook.

(Doc. 11-1 at 57). Shook insists his trial counsel was ineffective "for not objecting to the prejudicial jury instruction where the manslaughter by act instruction erroneously requires intent to kill, and the only non-intentional homicide offense remaining for the jury's consideration is second degree murder." (Doc. 1 at 19). Shook properly exhausted this claim. The state postconviction court found the jury instruction was appropriate and thus trial counsel had no basis for an objection. This Court agrees.

Contrary to Shook's assertions, the trial court did not instruct the jury that intent to kill is an element of voluntary manslaughter. Shook points to *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010), a Florida Supreme Court case that found a prior pattern instruction for manslaughter incorrect. But the trial court in Shook's case did not give that erroneous instruction. Rather, it tracked the post-*Montgomery* pattern instruction, which correctly requires an intentional act, not an intent to kill. *See Daniels v. State*, 121 So. 3d 409, 416-17 (Fla. 2013) (citing *In re Amendments to Standard Jury Instructions in Criminal Cases—Instruction 7.7*, 75 So. 3d 210, 211-12 (Fla. 2011)). Because

there was nothing wrong with the instruction, there was no basis for an objection.

The state postconviction court's denial of this claim was a reasonable application of *Strickland.*

L. Ground 12: Trial counsel failed to call witnesses

Shook argues his trial counsel was ineffective for failing to call Sandra Emory and Grant Fitcher to testify. Shook claims Emory would have testified that Shook called her between 10:30 and 11:00 a.m., the time during which he alleges the victim was killed. (Doc. 11-1 at 238). And he claims Fitcher would have testified the victim did not fear Shook and that Shook called him between noon and 12:30 p.m. every day to give a weather report. Together, Shook contends, the proposed witnesses would have provided an alibi.

Whether to call a particular witness is a question of trial strategy that should seldom be second guessed. *Conklin v. Schofield*, 366 F.3d 1193, 1204 (11th Cir. 2004), *cert denied*, 544 U.S. 952 (2005). Complaints of uncalled witnesses are not favored. *Long v. McNeil*, No. 09-60250-Civ., 2010 WL 1138913, at * 4 (S.D. Fla. Feb. 10, 2010) (citations omitted).

The postconviction court found that the proposed testimony was not exculpatory because "there was no certain evidence that the victim was killed between 10:30 a.m. and 11:00 a.m." (Doc. 11-11 at 10). The information alleged that Shook killed the victim between July 24, 2007, and July 29, 2007, and the

coroner explained why she could not give a more precise time of death. (*Id.*) The postconviction court held that the proposed testimony could only be considered alibi evidence if it covered the entire multi-day period. (*Id.* at 11).

The Court agrees. The proposed testimony of Emory and Fitcher would not have provided a plausible alibi. Proof that Shook made brief phone calls during the multi-day period when the victim died would not have meaningfully undermined the State's case. And Fitcher's proposed testimony that the victim was not afraid of Shook would have been cumulative because other witnesses testified to that effect. The postconviction court properly applied *Strickland.*

M. Ground 13: Trial counsel failed to present phone records and pictures

Shook argues that unused telephone records and pictures would have shown the victim was not afraid of him. The postconviction court denied the claim because "the record reflects that all throughout trial, defense counsel argued and was able to establish that the victim was not afraid of Defendant." (Doc. 11-11 at 12). For instance, the victim's stepmother testified the victim took her children to visit Shook and had contact with him despite a domestic violence injunction. (Doc. 11-12 at 311). And an investigator testified it was not unusual for the victim to visit Shook to drop off the children. (Doc. 11-12 at 457).

Shook's counsel successfully elicited testimony showing that the victim did not fear him. And during closing argument, the defense highlighted a lack of evidence the victim feared Shook and noted that the victim regularly brought the children to Shook's home. (Doc. 11-13 at 174). The postconviction court reasonably found the phone records and pictures unnecessary. (Doc. 11-11 at 12).

Shook failed to establish either *Strickland* prong. Trial counsel established that the victim was not afraid of Shook, and there is no reasonable probability that the proposed additional evidence would have made a difference. Additional evidence from telephone records and pictures would have been cumulative and extremely unlikely to affect the jury's verdict.

DENIAL OF CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). "A [COA] may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (*quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or that "the issues presented were adequate to deserve

encouragement to proceed further," *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (citations omitted). Shook has not made the requisite showing here and may not have a certificate of appealability on any ground of his Petition.

Accordingly, it is now

ORDERED:

Joseph Shook's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is **DENIED**. The Clerk is **DIRECTED** to terminate any pending motions and deadlines, enter judgment, and close this case.

DONE and **ORDERED** in Fort Myers, Florida on August 2, 2021.

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 27, 2022

Joseph Shook
South Bay CF - Inmate Legal Mail
PO BOX 7171
SOUTH BAY, FL 33493

Appeal Number: 21-12978-E
Case Style: Joseph Shook v. State of Florida, et al
District Court Docket No: 2:19-cv-00526-SPC-MRM

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED. NO FURTHER ACTION WILL BE TAKEN ON THIS APPEAL.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gloria M. Powell, E
Phone #: (404) 335-6184

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12978-E

JOSEPH SHOOK,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
SECRETARY, DOC,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

Joseph Shook has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated March 21, 2022, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed on appeal *in forma pauperis*, in his appeal from the district court's denial of his *pro se* 28 U.S.C. § 2254 habeas corpus petition. Because Shook has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.