

## Appendix A

No. 22-1247

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

Nov 3, 2022

DEBORAH S. HUNT, Clerk

SHANE SWINDALL CHAMBERS,

Petitioner-Appellant,

v.

FREDEANE ARTIS, Acting Warden,

Respondent-Appellee.

ORDER

Before: BATCHELDER, Circuit Judge.

Shane Swindall Chambers, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Chambers requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). He also requests leave to proceed in forma pauperis.

Barbara Andre, a 77-year-old woman, was beaten, sexually assaulted, and robbed after a man broke into her home while she was sleeping. Although Andre could not identify the perpetrator, investigation of the crimes led law enforcement officers to Chambers, and he was charged with the crimes committed against Andre. A jury found Chambers guilty of two counts of first-degree criminal sexual conduct, one during a felony and one causing personal injury; first-degree home invasion; and assault with intent to do great bodily harm less than murder. At sentencing, the trial court vacated the criminal-sexual-conduct-during-a-felony conviction. Chambers was sentenced to serve life in prison for the remaining criminal-sexual-conduct conviction, to run consecutively to concurrent sentences of 25 to 50 years in prison for the home-invasion conviction and 10 to 50 years in prison for the assault conviction. The Michigan Court of Appeals affirmed Chambers's convictions. *People v. Chambers*, No. 323024, 2015

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WL 8538928 (Mich. Ct. App. Dec. 10, 2015) (per curiam). The Michigan Supreme Court denied leave to appeal.

Chambers filed a post-conviction motion for relief from judgment. The trial court denied Chambers's motion, and the Michigan appellate courts denied leave to appeal.

In this habeas corpus petition, Chambers claimed that (1) the trial court improperly admitted propensity evidence at trial, (2) insufficient evidence was presented to support his criminal-sexual-conduct conviction, (3) insufficient evidence was presented to support his home-invasion and assault convictions, (4) he was denied a fair trial and the right of confrontation when the preliminary-examination testimony of three witnesses was introduced at trial, and trial counsel was ineffective for failing to object, (5) the trial court lacked jurisdiction over his prosecution due to an improper bindover, and (6) the prosecutor maliciously prosecuted him and committed misconduct during his trial. The district court denied Chambers's habeas corpus petition and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability 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).

In his first claim, Chambers challenged the admission of propensity evidence at his trial. Specifically, he challenged the testimony of Joan Schroeder and Cathie Nelson. The Michigan Court of Appeals determined that this testimony was properly admitted under state evidentiary rules to show "a common scheme, plan, or system." *Chambers*, 2015 WL 8538928, at \*2-4. It also noted that the risk of unfair prejudice did not outweigh the probative value of the evidence, pointing out that the trial court instructed the jury that a guilty verdict could not be based on

propensity evidence, and that even without the propensity evidence, substantial evidence supported Chambers's guilt. *Id.* at \*4.

The state appellate court's interpretation of its own law and evidentiary rules, "including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). In addition, Chambers failed to show that any error on the part of the state trial court in applying Michigan evidentiary rules was "sufficiently egregious to amount to a denial of" due process. *See Pulley v. Harris*, 465 U.S. 37, 41 (1984). "There is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence"; therefore, reasonable jurists could not debate the district court's conclusion that the admission of such evidence is not contrary to or an unreasonable application of clearly established federal law. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *see* 28 U.S.C. § 2254(d)(1).

In his second claim, Chambers challenged the sufficiency of the evidence supporting his criminal-sexual-conduct conviction. He admitted that the evidence was sufficient to show personal injury and force but argued that it was insufficient to show sexual penetration. In his third claim, Chambers challenged the sufficiency of the evidence supporting his home-invasion and assault convictions, arguing that the evidence was insufficient to identify him as the perpetrator.

The evidence is sufficient to support a conviction if, "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On habeas review, application of this standard involves two levels of deference when the state courts have rejected an insufficiency claim on the merits. *Brown v. Konteh*, 567 F.3d 191, 204-05 (6th Cir. 2009). First, the federal court analyzes the claim under the *Jackson* standard, whereby it may not "reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Id.* at 205. Second, the federal court defers "to the *state appellate court's* sufficiency determination as long as it is not unreasonable." *Id.*; *see Parker v. Matthews*, 567 U.S. 37, 43 (2012) (per curiam). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United*

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*States v. Lowe*, 795 F.3d 519, 522-23 (6th Cir. 2015) (quoting *United States v. Algee*, 599 F.3d 506, 512 (6th Cir. 2010)).

The Michigan Court of Appeals set forth the proper standard of review for an insufficient-evidence claim and concluded that sufficient evidence was presented to support Chambers's convictions. *Chambers*, 2015 WL 8538928, at \*4-5. Regarding penetration, it found that, although Andre testified that she lost consciousness when she was beaten, she also testified that she was wearing underwear when she went to sleep but, when she regained consciousness, her underwear was missing, her pelvic area was severely bruised, and her vaginal area was very sore and raw. *Id.* at \*5. It also noted that Kristin Reinink, a nurse who examined Andre after the assault, testified that Andre's vaginal area was swollen, scratched, and painful to the touch, and that her injuries "were consistent with penetration." *Id.* Regarding identity, the state appellate court found that Chambers possessed Andre's credit card and a purse resembling Andre's shortly after Andre was victimized, that Chambers described kicking in a door and told Shannon Colvin that he stole the purse resembling Andre's, that Andre's door was damaged and her purse was stolen, that Chambers had a tan car, and that Andre testified that a man driving a light colored car offered to help her carry items inside her home hours before she was assaulted. *Id.*

The district court concluded that the state appellate court's rejection of Chambers's sufficiency-of-the-evidence claims was neither contrary to nor an unreasonable application of federal law. Reasonable jurists would not debate that conclusion. Andre's and Reinink's testimony was sufficient to permit a rational jury to find that sexual penetration occurred so as to support Chambers's criminal-sexual-conduct conviction. *See Lowe*, 795 F.3d 519, 522-23. Testimony that Chambers was found in possession of Andre's credit card and that Chambers described kicking in a door and stealing a purse resembling Andre's, among other evidence, was sufficient to permit a rational jury to find that Chambers committed the home-invasion and assault crimes against Andre. Chambers essentially asks that this court reweigh the evidence in his favor, which is improper on habeas corpus review. *See Brown*, 567 F.3d at 205. The evidence presented by the State supports Chambers's convictions, and Chambers's contrary interpretation of the

evidence does not mean that a rational factfinder could not have found him guilty of the crimes beyond a reasonable doubt.

Chambers's fourth claim is that he was denied a fair trial and the right of confrontation when the preliminary-examination testimony of three witnesses was introduced at trial. He argues that the State should not have been permitted to introduce the preliminary-examination testimony of Stacy Gatlin, Markeeta Minor, and Ciesha Minor, who were not present at the trial, because the State did not diligently attempt to locate these witnesses. He also claims that trial counsel was ineffective for failing to object to the presentation of the preliminary-examination testimony at trial.

The Confrontation Clause prohibits the prosecution from substituting former testimony for live testimony unless the prosecution demonstrates that the witness is "unavailable to testify" and that "the defendant . . . had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A witness is unavailable for purposes of the Confrontation Clause if "the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

The Michigan Court of Appeals concluded that Chambers "waived any claim of error with respect to the admission of [the preliminary-examination] testimony at trial when his counsel agreed that the prosecutor had made sufficient efforts to secure the witnesses in question." *Chambers*, 2015 WL 8538928, at \*6. It also concluded that counsel was not ineffective for failing to object to the presentation of the preliminary-examination testimony at trial because admission of the testimony did not violate Chambers's right of confrontation. *Id.* at \*6-8. It found that the State showed that diligent efforts were made to locate all three witnesses for trial, that the witnesses were unavailable because they could not be located, and that because Chambers had an opportunity and similar purpose to cross-examine all three witnesses during the preliminary examination as he would at trial, his confrontation rights were not violated when the trial court admitted their preliminary-examination testimony at trial. *Id.* at \*7.

The district court concluded that the state court's rejection of Chambers's confrontation claim was neither contrary to nor an unreasonable application of federal law. Reasonable jurists

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would not debate that conclusion. The state appellate court's interpretation of its own law when concluding that Gatlin and the Minors were unavailable and that the admission of their preliminary-examination testimony was proper is binding on a federal habeas corpus court. *See Bradshaw*, 546 U.S. at 76. Additionally, Chambers failed to show that his confrontation rights were violated under federal law. Chambers failed to refute the state appellate court's conclusion that these witnesses were unavailable to testify at trial and that he had an opportunity and similar motive to cross-examine them during the preliminary examination. *See* 28 U.S.C. § 2254(e)(1); *Crawford*, 541 U.S. at 53-54. The State explained that it attempted to locate Gatlin and the Minors for trial by contacting their parents, seeking assistance from road patrol officers to find them, and issuing material witness warrants. When those reasonable efforts failed to locate the witnesses, the witnesses were unavailable for trial. *See Barber*, 390 U.S. at 724-25. Reasonable jurists also would agree that the state court did not unreasonably apply clearly established Supreme Court precedent when it concluded that Chambers had an opportunity and a similar motive to cross-examine the witnesses during the preliminary examination. *See Al-Timimi v. Jackson*, 379 F. App'x 435, 437-40 (6th Cir. 2010).

Chambers also claimed that trial counsel was ineffective for failing to object to the presentation of the preliminary-examination testimony at trial.

The district court rejected Chambers's ineffective-assistance-of-counsel claim as meritless. Reasonable jurists would not debate the district court's decision because the record supports the state appellate court's determination that Chambers's right of confrontation was not violated because the three witnesses were unavailable for trial and he had an opportunity to cross-examine them on the issues pertinent to his trial during the preliminary examination. *See Crawford*, 541 U.S. at 53-54. Counsel is not ineffective for failing to pursue a meritless objection. *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011).

Chambers's fifth claim is that the trial court lacked jurisdiction over his prosecution due to an improper bindover to the trial court. He argued that the state district court abused its discretion by finding probable cause to bind him over for trial based on the improper admission of testimony

from propensity witnesses during the preliminary examination and the lack of eyewitness or physical evidence connecting him to the crimes.

Reasonable jurists would not debate the district court's determination that the state trial court's rejection of this claim on post-conviction review was neither contrary to nor an unreasonable application of federal law. A probable cause finding "is not a constitutional prerequisite to the charging decision." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975). Instead, the decision to bind over a defendant for trial presents an issue of state law. *See Tegeler v. Renico*, 253 F. App'x 521, 525-26 (6th Cir. 2007). Additionally, the "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary." *Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976) (per curiam); *see Strunk v. Martin*, 27 F. App'x 473, 475 (6th Cir. 2001). Chambers has not shown "how this alleged violation of state law affected his rights under the Federal Constitution." *Tegeler*, 253 F. App'x at 525.

Chambers's sixth claim is that the prosecutor maliciously prosecuted him and committed misconduct during his trial. He asserted that his prosecution was malicious because no eyewitnesses identified him as the perpetrator, no physical evidence connected him to the crimes, the witnesses who testified were not credible, and the evidence presented was not reliable. He asserted that the prosecutor committed misconduct by bolstering and relying on Shroeder's testimony, denigrating both him and his defense, misstating Andre's testimony concerning when she experienced vaginal pain and her description of the color of the vehicle she saw hours before she was assaulted, and presenting irrelevant and prejudicial testimony from his ex-girlfriend, Tracy Drilling, concerning their sexual relations.

Reasonable jurists would not debate the district court's determination that the state trial court's rejection of this claim on post-conviction review was neither contrary to nor an unreasonable application of federal law. First, Chambers did not show that the State lacked probable cause to bring the charges against him. The Due Process Clause prohibits vindictive prosecution and prosecution based on an improper purpose "such as race, religion, or other arbitrary classification," but "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and



what charge to file or bring . . . generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). As previously discussed, sufficient evidence was presented to convict Chambers of the charged offenses. And, as the district court found, there is nothing in the record to indicate that the prosecutor’s decision to charge Chambers with these crimes was vindictive or based on any improper purpose.

Second, Chambers did not show that the prosecutor committed misconduct during his trial. A prosecutor’s comments at trial will not rise to the level of prosecutorial misconduct unless they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). It is permissible for a prosecutor “to argue ‘reasonable inferences from the evidence’” presented at trial. *Webb v. Mitchell*, 586 F.3d 383, 396-97 (6th Cir. 2009) (quoting *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000)). And although a prosecutor may not denigrate the defendant or his defense, *see Wogenstahl v. Mitchell*, 668 F.3d 307, 330-31 (6th Cir. 2012), a prosecutor may “respond to the defense’s strategies, evidence and arguments” during closing arguments. *Bedford v. Collins*, 567 F.3d 225, 233 (6th Cir. 2009). A prosecutor improperly vouches for a witness “by indicating a personal belief in the witness’s credibility thereby placing the prestige of the [government] behind that witness.” *Wogenstahl*, 668 F.3d at 328 (alteration in original) (quoting *Johnson v. Bell*, 525 F.3d 466, 482 (6th Cir. 2008)). “Generally, improper vouching involves either blunt comments or comments that imply that the prosecutor has special knowledge of facts not in front of the jury or of the credibility and truthfulness of witnesses and their testimony.” *Id.* (quoting *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999)).

Chambers cites no facts or evidence to support his claims that the prosecutor improperly bolstered Schroeder’s testimony and denigrated him and his defense. In any event, these claims are not supported by the record because the prosecutor’s closing arguments lack any bolstering or denigrating comments but are instead tied to evidence presented during the trial. Moreover, the prosecutor did not misstate Andre’s testimony concerning when she experienced vaginal pain and her description of the color of the vehicle that she saw hours before she was assaulted.

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Finally, Chambers failed to show that the prosecutor's presentation of Drilling's testimony was improper. The trial court overruled Chambers's relevancy objection and allowed Drilling's testimony. "A prosecutor may rely in good faith on evidentiary rulings made by the state trial judge and make arguments in reliance on those rulings." *Cristini v. McKee*, 526 F.3d 888, 900 (6th Cir. 2008).

For these reasons, the application for a certificate of appealability is **DENIED** and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

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Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Nov 3, 2022  
DEBORAH S. HUNT, Clerk

No. 22-1247

SHANE SWINDALL CHAMBERS,

Petitioner-Appellant,

v.

FREDEANE ARTIS, Acting Warden,

Respondent-Appellee.

Before: BATCHELDER, Circuit Judge.

**JUDGMENT**

THIS MATTER came before the court upon the application by Shane Swindall Chambers for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

**ENTERED BY ORDER OF THE COURT**

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Deborah S. Hunt, Clerk

## Appendix K

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHANE SWINDALL CHAMBERS,

Petitioner,

v.

CASE NO. 2:19-CV-11396  
HONORABLE PAUL D. BORMAN

MARK MCCULLICK,

Respondent.

**JUDGMENT**

The above-entitled matter having come before the Court, the Honorable Paul D. Borman, United States District Judge, presiding, and in accordance with the Opinion and Order entered on this date;

**IT IS ORDERED AND ADJUDGED** that the Petition for a Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2254 is **DENIED** and **DISMISSED WITH PREJUDICE**.

KINIKIA ESSIX  
CLERK OF THE COURT

Dated: March 1, 2022

By:

s/D. Tofil  
Deputy Clerk

APPROVED BY:

s/Paul D. Borman  
PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHANE SWINDALL CHAMBERS,

Petitioner,

v.

CASE NO. 2:19-CV-11396  
HONORABLE PAUL D. BORMAN

MARK MCCULLICK,

Respondent.

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**OPINION & ORDER DENYING THE PETITION FOR A WRIT OF  
HABEAS CORPUS, DENYING A CERTIFICATE OF APPEALABILITY, &  
DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

**I. Introduction**

This is a pro se habeas case brought pursuant to 28 U.S.C. § 2254. Michigan prisoner Shane Swindall Chambers (“Petitioner”) was convicted of first-degree criminal sexual conduct using force and causing personal injury, MICH. COMP. LAWS § 750.520b(1)(f), first-degree home invasion, MICH. COMP. LAWS § 750.110a(2), and assault with intent to do great bodily harm less than murder, MICH. COMP. LAWS § 750.84, following a jury trial in the Kent County Circuit Court. He was sentenced, as a fourth habitual offender, MICH. COMP. LAWS § 769.12, to life imprisonment on the criminal sexual conduct conviction, a consecutive term of 25 to 50 years imprisonment on the home invasion conviction,

and a concurrent term of 10 to 50 years imprisonment on the assault conviction in 2014. In his pleadings, Petitioner raises claims concerning the admission of other acts evidence, the sufficiency of the evidence, the admission of preliminary examination testimony for unavailable witnesses and the effectiveness of trial counsel, the trial court's jurisdiction, and the conduct of the prosecutor (alleged malicious prosecution).

For the reasons set forth herein, the Court denies the habeas petition. The Court also denies a certificate of appealability and denies leave to proceed in forma pauperis on appeal.

## **II. Facts and Procedural History**

Petitioner's convictions arise from a home invasion and assault upon on a 77-year-old woman in Kent County, Michigan on September 19, 2013. The Michigan Court of Appeals described the underlying facts, which are presumed correct on habeas review, *see* 28 U.S.C. § 2254(e)(1); *Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009), as follows:

According to the evidence introduced at trial, the 77-year-old victim, Barbara Andre, was sexually assaulted, beaten, and robbed during a home invasion in the early morning hours of September 19, 2013. Andre, who was asleep on her sofa when the attack began, could not see her assailant, but she testified that, the previous afternoon, a young man driving a light-colored car offered to help her carry some packages into her house. Defendant drove a tan colored Lexus. Further, Andre's snake-skin purse was taken during the home

invasion, and a similar purse was later seen in defendant's possession by Stacy Gatlin, Jeff McKee, Markeeta Minor, Ciesha Minor, and Shannon Colvin. Colvin and others helped defendant use credit cards from the purse to purchase gasoline for others in exchange for drugs. Colvin testified that defendant told him that he got the purse by "hitting a lick," which means to "take something, rob, or steal from somebody else." Defendant also told Colvin that "it shouldn't have took me like two or three times to kick in the door," and Andre's front door was damaged during the home invasion.

After receiving information that the perpetrator of Andre's attack was frequenting McKee's apartment in a tan or brown Lexus, police began to periodically drive pass McKee's apartment and on one such occasion they observed defendant driving the vehicle in question. Police stopped defendant, at which time he fled on foot. When defendant was apprehended, he had Andre's credit card in his possession as well as a credit card belonging to Cathie Nelson. Police also recovered some of Andre's items in the trash outside of McKee's apartment, and police found additional credit cards belonging to Andre in a sewer, where they had been disposed of by Colvin.

Cathie Nelson testified at trial as a MRE 404(b) witness. She explained that, on September 18, 2013, she was moving some items from her home to a storage unit. Defendant, who was Nelson's neighbor at the time, offered to help her move some items, and Nelson declined. Later that day, someone kicked in the sliding doors to Nelson's home and stole items from her house, including credit cards. The prosecution also presented other acts evidence from Joan Schroeder, who testified that, in 2003, when she was approximately 63 years old, she was awakened in her home by a loud noise. Schroeder went to investigate the noise, at which time she was grabbed on the arms by defendant and pushed backwards toward the bed, where defendant then sexually assaulted her. While in her home, defendant told Schroeder that he was attracted to older women.

*People v. Chambers*, No. 323024, 2015 WL 8538928, \*1 (Mich. Ct. App. Dec. 10, 2015) (unpublished).



Following his convictions and sentencing, Petitioner filed an appeal of right with the Michigan Court of Appeals raising claims concerning the admission of other acts evidence, the sufficiency of the evidence, and the admission of preliminary examination testimony from unavailable witnesses and a related ineffective assistance of counsel claim. The court denied relief on those claims and affirmed Petitioner's convictions and sentences. *Id.* at pp. 2-8. Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied in a standard order. *People v. Chambers*, 499 Mich. 970, 880 N.W.2d 552 (2016).

Petitioner subsequently filed a motion for relief from judgment with the state trial court raising claims concerning the admission of the other acts testimony, the trial court's jurisdiction, his actual innocence, the conduct of the prosecutor (malicious prosecution), the great weight of the evidence, and the effectiveness of appellate counsel. The trial court denied the motion for lack of merit. *People v. Chambers*, No. 14-000265-FC (Kent Cnty. Cir. Ct. June 8, 2017). Petitioner filed a delayed application for leave to appeal with the Michigan Court of Appeals which was denied for failure to establish that the trial court erred in denying relief from judgment. *People v. Chambers*, No. 341487 (Mich. Ct. App. Jan. 9, 2018). Petitioner also filed an application for leave to appeal with the Michigan Supreme

Court, which was denied for failure to establish entitlement to relief under Michigan Court Rule 6.508(D). *People v. Chambers*, 503 Mich. 885, 918 N.W.2d 817 (2018).

Petitioner thereafter filed his federal habeas petition raising the following claims:

- I. The state trial court violated his due process rights when it allowed the prosecutor to admit propensity evidence.
- II. The state court's rejection of his claim of insufficient evidence (for first-degree criminal sexual conduct) was contrary to or involved an unreasonable application of Supreme Court law.
- III. The state court's rejection of his claim of insufficient evidence (for first-degree home invasion and assault with intent to do great bodily harm less than murder) was contrary to or involved an unreasonable application of Supreme Court law.
- IV. The state court violated his right to a fair trial and to confront witnesses by allowing the prosecutor to admit hearsay statements (and trial counsel failed to object).
- V. The state court did not have jurisdiction to try and convict him from the improper bindover.
- VI. The prosecutor maliciously prosecuted him by not using its resources to uphold justice (and committed misconduct).

Respondent has filed an answer to the habeas petition contending that it should be denied because the first and fourth claims are procedurally defaulted and all of the claims lack merit.

### III. Standard of Review

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

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

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

28 U.S.C. §2254(d) (1996).

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

535 U.S. 685, 694 (2002). “[T]he ‘unreasonable application’ prong of § 2254(d)(1) permits a federal habeas court to ‘grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts of petitioner’s case.’” *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also Bell*, 535 U.S. at 694. However, “[i]n order for a federal court find a state court’s application of [Supreme Court] precedent ‘unreasonable,’ the state court’s decision must have been more than incorrect or erroneous. The state court’s application must have been ‘objectively unreasonable.’” *Wiggins*, 539 U.S. at 520-21 (citations omitted); *see also Williams*, 529 U.S. at 409. The “AEDPA thus imposes a ‘highly deferential standard for evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the doubt.’” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh*, 521 U.S. at 333, n. 7); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)).

A state court’s determination that a claim lacks merit “precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized “that even a strong case for relief does not mean the state court’s

contrary conclusion was unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). Pursuant to § 2254(d), “a habeas court must determine what arguments or theories supported or ... could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision” of the Supreme Court. *Id.* Thus, in order to obtain habeas relief in federal court, a state prisoner must show that the state court’s rejection of his claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.*; see also *White v. Woodall*, 572 U.S. 415, 419-20 (2014). Federal judges “are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.” *Woods v. Donald*, 575 U.S. 312, 316 (2015). A petitioner cannot prevail as long as it is within the “realm of possibility” that fairminded jurists could find the state court decision to be reasonable. *Woods v. Etherton*, 576 U.S. 113, 118 (2016).

Section 2254(d)(1) limits a federal habeas court’s review to a determination of whether the state court’s decision comports with clearly established federal law as determined by the Supreme Court at the time the state court renders its decision. *Williams*, 529 U.S. at 412; see also *Knowles v. Mirzayance*, 556 U.S.

111, 122 (2009) (noting that the Supreme Court “has held on numerous occasions that it is not ‘an unreasonable application of clearly established Federal law’ for a state court to decline to apply a specific legal rule that has not been squarely established by this Court”) (quoting *Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008) (per curiam)); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Section 2254(d) “does not require a state court to give reasons before its decision can be deemed to have been ‘adjudicated on the merits.’” *Harrington*, 562 U.S. at 100. Furthermore, it “does not require citation of [Supreme Court] cases—indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.” *Early v. Packer*, 537 U.S. 3, 8 (2002); *see also Mitchell*, 540 U.S. at 16.

The requirements of clearly established law are to be determined solely by Supreme Court precedent. Thus, “circuit precedent does not constitute ‘clearly established Federal law as determined by the Supreme Court’” and it cannot provide the basis for federal habeas relief. *Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam); *see also Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam). The decisions of lower federal courts, however, may be useful in assessing the reasonableness of a state court’s decision. *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) (citing *Williams v. Bowersox*, 340 F.3d 667, 671

(8th Cir. 2003)); *Dickens v. Jones*, 203 F. Supp. 354, 359 (E.D. Mich. 2002).

A state court's factual determinations are presumed correct on federal habeas review. *See* 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998). Moreover, habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

#### **IV. Analysis**

##### **A. Procedural Default**

As an initial matter, Respondent contends that part of Petitioner's first and fourth habeas claims are barred by procedural default. The Court declines to address this defense. Procedural default is not a jurisdictional bar to habeas review. *See Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005). Moreover, federal courts on habeas review "are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones*, 351 F.3d 212, 215 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)). The Supreme Court has explained the rationale behind such a policy: "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." *Lambrix*, 520

U.S. at 525. Such is the case here. The procedural issue is complex and the substantive claims are more readily decided on the merits. Accordingly, the Court shall proceed to the merits of the claims.

**B. Merits**

**1. Admission of Other Acts Evidence (Habeas Claim I)**

Petitioner first asserts that he is entitled to habeas relief because the trial court erred in admitting propensity evidence, i.e. other acts evidence, through the testimony of Cathie Nelson and Joan Schroeder. Respondent contends that this claim is procedurally defaulted in part and that it is not cognizable and lacks merit.

Alleged trial court errors in the application of state evidentiary law are generally not cognizable as grounds for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions”); *Serra v. Michigan Dep’t of Corr.*, 4 F.3d 1348, 1354 (6th Cir. 1993). “Trial court errors in state procedure or evidentiary law do not rise to the level of federal constitutional claims warranting relief in a habeas action, unless the error renders the proceeding so fundamentally unfair as to deprive the petitioner of due process under the Fourteenth Amendment.” *McAdoo v. Elo*, 365 F.3d 487, 494 (6th Cir. 2004). (quoting *McGuire*, 502 U.S. at 69-70); *see also Wynne v. Renico*, 606 F.3d 867,



871 (6th Cir. 2010) (citing *Bey v. Bagley*, 500 F.3d 514, 519-20 (6th Cir. 2007)); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003).

Petitioner raised this claim on direct appeal and the Michigan Court of Appeals denied relief. The court ruled that the other acts evidence was relevant and properly admitted on the issue of identity as evidence of a common scheme, plan, or system under Michigan Court Rule 404(b), that its admission was not unfairly prejudicial under Michigan Court Rule 403 and any prejudice was mitigated by the jury instruction on the proper consideration of such evidence, and that if there was an error, such error was harmless due to the significant evidence of Petitioner's guilt presented at trial. *Chambers*, 2015 WL 8538928 at \*2-4.

The state court's decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. First, the evidence was properly admitted under Michigan law. State courts are the final arbiters of state law and federal courts will not intervene in such matters. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Oviedo v. Jago*, 809 F.2d 326, 328 (6th Cir. 1987); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting on habeas review"); *Sanford v. Yukins*, 288 F.3d 855, 860 (6th Cir. 2002). Habeas relief does not lie for perceived errors of state law.

*Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions”).

Second, Petitioner fails to establish that the admission of the evidence violated due process or rendered his trial fundamentally unfair. As to the admission of other acts evidence, the Supreme Court has declined to hold that similar “other acts” evidence is so extremely unfair that its admission violates fundamental conceptions of justice. *Dowling v. United States*, 493 U.S. 342, 352–53 (1990). Thus, “[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence.” *Bugh*, 329 F.3d at 512. Consequently, there is no Supreme Court precedent that the state court decision can be deemed “contrary to” under 28 U.S.C. § 2254(d)(1). *Id.* at 513; *Adams v. Smith*, 280 F. Supp. 2d 704, 716 (E.D. Mich. 2003). Petitioner fails to state a claim upon which habeas relief may be granted as to such an issue.

Moreover, Petitioner fails to show that the admission of the evidence rendered his trial fundamentally unfair. The testimony from both witnesses was relevant as evidence of Petitioner’s common plan or scheme of offering to assist elderly women, later breaking into their homes, stealing from them and using their credit cards, and/or sexually assaulting them. Furthermore, the risk of unfair

prejudice was mitigated by the fact that the trial court instructed the jury on the proper consideration of the evidence. Jurors are presumed to follow the court's instructions. *See Penry v. Johnson*, 532 U.S. 782, 799 (2001) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *United States v. Powell*, 469 U.S. 57, 66 (1984) ("Jurors ... take an oath to follow the law as charged, and they are expected to follow it."). Petitioner fails to show that the admission of the evidence was erroneous or, more importantly for purposes of habeas review, that it rendered his trial fundamentally unfair. Habeas relief is not warranted on this claim.

## **2. Sufficiency of the Evidence (Habeas Claims II, III)**

Petitioner next asserts that he is entitled to habeas relief because the prosecutor presented insufficient evidence to support his convictions. In particular, he alleges that the prosecutor failed to present sufficient evidence that he sexually penetrated the victim as to the first-degree criminal sexual conduct conviction and failed to present sufficient evidence that he was the perpetrator as to all of the crimes. Respondent contends that these claims lack merit.

The Federal Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

The question on a sufficiency of the evidence claim 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.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The *Jackson* standard must be applied “with explicit reference to the substantive elements of the criminal offense as defined by state law.” *Brown v. Palmer*, 441 F.3d 347, 351 (6th Cir. 2006) (quoting *Jackson*, 443 U.S. at 324 n. 16).

A federal habeas court views this standard through the framework of 28 U.S.C. § 2254(d). *Martin v. Mitchell*, 280 F.3d 594, 617 (6th Cir. 2002). Thus, under the AEDPA, challenges to the sufficiency of the evidence “must survive two layers of deference to groups who might view facts differently” than a reviewing court on habeas review – the factfinder at trial and the state court on appellate review – as long as those determinations are reasonable. *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). “[I]t is the responsibility of the jury – not the court – to decide what conclusions should be drawn from the evidence admitted at trial.” *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). “A reviewing court does not re-weigh the evidence or re-determine the credibility of the witnesses whose demeanor has been observed by the trial court.” *Matthews v. Abramajtys*, 319 F.3d 780, 788 (6th Cir. 2003) (citing *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)). The “mere existence of sufficient evidence to convict ...

defeats a petitioner's claim." *Id.* at 788-89.

Under Michigan law, to convict a defendant of first-degree criminal sexual conduct relative to the charged offense, the prosecution must prove that the defendant engaged in sexual penetration with the victim using force or coercion to accomplish that penetration and caused personal injury to the victim. MICH. COMP. LAWS § 750.520b(f); *People v. Perkins*, 468 Mich. 448, 453, 662 N.W.2d 727 (2003). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MICH. COMP. LAWS § 750.520a®; *People v. Garrow*, 99 Mich. App. 834, 837; 298 N.W.2d 627 (1980).

The prosecution must prove every element of a charged offense beyond a reasonable doubt. This burden includes proving that the defendant is the person who committed the crime. *People v. Oliphant*, 399 Mich. 472, 489, 250 N.W.2d 443 (1976); *People v. Kern*, 6 Mich. App. 406, 409, 149 N.W.2d 216 (1967). Direct or circumstantial evidence and reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of an offense, *People v. Nowack*, 462 Mich. 392, 399-400, 614 N.W.2d 78 (2000); *People v. Jolly*, 442

Mich. 458, 466, 502 N.W.2d 177 (1993); including identity, *Kern*, 6 Mich. App. at 409-10, and intent or state of mind. *People v. Dumas*, 454 Mich. 390, 398, 563 N.W.2d 31 (1997); *see also Nowack*, 462 Mich. at 402-03.

The Michigan Court of Appeals considered these claims on direct appeal and denied relief. Citing the *Jackson* standard and applicable state law, the court ruled that the victim's testimony, along with that of a nurse who examined the victim, provided sufficient evidence of penetration to establish Petitioner's guilt of first-degree criminal sexual conduct. *Chambers*, 2015 WL 8538928 at \*5. The court also ruled that evidence of Petitioner's possession of the victim's credit cards and a purse similar to hers, his comments to Shannon Colvin about kicking in a door and "hitting a lick" and damage to the victim's door during crime, and the victim's testimony that a young man driving a car similar to Petitioner's offered to help her on the day of the crime provided sufficient evidence to establish that Petitioner was the perpetrator of the crimes. *Id.*

The state court's decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. The victim's testimony that she was missing her underwear and that her vaginal area felt raw and sore when she regained consciousness after the assault, along with the

examining nurse's testimony that the victim's vaginal area was swollen, had abrasions, and was painful to the touch and that such injuries were consistent with penetration, provided sufficient evidence of penetration to support the first-degree criminal sexual conduct conviction. To be sure, the testimony of a victim alone can be constitutionally sufficient to sustain a conviction. *See Tucker v. Palmer*, 541 F.3d 652, 658 (6th Cir. 2008) (citing cases). Additionally, the testimony that Petitioner possessed the victim's credit cards and a purse similar to hers after the assault, Colvin's testimony relaying Petitioner's statements about kicking in a door and "hitting a lick" and the damage to the victim's door, and the victim's testimony that a young man driving a car similar to Petitioner's offered to help her on the day of the crime, along with the similar acts evidence, provided sufficient evidence of identity to support all of Petitioner's convictions.

Petitioner challenges the witnesses' credibility and the jury's evaluation of the testimony presented at trial, as well as the inferences the jury drew from the evidence. However, it is the job of the fact-finder at trial, not a federal habeas court, to resolve evidentiary conflicts. *Jackson*, 443 U.S. at 326; *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002); *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983) ("A federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does

not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”). The jury’s verdict, and the Michigan Court of Appeals’ decision affirming that verdict, were reasonable. The evidence presented at trial, viewed in a light favorable to the prosecution, established Petitioner’s guilt of first-degree criminal sexual conduct, first-degree home invasion, and assault with intent to commit bodily harm less than murder beyond a reasonable doubt. Habeas relief is not warranted on these claims.

**3. Admission of Hearsay/Ineffective Assistance (Habeas Claim IV)**

Petitioner next asserts that he is entitled to habeas relief because the trial court erred in admitting hearsay in violation of state law and his confrontation rights. Specifically, he alleges that the trial court erred in admitting the preliminary examination testimony of Stacy Gatlin, Markeeta Minor, and Ciesha Minor, who did not appear at trial, because the prosecution did not exercise due diligence in attempting to locate and produce those witnesses. He relatedly asserts that trial counsel was ineffective for failing to object to the admission of the testimony. Respondent contends that this claim is waived in part, is procedurally defaulted in part, and lacks merit.

The Michigan Court of Appeals considered this claim on direct appeal and



denied relief. The court ruled that Petitioner waived the due diligence claim because defense counsel expressed satisfaction with the prosecution's efforts to secure the witnesses. The court further ruled that Petitioner failed to establish that trial counsel was ineffective because the admission of the witnesses' preliminary examination testimony was appropriate under state law and did not violate Petitioner's confrontation rights. *Chambers*, 2015 WL 8538928 at \*6-8.

The state court's decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. Waiver is an "intentional relinquishment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). A criminal defendant who waives rights "may not then seek appellate review of claimed deprivation of those rights, for his waiver has extinguished any error." *United States v. Griffin*, 84 F.3d 912, 924 (7th Cir. 1996) (citing *Olano*, 507 U.S. at 733-34); *see also Shahideh v. McKee*, 488 F. App'x 963, 965 (6th Cir. 2012) ("waiver is a recognized, independent and adequate state law ground for refusing to review alleged trial errors"). The right to confrontation may be waived. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314, n. 3 (2009). In this case, trial counsel essentially agreed that the prosecution exhibited due diligence in attempting to locate and produce the three witnesses and did not object to the

admission of their preliminary examination testimony. Consequently, Petitioner has waived review of this aspect of his claim. *See United States v. Chun Ya Cheung*, 350 F. App'x 19, 21-22 (6th Cir. 2009).

Petitioner, however, also asserts that trial counsel was ineffective for failing to object to the admission of the witnesses' testimony. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set forth a two-prong test for determining whether a habeas petitioner has received ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Second, the petitioner must establish that counsel's deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal. *Id.*

To satisfy the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance." *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. There is a strong presumption that trial counsel rendered adequate assistance

and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. The petitioner bears the burden of overcoming the presumption that the challenged actions were sound trial strategy.

As to the prejudice prong, a petitioner must 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 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the proceeding. *Id.* “On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

The Supreme Court has confirmed that a federal court’s consideration of ineffective assistance of counsel claims arising from state criminal proceedings is quite limited on habeas review due to the deference accorded trial attorneys and state appellate courts reviewing their performance. “The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” *Harrington*, 562 U.S. at 105 (internal and end citations omitted). “When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any

reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

In this case, Petitioner cannot establish that trial counsel erred and/or that he was prejudiced by counsel's conduct because the underlying claim lacks merit. First, with respect to the admission of the testimony under state law, the Michigan Court of Appeals determined that prosecution exercised due diligence to locate the witnesses by contacting their families and local road patrols such that the witnesses were unavailable and the admission of their preliminary examination testimony was proper under state law. Such a determination is a state law issue, *see, e.g., Collier v. Lafler*, 419 F. App'x 555, 559-60 (6th Cir. 2011), that is binding on federal habeas review. *See Bradshaw v. Richey*, 546 U.S. 74, 75 (2005); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Given the Michigan Court of Appeals' determination that the testimony was properly admitted under state law, Petitioner cannot establish that trial counsel erred or that he was prejudiced by counsel's conduct in this regard. Trial counsel cannot be deemed ineffective for failing to make a futile objection or meritless argument. *Tackett v. Trierweiler*, 956 F.3d 358, 375 (6th Cir. 2020); *Hoffner v. Bradshaw*, 622 F.3d 487, 499 (6th Cir. 2010).

Second, as to federal law, Petitioner's confrontation rights were not violated by the admission of the witnesses' preliminary examination testimony. The

Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him or her. U.S. Const., Am. VI. One of the main concerns of the Confrontation Clause is to ensure the reliability of evidence through cross-examination. *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause thus prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). While the Sixth Circuit has noted that there is “some question whether a preliminary hearing necessarily offers an adequate prior opportunity for cross-examination for Confrontation Clause purposes.” *Al-Timimi v. Jackson*, 379 F. App’x 435, 437–38 (6th Cir. 2010) (discussing *Vasquez v. Jones*, 496 F.3d 564, 577 (6th Cir. 2007)), the Supreme Court has never held that a defendant is denied the right of confrontation when a witness is unavailable at trial and the court admits the witness’s preliminary examination testimony. *Al-Timimi*, 379 F. App’x at 438.

In fact, the Supreme Court has found no Confrontation Clause violation by the admission of an unavailable witness’s prior testimony when there was an opportunity for cross-examination at the prior proceeding. *See Mattox v. United States*, 156 U.S. 237 (1895) (prior trial testimony); *Barber v. Page*, 390 U.S. 719,

725-26 (1968) (preliminary hearing testimony). A witness is ‘unavailable’ for purposes of the exception to the confrontation requirement if the prosecution has made a good faith effort to obtain the witness’s presence at trial. *Barber*, 390 U.S. at 724-25; *Winn v. Renico*, 175 F. App’x 728, 733 (6th Cir. 2006). “The lengths to which the prosecution must go to produce a witness, however, is a question of reasonableness.” *Winn*, 175 F. App’x at 733 (citing *California v. Green*, 399 U.S. 149, 189, n. 22 (1970) (concurring opinion, citing *Barber*)). “The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.... The prosecution bears the burden of proof in this regard.” *Id.* (citations omitted).

In this case, the record shows that the trial court conducted a preliminary examination in which both parties had the opportunity to question the witnesses and did so. The prosecution was subsequently unable to locate and/or produce those witnesses at trial. The police attempted to locate and produce the witnesses by contacting their families and/or local road patrols and issuing material witness warrants. One witness who was contacted was supposed to appear at trial, but failed to do so. Such efforts were reasonable and diligent under the circumstances such that the witnesses were unavailable at trial. Petitioner had an adequate opportunity, and the same motive, to question the witnesses at the preliminary

examination. Consequently, his confrontation rights were not violated by the admission of the witnesses' preliminary examination testimony at trial. *See Al-Timimi*, 379 F. App'x at 438-40; *see also Williams v. Bauman*, 759 F.3d 630, 636 (6th Cir. 2014) (citing *Al-Timimi* and denying habeas relief on similar claim). Given the Michigan Court of Appeals' ruling and this Court's determination that Petitioner's confrontation rights were not violated by the admission of the witnesses' preliminary examination testimony, Petitioner cannot establish that trial counsel erred or that he was prejudiced by counsel's conduct. As noted, trial counsel cannot be deemed ineffective for failing to make a futile objection or meritless argument. *Tackett*, 956 F.3d at 375; *Hoffner*, 622 F.3d at 499. Habeas relief is not warranted on this claim.

#### **4. Lack of Jurisdiction (Habeas Claim V)**

Petitioner next asserts that he is entitled to habeas relief because the trial court lacked jurisdiction to try him due to an improper bindover. Respondent contends that this claim is not cognizable and that it lacks merit.

Petitioner raised this claim on post-conviction collateral review and the state trial court denied his motion for relief from judgment for lack of merit. *Chambers*, No. 14-000265-FC at \*1.

The state court's decision is neither contrary to Supreme Court precedent

nor an unreasonable application of federal law or the facts. The Supreme Court has held that the Federal Constitution does not require that a probable cause hearing be conducted prior to a criminal trial. *Gerstein v. Pugh*, 420 U.S. 103, 119, 125 n. 26 (1975); *Dillard v. Bomar*, 342 F.2d 789, 790 (6th Cir. 1965). Consequently, the bindover decision constitutes a state law issue which does not implicate a federal constitutional right and is not subject to review in a federal habeas proceeding. *See Tegeler v. Renico*, 253 F. App'x 521, 525-26 (6th Cir. 2007); *Schacks v. Tessmer*, No. 00-1062, 2001 WL 523533, \*6 (6th Cir. May 8, 2001) (unpublished) (refusing to review state court determination that second-degree murder conviction rendered bindover sufficiency of the evidence challenge moot); *Dorchy v. Jones*, 320 F. Supp. 2d 564, 578-79 (E.D. Mich. 2004) (denying habeas relief on state prisoner's claim that there was insufficient evidence to bind him over for trial). It is well-settled that federal habeas relief is not available for perceived violation of state law. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 67 (1991).<sup>1</sup>

Similarly, the determination of whether a state court is vested with

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<sup>1</sup>Even under Michigan law, any error in the preliminary examination proceeding is considered harmless once a valid conviction has been obtained. *See People v. Hall*, 435 Mich. 599, 610-12, 460 N.W.2d 520 (1990); *see also Redmond v. Worthinton*, 878 F. Supp. 2d 822, 844 (E.D. Mich. 2012).



jurisdiction under state law over a criminal case is a function of the state courts, not the federal courts. *Wills v. Egeler*, 532 F. 2d 1058, 1059 (6th Cir. 1976) (per curiam); *Daniel v. McQuiggin*, 678 F. Supp. 2d 547, 553 (E.D. Mich. 2009).

A state court's interpretation of state jurisdictional issues conclusively establishes jurisdiction for purposes of federal habeas review.” *Strunk v. Martin*, 27 F. App'x 473, 475 (6th Cir. 2001). Consequently, Petitioner fails to state a claim upon which federal habeas relief may be granted as to such issues. *See Herron v. Trierweiler*, No. 18-2353, 2019 WL 6445422, \*3 (6th Cir. July 10, 2019) (citing *Wills, supra*, and denying a certificate of appealability to review such state law claims). Habeas relief is not warranted on this claim.

#### **5. Malicious Prosecution (Habeas Claim VI)**

Lastly, Petitioner asserts that he is entitled to habeas relief because the prosecutor engaged in malicious prosecution and committed misconduct during trial. Respondent contends that this claim lacks merit.

The United States Supreme Court has stated that prosecutors must “refrain from improper methods calculated to produce a wrongful conviction.” *Berger v. United States*, 295 U.S. 78, 88 (1935). To prevail on a claim of prosecutorial misconduct, a habeas petitioner must demonstrate that the prosecutor's conduct or remarks “so infected the trial with unfairness as to make the resulting conviction a

denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citing *Donnelly*); *see also Parker v. Matthews*, 567 U.S. 37, 45 (2012) (confirming that *Donnelly/Darden* is the proper standard).

Petitioner raised this claim on post-conviction collateral review and the state trial court denied his motion for relief from judgment for lack of merit. *Chambers*, No. 14-000265-FC at \*1.

The state court’s denial of relief is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. Petitioner first asserts a claim of malicious prosecution, essentially arguing that the prosecutor charged and prosecuted him based upon slim, improper, and insufficient evidence. A prosecutor has significant discretion in determining what charges to file against an accused provided that probable cause exists to believe that an offense was committed by the accused under the charging statute.

*Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Davis*, 15 F.3d 526, 529 (6th Cir. 1994). A prosecutor, however, may not undertake a prosecution based upon a vindictive motive, *Bordenkircher*, 434 U.S. at 363, or based upon race, religion, or some other arbitrary classification. *Oyler v. Boles*, 368 US. 448, 456 (1962). In this case, the prosecutor had probable cause to

believe that Petitioner was guilty of the charged offenses based upon statements from the victim, the examining nurse, his own acquaintances, and the victims' of his other, similar offenses. To be sure, as the Michigan Court of Appeals and this Court have found, there was sufficient evidence to support his convictions. There is also no indication in the record that the prosecutor's charging decision was vindictive or based upon any impermissible factors. Petitioner fails to establish that the prosecutor engaged in a malicious prosecution.

Petitioner also asserts that the prosecutor committed misconduct by bolstering and relying upon the testimony of witness Joan Shroeder. It is improper for a prosecutor to express his or her own personal opinions about the credibility of a witness. *United States v. Young*, 470 U.S. 1, 9-10 (1985); *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). Such statements are improper because they can convey the impression that the prosecutor has evidence not presented to the jury which supports the charges against the defendant thereby infringing upon the defendant's right to be judged solely based upon the evidence presented and because the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own. *Young*, 470 U.S. at 18-19; *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008); *see also Wilson v. Bell*, 368 F. App'x 627, 633 (6th Cir.

2010) (citing cases).

Petitioner, however, does not explain how the prosecutor improperly bolstered Shroeder's testimony. Conclusory allegations, without evidentiary support, are insufficient to justify habeas relief. *See Cross v. Stovall*, 238 F. App'x 32, 39-40 (6th Cir. 2007); *Workman v. Bell*, 178 F.3d 759, 771 (6th Cir. 1998) (conclusory allegations of ineffective assistance of counsel do not justify federal habeas relief); *see also Washington v. Renico*, 455 F.3d 722, 733 (6th Cir. 2006) (bald assertions and conclusory allegations do not provide a basis for an evidentiary hearing on habeas review). Moreover, the trial court found Shroeder's testimony to be relevant and admissible other acts evidence. It is well-settled that a prosecutor's good faith effort to admit evidence does not constitute misconduct, particularly where, as here, the trial court admits the evidence. *Cristini*, 526 F.3d at 900. Petitioner fails to establish that the prosecutor engaged in misconduct which rendered his trial fundamentally unfair.

Petitioner also asserts that the prosecutor denigrated him and his defense. It is inappropriate for a prosecutor to make personal attacks on a defendant or defense counsel. *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996). Prosecutors may not "make unfounded and inflammatory attacks on the opposing advocate," *Young*, 470 U.S. at 9, "or argue that counsel is attempting to mislead

the jury.” *West v. Bell*, 550 F.3d 542, 565 (6th Cir. 2008). Prosecutors may, however, highlight inconsistencies or inadequacies in the defense, *Bates v. Bell*, 402 F.3d 635, 646 (6th Cir. 2005), point out the lack of evidence supporting the defense theory, *United States v. Forrest*, 402 F.3d 678, 686 (6th Cir. 2005), and argue from the facts that a defense witness, including a testifying defendant, is not worthy of belief. *Portuondo v. Agard*, 529 U.S. 61, 69 (2000); *Cristini*, 526 F.3d at 901-02. In this case, Petitioner fails to provide examples of any such conduct or otherwise support this claim with factual allegations. As discussed, conclusory allegations do not provide a basis for habeas relief. *See Cross*, 238 F. App’x at 39-40; *Workman*, 178 F.3d at 771; *see also Washington*, 455 F.3d at 733.

Petitioner fails to show that the prosecutor engaged in misconduct which rendered his trial fundamentally unfair.

Petitioner further asserts that the prosecutor engaged in misconduct by mischaracterizing the evidence, namely the victim’s statements about her vaginal pain and the color of the vehicle she saw on the day of the crime. While a prosecutor may not misstate the evidence, *United States v. Carter*, 236 F.3d 777, 784 (6th Cir. 2001), or argue facts not in evidence, *Abela v. Martin*, 380 F.3d 915, 929 (6th Cir. 2004), a prosecutor can make arguments based upon the evidence and has “‘leeway to argue reasonable inferences from the evidence’ during closing

arguments.” *United States v. Crosgrove*, 637 F.3d 646, 664 (6th Cir. 2011) (quoting *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000)). Such was the case here. The prosecutor’s argument was based on the police officer’s testimony relaying the victim’s statements about vaginal pain after the crime and the victim’s own trial testimony about the light-colored car that she saw on the day of the crime. Petitioner fails to show that the prosecutor’s conduct was improper.

Lastly, Petitioner asserts that the prosecutor engaged in misconduct by presenting testimony from his ex-girlfriend that he had sex with her when she was passed out from drinking. Such evidence was arguably admissible under Michigan Rule of Evidence 404(b) as evidence to show that Petitioner would have sex with an unconscious victim. It is well-settled that a prosecutor’s good faith effort to admit evidence does not constitute misconduct, particularly where, as here, the trial court admits the evidence. *Cristini*, 526 F.3d at 900. Petitioner fails to establish that the prosecutor engaged in misconduct which rendered his trial fundamentally unfair. Habeas relief is not warranted on this claim.

## **V. Conclusion**

For the reasons stated, the Court concludes that Petitioner is not entitled to habeas relief on his claims. Accordingly, the Court **DENIES** and **DISMISSES WITH PREJUDICE** the petition for a writ of habeas corpus.

Before Petitioner may appeal, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); FED. R. APP. P. 22(b). A certificate of appealability may issue only if a petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court’s assessment of the claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). The Court concludes that Petitioner fails to make a substantial showing of the denial of a constitutional right as to his claims. Accordingly, the Court **DENIES** a certificate of appealability.

Lastly, the Court concludes that an appeal from this decision cannot be taken in good faith. *See* FED. R. APP. P. 24(a). Accordingly, the Court **DENIES** leave to proceed in forma pauperis on appeal. This case is **CLOSED**.

**IT IS SO ORDERED.**

s/Paul D. Borman  
PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

Dated: March 1, 2022

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHANE SWINDALL CHAMBERS,

Petitioner,

v.

CASE NO. 2:19-CV-11396  
HONORABLE PAUL D. BORMAN

MARK MCCULLICK,

Respondent.

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**ORDER TRANSFERRING PETITIONER'S MOTION  
FOR A CERTIFICATE OF APPEALABILITY (ECF NO. 13) TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

This matter is before the Court on Petitioner's motion for a certificate of appealability concerning the Court's March 1, 2022 Opinion and Order denying and dismissing with prejudice his petition for writ of habeas corpus. The Court denied a certificate of appealability and denied leave to proceed in forma pauperis on appeal in its Opinion and Order denying the habeas petition. Consequently, the Court construes Petitioner's motion as a request for reconsideration. *See Jackson v. Crosby*, 437 F.3d 1290, 1294 n. 5 (11th Cir. 2006); *Lyons v. Lafler*, No. 2:10-CV-11386, 2013 WL 812083, \*1 (E.D. Mich. Mar. 5, 2013); *Pettigrew v. Rapelje*, No. 08-12530-BC, 2008 WL 4186271, \*1 (E.D. Mich. Sept. 10, 2008).

Having reviewed the matter, the Court finds no reason to reconsider its prior decision. A motion for reconsideration which presents issues already ruled upon by the



Court, either expressly or by reasonable implication, will not be granted. *Hence v. Smith*, 49 F. Supp. 2d 547, 550 (E.D. Mich. 1999); *Czajkowski v. Tindall & Assoc., P.C.*, 967 F. Supp. 951, 952 (E.D. Mich. 1997). Such is the case here.

When a district court denies a certificate of appealability, the proper procedure is for a habeas petitioner to file a motion for a certificate of appealability with the appellate court. *See Sims v. United States*, 244 F.3d 509 (6th Cir. 2011) (citing Fed. R. App. P. 22(b)(1)). Accordingly, in the interest of justice, the Court transfers the motion for a certificate of appealability (ECF No. 13) to the United States Court of Appeals for the Sixth Circuit.

**IT IS SO ORDERED.**

s/Paul D. Borman  
PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

Dated: March 28, 2022