APPENDIX

A

No. 22-1148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 22, 2022
DEBORAH S. HUNT, Clerk

QUINTEL WEST,

Petitioner-Appellant,

v.

FREDEANE ARTIS, ACTING WARDEN,

Respondent-Appellee.

ORDER

Before: BOGGS, THAPAR, and READLER, Circuit Judges.

Quintel West petitions for rehearing en banc of this court's order entered on September 12, 2022, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judges Griffin, Larsen, and Davis recused themselves from participation in this ruling.

APPENDIX

B

NOT Produced

Neutral
As of: September 29, 2022 11:57 PM Z

West v. Artis

United States Court of Appeals for the Sixth Circuit

September 12, 2022, Filed

No. 22-1148

Reporter
2022 U.S. App. LEXIS 25628 *

QUINTEL WEST, Petitioner-Appellant, v. FREDEANE ARTIS, Acting Warden, Respondent-Appellee.

Prior History: West v. Chapman, 2022 U.S. Dist. LEXIS 17543, 2022 WL 286548 (E.D. Mich., Jan. 31, 2022)

Core Terms

arrest, ineffective, dangerous weapon, carrying, jurists, reckless driving, shooting, cell phone, Appeals, robbery, preliminary examination, right to a fair trial, suppression, appearance, conceding, night

Case Summary

Overview
HOLDINGS: [1]-There was ample evidence aside from the cell phone location data that connected defendant to the crimes, and the expert's own testimony and his cross-examination conveyed to the jury the unreliability of the data supporting his opinion about the location of defendant's cell phone; [2]- Reasonable jurists thus could not disagree that defendant did not show that the admission of the expert's testimony regarding the location of his cell phone had a substantial and injurious effect on the jury's verdict or that the state court's harmlessness determination was unreasonable; [3]- Defendant was arrested without a warrant after officers saw him violate the law, and a motion to challenge his arrest would have been meritless, and counsel was not ineffective for failing to bring such motion.

Outcome
Application denied and motion denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Criminal Law & Procedure > Habeas Corpus > Appeals > Certificate of Appealability

HN1[] **Review, Burdens of Proof**

To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right, 28 U.S.C.S. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate 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.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Cognizable Issues > Threshold Requirements > Due Process

Criminal Law & Procedure > ... > Jurisdiction > Cognizable Issues > Evidentiary Rulings

Criminal Law & Procedure > ... > Review > Specific Claims > Evidentiary Errors

HN2[] **Procedural Due Process, Scope of Protection**

The erroneous admission of evidence under state law violates the constitutional right to due process only if it renders the petitioner's trial fundamentally unfair, and a constitutional error warrants habeas relief only if it had a

substantial and injurious effect or influence in determining the jury's verdict.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Review > Specific Claims > Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN3[] **Criminal Process, Assistance of Counsel**

To establish ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice to the defense. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Counsel's challenged conduct must be assessed against the facts of the particular case, viewed as of the time of counsel's conduct. The test for prejudice is whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. When a habeas petitioner bases an ineffective-assistance claim on counsel's failure to bring a suppression motion, the petitioner must prove that his *Fourth Amendment* claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Counsel: **[*1]** QUINTEL WEST, Petitioner - Appellant, Pro se, Muskegon Heights, MI.

For FREDEANE ARTIS, Acting Warden, Respondent - Appellee: Andrea M. Christensen-Brown, Office of the Attorney General, Lansing, MI.

Judges: Before: NALBANDIAN, Circuit Judge.

Opinion

Quintel West, a Michigan prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to *28 U.S.C. § 2254*. West has filed an application for a certificate of appealability ("COA") and a motion for the appointment of counsel.

A jury convicted West of first-degree felony murder, *Mich. Comp. Laws § 750.316*; assault with intent to murder, *id. § 750.83*; first-degree home invasion, *id. § 750.110a(2)*; conspiracy to commit first-degree home invasion, *id. §§ 750.110a(2)*, *750.157a*; armed robbery, *id. § 750.529*; conspiracy to commit armed robbery, *id. §§ 750.529*, *750.157a*; carrying a dangerous weapon with unlawful intent, *id. § 750.226*; and five counts of possession of a firearm during the commission of a felony (felony-firearm), *id. § 750.227b*. The convictions arose from a robbery and home invasion that resulted in the fatal shooting of Michael Kuhlman. The trial court sentenced West to life imprisonment without the possibility of parole. The Michigan Court of Appeals affirmed, *People v. West, No. 317109, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *6 (Mich. Ct. App. Dec. 16, 2014)* (per curiam), and the Michigan Supreme Court denied leave **[*2]** to appeal, *People v. West, 498 Mich. 919, 871 N.W.2d 172 (Mich. 2015)* (mem.). West filed a motion for relief from judgment, which the trial court denied. The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *See People v. West, 503 Mich. 885, 919 N.W.2d 260 (Mich. 2018)* (mem.).

West then filed a *§ 2254* petition in the district court, raising nine grounds for relief: (1) the Michigan Court of Appeals' ruling that admission of the State's "cellular tower expert witness testimony" was harmless error conflicted with *Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*, and *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)*; (2) trial counsel was ineffective for failing to challenge West's arrest for reckless driving on *Fourth Amendment* grounds and for failing to seek suppression of evidence obtained as a result of the arrest; (3) the trial court's jury instruction on flight violated his right to a fair trial; (4) the seating of a biased

juror violated West's right to a fair trial before an impartial jury; (5) he was denied a fair trial because the judge who presided over his preliminary examination later appeared as a prosecutor in the case; (6) trial counsel was ineffective for conceding the elements of the charge of carrying a dangerous weapon; (7) the trial court's denial of his motion to quash "oral reckless driving and firearm possession accusations" deprived West of his right to a fair **[*3]** trial; (8) the prosecutor's closing argument violated West's right to a fair trial; and (9) the State failed to disclose the name, contact information, and statement of a witness who claimed to have found a cell phone that had been stolen during the robbery. In addition, West asserted that appellate counsel was ineffective for failing to raise claims three through nine on direct appeal. Despite the State's argument that certain claims were procedurally defaulted, the district court reviewed all of West's claims on their merits and concluded that none warranted habeas relief. The court declined to issue a COA.

West now appeals and seeks a COA on claims one, two, five, and six, and his claims that appellate counsel was ineffective for failing to raise claims five and six on appeal. West raises no arguments with respect to his remaining claims. He has therefore forfeited review of those claims in this court. *See* Jackson v. United States, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); Elzy v. United States, 205 F.3d 882, 886 (6th Cir. 2000).

HN1[↑] To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims **[*4]** 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

As described by the Michigan Court of Appeals, the evidence at trial included

> the recovery of a handgun in [West]'s possession whose forensic characteristics matched evidence recovered from the scene, testimony about [West]'s purchase of a consistent-looking gun, clothing found in [West]'s possession that matched that worn by one of the robbers, a photograph on [West]'s cellular telephone that depicted him posing with cash and a handgun, a victim's cellular telephone found in an area behind [West]'s home, and cellular-telephone-analysis evidence showing telephone calls made between Kuhlman and [West] on the day of the robbery.

West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *1. The State also presented expert testimony from Sergeant Timothy Fink, who opined that cellular telephone data indicated that, on the night of the robbery and shooting, West's cell phone was moving around the Saginaw area and at certain points was near Kuhlman's home.

West's first habeas claim challenges the admission of Fink's expert testimony. On direct appeal, West argued that Fink's testimony was inadmissible under Michigan Rule of Evidence 702 and violated his right to a fair **[*5]** trial. The state appellate court ruled that admission of this testimony was erroneous because Fink admitted that he did not have the "underlying factual data" to reliably opine about the location of West's cell phone. West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *2. The court concluded, however, that the error was harmless given Fink's testimony about "the shortcomings in the data he had been furnished" and "the inherent unreliability concerning the location data," defense counsel's "extensive cross-examination" of Fink, and "the other very strong evidence linking [West] to the crimes." 2014 Mich. App. LEXIS 2477, [WL] at *3.

HN2[↑] The erroneous admission of evidence under state law violates the constitutional right to due process only if it renders the petitioner's trial fundamentally unfair, *see* Broom v. Mitchell, 441 F.3d 392, 406 (6th Cir. 2006), and a constitutional error warrants habeas relief only if it had a "substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting Kotteakos, 328 U.S. at 776). As noted by the state court and the district court, there was ample evidence aside from the cell phone location data that connected West to the crimes, and Fink's own testimony and his cross-examination conveyed to the jury the unreliability of the data supporting his opinion about the location of West's cell phone. **[*6]** *See* West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *3. Reasonable jurists thus could not disagree that West did not show that the admission of Fink's testimony regarding the location of West's cell phone had a "substantial and injurious effect" on the jury's verdict or that the state court's harmlessness determination was unreasonable. Brecht, 507 U.S. at 637; *see* Brown v. Davenport, 142 S. Ct. 1510, 1527-28, 212 L. Ed. 2d 463 (2022).

In his second and sixth claims, West asserts that trial counsel provided ineffective assistance by (1) failing to challenge his arrest for reckless driving on Fourth Amendment grounds and seek suppression of evidence obtained as a result of that arrest and (2) conceding the elements of the charge of carrying a dangerous weapon. HN3[↑] To establish ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). Counsel's **[*7]** challenged conduct must be assessed against "the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When a habeas petitioner bases an ineffective-assistance claim on counsel's failure to bring a suppression motion, the "[p]etitioner must 'prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.'" Robinson v. Howes, 663 F.3d 819, 825 (6th Cir. 2011) (quoting Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

West became a suspect in the shooting when witnesses informed detectives that they had seen West at Kuhlman's home on the day of the shooting and that he was a source of cocaine for some of the people who had been at the house. Witnesses advised the detectives that West had been driving a maroon Blazer. The following day, while surveilling the location where they had found the Blazer, detectives saw West enter the Blazer and drive away. At the hearing on West's motion to suppress, Detective Jack Doyle testified that he followed the Blazer in his **[*8]** unmarked police car on to Interstate 675. West was initially traveling at a normal speed for expressway travel but then slowed down to 30 miles per hour. He then began to exit the interstate, but when he "got almost to the top of the off ramp, he "made an abrupt left turn" at the "last possible moment" and "went down over the median and then back onto southbound 1-75" in front of another vehicle traveling down the highway. Doyle and other officers then stopped the Blazer and arrested West for reckless driving. After a decision was made to impound the Blazer, Detective Robert Bean went into the vehicle and noticed that the center console was loose. He lifted the console and saw a loaded 30-round magazine. Once the Blazer was taken to the police station, Detective Bean and another officer searched the vehicle and recovered the 30-round magazine, a plastic baggie containing 12 Adderall pills, a loaded nine-millimeter handgun, a pair of gloves, and two black knit hats.

West claims that his attorney was ineffective for failing to seek suppression of evidence obtained from the Blazer on the ground that his warrantless arrest for reckless driving was not supported by probable cause, noting **[*9]** that he was never charged with reckless driving. The Michigan Court of Appeals rejected this claim, finding that the traffic stop was supported by an articulable and reasonable suspicion that West had violated Michigan's law against reckless driving and that the officers acted within their powers to arrest West. West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *6. The court also found no authority to support West's assertion that he had to have been charged with the offense for which he had been arrested in order for the evidence to be admissible. *Id.*

West argues that the state appellate court's decision was contrary to Whiteley v. Warden, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), in which the Supreme Court held that the defendant's arrest violated his rights under the Fourth Amendment because the complaint for the arrest warrant did not support a finding of probable cause by the issuing magistrate. Id. at 568-69. But Whiteley does not apply here because West was not arrested pursuant to an allegedly defective warrant. Rather, he was arrested without a warrant after officers saw him violate the law. See Mich. Comp. Laws § 764.15(1)(a). Reasonable jurists could not disagree with the district court's determination that a motion to challenge West's arrest would have been meritless and that counsel therefore was not ineffective for failing to bring such motion. **[*10]** See Robinson, 663 F.3d at 831.

Next, West claims that counsel was ineffective when he conceded that he was guilty of carrying a dangerous weapon. He argues that, because the State had to prove that West carried a dangerous weapon at

Kuhlman's home on the night of May 29, 2012, counsel's concession, which was based on the evidence that he had a gun in his car on May 31, 2012, "relieved the prosecution of it[]s burden to prove [his] presence" at Kuhlman's house on the night of the shooting in order to counter his alibi defense. But counsel did not concede that West was carrying a dangerous weapon on the night of the shooting. During his closing argument, counsel stated,

> If you are convinced in your own mind that when he was stopped and he had that gun in the car that he was carrying a dangerous weapon with an unlawful intent, then you're free to conclude that. And you're free to convict him of that charge. Because he was carrying a dangerous weapon. We have conceded at least the first half of that. If you think they have proven the second half of that, that he had an unlawful intent, and you think that was proven beyond a reasonable doubt, you can convict him of that.

Counsel's concession said nothing about whether **[*11]** West was carrying a dangerous weapon on the night of the shooting and did not relieve the State of its burden of proving that West was at Kuhlman's home. Indeed, counsel argued West's alibi defense to the jury, argued that there were other reasons for West having a gun in his car on the day he was pulled over, and maintained that none of the other charges had been proven beyond a reasonable doubt. On this record, reasonable jurists could not disagree with the district court's determination that, "[v]iewed in the context of the seriousness of the other offenses and the strength of the evidence, counsel's decision to concede that [West] was carrying a dangerous weapon was not unreasonable." *West v. Chapman, No 18-13567, 2022 U.S. Dist. LEXIS 17543, 2022 WL 286548, at *7 (E.D. Mich. Jan. 31, 2022)*; *see Florida v. Nixon, 543 U.S. 175, 187-92, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)*; *Poindexter v. Mitchell, 454 F.3d 564, 581-82 (6th Cir. 2006)*. Moreover, West has failed to make a substantial showing that, absent counsel's concession, the jury would have acquitted him of the carrying-a-dangerous-weapon charge or believed his alibi defense and acquitted him of the other charges. *See Strickland, 466 U.S. at 694*. Reasonable jurists would agree that this claim does not deserve encouragement to proceed further.

In his fifth ground for relief, West claims that he was denied a fair trial because the judge who presided over his preliminary examination, Christopher **[*12]** S. Boyd, later appeared as a prosecutor in the case. Boyd presided over West's preliminary examination in July and August of 2012. During the 2013 trial, Boyd's appearance on behalf of the State was limited to one day, during which he examined the State's expert witness, Fink, and cross-examined the defense's expert witness.

To the extent West argues that Boyd's subsequent appearance for the prosecution violated Michigan's Rules of Professional Conduct, reasonable jurists could not disagree with the district court's determination that the claim is not cognizable on habeas review. *See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*. Nor could reasonable jurists debate the district court's denial of West's due process claim. West framed his claim as one of judicial misconduct, but Boyd did not serve as a judge over West's trial. And to the extent West argued that Boyd's appearance as a prosecutor was improper, as the district court stated, "there is no evidence that by presiding over the preliminary examination, Boyd became aware of privileged or otherwise unavailable information or evidence." *West, 2014 Mich. App. LEXIS 2477, 2022 WL 286548, at *9*. West has failed to make a substantial showing that Boyd's appearance in his case violated his right to due process.

Finally, West seeks a **[*13]** COA on his claims that appellate counsel was ineffective for failing to raise claims five and six on appeal. As discussed above, West failed to make a substantial showing that trial counsel was ineffective for conceding that West had carried a dangerous weapon or that Boyd's appearance as a judge during his preliminary examination and then later as a prosecutor at trial violated his due process right to a fair trial. He therefore cannot show that appellate counsel was ineffective for failing to raise these claims on appeal. *See Strickland, 466 U.S. at 687-88, 694*; *Shaneberger v. Jones, 615 F.3d 448, 452 (6th Cir. 2010)*. Reasonable jurists would agree that West's appellate-counsel claims do not deserve encouragement to proceed further.

For these reasons, West's application for a COA is **DENIED** and his motion for appointment of counsel is **DENIED** as moot.

End of Document

APPENDIX C

Neutral
As of: September 29, 2022 10:50 PM Z

West v. Chapman

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

January 31, 2022, Decided; January 31, 2022, Filed

Case No. 18-13567

Reporter
2022 U.S. Dist. LEXIS 17543 *; 2022 WL 286548

QUINTEL WEST, Petitioner, v. WILLIS CHAPMAN, Respondent.

Subsequent History: Certificate of appealability denied, Motion denied by, As moot, Request denied by *West v. Artis, 2022 U.S. App. LEXIS 25628 (6th Cir., Sept. 12, 2022)*

Prior History: *People v. West, 2014 Mich. App. LEXIS 2477 (Mich. Ct. App., Dec. 16, 2014)*

Core Terms

ineffective, arrest, Juror, telephone, argues, reasonable probability, appellate counsel, state court, fair trial, punctuation, modified, suppress, habeas relief, certificate, fail to raise, trial counsel, credibility, murder, reckless driving, trial court, cell phone, convictions, impartial, carrying, harmless, merits, tower, in forma pauperis, dangerous weapon, federal court

Counsel: **[*1]** Quintel West, Petitioner, Pro se, MUSKEGON HEIGHTS, MI.

For Willis Chapman, Warden, Respondent: Andrea M. Christensen-Brown, Michigan Department of Attorney General, G. Mennen Williams Building, 4th Floor, Lansing, MI; John S. Pallas, Michigan Department of Attorney General, Appellate Division, Lansing, MI.

Judges: HON. MARK A. GOLDSMITH, United States District Judge.

Opinion by: MARK A. GOLDSMITH

Opinion

OPINION AND ORDER (1) DENYING PETITION FOR WRIT OF HABEAS CORPUS, (2) DENYING CERTIFICATE OF APPEALABILITY, AND (3) GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

Michigan prisoner Quintel West filed a pro se petition for a writ of habeas corpus under *28 U.S.C. § 2254* (Dkt. 1). Petitioner challenges his 2013 convictions for first-degree felony murder, assault with intent to murder, first-degree home invasion, armed robbery, conspiracy to commit first-degree home invasion, conspiracy to commit armed robbery, carrying a weapon with unlawful intent, and five counts of possession of a firearm during the commission of a felony. The petition raises nine claims for relief. For the reasons explained below, the Court denies the petition. The Court denies a certificate of appealability and grants Petitioner leave to proceed in forma **[*2]** pauperis on appeal.

I. BACKGROUND

The charges against Petitioner arose from a fatal shooting and robbery in Saginaw, Michigan at around midnight on May 29-30, 2012. The Michigan Court of Appeals summarized the testimony leading to Petitioner's convictions as follows:

> This appeal involves the shooting death of Michael Kuhlman and related crimes stemming from a robbery and home invasion that occurred while Kuhlman and the other victims were playing poker at Kuhlman's home. Evidence against defendant included the recovery of a handgun in defendant's possession whose forensic characteristics matched evidence recovered from the scene, testimony about defendant's purchase of a consistent-looking gun, clothing found in defendant's possession that matched that worn by one of the robbers, a photograph on defendant's cellular telephone that depicted him posing with cash and a handgun, a victim's cellular telephone found in an area behind defendant's home, and cellular-telephone-analysis evidence showing telephone calls made between

Kuhlman and defendant on the day of the robbery.

*People v. West, No. 317109, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *1 (Mich. Ct. App. Dec. 16, 2014)*.

Following a jury trial, Petitioner was convicted of the following offenses: first-degree felony murder, *Mich. Comp. L. § 750.316*; assault with **[*3]** intent to murder (AWIM), *Mich. Comp. L. § 750.83*; first-degree home invasion, *Mich. Comp. L. § 750.110a(2)*; conspiracy to commit first-degree home invasion, *Mich. Comp. L. § 750.110a(2)* and *Mich. Comp. L. § 750.157a*; armed robbery, *Mich. Comp. L. § 750.529*; conspiracy to commit armed robbery, *Mich. Comp. L. § 750.529* and *Mich. Comp. L. § 750.157a*; carrying a dangerous weapon with unlawful intent, *Mich. Comp. L. § 750.226*; and five counts of possession of a firearm during the commission of a felony (felony-firearm) *Mich. Comp. L. § 750.227b*. On June 17, 2013, Petitioner was sentenced to life without parole for the murder conviction, 210 months to 40 years for the assault conviction, 5 to 20 years for both home-invasion convictions, 210 months to 40 years for both armed-robbery convictions, and two years for each felony-firearm conviction.

Petitioner filed an appeal of right in the Michigan Court of Appeals. Through counsel and in a pro se supplemental brief, he raised five claims. First, the trial court improperly admitted an expert witness's maps and diagrams. Second, the trial court erred in denying Petitioner's motion to suppress evidence. Third, the trial court erred in giving a flight instruction. Fourth, evidence found following Petitioner's warrantless arrest should have been suppressed. Fifth, trial counsel was ineffective for failing to file a motion to suppress evidence seized following an unlawful **[*4]** arrest. The Michigan Court of Appeals affirmed Petitioner's convictions. *West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *6*.

Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims that he raised in the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal, *People v. West, 498 Mich. 919, 871 N.W.2d 172 (Mich. 2015)*, and denied Petitioner's motion for reconsideration, *People v. West, 499 Mich. 872, 874 N.W.2d 692 (Mich. 2016)*.

Petitioner then filed a motion for relief from judgment in the trial court that raised 11 claims, including the following claims that are also raised in his habeas petition: (i) Petitioner was denied a fair trial because a juror stated that an alibi witness would come forward promptly if the witness were telling the truth; (ii) Petitioner was denied his right to an unbiased judge; (iii) ineffective assistance of trial counsel; (iv) prosecutorial misconduct; (v) the trial court improperly denied the motion to suppress allegations of reckless driving and possession of a firearm; and (vi) police withheld exculpatory evidence. The trial court denied the motion. People v. West, No. 12-037699-FC (Saginaw Cnty. Cir. Ct. June 1, 2017). The Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner leave to appeal. People v. West, No. 338903 (Mich. Ct. App. Jan. 3, 2018); *People v. West, 503 Mich. 885, 919 N.W.2d 260 (Mich. 2018)*.

Petitioner then filed this **[*5]** habeas petition. He seeks habeas relief on the following grounds:

> I. The M.C.O.A. [Michigan Court of Appeals] harmless error finding, relating to the admission of the prosecution's cellular tower expert witness testimony, was contrary to, or involved an unreasonable application of Kotteakos v. United States, and/or Chapman v. California, where the prosecution's heavy reliance on the expert's testimony had a substantial and injurious effect or influence on the jury's verdict, resulting in actual prejudice.
>
> II. Petitioner's trial counsel was ineffective, pursuant to the *Sixth Amendment*, for failing to challenge the alleged arrest for reckless driving, pursuant to the *Fourth Amendment*, and for failing to move to suppress evidence from the arrest on the grounds that the arrest lacked probable cause. The M.C.O.A. finding that trial counsel is not ineffective because the petitioner has not shown the arrest was unlawful is contrary to, or an unreasonable application of, Strickland v. Washington, Giordenello v. United States, County of Riverside v. McLaughlin, and Whitely v. Warden, where counsel knew that there was never a probable cause determination for a reckless driving, and had counsel challenged the arrest the handgun **[*6]** would have been suppressed and there would have been a reasonable probability that the petitioner would have been acquitted.
>
> III. The trial court's flight instruction over the Petitioner's objection violated the Petitioner's right to a fair and impartial trial, pursuant to the *Sixth* and

Fourteenth Amendment, where the instruction created the presumption that the Petitioner had something to do with the crimes, and relieved the prosecution of its burden to prove presence, and appellate counsel was ineffective, under Sixth and Fourteenth Amendment, for failing to raise this claim on appeal where had counsel raised the claim there would be a reasonable probability that Petitioner's conviction would have been reversed.

IV. The opinion of a juror, that an alibi witness would come forward right away if they were telling the truth deprived the Petitioner of his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury where defense alibi did not come forward right away, and appellate counsel was ineffective under the Sixth and Fourteenth Amendments for failing to raise the claim on appeal where had counsel raised the claim there would be a reasonable probability that the Petitioner's conviction would have been reversed.

V. Prosecuting attorney Christopher S. Boyd violated MRPC 1.12 and **[*7]** Petitioner's due process rights to fundamentally fair proceeding by an impartial judge guaranteed by the Sixth and Fourteenth Amendment was violated where Boyd participated in the prosecution during trial, but was also the district court judge who bonded [sic] the case over for trial. And appellate counsel was ineffective under the Sixth and Fourteenth Amendment, for failing to raise this claim on appeal where had counsel raised the claim there would be a reasonable probability that Petitioner's conviction would have been reversed.

VI. The trial counsel was ineffective under the Sixth and Fourteenth Amendment, by relieving the prosecution of its burden to prove presence by conceding the elements of the charged carrying a dangerous weapon offense which was charged as being committed at the crime scene, and appellate counsel was ineffective under the Sixth and Fourteenth Amendment for failing to raise this claim on appeal where had counsel raised the claim there would have been a reasonable probability that Petitioner's conviction would have been reversed.

VII. The trial court denial of the Petitioner's motion to quash based on oral reckless driving and firearm possession accusations deprived the Petitioner of his due process rights to a fair trial and impartial hearings, pursuant to **[*8]** the Fifth, Sixth and Fourteenth Amendment, where Petitioner was never given notice in the form of an information of the oral accusations. And appellate counsel was ineffective under the Sixth and Fourteenth Amendment for failing to raise this claim on appeal where had counsel raised the claim on appeal there would be a reasonable probability that Petitioner's conviction would have been reversed.

VIII. The prosecutor's closing arguments amounted to prosecutor misconduct resulting in a violation of the Petitioner's due process right to a fair trial guaranteed by the Sixth and Fourteenth Amendment. And appellate counsel was ineffective under the Sixth and Fourteenth Amendment for failing to raise this issue on direct appeal where had counsel raised the issue there would be a reasonable probability that the Petitioner's conviction would have been reversed.

IX. The police failure to disclose to the Petitioner the statement, name, contact information of a witness relating to a stolen cell phone from the robbery violated the Petitioner's Sixth and Fourteenth Amendment rights to a favorable witness resulting in an unfair trial. And appellate counsel was ineffective under the Sixth and Fourteenth Amendment for failing to raise the claim on appeal where had counsel raised the claim there would be a reasonable probability that the Petitioner's conviction **[*9]** would have been reversed.

Respondent filed an answer to the petition, maintaining that Petitioner's fourth, fifth, sixth, and eighth claims are procedurally defaulted and that all of his claims are meritless (Dkt. 9). Petitioner filed a reply (Dkt. 14) and an amended reply (Dkt. 19).

Under the doctrine of procedural default, a federal court generally may not review claims that a habeas petitioner has defaulted in state court "pursuant to an independent and adequate state procedural rule." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). The procedural default doctrine is not jurisdictional, and the Court may bypass this question when proceeding directly to the merits is more efficient. Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) ("Judicial economy might counsel giving the [merits] question priority . . . if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."). The Court

will proceed to the merits of Petitioner's claims without deciding the procedural-default issue.

II. STANDARD OF REVIEW

Title 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), imposes "important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases." **[*10]** Shoop v. Hill, 139 S. Ct 504, 506, 202 L. Ed. 2d 461 (2019). A federal court may grant habeas corpus relief only if the state court's adjudication "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." 28 U.S.C. § 2254(d)(1).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405-406, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." Id. at 409. 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." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

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 of correctness only with clear and convincing **[*11]** evidence. Id. For claims that were adjudicated on the merits in state court, habeas review is "limited to the record that was before the state court." Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

III. DISCUSSION

A. Habeas Petition

The Court addresses each of Petitioner's claims for relief in turn.

1. Expert Witness Testimony (Claim 1)

Petitioner's first claim concerns the testimony of the prosecution's expert witness in cellular telephone data. Petitioner argues that the expert witness should not have been permitted to give his opinion about the location and movement of Petitioner's cell phone, particularly that the phone was moving around Saginaw at the time of the robbery and that the phone was near the victim's home.

The Michigan Court of Appeals held that the trial court erred when it allowed the expert's opinion regarding the location and movement of Petitioner's phone. West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *2. But the state court held the error was harmless:

> [T]he expert's own testimony undermined the reliability of this opinion. He acknowledged that he could not testify regarding how Verizon routes calls and that calls did not always connect to the nearest tower. He also stated that call volume was one of the factors that affected which tower would connect with a **[*12]** telephone. He stated that one of the ways that a telephone call could be rerouted to a different tower during a call would be if the telephone was moving, but did not know whether other reasons could cause the telephone to switch towers. He also stated that some of the cellular tower service areas overlapped so that moving a few feet could cause the telephone to switch towers. Nothing in the expert's training told him how far the tower service areas reached. In short, the expert admitted he was not qualified, or at least did not have the underlying factual data, to opine in the instant case about the location of defendant's telephone with reasonable reliability.
>
> However, because it does not affirmatively appear more probable than not that this testimony was outcome-determinative, any error was harmless. Lukity, 460 Mich. at 495-496. Nothing prevented the jury from drawing its own opinion about the location of the telephone calls from the data presented by the expert, and, significantly, the expert was very forthcoming about the shortcomings in the data he had been furnished. In addition, defendant's own expert witness further explained the inherent unreliability concerning the location data. Given the extensive **[*13]** cross-examination of the

> prosecution's expert, we find that the jury was not left with a misunderstanding of the extent to which the cellular telephone data could be used. We also note the other very strong evidence linking defendant to the crimes. Accordingly, any error in allowing the expert's opinion testimony concerning location information was harmless. See *Benton, 294 Mich. App at 199* ("Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence.").

*2014 Mich. App. LEXIS 2477, [WL] at *2—*3.*

Habeas relief is seldom available for a state court's erroneous evidentiary ruling because habeas relief "does not lie for errors of state law." See *Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*. An evidentiary ruling may violate the *Due Process Clause* and thereby provide a basis for habeas relief where the ruling "is so extremely unfair that its admission violates fundamental conceptions of justice." *Dowling v. United States, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)* (punctuation modified); see also *Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003)* ("When an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief."). The Supreme Court has "defined the category of **[*14]** infractions that violate fundamental fairness very narrowly." *Estelle, 502 U.S. at 73* (punctuation modified). To violate due process, an evidentiary decision must "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Seymour v. Walker, 224 F. 3d 542, 552 (6th Cir. 2000)* (punctuation modified).

On habeas review, a constitutional error is considered harmless if it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)* (punctuation modified). A state court's decision that an error was harmless constitutes an adjudication "on the merits" to which the "highly deferential AEDPA standard" applies. *Davis v. Ayala, 576 U.S. 257, 269, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015)*; see also *Langford v. Warden, 665 Fed. Appx. 388, 389 (6th Cir. 2016)* (explaining that when a state court has held that any error was harmless, courts on collateral review must "give a heightened degree of deference to the state court's review of a harmless error decision").[1]

The evidence against Petitioner was substantial, including that the suspect vehicle matched Petitioner's vehicle, that a victim's cell phone was found in a yard abutting Petitioner's own, and that a handgun that was consistent with evidence recovered from the scene was recovered in Petitioner's possession. Additionally, as noted by the state **[*15]** court, the impact of the expert's challenged testimony was significantly diluted by the expert's own testimony detailing the limitations and shortcomings of his analysis. The Court finds that any error in admitting the expert's challenged testimony did not have a "substantial and injurious effect or influence" on the jury's verdict. *Brecht, 507 U.S. at 637*.

2. Ineffective Assistance of Counsel (Claims 2 and 6)

Petitioner argues in his second and sixth claims for habeas relief that he received ineffective assistance of counsel. An ineffective assistance of counsel claim has two parts. A petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defense. See *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Because the Michigan Court of Appeals adjudicated Petitioner's ineffective assistance of counsel claims on the merits, AEDPA's deferential standard of review applies to these claims. Under AEDPA, "the question" for this Court "is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*.

The Court first discusses Petitioner's claim that trial counsel was ineffective for failing to challenge

---

[1] Petitioner contends that state court's harmless error determination was contrary to *Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)* (holding that constitutional error is reversible unless harmless beyond a reasonable doubt). As noted, on federal habeas review, *Brecht* is the proper standard. The Supreme Court recently granted certiorari to decide whether, in a habeas proceeding under § 2254, a federal court may grant relief based solely on *Brecht* or if it must also find that the state court's application of the *Chapman* standard was unreasonable under § 2254(d)(1). See *Brown v. Davenport, 141 S. Ct. 2465, 209 L. Ed. 2d 527, 2021 WL 1240919 (U.S. 2021)*. The outcome of *Brown* will not affect this case because Petitioner's claim fails even if only the *Brecht* standard applies.

Petitioner's arrest for reckless driving or to move to suppress evidence from the arrest on **[*16]** the ground that the arrest lacked probable cause. It then examines Petitioner's claim that trial counsel was ineffective because counsel conceded Petitioner's guilt for the elements of carrying a dangerous weapon. The Court determines that the Michigan Court of Appeals' decision that counsel was not ineffective was not contrary to or an unreasonable application of Supreme Court precedent.

a. Evidentiary Issues

In his second claim, Petitioner argues that trial counsel was ineffective for failing to challenge his arrest for reckless driving or to move to suppress evidence from the arrest. Petitioner was identified as a suspect in the robbery of Kuhlman's home because he and his maroon Chevy Blazer had been seen there the day of the robbery. The day after the shooting, Saginaw Township Police Detective Sergeant Jack Doyle saw Petitioner leave his home and enter his Chevy Blazer. Doyle followed the Blazer onto the highway. Petitioner began to drive recklessly and was ultimately stopped and arrested for reckless driving. After Petitioner had been placed under arrest and while the Blazer was still on the side of the highway, Police Detective Robert Bean reached into the car to begin to perform **[*17]** an inventory search. Detective Bean placed his hand on the middle console and noticed it was extremely loose. He looked under the console and found a fully loaded magazine. The police did not conclude the inventory search until the vehicle was impounded because the vehicle was on a well-traveled portion of the interstate, and it was safer for officers to conduct the inventory search at the police station. Once back at the police station, police discovered prescription medicine and a handgun in the vehicle.

Defense counsel moved to suppress the magazine on the ground that the automobile exception to the warrant requirement did not justify the search of the vehicle's console and moved to suppress the handgun on the ground that the police did not follow established policies during the inventory search. Petitioner argues that counsel was ineffective in failing to move to suppress on the ground that police lacked probable cause to arrest him, that he was not charged with reckless driving, and that he never received a probable cause hearing for the arrest. He maintains that because police lacked probable cause to arrest him, all evidence obtained in searches after the arrest was inadmissible. **[*18]**

Petitioner raised this claim in a pro se supplemental brief on direct review. The Michigan Court of Appeals held that the police had probable cause to arrest Petitioner and that there was no authority for Petitioner's contention that, "in order for the evidence to be used, he had to have been charged with the offense for which he was initially arrested." *West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *6*. The court also held that, because the arrest was lawful, counsel was not ineffective for failing to argue that the evidence should be suppressed on the ground that police lacked probable cause for the arrest. Id.

The Michigan Court of Appeals' holding that probable cause existed for the arrest is supported by the record, and a motion to challenge the arrest would have been meritless. "[F]ailing to make a futile motion is neither unreasonable nor prejudicial." *Jacobs v. Sherman, 301 F. App'x 463, 470 (6th Cir. 2008)*. It follows that trial counsel was not ineffective for failing to move to suppress on the basis of an illegal arrest. Therefore, habeas relief is not warranted on this claim.

b. Concession of Guilt

In his sixth claim, Petitioner asserts that counsel was ineffective because counsel conceded Petitioner's guilt for the elements of carrying a dangerous weapon. At trial, defense counsel **[*19]** argued:

> It's a heavy burden, beyond a reasonable doubt; they haven't met it. They didn't show that Quintel murdered anybody, that he broke into that house. That he stole any money. If you are convinced in your own mind that when he was stopped and he had that gun in the car that he was carrying a dangerous weapon with an unlawful intent, then you're free to conclude that. And you're free to convict him of that charge. Because he was carrying a dangerous weapon. We have conceded at least the first half of that. If you think they have proven the second half of that, that he had unlawful intent, and you think that was proven beyond a reasonable doubt, you can convict him of that.

5/3/13 Jury Trial Tr. Vol VII of VIII at PageID.1736 (Dkt. 10-18).

Defense counsel undoubtedly recognized that the evidence showing that Petitioner had a gun in his vehicle was overwhelming and that contesting this point would be of little use. It was reasonable, therefore, for defense counsel to concede this point for the lesser offense. The United States Supreme Court has

recognized that defense counsel may concede a defendant's guilt for lesser offenses in an effort to avoid conviction on more serious charges **[*20]** without violating the Sixth Amendment. See Florida v. Nixon, 543 U.S. 175, 189, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) (finding that trial counsel's strategic decision to concede guilt at the guilt phase of a capital trial did not automatically render counsel's performance deficient); see also Poindexter v. Mitchell, 454 F.3d 564, 582 (6th Cir. 2006) (holding that counsel was not ineffective by conceding that the petitioner was guilty of murder but arguing that he was not guilty of aggravated murder) (citing Nixon, 543 U.S. at 189); Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990) ("[T]here is a distinction which can and must be drawn between . . . a tactical retreat and . . . a complete surrender."). Viewed in the context of the seriousness of the other offenses and the strength of the evidence, counsel's decision to concede that Petitioner was carrying a dangerous weapon was not unreasonable. Therefore, Petitioner is not entitled to relief on this claim.

3. Jury Instruction (Claim 3)

In his third claim, Petitioner argues that his right to a fair trial was violated when the trial court gave a jury instruction on flight. He claims that the instruction was improper because there was no evidence that Petitioner was one of the three men seen fleeing the scene.

Obtaining federal habeas relief for a jury instruction claim is "a difficult hill to climb." Keahey v. Marquis, 978 F.3d 474, 478 (6th Cir. 2020). To show that a jury instruction violates due process, **[*21]** a habeas petitioner must demonstrate "both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Waddington v. Sarausad, 555 U.S. 179, 190-191, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009) (punctuation modified). A federal court may not grant a writ of habeas corpus on the ground that a jury instruction was incorrect under state law; instead, the relevant inquiry is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72 (punctuation modified). The jury instruction "must be considered in the context of the instructions as a whole and the trial record." Id.

The Michigan Court of Appeals held that the evidence presented supported the flight instruction. West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *5. Federal courts are bound by state courts' interpretation of state laws. See Mullaney v. Wilbur, 421 U.S. 684, 690-691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). Because the Michigan Court of Appeals ruled that the evidence was sufficient to support a flight instruction under Michigan law, the Court must defer to that determination. See Seymour v. Walker, 224 F.3d 542, 558 (6th Cir. 2000) (explaining that when a state court finds an instruction accurately reflects state law, a federal court on habeas review may not "question **[*22]** the state court's interpretation of its own law"). Therefore, Petitioner is not entitled to relief on this claim.

4. Right to an Impartial Jury (Claim 4)

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The right to an impartial jury is made applicable to the states by the Fourteenth Amendment. Turner v. Louisiana, 379 U.S. 466, 471-472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). The presence of even a single biased juror deprives a defendant of the right to an impartial jury. Williams v. Bagley, 380 F.3d 932, 944 (6th Cir. 2004).

Petitioner claims that his right to an impartial jury was violated by the seating of a biased juror, Juror No. 17. During voir dire, the prosecutor established that Juror No. 17 spent the previous Saturday night with her husband and her family. 4/24/13 Jury Trial Tr. Vol I of VIII at PageID.1046 (Dkt. 10-12). The prosecutor then asked Juror No. 17 whether, if she were accused of committing a serious crime, her husband and family would delay reporting that she had been with them the night that the crime occurred. Id. She replied, "If it was the truth, I would think they would come forward." **[*23]** Id. Petitioner contends the seating of Juror No. 17 denied him a fair trial because his own alibi witness waited eight months before coming forward.

Petitioner fails to show that Juror No. 17's response reflected an inability to be impartial. The prosecutor's question must be considered in the context of the entire voir dire proceeding. The prosecutor did not introduce the topic of an alibi witness's credibility. Defense counsel previously asked multiple potential jurors about their views on an "alibi." Id. at 1031-1032. Defense

counsel's questions were designed to ensure that potential jurors did not see an alibi as "just an excuse" and that jurors understood that "people that give us alibis are the people that we are close to." Id. at 1031. She asked whether any juror would have a "question or issue" about that. Id.

In addition, Juror No. 17's response did not indicate an inability to be impartial. Jurors are tasked with judging witnesses' credibility. *United States v. Bailey, 444 U.S. 394, 414, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980)* ("The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses."). Jurors are free to consider any number of factors when assessing **[*24]** credibility. A witness's delay in coming forward is one factor that may be considered. *See United States v. Aguwa, 123 F.3d 418, 420 (6th Cir. 1997)* (holding that a prosecutor may properly argue that a witness is not to be believed because the witness delayed in coming forward with an alibi). Juror No. 17 cited a properly considered factor for assessing credibility and did not in any way indicate a bias in favor of the prosecution or defense. Further, there is no indication that Juror No. 17 did not follow the trial court's instruction that a verdict must be based only on the evidence presented or follow the court's guidance on what factors are properly considered when assessing credibility. 5/3/13 Jury Trial Tr. Vol VII of VIII at PageID.1740-1741. The record does not support Petitioner's claim that Juror No. 17 could not be fair and impartial. Petitioner is not entitled to relief on this claim.

5. Former Judge's Appearance as Prosecutor (Claim 5)

Next, Petitioner argues that he was denied a fair trial because Christopher S. Boyd, the judge who presided over his preliminary examination and found probable cause for a bindover, appeared as a prosecutor in his case. Boyd's appearance was limited to one day of Petitioner's eight-day trial, and **[*25]** Boyd questioned only the prosecution's expert witness and cross-examined the defense's expert witness.

Petitioner frames the issue as the denial of his constitutional right to an impartial judge. But this framework is inapplicable here because he does not allege that the judge who presided over his trial was biased. The question is whether Boyd's limited appearance violated Petitioner's right to a fair trial. Petitioner argues that Boyd violated *Michigan Rule of Professional Conduct 1.12*, which applies to former judges and provides that a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge unless all parties consent. Habeas relief is available only for violations of the United States Constitution. *28 U.S.C. § 2254(a)*. Petitioner's allegation based upon the Michigan Rules of Professional Conduct is not cognizable on federal habeas review.

Petitioner relies on *Williams v. Pennsylvania, 579 U.S. 1, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016)* to argue that Boyd's appearance at his trial violated due process. *Williams*, however, is distinguishable. In *Williams*, the Supreme Court stated a state judge must recuse "when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable." *Id. at 4* (punctuation modified). The Supreme Court found a serious **[*26]** risk of bias or prejudice because the sitting judge previously served as a prosecutor in the case and therefore "earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id. at 8*. Boyd was not the judge at Petitioner's trial, and there is no evidence that by presiding over the preliminary examination, Boyd became aware of privileged or otherwise unavailable information or evidence. On this record, Petitioner fails to show that his due process rights were violated.

6. *Fourth Amendment* Claim (Claim 7)

Petitioner claims that the police violated his right to be free from unlawful search and seizure when they conducted a warrantless search of his vehicle.

Where a state "has provided an opportunity for full and fair litigation of a *Fourth Amendment* claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)*. "Michigan has a procedural mechanism which presents an adequate opportunity for a criminal defendant to raise a *Fourth Amendment* claim." *Robinson v. Jackson, 366 F. Supp. 2d 524, 527 (E.D. Mich. 2005)*. Petitioner availed himself of this process by filing a motion to suppress before trial, and the Michigan Court of Appeals considered **[*27]** and rejected this claim on the merits. *See West, 2014 Mich. App. LEXIS 2477, 2014 WL 7157390, at *3—*4*. Accordingly, Petitioner is not entitled to relief on this claim.

7. Prosecutorial Misconduct (Claim 8)

In his eighth claim, Petitioner argues that the prosecutor's misconduct during closing argument deprived him of his right to a fair trial. Specifically, Petitioner argues that the prosecutor suggested that Petitioner's alibi witness perjured himself, argued that Petitioner manufactured Petitioner's defense in response to police reports, and shifted the burden of proof.

A prosecutor's misconduct violates a criminal defendant's constitutional rights if it "'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, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)* (quoting *Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)*). Prosecutorial misconduct entails much more than conduct that is "undesirable or even universally condemned." Id. To constitute a due process violation, the conduct must have been "so egregious so as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher, 602 F.2d 117, 119 (6th Cir. 1979)*.

The *Darden* standard "is a very general one, leaving courts more leeway . . . in reaching outcomes in case-by-case determinations." *Parker v. Matthews, 567 U.S. 37, 48, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)* (punctuation modified). "That leeway increases in assessing a state court's ruling under AEDPA" because the **[*28]** court "cannot set aside a state court's conclusion on a federal prosecutorial-misconduct claim unless a petitioner cites . . . other Supreme Court precedent that shows the state court's determination in a particular factual context was unreasonable." *Stewart v. Trierweiler, 867 F.3d 633, 638-639 (6th Cir. 2017)* (punctuation modified).

Petitioner argues that the prosecutor committed misconduct in three ways. First, Petitioner claims that the prosecutor accused his alibi witness of lying. It is not improper for a prosecutor to explore a witness's motive for testifying that may bear upon credibility determinations. *See United States v. Akins, 237 F. App'x 61, 64 (6th Cir. 2007)*. Here, the prosecutor argued that alibi witness Jermaine Boose was motivated to testify because Boose wanted to help Petitioner, who was like a brother to Boose. The prosecutor also commented that inconsistency in Boose's testimony was because Boose did not pay attention during "dress rehearsal." 5/3/13 Jury Trial Tr. Vol VII of VIII at PageID.1737. The prosecutor's arguments did not express his personal belief as to Boose's credibility; instead, he emphasized Boose's personal allegiance to Petitioner from which one could infer a desire to protect Petitioner. This argument did not deprive Petitioner of a fair trial.

Second, Petitioner **[*29]** claims that the prosecutor committed misconduct by arguing that Petitioner's defense was crafted after Petitioner reviewed the police reports in the case. The prosecution was free to argue that a defense has been crafted in response to the prosecution's case. *See Portuondo v. Agard, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2002)*. The prosecution's argument was focused on the evidence presented at trial and the credibility of Petitioner's defense. Such arguments were not improper.

Third, Petitioner claims that the prosecutor improperly shifted the burden of proof during closing argument by posing a rhetorical question to the jury. Boose testified that Petitioner's business of buying and selling guns and controlled substances was motivated by money. The prosecutor asked why Petitioner would then not also be motivated to commit armed robbery and murder at Kuhlman's house when thousands of dollars were there. This argument did not shift the burden of proof to defendant. The prosecutor simply argued that, based on the evidence presented at trial, it was reasonable to infer that the desire for money would have provided Petitioner motivation to break into Kuhlman's house. This argument did not render Petitioner's trial fundamentally unfair.

8. Failure to [*30] Turn Over Witness Statement (Claim 9)

In his ninth claim, Petitioner argues that his right to due process was violated when police withheld the name and witness statement of the individual who found a cell phone stolen from Kuhlman's home. Petitioner fails to show that information exclusively within the control of the police was withheld or that this information was exculpatory.

The *Due Process Clause* requires the state to disclose to the defense favorable evidence that is material to guilt or punishment. *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1967)*. "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been

2254 Proceedings 11. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

In this case, reasonable jurists would not debate the Court's conclusion that none of the claims in the habeas petition warrants relief. Therefore, the Court denies a certificate of appealability.

C. Leave to Proceed In Forma Pauperis on Appeal

The standard for granting an application for leave to proceed in forma pauperis has a lower threshold than the standard for issuing a certificate of appealability. Foster v. Ludwick, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002). While a certificate of appealability may be granted only if a petitioner makes a substantial showing of the denial of a constitutional right, a court may grant leave to proceed in forma pauperis on appeal if it finds that an appeal can be taken in good faith. Id. at 764-765; 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(2). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. Foster, 208 F. Supp. 2d at 765. The Court finds that an appeal **[*35]** could be taken in good faith, and it grants Petitioner leave to proceed in forma pauperis on appeal. Id.

IV. CONCLUSION

For the reasons set forth above, the Court denies the petition for writ of habeas corpus, declines to issue a certificate of appealability, and grants leave to proceed in forma pauperis on appeal.

SO ORDERED.

Dated: January 31, 2022

Detroit, Michigan

/s/ Mark A. Goldsmith

MARK A. GOLDSMITH

United States District Judge

End of Document

APPENDIX

D

Neutral
As of: March 10, 2023 8:01 PM Z

People v. West

Supreme Court of Michigan

October 30, 2018, Decided

SC: 157274

Reporter
2018 Mich. LEXIS 2130 *; 503 Mich. 885; 919 N.W.2d 260; 2018 WL 5776432

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v QUINTEL ANDREW WEST, Defendant-Appellant.

Prior History: **[*1]** COA: 338903. Saginaw CC: 12-037699-FC.

People v. West, 498 Mich. 919, 871 N.W.2d 172, 2015 Mich. LEXIS 2633 (Nov. 24, 2015)

Core Terms

order of the court

Judges: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement, Justices.

Opinion

Order

On order of the Court, the application for leave to appeal the January 3, 2018 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under *MCR 6.508(D)*. The motion to remand for an evidentiary hearing is DENIED.

End of Document

APPENDIX

E

[redacted]

Court of Appeals, State of Michigan

ORDER

Joel P. Hoekstra
Presiding Judge

People of MI v Quintel Andrew West

David H. Sawyer

Docket No. 338903

LC No. 12-037699-FC

Mark T. Boonstra
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Court orders that the motion to remand for an evidentiary hearing is DENIED.

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN - 3 2013
Date

Chief Clerk

APPENDIX

F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff,

Case No. 12-037699-FC

Hon. James T. Borchard

-vs-

QUINTEL A. WEST

Defendant.

A TRUE COPY
Michael J. Hanley, Clerk

JOHN A. McCOLGAN
Saginaw Prosecuting Attorney
111 S. Michigan Ave.
Saginaw MI 48602

QUINTEL A. WEST #876569
Pro Per
Muskegon Correctional Facility
2400 S. Sheridan Dr.
Muskegon, MI 49442

ORDER AND OPINION OF THE COURT DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

AT A SESSION OF SAID COURT HELD IN THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, THIS 1st DAY OF June, 2017.

PRESENT: THE HONORABLE JAMES T. BORCHARD, CIRCUIT COURT JUDGE.

Status

Presently before the Court is Defendant's motion for relief from judgment pursuant to MCR 6.500 *et seq*. For the reasons set forth below, Defendant's motion is **DENIED.**

Factual and Procedural History

On May 6, 2013, Defendant was convicted by a jury of felony murder, assault with intent to murder, home invasion – 1st degree, armed robbery, conspiracy to commit armed robbery,

carrying a dangerous weapon with unlawful intent, six counts of felony firearms. On June 13, 2013, Defendant was sentenced to life imprisonment without the possibility of parole for felony murder; life imprisonment; 5 to 20 years; life imprisonment; life imprisonment; 24 months to 5 years; and 24 months preceding and consecutive to the following other counts. Defendant filed an appeal as of right in the Court of Appeals and was denied. On November 24, Defendant filed an application for leave in the Michigan Supreme Court and was denied.

Now, Defendant has filed this motion for relief from judgment based on: 1. Defendant was denied his Due Process rights. 2. Trial judge influenced the jury. 3. Unfair trial. 4. Trial court abused its discretion. 5. Ineffective assistance of defense counsel. 6. Ineffective assistance of appellate counsel.

Law and Analysis

A motion for relief from judgment may not be granted if the motion "alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding" unless Defendant establishes a "retroactive change in the law [that] has undermined the prior decision." MCR 6.508(D)(2). Additionally, the motion may not be granted if it "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence" unless good cause for failure to raise such grounds and actual prejudice are both established. MCR 6.508(D)(3)(a), (b); *People v Clark*, 274 Mich App 248, 253; 732 NW2d 605 (2007).

Here, Defendant raised the following issues: 1. Defendant was denied his Due Process rights. 2. Trial judge influencing the jury. 3. Unfair trial. 4. Trial court abused its discretion. 5. Ineffective assistance of defense counsel. 6. Ineffective assistance of appellate counsel. Defendant alleges that all of these actions violated his right and asks for a hearing based on these arguments. None of the arguments have merit.

All of these issues could have been raised in Defendant's original appeal. And he does not even attempt to put forward good cause for his failure to do so. In fact, many of these issues have already been ruled on by our Court of Appeals. Indeed, in Defendant's appeal of right, our Court of Appeals addressed Defendant's claims of: ineffective assistance of Defendant's trial counsel. In short, all of Defendant's arguments, except perhaps for ineffective assistance of appellate counsel, could have been raised on appeal or we already ruled on by our Court of Appeals. Defendant has not established any good cause and prejudice for failing to raise these issues previously, or in regard to the issues that have already been ruled on, Defendant has not established a retroactive change in the law that undermines the prior decision. Thus, Defendant is not entitled to any relief on those grounds pursuant to MCR 6.508(D)(2) and MCR 6.508(D)(3)(a), (b).

Defendant's claim of ineffective assistance of appellate counsel also lacks merit. Defendant argues that his appellate counsel was ineffective because he did not raise all of the issues Defendant wanted on appeal. The issue of the ineffectiveness of Defendant's trial

counsel has already been ruled on by our Court of Appeals. Defendant could have issued a standard 4 brief; making the argument to the Court. The Court notes that it is not enough for a defendant "in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitchmam v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Conclusion

For the reasons stated above, Defendant's motion for relief from judgement is **DENIED.** Additionally, for the reasons stated above, all other relief requested by Defendant, including his request for a hearing, and request for appointment of counsel is **DENIED.**

IT IS THEREFORE ORDERED that Defendant's motion for relief from judgment is **DENIED.**

IT IS SO ORDERED.

James T. Borchard #P27015
Circuit Court Judge

APPENDIX

I

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUINTEL ANDREW WEST,

Defendant-Appellant.

UNPUBLISHED
December 16, 2014

No. 317109
Saginaw Circuit Court
LC No. 12-037699-FC

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of first-degree felony murder, MCL 750.316; assault with intent to murder, MCL 750.83; first-degree home invasion, MCL 750.110a(2); conspiracy to commit first-degree home invasion, MCL 750.110a(2) and MCL 750.157a; armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; carrying a dangerous weapon with unlawful intent, MCL 750.226; and five counts of possession of a firearm during the commission of a felony (felony-firearm) MCL 750.227b. The trial court sentenced him to prison terms of life without parole for the murder conviction, 210 months to 40 years for the assault conviction, 5 to 20 years for both home-invasion convictions, 210 months to 40 years for both armed robbery convictions, and two years for each felony-firearm conviction. We affirm.

This appeal involves the shooting death of Michael Kuhlman and related crimes stemming from a robbery and home invasion that occurred while Kuhlman and the other victims were playing poker at Kuhlman's home. Evidence against defendant included the recovery of a handgun in defendant's possession whose forensic characteristics matched evidence recovered from the scene, testimony about defendant's purchase of a consistent-looking gun, clothing found in defendant's possession that matched that worn by one of the robbers, a photograph on defendant's cellular telephone that depicted him posing with cash and a handgun, a victim's cellular telephone found in an area behind defendant's home, and cellular-telephone-analysis evidence showing telephone calls made between Kuhlman and defendant on the day of the robbery.

I. Defendant first argues that the prosecution witness admitted as an expert witness regarding cellular telephone data should not have been permitted to opine that, given the data provided by the telephone carrier, defendant's cellular telephone was not stationary during the

evening of the robbery, but was moving around the Saginaw area and at times was close to Kuhlman's home. This Court reviews the admission of evidence for an abuse of discretion. *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). To the extent that a decision about the admission of evidence involves a "preliminary question[] of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence," then review of that issue is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The Michigan Supreme Court has referred to the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), regarding the reliability of expert testimony. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004). Specifically, MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant does not challenge the introduction of the expert's testimony showing that calls were made between defendant and Kuhlman, the fact that each call involved one or more cellular towers, or more precisely "sections" of tower coverage, nor the timing of the calls. In other words, he does not challenge the reliability of the data given to the expert from Verizon, the provider. Instead, he challenges the "location" opinion testimony provided by the expert and, in particular, the expert's opinion that normally if a call began on one cellular tower and ended on another tower it would mean that the caller was moving. This is essentially a challenge to requirements (1) and (2) above, with a primary focus on requirement (2). Defendant argues that even if a Verizon computer algorithm could show why a certain tower or tower section carried a particular telephone call, this algorithm was unknown to the expert and thus his conclusion was not based on adequate facts or data, nor was it the product of reliable principles and methods.

"When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012). However, "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (internal quotation marks and citation omitted). The proper inquiry is whether the expert opinion is rationally derived from a sound foundation, not whether it is ultimately correct or universally accepted. *Id.*

We conclude that defendant has shown that the trial court erred when it permitted the prosecution to present the expert's opinion that the cellular tower data likely indicated that defendant's cellular telephone was moving around Saginaw during the time of the robbery and,

in particular, that the telephone was near Kuhlman's location. Indeed, the expert's own testimony undermined the reliability of this opinion. He acknowledged that he could not testify regarding how Verizon routes calls and that calls did not always connect to the nearest tower. He also stated that call volume was one of the factors that affected which tower would connect with a telephone. He stated that one of the ways that a telephone call could be rerouted to a different tower during a call would be if the telephone was moving, but did not know whether other reasons could cause the telephone to switch towers. He also stated that some of the cellular tower service areas overlapped so that moving a few feet could cause the telephone to switch towers. Nothing in the expert's training told him how far the tower service areas reached. In short, the expert admitted he was not qualified, or at least did not have the underlying factual data, to opine in the instant case about the location of defendant's telephone with reasonable reliability.

However, because it does not affirmatively appear more probable than not that this testimony was outcome-determinative, any error was harmless. *Lukity*, 460 Mich at 495-496. Nothing prevented the jury from drawing its own opinion about the location of the telephone calls from the data presented by the expert, and, significantly, the expert was very forthcoming about the shortcomings in the data he had been furnished. In addition, defendant's own expert witness further explained the inherent unreliability concerning the location data. Given the extensive cross-examination of the prosecution's expert, we find that the jury was not left with a misunderstanding of the extent to which the cellular telephone data could be used. We also note the other very strong evidence linking defendant to the crimes. Accordingly, any error in allowing the expert's opinion testimony concerning location information was harmless. See *Benton*, 294 Mich App at 199 ("Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence.").

2. Defendant next argues that the trial court erred in denying his motion to suppress, thereby allowing the prosecution to present evidence found after various improper searches of his automobile. "This Court reviews a trial court's findings of fact at a suppression hearing for clear error and reviews de novo its ultimate decision on a motion to suppress the evidence." *People v Tavernier*, 295 Mich App 582, 584; 815 NW2d 154 (2012). Questions of law relevant to a motion to suppress evidence are reviewed de novo. See *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

During the suppression hearing, Saginaw Township Police Detective Sergeant Jack Doyle testified he had been given defendant's name as a possible suspect in the robbery, including information that defendant drove a maroon Blazer and had been seen at Kuhlman's home on the day of the robbery. The day after the shooting, Doyle saw defendant enter the suspect Blazer as he watched defendant's residence. In an unmarked police car, he and another detective followed the car onto the freeway. The Blazer then began to slow down, and the officers did as well; at one point the cars reached approximately 30 miles an hour. Defendant began to get off the freeway using an exit ramp, but as Doyle began to follow him, defendant swerved back onto the freeway, traveling over "the grass or gravel" in the area between the freeway and the ramp. Defendant reentered the freeway in front of a red truck pulling a trailer, causing the truck driver to use his brakes. The officers continued to follow defendant and defendant was stopped and arrested for reckless driving.

Intending to impound the car, Saginaw Township Police Detective Robert Bean "reached in, on the front seat" and placed his hand on the center console. As he did so, the console moved. Bean then lifted the console and noticed a 30-round loaded gun magazine. He left the magazine, and the car was towed to the police station. He and Officer Kevin Gloude searched the car at the station and recovered the magazine. Gloude testified that he then saw a corner of a plastic baggie sticking out from between the plastic housing the car's map lights and the roof liner. When he removed it from the partly attached housing, he saw that the baggie contained 12 pills, later determined to be Adderall. Gloude then searched the car, and because he had previously found contraband behind car glove boxes, he searched in that area. He pushed the plastic tabs that allowed the glove box to swing down and found a loaded 9mm handgun. He also removed black knit caps and a pair of gloves from the car.

The trial court concluded that the evidence was admissible because the inventory searches were proper following defendant's arrest for reckless driving. The court also concluded that the police had probable cause to search the car under the automobile exception based on the previous information concerning defendant's possible involvement in the armed robbery/homicide, the fact that a victim's telephone was found at a home near defendant's home, and defendant's actions while followed by the police.

The United States and the Michigan Constitutions prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The basic rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009) (citation, quotation marks, and emphasis omitted). In other words, warrantless searches and seizures are presumptively unreasonable unless an exception to the warrant requirement applies. Inventory searches are recognized exceptions to the warrant requirement. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011).

In general, an automobile may be searched by police officers without a search warrant if there is probable cause to support the search. *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). "[T]he automobile exception is premised on an automobile's ready mobility and pervasive regulation, and if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." *Id.* at 418. ✓ Lie

Defendant admits that the portion of the inventory search in which Gloude found the bag of Adderall was proper. Nor does defendant contest the general principle that a warrantless search may be conducted under the automobile exception even after a vehicle is in police custody and no longer subject to being driven away. See *People v Carter*, 250 Mich App 510, 515-518; 655 NW2d 236 (2002). Rather, defendant argues that the initial search of the car at the side of the road was not done pursuant to the department's policy regarding appropriate areas to be searched during an inventory search and that the police did not have sufficient probable cause to continue the extended search of the car following the discovery of the Adderall pills. Defendant's arguments regarding discovery of the loaded handgun behind the glove box and the loaded magazine under the console must fail.

The loaded handgun was discovered after the officers had ample probable cause to believe that further contraband would likely be found in the car due to the discovery of the Adderall pills, which were tucked up behind the map light, rather than in the console or any other "ordinary" location. The handgun was properly admitted.

The additional loaded magazine was also admissible. Leaving aside the question of whether it would be admissible as evidence found pursuant to a valid initial inventory search, we find that it would be admissible even if it were not. Once Gloude discovered the pills and began searching the car, it is highly likely that he too would have discovered the loose center console, lifted it up, and inevitably found the magazine. "The inevitable discovery exception generally permits admission of tainted evidence when the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been revealed in the absence of police misconduct." *People v Stevens (After Remand)*, 460 Mich 626, 637; 597 NW2d 53 (1999). Applying the exception under the factual circumstances of this case would not provide an "incentive for police misconduct." *Id.* at 637 (citation and quotation marks omitted).[1]

3. Defendant next argues that the trial court erroneously gave an instruction on flight based on testimony that a witness saw three individuals fleeing from the scene of the murder, because no testimony was presented that defendant was one of those individuals. "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The instruction being challenged is the following:

> There has been some evidence that the defendant ran away or hid after the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true. And, if true, whether the evidence shows that the defendant had a guilty state of mind.

A flight instruction is appropriate when the evidence shows the defendant fled the scene or ran from the police. See *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). At trial, an eyewitness testified that he saw three people running from the scene. While the witness did not specifically state that one of those people was, in fact, defendant, this testimony, when coupled with the *additional* evidence of defendant's involvement (including his actions on the freeway), provided sufficient circumstantial evidence supporting the flight instruction.

---

[1] In a supplemental brief, defendant seems to be arguing that suppression of evidence was required because of various alleged violations of departmental policies. However, we need not address these arguments because they are not raised in the statement of questions presented for appeal in the brief. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). At any rate, the arguments are without merit and demonstrate no entitlement to appellate relief. For example, two officers worked on the search and one of them testified that he completed an inventory form. Defendant has set forth no persuasive authority for finding an error requiring reversal in the procedure employed.

4. Defendant lastly argues that the warrantless arrest for reckless driving was unreasonable because the police lacked probable cause. He notes that he was neither arraigned for nor issued a warrant, a citation, or a ticket for reckless driving. Defendant argues that, because the police lacked probable cause to arrest, the evidence found after the subsequent searches should have been suppressed as fruit of the poisonous tree. He concurrently argues that counsel provided ineffective assistance for failing to move to suppress the evidence on this ground.

> In order to effectuate a valid traffic stop, a police officer must have an articulable and reasonable suspicion that a vehicle or one of its occupants is subject to seizure for a violation of law. The reasonableness of an officer's suspicion is determined on a case-by-case basis in light of the totality of the facts and circumstances and specific reasonable inferences he is entitled to draw from the facts in light of his experience. [*People v Jones,* 260 Mich App 424, 429; 678 NW2d 627 (2004) (citations and quotation marks omitted).]

As discussed above, testimony was presented that an officer saw defendant appear to exit the freeway, but then abruptly turn back onto the freeway in front of a vehicle pulling a trailer. Under MCL 257.626(2), "a person who operates a vehicle upon a highway . . . in willful or wanton disregard for the safety of persons or property" is guilty of reckless driving which, if no injury results, is a misdemeanor. Thus, the officer was acting within his power to arrest defendant. MCL 764.15(1)(a). Defendant has not identified any authority in support of his contention that, in order for the evidence to be used, he had to have been charged with the offense for which he was initially arrested.

Nor can defendant show he was provided ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because defendant cannot show that his arrest was unlawful, trial counsel cannot be faulted for failing to make an issue out of it. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

It was an unreasonable determination of fact to find that officer Doyle had probable cause to arrest Mr. West even though Doyle never filed any charges showing probable cause for the arrest.

Additional material from this filing is available in the Clerk's Office.