No. 22-2121

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL RAY THOMAS,

Petitioner-Appellant,

v.

ADAM DOUGLAS, Acting Warden, Saginaw Correctional Facility,

Respondent-Appellee.

ORDER

Before: McKEAGUE, Circuit Judge.

Michael Ray Thomas, a pro se Michigan prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. Thomas moves the court for a certificate of appealability (COA). Additionally, Thomas moves the court for appointment of counsel, for release pending appellate review of the district court's judgment, and to expedite the decision on his motion for release.

In 2012, Paul McNeil reported to the police that he had received an email containing child pornography and soliciting him to provide the sender with nude pictures of his children. Investigators traced the email back to an IP address used by Thomas. The police then executed a search warrant on the house that Thomas shared with his girlfriend, Karen Cipriano. During the search, the police seized several computers and storage devices. Two of the computers contained a total of 115 images of child pornography and search terms typically used by persons searching for child pornography on the internet. *See People v. Thomas*, No. 329750, 2017 WL 1967475 (Mich. Ct. App. May 11, 2017) (per curiam).

Thomas was subsequently convicted of possessing child sexually abusive material, using a computer to commit possession of child sexually abusive material, and using the internet to solicit

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child sexually abusive activity. The trial court sentenced Thomas to a total term of 12 to 20 years of imprisonment. The Michigan Court of Appeals affirmed, *see id.* at *1, and the Michigan Supreme Court did not accept Thomas's appeal for review, *People v. Thomas*, 907 N.W.2d 565 (Mich. 2018) (mem.).

In December 2018, Thomas filed a § 2254 petition in the district court, raising four claims: (1) improper admission of prior acts evidence; (2) insufficiency of the evidence; (3) prosecutorial misconduct; and (4) ineffective assistance of trial counsel. The district court denied each of Thomas's claims on the merits and declined to grant Thomas a COA. Later, the court denied Thomas's motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e). Thomas now moves this court to grant him a COA on each of his claims. To the extent that Thomas's COA application omits claims or subclaims that he raised in the district court, he has forfeited appellate review of them. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A. COA Standard

A COA 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). To satisfy this standard, the applicant 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Where the state courts adjudicated the petitioner's claim on the merits, the relevant question is thus whether the district court's application of § 2254(d) to that claim is debatable by jurists of reason. *Miller-El*, 537 U.S. at 336.

B. Thomas's Claims

1. Admission of Evidence of Prior Acts

As discussed above, investigators discovered child pornography and related search history on two of Thomas's computers. Thomas's defense was that Cipriano's ex-boyfriend, Alexander Waschull, had accessed his wireless network and planted the child pornography on his computers. At the time, Cipriano and Waschull were in a custody dispute over their son, and Thomas's theory was that Waschull was upset that Thomas was spending time with the child. To establish that Thomas knowingly possessed child pornography and was the person who had communicated with McNeil, the prosecution called an Ohio detective to testify under Michigan Rule of Evidence 404(b) that from late 2011 to early 2012, a person using the email address GoodTimes.Jones@gmail.com sent the detective several images of child pornography. This email address was the same one used to communicate with McNeil. *See Thomas*, 2017 WL 1967475, at *1.

The Michigan Court of Appeals rejected Thomas's argument that the trial court erred in admitting the Rule 404(b) evidence. Although the Ohio detective could not identify Thomas, the court found that his testimony was probative of the identity of the person who had communicated with McNeil. Further, the court found that the detective's testimony rebutted Thomas's claim that Waschull had planted child pornography on his computer because the detective's communication with the account holder of GoodTimes.Jones@gmail.com occurred before Thomas and Waschull knew each other. *See id.* at *2-4.

Thomas claims that the trial court erred in admitting the detective's testimony under Rule 404(b) because no evidence linked him to a prior bad act. Further, Thomas appears to claim that his attorney performed ineffectively by not challenging the prosecution's notice of intent to use Rule 404(b) evidence. He argues that the prosecution's notice stated that it intended to use this evidence to prove knowledge and intent whereas the Michigan Court of Appeals stated the evidence was admissible to prove identity.

The district court concluded that this claim was not cognizable to the extent that Thomas claimed that the trial court admitted the evidence in violation of state rules of evidence. Further, the court ruled that the trial court's admission of this evidence did not violate his constitutional right to due process and therefore that the Michigan Court of Appeals' resolution of this claim was not contrary to or an unreasonable application of Supreme Court precedent. The district court did not address Thomas's contention that his trial attorney performed ineffectively by not challenging the Rule 404(b) evidence.

As the district court concluded, a claim that the trial court erred in admitting evidence under state rules of evidence is not cognizable in federal habeas proceedings. *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). It is true that the Ohio detective could not identify Thomas. But a person using the same email address also sent child pornography to McNeil, and the IP address in both incidents led back to Thomas. So the Ohio detective's testimony was circumstantial evidence establishing Thomas's identity as the perpetrator in this case. Reasonable jurists therefore would not debate whether the admission of the Rule 404(b) was so fundamentally unfair as to have violated Thomas's right to a fair trial. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Otherwise, no clearly established Supreme Court precedent prohibits state courts from admitting evidence of a defendant's prior acts. *Stewart v. Winn*, 967 F.3d 534, 538 (6th Cir. 2020); *Bugh*, 329 F.3d at 512-13. Reasonable jurists therefore would not debate the district court's resolution of Thomas's first claim to the extent that he assigns error to the trial court's admission of the Rule 404(b) evidence.

To the extent that Thomas claims that his attorney performed ineffectively by not challenging the prosecution's notice of intent to use the Rule 404(b) evidence, reasonable jurists would not debate whether the claim deserves encouragement to proceed further. The Michigan Court of Appeals denied this claim, finding that the prosecution's notice complied with Rule 404(b) and therefore that any challenge to the notice would have been futile. *See Thomas*, 2017 WL 1967475, at *8. Inasmuch as federal habeas courts are bound by a state court's interpretation of state law, *Alley v. Bell*, 307 F.3d 380, 398 (6th Cir. 2002), no reasonable jurist

could conclude that Thomas's attorney performed ineffectively by not challenging the prosecution's notice, *see Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

2. Sufficiency of the Evidence

Thomas claims that the evidence was insufficient for the jury to convict him because no witness implicated him in personally possessing child pornography. The Michigan Court of Appeals denied this claim, concluding that there was sufficient circumstantial evidence for the jury to convict him. *See Thomas*, 2017 WL 1967475, at *5-6. The district court concluded that the state court's resolution of Thomas's sufficiency claim was not contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979).

In reviewing sufficiency claims under AEDPA, this court gives the state court's judgment a double layer of deference. *See Brown v. Konteh*, 567 F.3d 191, 204-05 (6th Cir. 2009). First, the court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 205 (citing *Jackson*, 443 U.S. at 319). Second, even if the court concludes that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, it must defer to the state court's sufficiency determination as long as it is not unreasonable. *Id.* (citing 28 U.S.C. § 2254(d)(2)). In evaluating sufficiency claims, this court "do[es] not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Id.* Moreover, "circumstantial evidence 'is entitled to the same weight as direct evidence,' and 'circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.'" *United States v. Mack*, 808 F.3d 1074, 1080 (6th Cir. 2015) (quoting *United States v. Wettstain*, 618 F.3d 577, 583 (6th Cir. 2010) (cleaned up); *United States v. Farley*, 2 F.3d 645, 650 (6th Cir. 1993)).

Here, as the Michigan Court of Appeals found, there was compelling circumstantial evidence that Thomas committed the offenses—child pornography was discovered on computers and storage devices that apparently only he had access to; investigators traced emails soliciting child pornography backed to his IP address; and the prosecution presented expert testimony that it

was not possible for a third party to plant child pornography on the computers, thus undercutting Thomas's theory that Waschull had framed him. *See Thomas*, 2017 WL 1967475, at *6. Given this compelling circumstantial evidence, reasonable jurists would not debate the district court's conclusion that the Michigan Court of Appeals did not unreasonably resolve Thomas's sufficiency claim.

3. Prosecutorial Misconduct

Thomas asserts various instances of alleged prosecutorial misconduct.

Thomas first claims that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not seizing a router from his house. In the Michigan Court of Appeals, Thomas contended that the router would have contained a history of all the devices that had accessed the internet through his home network. The state court reviewed this claim for plain error because Thomas did not raise this issue in the trial court. The court then concluded that Thomas had not established a *Brady* violation because he had not shown that the police acted in bad faith by not seizing the router; moreover, there was no basis for concluding the router had exculpatory value. Additionally, the court noted that the police had neither suppressed nor failed to preserve the router; rather, they simply did not collect it as evidence. And in that regard, the court held that the police did not have a duty to assist Thomas in developing exculpatory evidence. *See Thomas*, 2017 WL 1967475, at *6-7. The district court concluded that this decision was not contrary to or an unreasonable application of Supreme Court precedent.

When the state fails to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988), the petitioner must show that the police acted in bad faith in failing to preserve the evidence, *id.* at 58. Here, as the state court found, the police did not suppress the router, and Thomas made no showing that the police acted in bad faith by not seizing it. In addition, according to the state court's findings, it was unlikely that the router was configured to capture any "logging" activity. *See Thomas*, 2017 WL 1967475, at *6. Given that limitation, the prosecution would have had little or no incentive to prevent Thomas from conducting his own

examination of the router. Finally, as the state court also concluded, the police did not have a constitutional duty to collect and examine the router themselves. *See Youngblood*, 488 U.S. at 58-59. Reasonable jurists therefore could not debate the district court's resolution of this claim.

Thomas next claims a *Brady* violation because the police seized seven computers from his house but submitted only four of them for forensic examination. The district court denied this claim for the same reasons as Thomas's router claim. For the reasons already discussed, reasonable jurists would not debate that denial.

Thomas also claims that the prosecution suppressed a Google search log that showed IP addresses that were different from those listed in the police's search warrant. The Michigan Court of Appeals examined this log in connection with one of Thomas's ineffective-assistance-of-counsel claims and concluded that Thomas had not shown that it was exculpatory. *See Thomas*, 2017 WL 1967475, at *8. The district court reached the same conclusion.

A *Brady* violation requires the defendant to demonstrate that the suppressed evidence was material to his guilt or punishment. *Brady*, 373 U.S. at 87. And here, reasonable jurists would not debate whether the Google log was material. As the district court found, a prosecution witness explained to the jury that Google assigns its own IP address to emails sent through Google and that that IP address will be different from the IP address utilized by the sender's internet service provider. Any apparent discrepancy in IP addresses was thus not probative of Thomas's guilt or innocence. Consequently, reasonable jurists would not debate the district court's resolution of this claim.

Thomas's remaining claims of prosecutorial misconduct are that the prosecutor shifted the burden of proof to Thomas during closing arguments, allowed allegedly false testimony to go uncorrected, made a false promise in his opening statement, and referred to facts that were not in evidence during closing argument. We address these claims in turn.

In response to Thomas's theory that Waschull planted child pornography on his computers, the prosecutor argued, "[i]t's a question that he has the burden to answer is how this stuff got onto

computers in Mr. Thomas's home without him knowing, without, actually without him having done it." *Thomas*, 2017 WL 1967475, at *4. The Michigan Court of Appeals found that the prosecutor's comment was clearly improper. Nevertheless, the court concluded that reversal of Thomas's convictions was not required because the comment was brief and isolated, and the trial court correctly instructed the jury on the defendant's presumption of innocence and the prosecution's burden to prove Thomas guilty. Further, the trial court instructed the jury that Thomas was not required to prove his innocence and to disregard arguments that were inconsistent with its instructions. *See id.* The court of appeals concluded that these instructions were sufficient to protect Thomas's substantial rights. *See id.* The district court concluded that Thomas was not entitled to relief on this claim.

Prosecutorial misconduct can merit habeas relief only if the prosecutor's remarks render the trial so unfair as to be a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974). An argument that shifts the burden of proof to the defendant or suggests that he has to produce evidence of his innocence is improper. *Wogenstahl v. Mitchell*, 668 F.3d 307, 332 (6th Cir. 2012). Nevertheless, the trial court can cure this error with jury instructions that properly explain that the prosecution has the burden of proof and that the defendant is not required to produce any evidence. *Id.* at 333; *see also United States v. Hall*, 979 F.3d 1107, 1120 (6th Cir. 2020) ("[G]eneral curative instructions, given during final jury instructions, may suffice to clear up any prejudice."). And here, the trial court properly instructed the jury on the burden of proof and admonished the jury to disregard arguments that were inconsistent with its instructions. Reasonable jurists therefore could not debate the district court's resolution of this claim.

Thomas next claims that the prosecution committed misconduct by not correcting perjured testimony. Thomas asserts that Waschull committed perjury when Waschull testified that he had not been in contact with the prosecutor's office about the child-pornography investigation. The Michigan Court of Appeals denied this claim because Waschull was called as a defense witness and Thomas's attorney—not the prosecution—elicited the allegedly false testimony. *See Thomas*, 2017 WL 1967475, at *5. Further, the court found that Thomas failed to establish perjury because

he did not show that Waschull's knowledge of the case came from the prosecutor's office. *See id.* The district court concluded that this decision was not contrary to or an unreasonable application of Supreme Court precedent.

"A conviction obtained by the knowing use of perjured testimony must be set aside if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Rosencrantz v. Lafler*, 568 F.3d 577, 583 (6th Cir. 2009) (cleaned up). But here, as the Michigan Court of Appeals found, the prosecution did not elicit the allegedly false testimony. Thomas does not cite any Supreme Court authority that requires the prosecution to correct false testimony elicited by the defense. Reasonable jurists would not debate the district court's denial of this claim.

Thomas claims that the prosecutor committed misconduct by referring to facts not in evidence during his closing argument, i.e., that McNeil had testified that "he was asked to involve himself in sexual activity with the Defendant, with the person he was speaking with, and his children." The district court did not specifically address this claim, but the Michigan Court of Appeals reviewed the prosecutor's closing argument and concluded that he had properly argued the evidence of record and the reasonable inferences to be drawn from the evidence and that he did not offer opinions based on evidence that was not in the record. *See Thomas*, 2017 WL 1967475, at *4.

A prosecutor cannot misstate the evidence or refer to facts not in evidence. *Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002). In this case, McNeil testified that the unknown person who had emailed McNeil the child pornography had also written that he was interested in children and that he and wife liked to invite other people to their home to have sex with their children. Consequently, reasonable jurists would not debate whether the prosecutor unreasonably construed this testimony as at least an implied invitation by the sender to McNeil to have sex with his children. Reasonable jurists therefore would not debate whether the Michigan Court of Appeals unreasonably denied Thomas's claim that the prosecutor misstated the evidence, and therefore they would not debate whether this claim deserves encouragement to proceed further. *See Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020).

Relatedly, Thomas claims that during his opening statements, the prosecutor said that he would call a witness who would testify that Thomas had solicited him to commit the crime of child sexually abusive activity. Thomas contends that the prosecutor's statement was not supported by McNeil's subsequent testimony or any other evidence that was adduced at trial. As just discussed, however, the record supports a reasonable argument that Thomas invited McNeil to engage in sexual activity with his children. Reasonable jurists therefore would not debate whether this claim deserves encouragement to proceed further.

4. Ineffective Assistance of Trial Counsel

Thomas's final claims allege the ineffective assistance of trial counsel. To establish ineffective assistance of counsel, the petitioner must prove both (1) that his trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

If a state court has adjudicated a claim of ineffective assistance of counsel on the merits, a § 2254 petitioner must demonstrate that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 699 (2002). Because *Strickland* requires deference to counsel's performance and AEDPA requires deference to a state court's adjudication of an ineffective-assistance claim, a state habeas petitioner must overcome a "doubly deferential" standard of review that gives both the state court and counsel the benefit of the doubt. *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). And to satisfy this "doubly deferential" standard, the petitioner must show that the state court's resolution of his ineffective-assistance 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 (2011)).

Thomas first argues that his attorney was ineffective because he did not present testimony from a computer expert. Prior to trial, Thomas's attorney retained a computer expert to review

Thomas's claims that his computer was hacked. The expert created a report but was not called to testify at trial. Thomas claims that this expert could have testified that there was no child pornography on the computers seized by the police. The Michigan Court of Appeals found that Thomas had not submitted any evidence as to the expert's findings and therefore that Thomas had not overcome the presumption that his attorney made a reasonable strategic decision not to call the expert at trial. *See Thomas*, 2017 WL 1967475, at *7. The district court concluded that the state court's decision was not contrary to or an unreasonable application of *Strickland*.

Thomas did not submit the allegedly exculpatory expert report to the Michigan Court of Appeals to review. Indeed, the report did not appear in the case until Thomas moved the district court to expand the record and filed it with his motion. When a state court has adjudicated a claim on the merits, a federal habeas court is limited to the record that was before the state court. *Cullen*, 563 U.S. at 181. Because Thomas failed to submit the expert report to the state court, reasonable jurists would not debate the district court's conclusion that the state court did not unreasonably apply *Strickland* in denying this claim.

Next, Thomas claims that his attorney performed ineffectively by not presenting documentary evidence that would have established that the prosecution allowed Waschull's allegedly false testimony to go uncorrected. The district court denied this claim as meritless because counsel adequately explored whether Waschull spoke to the prosecution about Thomas and sufficiently attacked Waschull's credibility. Moreover, as with his expert's allegedly exculpatory report, the evidence on which Thomas relies to support this claim was not before the state court. Reasonable jurists would not debate the district court's resolution of this claim or debate whether it deserves encouragement to proceed further.

Finally, Thomas claims that his attorney should have objected to the prosecution's allegedly defective Rule 404(b) notice and should have filed motions to suppress the router and the computers that the police seized but did not forensically examine. The district court denied these claims, giving deference to the Michigan Court of Appeals' determination that the notice was not defective as a matter of state law and that the prosecution did not suppress the router and

computers. For the reasons already discussed with respect to the underlying substantive claims, reasonable jurists would not debate the district court's resolution of these two claims.

Conclusion

For the reasons stated, the court **DENIES** Thomas's COA application. The court **DENIES** all other pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Thomas v. Miniard

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

April 21, 2022, Decided; April 21, 2022, Filed

2:18-CV-13829-TGB

Reporter
2022 U.S. Dist. LEXIS 73202 *; 2022 WL 1194056

MICHAEL-RAY THOMAS, Petitioner, vs. GARY MINIARD, Respondent.

Prior History: *Thomas v. Winn, 2020 U.S. Dist. LEXIS 29177, 2020 WL 833252 (E.D. Mich., Feb. 20, 2020)*

Core Terms

sexually, router, communicated, email address, ineffective, argues, state court, Internet, log, defense counsel, solicit, images, present evidence, bad faith, seized, email, prosecutorial misconduct, habeas relief, unfair, defense theory, certificate, GoodTimes, meritless, exculpatory evidence, child pornography, due process, convictions, exculpatory, prejudicial, Google

Counsel: **[*1]** For Michael Ray Thomas, Petitioner: Nicole L. Smith, LEAD ATTORNEY, Smith Mihas PLLC, Wyandotte, MI.

For Thomas Winn, Warden, Respondent: Andrea M. Christensen-Brown, Michigan Department of Attorney General, G. Mennen Williams Building, 4th Floor, Lansing, MI; Scott Robert Shimkus, Michigan Department of Attorney General, Lasnsing, MI.

Judges: HON. TERRENCE G. BERG, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRENCE G. BERG

Opinion

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

Michael Ray Thomas is in the custody of the Michigan Department of Corrections pursuant to convictions for possession of child sexually abusive material, *Mich. Comp. Laws § 750.145c(4)*, using a computer to commit possession of child sexually abusive material, *Mich. Comp. Laws § 752.796*, and unlawful use of the Internet to solicit child sexually abusive activity, *Mich. Comp. Laws § 750.145d*. He has filed a petition for a writ of habeas corpus pursuant to *28 U.S.C. § 2254*.[1]

Thomas raises four grounds for relief: (i) the trial court improperly allowed admission of other acts evidence; (ii) insufficient evidence supported his convictions; (iii) the prosecutor engaged in multiple instances of misconduct; and (iv) defense counsel was ineffective. For the reasons discussed the Court denies the petition **[*2]** and denies a certificate of appealability.

I. Background

The charges against Thomas arose from the discovery of child sexually abusive material on his computers in 2012. The Michigan Court of Appeals summarized the testimony leading to Thomas's convictions as follows:

> The police became involved with Thomas after Paul McNeil reported being involved in an Internet exchange in September 2012, in which he was contacted by an individual who inquired about sexual activity with children. The person sent McNeil an email containing three photos of children, one of which showed sexual activity between a young female and a male. The person asked McNeil to send him nude photographs of McNeil's children. McNeil instead contacted the police. Using McNeil's email account, the police were able to obtain the IP address for the source of the sender's emails, which was traced to Thomas. The police then obtained search warrants for Google and Comcast accounts and Thomas's home, which he

[1] Thomas filed the petition *pro se*. The Court later appointed counsel to represent him. (*See* ECF No. 17.)

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shared with his girlfriend, Karen Cipriano, and her young son.

The police seized a number of computers and other electronic storage devices from Thomas's home. A forensic computer expert examined the computers and equipment. **[*3]** She was able to recover parts of the conversations with McNeil on two of the computers, along with 115 images of child pornography.

The computers also contained search terms typically used by persons looking for child pornography on the Internet, programs used to anonymously share such files, and web histories of such searches.

In addition, the prosecution presented evidence of a prior email exchange, from late 2011 to early 2012, between Detective Marcus Penwell, a police officer in Ohio who investigated child pornography cases and another person who used the email address GoodTimes.Jones@gmail.com, which was the same email address used in the communications with McNeil. The person sent Penwell several images of young children, including some showing children engaged in sexual activity, and the person sought similar images of child sexual activity from Penwell.

Thomas did not dispute that child sexually abusive material was found on his computers. However, he denied knowledge of the images and denied that he was the person who communicated with McNeil. Thomas argued that anyone near his home would have been able to access his wireless network and plant the images on his computers using **[*4]** remote access software. The defense theory was that the images and the emails to McNeil were planted by Alexander Waschull, Cipriano's former boyfriend and the father of Cipriano's child. Thomas presented evidence that Waschull and Cipriano were involved in an ongoing custody dispute, that Waschull was upset that his child was spending time with Thomas, and that Waschull had become obsessed about Thomas's case and written articles and acquired numerous documents about it.

*People v. Thomas, No. 329750, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *1 (Mich. Ct. App. May 11, 2017).*

Following a jury trial in Macomb County Circuit Court, Thomas was convicted of possession of child sexually abusive material, using a computer to commit possession of child sexually abusive material, and unlawful use of the Internet to solicit child sexually abusive activity. On September 29, 2015, he was sentenced to concurrent terms of one to four years for possession of child sexually abusive material, one to seven years for unlawful use of a computer, and twelve to twenty years for unlawful use of the Internet. *Id.*

Thomas filed an appeal of right in the Michigan Court of Appeals raising these claims: (i) other act evidence improperly admitted; (ii) prosecutor committed misconduct during closing argument; (iii) **[*5]** verdict against the great weight of the evidence; (iv) *Brady* violation; (v) ineffective assistance of trial counsel; and (vi) prosecutor committed misconduct throughout trial. The Michigan Court of Appeals affirmed Thomas's convictions. *Id.* He filed an application for leave to appeal in the Michigan Supreme Court raising these claims: (i) *Brady* violation; (ii) prosecutorial misconduct; (iii) ineffective assistance of counsel; (iv) verdict against the great weight of the evidence; (v) improper bind over; (vi) improper application of *Mich. Comp. Laws § 750.145d(2)(f)* to secure conviction; and (vii) jury instruction failed to set forth the solicitation element of soliciting another person to commit crime. The Michigan Supreme Court denied leave to appeal. *People v. Thomas, 501 Mich. 981, 907 N.W.2d 565 (Mich. March 5, 2018).*

Thomas then filed a motion for habeas corpus relief raising eight claims. The Court dismissed the petition without prejudice because four claims were unexhausted. *Thomas v. Winn, No. 18-11253, 2018 U.S. Dist. LEXIS 84616, 2018 WL 2299080, at *3 (E.D. Mich. May 21, 2018).* Thomas filed another habeas petition in the Western District, which transferred the petition to this Court. (*See* ECF No. 2.) That petition—the instant petition—abandons the unexhausted claims, retaining only the first four claims from the original petition, (ECF No.1):

i. Improper use of 404b evidence.

ii. **[*6]** Insufficiency of the evidence.

iii. Prosecutorial misconduct.

iv. Ineffective assistance of counsel.

Respondent has filed an answer to the petition maintaining that Thomas's first and third claims are procedurally defaulted and that all of his claims are meritless. "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." *Hudson v. Jones, 351 F.3d 212, 215 (6th Cir. 2003)* (citing *Lambrix v. Singletary,*

520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997)). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997). In this case, the Court finds that the interests of judicial economy are best served by addressing the merits of these claims.

II. Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Court must defer to the Michigan Court of Appeals' plain-error analysis of Thomas's claims. See Stewart v. Trierweiler, 867 F.3d 633, 638 (6th Cir. 2017). The AEDPA imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings **[*7]** unless the adjudication of the claim —
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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.

AEDPA "imposes a highly deferential standard for evaluating state-court rulings," and "demands that state-court decisions be given the benefit of the doubt." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (internal citations omitted). A "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state **[*8]** court's decision." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)). Pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. Id. A "readiness to attribute error [to a state court] is inconsistent with the presumption that state courts know and follow the law." Woodford v. Viscotti, 537 U.S. 19, 24 (2002).

A state court's factual determinations are presumed correct on federal habeas review. See 28 U.S.C. § 2254(e)(1). This presumption is rebutted only with clear and convincing evidence. Id. Moreover, for claims 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. Claim One: Admission of Other Acts Evidence

In his first claim, Thomas challenges the admission of evidence concerning Detective Penwell's email exchange with a person using the email address "GoodTimes.Jones@gmail.com," who inquired about child pornography, and sent images of children engaged in sexual activity. He argues that the admission of these emails violated Mich. R. Evid. 404(b) and was unfairly **[*9]** prejudicial.

The Michigan Court of Appeals held that the evidence was relevant to a proper, noncharacter purpose under Rule 404(b) and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The state court explained:

> In this case, the defense did not dispute that child sexually abusive material was found on Thomas's computers. However, Thomas denied any knowledge of the material, and he also denied being the person who communicated with McNeil

for the purpose of soliciting child sexually abusive activity. Therefore, the principal issue in the case was the identity of the person who communicated with McNeil and sent him images of child pornography. The evidence that Penwell communicated with a person who transmitted images of child sexually abusive material and who used the same email address as the person who communicated with McNeil, from an IP address that was also linked to Thomas, made it more probable that it was Thomas who used the email address GoodTimes.Jones@gmail.com to communicate with McNeil.

The fact that Penwell could not say with certainty that Thomas was the person he was communicating with through the GoodTimes.Jones@gmail.com **[*10]** email address did not preclude admission of the evidence. *MRE 404(b)(1)* is a rule of inclusion ... and it provides that other acts evidence may be admissible to prove identity, *MRE 404(b)(1)*. Here, Penwell's contact with the person using GoodTimes.Jones@gmail.com—an email address traced to Thomas's home and the same email address used in the communications with McNeil—was circumstantial evidence that it was Thomas who used that email address, particularly where the person made other comments during the chat that were consistent with Thomas's home business. Therefore, the evidence was relevant for a proper, noncharacter purpose under *MRE 404(b)(1)*.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Thomas maintained that while the email address GoodTimes.Jones@gmail.com was traced back to his home and Internet provider, it was possible that anyone with access to his Wi-Fi network could have placed the images on his computers and communicated with McNeil with that email address. Thomas accused Waschull of planting the pornographic images and using his Internet service to communicate with McNeil, ostensibly because Waschull did not like that his child was spending **[*11]** time with Thomas and to provide Waschull with leverage in his ongoing custody dispute with Cipriano by showing that Cipriano was involved in a relationship with an unsavory person. However, Penwell's testimony indicated that his contacts with the person who used the GoodTimes.Jones@gmail.com email address occurred in late 2011 or early 2012, which was before Thomas and Waschull knew each other. The fact that the communications with Penwell predated the timeframe in which Waschull would have developed a motive to frame Thomas significantly increased the probative value of the prior acts evidence. Moreover, while the evidence was prejudicial, it was not unfairly prejudicial. Penwell's testimony ... allowed the jury to weigh whether the similar contacts with Penwell and McNeil, from the same email address, was simply a coincidence or whether Thomas was engaged in a similar pattern of conduct with both persons. Finally, the trial court instructed the jury on the limited, permissible purpose for which the evidence could be considered, thereby reducing the potential for unfair prejudice.

*Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *2-3*.

The Michigan Court of Appeals' decision was not contrary to, or an unreasonable application of, Supreme **[*12]** Court precedent. First, Thomas's claim that admission of the testimony violated state law is not cognizable on federal habeas review. *Shoemaker v. Jones, 600 Fed. App'x 979, 984 (6th Cir. 2015)*. A federal court may grant an application for writ of habeas corpus only on the ground that the petitioner is in custody in violation of the Constitution, laws, or treaties of the United States, and not for perceived errors of state law. *See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*.

Second, to the extent that Thomas alleges admission of this evidence violated his right to due process, this claim is meritless. The admission of evidence may violate the Due Process Clause (and thereby provide a basis for habeas relief) where the admission "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)* (quoting *United States v. Lovasco, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)*); *Bugh v. Mitchell, 329 F.3d 496, 512 (2003)*. The Supreme Court "defined the category of infractions that violate fundamental fairness very narrowly." *Estelle, 502 U.S. at 73 (1991)*. 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)* (citation omitted). This standard accords the state courts "wide latitude ... with

regard to evidentiary matters under the Due Process Clause." *Id.*

For the reasons discussed by the Michigan Court of Appeals, **[*13]** the challenged evidence was relevant and probative. It directly addressed Thomas's claim that Waschull intentionally planted these photographs as a means to retaliate against Thomas and to influence the custody dispute. The challenged testimony tended to show that someone utilized the "goodtimes" email address to solicit sexually abusive photographs before Thomas was known to Waschull. The "other acts" evidence, while prejudicial, was not unfairly so.

The Court concludes that it was not fundamentally unfair to admit evidence of the prior email communication. Therefore, Thomas's right to due process was not violated by admitting the evidence, and he has no right to habeas relief on his claim.

B. Claim Two: Sufficiency of the Evidence

In his second claim, Thomas claims that insufficient evidence supports his convictions because there was no evidence showing that he knew that the child sexually abusive material was on his computers or that he was the person responsible for downloading it. He also claims that there was no evidence to show that he was the person who sent emails to Paul McNeil containing nude photos of children and soliciting nude photographs of children from McNeil.

On habeas **[*14]** review, the sufficiency of the evidence inquiry involves "two layers of deference": one to the jury verdict, and a second to the Michigan Court of Appeals' decision. *Tanner v. Yukins, 867 F.3d 661, 672 (6th Cir. 2017)*. First, the Court "must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979)* (emphasis in *Jackson*). Second, if the Court were "to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, [the Court] must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable." *Id.*

Under *Mich. Comp. Laws § 750.145c(4)*, a person is guilty of a felony if the person "knowingly possesses . . . child sexually abusive material." *Mich. Comp. Laws § 752.796(1)* provides: "A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime." Finally, to prove a defendant guilty of unlawful use of the Internet to solicit child sexually abusive activity, the prosecution must prove: (1) use of the Internet or a computer, **[*15]** (2) intent to commit solicitation of child sexually abusive activity, and (3) the intended victim is a minor or believed to be a minor. *Mich. Comp. Laws § 750.145d*.

The Michigan Court of Appeals, applying the standard of review set forth in *Jackson*, denied Petitioner's sufficiency-of-the-evidence claim. The Michigan Court of Appeals held that the direct and circumstantial evidence, considered together, supported the verdict:

> Although Thomas presented evidence in support of his theory that Waschull had a motive to frame Thomas, the prosecution presented circumstantial evidence pointing to Thomas as the only person who had access to all of the computers and storage devices on which the child sexually abusive images were found. A forensic examination of Thomas's devices showed that the email address used to communicate with McNeil was used on Thomas's computers before Waschull even knew Thomas, and before Cipriano moved in with Thomas. In addition, the images of child pornography were found on multiple computers and storage devices in Thomas's home, and those devices also contained evidence of search terms typically used by persons looking for child pornography on the Internet, programs used to anonymously share such files, **[*16]** and web histories of such searches. That circumstantial evidence was strong proof that Thomas used those devices to download and search for child sexually abusive material on the Internet and solicited the offense of child sexually abusive activity in the contacts with McNeil. Furthermore, the communications with Penwell, which were made using the same email address as the communications with McNeil, and which similarly involved inquiries about sexual activity with children, occurred before Waschull knew Thomas, thereby undercutting Thomas's theory that Waschull planted that evidence. The prosecution also presented expert testimony that the computers on which child sexually abusive material was found did not contain software or malware that would allow a person to access the computers remotely. While the defense made a concerted effort to show

that it was possible that someone else planted the evidence on defendant's computers, in light of the body of evidence refuting that theory and pointing to Thomas as the person responsible for committing the charged offenses, the jury's verdicts are not so manifestly against the great weight of the evidence that it would be a miscarriage of justice **[*17]** to allow the verdicts to stand.

Thomas appears to also argue that the evidence was insufficient to support his convictions because of the lack of evidence that he was the person who committed the charged offenses. "[I]dentity is an element of every offense." *People v. Yost, 278 Mich. App. 341, 356; 749 N.W.2d 753 (2008)*. The above evidence, viewed in the light most favorable to the prosecution, supports an inference that Thomas was the only person who had access to all of the computers and storage devices on which the child sexually abusive images were found, and it identifies him as the person who solicited the child sexually abusive activity in the email communications with McNeil. Accordingly, there is sufficient evidence to establish that Thomas was the individual who committed the charged crimes.

*People v. Thomas, No. 329750, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *6 (Mich. Ct. App. May 11, 2017)*.

Thomas's argument essentially asks the Court to reweigh the evidence and to come to a different conclusion than that reached by the jury. This is not the Court's role on habeas review. The Court does not "rely simply upon [its] own personal conceptions of what evidentiary showings would be sufficient to convince [the Court] of the petitioner's guilt." *Brown, 567 F.3d at 205*. Instead, the Court asks whether the Michigan Court of Appeals "was unreasonable in *its* conclusion **[*18]** that a rational trier of fact could find [Petitioner] guilty beyond a reasonable doubt based upon the evidence presented at trial." *Id.* (citing *Knowles v. Mirzayance, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)*) (emphasis in *Brown*). Further, "circumstantial evidence may support a conviction, and such evidence need not remove every reasonable hypothesis except that of guilt." *Hill v. Mitchell, 842 F.3d 910, 934 (6th Cir. 2016)* (internal quotation omitted). *See also Gipson v. Sheldon, 659 Fed. App'x 871, 881 (6th Cir. 2016)* ("[C]ircumstantial evidence ... is intrinsically no different from testimonial evidence and that is sufficient as long as the jury is convinced beyond a reasonable doubt.") (internal quotation omitted).

"A reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *McDaniel v. Brown, 558 U.S. 120, 133, 130 S. Ct. 665, 175 L. Ed. 2d 582 (2010)* (quoting *Jackson, 443 U.S. at 326*). The evidence against Thomas was sufficient for a reasonable trier of fact to find the essential elements of Thomas's crimes proven beyond a reasonable doubt. It was not unreasonable for the state court to conclude that, weighing all reasonable inferences in the State's favor, there was legally sufficient evidence presented to support the convictions. Accordingly, **[*19]** habeas relief is denied on this claim.

C. Claim Three: Prosecutorial Misconduct

Next, Thomas argues that his right to due process was violated by the prosecutor's misconduct. Specifically, Thomas argues that the prosecutor denigrated him and defense counsel; allowed perjured testimony from Waschull; interjected personal opinions and knowledge about the case when questioning witnesses; failed to preserve exculpatory evidence; and improperly shifted the burden of proof to the defense.

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.* (internal quotation omitted). To constitute a due process violation, the conduct must have been "so egregious so as to render the entire trial fundamentally unfair." *Byrd v. Collins, 209 F.3d 486, 529 (6th Cir. 2000)* (citations omitted). The "first question" is whether the prosecutor's comments were improper. *Stermer v. Warren, 959 F.3d 704, 725 (6th Cir. 2020)*.

a. Closing Argument and Cross-Examination

First, Thomas argues that the prosecutor improperly denigrated him and defense counsel during closing **[*20]** argument by asserting that Thomas's defense theory claiming Waschull framed him was a "smoke screen" designed to deflect the jury's attention

away from the evidence. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *3*. The prosecutor followed this comment with a review of the evidence and an explanation as to why the evidence did not support the defense theory. The Michigan Court of Appeals held that it was "not improper for the prosecutor to . . . argue that the defense theory was not credible in light of the facts and evidence." *2017 Mich. App. LEXIS 766, [WL] at *4*.

A prosecutor may not make personal attacks on a defendant or defense counsel but may highlight inconsistencies or inadequacies in the defense, *Bates v. Bell, 402 F.3d 635, 646 (6th Cir. 2005)*, and point out the lack of evidence supporting the defense theory. *United States v. Forrest, 402 F.3d 678, 686 (6th Cir. 2005)*. A prosecutor's description of defense counsel's argument as a smoke screen is not *per se* improper. *See Key v. Rapelje, 634 Fed. App'x 141, 149 (6th Cir. 2015)* (prosecutor's "smoke screen" argument was prosecutor's fair characterization of defendant's evidence that did not render defendant's trial unfair).

Because the prosecutor's comment was not an attack on the defense, but rather a comment on the strength of the defense, the Court finds that Michigan Court of Appeals' decision is not contrary to, nor an unreasonable application of, federal law or the **[*21]** facts.

Thomas challenges the prosecutor's opening and closing statements and the manner in which he questioned and cross-examined witnesses. For example, he claims that counsel's cross-examination of Thomas regarding videotape evidence submitted by the defense was improper because he implied that Thomas was lying and had tampered with the evidence. The record supports the Michigan Court of Appeals' conclusion that "Thomas was subjected to appropriate cross-examination intended to challenge the competency of the evidence produced." *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *5*. Thomas's claims with respect to the prosecutor's cross-examination of additional witnesses is similarly meritless. A prosecutor is free to question a witness's recollection, potential bias, and motive for testifying. The transcript does not support Thomas's claim that the prosecutor's questioning or arguments veered outside the range of acceptable conduct.

b. Alleged Presentation of False Testimony

Next, Thomas argues that the prosecutor committed misconduct when he knowingly presented false testimony from witness Alexander Waschull. Thomas maintains that Waschull had contact with the prosecutor's office prior to Thomas's arrest and that his trial testimony **[*22]** to the contrary was perjured. The Michigan Court of Appeals recognized that a prosecutor's knowing presentation of material, false testimony could violate due process but found no violation because Thomas did not establish that Waschull's testimony was false. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *5*. The state court reasoned:

> Thomas cites several pages of trial transcript and argues that Waschull's denial is refuted by testimony demonstrating his explicit knowledge of details about Thomas's case. However, the fact that Waschull had knowledge about various details of the case does not establish that he acquired that knowledge from the prosecutor's office. In addition, because the cited testimony was presented to the jury, the jury was able to decide for itself whether it affected the credibility of Waschull's denial. Thomas refers to two other documents that he contends support his claim that Waschull's trial testimony was false. We have reviewed those documents and neither one supports Thomas's contention that Waschull presented false testimony.

*Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *5*.

Prosecutors may not deliberately present evidence that they know is false. Indeed, the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible **[*23]** with rudimentary demands of justice." *Giglio v. United States, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)* (citations and internal quotations omitted).

Thomas has not shown that the Michigan Court of Appeals' holding that the prosecutor did not knowingly present false testimony was unreasonable. There were some inconsistencies between Waschull's testimony and documents cited by Thomas. But that does not establish that Waschull's testimony was false. Further, the defense theory that Waschull had a personal vendetta against Thomas was placed before the jury and Waschull and Thomas each testified such that the reliability of their testimony was assessed "by testing in the crucible of cross-examination." *Crawford v. Washington, 541 U.S. 36, 41, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. Thomas fails to show that the

Michigan Court of Appeals' decision denying this claim was contrary to, or an unreasonable application of, Darden.

c. Burden of Proof

Thomas argues that the prosecutor improperly shifted the burden of proof by making the following remark in closing argument:

> Now, defense counsel attempts to answer the question of how this stuff got on [defendant's computers]. It's a question that he has a burden to answer is how this stuff got onto computers in Mr. Thomas's home without him knowing, without, actually without him having done it.

Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *4.

A **[*24]** prosecutor may not employ an argument that shifts the burden of proof to a defendant, Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), or imply that the defendant is required to provide evidence to prove his or her innocence, Joseph v. Coyle, 469 F.3d 441, 474 (6th Cir. 2006). The Michigan Court of Appeals held that the prosecutor's argument improperly shifted the burden of proof, but that the error did not require reversal. Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *4.

The prosecutor's comment was brief and isolated and, as the Michigan Court of Appeals noted, the trial court correctly instructed the jury about the burden of proof and explained that attorneys' arguments are not evidence and told the jury that if an attorney said something contrary to the court's instructions the jury must follow the instructions. *Id.* Jurors are presumed to follow the court's instructions. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Moreover, defense counsel could have timely objected to cure any potential prejudice amongst the jury, by requesting the court to reiterate the appropriate burden of proof but failed to do so. Nevertheless, although the prosecutor's comment was clearly improper, considered in the context of the entire trial, the prosecutor's entire closing and rebuttal arguments, and the trial court's instructions, Thomas fails to show that the prosecutor's isolated **[*25]** remark rendered his trial fundamentally unfair. Habeas relief is not warranted on this claim.

d. Suppression of Evidence

Thomas next argues that the prosecutor violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to seize and preserve a router from his home, failing to preserve computers seized from his home, and failing to produce a google log until after trial.

The Due Process Clause requires that the State disclose to criminal defendants "evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed." California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). "Separate tests are applied to determine whether the government's failure to preserve evidence rises to the level of a due process violation in cases where material exculpatory evidence is not accessible, *see* Trombetta, 467 U.S. at 489, versus cases where 'potentially useful' evidence is not accessible." United States v. Wright, 260 F.3d 568, 570-71 (6th Cir. 2001) (citing Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). A defendant's due process rights are violated where material exculpatory evidence is not preserved. Trombetta, 467 U.S. at 489. For evidence to meet the standard of constitutional materiality, it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 488-89. The destruction **[*26]** of material exculpatory evidence violates due process regardless of whether the government acted in bad faith. *See* *id.* at 488; Youngblood, 488 U.S. at 57.

However, "the Due Process Clause requires a different result when . . . deal[ing] with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, 488 U.S. at 56. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. A habeas petitioner has the burden of establishing that the police acted in bad faith in failing to preserve potentially exculpatory evidence. *See* Malcum v. Burt, 276 F. Supp. 2d 664, 683 (E.D. Mich. 2003).

i. The router

Thomas states that the router was specifically listed as an item to be seized when police executed the search warrant at his home, but police did not seize the router.

He argues the router could have been examined to determine whether any unknown devices accessed the Internet through this router. Thomas maintains that the router would have supported Thomas's claim that he was framed.

The Michigan Court of Appeals applied the correct standard of review and held that Thomas **[*27]** failed to show that the evidence was favorable or that the police acted in bad faith. The court reasoned:

> The record indicates that the police did not seize the router from Thomas's home when they executed a search warrant. Thomas argues that the router would have contained exculpatory information because it would have shown a history of all devices that accessed the Internet through his home network. However, Thomas overstates the evidentiary value of the router. The prosecution's expert explained that a router could be capable of storing its logging history, but only if that feature has been activated. According to the prosecution's expert, the feature typically is not turned on by default. In addition, the logging information must be viewed or examined at the scene. If a router is collected as evidence, it cannot be forensically examined later at another location to determine its logging history. Therefore, while Thomas accurately states that the police did not collect the router as evidence, there is no basis for concluding that it had exculpatory value or that the police destroyed any evidence on the router intentionally or in bad faith. In addition, the police did not suppress **[*28]** that evidence; they only failed to seize the router during the execution of the search warrant. Accordingly, Thomas cannot establish a *Brady* violation.
>
> Moreover, Thomas has not shown that the police acted in bad faith. The prosecution's expert described possibly being able to view the logging history at the search scene, but she was not part of the search team and that method would have only been potentially useful if the router's logging history feature had been activated. Further, to the extent Thomas criticizes the police for not attempting to examine the router to find out if its logging history could be determined, that argument is directed at the failure by the police to develop the evidence. As previously indicated, neither the police nor the prosecution has a duty to assist a defendant in developing potentially exculpatory evidence. *Anstey*, 476 Mich. at 461.

*Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *6-7*.

This decision is neither contrary to Supreme Court precedent nor an unreasonable application of federal law or the facts. Thomas has not shown that the router would have been exculpatory, and the record is devoid of evidence that the police or prosecution authorities acted in bad faith—a necessary requirement to establish a constitutional violation **[*29]** where the destroyed evidence was only potentially useful to the defense. Given these circumstances, Thomas has failed to establish a constitutional violation. Habeas relief is not warranted.

To the extent that Thomas claims, in the alternative, that police seized the router but failed to turn it over to him or the lab for testing, (ECF No. 16, PageID.2039), this claim is meritless for the same reasons. He has not shown that the router would have contained exculpatory evidence nor has he shown bad faith by the prosecutor or police.

ii. Seized computers

Thomas also claims that police seized seven computers, but police only turned over four of these computers to the crime lab for testing. This claim is meritless for the same reasons as the router-based claim — the computers were only potentially useful to the defense and Thomas fails to show that authorities acted in bad faith.

iii. Certified Google log

Finally, Thomas claims that the state failed to produce a certified Google log obtained pursuant to a search warrant until after the trial. He argues that the log shows a different IP address than was the subject of the search warrant. The Michigan Court of Appeals held that Thomas fails to **[*30]** show that this log was exculpatory. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *8*. As explained by the prosecutions' expert witness, the internet provider and Google assign different IP addresses to users. Thomas fails to show that the log was exculpatory or that its late production was the result of bad faith.

D. Claim Four: Ineffective Assistance of Trial Counsel

In Thomas's last claim he asserts that his defense counsel was ineffective for: (1) failing to file any pretrial motions; (2) failing to present an expert witness; (3) eliciting inadmissible and prejudicial testimony; (4) failing to object to the prosecutor's misconduct or to present physical evidence of the misconduct; and (5) failing to point out the evidence was insufficient to support a conviction.[2]

A violation of the *Sixth Amendment* right to effective assistance of counsel is established where an attorney's performance was deficient, and the deficient performance prejudiced the defense. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. An attorney's performance is deficient if "counsel's representation fell below an objective standard of reasonableness." *Id. at 688*. To establish that an attorney's deficient performance prejudiced the defense, the petitioner must show "a reasonable probability that, but for counsel's unprofessional **[*31]** errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id. at 694*. A reasonable probability requires "that the likelihood be 'substantial,' not just 'conceivable.'" *Taylor v. Patel, 2021 U.S. App. LEXIS 24142, 2021 WL 3520819, *5 (6th Cir. Aug. 11, 2021)* (quoting *Cullen, 563 U.S. at 189*). "Surmounting *Strickland*'s high bar is never an . . . easy task," but it is "all the more difficult" to accomplish under AEDPA. *Harrington, 562 U.S. at 105* (quotation omitted). AEDPA and *Strickland* standards are both "highly deferential," and "when the two apply in tandem, review is 'doubly' so." *Id.*

a. Pre-trial Motions

Thomas argues that his attorney performed deficiently by failing to file pretrial motions. He claims that counsel should have responded to the prosecutor's notice of intent to present 404(b) evidence by filing a motion in limine to challenge the evidence. Thomas cannot satisfy *Strickland*'s prejudice prong because the Michigan Court of Appeals held that the evidence was properly admitted under Michigan Rules of Evidence. Counsel is not ineffective for failing to file meritless motions. *See Harris v. United States, 204 F.3d 681, 683 (6th Cir.2000)* (attorney not required to file meritless motions). Counsel also was not ineffective for failing to file a motion to recuse the prosecutor based on the "missing" router. Here too, **[*32]** the Michigan Court of Appeals held that the router was not suppressed by police or prosecutor and no bad faith was involved. Therefore, counsel did not perform deficiently by failing to move for the prosecutor's recusal.

b. Expert Witness

Thomas next maintains that defense counsel was ineffective for failing to present an expert witness in computer forensics.

> The record shows that Thomas's lawyer retained an expert to investigate the evidence and that the expert reviewed the evidence and reported to Thomas's lawyer. Thereafter, Thomas's lawyer declined to call the expert witness at trial. His decision not to call the expert was a matter of trial strategy. Because Thomas has not submitted any evidence showing the defense expert's findings, or otherwise explaining why his lawyer declined to call the witness at trial, he has failed to overcome the presumption that the decision not to call the witness was sound strategy.

*Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *7*.

The rejection of this claim by the Michigan Court of Appeals is neither contrary to, nor an unreasonable application of, Supreme Court precedent or federal law. Petitioner is unable to overcome the strong presumption that counsel rendered adequate assistance and "made all **[*33]** significant decisions in the exercise of reasonable professional judgment." *Strickland, 466 U.S.*

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[2] Respondent also addresses a claim Thomas raised on state court direct review that counsel was ineffective for failing to move to excuse two jurors for cause. Thomas did not raise this claim in his current petition. In any event, the claim is meritless. The Michigan Court of Appeals held that counsel was not ineffective for failing to move to excuse one juror who initially expressed a misunderstanding about the burden of proof because the trial court clarified the burden, and the juror acknowledged and understood the correction. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *8*. The state court also held that counsel was not ineffective for failing to move to excuse a juror who knew the officer-in-charge from high school because the juror did not socialize with the officer, had not seen the officer for three years, and affirmed that he would assess the officer's testimony in the same manner as any other witness's. *Id.* Based on this record, there was no basis for challenging these jurors. Thomas fails to show that the state court's decision was contrary to, or an unreasonable application of, *Strickland*.

at 690.

Here, defense counsel retained an expert witness prior to trial. ECF No. 8. PageID.104-06. The expert conclusions did not support the defense theory that Thomas's computers had been hacked. The expert concluded that "there was no way forward with [a hacking] defense", and that a computer forensic expert "attempting to move forward in sworn testimony will suffer ... a significant loss of reputation attempting to propose and defend it." (*Id.* at 106.) Given that the defense expert's findings undermined Thomas's defense, counsel was not ineffective for failing to present this testimony.

c. Introduction of Prejudicial Testimony

Thomas argues that defense counsel elicited inadmissibly and highly prejudicial testimony from defense witness Waschull. Thomas elicited testimony from Waschull that Thomas had a history of drunk-driving convictions and that he once almost ran over a sheriff's vehicle while trying to evade police. The Michigan Court of Appeals acknowledged that a defense attorney would not typically elicit this sort of testimony but held that doing so here was clearly in furtherance of the defense theory that **[*34]** Waschull "had become obsessed with Thomas and would go to great lengths to harm and embarrass him." *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *8.* The Court of Appeals concluded that Thomas failed to overcome the presumption that defense counsel's questioning was reasonable trial strategy. *Id.* The Court agrees that counsel's questioning, while unconventional, painted a portrait of Waschull as a man obsessed with Thomas and intent on bringing him down. This portrait supported the defense that Waschull was the source of the photographs on Thomas's computers. The jury ultimately rejected this defense, but it was not an unreasonable one. The state court's holding was not contrary to, or an unreasonable application of, *Strickland*.

d. Objection to Prosecutorial Misconduct

Thomas's claim that counsel was ineffective in failing to object to the prosecutor's alleged misconduct does not entitle him to relief. As discussed above, with one exception, the prosecutor's conduct was not improper. Counsel, therefore, was not ineffective in failing to object. With respect to the prosecutor's improper burden-shifting, the state court found no ineffective assistance of counsel because Petitioner failed to show any prejudice. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475, at *9*. The Court finds this to be a reasonable **[*35]** application of *Strickland's* second prong. The prosecutor's statement was brief, tangential to the heart of the case, and the jury was instructed that the lawyers' arguments were not evidence. The Court finds no error warranting habeas relief.

e. Physical Evidence

Thomas argues that counsel was ineffective for failing to present physical evidence of prosecutorial misconduct. The Michigan Court of Appeals, noting that the basis for the claim was unclear, concluded that Thomas's argument was based on counsel's failure to present evidence of Google logs. *Thomas, 2017 Mich. App. LEXIS 766, 2017 WL 1967475 at *8*. The state court held that, because Thomas failed to show that the Google logs had any exculpatory value, counsel was not ineffective in failing to present them. *Id.* This holding is supported by the record and not contrary to, or an unreasonable application of, *Strickland*.

To the extent that Thomas also argues that counsel should have presented evidence that the prosecutor communicated with Waschull outside the courtroom, this claim is also meritless. As discussed above, counsel questioned Waschull about how and from whom he obtained information regarding Thomas's criminal case. Waschull's credibility and grudge against Thomas was adequately explored **[*36]** by counsel.

f. Burden of Proof

Finally, Thomas argues that defense counsel was ineffective for failing to point out to the jury that the State failed to satisfy its burden of proof. In fact, during closing argument, defense counsel carefully reviewed the testimony and argued that the prosecutor failed to satisfy his burden. Habeas relief is denied on this claim.

IV. Certificate of Appealability

"[A] prisoner seeking postconviction relief under *28 U.S.C. § 2254* has no automatic right to appeal a district court's denial or dismissal of the petition. Instead, [the] petitioner must first seek and obtain a [certificate of appealability.]" *Miller-El v. Cockrell, 537 U.S. 322, 327,*

123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To receive a certificate of appealability, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 336 (2003) (internal quotes and citations omitted).

The Court finds that jurists of reason could not debate the conclusion that Petitioner has failed to **[*37]** demonstrate an entitlement to habeas relief. A certificate of appealability is denied.

V. Conclusion

For the reasons set forth above, Petitioner's request for writ of habeas corpus and certificate of appealability is **DENIED**.

IT IS SO ORDERED.

Dated: April 21, 2022

/s/ Terrence G. Berg

TERRENCE G. BERG

UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Opinion and Order issued on this date; It is **ORDERED AND ADJUDGED** that this case is **DISMISSED**.

Dated at Detroit, Michigan: April 21, 2022

APPROVED:

/s/ Terrence G. Berg

HON. TERRENCE G. BERG

UNITED STATES DISTRICT JUDGE

No. 22-2121

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 18, 2023
DEBORAH S. HUNT, Clerk

MICHAEL RAY THOMAS,

Petitioner-Appellant,

v.

ADAM DOUGLAS, ACTING WARDEN, SAGINAW CORRECTIONAL FACILITY,

Respondent-Appellee.

ORDER

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

Michael Ray Thomas petitions for rehearing en banc of this court's order entered on April 20, 2023, 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

*Judge Davis recused herself from participation in this ruling.

App. C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL RAY THOMAS,

Petitioner,

Case Number: 2:18-CV-13829
HON. ARTHUR J. TARNOW

v.

THOMAS WINN,

Respondent.
_____/

ORDER APPOINTING COUNSEL AND SETTING DEADLINES FOR SUPPLEMENTAL PLEADINGS

Petitioner Michael Ray Thomas filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging his convictions for possession of child sexually abusive material, using a computer to commit possession of child sexually abusive material, and unlawful use of the internet to solicit child sexually abusive material.

A habeas petitioner may obtain representation at any stage of the case "[w]henever the United States magistrate or the court determines that the interests of justice so require." *See* 18 U.S.C. § 3006A(a)(2)(B). The Court finds the interests of justice require the appointment of counsel.

The Court APPOINTS the Federal Defender Office, 613 Abbott Street, Detroit, Michigan, 48226, telephone number (313) 967-5555, to represent Petitioner in this case. Such representation shall continue unless terminated by (1) order of the court; (2) appointment of substitute counsel; or (3) appearance of retained counsel.

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Within 60 days from the date of assignment, appointed counsel shall consult with Petitioner and, if necessary, file an amended petition or other supplemental pleadings. Respondent shall have 30 days from the filing of an amended petition or other supplemental pleadings to file a response.

SO ORDERED.

s/Arthur J. Tarnow
ARTHUR J. TARNOW
United States District Judge

Dated: May 16, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL RAY THOMAS, Petitioner, vs. **THOMAS WINN,** Defendant.	**2:18-CV-13829-TGB-PTM** **ORDER GRANTING PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS** **(ECF NO. 48)**

This matter is before the Court on Petitioner Michael Ray Thomas's motion to proceed in forma pauperis on appeal. ECF No. 48. Petitioner has filed a notice of appeal of this Court's Order denying his motion to alter or amend the judgment (ECF No. 46), in which the Court declined to alter its April 2022 Order and Judgment denying Petitioner's habeas petition (ECF Nos. 38, 39). The Court's April 2022 Order also denied issuance of a certificate of appealability ("COA"). ECF No. 38, PageID.2215.

Under Federal Rule of Appellate Procedure 24(a)(1), a party who wishes to proceed in forma pauperis must file a motion with the district court. A district court may deny permission to proceed in forma pauperis if the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3). While the Court has denied issuance of a COA, "[t]he standard for issuing a certificate of appealability has a higher threshold than the standard for

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granting in forma pauperis status." *Foster v. Ludwick*, 208 F. Supp. 2d 750, 764 (E.D. Mich. 2002). Specifically, an appeal can be taken in good faith so long as it is "not frivolous." *Id.* And "[a]lthough reasonable jurists would not debate the Court's resolution of Petitioner's claims, the issues are not frivolous." *Id.*

Accordingly, Petitioner's motion to proceed in forma pauperis on appeal is **GRANTED**. But to the extent Petitioner seeks to have the Court reconsider its prior denial of a COA, such a request is **DENIED**. *See Richards v. Taskila*, No. 20-1329, 2020 WL 8024582, at *5 (6th Cir. Sept. 1, 2020) ("[A] grant of permission to proceed in forma pauperis on appeal does not imply a grant of a COA.").

IT IS SO ORDERED.

Dated: January 12, 2023 s/Terrence G. Berg
TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE

People v. Thomas

Court of Appeals of Michigan

May 11, 2017, Decided

No. 329750

Reporter
2017 Mich. App. LEXIS 766 *; 2017 WL 1967475

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL RAY THOMAS, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Motion granted by, Request denied by *Thomas v. Court of Appeals, 501 Mich. 865, 901 N.W.2d 386, 2017 Mich. LEXIS 1807 (Sept. 12, 2017)*

Leave to appeal denied by, Motion granted by *People v. Thomas, 501 Mich. 981, 907 N.W.2d 565, 2018 Mich. LEXIS 354 (Mar. 5, 2018)*

Writ of habeas corpus dismissed, Without prejudice, Certificate of appealability denied *Thomas v. Winn, 2018 U.S. Dist. LEXIS 84616 (E.D. Mich., May 21, 2018)*

Habeas corpus proceeding at, Motion granted by, Motion denied by *Thomas v. Winn, 2020 U.S. Dist. LEXIS 29177 (E.D. Mich., Feb. 20, 2020)*

Prior History: **[*1]** Macomb Circuit Court. LC No. 2014-003488-FH.

Core Terms

communicated, juror, email address, sexually, argues, trial court, ineffective, images, router, questioning, email, defense theory, convictions, contacts, prosecutorial misconduct, substantial rights, child pornography, plain error, exculpatory, prejudicial, frame, unfair prejudice, charged offense, sexual activity, trial strategy, logging, ineffective assistance, closing argument, personal opinion, search warrant

Judges: Before: M. J. KELLY, P.J., and BECKERING and SHAPIRO, JJ.

Opinion

PER CURIAM.

A jury convicted defendant, Michael Thomas, of possession of child sexually abusive material, *MCL 750.145c(4)*, using a computer to commit possession of child sexually abusive material, *MCL 752.796*, and unlawful use of the Internet to solicit child sexually abusive activity, *MCL 750.145d*. The trial court sentenced Thomas to concurrent prison terms of one to four years for the possession of child sexually abusive material conviction, one to seven years for the unlawful use of a computer conviction, and 12 to 20 years for the unlawful use of the Internet conviction. Thomas appeals as of right. Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

The police became involved with Thomas after Paul McNeil reported being involved in an Internet exchange in September 2012, in which he was contacted by an individual who inquired about sexual activity with children. The person sent McNeil an email containing three photos of children, one of which showed sexual activity between a young female and a male. The person asked McNeil to send him nude photographs of McNeil's children. McNeil instead contacted **[*2]** the police. Using McNeil's email account, the police were able to obtain the IP address for the source of the sender's emails, which was traced to Thomas. The police then obtained search warrants for Google and Comcast accounts and Thomas's home, which he shared with his girlfriend, Karen Cipriano, and her young son.

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The police seized a number of computers and other electronic storage devices from Thomas's home. A forensic computer expert examined the computers and equipment. She was able to recover parts of the conversations with McNeil on two of the computers, along with 115 images of child pornography. The computers also contained search terms typically used by persons looking for child pornography on the Internet, programs used to anonymously share such files, and web histories of such searches.

In addition, the prosecution presented evidence of a prior email exchange, from late 2011 to early 2012, between Detective Marcus Penwell, a police officer in Ohio who investigated child pornography cases and another person who used the email address GoodTimes.Jones@gmail.com, which was the same email address used in the communications with McNeil. The person sent Penwell several images of **[*3]** young children, including some showing children engaged in sexual activity, and the person sought similar images of child sexual activity from Penwell.

Thomas did not dispute that child sexually abusive material was found on his computers. However, he denied knowledge of the images and denied that he was the person who communicated with McNeil. Thomas argued that anyone near his home would have been able to access his wireless network and plant the images on his computers using remote access software. The defense theory was that the images and the emails to McNeil were planted by Alexander Waschull, Cipriano's former boyfriend and the father of Cipriano's child. Thomas presented evidence that Waschull and Cipriano were involved in an ongoing custody dispute, that Waschull was upset that his child was spending time with Thomas, and that Waschull had become obsessed about Thomas's case and written articles and acquired numerous documents about it.

II. OTHER ACTS EVIDENCE

A. STANDARD OF REVIEW

Thomas first challenges the introduction of the testimony relating to Detective Penwell's email exchange in late 2011 and early 2012 with a person using the email address GoodTimes.Jones@gmail.com to **[*4]** inquire about child pornography and send images of children engaged in sexual activity. Thomas argues that this evidence was irrelevant, unfairly prejudicial, and inadmissible under MRE 404(b)(1). Although the prosecution filed a pretrial notice of its intent to offer this evidence at trial pursuant to MRE 404(b)(1), Thomas did not challenge the admissibility of the evidence in a pretrial motion or at trial. Therefore, this issue is unpreserved and our review is limited to plain error affecting Thomas's substantial rights. People v Jones, 468 Mich 345, 355; 662 NW2d 376 (2003). An error is plain if it is clear or obvious, and an error affects substantial rights if it is prejudicial, i.e., if it affects the outcome of the proceedings. Id.

B. ANALYSIS

MRE 404(b)(1) prohibits evidence of a defendant's other bad acts to prove a defendant's character or propensity to commit the charged crime, but permits such evidence for a noncharacter purpose when that evidence is relevant to a material issue at trial and the probative value of the evidence is not substantially outweighed by its prejudicial effect. The purpose of the rule is to prevent a jury from convicting a defendant because it believes he is a bad person. People v Crawford, 458 Mich 376, 384; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the **[*5]** evidence is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. People v VanderVliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich. 1205, 520 N.W.2d 338 (1994). The trial court may also provide the jury with a limiting instruction for any evidence admitted under MRE 404(b)(1). Id. at 75.

The prosecution has the initial burden of establishing the relevancy of the evidence for a permissible purpose under MRE 404(b)(1). People v Knox, 469 Mich 502, 509; 674 NW2d 366 (2004). "'Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.'" Id., quoting Crawford, 458 Mich at 387. Relevant evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. People v Sabin (After Remand), 463 Mich 43, 58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." People v Pickens, 446 Mich 298, 337; 521 NW2d 797 (1994) (citation and quotation marks omitted).

In this **[*6]** case, the defense did not dispute that child sexually abusive material was found on Thomas's computers. However, Thomas denied any knowledge of the material, and he also denied being the person who communicated with McNeil for the purpose of soliciting child sexually abusive activity. Therefore, the principal issue in the case was the identity of the person who communicated with McNeil and sent him images of child pornography. The evidence that Penwell communicated with a person who transmitted images of child sexually abusive material and who used the same email address as the person who communicated with McNeil, from an IP address that was also linked to Thomas, made it more probable that it was Thomas who used the email address GoodTimes.Jones@gmail.com to communicate with McNeil.

The fact that Penwell could not say with certainty that Thomas was the person he was communicating with through the GoodTimes.Jones@gmail.com email address did not preclude admission of the evidence. *MRE 404(b)(1)* is a rule of inclusion, *People v Mardlin, 487 Mich 609, 616; 790 NW2d 607 (2010)*, and it provides that other acts evidence may be admissible to prove identity, *MRE 404(b)(1)*. Here, Penwell's contact with the person using GoodTimes.Jones@gmail.com—an email address traced to **[*7]** Thomas's home and the same email address used in the communications with McNeil—was circumstantial evidence that it was Thomas who used that email address, particularly where the person made other comments during the chat that were consistent with Thomas's home business. Therefore, the evidence was relevant for a proper, noncharacter purpose under *MRE 404(b)(1)*.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Thomas maintained that while the email address GoodTimes.Jones@gmail.com was traced back to his home and Internet provider, it was possible that anyone with access to his Wi-Fi network could have placed the images on his computers and communicated with McNeil with that email address. Thomas accused Waschull of planting the pornographic images and using his Internet service to communicate with McNeil, ostensibly because Waschull did not like that his child was spending time with Thomas and to provide Waschull with leverage in his ongoing custody dispute with Cipriano by showing that Cipriano was involved in a relationship with an unsavory person. However, Penwell's testimony indicated that his contacts with the person who used **[*8]** the GoodTimes.Jones@gmail.com email address occurred in late 2011 or early 2012, which was before Thomas and Waschull knew each other. The fact that the communications with Penwell predated the timeframe in which Waschull would have developed a motive to frame Thomas significantly increased the probative value of the prior acts evidence. Moreover, while the evidence was prejudicial, it was not unfairly prejudicial. Penwell's testimony did not focus on matters that were extraneous to the primary issue, and he conceded that he did not know the actual name of the person with whom he communicated. His testimony allowed the jury to weigh whether the similar contacts with Penwell and McNeil, from the same email address, was simply a coincidence or whether Thomas was engaged in a similar pattern of conduct with both persons. Finally, the trial court instructed the jury on the limited, permissible purpose for which the evidence could be considered, thereby reducing the potential for unfair prejudice.

In sum, because the challenged evidence was relevant to a proper, noncharacter purpose under *MRE 404(b)(1)*, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice **[*9]** under *MRE 403*, there was no plain error in introducing this evidence at trial.

III. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Next, Thomas raises several claims of prosecutorial misconduct. First, in the brief filed by his lawyer, Thomas argues that he was denied a fair trial by the prosecutor's remarks, made during closing argument, characterizing the defense theory as a "smoke screen" that was intended to deflect the jury's attention away from the evidence. Second, in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Thomas argues that the prosecutor committed misconduct by allowing perjured testimony from Waschull, by interjecting personal opinions and knowledge of the case while questioning witnesses, and by making inaccurate statements or improperly expressing his personal opinions about the case during closing and rebuttal arguments. Because Thomas did not object to the prosecutor's questions or remarks at trial, this issue is unpreserved. An unpreserved issue of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Abraham, 256 Mich App 265, 274; 662 NW2d 836 (2003)*. This Court will not reverse if the prejudicial effect of any improper conduct could **[*10]** have been cured by a timely instruction from the trial court. *People v Williams, 265 Mich App 68, 70-71; 692 NW2d 722*

(2005). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. People v McElhaney, 215 Mich App 269, 283; 545 NW2d 18 (1996).

B. ANALYSIS

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. People v Bahoda, 448 Mich 261, 267; 531 NW2d 659 (1995). A prosecutor is afforded great latitude during closing argument and is permitted to argue the evidence and reasonable inferences arising from the evidence in support of his or her theory of the case. Id. at 282. Likewise, while prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when the evidence supports it and they are not required to phrase their arguments in the blandest of terms. People v Ullah, 216 Mich App 669, 678; 550 NW2d 568 (1996). However, the prosecutor must refrain from resorting "to civic duty arguments that appeal to the fears and prejudices of jury members or express[ing] their personal opinions of a defendant's guilt, and [they] must refrain from denigrating a defendant with intemperate and prejudicial remarks." Bahoda, 448 Mich at 283. Additionally, a prosecutor is not permitted to personally attack the defendant's lawyer, People v McLaughlin, 258 Mich App 635, 646; 672 NW2d 860 (2003), nor may he suggest that the defendant's lawyer is "intentionally attempting to mislead the jury." People v Unger, 278 Mich App 210, 236; 749 NW2d 272 (2008).

Here, during closing **[*11]** argument, the prosecutor asserted that the defense theory that Thomas was framed by Waschull was a "smoke screen to deflect the evidence" from Thomas's guilt. In particular, he stated that Thomas "has created a well-crafted, or what I would say smoke screen to deflect the evidence from [Thomas's] guilt in this case. I submit to you that when the smoke clears, you look at and analyze that evidence carefully, it amounts to nothing." The prosecutor then engaged in a thorough review of the evidence allegedly showing that Thomas was framed, and then, without denigrating Thomas or his lawyer, the prosecutor explained why the evidence did not actually support the defense theory. Because the prosecutor was not required to phrase his arguments in the blandest terms possible, it was not improper for the prosecutor to use the term "smoke screen" to argue that the defense theory was not credible in light of the facts and evidence. Moreover, to the extent that the prosecutor's comments could be considered improper, a timely objection by Thomas could have cured any perceived prejudice. Accordingly, Thomas is not entitled to relief.

Thomas also argues that throughout the closing and rebuttal argument **[*12]** the prosecutor made inaccurate statements or improperly expressed his personal opinions about the case. We have reviewed the challenged comments and, viewed in context, the prosecutor was merely arguing the evidence, and reasonable inferences arising therefrom, in the context of explaining why the evidence did not support the defense theory of the case. The prosecutor did not inject any personal knowledge of facts not supported by the evidence, and his expressions of opinion were based on the evidence. Accordingly, there was no plain error. Further, to the extent that the prosecutor may have confused some dates or timelines in his comments that is not a basis for appellate relief because an objection could have cured any perceived prejudice. Williams, 265 Mich App at 70-71. Even without an objection, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and that the jury "should only accept things the lawyers say that are supported by the evidence." These instructions were sufficient to protect Thomas's substantial rights.

Thomas also argues that the following remarks in the prosecutor's closing argument were improper:

> Now, defense counsel attempts to answer the question of **[*13]** how this stuff got on [defendant's computers]. It's a question that he has a burden to answer is how this stuff got onto computers in Mr. Thomas's home without him knowing, without, actually without him having done it.

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." People v Fyda, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). Therefore, the prosecutor's comment was clearly improper. However, the error does not require reversal. The comment was brief and isolated, and a timely objection could have cured any prejudice by obtaining an instruction advising the jury on the appropriate burden of proof. Williams, 265 Mich App at 70-71. In addition, even without an objection, the trial court properly instructed the jury on Thomas's presumption of innocence and the prosecutor's burden to "prove each element of the crime beyond a reasonable doubt," and that "[t]he defendant is not required to prove his innocence or to do anything." The court also instructed the jury that "[i]f a lawyer says

something different about the law, follow what I say." These instructions were sufficient to protect Thomas's substantial rights, *People v Steanhouse, 313 Mich App 1, 35; 880 NW2d 297 (2015)*, lv gtd *499 Mich 934; 879 N.W.2d 252 (2016)*, and **[*14]** the jury is presumed to have followed the court's instructions. *People v Henry, 315 Mich App 130, 150; 889 NW2d 1 (2016)*. Accordingly, Thomas is not entitled to relief on this basis.

Next, Thomas argues that the prosecutor knowingly used perjured testimony to obtain his convictions because Waschull falsely denied having any contact with the prosecutor's office about this case. A conviction obtained through the knowing use of perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected" the jury's decision. *People v Aceval, 282 Mich App 379, 389; 764 NW2d 285 (2009)* (citation and quotation marks omitted). Waschull was called as a defense witness to show that he was framing Thomas for the charged offenses, and his testimony denying any contact with the prosecutor's office about Thomas's case was elicited by Thomas's lawyer, not the prosecutor. Further, Thomas has not established that Waschull's testimony was false. Thomas cites several pages of trial transcript and argues that Waschull's denial is refuted by testimony demonstrating his explicit knowledge of details about Thomas's case. However, the fact that Waschull had knowledge about various details of the case does not establish that he acquired that knowledge from the prosecutor's office. **[*15]** In addition, because the cited testimony was presented to the jury, the jury was able to decide for itself whether it affected the credibility of Waschull's denial. Thomas refers to two other documents that he contends support his claim that Waschull's trial testimony was false. We have reviewed those documents and neither one supports Thomas's contention that Waschull presented false testimony. Accordingly, Thomas has failed to establish a plain error affecting his substantial rights.

Thomas also argues that the prosecutor improperly interjected his personal opinions or knowledge of the case when cross-examining Thomas about a video recording that Thomas offered as proof that he was in his garage at the time one of the emails at issue was sent or received. Our review of the challenged line of questioning reveals that Thomas was subjected to appropriate cross-examination intended to challenge the competency of the evidence produced. Thomas has not shown that the prosecutor's questioning was improper, let alone plain error.[1]

IV. GREAT WEIGHT AND SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Thomas next argues that the trial court erred by denying his motion for a new trial based on the **[*16]** great weight of the evidence. We review "for an abuse of discretion a trial court's grant or denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v Lacalamita, 286 Mich App 467, 469; 780 NW2d 311 (2009)*. "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes." *Id.*

> The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray, 245 Mich App 631, 637; 630 NW2d 633 (2001)*. Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *People v Plummer, 229 Mich App 293, 306; 581 NW2d 753 (1998)*. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon, 456 Mich 625, 647; 576 NW2d 129 (1998)*. Further, the resolution of credibility questions is within the exclusive province of the jury. *People v DeLisle, 202 Mich App 658, 662; 509 NW2d 885 (1993)*. [*Id. at 469-470*.]

Thomas also asserts that there was insufficient evidence to convict him of the charged crimes. Challenges to the sufficiency of the evidence are reviewed de novo. *People v Ericksen, 288 Mich App 192, 195; 793 NW2d 120 (2010)*. Due process requires, **[*17]** that when the evidence is viewed in the

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[1] Thomas argues that the prosecutor engaged in similar tactics with other witnesses, but he only cites transcript pages where the improper questioning allegedly occurred. One of the witnesses was Waschull, but Thomas does not explain how the questioning of Waschull was improper. The other witness was Cipriano, but Thomas again fails to explain why the prosecutor's questions were improper. Given Thomas's failure to explain why the subject questioning was improper, he has not satisfied his burden of establishing a plain error.

light most favorable to the prosecution, a reasonable trier of fact could find each element of the crime established beyond a reasonable doubt. *People v Lundy, 467 Mich 254, 257; 650 NW2d 332 (2002)*. It is the trier of fact's role to judge credibility and weigh the evidence. *People v Jackson, 292 Mich App 583, 587; 808 NW2d 541 (2011)*.

B. ANALYSIS

Although Thomas presented evidence in support of his theory that Waschull had a motive to frame Thomas, the prosecution presented circumstantial evidence pointing to Thomas as the only person who had access to all of the computers and storage devices on which the child sexually abusive images were found. A forensic examination of Thomas's devices showed that the email address used to communicate with McNeil was used on Thomas's computers before Waschull even knew Thomas, and before Cipriano moved in with Thomas. In addition, the images of child pornography were found on multiple computers and storage devices in Thomas's home, and those devices also contained evidence of search terms typically used by persons looking for child pornography on the Internet, programs used to anonymously share such files, and web histories of such searches. That circumstantial evidence was strong proof that Thomas used those devices to **[*18]** download and search for child sexually abusive material on the Internet and solicited the offense of child sexually abusive activity in the contacts with McNeil. Furthermore, the communications with Penwell, which were made using the same email address as the communications with McNeil, and which similarly involved inquiries about sexual activity with children, occurred before Waschull knew Thomas, thereby undercutting Thomas's theory that Waschull planted that evidence. The prosecution also presented expert testimony that the computers on which child sexually abusive material was found did not contain software or malware that would allow a person to access the computers remotely. While the defense made a concerted effort to show that it was possible that someone else planted the evidence on defendant's computers, in light of the body of evidence refuting that theory and pointing to Thomas as the person responsible for committing the charged offenses, the jury's verdicts are not so manifestly against the great weight of the evidence that it would be a miscarriage of justice to allow the verdicts to stand.

Thomas appears to also argue that the evidence was insufficient to support his **[*19]** convictions because of the lack of evidence that he was the person who committed the charged offenses. "[I]dentity is an element of every offense." *People v Yost, 278 Mich App 341, 356; 749 NW2d 753 (2008)*. The above evidence, viewed in the light most favorable to the prosecution, supports an inference that Thomas was the only person who had access to all of the computers and storage devices on which the child sexually abusive images were found, and it identifies him as the person who solicited the child sexually abusive activity in the email communications with McNeil. Accordingly, there is sufficient evidence to establish that Thomas was the individual who committed the charged crimes.

V. SUPPRESSION OF EVIDENCE

A. STANDARD OF REVIEW

In his Standard 4 brief, Thomas argues that the prosecutor was responsible for the suppression of exculpatory evidence when the router from his home was not seized or analyzed by the police during the execution of the search warrant at his home. Because Thomas did not raise this issue in the trial court, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Wood, 307 Mich App 485, 525; 862 NW2d 7 (2014)*, vac in part on other grounds *498 Mich. 914, 871 N.W.2d 154 (2015)*.

B. ANALYSIS

The right to due process under *US Const, Am XIV*, requires that the prosecution **[*20]** not suppress material evidence favorable to the defense. *Brady v Maryland, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)*; *People v Fox (After Remand), 232 Mich App 541, 549; 591 NW2d 384 (1998)*. To establish a *Brady* violation, a defendant must show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) viewed in its totality, the evidence was material. *People v Chenault, 495 Mich 142, 155; 845 NW2d 731 (2014)*. However, when the government fails to preserve evidence whose exculpatory value is indeterminate or only "potentially useful," the defendant has the burden of proving that the government acted in bad faith in failing to preserve the evidence. *Arizona v Youngblood, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988)*; *People v Johnson, 197 Mich App 362, 365; 494 NW2d 873 (1992)*. Neither the police nor the prosecution has a duty to assist a defendant in developing potentially exculpatory evidence. *People v Anstey, 476 Mich 436, 461; 719 NW2d 579 (2006)*. The bad-faith standard from *Youngblood* does not apply to evidence that has not yet

been developed. *Id.*

The record indicates that the police did not seize the router from Thomas's home when they executed a search warrant. Thomas argues that the router would have contained exculpatory information because it would have shown a history of all devices that accessed the Internet through his home network. However, Thomas overstates the evidentiary value of the router. The prosecution's expert explained that a router could be capable of storing its logging history, **[*21]** but only if that feature has been activated. According to the prosecution's expert, the feature typically is not turned on by default. In addition, the logging information must be viewed or examined at the scene. If a router is collected as evidence, it cannot be forensically examined later at another location to determine its logging history. Therefore, while Thomas accurately states that the police did not collect the router as evidence, there is no basis for concluding that it had exculpatory value or that the police destroyed any evidence on the router intentionally or in bad faith. In addition, the police did not suppress that evidence; they only failed to seize the router during the execution of the search warrant. Accordingly, Thomas cannot establish a *Brady* violation.

Moreover, Thomas has not shown that the police acted in bad faith. The prosecution's expert described possibly being able to view the logging history at the search scene, but she was not part of the search team and that method would have only been potentially useful if the router's logging history feature had been activated. Further, to the extent Thomas criticizes the police for not attempting to examine the router **[*22]** to find out if its logging history could be determined, that argument is directed at the failure by the police to develop the evidence. As previously indicated, neither the police nor the prosecution has a duty to assist a defendant in developing potentially exculpatory evidence. *Anstey, 476 Mich at 461*.

Accordingly, we reject this claim of error.

VI. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

In his Standard 4 brief, Thomas argues that his lawyer provided ineffective assistance. Because Thomas did not raise these claims in an appropriate motion in the trial court, our review is "limited to errors apparent on the record." *People v Matuszak, 263 Mich App 42, 48; 687 NW2d 342 (2004)*.

B. ANALYSIS

To establish that his lawyer provided ineffective assistance, a defendant must show that his lawyer's performance "fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens, 446 Mich 298, 338; 521 NW2d 797 (1994)*. The defendant "must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991)*. To establish prejudice, the defendant must show a reasonable probability that, but for his lawyer's errors, the result of the proceeding would have been different. *People v Johnson, 451 Mich 115, 124; 545 NW2d 637 (1996)*. The burden is on the defendant to establish **[*23]** factual support for his claim of ineffective assistance. *People v Hoag, 460 Mich 1, 6; 594 NW2d 57 (1999)*.

Thomas first complains that his lawyer was ineffective for failing to investigate and present evidence regarding Waschull's efforts to work with the police and the prosecutor to obtain Thomas's convictions. The record does not support this claim. On the contrary, Thomas's lawyer called Waschull as a witness in furtherance of the defense theory that Waschull framed Thomas for the charged offenses. Thomas's lawyer specifically asked Waschull if he had any communications with anyone from the prosecutor's office or anyone in law enforcement about the details of the case. Waschull denied or could not recall any such contacts. Thomas's lawyer confronted Waschull with writings on his blog to show that he had acquired detailed information about Thomas's case, and Waschull conceded that he probably wrote the articles. On appeal, Thomas relies on evidence that he contends supports his claim that there were contacts between Waschull and the police or prosecutor. However, this evidence does not reveal the scope or nature of any contacts. And on this record, Thomas has not established that his lawyer efforts to investigate Waschull's connection **[*24]** with the case fell below an objective standard of reasonableness. In addition, because Thomas has not identified any evidence supporting his contention of improper collusion between Waschull and the prosecutor, Thomas's lawyer was not ineffective for failing to move to disqualify the prosecutor on this ground. Without supporting evidence, any motion would have been futile. A defense lawyer is not required to bring a futile motion. *People v Buie (On Remand), 298 Mich App 50, 66; 825 NW2d 361 (2012)*.

Thomas next argues that his lawyer was ineffective for failing to call a defense expert to respond to the prosecution's forensic expert witness. Again, the record does not support this claim. A lawyer's decision whether to call a witness, including an expert witness, is a matter of trial strategy. *People v Payne, 285 Mich App 181, 190; 774 NW2d 714 (2009)*. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it 'deprives the defendant of a substantial defense.'" *Id.* (citation omitted). The record shows that Thomas's lawyer retained an expert to investigate the evidence and that the expert reviewed the evidence and reported to Thomas's lawyer. Thereafter, Thomas's lawyer declined to call the expert witness at trial. His decision not to call the expert was a matter **[*25]** of trial strategy. Because Thomas has not submitted any evidence showing the defense expert's findings, or otherwise explaining why his lawyer declined to call the witness at trial, he has failed to overcome the presumption that the decision not to call the witness was sound strategy.

Thomas also asserts that his lawyer was ineffective for not moving to excuse two jurors for cause. Because the selection of jurors is a matter of trial strategy, this Court is disinclined to find ineffective assistance of counsel on the basis of a failure to challenge a juror. *Unger, 278 Mich App at 257-258*. Although Juror No. 53 initially expressed an understanding that Thomas could be convicted if the prosecutor proved most, but not all, of the elements of an offense beyond a reasonable doubt, the trial court corrected that understanding and explained that the prosecutor is required to prove "each and every element." The court thereafter asked the jurors, "Do you all get that?" and the jurors responded affirmatively. In light of this record, it was not unreasonable for Thomas's lawyer to believe that Juror No. 53's initial misunderstanding had been corrected by the trial court's explanation, and that the juror now properly understood **[*26]** that the burden was on the prosecutor to prove all elements of the charged offenses beyond a reasonable doubt.

We also reject Thomas's claim that his lawyer was ineffective for not challenging Juror No. 362 for cause after the juror admitted knowing the officer-in-charge from high school. The trial court questioned the juror about how well he knew the officer, and Thomas's lawyer also questioned the juror on this subject. The juror explained that he did not socialize with the officer and that he last saw the officer approximately three years earlier. The juror affirmed that his knowledge of the officer would not prevent him from being fair and impartial or from judging the officer's testimony in the same manner as any other witness. Given this record, Thomas's lawyer had a reasonable basis for concluding that the juror's knowledge of the officer-in-charge from high school did not establish a basis for excusal for cause, either because the juror was biased for a party or would not be able to render a just verdict. *MCR 2.511(D)(2)* and *(3)*. Thomas's lawyer's decision not to try to excuse the jurors for cause was a matter of trial strategy, and Thomas has not overcome the presumption of sound strategy.

Next, **[*27]** Thomas argues that his lawyer was ineffective for not challenging the prosecutor's notice of intent to offer other acts evidence under *MRE 404(b)*, and for not objecting to the admission of this evidence at trial. However, the record indicates that the notice of intent was filed in June 2015—about three months before trial—and there is no dispute that Thomas's lawyer received it. The notice identified the evidence being offered and the purpose for introducing it, and thus complied with *MRE 404(b)(2)*. In addition, as discussed earlier, the other acts evidence was admissible under *MRE 404(b)(1)*. Accordingly, any challenge to the notice itself, and any objection to the other acts evidence, would have been futile and cannot be the basis for an ineffective assistance challenge. See *Buie (On Remand), 298 Mich App at 66*.

Thomas additionally asserts that his lawyer was ineffective for failing to present physical evidence that would have completely exonerated him. Thomas does not develop this argument on appeal. He refers only to an exhibit attached to his supplemental brief, which contains Google records for the emails sent through GoodTimes.Jones@gmail.com and the search warrant for Google's records for that account. The exculpatory value of this evidence is not **[*28]** apparent and Thomas fails to explain how it could have exonerated him. Accordingly, Thomas has not met his burden of establishing that his lawyer was ineffective with respect to this evidence.

Thomas also criticizes his lawyer for eliciting from Waschull that Thomas had a history of drunk-driving convictions. Although it is not typical for a defense lawyer to elicit such evidence, the record reflects that Thomas's lawyer did so in this case as part of a larger strategy of showing that Waschull had become obsessed with Thomas and would go to great lengths to harm and embarrass him. Waschull admitted writing articles on his website about details of Thomas's case, as well as Thomas's history of drunk-driving offenses.

Waschull also admitted that he had obtained documents relating to the instant case and Thomas's prior cases. Thomas's lawyer questioned Waschull about his efforts to get Thomas in trouble with his probation officer, with the apparent goal of extending Thomas's probationary period. This evidence was critical to the defense theory that Waschull had a motive to frame Thomas with the charged offenses. Under the circumstances, Thomas has not overcome the presumption that the challenged **[*29]** line of questioning was reasonable trial strategy.

Finally, Thomas also faults his lawyer for not raising a *Brady* violation or objecting to the instances of prosecutorial misconduct. As discussed earlier, there is no merit to Thomas's claim of a *Brady* violation. Thus, his lawyer was not ineffective for failing to raise this issue. *Buie (On Remand), 298 Mich App at 66*. Further, Thomas was not prejudiced by the improper prosecutor's burden-shifting comment, and Thomas's remaining claims of prosecutorial misconduct are without merit. Accordingly, Thomas's related ineffective assistance claim must also fail.

Affirmed.

/s/ Michael J. Kelly

/s/ Jane M. Beckering

/s/ Douglas B. Shapiro

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL RAY THOMAS,

Petitioner,

Case Number: 2:18-CV-13829
HON. ARTHUR J. TARNOW

v.

THOMAS WINN,

Respondent.
_____/

ORDER GRANTING PETITIONER'S MOTION TO AMEND MOTION FOR DISCOVERY (ECF NO. 22), DENYING PETITIONER'S MOTION FOR DISCOVERY (ECF NO. 21), AND DENYING PETITIONER'S MOTION FOR BOND (ECF NO. 25)

Michigan state prisoner Michael Ray Thomas filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his convictions for possession of child sexually abusive material, using a computer to commit possession of child sexually abusive material, and unlawful use of the internet to solicit child sexually abusive material. On May 16, 2019, the Court appointed counsel to represent Thomas. Now before the Court are three motions filed by counsel: Motion for Discovery, Motion to Amend Motion for Discovery, and Motion for Bond.

App. G

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